Speech by David Manne for Castan Centre for Human Rights Law: "*Boatloads of Extinguishment?* Forum on the proposed offshore processing of "Boat People"" (5 May 2006)

The optimism that many Australians felt following significant reforms to asylum and refugee policy in 2005 has been cruelly dashed by the government's wretched response to Indonesia's displeasure at the granting of protection visas to 42 West Papuans in March.

At its core, the Government's proposal seeks to introduce new laws which would mean that all people who arrive informally, (so-called 'unauthorised'), by boat in Australia will be automatically transferred to 'offshore' processing centres to have their claims for refugee status assessed. Offshore processing, most likely in Nauru, would apply to all boat arrivals regardless of where they land in Australia. In practice, all of Australian territory would become excised, and all claims by such people for refugee status would have to be made outside of the Australian legal system.

My focus tonight will be on setting the scene and providing a predominantly practical perspective on how we have arrived at this point, what it means in human and legal terms, and how ultimately, the Government's offshore processing proposal is far more than a mere extension or revisiting of the so-called Pacific solution. That, in my judgment, it would usher in a new era of extremity, indifference and cruelty in the treatment of those most vulnerable and deserving of our protection – a proposal best described as one of 'Radical Rejection'.

During 2005, the shocking and tragic circumstances of the Cornelia Rau and Vivian Solon cases awakened in Australians a recognition of the scandalous abuse and cruel indifference which the Immigration system was perpetuating on innocent and vulnerable people, including asylum seekers.

A number of significant developments flowed from this. The Government rejected calls for a Royal Commission and instead, established the Palmer Inquiry, which ultimately made findings constituting one of the most devastating indictments of a major government department in Australia's history. The Palmer Report shaped much of the promised process of 'wide-ranging, systemic reform' of the Immigration Department, which commenced in the first half of 2005. Fair and reasonable treatment of those confronting the Immigration system has been part of the new mantra and intended practice.

Another development was the drafting by Liberal MP, Petro Georgiou, of Private Members Bills which sought a serious curtailment of the mandatory, indefinite detention system, and the abolition of temporary protection visas. The compromise deal subsequently struck with the Prime Minister represented a significant, albeit seriously inadequate, set of reforms which had the real potential to limit or end the suffering of many still subjected to the system, if implemented quickly and in good faith. They included provisions for release of children and their families, as well as others from detention centres, quicker processing of refugee applications, and oversight of cases involving over two years of detention by the Commonwealth Ombudsman, and oversight of the reform process by an Inter-Departmental Committee chaired by the head of the Department of Prime Minster and Cabinet.

There was also some concrete and important progress in the 'reform' process. A highpoint of this was the release of all children and their families from detention centres by the end of July 2005. As well, most long-term detainees were released into the community, and the DIMA worked on development of new case management co-ordination processes, which focused on proper treatment of people, particularly those most vulnerable.

And although none of the reforms announced included reform of the so-called Pacific Solution and the situation on Nauru, the Government finally relinquished and tried to clean the slate by reassessing, approving and resettling to Australia all but two of the remaining Afghan and Iraqi asylum seekers on Nauru. The atmosphere was now different, and this shift from the previous position of deadlock and hostility to such a resolution appeared to be part, at least, of the spirit (if not the letter) of the new reform period. It seemed to represent a mixture of pragmatism, and even, perhaps humanity.

However, the shape and trajectory of the reforms was always very fragile; very tenuous at its core. Why? Because they had always depended on the external environment; on the external environment remaining substantially unchanged and benign. In other words, it was a situation in which if there was one significant change in the external environment, the fragile reform process would be thrown into a state of crisis and collapse.

This is because there was never a true change of heart by the Government in 2005. By the end of 2005, the fact remains that most of the key aspects of one of the toughest and most comprehensive anti-asylum seeker systems in the Western world remained in place. Key features continued to be: mandatory, indefinite, non-reviewable detention; Temporary Protection Visas; the Pacific Solution; naval repulsion of asylum seekers arriving by boat; and 'excision' of Australian territory to preclude people seeking asylum in Australia at all. While the reforms ended or limited the agony and uncertainty for many subjected to the system, the new detention regime left the ultimate power of release into the community entirely to the discretion of the Minister, with still no other legislative limits placed on the government's ability to indefinitely detain innocent people.

