



**Briefing Paper to Mr. Antonio Guterres, UN High Commissioner for  
Refugees on his visit to Australia (February 2009):**

**Key Refugee and Asylum Seeker Issues in Australia**

**1. Introduction and outline of key issues**

RILC welcomes the opportunity provided by the visit to Australia of Mr. Antonio Guterres, the United Nations High Commissioner for Refugees, and provides this briefing paper on some of the key issues relevant to refugee and asylum seeker policy in Australia. This briefing paper is not intended to provide a comprehensive overview of all issues relevant in this area, but rather, to cover current significant issues RILC has identified in the course of its operations in recent years.

This paper focuses on the following key issues:

- (a) Australia's domestic approach concerning spontaneous asylum seeker arrivals, including:
  - treatment of spontaneous arrivals;
  - implementation of the new detention policy;
  - assessment of protection needs; and
  - conditions of asylum seekers in the community.
  
- (b) Interception and reception of asylum seekers and refugees in the Asia-Pacific region, including the:
  - disproportionate prioritisation of border protection policy over regional protection needs;
  - effect of Australia's regional border protection policies and practices on asylum seekers and refugees in the region;
  - need for greater emphasis on protection of refugee rights regionally; and
  - need to strengthen protection space through capacity-building activities in the region.
  
- (c) Australia's Refugee and Humanitarian Resettlement Program, including the:
  - numbers of places available;
  - role of family reunion;
  - lack of clarity in decision-making;
  - risk of geo-political considerations assuming disproportionate influence in the determination of resettlement priorities under the program.

**2. Australia's domestic approach concerning spontaneous asylum seeker arrivals**

- RILC welcomes the substantial reform of asylum seeker and refugee policy by the current Australian Government over the last year. Core features have included:

- an end to the policy of ‘warehousing’ and processing of asylum seekers’ claims offshore under the so-called ‘Pacific Solution’; and
- abolition of the Temporary Protection Visa (TPV) regime;
- steps towards the introduction of a law-based Complementary Protection system;
- significant changes in detention policy announced in July 2008.
- However, a number of serious concerns remain. These principally relate to:
  - the treatment of spontaneous asylum seeker arrivals;
  - implementation of the new detention policy;
  - assessment of protection needs; and
  - conditions for asylum seekers in the community.

### 2.1 Treatment of spontaneous arrivals

- Whilst the current Government has abolished the policy of Pacific warehousing, it has retained the policy of territorial ‘excision’. Asylum seekers who arrive in ‘excised’ territory continue to be excluded from making an application for asylum under Australian Migration legislation. Under current policy, asylum seekers in these circumstances are screened and assessed for protection need under an inferior, non-legal process. They are initially denied:
  - access to proper assessment of their claims under the ordinary safeguards of the rule of law;
  - any form of independently regulated merits assessment or judicial review of their claims for refugee status; and
  - the guarantee of resettlement in Australia if recognised as Convention refugees.
- Irregular asylum seeker arrivals in these circumstances are housed in extremely remote, inaccessible detention on Christmas Island, which presents substantial obstacles to them accessing adequate legal, medical and other basic resources.
- In practice, the use of remote reception and housing of asylum seekers places serious restrictions on the proper resourcing and operation of both the previous and the new detention policies.
- Treatment of spontaneous arrivals in this way is discriminatory as it is based on the circumstances of their arrival and is a disproportionately harsh policy response to the need to regulate the arrival of non-citizens in Australia.

### 2.2 Implementation of new detention policy

- RILC welcomes the Government’s recently announced detention policy, which brings Australia’s detention policy more closely into line with international human rights law and domestic standards governing detention. However, a number of serious matters remain at issue:

#### A. Lack of legal and operational framework

The new policy has not yet been entrenched in law; nor has any comprehensive or transparent operational framework been outlined or implemented. As a result, fundamental parameters of the policy remain completely unclear, including:

- the identity and role of decision-makers;
- definitions of key relevant terms and criteria; and
- when and how reviews of detention will be conducted.

#### B. Lack of judicial oversight

The new policy remains inconsistent with international law by not providing for independent judicial oversight of the decision to detain or the form of detention.

### C. Lack of implementation

The new policy has not been properly, if at all, implemented on several occasions since it was announced. Where it has been applied, interpretation of the key criteria and of the roles of individual decision makers has been inconsistent. As a result, individuals have been detained in apparent breach of the new detention policy.

