Submission from ACT Refugee Action Committee to the Expert Panel on Asylum Seekers, July 2012

(See pages 2–5 for a summary of the proposed alternative measures for the future.)

Introduction

We are a Canberra-based committee with a mailing list of about 750 people who want Australian governments to treat asylum seekers humanely, with dignity and sympathy, in line with all the requirements of the 1951 Refugee Convention and its 1967 Protocol (the Convention), under which there are no grounds for deterring those fleeing persecution from seeking protection here, however they may arrive. To this end, we argue specifically for abolition of mandatory detention and offshore processing of boat arrivals.

The treatment of asylum seekers is a humanitarian and human rights issue rather than a security issue. Australia should accept its fair share of refugees by processing refugee claimants who arrive in Australian territory and resettling those found to be refugees under the Convention, and do so in accordance with internationally accepted standards. This should be done without mandatory detention.

This is also the broad stand taken by Non-Government Organisations (NGOs) like the Refugee Council of Australia (RCOA), Amnesty International, Oxfam, other refugee support and advocacy groups,¹ and by the office of the UN High Commissioner for Refugees (UNHCR), which throughout discussion of the Malaysia Arrangement has maintained its declared preference for processing refugee claims in Australia, while bowing to apparent realpolitik when Australia proceeded to develop this scheme.²

Concern for the lives of asylum seekers who have died so tragically in recent and past disasters at sea should not lead to the panicked adoption of flawed "solutions". The refugee problem is not that refugees seek asylum in Australia, but that some governments cannot or do not protect the lives and freedoms of the people under their jurisdiction. Australians certainly do want government and Parliament "to do something" about this issue, but it matters very much what is actually done.

The outcry at the tragic loss of refugees’ lives at sea in June this year led to Parliamentary and political stalemate, followed by the appointment of the Expert Panel by the Prime Minister. We hope that the Panel process will provide an opportunity to break the circuit of misguided refugee policy by both major parties based largely on a policy of deterrence of sea journeys by potential asylum seekers.

¹ RCOA, ‘A Regional Protection Framework: A joint statement by Australian non-government organisations’, 1 August 2010; the organisations include Oxfam, Amnesty International, the Edmund Rice Centre, the Brotherhood of St Laurence, the Uniting Church and many other organisations providing aid and assistance to refugees: www.refugeecouncil.org.au/docs/releases/2010/100801_Regional_Protection_Framework.pdf
through offshore processing of their claims.

Successful policy in this area needs to be based on access to genuinely effective refugee protection, on better measures for the rescue of asylum seekers who are in danger, and on alternative pathways for asylum seekers in countries of origin and transition to obtain effective protection through integration (in a transition country) or refugee resettlement (in another country) other than by risking their lives on boats.

This is recognised in the submission already made to the Panel by the Melbourne Asylum Seeker Resource Centre (ASRC) and the Open Letter from Academics. At this stage we have not seen the submissions of other NGOs and individuals except for a brief summary of Chilout’s submission and the media release of the RCOA of 28 June 2012. We have also read the Labor for Refugees submission and drawn on it. We strongly associate ourselves with the analysis and proposals made in those submissions we have seen.

We expect the Panel will consider these alternative views with an open mind, and hope it will recognise that the various offshore processing policies and associated measures will not prevent asylum seekers from taking to boats, which is the litmus test for Government and Opposition alike. The other defects of those policies are discussed below. They are a dead end.

**Suggested measures to commence a new approach – summary**

We note that a significant term of reference of the Expert Panel is to provide a report on the best way forward for Australia to prevent asylum seekers risking their lives on dangerous boat journeys to Australia. We also note that it is impossible to carry out that task without considering many of the divisive issues relating to refugee and asylum seeker policy (and see dot point 4 of terms of reference).

As part of a package of measures such as those suggested below and by other community organisations, it will be necessary for the Government to explain in the media exactly why these measures are needed and how they are linked to the alleviation of maritime deaths and how they are linked to a lingering existence on the edges of the society of a transit country. It should be explained that many of those who come to Australia by boat have been in camps or in discriminatory circumstances for a lengthy period of time and are just as “deserving” as those in camps elsewhere in the world of gaining permanent protection in Australia. After years of negative political pronouncements on boat arrivals, this will require strong leadership and commitment.