The whole reform framework was essentially dependent not on the rule of law, but on the grace and discretion of the Minister and her Government.

So there *was* a new law, which set out the fundamental human rights principle that 'children shall only be detained as a measure of last resort'; but the law has no *enforceability* for the children it is meant to protect from abuse. By end July last year, all children and their families were released from immigration detention centres into the Australian community. But the release was the personal, discretionary decision of the Minister; not mandated or enforceable by law under any circumstances, including external political interference.

What's more, the Government was at pains to point out that there was to be no retreat from the so-called Pacific solution policies. In August last year, I was at small meeting where one of the Immigration Minister's senior advisers (since departed) outlined steps being taken in the reform process and then proceeded, in a cavalier, chest-puffing manner, to make it abundantly clear that the successful policies of the Pacific Solution would continue to be pursued with full vigour and that the Government had just signed a new Memorandum of Understanding with Papua New Guinea and were about to do the same with Nauru.

At the same time, I think it's fair to say that as part of the spirit of the reform process, there was the creation of a reasonable expectation that things wouldn't get tougher of the Pacific Solution front.

So we had a situation where a harsh policy on paper could co-exist with a relatively benign practice because of the Palmer and Petro processes, at least for a short period. And if, and only if, the external environment remained unchanged and benign.

Let's fast forward to mid-January this year, and to the spontaneous arrival on the Australian mainland of 43 West Papuan asylum seekers; arriving in no more than a well-carved out tree-trunk – a traditional boat, with a banner hoisted above which accused the Indonesian Government of genocide against the West Papuan people.

The situation threw up an extraordinary mixture of matters; it was a situation which revealed radical contradictions in the policies, laws and practices.

One the one hand, the West Papuans asylum seekers were transported from mainland Australia to Christmas Island – one the most remote and inaccessible parts of Australian territory and only a short boat ride away from Indonesia. Such a decision was completely illogical and irrational. The group was flown by a chartered Australian Air Force Hercules aircraft at an estimated cost of about $700,000 to the Australian taxpayer. And in terms of the lesser access to health, welfare, legal and other support needs of these vulnerable people, and well as the ongoing exorbitant financial costs, it made no sense. But, it was in accordance with policy and clearly was seen by the Government as important in relation to political sensitivities and sending a message of tough border protection to the Australian public and other would-be spontaneous arrivals. It also, no doubt, fulfilled a policy imperative which has been energetically pursued by the Government in relation to refugees in recent years; a policy best described as: 'out of sight, out of mind.'

On the other hand, our organisation was engaged as the legal representatives for the 43 West Papuans, and three colleagues and I had our access and ability to provide legal representation to our clients well-facilitated by the Department of Immigration. Our personal experience was somewhat rare and unique. It is clear that the processing of the West Papuan claims was seen as a significant test case of the new, reforming Immigration Department. As I remarked publicly shortly after 42 of our clients were granted Protection Visas, our clients were grateful that justice has been done; that their treatment and the due legal processes provided by the Australian Government and the Department of Immigration had been fair, reasonable, just and decent. What features of the process contributed to this judgment?

- The West Papuan refugees were treated well and with respect and dignity from the time of their arrival. From our observation, they were treated, quite properly, as if they may well be refugees and accordingly, may have certain rights and needs. This is what should happen, rather than what we have routinely experienced in the past, which, from the outset has been an institutional suspicion which starts with the assumption that these people may *not* be, or probably *are not,* asylum seekers, but rather, cynical opportunists looking for a good migration outcome.
- They were promptly provided with experienced, competent legal representatives.

- The process provided time for us to both advise and prepare detailed written claims for submission in support of each person's formal application for a Protection Visa.
- These claims were examined by a DIMA case delegate at an interview with the client, legal adviser and qualified interpreter present. Clients were treated with respect and dignity, and given a genuine opportunity to put their case. Legal representatives were also given a reasonable opportunity to make oral submissions on behalf of clients.
- Post-interview, there was reasonable opportunity for lodgment of detailed legal submissions, including expert evidence.
- A process in which there was great flexibility and decisions about the functioning of the process - in an environment where everyone was operating under considerable pressures - were made in a spirit of cooperation and guided by the aim of achieving fair and reasonable results.
- Evidence and submissions lodged by legal representatives in relation to interference by Indonesian authorities in the refugee determination process were generally well-received and sensitively handled by DIMA.

