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19 July 2012

Submissions

Expert Panel on Asylum Seekers

PO Box 6500

Canberra ACT 2600

To the Expert Panel on Asylum Seekers

Dear Members of the Panel,

Liberty Victoria is one of Australia's foremost civil liberties and human rights advocacy organizations. It is also the longest standing, having been established initially as the Australian Council for Civil Liberties in 1936. Further information on our activities may be found at [www.libertyvictoria.org.au](http://www.libertyvictoria.org.au).

Liberty is grateful for the opportunity to provide this submission on the present very difficult and politically fraught situation with respect to the reception and treatment of asylum seekers.

The Panel's terms of reference cover, among other things, the following matters:

1. Relevant international obligations.
2. Prevention of asylum seekers from risking their lives by travelling to Australia by boat.
3. Short, medium and long term approaches to assist in the development of an effective and sustainable approach to asylum seekers.

We deal with each of these matters in turn.

## ***Australia's International Obligations***

Asylum seekers are, by definition, people who seek to exercise their right of asylum in Australia. That is, they claim to be refugees within the meaning of that term in the International Convention relating to the Status of Refugees, 1951. Australia's international obligations to refugees are defined in the international agreements to which Australia is a party. They include:

- The Convention relating to the Status of Refugees
- The International Convention on the Rights of the Child
- The International Covenant on Civil and Political Rights

### The International Refugee Convention<sup>1</sup>

The Convention on the Status of Refugees (the Refugee Convention) is the primary source of Australia's obligations in relation to people who seek asylum on our shores. The Refugee Convention was originally limited to protecting people who were escaping the totalitarian regimes of Europe in the middle of the 20<sup>th</sup> century. In 1967 the *Protocol relating to the Status of Refugees* was adopted. Since 1967 the Refugee Convention has applied to all people who meet the Refugee Convention criteria for refugee regardless of their origin.

The Refugee Convention applies to people who are found to be genuine refugees. The Refugee Convention also applies, in a more limited capacity, to people who have entered Australia's borders without authorisation and who seek to be determined as genuine refugees.<sup>2</sup> Australia has obligations to receive and assess claims of refugee status. The relevant provisions of the International Refugee Convention read as follows:

*Article 16(1) "A refugee shall have free access to the courts of law on the territory of all Contracting States."*

*Article 31(1) "The Contracting 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, in the sense of Article 1, enter or are present in the territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."*

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<sup>1</sup> *Convention relating to the Status of Refugees* 189 U.N.T.S. 2545, entered into force on April 22, 1954.

<sup>2</sup> *Ibid*, Art 1; *Minister for Immigration v Khawar* (2002) 210 CLR 1.

*Article 31(2) "The Contracting states shall not apply to the movement of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized..."*

*Article 32(1) "The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."*

*Article 32(2) "The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law..."*

*Article 33 (1) "No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."*

It follows from these provisions that under the Refugee Convention, Australia must not, therefore:

1. refuse to process refugee claims where people seeking asylum present themselves to governmental authorities without delay in order to have their claim for refugee status heard and determined by the courts;
2. punish asylum seekers within Australia's territory because they have arrived without authorisation; or
3. return people to a country where their "life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion."<sup>3</sup>

Further, expulsion from Australia is prohibited unless:

1. circumstances of national security or public order justify the expulsion; or
2. a decision has been reached in accordance with due process of law; and
3. an appeal can be made from that decision to a competent authority.<sup>4</sup>

In the context of these treaty provisions, with which Australian governments have agreed to comply, we note the following with respect to proposals for off-shore processing whether in Malaysia or Nauru. These arrangements seek to remove asylum seekers (transferees) from

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<sup>3</sup> *Convention relating to the Status of Refugees* 189 U.N.T.S. 2545, entered into force on 22 April 1954, Art 31.

<sup>4</sup> *ibid*, Art 32.

Australian territory completely. Removal is to be made without considering claims of refugee status. The schemes are to be executed in such a way that review of any action on the part of the Executive Government is effectively barred. Once removed from Australia the Commonwealth Executive will have no control, or in Nauru, only limited control over the fate of the transferees. In that these arrangements preclude consideration of refugee claims whilst transferees are in Australian territory, they are inconsistent with Australia's international obligations under the Refugee Convention.

