ACT Refugee Action Committee
LPO Box 8287
ANU ACT 0200
Email address: ron.fraser@effect.net.au
Phone: 02 6247 2114
23 May 2006

Mr Jonathan Curtis
Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House ACT 2600

Dear Mr Curtis,

Submission concerning the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (the Bill) – ACT Refugee Action Committee (RAC)

> It is a cornerstone of the Refugee Convention that countries of first asylum should admit refugees from neighbouring countries regardless of the political relationship between the two countries. Once political considerations intrude, the integrity of the system is compromised and the concept of refugee protection placed on trial.
>
> (Asylum Seeker Resource Centre Briefing Paper on Proposed Changes, 1 May 2006)[1]

1. The submission expresses RAC's opposition to this radical Bill and the associated policies of which it is the legislative underpinning.

2. The more general points we make in the submission will undoubtedly accord with submissions by many other organisations and individuals. In addition, members of RAC have had close ties with many of the families now resident in Canberra who were in Nauru and Baxter, and they are aware of the impact on individuals of that experience. We are also aware of the systemic flaws in the decision-making processes in relation to refugee claimants on Nauru. We urge the committee to inform itself of the defects of that system before determining whether it should be given it an unwarranted new lease of life.

Issues of concern in legislation and associated proposals

3. Those features of the Bill and the associated proposals to which we object are the following:

- Extension of the offshore processing system to all 'unauthorised' asylum seekers who reach mainland Australia by boat, thereby continuing the discrimination according to the method of arrival. The prohibition of such discrimination on the basis of illegal entrance or presence according to the law of a country of asylum is one of the central planks of the 1951 Convention relating to the Status of

[1] Available from: www.asrc.org.au .

Refugees and its 1967 Protocol (the Refugee Convention) (Article 31(1)).

- The nomination of Nauru as the place to which all such 'unauthorised' asylum seekers will be sent, thus reviving the virtually moribund and justly criticised 'Pacific solution'.
- The retrospective applications of these measures to those arriving after 13 April 2006 (the date of the Minister's announcement of the new policies) but before the commencement of the legislation.
- The failure of the Minister for Immigration and Multicultural Affairs (the Minister) to guarantee that those processed offshore will be integrated into Australia; the statement refers only to 'refugees remaining offshore until resettlement to a third country is arranged'.
- The announcement that Australian naval and customs vessels and personnel (and perhaps intelligence personnel) will again be involved in seeking to interdict the arrival of refugees, especially from West Papua, with all the dangers to life and safety of the refugees that were revealed during 2001 and after.
- The fact that this legislation is clearly in part a response to the objections of the Indonesian Government to the recognition by Australian decision makers of the refugee status of 42 West Papuans who had landed on Australian soil. We should not permit our relationship with Indonesia to affect adversely our obligations to protect refugees.

Our objections to the Bill

4. Apart from the retrospectivity issue and the question of the language used, our objection is to the policy the Bill embodies and the effects it will have on bona fide refugees and the international refugee protection system. In addition, we condemn the almost certain breach of many of Australia's international obligations under the Refugee Convention and other human rights instruments.

5. We draw attention to the fact that the Bill provides for retrospective operation of its provisions where an entry into Australia occurs on or after 13 April 2006, the date of the Minister's announcement on this matter. This is not a taxation measure where it is vital that people not be able to re-arrange their affairs between the announcement of a new tax and the passage of the legislation. This is a Bill that affects liberty and the whole future of those fleeing from persecution. It ought not to be made retrospective from the date of commencement to the Minister's announcement.

6. In addition, we draw attention to the use of the term 'designated unauthorised arrivals' as the central concept for defining those who are subject to offshore processing. It is intended to lend a neutral, objective character to the Bill, and to mark those affected by it as clearly transgressive. Use of such language seeks to disguise the fact that it adversely affects refugees in the process of fleeing from persecution and seeking asylum in a country that has signed, ratified and incorporated in its law the Convention which allows them that right.

Critique of the Government's case for the Bill

7. While everyone knows that the trigger for the Bill was the objection by Indonesia to the recognition of 42 West Papuans as Convention refugees, the Government's formal explanation of the purpose of the Bill makes no mention of this point. (Perhaps this is because such a purpose could be seen as discriminatory contrary to Article 3 of the Refugee Convention.)

8. Instead, the Parliamentary Secretary's Second Reading Speech in the House of Representatives[2] explained the measure in terms of a minor rationalisation of the existing offshore processing regime (the deceptively named 'Pacific solution'). The Government is, of course, correct that there is a formal incongruity in processing under Australian law those asylum seekers who make it to the mainland, while denying that right to those who only make it to one of the thousands of excised islands. That anomaly is a matter of the Government's own making, and the taking of the extra step constitutes a major and radical change to the existing practice.