While this process was proceeding on Christmas Island, we were seeing extraordinary and extreme pressure and interference being applied by the Indonesian Government both publicly and behind the scenes; that is, we were aware of a bigger game playing itself out. The conduct of the Indonesians included:

- Rejecting the substance of the asylum seekers' claims.
- Attempting to prevent the asylum seekers from seeking and enjoying asylum in Australia.
- Repeatedly seeking direct access to the asylum seekers while they are held in immigration detention despite express opposition by the asylum seekers to such access.
- Seeking the return of the asylum seekers to Indonesia.

In fact, behind the scenes, while the 43 West Papuans were on Christmas Island, and in the process of putting their claims for protection to Australia officials, there were repeated requests by the Indonesian government for Indonesian consular officials to meet with the asylum seekers, despite their express opposition to this. Not only did these extraordinary measures of Indonesian officials display a flagrant disrespect for and concerted attempt to deny the asylum seekers their fundamental human rights to seek and enjoy asylum; an internationally-respected law professor confirmed that this conduct clear violation of both the Refugees Convention and the Vienna Convention on Consular Relations 1961.

So here again, we had parallel tracks.

On the one hand, DIMA acting properly; one the other hand, we know of the strenuous attempts by the Indonesians to scuttle the process through seeking to intervene through approaches to DFAT and the Prime Minister's Office. And we now know that from soon after the time that the boat arrived in Australia, an Inter-Departmental Committee was set up, including officials from the Office of Prime Minister and Cabinet, the Department of Defence, the Department of Foreign Affairs and Trade, and the Department of Immigration. Reportedly, they have since met regularly and worked closely together.

And these parallel tracks continued when the decisions on the 42 West Papuans were made.

On the one hand, the delivery of health and welfare and other legal services proceeded and is functioning very well, and in accordance with the spirit and the letter of the new Departmental reform process.

On the other hand, in response to Indonesia's fury and threats over the grant of Protection Visas to the 42, what has resulted is not only a radical, rearguard retreat from a commitment to such fair and decent treatment, but the sudden ushering in of a new era of extreme harshness and potential cruelty – a new policy of 'Radical Rejection'.

The new offshore processing for all informal boat arrivals has been portrayed as just an extension or revisiting of the 'excision' and 'Pacific Solution' policies.

It's actually far more radical than that in human, legal and ethical terms. (Julian Burnside QC will address some of the particular legal dimensions of this.) Essentially, at the first sign of external political trouble, Australia's commitment to a fair and decent process for asylum seekers is surrendered.

The Government's justifications appear to be at least twofold:

(1) Deterrence – a justification chilling in its own right, given that it is essentially asserting something of radically unethical proportions: namely, that it's acceptable public policy to punish and damage innocent and vulnerable people in order defeat people smugglers.
(2) Appeasement – that is, the Australian Government sending a signal that it's prepared to cave into pressure from a foreign country and to rewrite our own laws and ultimately, to ditch our fundamental commitment to international obligations to protect vulnerable people from human rights abuse.

So what does the proposed new system mean for someone who arrives on a boat in mainland Australia? Let's say, for someone with circumstances similar to some of the West Papuans who recently arrived:

- A 14 year-old boy who had been repeatedly bashed by Indonesian military officials because he had been present at a peaceful pro-Independence flag raising ceremony.
- Whose father had been jailed for two years for raising a flag and then tortured in jail.
- Whose mother had been gang-raped by Indonesian military officials to send a message that pro-Independence families need to stop their activities.
- Who attended a peaceful pro-Independence demonstration, which ultimately transformed into a massacre by Indonesian military officials in which he saw school friends and their families being gunned down before his eyes.
- Whose father has sent him to Australia to avoid him being targeted and brutalized in the future by Indonesian military officials.

Under the proposed system, a person will be deprived of access to the Australia legal system and its due legal processes – that is, those processes which were applied properly to 42 of the West Papuan refugees recently.

In essence, there will be two key dimensions to the processing arrangements.

Firstly, the processing of applications for refugee status will be under a completely different system to that under which we have, in this country, previously decided it is necessary to ensure fundamental fairness. Instead:

- There will be *no* access to any legal advice or assistance, or other appropriate supports.
- There will be *no* proper independent administrative review mechanism (only an internal review – that is, a review of a refusal by those who have already refused the case).
- There will be *no* access to the Australian Courts in relation any matters, including errors in the decision on refugee status, treatment in detention, or even *habeas corpus*.