Further, the following rights under the Refugee Convention are refused. The entitlement of an applicant for refugee status to have their claim for refugee status determined by the courts of a Contracting Party, in this case, Australia, is denied. A transferee, in the terms of the Convention, is also refused the opportunity to 'show good caused for their illegal entry and presence'.

A penalty is imposed upon a refugee claimant who has arrived on Australian territory irregularly. That penalty is constituted first by their mandatory detention in a government detention facility, secondly by their expulsion from Australia at the earliest possible opportunity and thirdly by their removal to a country in which their personal safety and well-being cannot be guaranteed.

The removal of transferees from Australia to another country, without consideration of their claims for refugee status, constitutes their expulsion within the terms of the Convention. Such expulsion is permitted under the Convention only on grounds of national security or public order. Neither national security nor public order is threatened by a refugee claimant's approach to the Courts of the land to vindicate their refugee claim.

#### The Convention on the Rights of the Child<sup>5</sup>

The Convention on the Rights of the Child (CRC) requires that Australia protect all children within its jurisdiction without discrimination of any kind, including on the basis of the child's status or activities.<sup>6</sup> The CRC requires that the State party must put the child's best interests as the foremost consideration,<sup>7</sup> subject only to economic capacity.<sup>8</sup> The CRC defines the rights owed to children in recognition of their vulnerability. CRC rights include:

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<sup>5</sup> *Convention on the Rights of the Child*, open for signature 20 November 1989, 1577 U.N.T.S. 3 (entered into force 16 January 1991).

<sup>6</sup> *Ibid*, Art 2.

<sup>7</sup> *Ibid*, Art 3.

1. the right not to be separated from his or her parents;<sup>9</sup>
2. the right to reunification with family, dealt with humanely and expeditiously;<sup>10</sup>
3. the right to be free from mental and physical abuse, neglect, negligent treatment, maltreatment and exploitation;<sup>11</sup>
4. the right to special treatment, including alternative care, from the State when deprived of his or her family environment;<sup>12</sup>
5. the right to appropriate protection and humanitarian assistance in relation to claiming refugee status regardless of whether they are accompanied by an adult or not;<sup>13</sup>
6. the right to an adequate standard of living;<sup>14</sup>
7. the right to education;<sup>15</sup>
8. the right to live free from cruel, inhumane or degrading treatment.<sup>16</sup>

In relation to these treaty provisions we note the following matters concerning off-shore processing, whether in Malaysia or Nauru. The Arrangements contemplate transferring children to another country as though they were adults. It does not take into account the special needs of children in recognition of their inherent vulnerability. It does not guarantee the security of the child transferees and, given that Malaysia is a country in which corporal punishment on minors is sanctioned by law,<sup>17</sup> the Arrangements pose a real threat to the welfare of child transferees. The Arrangements seek to avoid all of Australia's obligations under the CRC to transferees who are children in the same way that they seek to avoid all obligations to adults under the Refugee Convention. In this respect they are inconsistent with Australia's international obligations.

In particular the following rights under the CRC are endangered by the transfer of children. The right of a child to be free from mental and physical abuse, maltreatment or exploitation is

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<sup>8</sup> Ibid, Art 4.

<sup>9</sup> Ibid, Art 9.

<sup>10</sup> Ibid, Art 10.

<sup>11</sup> Ibid, Art 19

<sup>12</sup> Ibid, Art 20.

<sup>13</sup> Ibid, Art 22.

<sup>14</sup> Ibid, Art 27.

<sup>15</sup> Ibid, Art 28.

<sup>16</sup> Ibid, Art 37.

<sup>17</sup> *Child Act 2001 (Malaysia)* Act 611, s91, 92.

not guaranteed as no such guarantee appears anywhere in Malaysian or Nauruan law and, in so far as Malaysian law permits the corporal punishment of children, it is entirely inconsistent with the protection afforded under the CRC. It follows similarly that a child's right to be free from cruel, inhuman or degrading treatment is not guaranteed. A child's right to family reunion may be prejudiced by their transfer to another country if the law in that country, as in Malaysia for example, provides no guarantee that family reunion for children seeking asylum will be pursued expeditiously and humanely.

