Offshore Refugee Processing

Brief on the proposed changes
27 April 2006

The proposal:

- All unauthorised boat arrivals will be transferred to offshore centres to have their claims for refugee status assessed. No distinction will be made as to whether they reached an excised or non-excised location. In short, it seems that all of Australia will be excised from the Migration Act for the purposes of seeking asylum.
- Indications are that plane arrivals will not be included in the new offshore processing
- Indications are that Nauru is the preferred location, PNGs Manus Island 2nd choice with Christmas Island also an option.
- The durable solution sought is resettlement in a third country. There is confusion as to whether Australia will be considered as a third country option.
- There will only be a refugee status decision by a DIMA officer and internal DIMA review. There will be no access to the Australian legal system such as a merits review by the Refugee Review Tribunal or judicial review.
- The change will be effected by Amendments to the Migration Act by treating unauthorised boat arrivals as subject to this off-shore processing regardless of where they land in Australia.
- There will be a non-reviewable, non-compellable power for the Minister to admit persons to the onshore process.
- There will be attempts to engage the United Nations High Commissioner for Refugees (UNHCR) in the determination process. The UNHCR has indicted it would not normally substitute its procedures for a well-established national procedure such as Australia's.
- Unauthorised boat arrivals who have already applied for protection before today will not be affected by these changes.
- In addition, the Government will increase its capacity to patrol Australia's northern waters to identify and locate any potential unauthorised arrivals. Further details will be announced by the Ministers for Defence and Justice and Customs.

These changes are most likely to be legislative as opposed to regulatory changes. They are likely to be brought into Parliament the week of May9-11, with the Government guillotining debate so that the votes in both houses can be expedited.

The laws which the Government seek to put in place, coupled with various administrative arrangements cutting across a number of portfolios, raise the prospect of breaches of international law and violations of our international obligations. As bad as the Tampa laws were, they concerned 'secondary movers' — refugees who had fled from their homelands and had arrived in places like Malaysia and Indonesia before attempting to land in Australia. Papuan refugees, on the other hand, are fleeing directly from a country of persecution and are in a qualitatively different position.

Even if this process is again applied to asylum seekers other than Papuans from Indonesia, it will still retain all the shortcomings experienced in the earlier use of the "Pacific Solution".

All this is at the expense of people who are fleeing well-documented persecution — persecution that will not be ameliorated but rather encouraged by the proposed changes.

A JUST AUSTRALIA

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Offshore Refugee Processing
Domestic Issues

Reneged on Palmer Inquiry Detention reforms
While much has been made by the government of the reforms introduced to satisfy recommendations made by the Palmer Inquiry, unauthorised asylum seekers will simply no longer be detained in Australia and under Australian law. This in itself opens up huge questions as to detention standards, length and accountability and renders much of the reforms meaningless.

Children in detention
Despite writing into the Migration Act the principal that "children shall be detained as a measure of last resort" this proposal will see all boat arrival children detained in far worse conditions than had been used in Australia in the past, with little hope of a speedy resolution to that detention.

Navy Interdiction
The Australian Navy will be instructed to intercept asylum seekers who arrive in our territorial waters and transfer them to Nauru. If the Navy also assists Indonesian forces either directly or by providing intelligence, information or identifying Papuan boats for the Indonesians, then this will breach the Refugees Convention. As with 'Children Overboard' and the use of the military during the Tampa crisis, our naval personnel will again be placed in extremely difficult moral and legal situations — with the same potential for affecting morale problems as happened before.

Claims processed outside Australian law
Asylum claims will be processed by Australian immigration officials, but not under Australian law, with independent scrutiny and no access to review by the Refugee Review Tribunal or the courts. Statistics show that the RRT is a necessary part of the asylum seeking process. For some countries, the RRT found that 89% of visa refusals by DIMA were wrong.[1] Denying this level of review means many refugees will be denied the protection they need.

> UNHCR stated: This is even more worrying in the absence of any clear indications as to what might be the nature of the envisaged off-shore processing arrangement. If it is not one that meets the same high standards Australia sets for its own processes, this could be tantamount to penalising for illegal entry.[2] Such penalising violates Article 31 of the Refugees Convention.

Resettlement options
Australia will accept no obligations towards any refugees other than to see whether a 'third' country will take them. In the previous use of the Pacific Solution, of the 1063 refugees eventually resettled only 46 (4.3%)[3] were accepted into countries other than Australia and New Zealand. There is genuine concern that other countries are unlikely to accept any resettlements from the Pacific Solution MkII.This will lead to indefinite detention while refugees wait for a place to call home.

Costs
Government estimates are $240 million spent so far on Nauru - that comes to approx $195,000 per asylum seeker housed on Nauru.

Private companies blurring lines of responsibility
Security and detention contracts may be given to private corporations, creating concerns over transparency and accountability, particularly given the remote location of the detention centres. This will make it difficult for NGOs and Churches to monitor detention conditions and processing standards even if access to the centres is granted.