In short, there will be a fundamental absence of basic scrutiny and accountability mechanisms; mechanisms long considered a basic pre-requisite for fair and just administrative decision-making in Australia.

To be sure that these are no small losses, consider that in the last three years, the Refugee Review Tribunal ("RRT") (the independent review body which will not be available to applicants at all) has overturned 92% refusals by the Department of Immigration officials of Iraqi and Afghan Protection Visa applications. In all, 3,200 people have been granted protection from returning to post-regime change catastrophes of Afghanistan and Iraq, only after a decision by the RRT to overturn the Department of Immigration's rejection. In other words, in the last three years, the safety mechanism of independent administrative review has resulted in 3,200 people who were found to face a real chance of being persecuted if returned to their homeland ultimately being granted protection.

And, the 43rd West Papuan, still stranded on Christmas Island who has recently brought an action in the Courts seeking that a decision be made on his protection application, and alleging that his case been unlawfully delayed due to interference from higher up on political grounds, would have no ability to bring a case at all. He could be stranded on Nauru and without a decision indefinitely or least for many years, and were there evidence that politics had played a part in it, there would be no way to challenge this legally.

So what happens if someone is found to be a refugee under the Government's proposal? The Government has made it clear that the main aim will be to find other, 'third countries', to resettle people. And there have been contradictory messages about whether Australia would agree take anyone. (The Immigration Minister initially said no one would be resettled to Australia; shortly afterwards, the Prime Minister suggested it was possible that some people may ultimately be resettled to Australia.)

In other words, under this system even if you're found to be a genuine refugee under the United Nations Refugees Convention definition, there will be no guarantee of resettlement at all. You're fate and your future will be completely uncertain, in limbo, and completely at the discretionary whim of the Australian Government and possibly other countries. The aim set out by the United Nations High Commissioner for Refugees of finding a 'durable solution' for refugees where they can rebuild their lives in dignity

and safety will be uncertain and, quite possibly, illusory. At its core, the proposal will result in refugees being cast into exile, quite possibly forever.

History has already told us how bad it can be for those on Nauru.

In the early period of the Nauruan arrangements, the Government suggested that they would be temporary. Ultimately, it took many years for the full extent of the harm to be exposed. We now know two key things about the Nauruan experiment.

First, how inordinately long it took - in many cases years - to resettle refugees; and that despite early assurances from our political leaders that no one would end up in Australia, that in fact, the *majority*, that is, well over 500 people mainly from Afghanistan and Iraq with compelling protection needs actually ended up here. Largely, of course, because the international protection framework is predicated on burden-sharing and other countries rightly refused to accept responsibility for that which was clearly Australia's obligation and responsibility.

Second, we know of the terrifying human destruction which was suffered by many of the people subjected to the policy and its practices.

If the proposal passes into law, we will now have to almost inevitably have to go through the indignity and the horror all over again. But this time it could be well be even worse.

First, a quick glimpse at the extent of destruction was recently wrought on refugees. Michael Gordon's excellent book, *Freeing Ali* (which, in my view, is the most important account we have of what has happened on Nauru under the 'Pacific Solution'), documents the human face of this terrible episode in our history. One of numerous stories recounted is that of Ali Rezaee. This is a short extract from Michael Gordon's book about Ali Rezaee:

> "Ali Rezaee was the youngest of the single Afghan men in the camp. He was 17 when his life in offshore detention began and confessed that often, when he became consumed by despair, he would go to a corner of the camp and cry at the sky. "I'm thinking, where are my family? Where are they now? What are they feeling now? They might think I'm dead. They think that they have lost me."
>
> … Rezaee had expressed his feeling of helplessness in an email to … a tireless supporter [who lives in Melbourne]:
>
> > *"I was a leaf fallen down from a tree, I have no home, no shelter.*
> > *…*
> > *I am a boy whose brain is full of sorrow. I am a boy whose body is full of wound feeling of pain, doesn't have rest for awhile.*
> > *I am a boy, who just sees dark and dark, and a minute is passing like one hour, a month is passing like a year. And have no sleep without tablet, no medicine available for reducing the pain, except rolling tear on my cheek.*
> > *I am a boy who in the mid of night, most of the time lonely sitting in the corner side the fence, looking at blue sky, at stars, weeping tears, during that time none is moving around.*

The substandard living conditions and dangerously inadequate access to medical treatment have been well-documented. So too, has the physical and psychological disintegration commonly experienced by those detained in Nauru. In many cases, people literally fell apart.