9. RAC notes the comment of refugee expert Father Frank Brennan[3] that the Government was poised to extend the Pacific solution in the way now proposed 'once a new wave of secondary movers came from Indonesia anyway'. The Minister's recent announcement concerning readying of the centre on Nauru supports this supposition.

10. To revive and extend the 'Pacific solution' would in fact be a drastic and radical withdrawal of Australia from one of the central elements of the Refugee Convention, the provision of a mechanism for protecting those actively fleeing from persecution, i.e. **Australia would no longer be acting as a country of refugee asylum at all**. While Australia would remain a country offering relatively generous resettlement of refugees (**i.e. acting as a country of refugee resettlement** – but not, it appears, for those subject to this law!), it would cease to provide for asylum to those in flight from persecution. **We should not take that final step in repudiating a central feature of the Convention.**

11. While refugee claims would be processed in Nauru by reference to the Refugee Convention's definition of a refugee (doubtless as amended by the *Migration Act 1958* (Cth)), the process would be secretive, not subject to any form of accountability such as tribunals, courts, and the Ombudsman, and it seems can only lead to a durable solution in Australia through an exercise of the Minister's non-compellable and non-reviewable discretion. Australia will in effect have gutted the Convention of some of its most significant provisions aimed at protection of those forced to flee persecution, whether or not they meet domestic requirements for entry.

12. Moreover, the deliberate extension of provision for offshore processing to refugees fleeing **directly** from persecution,[4] as in the case of the 43 West Papuans, is a major change in principle and application.

13. To call this acting consistently with Australia's obligations under international law is an Orwellian misuse of language. If every first world country acted in this way

---

[2] *Hansard*, House of Representatives, 11 May 2006, pp 5–6.
[3] Father Frank Brennan, editorial in the *Catholic News* at: http://cathnews.com/news/605/doc/9bre.html.
[4] Even under the Government's own definitions of this; and compare the UNHCR view referred to in note 22 below.

the protection of refugees under the Convention would collapse.[5] To paraphrase retiring Federal Court Justice Ron Merkel today, the Refugee Convention was established to ensure the very kind of conduct mandated in the Bill did not occur, and that refugees were not rejected at the border before the opportunity to make their refugee claims (ABC Radio National, 'The Law Report', 23 May 2006).

14. The Parliamentary Secretary's reference to the fact that the Convention does not directly specify the country in which processing and resettlement will occur is misleading and disingenuous. It takes no account of the fact that in practice the functioning of the international refugee system depends on countries such as ours playing a proper part both in processing refugee claims according to their national laws, and the protection without penalty in their own territories of those found to be refugees, at the very least until resettlement can be found in another country. In the words of the Asylum Seeker Resource Centre, the policy:

> Undermines the purpose of the international refugee protection framework, which is that asylum should be provided to refugees in the country of arrival unless they can access effective protection elsewhere.6

15. Such refugees are also entitled to live with dignity at all times, and to begin to rebuild their lives. To quote one commentator:

> Experience has shown time and again that asylum seekers must begin to rebuild their lives as soon as possible and that positive outcomes occur when they are able to make connections with likely host communities at the earliest opportunity. Otherwise there is a loss of psychological and physical health, which may become irreparable over time.[7]

16. In the words of the briefing notes issued by the UN High Commissioner for Refugees in April 2006, the proposed Bill would have the effect of 'Australia's responsibilities to bona fide refugees being deflected elsewhere'. The notes continue:

> If this were to happen, it would be an unfortunate precedent, being for [sic] the first time, to our knowledge, that a country with a fully functioning and credible asylum system, in the absence of anything approximating a mass influx, decides to transfer elsewhere the responsibility to handle claims made actually on the territory of the state.[8]

17. Parliament should not enact a measure of this kind.

Incompatibility between 2005 compassionate measures and 'Pacific solution, Mark 2'

20. The reforms negotiated in 2005 between the Government and a group of its own backbenchers, acclaimed by many (including the Prime Minister) as representing an evolution of the system of mandatory detention to a more compassionate practice (the system would be 'administered more flexibly and fairly') will be rendered

---

[5] See Father Brennan, note 3 above: 'If every country signed the Refugee Convention and then adopted the Pacific Solution Mark 2, there would be nowhere in the world for asylum seekers to land. The Convention would be dead in the water.'

[6] See note 1, above.