### D. Limited commitment to alternatives to detention

While there has been significant progress in the development of alternatives to detention, the resourcing and implementation of these alternatives remain limited, inadequate and inconsistent. RILC's experience is that inadequate resourcing and availability of community-based alternatives has resulted in the ongoing detention of refugees in clear breach of the policy.

### E. Ongoing detention of children

While the Government's new policy commitment prohibits detention of children in 'immigration detention *centres*' it continues to detain children under conditions that seriously restrict their freedom of movement and right to privacy. This is inconsistent with the stated policy that the deprivation of liberty of children should be a measure of last resort. Guardianship arrangements for detained children remain seriously inadequate. Mainstream child protection laws must apply to all children in detention centres or in arrangements which are alternatives to detention.

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## 2.3 Assessment of protection needs

- The current assessment of Complementary Protection needs by exercise of Ministerial discretion is inadequate, arbitrary, inconsistent and lacking the necessary safeguards of a process governed by due legal process. RILC welcomes the Government's apparent commitment to develop and implement an integrated, law-based assessment of Complementary Protection needs as a crucial amendment to the current process to ensure proper compliance with *non-refoulement* and other treaty obligations.
- The current procedures for the administrative and judicial review of refugee status decisions require significant reform. The recent trajectory of legislative reform has involved measures designed to severely curtail rights of review concerning refugee determination. This has involved substantial and discriminatory deviations from the ordinary principles of mainstream Australian administrative law, such as unjustifiable restrictions on the application of normative principles of natural justice and procedural fairness in areas of refugee decision-making, and decisions relating to detention. Examples include:
  - introduction of the 'privative clause' to restrict grounds of judicial review;
  - restrictive rules of procedure for primary and merits review decision-making; and
  - the denial of access to independent statutory merits or judicial review for asylum seekers subject to the excision laws.
- Proper, comprehensive funding for the provision of credible, affordable legal advice to all asylum seekers at all stages of the process is required.

## 2.4 Conditions for asylum seekers in the community

- RILC welcomes the current government's apparent commitment to developing and properly resourcing alternatives to detention for asylum seekers in the community, including the further development of community-based schemes such as Case Management and the Community Care Pilot.

- However, serious limitations on the steps the government has taken in this area remain, resulting in the continued denial of basic social and economic rights to many asylum seekers in the community, leaving them destitute. Issues requiring immediate change include:
  - the mandatory no work condition, and consequent denial of access to Medicare, for asylum seekers who apply for protection more than 45 days after they arrive in Australia; and
  - a lack of coordination of, and a failure to fully integrate and properly resource, the current community-based programs.
- Fundamental reform of the community-based system is required to provide the opportunity for asylum seekers to live in dignity and safety, pending fair, transparent and timely decisions on their applications for refugee status.

### **3. Interception and reception of asylum seekers and refugees in the Asia-Pacific region**

- In the Asia-Pacific region, there is a serious lack of protection or humanitarian space, which is particularly acute in certain areas. The recent plight of Rohingya refugees in Thailand and Indonesia are compelling cases in point. Australia's recent substantial progress with reform of refugee policy domestically provides a significant opportunity for it to play a leading role in the promotion of measures to strengthen protection frameworks within the region. However, Australian policy continues to disproportionately prioritise strategies aimed at border protection to the detriment of refugee protection.

#### **3.1 Effect of Australia's bilateral arrangements on refugees and asylum seekers in the region**

- The development of bilateral regional cooperation arrangements with transit countries such as Indonesia and Papua New Guinea has been central to Australia's border protection policy. The arrangements have involved substantial financing and direction by Australia in relation to the detection, interception, and warehousing of asylum seekers, refugees and other irregular migrants in such countries.
- Consistent with UNHCR Guidelines, Australia has significant moral and legal responsibility for those seeking protection under these arrangements. Australia's *non-refoulement* obligations under international human rights law are arguably extraterritorially binding and triggered by the interception activities of its agents wherever engaged. Arguably, Australia also has responsibilities under the International Covenant on Economic, Social and Cultural Rights in relation to its exercise of influence or control over the conditions associated with warehousing arrangements in countries such as Indonesia.
- While RILC acknowledges Australia's legitimate concerns regarding irregular movement and mixed flows, these arrangements give rise to serious concerns. Broadly, there is a significant lack of transparency in relation to the principles and practice underlying these arrangements: available information and government disclosure about these arrangements are seriously deficient.
- More specifically, serious concerns about these arrangements in relation to people seeking asylum both regionally, and globally include:
  - denial of adequate standards of due process in the assessment of asylum claims;