There is also clear and concrete evidence of the fundamental unfairness of the refugee assessment process which occurred on Nauru. During 2005, a migration agent eventually reviewed the cases of many of those Afghans still stuck in Nauru and found a pattern of material errors in the decision-making which were so serious as to include:

- Untested 'dob-in' material which should never have been included or given any weight in the decision-making process, because they came from a disaffected and unreliable source.
- In a third of files examined, there had been evidence of merging of facts from others cases, and Departmental case officers finding it difficult to differentiate claims between different cases.
- Two files were found to include negative comments by interpreters, which were found to be "totally unprofessional."

As is the Government policy for asylum seekers on Nauru, they were previously denied the opportunity to obtain any form of legal representation. The examination and subsequent submissions by the legal adviser seem to have substantially contributed to the ultimate reassessment of cases of Afghans who were ultimately found to be refugees after well over three years and serial refusals of their protection claims while on the island. One of those people, eventually resettled to Australia, was an unaccompanied 13 year old when he was sent to Nauru, and left there aged almost 17.

In March 2005, a senior Departmental of Immigration official stated in response to a request by a migration agent for a re-opening of refused cases on the basis of new information and serious doubts about the soundness of previous decisions: *"The offshore assessment process was designed to obviate the need for any professional assistance to those on Nauru."* With respect, it was designed largely to obstruct and eliminate access to legal advice and to due legal processes in Australia.

It was also designed to comprehensively block access to and public scrutiny of the treatment of asylum seekers and refugees on Nauru, and to ensure that these people, their faces, and their stories, were kept 'out of sight, out of mind.'

And the terrifying question which has been asked by many, including those who have spent time investigating what actually happened: how many of those several hundred people who were placed under severe pressure to abandon their claims and return to Afghanistan, and who we know then fled again in fear for their lives to neighbouring countries, were also victims of apparent systemic errors and unfairness in the processing of their claims?

The Government clearly thought that it was necessary for the 43 West Papuans who recently arrived to have access to legal advisers, and for those advisers to play a significant role in the processing of their claims for refugee status. This is what my colleagues and I did. Our role was structured into the process, and facilitated. It was clearly considered important by the Department of Immigration in affording people their full rights and dignity. The automatic facilitation of such assistance to asylum seekers

who arrive informally has long been Government policy. So too, it has long been the law under the *Migration Act* that a person in immigration detention has the right to obtain legal advice, if they so request it. Now it appears that the Government is, quite inexplicably, saying: 'for future boat arrivals, provision of legal advice will not be in their interests, and not a right worth affording'. There is simply no apparent justification for this fundamental about face.

Further, it is crucial to remember the human face, the human cost; that we are dealing here with some of the most vulnerable people in the world. They do have rights and we are well-placed to meet their needs. Essentially, we are talking about protecting the most needy. We are also, in the case of West Papuan refugees, talking about our neighbours. So in addition to the legal obligation to protect refugees who arrive within our territory, in the case of, for example, West Papuan refugees, they are our neighbours coming here in desperate circumstances and with nowhere else to go. One would hope that with the physical closeness, there too would be established and acknowledged a strong sense of *ethical* obligation to help; to protect them from further brutality and suffering. Our policy should be based on assisting our neighbours with generosity and decency when they arrive on our doorstep in need; rather than a policy of placing rottweillers at the gate.

As mentioned, this policy of 'Radical Rejection' is far more than a mere extension or revisiting of the Pacific Solution policy.

First, the goal posts have been moved radically. Originally, in 2001, the Government asserted the Pacific Solution policy was based on the imperative and rationale of deterrence of those which were seen to have come here by way of 'secondary movement' – otherwise referred to by some as 'queue jumping' – and who have thus forsaken 'effective protection' elsewhere on the way to Australia. As objectionable as this justification was in law and fact for those from Afghanistan or Iraq who, in reality, had no queue to join, let alone jump, on the way here, it clearly did not seek to target refugees who had fled to Australia directly from their own country. A clear distinction was drawn between those coming here via other countries, as opposed to those fleeing to here directly; and it was seen by the Government as central to the structural foundations of its policy. In fact, Government policy not only accepted that there should be no penalisation (or discrimination) of those fleeing here directly, but also predicated its justification for discriminating against so-called 'secondary movers' on the basis that they should properly have sought protection in their country of first asylum – that is, the country they fled to directly.