[7] Father David Holdcroft, Director of the Jesuit Refugee Service (Australia), 10 May 2006, posted on: www.onlineopinion.com.au/view.asp?article=4441.

[8] Briefing Notes, Media Relations & Public Information, UNHCR, Geneva, 18 April 2006, available from the UNHCR website: www.unhcr.org/cgi-bin/texis/vtx/country?iso=aus .

nugatory for future 'boat people' by the proposed Bill. The entrenchment of the 'Pacific solution' for those landing on excised territory, and its extension to those who land on the mainland, will leave these people completely outside those measures, which were never applicable to Nauru and other 'offshore processing centres'.

21. This would in effect negate the following measures in relation to future asylum seekers:

- Holding of minors in a detention centre only as a matter of last resort.
- Detention of families with children to take place in the Australian community on certain conditions.
- Wider powers for the Minister to grant bridging visas to those in detention.
- Non-enforceable time limits of 90 days for processing applications for refugee protection visas and review by the Refugee Review Tribunal.
- Requirement for the Ombudsman to review the cases of those detained for more than 2 years, and thereafter every 6 months.

None of these measures will apply in Nauru as a matter of law, and the first two will be completely impossible as a matter of fact, no matter what linguistic fiction concerning the word 'detention' the Government uses to pretend otherwise.

22. It is not an adequate response to say, as some Coalition representatives have, that women and children will be let out of the 'processing centre' on Nauru during the day, and only have to return at night. The experience of any form of detention is harmful in itself especially for children, and the effect is compounded by the isolation of Nauru from all support and contact with the **Australian** community, including friends, relatives and supporters in the wider community.

23. Moreover, the absence of any accountability through the Ombudsman in relation to long-term detainees is in stark contrast to the situation achieved on the mainland by the reforms.

24. The two approaches, the evolutionary one favouring a compassionate approach to detention, together with some accountability for long-term detainees through the Ombudsman, and the legal black hole of the 'Pacific solution', are simply incompatible. While we contend that the former has a long way to go to achieve justice and fairness of the kind outlined in the Bills introduced by Mr Georgiou MP in 2005, but not passed, that approach would become irrelevant under the proposed legislation. We will have learned nothing at all from the human disasters of the past.

25. It is a matter of considerable shame that Australia's refugee policies, both existing and proposed in this Bill, fail the test of Articles 2 to 12 of the Refugee Council of Australia's Refugee Charter.[9] We are going backwards in terms of the recognition and protection of the human rights of refugees.

[9] That is, all but the most general of them, Article 1. See RCOA website: www.refugeecouncil.org.au/index.html .

West Papuan refugees fleeing directly from persecution

26. The legislation is a response to Indonesian criticism of the recognition of the refugee status of 42 of 43 West Papuans who reached the Australian mainland (at the time of writing, the refugee claim of the 43rd remained under consideration). While it replaces the earlier unfortunate suggestion of the Prime Minister that consideration of asylum claims of West Papuans could take account of the views of the Indonesian Government, the process that is proposed is wide open to pressure not to upset the Indonesian government or other governments (see below on the lack of accountability and scrutiny).

27. West Papuan asylum seekers have a better chance than anyone else of reaching the Australian mainland by boat and therefore of being entitled under the existing law to have their refugee claims processed under the general Australian procedures for refugee determination and review. As in the case of all the 43 arrivals earlier this year, there is a good chance that at least some of them will flee **directly** from West Papua to Australian soil, although others may find their way here via Papua New Guinea, as may have been the case with the three who were located on Boigu Island in May.

28. There can be little doubt that elements of the Indonesian Army (TNI) have been guilty of systemic persecution of a significant number of West Papuans.[10] Australia should accordingly be prepared to offer refugee protection to those fleeing from such persecution. Our Government should tell the Indonesian Government that we will meet our legal obligations under the Refugee Convention in relation to West Papuan asylum seekers, but that this is completely separate from Australia's attitude towards the question of West Papuan independence (which the Australian Government has made clear it does not support).[11] Our Government should also address, through diplomatic pressure and other channels, the root causes of this persecutory behaviour.

29. If we back down on this issue it will tell the Indonesians that we aren't serious in supporting human rights in West Papua.

30. The practical result of the new legislation for West Papuan refugees fleeing after 13 April 2006 is that they would be processed in a system that lacks transparency, that is subject to abuse and political pressure, that has no adequate review or accountability measures, and that is very unlikely to produce a durable solution speedily and fairly if at all (for these points generally see below).