[1] A Just Australia Submission to the Migration Act Inquiry

[2] UNHCR media release 18th April 2006 issued by Media Relations & Public Information, Geneva.

[3] Statistics provided by IOM

Offshore Refugee Processing

International Law issues

The Minister for Immigration, Senator Amanda Vanstone stated that "Australia's approach to unauthorised arrivals will continue to reflect our commitment to our international protection obligations."[1]

However, this proposal breaches international laws both by the letter and the spirit.

Refugee Rights vs Asylum Seekers
Processing an asylum seeker's refugee claim does not *make* him or her a refugee, it simply makes a formal declaration that she or he *is* a refugee. Repelling people from our borders before this status determination happens, ensures Australia remains at serious risk of breaching refugees' rights.

Refugees Convention[2]

- Article 33: Any act of turning back boats which reach Australian waters coming directly from a country of persecution and returning its occupants to that country, in this case to Indonesia, is a clear breach of Article 33 of the Convention[3]
- Article 32: "States shall not expel a refugee lawfully in their territory save on grounds of national security or public order" Small numbers of unarmed asylum seekers do not constitute a threat to Australia's security.
- Article 31: "States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened…" Treating unauthorised boat arrivals – particularly from Papua who made a direct journey to Australia from the country where they were being persecuted – differently to plane arrivals asylum seekers is a clear breach of Article 31.
- Article 3 – "The Contracting States shall apply the provisions of this convention to refugees without discrimination as to race, religion or country of origin." This new policy proposal has been specifically formulated to deal with asylum seekers from Papua, and as such its purpose can be viewed as a breach of Article 3.

United Nations Declaration on Territorial Asylum 1967
Article 3-1 "No [refugee] shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution." Clearly, any moves to repel asylum seekers from Australian waters is in breach of this principal.

Non refoulement
The most serious problem is that the legislation fails to articulate adequate guarantees of safety in defining what constitutes a 'safe country'. This is particularly worrying given that Australia may be sending asylum seekers to Nauru, which is not a signatory to the 1951 Refugee Convention and is therefore under no legal obligation not to return or expel refugees.

[1] Minister media release 13 April 2006
[2] 1951 Convention relating to the Status of Refugees http://www.unhchr.ch/html/menu3/b/o_c_ref.htm
[3] Refugee Council of Australia, press release 11th April 2006.

Offshore Refugee Processing
International Diplomacy Issues

Harms Australia's International Reputation
This proposal creates the impression that we are seeking to dump our 'problems' on small less-developed and/or dependent nations. This makes Australia look like an unwelcoming country instead of a tolerant, compassionate, multicultural society.

During the Tampa stand-off, the impression expressed by Australia's church partners in the Pacific and internationally was one of Australia lacking compassion and violating international law. Such perceptions could undermine Australia's efforts to promote human rights, good governance and the rule of law abroad.

Appears as if Australia has caved in to pressure from Indonesia
This proposal sends a clear signal to foreign powers that Australia is willing to change the laws governing its refugee protection system. It is vital to our national interest and our ethical values as a democratic country that we do not bow to external pressure to compromise our commitment to protecting human rights. As an international citizen, Australia will not be respected for repudiating those values.

> What if China objected to Australia taking refugees from Tibet prior to signing off on a bilateral free trade agreement? What if Russia object to Australia taking refugees from Chechnya?

We should be making it known to Indonesia that we consider it vital to peace and stability in the region that the human rights and welfare of all Indonesians be fully protected and differences resolved peacefully.

Sets a Poor Precedent for Other Countries
After Australia introduced the Pacific Solution, several European countries were encouraged to follow suit, including the UK and Italy, and develop their own versions of the Pacific Solution. Pakistan, who then hosted over two million refugees, cited Australia's response to minor numbers of asylum seekers as justification for closing its borders to Afghan refugees.

In signalling a further withdrawal from the international system of protection, the proposal sets a negative precedent that could encourage other developed countries to abrogate their responsibilities.

> UNHCR stated: "If this were to happen, it would be an unfortunate precedent, being for 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." [1]

Inducements Cause Distortions
Under the Pacific Solution, there were serious concerns about the use of aid as a lever to extract concessions from smaller aid-dependent countries. In particular, the impact that large offers of conditional development aid had on the domestic politics of PNG and Nauru, particularly on the freedom of the media in these countries.

Encourages the use of arbitrary detention
Under the Pacific Solution, Nauru was encouraged to detain asylum seekers on Australia's behalf even though its constitution prohibited arbitrary detention. Mandatory, indefinite and non-reviewable forms of detention, which are practiced in Australia were essentially exported to Nauru.

Allows for prolonged processing and detention
DIMA has developed 90 day deadlines for protection visa processing in Australia. These deadlines will not be adhered to in offshore centres, leading to prolonged detention.

[1] UNHCR media release 18th April 2006 issued by Media Relations & Public Information, Geneva.