There can be no basis whatsoever under the Refugees Convention or elsewhere for imposing such penalties or discriminating against such refugees who flee directly to the country where they then seek protection. Given their circumstances, particularly the complete lack of any effective protection elsewhere, they should be afforded full access to the due legal process to seek and be afforded protection in the country that they first flee to. The Government's new proposal constitutes a radical departure from this principle and practice, and a radical retreat from the foundations of its own policy, without any proper basis or explanation.

Second, the recent comments of certain political leaders have sought to both silence and defame West Papuan refugees.

Certain public comments by Government MPs have openly stated: 'we don't want pro-Independence West Papuans coming to Australia, because they express their political

beliefs openly and publicly'. The Immigration Minister has also criticized such conduct and accused the West Papuan refugees of seeking to use Australia as a "staging post" for their political cause, just after her Departmental delegates have presumably found that such people face political persecution based on the peaceful expression of precisely those political beliefs. This represents a completely odious and unacceptable undermining of the fundamental human right of freedom of political expression, which one would expect to be fully guaranteed and promoted in democratic society. (The Government appears to have suddenly a adopted a new politic slogan*: "We will decide who comes to this country, and what they will say."*)

The Immigration Minister has recently called the West Papuan pro-Independence cause "racist" and "toxic". In this context, it is also well to remember that one of the core claims by West Papuan refugees commonly relates to feared infliction of persecution by the Indonesian military by reason of their indigenous West Papuan *race*. These claims are supported by independent evidence. Such accusations by our political leaders are not only a bizarre and baseless perversion of the facts, but are a gross vilification of those West Papuans recently granted asylum, and other West Papuans.

Particularly alarming in this context is the further admission by the Immigration Minister that the new offshore processing proposal will ensure that pro-Independence West Papuan refugees will be kept out of Australia for the purposes of processing and resettlement. The introduction of national interest and foreign relations, that is, political imperatives into the protection equation is completely unacceptable and unworkable; it runs completely counter to the fundamental principles and practices of the international refugee protection system, in which the assessment of refugee status should be made in accordance with the requirements of fairness, due process and objectivity.

The offshore processing proposal constitutes a flagrant violation of numerous international obligations, including the clear-cut prohibition on penalising or discriminating against people on the basis of their mode of arrival - that is, if arrive without formal authorisation having fled directly from threats to their life of liberty. Article 31 of the Refugee Convention is the cornerstone of the prohibition against such practices. Arguably, the explicit, apparent discriminatory targeting of West Papuan refugees under the Government's new proposal could also violate Article 3 of the Refugees Convention, which states: "The Contracting States shall apply the provisions of this convention to refugees without discrimination as to race, religion or country of origin". This policy, we now know, has been designed to keep indigenous West Papuans out of Australia, and its practical application could well be unlawful if that is who it targets and discriminates against.

Worse still is the most likely practical implication of all of this: namely, the political and ethnic definition and defamation by the Australian Government will potentially make third country resettlement even more difficult than it was for Afghans and Iraqis stranded on Nauru in the past; and arguably it will make such resettlement almost impossible. It is not clear why any other country, already reluctant to take up what are properly Australia's obligations and responsibilities, would be in the slightest interested in resettling people who have already been discarded as too troublesome politically.

The new policy of 'Radical Rejection' not only involves offshore processing. The Government has also refused to discount the possibility of using our navy to intercept or interdict boats with asylum seekers on board, without undertaking any assessment of the person's fears or need for protection, before handing them back to the alleged persecutor,

such as Indonesia. In a recent interview by ABC journalist Peter Mares, the Defence Minister, Chris Ellison, was asked numerous times to clarify whether or not people arriving by boat who are seeking asylum could be sent back to their home country, without an attempt to ascertain whether they have a real fear of being persecuted if returned to, for example, Indonesia, in the case of West Papuans refugees. In point-blank refusing to discount possibility, Minister Ellison stated:

> *"… depending on the circumstances, there may well be in the interdiction, an apprehension of people. That may well occur, turning back of vessels. I'm not going to say that in any particular circumstance what will occur.*
> …
> *No it isn't [a clear-cut question in a situation where people say 'please help us we are refugees' and whether or not that boat would be sent back]. It's not clear at all because what you are not acknowledging are the varying circumstances you can encounter on the high seas, out there on the water where our people are doing a very difficult job. … It is a decision we make on a case by case basis, dependant on circumstances."*

In other words, the Government is saying that there *are* circumstances in which people, such as West Papuans, who say they are refugees fleeing from persecution, will be forced back to Indonesia. There can be no more clear-cut and serious violation of the core obligations under of non-expulsion and protection under the Refugees Convention than for a country to send refugees straight back into the hands of the persecutors.

Is this possibility of interdiction and forced return in the realms of mere speculation or an unwarranted fear? History has told us it is not; that it is quite real.

For example, take two incidents in which we were directly involved during January 2003. In the first of these, two African men who stowed away on a ship wanted to claim refugee status. The Department of Immigration had determined the two men should not be allowed to leave the ship while it was in Australia, so they would not be able to disembark, seek legal advice or make applications for refugee status. The captain of the ship was threatened with serious criminal penalties if the men were able to disembark.

It was necessary for myself and another lawyer to board the ship and prepare and lodge applications for refugee status to force the decision to permit their release from detention on the ship and on to Australian soil before the ship set sail for international waters, so that could have their cases for protection considered.

The second of the incidents, less than a week later, involved another foreign ship, berthed in Fremantle, with an Iraqi national on board who also wanted to apply for asylum in Australia. Again, it appears that the ship had been served with a departmental notice forbidding the release of the man from the ship. (While the application was being prepared, in the very same port, Australian Naval ships were being farewelled as they set off for the Gulf and a possible war with Iraq.)

Ultimately, it was necessary for a team of lawyers in Melbourne to appear before a Federal Court judge to seek an urgent injunction to ensure that the ship did not sail without the Department of Immigration agreeing to allow the asylum seeker off the ship and on to Australian soil so that he could have his case for protection against Iraqi persecution properly and fully considered.

A similarly disturbing set of events occurred in November 2003. As a boat carrying 14 Kurdish asylum seekers from Turkey approached Australia's Melville Island, the Government urgently "excised" by regulation – without parliamentary scrutiny – not only Melville Island, but a wide expanse of islands which form part of Queensland, Western Australia, the Northern Territory and the Coral Sea islands. All to prevent 14 people seeking protection from doing so. They were then forced back to Indonesia by our navy with the initial pretense by the Government - a claim later abandoned - that those on board had not specifically sought asylum while in Australia. Indonesia is not a signatory to the Refugees Convention, does not have procedures to assess refugee status, and made it clear at the time that the asylum seekers were the responsibility of Australia, and that the Indonesian Government's policy was to return those 'illegally' in their country back to their home country. This was a clear-cut case of *refoulement* (expulsion) by the Australian Government in violation of the Refugees Convention and other international human rights treaty obligations. It placed these men's lives in grave danger.

It is clear that under the Government offshore processing proposal, the protection of borders prevails over the protection of people. Were all other countries to adopt such policies and practices, the international framework designed to protect refugees would be so seriously undermined as to be rendered ineffective and meaningless. It would, in fact, collapse. And from an ethical standpoint, such practices seem to cast our country's commitment to justice, to fairness and to decency out onto the high seas.

The proposal has not yet become law, and its passage into law is not a foregone conclusion. In recent times, there have been some courageous stands - acts of conscience and conviction - and some substantial successes in seeking reform of refuge policy in this country.

In August 2004, the High Court of Australia ruled by a 4-3 majority in the case of *Al-Kateb* that under Australian law, it is lawful to lock up an innocent person, an asylum seeker, in immigration detention and keep them there *indefinitely*. Justice McHugh, one of the judges who so ruled, stated:

> *"For such laws, the Parliament and those who introduce them must answer to the electors, to the international bodies who supervise human rights treaties to which Australia is a party and to history. Whatever criticism some - maybe a great many - Australians make of such laws, their constitutionality is not open to doubt."*

So don't leave the room tonight despondent; leave disturbed, disgusted, and even angry; but leave with purpose, as there are various ways to vote and not all of them are at election time at the ballot box. Tell the right people what you think and what you feel.

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REFUGEE & IMMIGRATION LEGAL CENTRE

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