31. There can be no principled justification whatever for refusing to apply our full refugee determination processes to West Papuans or refusing to accept them for

---

[10] See e.g. John Wing with Peter King,*Genocide in West Papua? The role of the Indonesian state apparatus and a current needs assessment of the Papuan people*, a report for the West Papua Project, Centre for Peace and Conflict Studies, University of Sydney and ELSHAM, Jayapura, Papua, August 2005 (available from: www.arts.usyd.edu.au/centres/cpacs/wpp.htm).

[11] Indeed, that was initially the response of the Foreign Minister, Mr Alexander Downer, in February 2006, when he is reported to have told his Indonesian counterpart 'that the Department of Immigration's forthcoming decision would be constrained by international law and treaty obligations, and did not reflect Australia's foreign policy towards Indonesia.' (Dr Clinton Fernandes, 'West Papua: Reluctant Indonesians', 29 March 2006, available from:www.westpapua.can/). Australia should maintain that stance.

resettlement in Australia if found to be refugees. Among other objectives, the Refugee Convention was designed to prevent states from putting considerations of 'national interest' before humanitarian concerns for those in danger of persecution. To take the route the Government proposes is to further undermine the system of international refugee protection.

32. It is impossible for Australia to argue that it is not the country of first asylum for West Papuan refugees reaching the mainland directly. Australia had hitherto argued both before and after the *Tampa*, that 'secondary movement' of refugees is undesirable and that countries of first asylum must continue to host direct flight refugee populations. Despite the lack of merit in Australia's application of that position, it is breathtakingly hypocritical of the Government to turn around now and propose a system that has the specific purpose of preventing West Papuans **directly fleeing** from persecution from being eligible for refugee protection in Australia. Apart from other considerations, the proposals are clearly inconsistent with the announced basis for the Government's harsh policies in the past.

33. Moreover, as Father Brennan points out, the introduction of 'Pacific Solution Mark 2' in relation to West Papuans is premised on smoke and mirrors.[12] If a large number of West Papuan refugees ends up on Nauru, on the basis of previous experience very few of them are likely to be accepted by other resettlement countries when we have refused to do so (only New Zealand and Australia took any significant numbers of 'Pacific Solution Mark 1' refugees). Bona fide refugees will either remain on Nauru **indefinitely** (as Nauru has not signed the Refugee Convention they will not be sub), or will eventually be accepted by Australia, which will again incense the Indonesians. This will all have been at the expense of the health of the refugees themselves and a crippling delay in their ability to rebuild their lives.

34. The Government's hope, of course, is that its measures will have a deterrent effect and send any influx of West Papuan refugees to Papua New Guinea. The interests of the refugees themselves will again be sacrificed to Australia's *real-politik*. In addition, we would be adding to Papua New Guinea's genuine burden of providing protection for an estimated 8,500 West Papuan refugees.

35. Of equal concern is the threat that Australian naval and customs resources, and perhaps intelligence resources as well, will be involved in deliberately disrupting attempts by West Papuans to escape from persecution and seek asylum, whether these activities are in West Papua itself or by turning back to Indonesian territory boats heading for Australian waters. This strikes at the heart of the Refugee Convention obligation not to expel or return (*refoule*) refugees to the frontiers of territories where their life or freedom would be threatened on grounds of race, religion, nationality, membership of a particular social group or political opinion (Article 33). The Parliament should make it clear that Australian interests are not served by imperilling the lives and liberty of West Papuan refugees.

36. While provision for such action is not incorporated in the Bill the Committee is considering, the prospect of it occurring should inform the Committee and the Parliament in their consideration of the Bill. We urge the Committee to reject the policy of the Bill and therefore place a rein on the associated policies.

[12] See note 3, above.

37. The Immigration Minister, Senator Vanstone, has argued publicly that Australia should not be used as 'a staging post' for the political views of West Papuans. This is an astonishing comment, which again fails to recognise that an international refugee protection system must be based on a complete separation between objective legal determination of refugee status and provision of protection to refugees, and political considerations of, for example, whether or not the countries of origin will be happy with the free expression of criticism of their regimes. It is vital to refugees from political persecution that they be able to express their opinions freely and attempt to build pressure for an end to such persecution.

38. Moreover, shunting West Papuan refugees to Nauru is to ensure their case is barely heard internationally. For a country like Australia to collaborate in suppressing the ability of exiles from oppression and persecution to seek the help of the world community is disgraceful.

39. What the Minister's view does is to underscore the clear implication that the 'Pacific solution' is designed to hide any unfortunate West Papuan refugees away from the Australian people so they cannot draw attention to the plight of their people. This is a further reason **for** allowing West Papuan refugees to be processed and resettled in Australia, not the reverse.