### The International Covenant on Civil and Political Rights<sup>18</sup>

The International Covenant on Civil and Political Rights (ICCPR) contains basic rights relating to political and civil freedom necessary in any functioning democracy. The ICCPR requires Australia to acknowledge and protect the rights therein contained in relation to anyone within the Australian jurisdiction, without discrimination.<sup>19</sup> The ICCPR rights infringed by the Arrangements include:

1. the right to be free of cruel inhumane or degrading treatment;<sup>20</sup>
2. the right to liberty and security of the person;<sup>21</sup>
3. the right to be treated humanely when deprived of liberty;<sup>22</sup>
4. the right of aliens to stay within a jurisdiction until the decision to have them removed has been reviewed by a competent authority where their interest can be represented;<sup>23</sup>
5. the right to recognition as a person before the law;<sup>24</sup>
6. the right to avoid arbitrary interference with one's family;<sup>25</sup>
7. the right of children to have such protection as is required by reference to their vulnerability as children;<sup>26</sup>
8. the right to equal protection before the law;<sup>27</sup>

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<sup>18</sup> *International Covenant on Civil and Political Rights* 99 U.N.T.S. 171, entered into force on 23 March 1976.

<sup>19</sup> *Ibid*, Art 2.

<sup>20</sup> *Ibid*, Art 7.

<sup>21</sup> *Ibid*, Art 9.

<sup>22</sup> *Ibid*, Art 10.

<sup>23</sup> *Ibid*, Art 12.

<sup>24</sup> *Ibid*, Art 16.

<sup>25</sup> *Ibid*, Art 17.

<sup>26</sup> *Ibid*, Art 24.

The Commonwealth Government will transfer people seeking asylum in Australia to another country thereby avoiding all of its obligations under the ICCPR. The obligations stated above, particularly those in relation to the expulsion of aliens, fall on the government as soon as the transferees enter the Australian jurisdiction.

Whilst the Commonwealth Government may claim to be satisfied that a country to which asylum seekers are to be transferred, an Arrangement will not contain any such guarantee if the country is not a party to the International Covenant on Civil and Political Rights and if, in consequence, it has no laws presently in place that protects these rights. Malaysia's commitment to observe the terms of the administrative arrangement, for instance, is radically insufficient to guarantee the ICCPR's legal requirements. The situation is only made worse by the fact that Malaysia has not signed the Refugee Convention, does not recognise refugee status under its domestic law and condones, in law, the canning of people in the same circumstances as those who will be transferred from Australia to Malaysia under the Arrangement.<sup>28</sup> Any action that seeks to avoid the obligations contained in the ICCPR, such as the removal of the transferees, is an action inconsistent with Australia's international obligations.

#### The High Court's Malaysia Solution Decision

By way of further clearing the legal ground we briefly consider here the High Court's decision with respect to the Malaysia Solution. In the recent case of Plaintiff M70/2011 v Minister for Immigration and Citizenship the High Court invalidated the Minister for Immigration's declaration of Malaysia as a country to which people seeking asylum in Australia could be transferred. The Court's reasoning was as follows.

The Court's task was to interpret a provision in the *Migration Act*. That provision, s.198A(3)(a), says that a person arriving irregularly in Australia from offshore may be taken to another country to process their claim for refugee status - if the Immigration Minister declares that the country meets certain conditions.

The conditions are that the country must possess effective procedures to determine whether a person needs protection from persecution; it must protect people from harm while their claims are being assessed; it must protect people who are found to be refugees pending

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<sup>27</sup> Ibid, Art 26.

<sup>28</sup> Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship [2011] HCA 32, [28].

their resettlement elsewhere; and the protection given must comply with relevant human rights standards.