Taking account of the suggestions made both now and in the past by other organisations and commentators (our apologies for lack of specific acknowledgments), ACT RAC urges the Expert Panel to include the following elements in its recommendations to the Government and the Parliament:

- Immediately renegotiate with Indonesia the current search and rescue arrangements, increasing the area of Australian responsibility for response to emergencies from its present confined area, and providing substantial resources for increased maritime rescues, both in communication capability and adequate boats. Wherever possible, assist asylum seekers arriving by boat to reach the mainland safely for
processing of their claims.

• As an emergency measure, resettle two groups of refugees from the region (as proposed by the ASRC, 1,000 from Indonesia and 4,000 from Malaysia, in effect honouring the undertaking made in the invalid Australia-Malaysia Arrangement). This would be evidence of good faith by Australia in trying to meet refugee needs in a way that is non-punitive and removes the pressure for them to board boats.

• Note that in practical terms it is virtually impossible to construct a scheme of offshore processing by a third country in the region that would comply with Australia’s international obligations under the Refugee Convention and other human rights instruments to which we are a party. Australia should not seek to avoid those responsibilities on the highly speculative ground that it may save lives at sea. So long as the Migration Act allows offshore processing, Parliament and the Government should accept that the High Court decision in M70/2011 (see below), and the provision in s 198A(3) of the Migration Act on which it rested, reflect Australia’s international responsibilities and should not be nullified by legislation.

• Endorse the principle that asylum seekers who come to Australia by any means to seek protection will have their claims processed on the Australian mainland and not be removed for this purpose to any other country, or interdicted from making a claim in any way. Australia has an obligation to process claims and provide protection for those found to be refugees under the Refugee Convention. Repeal the provisions allowing excision of territory from the Australian Migration Zone and allowing refugee processing in a declared country.

• End detention during processing, except as a last resort, and subject to legal review on a regular basis, and normally carry out initial checks in a community setting on the mainland. Community processing would free up large amounts of funding that could be spent on the other measures discussed here.

• Emphasise through international forums, especially in the region, the need of asylum seekers for common standards for humane treatment, determination of refugee status and provision of a durable solution through resettlement or integration in a country of asylum. As recommended by the RCOA, work with other countries in the region for them to become parties to the Refugee Convention and in any case for them to grant legal status to refugees and asylum seekers, giving rights to remain, protection against arrest, detention and deportation, and permission to work.

• Rule out Australia funding, or being party to, the detention of refugees in other countries. Resettlement offers must not be dependent on refugees being “concentrated” and detained. Redirect to UNHCR funds that are
currently being directed to detention as in Tanjung Pinang in Indonesia.

- Take immediate steps to negotiate arrangements with major refugee transit countries in the region and with countries of refugee origin for Australia (and perhaps later other countries who wish to participate) to accept for resettlement a significant number of refugees recognised as such by Australian officials or the UNHCR. Where necessary, provide the UNHCR with substantial additional funds for the processing of refugees for this purpose – noting that UNHCR processing is conceded to be at a fairly low level, and is not a first choice if it can be avoided. This provides, in the words of the Greens, alternative pathways to refugees to obtain legal and substantive protection in a country able to offer both. (We note that current government policy contributes to boat journeys by refusing to accept visa applications in the region by those who might be likely to claim asylum, and by the generally low level of resettlement refugees from the region.)

- Expand the number of places for resettlement from offshore to about double the present total refugee and humanitarian quota, to say 25,000. The present figure has hovered around the same level for a considerable time.

- At the same time remove any “quota” on onshore refugees, and end the unnecessary and unjust competition for settlement places between refugees processed overseas by the UNHCR or similar bodies and refugees recognised “onshore” by Australian authorities. In addition, as Labor for Refugees proposes, create a separate family reunion category in the annual migration program – the competition for places causes deep distress among families and contributes to attempts to come by boat because of lengthy waiting times. Other major resettlement countries do not have such a linkage.

- Negotiate with Indonesia for the resettlement by Australia of some 2,000 recognised refugees per annum, and make arrangements for the assessment of refugee claims in Indonesia either by Australian personnel, or by UNHCR personnel with an appeal mechanism provided by Australia comparable to that for onshore arrivals.

- Renegotiate with Malaysia for ongoing resettlement of a substantial number of refugees per annum in addition to the initial 4,000 (above).