40. Australia has a poor record in responding to the protection needs of refugees from West Papua once Indonesia took over its administration.[13] We should not again make them the pawns of our foreign policy.

Radical flaws in the 'Pacific solution' Marks 1 & 2

Effects of isolation

41. The Government states that 1,547 people have been processed offshore, and that all have been dealt with consistently with its obligations under the Refugee Convention (2nd Reading Speech, pp 5-6).

42. This ignores the real history of 'offshore processing', and its glaring inherent defects. No-one who has read Michael Gordon's *Freeing Ali*[14] could come away with a rosy picture of the human and legal effects of this system in the past, and in particular Nauru as a processing centre. It should be left to wither away with the departure to Australia of the last of the refugees and asylum seekers who ended up there in 2001–2002.

43. Almost everything that is wrong with 'offshore processing' flows from its central premise, namely isolating asylum seekers thousands of miles away from contact with and support from the Australian community. They are cut off from friends and relatives, from legal advice, from the support of community refugee advocates, from full medical and mental health services, and from a wide range of welfare services of all kinds. There is no access to the facilities by media as a matter or right, and it is very rare for politicians to be prepared or able to visit. In the past,

---

[13] See Klaus Neumann, 'Hush-hushing the whole matter: The UNHCR, Australia, and the West Papuan Refugees' (2006) Institute for Social Research, Swinburne University of Technology: www.apo.org.au/linkboard/results.chtml?filename_num=77076.

[14] Michael Gordon, *Freeing Ali: The Human Face of the Pacific Solution*, UNSW Press, Sydney, 2004. For other accounts of the 'Pacific solution' see Peter Mares, note 20, and Robert Manne & David Corlett, 'Sending them Home: Refugees and the New Politics of Indifference', *Quarterly Essay*, Issue 13, 2004, at pp 43–58.

distinguished lawyers such as Julian Burnside QC have been denied access to clients held there. Critics of the existing system have pointed to inferior character and health checks in these isolated locations.

44. The effects of this system on individuals can be as devastating as long-term detention on the mainland, although some aspects of the running of the centres have been somewhat less harsh than the mainland detention centres.[15] There is a large amount of research on the general health and mental health effects of indefinite mandatory detention, and the effects of being held in an 'offshore processing centre' are no different in this respect. We therefore attach a summary of this research as at May 2005, prepared in 2005 by a member of RAC, Rosemary Nairn.[16]

45. Some of the members of RAC in Canberra have close ties with Afghan and Iraqi families and young single men who were held for years on Nauru and in Baxter. We have come to know their stories and see their suffering as a result of lengthy detention in those places.

46. In particular we note what some of the teenagers say who are able to articulate in English the traumatic effects on them and their families of being detained in Nauru. It is sad to hear children identifying the harm and suffering caused them and their families by discriminatory government policies and practices.

47. There is other strong testimony to the mental health effects on those held long-term on Nauru. Dr Maarten Dormaar, who was an International Office of Migration-appointed psychiatrist on Nauru, found that mental health deteriorated sharply the longer people were there and the more hopeless their situation became. Among his observations is the following:

> Mental health under these circumstances [being kept in a prison-like situation] is like trying to use antibiotics in … hospitals [before modern hygiene arrangements]; the bare essentials of mental hygiene, like respect for a person's autonomy and integrity, are violated by those in power …[17]

48. Now that the large number of those on Nauru found to be refugees or given humanitarian visas and returned to Australia have made contact with members of the Australian community, including other refugees, most are slowly rebuilding their lives, although they are still subject to the terrible uncertainties of the TPV system, and many continue to experience the effects of the trauma produced by detention.

50. To return to an offshore processing system after the experience of the past 5 years flies in the face of the human realities.

No family reunion

51. A significant number of women and children who have been in offshore detention could have been recognised as refugees and obtained protection visas if they

---

[15] Note the UNHCR briefing notes dated 14 October 2005 concerning the return of asylum seekers held on Nauru to Australia, including the comment: 'While the asylum seekers have been well cared for in physical terms, UNHCR has been very concerned about the impact of their isolation and prolonged situation on their mental health.' (See note 8 above for UNHCR website.)

[16] Rosemary Nairn, *Notes on Health and Mental Health for Asylum Seekers and Refugees held in Immigration Detention Centres and Living in the Community*, available from: www.refugeeaction.org ; Ms Nairn, a member of RAC, was a Vietnam Veterans Counsellor for 5 years & Director of the Canberra Child & Adolescent Unit for 3 1/2 years.