By a 6:1 majority, the High Court found that the Minister could not properly make a declaration in relation to Malaysia. This was because when determining that Malaysia was a country that met these conditions the Minister had misinterpreted what the statutory conditions required. He had decided that Malaysia met the relevant conditions because it had given positive undertakings about how people transferred from Australia would be treated in Malaysia. These undertakings had been written into the administrative arrangement concluded jointly by Australia and Malaysia. The written undertakings amounted to a political assurance given by Malaysia that it would institute new procedures to ensure that people sent to Malaysia under the arrangement would be treated fairly and protected properly. At the risk of over-simplifying, the Minister had accepted that the statutory conditions would be met because Malaysia had undertaken that they would be.

The High Court decided that in making a declaration that Malaysia was a suitable country to which to send people seeking asylum, the Minister could not validly rely on Malaysia's promise alone. In the Court's view, s.198A(3)(a) required the Minister to be certain that the required protections were in place at the time he made the declaration. In this instance he could not be so satisfied. This was because Malaysia's undertakings related to what it might do in the future rather than to any commitment to preserve and strengthen protections in effect in the present.

The Minister had asked the wrong question. He had asked whether the political undertakings provided by Malaysia as to its future conduct were sufficient to satisfy him that the statutory preconditions for a declaration were met. He should have asked instead whether Malaysia's existing laws and procedures were adequate to provide him with the certainty that was required. Not to do so constituted a jurisdictional error.

The Court observed that Malaysia was not presently a signatory to the International Refugee Convention. It had no legal obligation to implement the Convention's protections. It had no domestic laws defining its assessment and protection obligations. It had no effective procedures in place to evaluate refugee claims. Its commitments under the arrangement with Australia were not legally enforceable.



The recognition and protection of refugees by a country is guaranteed by its laws. The complete absence of an existing system of legal and procedural protective guarantees in Malaysia, therefore, rendered the Minister's declaration ineffective. He had misapplied the statutory criteria. The implications of this decision for the Malaysia solution would appear to be as follows:

1. Given that Malaysia is not presently a signatory to the International Refugee Convention; that it has no domestic laws defining its assessment and protection obligations; it has no effective procedures in place to evaluate refugee claims; and that its proposed arrangement with Australia is not legally enforceable or indeed binding in any way, there is no reasonable likelihood that the Minister will be able to declare Malaysia as a country to which refugee claimants can be sent from Australia in the foreseeable future within the terms of s.198A(3)(a). This is because such laws and procedures must be in place at the time the Minister's declaration is made. It is highly unlikely that Malaysia will agree either to sign the Refugee Convention or to implement such laws and procedures just to put the administrative arrangement between Australia and Malaysia into effect. Even if it did, to meet the legal requirements contained in the conditions would necessitate extensive legislative activity and take a considerable period of time. Even then, the Minister would have to be satisfied that the legislation was appropriate and that the procedures were workable, fair and sufficiently protective of transferees' human rights.
2. The only way, therefore, that the Malaysia solution could be revived is for the Parliament to pass an amendment to s.198A(3)(a). Such an amendment would make it easier for the Minister to declare that Malaysia was a suitable country for processing transferees. The amendment may seek to overcome the High Court decision by providing that the Minister could make a declaration as to the suitability of a country for off shore processing in his or her absolute discretion. That is, the Minister's decision as to whether a country met the conditions set down in s.198A(3)(a) would be one to be exercised by him or her alone. In our view, it would be highly unlikely that such a sweeping discretion would find favour with the High Court, particularly if it purported to remove the possibility of judicial review. In any case, the conferral of such a broad discretion upon a Minister of the Executive Government would clearly run foul of Australia's international legal obligations as previously outlined.

3. Alternatively, an amendment might take the form of removing the conditions attached to the Minister's issue of a declaration. In other words, the Minister could simply be given the power to make a declaration as to a country's suitability, without reference to the protective conditions presently contained in the sub-paragraph. The protective conditions would simply be deleted. In the absence of criteria against which the appropriateness of the Minister's decision could be assessed, judicial review would be rendered nugatory. The problem with any such amendment would be that it would by implication represent Australia's complete withdrawal from its international legal obligations to assess and protect refugee claimants under the International Refugee Convention in so far as these applied to the Malaysian arrangement. This would be a morally repugnant solution to highly questionable problem. On any account, Australia's problem with asylum seekers arriving by boat is minuscule compared with that experienced by every other South East Asian neighbouring country, including Malaysia. To pass off Australia's problem onto countries far less able to manage refugee flows than our own, in return for extensive monetary support, is ethically reprehensible.