- In the longer term, it may be possible, through the Bali Process or otherwise, to work out a regional framework within which the above

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measures can function optimally. That will take time. At the moment the Bali Process seems aimed primarily at preventing “irregular movements” of asylum seekers, and less at meeting their positive protection needs.

- End the policy of indefinite detention for refugees receiving negative ASIO assessments.

- Ensure that the security clearance process is quick, transparent and subject to challenge and review.

- End the policy of scuttling the vessels on which refugees arrive to discourage the use of unseaworthy craft.

- End the policy of arresting the crew of such vessels.

- Absolutely no refoulement of asylum seekers or stateless persons to countries where there are known human rights issues, such as Sri Lanka, Myanmar and Afghanistan.

What are the real “problems”?

Policies of deterrence or interdiction of refugee claimants are said to be based on the need to stop the people smugglers, “to stop the boats”.

The real problem in this area, however, is not a huge influx of asylum seekers by boat (many more come by plane) that Australians could not cope with. Boat arrivals constituted only 2.7% of permanent migrants in 2010–11, and less in most previous years. While there is community concern about these arrivals, it is often based on ignorance of the actual numbers of refugee applicants and how many of them arrive by boat, let alone the relatively low proportion of total world asylum claims received by Australia compared to other parts of the world (2.67% in 2011).

The real “problems” are political, resulting from the potential impact in marginal seats of voters who oppose Australia taking more refugees and from the opportunity to wedge political opponents. The views of these voters have had disproportionate effect within the major political parties since at least 1992, and more massively since 2001. Few if any attempts have been made at the political level over the past 11 years to present refugees arriving by boat in a positive light.

And yet despite attacks from both major parties, some 53% of Australians polled in 2011 were opposed to offshore processing. The consensus since 2010 between the major political parties on the need for offshore processing did not reflect majority opinion. (That figure may have changed since the recent boat sinkings, of course, but only as a result of the sense of impotence to prevent deaths at sea that resulted from the Parliamentary stalemate.)

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5 Asylum Trends and Levels in Industrialised Countries –2011, UNHCR.
6 See Nielsen Poll discussed in interview between Minister Bowen and ABC’s Marius Benson, Media Transcript, 10 August 2011. We have paraphrased the words of a commentator we cannot now recall.
In discussions about asylum policy, virtually no mention is made of a major issue, the desire of persecuted people for effective protection that involves certainty and permanence. Refugee flows in this region have complex causes and patterns, and are not likely to cease because of deterrent policies. As Professor Bill Maley has written:

Refugees fleeing persecution and abuse understandably seek to relocate to states in which they will enjoy both legal and substantive protection…. Australia falls into [the category of a party to the Refugee Convention, and has a history of treating refugees with some decency]…. Australia is the first [Refugee Convention] country [that persecuted Hazaras from Afghanistan] will encounter: in intervening states, they can expect to be pushed to the fringes of society and denied any meaningful future. The combination of powerful push factors in their own country and misery in transit means that Australia will likely remain the obvious destination, no matter what bipartisan deterrent measures might be pursued.\(^7\)

One “problem” that offshore processing is said to answer, through its deterrent effect, is the question of deaths at sea. Once again deterrence is as much a political as a real “solution”. There are other ways Australian authorities could seek to provide greater safety for those seeking asylum who are in danger, either themselves (see Tony Kevin’s new book) or through additional financial and other support to Indonesia. There is also no clear evidence that either a return to the “Pacific Solution” by the Coalition, using Nauru as a place to process refugee claims, or implementation of the Malaysia Arrangement, will severely cut the number of boat arrivals, in large part because of the reasons Professor Maley gives (and see discussion below).

**Offshore processing will not provide a resolution of asylum seeker issues**

There will never be a real-world "offshore processing" policy that will in practice be politically and ethically acceptable to all (or even both major) political parties and most Australians. Nor do such "non-solutions" (Jack Waterford's phrase)\(^8\) promise much in the way of saving lives either long-term or now.

The major parties may agree at a high level of abstraction that sending refugee claimants away for processing is the only "good policy", but specific applications of that approach are all likely to be fraught with injustices, traumatisation of already traumatised people, and failure to fulfil Australia's Refugee Convention and other human rights obligations. That will continue to generate substantial opposition and community concern.