[17] Quoted in Manne & Corlett, note 14, at p 54, and see pp 51–54.

had been permitted reunion with family already in Australia. The absence of family reunion under this system is one of its cruellest features. We are now set to inflict this suffering again, this time on the families of West Papuans already in Australia and who are seeking to reunite with them.

Poor and unreviewable decision making

52. Equally significant is that the process of decision-making by DIMA officers on Nauru is not and will not be subject to any external checks and accountability, only internal review. Internal review is by other officers of DIMA, and provides no way of testing the justice and appropriateness of the reasoning of decision makers, nor does it impose the same discipline on decision making itself as external review.

53. The experience of those on Nauru showed just how little protection this system provides. At the request of the Minister, refugee advocate Marion Le and her staff represented over 280 Afghans and Iraqis on Nauru many of whose claims for recognition of refugee status had been rejected numerous times. Ms Le reports that access to the case files of these people quickly revealed that there were major flaws in the decisions affecting these people. This is consistent with a system in which decision makers had not expected that their work would be scrutinised.

54. According to Ms Le, the pattern of errors in the decision-making included:

- Untested 'dob-in' material, which should never have been included or given any weight in the decision-making process, because it came from a disaffected and unreliable source.
- In a third of files examined, there had been evidence of merging of facts from other 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'.

55. In addition, some members of RAC have first hand knowledge of young Iraqi men with strong refugee cases which were completely mishandled by DIMA.

56. When account is taken of the prevalence of such errors in the past, and the fact that the RRT in the last three years overturned 92% of refusals by DIMA of Iraqi and Afghan protection visa applications, resulting in some 3,200 people receiving protection visas who would not have done so without the independent scrutiny of the RRT, it is horrific that the Government proposes to go back to a system with no appeal rights or independent scrutiny.

57. In the end, all Ms Le's clients entered Australia or New Zealand as bona fide refugees or humanitarian visa holders. (Only two people now remain on Nauru: what effect this isolation from compatriots has on them can only be imagined.) In the absence of this one advocate, the system would have condemned over 280 people to return to danger, or to remain in indefinite detention on Nauru. No system that shows as poor a record as this one did in those cases is an acceptable mechanism for refugee determination by a country with an already functioning and credible system (in the UNHCR's view). In effect, Ms Le was doing the job the RRT and the courts had been excluded from. In the future, as in the past, the ability of advocates like Ms Le to represent asylum seekers sent to Nauru would depend on the Minister's discretion, which is no safeguard at all.

58. The experience of Ms Le backs up the finding referred to by Father Brennan, that applied also to mainland detention in isolated places, that '[d]etention in remote places has never been an aid to accurate determination of refugee claims'.[18]

59. For the committee to assess properly the likely effects of the system the Bill proposes, it needs to know what happened in Nauru under the 'Pacific solution Mark 1'. The best source of that information is Ms Le who we expect will wish to provide the committee with evidence of the working of the processing system in the past.

60. By way of instructive contrast, David Manne recounts the exemplary way in which DIMA dealt with the cases of the 42 West Papuans who were recognised as refugees. Manne writes:

> Our role [as legal advisers] was structured into the process. It was clearly considered important by the Department of Immigration in affording people their full rights and dignity. … 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.[19]

We should not again go down this path of unaided, secretive and unreviewable decision making.

61. This is particularly so where the decisions may involve a high degree of political sensitivity, as in the case of claims to refugee status by West Papuans. Secret and unaccountable decision-making in such circumstances is a recipe for injustice and unfairness for highly vulnerable people.

62. In this context, it should be noted that after initial involvement in decision making following the introduction of the first 'Pacific solution', the UNHCR withdrew from performing that function on the basis that it was inappropriate for Australia, with a 'very sophisticated and very well developed refugee status determination procedure' to ask the UNHCR to process asylum seekers who had reached Australian territory.[20] The UNHCR has taken the same stand from the beginning in relation to the proposals now embodied in the Bill, saying that: 'UNHCR would not normally substitute for a well-established national procedure such as Australia's.'[21]

Absence of all real accountability

63. Despite the provision in the Bill for an annual report by the DIMA Secretary *to the Minister* (not the Parliament: Item 27 of Schedule 1, new section 486R), there will be no meaningful accountability in the refugee processing system on Nauru.

64. As already discussed, there will continue to be no formal external review by courts and tribunals of offshore refugee decisions – described dismissively by the

---

[18] Frank Brennan,*Tampering with Asylum: A Universal Humanitarian Problem*,University of Queensland Press, Brisbane, 2003, p 87.