For these legal reasons, Liberty recommends that the Malaysia solution should be abandoned in its entirety. We note further that of the requirements set down in the legislation, to which the High Court has referred, Nauru meets only that which requires a third country to be a signatory to the Refugee Convention. Nauru remains in no position to assume the obligations required of it under the Convention or in satisfaction of Australian law. The Nauru option ought also to be abandoned.

### ***Preventing Asylum Seekers from Risking their Lives***

In this second part of this submission, Liberty adopts the analysis of its former President, Julian Burnside QC, as presented to the Panel. We reproduce the relevant portion of the analysis here and make some additions to the recommendations for the Panel's further consideration.

#### **"The known facts**

We know that boat-people come here principally from Afghanistan, where the Hazaras are the target of Taliban genocide, and from Sri Lanka, where the Tamils are being persecuted

in the wake of their failed liberation movement. Those two groups have dominated boat-people numbers in the last few years.

We know that Hazaras and Tamils are really desperate in their bid for freedom. Apart from any other consideration, a person has to be desperate to take the risks they in fact take in an attempt to reach safety in Australia.

We know that most boat-people who arrive here alive end up being assessed as genuine refugees, entitled to our protection. About 90 per cent of them are ultimately successful in their asylum claims. This compares with a success rate of about 20% among asylum claims of people who arrive here by air on short term visas, such as business, tourist or student visas. The different success rates are readily explained: the boat trip is dangerous: it is a mark of sincerity that a person takes the risks it involves.

We know that some of the boats carrying asylum seekers sink, and some of the refugees drown. The number who have drowned is not clear, but it looks like about 2-3 per cent of them since 2000.

We know that desperate people will take desperate measures. The experience of the Jews in the 1930s and the Vietnamese in the late 1970s tells us that. Ordinary human experience tells us that.

We know that a person facing death or torture is not likely to be deterred by the prospect of being locked up in a detention centre, or even by the risk of drowning. Common sense and ordinary experience tells us that. In the past few weeks I have asked Hazaras I know personally and who came here as boat-people, whether they had been aware of the risks before setting out. They did. I asked them why they took the risk: they said that the Taliban represented a greater risk.

It is also significant that, at present, asylum seekers who get to Indonesia face the real prospect of being mistreated and jailed by the Indonesian authorities if they are caught. In addition, they are not permitted to work or to send their children to school. I suspect that most Australians faced with the same problem would choose the same solution: take a risk and get on a boat.

## **Offshore processing**

Both major parties have suggested "offshore processing". The difficulty with this is first to decide what it means, and then see whether it is workable.

If it means processing asylum claims and resettling those found to be refugees, then the choice of an offshore processing place is a reasonably straight-forward practical and political problem. However the government and the Opposition do not appear to mean this. Rather, as noted in the first part of this submission, they would send boat-people offshore (to Malaysia or Nauru) for processing, but it is not part of their proposal that those accepted as refugees be resettled in Australia and there is no definite plan about where or when they would be resettled. Calling this "offshore processing" is arguably inaccurate: it looks like a fig-leaf for pushing refugees away permanently.

## **Nauru**

Nauru has a population of around 10,000 people; it does not have a sufficient supply of food or water for its own citizens. Its ability to receive and resettle refugees is necessarily very limited: in theory, it may be able to accommodate an additional 10 or 20 people a year, although its willingness to do that is uncertain. It is unthinkable that Nauru could receive thousands of refugees on a permanent basis. That being the case, using Nauru is, at best, a warehousing operation.

The use of Nauru to warehouse people leaves unanswered the question of resettlement. Other countries were reluctant to help Australia resettle refugees caught up in the Pacific Solution. Those who were not returned to their country of origin were eventually resettled in Australia (as Ali Mullaie was, after four years on Nauru).