Offshore processing (or lack of processing in the case of the Malaysia Arrangement) is not going to be the solution of the political problem or the problem of deaths at sea. It will not be a quick or even a long-term fix.

The Malaysian Arrangement rests on a pious hope that an overstretched UNHCR assessment process intended for frontline conditions will be able to deal adequately with "returnees", and makes no provision at all for lasting refugee outcomes. The

\(^7\) *Canberra Times*, 27 June 2012, Opinion, p 9, “Need for mature asylum policy, not political point scoring”.

\(^8\) *Canberra Times*, 30 June 2012.
800 people to be returned would in fact be dumped with little chance of obtaining resettlement and with the certainty of a marginalised existence as long as they remain in Malaysia.

The Arrangement remains a process for disposing of refugee claimants quickly, with only a seemingly brief and shallow pre-transfer assessment process before turning them around, and then legally denying them the possibility of seeking asylum in Australia again. Nor has the Government’s claim that it could “stop the boats” with this scheme been vindicated, and as William Maley argues, it seems unlikely. The author of the Arrangement, Andrew Metcalfe, concedes that it is speculative that it will be effective in this respect.

The evidence against the renewal of Nauru as a processing centre doing what its authors want it to is strong. As Andrew Mecalfe (former Head of DIAC) has said, any deterrent effect it may have had in 2001 onwards would not operate a “second time around” when it became clear that, despite the strong pressure that induced 484 asylum seekers (out of 1687 on Nauru or Manus Island) to return from Nauru to the places they fled from, the large majority in those two places were ultimately recognised as refugees and resettled in Australia (705, 61%), New Zealand (401, 35%) and a few elsewhere (47, 4%).

If Mr Metcalfe is correct, the brutal conclusion is that offshore schemes will only “work” if they deny a clear refugee protection outcome to claimants arriving by boat, large numbers of whom now have their refugee status accepted and are resettled in Australia. That is clearly the conclusion that has been drawn by the Government and its advisors in proposing the Malaysian Arrangement, in effect leaving the “returnees” largely to their own devices once they have been recognised as refugees. This is surely unacceptable.

While the UNHCR has been willing to assist with the assessment process if Australia goes ahead, despite its strong preference for onshore processing, the Assistant High Commissioner for Protection, Australian Erika Feller, has stated that the UNHCR would require a detailed explanation concerning pre-transfer arrangements, and “would seek more detail on the resettlement prospects of those sent to Malaysia who were found to be refugees”. Ms Feller is also quoted as having said: “There is no point in having an arrangement predicated on refugee status determination which has no solutions at the end of it.”

That may be the Australian Government’s whole point, and complying with the

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9 RAC tends very much to doubt that the Nauru processing arrangement had much effect on the reduction in boats during the Howard era. As Bill Maley writes, Opposition lauding of the success of the “Pacific solution” doesn’t mention, for example, that “the vicious Taliban was overthrown, triggering a period of considerable (if misplaced) optimism among Afghans about the future of their country, and reducing their disposition to seek protection abroad” (see note 7 above).


UNHCR’s requirements would make it even more difficult to achieve the desired political end of “stopping the boats” if any new Arrangement has to include a guaranteed durable resettlement to recognised refugees.

**Other proposed deterrent measures**

The Coalition’s other major measures, reintroducing temporary protection visas and promising to tow back boats where it is safe to do so, will create the same major difficulties and dangers as their forerunners did under the “Pacific Solution”. Clearly, TPVs had no deterrent value on its first run from 1999 to 2008, and in fact led to greater numbers of family members taking dangerous voyages because they could not be sponsored by those with TPVs. The tragic sinking of the SIEV-X with hundreds of women and children on board was one result.

Towing boats back may for a while inhibit others from trying, but will not overcome the positive push factors for long, and is likely to lead to more danger for asylum seekers. It is currently publicly opposed by the Indonesian Government. There is every likelihood that asylum seekers diverted in this way will either languish on the margins of Indonesian society, or will be forced to seek asylum elsewhere through people smugglers. We should play our part in sharing the burden, not worsen the international asylum situation.

Both policies will continue to offend against international norms, and are totally irresponsible.