[19] Speech by David Manne, given at a forum entitled 'Boatloads of Extinguishment? A Forum on the proposed offshore processing of "Boat People"', Castan Centre for Human Rights Law, 5 May 2006, available from the Project Safecom Inc website, www.safecom.org.au .

[20] Taken from Peter Mares,*Borderline: Australia's response to refugees and asylum seekers in the wake of the 'Tampa'*, UNSW Press, Reportage Series, Sydney, 2nd ed, 2002, p 140.

[21] See UNHCR briefing notes referred to in note 8 above.

Parliamentary Secretary as 'protracted merits review and litigation processes'[22] – despite the fact that the Government has itself secured the passage of the *Migration Litigation Reform Act 2005* which is designed to limit many of the supposed problems with judicial review of migration decisions.

65. That is bad enough in itself, but the effect is worsened by the fact that the Ombudsman and the Human Rights and Equal Opportunity Commission (HREOC) also have no jurisdiction. There is no external mechanism that might serve to monitor the system and its compliance with human rights norms and the normal requirements of administrative law. There is no way of making the system accountable and ensuring its fairness unless the Minister uses her absolute discretion to allow an advocate like Marion Le access to case files and to make representations on behalf of asylum seekers. This places a crippling burden on such an advocate or advocates, leaves the outcome to the final decision of the Department or the Minister, and makes the vindication of the rights of refugees depend on chance and goodwill.

66. Similarly, it was community action that drew attention to the plight of Cornelia Rau, which would otherwise have remained invisible. Such action is impossible in the Nauru context.

67. Given the absence of community access and external scrutiny, the Parliament should refuse to enact this legislation.

Costs

68. The Government claims that the deterrent effect of the 'Pacific solution' has and will save in the vicinity of '$50,000 for each person whose unauthorised arrival was avoided'. It also claims that there are no financial implications of the Bill, as it is merely giving the flexibility to 'move a wider group of people to offshore processing centres'. [23] This is surely disingenuous. If the Government is again to ramp up a new and expanded 'Pacific solution', there will continue to be very high additional costs of keeping the Government of Nauru onside, the transportation of asylum seekers, and the high costs of keeping them on Nauru (about $1500 a day according to Julian Burnside),[24] and so on.

69. We urge the committee to seek from the Government a detailed costing of the proposed expanded system both on the basis that it is used in relation to a certain number of asylum seekers, stating the assumptions as to length of stay, special services, etc., and on the basis that the system is not used at all and the facilities are in effect mothballed. The costs of the continued availability of Nauru for receiving asylum seekers should be factored in to any assessment of the real costs flowing from the passage of this Bill.

Impact on Nauru

70. We do not have time to explore the adverse impacts on the government and people of the existing system of offshore processing under the 'Pacific solution' Mark 1, but there are a number of examinations of that issue.[25] That effect provides another

[22] 2nd Reading Speech, see note 2 above.
[23] Explanatory Memorandum, 11 May 2006, Outline, penultimate paragraph.
[24] Julian Burnside, 'Howard's Australia: Unfair Go', www.NewMatilda.com, 26 April 2006.
[25] See for example Peter Mares, note 20 above, at pp 128–132. And note the comment of Dr Dormaar that Nauru was 'for all practical purposes … a vassal state': 'Nauru cannot refuse the money and its big brother is aware of this …' (see Manne & Corlett, note 14 above, p 53).

reason why we should not embark on this course again, coopting failing or damaged Pacific states to do our dirty work. If they require foreign aid, or other structural or governance assistance, it should be given according to need and on a fair basis.

Failure to ensure durable integration or resettlement

71. As already stated, the Government has failed to guarantee that those recognised as Convention refugees after processing in an offshore centre will be allowed to seek refugee protection in Australia. The potential is quite high for acknowledged refugees to be left indefinitely on Nauru, depending on the willingness of other countries to bail Australia out, and on the potential embarrassment to Australia's external relations if it accepts them for resettlement.

72. The attempt to deter bona fide refugees from coming to Australia by denying resettlement in Australia is certainly not consistent with the purposes of the Refugee Convention. It is made worse when those likely to suffer prejudice from this policy are asylum seekers like the West Papuans who are directly fleeing from persecution. There could be no stronger case than that of the West Papuans for Australia to acknowledge that it is a country of first asylum, with the moral and legal duties that entails. Instead, after only two incidents, involving a total of 46 people, we are proposing to subject future West Papuan refugees to a system designed, however mistakenly, to deal with 'secondary movers'.

73. We urge the committee to reject this unconscionable policy accompanying the Bill. At the very least, it should seek the insertion in the Bill of a provision that Australia will provide full protection for those refugees who have not been accepted by another country for resettlement within a short period (say 30 days) of their refugee recognition. This would not make the Bill acceptable to us or its many other critics, but if the Bill is passed such a provision would render it a little less inhumane in its effects.