Nauru has recently signed the Refugees Convention, but it has virtually no capacity to process their asylum claims or look after their welfare: it would all have to be done by Australia or at Australia's expense. Convention countries which accept a person's asylum claim are required to protect the person. It is difficult to see how Nauru could discharge that obligation, because it is tiny, bankrupt and not able to look after its own population adequately without external support.

## **Malaysia**

Malaysia's capacity to receive larger numbers of boat-people is clear enough, but it is not a signatory to the Refugees Convention and does not offer any protection for those who arrive there, whether directly or by transfer from Australia. That is the reason the High Court rejected the Government's "Malaysian Solution".

Apart from the fact that "offshore processing" is not really about processing at all, both schemes only come into operation *after* asylum seekers have got onto a boat in an attempt to get to safety in Australia. In short, it operates only after they are exposed to the risk from which we want to protect them.

Thus, neither the Pacific Solution (mark I or mark II) nor the Malaysian Solution is a solution to the identified problem. In effect, they are a device to push asylum seekers away if they set sail for Australia, and they have nothing to do with processing. I submit that "solutions" which are misleadingly described, and which do not solve the problem at which they are directed, should not be adopted".

## **An Alternative Approach**

On the basis of this analysis Liberty follows Julian Burnside in suggesting an alternative form of 'offshore processing', which is for Australia, in the short term, to process asylum seeker claims offshore (i.e. in Indonesia, where they are before they get on a boat) and to make arrangements for the resettlement of genuine refugees within a reasonable time. In the third part of this submission we make further recommendations, on similar lines, towards the adoption of a medium-term to long-term solution.

The essential elements of the initial proposal will include the following:

- The Australian Government should seek immediately to make an arrangement with the Indonesian Government to allow for the processing of the claims of people seeking asylum in Australia – in Indonesia. To this end, the Australian Government should provide adequate funding to Indonesia to enable claims to be fairly and effectively processed in accordance with the standards set down in the International Refugee Convention. This processing should be conducted either by, or on behalf of, the UNHCR. The UNHCR, for example, may wish to delegate the task of processing to an approved or several approved international or national non-governmental

organizations. The conduct of processing should, as far as is reasonably possible, also be equivalent in standard to that which would be offered in Australia itself.

- It follows that the processing has to be fair. Experience suggests that when processing is not subject to judicial oversight or some similar system of monitoring and accountability, the outcomes of the process owe more to political considerations than to the merits of the particular claims. Experience on Nauru, for example from 2001 to 2005, threw up some notorious examples of grossly unfair processing. The exact nature of the requisite oversight will be a matter for negotiation between the Australian and Indonesian Governments and the UNHCR as the guardian of the Refugee Convention.
- As part of the new arrangement, the Australian Government would have to enlist Indonesia's cooperation so that the refugees who arrive in Indonesia could live without harassment and in reasonable conditions while they waited in Indonesia for resettlement. In particular, it is desirable that they be allowed to work while in Indonesia awaiting resettlement.
- Further, as previously argued, in the course of having their asylum claims assessed, applicants for refugee status residing temporarily in Indonesia should be accorded their full rights as specified in the International Covenant on Civil and Political Rights and the International Convention on the Rights of the Child. The position of children in transit is a particularly vulnerable and desperate one. This should be an absolutely fundamental consideration in determining appropriate living and processing arrangements for families with children and unaccompanied minors.
- Australia's annual refugee intake should be substantially increased. It is presently set at 13,750. Liberty suggests that it be increased to between 20,000-25,000 per year. Since the immediate objective is to discourage asylum seekers from embarking on dangerous boat journeys, those asylum seekers already in Indonesia must perceive that their genuine claims to refugee status and effective resettlement have some reasonable prospect of success. Otherwise they will not be deterred. The increase in refugee places has to be sufficient to keep their waiting time in Indonesia to a reasonable length. A maximum of two years would seem appropriate. However we recognize that actual waiting times will in the end depend upon the numbers arriving in Indonesia and Australia's willingness and capacity to accept larger numbers of genuine refugees.