**International obligations and the High Court**

‘The Refugee Convention is premised on the understanding that states will protect refugees in their territories, or cooperate with other states to find durable solutions for them (local integration, voluntary repatriation, and resettlement). Transferring asylum seekers to offshore processing centres was not a durable solution ….’ (Assoc. Prof. Jane McAdam & Kate Purcell, 2008, on the Pacific Strategy)

For excellent statements on the issues involved here, we refer the Panel to the submission and evidence presented by Professor McAdam and other distinguished legal academics to the Senate Committee on the Malaysia–Australia Arrangement.

The Australian Government, in drawing up the Australia-Malaysia Arrangement, certainly did not act in the way Professor McAdam indicates is necessary under Australia’s international obligations for it to transfer asylum seekers to another country for processing.


Oral evidence by Professor McAdam on 23 September is accessible at: www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/malaysia_agreement/hearings/index.htm
We reiterate that we strongly oppose offshore processing for moral and humanitarian reasons, but if an Australian government proceeds with an offshore scheme it must be one which does not abandon its international obligations to those who have sought asylum here.

**We strongly urge the Panel not to recommend to the Government and Parliament any proposal that does not ensure those obligations are met by any country to which asylum seekers may be transferred.**

What those obligations in effect require is that asylum seekers’ human needs and human rights are protected while they are awaiting processing (protections spelled out in the Refugee Convention and other instruments to which Australia is a party) and when their status as refugees is determined they have access to a durable outcome (integration or resettlement elsewhere, or return to their country of origin if that is their wish) when their refugee status is successfully determined. Australia must ensure that its international obligations to asylum seekers who have reached Australia will be met in any country to which they are being sent. If this means that such schemes are not feasible, so be it.

When the High Court came to examine s 198A(3) of the *Migration Act 1958* in *M70/2011*\(^{14}\) it in effect decided that the protections in that provision – concerning access to procedures for assessment of refugee claims, and provision of “protection” to human rights and needs during and after that assessment (including a durable outcome), were the “reflex of” the international obligations that Australia assumes when asylum seekers in its territory or jurisdiction claim to be refugees under the Convention. It also decided that the Minister’s determination that a particular country met these protections was subject to judicial review. It found the Australia–Malaysia Arrangement to be invalid as Malaysia is not a party to the Refugee Convention and therefore not bound to provide the protections contained in the Convention and did not do so in fact.

What the Government, the Opposition and Mr Rob Oakeshott essentially sought to do in their respective Bills was to repeal s 198A(3) and thereby rob the *M70/2011* decision of any further effect. The Government left it to the Minister to decide on appropriate countries in the “national interest”, the Opposition required a country to be a party to the Refugee Convention (which by that time Nauru was), and Mr Oakeshott, in a compromise Bill, required that, to be declared, a country had to be a member of the Bali Process.

In our submission all three of these approaches should be rejected by the Panel, both on moral and humanitarian grounds, and on the ground that none of them provides for the fulfilment of Australia’s international obligations in relation to asylum seekers reaching Australia. We have said enough about the first two schemes (Nauru and Malaysia). The compromise deal in fact provides no guarantees whatever that any of the 44 extremely diverse countries of the Bali Process would meet the legal and practical obligations attaching to Australia if declared a country for offshore processing. The proposed deal fudges the real issues.

Alternative measures for a new approach

We have suggested above alternative measures that will contribute to helping asylum seekers obtain access to refugee status determination and resettlement from countries of origin or transition without risking their lives on unseaworthy craft.

We note the strong demand of many groups, including Melbourne’s frontline ASRC, to depoliticise the asylum seeker issue in order both to save lives and to meet the protection needs of at least some of those who find themselves compelled by circumstances to attempt sea voyages to Australia.

In the present situation, the only way to make a substantial contribution to the above aims is to negotiate arrangements based on the needs of asylum seekers and recognised refugees for some status in the countries of transition and for resettlement from such countries. We are in substantial agreement with many other groups’ proposals which we have adapted in our list above.

Once again we urge the Expert Panel to recommend to the Government and Parliament measures of this kind that government can begin to work on straightaway. That also involves accepting that offshore processing schemes are not politically feasible at this point and are not ever likely to be compatible with Australia’s international obligations.

Over and above immediate action, we stress the need both now and in the future for Australian refugee and asylum seeker policy to abide by our Refugee Convention and other international obligations in full. The High Court decision in M70/2011 and the impasse in the Parliament over its effects have given the Panel and the political system an opportunity to withdraw from the destructive offshore processing policies of the last 11 years and begin again from first principles.