74. Fear of Indonesian disapproval of resettlement of those who are recognised to be refugees should not be a consideration for Australia.

Adverse effects on international refugee and human rights protection system

75. This submission has attempted to look at the practical and policy consequences of enacting this Bill and implementing its associated proposals, both for individual refugees and for the international refugee protection system, as well as for Australia's public policy. This Bill is not a minor tidying up measure, it has very wide implications. The effect in the region and elsewhere is likely to be large if Australia adopts this further sidelining of the central asylum provisions of the Convention for those fleeing persecution.

76. The changes the Bill and associated measures would effect threaten breaches of international human rights and undermine the basis of the international refugee system, sending a message to other countries that it is acceptable to manipulate the Refugee Convention for domestic or foreign policy reasons. It will strike a blow at the objective legal processing of refugee claims by making the decision making unaccountable and secretive, involving the danger that it may be affected by political considerations.

77. The proposed system fails to distinguish, as a fair domestic refugee determination system must, between fair and legal determination processes, on the one hand, and a system open to the influence of political considerations on the other.

78. Many other organizations such as the Refugee Council of Australia and HREOC have commented publicly and in detail about the breaches of the Refugee Convention and other international human rights law that are threatened by this package, and they will doubtless make submissions to the committee.

79. RAC simply wishes to draw attention again to two central provisions of the Refugee Convention that are in danger of being breached by the proposed legislative and administrative measures, and the breach of which would have major consequences for both individuals and for the refugee protection system.

80. Those provisions are:

- Article 31 of the Refugee Convention, which prohibits imposition of penalties on refugees just because their entry or presence is not authorised under a state's domestic law. This is a central provision of the Convention to protect asylum seekers, who will very often be unable to enter a place of refuge according to domestic law.

  The Australian Government has previously argued that the requirement in Art. 31 that refugees be 'coming directly from a territory where their life or freedom was threatened' excluded Article 31's application in relation to Iraqis, Iranians, Afghans and so on arriving by boat from Indonesia, Malaysia etc.[26] Whatever dubious merit that may have had, it can have no application to West Papuan refugees who come directly to Australian territory. A breach of Article 31 is a serious derogation from the international refugee protection system. The whole scheme of the Bill appears to breach Article 31(1).

- Article 33(1): The interception at sea of West Papuan asylum seekers, and their return to West Papua, perhaps with the aid of Indonesian authorities, would constitute a breach of this foundational provision of the Refugee Convention. Article 33(1) prohibits expulsion or return of a refugee to the frontiers of a territory where his life or freedom would be threatened for a reason specified in the Convention. There is grave danger that the protections of this provision will be swept aside in the application of this policy. While that policy is not embodied in the Bill, it is clearly part of the package of which the Bill is the centrepiece.

[26] This approach is not consistent with specific consideration 10, paras (b) & (c) of the UNHCR's summary conclusions on Article 31 in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, ed Erika Feller et al, Cambridge University Press, Cambridge, 2003, p 255: '10. In relation to Article 31(1): … (b) Refugees are not required to have come directly from territories where their life or freedom was threatened. (c) Article 31(1) was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries or who are unable to find effective protection in the first country or countries to which they flee. The drafters only intended that immunity from penalty should not apply to refugees who found asylum, or who were settled, temporarily or permanently, in another country. The mere fact of UNHCR being operational in a certain country should not be used as a decisive argument for the availability of effective protection in that country.'

81. The broader threat is to the cooperative functioning of the international refugee protection system, with the potential to help to destroy it.

82. Ultimately, as Father Holdcroft has written:

> The proposed amendments shift the burden of responsibility to other states in a manner that is unlikely to be embraced by those states: the burden will be carried by the asylum seekers themselves.[27]

Conclusion

83. This is a crucial stage in Australia's refugee law and practice. RAC urges the committee to reject the Bill in its entirety as a completely retrograde step which is unnecessary, unjust and contrary to the letter and spirit of the international scheme of refugee protection.

'Don't tear up refugee rights!'

Yours sincerely

…… ……

Ms Jane Keogh, Convenor, ACT Refugee Action Committee, Brigidine Sister & refugee advocate

Ron Fraser, ACT Refugee Action Committee, BA/LLB, M Litt, Grad Dip Pub Law, Barrister & Solicitor of the ACT Supreme Court, formerly Principal Legal Officer, Information Access Unit, Attorney–General's Department

[27] See note 7 above.