- Liberty further recommends that the nexus between the number of humanitarian refugee places offered each year and the number of places allocated to asylum seekers arriving on Australian shores be broken. The perpetuation of this nexus presently ensures that asylum seekers applying for refugee status from beyond Australia's borders are disadvantaged by reference to the claims of those who arrive on the nation's shores. This is a politically motivated and punitive arrangement designed only to allow the governments of the day to demonize the latter grouping whose claim to refugee status may be no different and no less urgent than that of others applying and waiting elsewhere. The de-coupling of resettlement places from onshore applications is necessary to avoid a grave injustice in the current system. At present, those who are already accepted to Australia as resettled refugees are unable, in effect, to achieve reunification with their family because the same "places" are being "taken" by those applying onshore. Those who are already refugees and have settled here sufficiently to be in a position to sponsor relatives should be not be punished by extended separation from loved ones because of unrelated movements of people into Australia. This injustice deserves speedy redress as part of this review process. The current system brings into the permanent protection regime of Australia one of the worst characteristics of the temporary protection regime of the previous government.
- It follows from all this that if asylum seekers in Indonesia are not found to be genuine refugees within the terms of the International Refugee Convention, they should be sent back to their countries of origin or to some acceptable third country willing to provide them with temporary protection.
- Closer law enforcement collaboration should also be part of a new set of arrangements. It is beyond the scope of this submission to set down the precise nature of such collaboration. However, at the very least, Australian law enforcement agencies should collaborate with their Indonesian counterparts to ensure, as far as is possible, that people-smuggling syndicates are disrupted and dismantled. Indonesian police should ensure, as far as possible, that unseaworthy vessels used by such syndicates are confiscated and destroyed. As a last resort, if it comes to the attention of Indonesian police or customs officials that the departure of boats carrying asylum seekers is imminent, their departure should be prevented. This latter, of course, is particularly important if the vessels concerned are unseaworthy or incapable of carrying the numbers of people aboard. We recognize that corruption of Indonesian

police may play a part in permitting the people-smuggling trade to prosper. The Australian government may wish, therefore, to assist the Indonesian government to combat the problem of corruption by providing additional resources to its police forces so as to minimize this risk.

This sort of offshore processing would in fact solve the problem of people risking their lives at sea. By processing refugee claims in Indonesia, and increasing our refugee intake, we would be able to move to the creation of a system of safe, orderly resettlement in the country from which most asylum seeker boats depart.

It may be objected that a system like this would increase the number of people arriving in Indonesia seeking resettlement in Australia. That is a possibility. If our increased refugee intake is realistic, it would mean that the resettlement time would decrease significantly. We recognize that this would raise practical problems in dealing with Indonesia. It is, unfortunately, beyond the scope of this submission to attempt to resolve the problems which might, contingently, arise if this approach is adopted.

Nevertheless, this approach at least has the advantage that it offers a genuine solution to the problem at which it is directed, and it is consistent with our international treaty and humanitarian obligations.

### ***Longer Term Arrangements***

The recommendations in the previous section are designed specifically to deal with the term of reference to which they are addressed. That is, to propose a solution that will in the short term prevent people from drowning at sea. It is plain, however, that if only this alternative model were adopted, the wider, global problem of assessing and resettling refugees would be only marginally advanced and Australia's efforts to contribute to the problem would remain limited and marginally effective. Liberty therefore offers the following brief analysis and proposals as a starting point for the consideration of a more durable, genuinely regional solution to the refugee problem.

Liberty Victoria proposes that the Expert Panel on Asylum Seekers recommend to the Australian government that:

- our annual refugee intake, presently set at 13,750, be reset to 20,000-25,000 per year.



- as a matter of priority, refugee processing take place in the closest safe place from which most asylum seekers to Australia currently first transit, namely Pakistan (for Afghans) and south east India (for Tamils).
- those who are resettled to Australia be allocated to a separate pool from those who apply for asylum in Australia. In other words, there be a set number within the 25,000 who are resettled regardless of how many people apply for asylum in Australia.
- a rapid response resettlement team be established within the Department of Immigration to attend places in the world which, from time to time, are the sources of those coming to our region to seek asylum from outside it. Such a team would be able to relocate at Australian diplomatic posts or in the field to conduct resettlement assessments in conjunction with UNHCR. They would have the same skill set as those who already conduct this program on behalf of the Australian government elsewhere.

The rationale for this proposal is as follows.

At any given time, there are in excess of 10 million refugees worldwide. These refugees theoretically can access three durable solutions; repatriation, local integration and resettlement. The vast majority of refugees ultimately repatriate to their country of origin, often after being displaced for protracted periods. Most others seek to locally integrate in the country of first asylum. For example, a very significant number of Afghan and Tamil refugees have been locally integrated in Pakistan and India respectively.

Of the 10 million refugees in the world, less than 100,000 will be offered a resettlement place to one of the few wealthy countries that offer resettlement places. That is to say, at present, a refugee has, at best, a one in a thousand chance of being resettled each year.

Those that are resettled are not only refugees but refugees who have unique security issues in the places in which they seek refuge. That is, they are refugees who are at particular risk of violence or further persecution in the places where they seek refuge.

Australia has a long and proud history in providing a durable solution to these people. Our Women at Risk programme is an especially good example of this.

In Liberty Victoria's view, we must maintain and build this programme. We must also utilise it strategically and in a way that responds to the current situation, without compromising on the principles of protection.

Australia resettles around 0.01% of the world's refugee population. By contrast our population is about 0.03% of the world population, our GDP is 1.6% of the world's and our land mass about 5.0%. On any proper measure our refugee intake is miserly. Liberty Victoria would like to see Australia embrace this small imposition and take responsibility for its share of the international refugee 'burden'.

It is for this reason that Liberty Victoria proposes both an increase in the resettlement places overall, and a re-distribution of resettlement places to those countries which are the closest safe places for those who are fleeing the primary sources of asylum seekers to Australia at present. By relocating and increasing the resettlement programme in those places, Australia would be providing those who would otherwise use people smugglers to come to Australia with a viable alternative. The decision for them would no longer be between, on the one hand, scratching together a family's savings to make a long and unsafe journey at the end of which a period in detention would follow in Australia and on the other, waiting indefinitely for an unlikely safe haven in the country of origin and no chance of resettlement. The decision would become on the one hand waiting in the closest safe place to the country of origin with a decent chance of resettlement, at no cost, to a free life in Australia and on the other, risking money, pride and life itself for an extended and unsafe journey to Australian detention.

If Australia increases its resettlement offering, it has a strong basis on which to encourage other nations, especially wealthy ones, to also increase their resettlement intake. It also promotes the spirit of the Refugee Convention and improves the nation's international standing. This, in turn, will allow Australia to advocate more strongly for non-signatory nations, especially our neighbours, to sign the Convention.

For those already closer to our shores, Liberty has both a short and long term proposal. In the short term, as previously argued, the Australian government should provide support to the primary host countries – in particular Indonesia – to improve conditions for asylum seekers, to process them effectively, to ensure more effective law enforcement and to provide them with information about the risks of seeking to come by boat to Australia. In addition, and as a central part of the proposal, the asylum seekers there should also be

informed of the increased chance of resettlement from safe nations closer to their country of origin.

In the longer term, Liberty Victoria opposes the idea of any significant resettlement program from our region for those from outside it. The reason for this is that a significant resettlement program creates a strong incentive to travel to the region from places of first asylum. In addition, it promotes people smuggling by increasing the “customer base” of those seeking, but not promptly attaining, a resettlement place.

In combination this proposal would provide the following benefits:

- It is consistent with Australia’s obligations under international law and boosts our international standing as a protector and promoter of the Refugee Convention.
- It creates an incentive and real choice for those seeking protection in our region to return to the closest safe place to their place of origin by making resettlement a real possibility in their first country of asylum.
- It promotes regional efforts to improve protection standards for asylum seekers and bolsters good relations with neighbours.
- It contributes to increasing the global resettlement numbers and thereby offers durable solutions to suit those most in need in the global refugee population.

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Thank you for the opportunity to make this submission. Please contact Professor Spencer Zifcak, through the Liberty Victoria office on 9670 6422 or [info@libertyvictoria.org.au](mailto:info@libertyvictoria.org.au) if we can provide any further information or assistance. This is a public submission and is not confidential.