- deprivation of basic social and economic rights, such as the denial of education for children, and work rights for adults;
  - serious restrictions on freedom of movement, including the use of detention facilities with often poor, if not inhumane, conditions;
  - inadequate distinctions made between treatment of asylum seekers and, for example, economic migrants;
  - inadequate safeguards against *refoulement*;
  - inadequate access to timely durable solutions, and prolonged warehousing of asylum seekers and refugees;
  - prioritisation of Australia's geo-political border protection policies ahead of the protection of people; and
  - disproportionate prioritisation of Australia's geo-political concerns above global protection need priorities in the administration of the Refugee and Humanitarian program (see further below).
- In light of these concerns, these arrangements may place Australia in breach of its obligations under international human rights law and also endanger asylum seekers and refugees, particularly where interception activities are undertaken in States that cannot be considered 'safe third countries' for some asylum seekers.

### **3.2 Emphasis on protection of refugee rights regionally**

- Australian policy in the region needs to place far greater emphasis on protection of refugee rights, with particular focus on ensuring that all extraterritorial activities prioritise and properly resource:
  - adequate refugee status assessment;
  - protection against *refoulement*; and
  - provision of durable solutions.
- RILC considers that capacity-building measures aimed at expanding and improving the provision of protection space is a key challenge for Australia in the region. A core component of Australia's regional strategy should be the active encouragement and resourcing of regional neighbours to:
  - become parties to the Refugees Convention and other international human rights instruments; and
  - achieve effective domestic implementation of these treaties at a legal and administrative level.

## **4. Australia's Refugee and Humanitarian Resettlement Program**

- RILC supports Australia's substantial and comparatively well-resourced refugee resettlement program and welcomes the- albeit small - increase in the number of people to be resettled under the program in 2008–2009 and thereafter, as well as the apparent commitment to move to multi-year planning for the program. RILC strongly urges the Australian government to play a leadership role in the development of the resettlement capacity of other States and close cooperation between resettlement States.
- However, significant concerns remain as to criteria used to determine which people should be given priority in the grant of places under the program. Key areas of concern are the:
  - numbers of places available in the program;

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- role of family reunion;
- lack of clarity in decision-making; and
- risk of geo-political considerations unduly influencing Australia's commitment to refugee protection and determination of resettlement priority under the program.

#### **4.1 Places under the program**

- The UNHCR's enhanced capacity to provide resettlement referrals, along with the current crisis of protracted displacement internationally, provides the Australian government added opportunity and impetus to increase the number of places in the program to address the needs of those in greatest need of protection throughout the world.
- The current numerical link between the number of places available under the program and the number of onshore protection visas granted should be removed as it links two separate and distinct refugee-related responsibilities which should not be contingent upon each other.

#### **4.2 Family reunion**

- Australian government policy adopts a very narrow approach to the definition of 'family' in granting visas under the program, strongly prioritising the concept of the 'nuclear family' and failing to adequately recognise the strong ties and obligations to members of extended families in some cultures. RILC supports the application of a wider definition of 'family' in accordance with UNHCR Guidelines, incorporating wider concepts of social and emotional dependence within a family.
- Australia's restrictive approach to family reunion has also placed great pressure on many refugees, their immediate and extended families, and their communities. Prolonged separation from family continues to adversely affect successful settlement, and to cause many refugees further profound suffering. For many former holders of the now abolished TPV, family separation is nearing a decade.
- Consideration should be given to establishing a separate, specific family reunion program that gives priority in accordance with UNHCR policies in this area.

#### **4.3 Lack of clarity in decision-making**

- Decision-making in relation to the allocation of places under the program continues to lack transparency, coherence and consistency. This has caused considerable distress, concern and controversy amongst affected communities in Australia.

#### **4.4 Selection considerations**

- While RILC acknowledges the demand for resettlement will always greatly outweigh the number of places available under the program, it is fundamental that Australian policy strongly prioritises the needs of those in greatest need of protection, and ensure that it represents an appropriate balance between regional and global needs in close alignment with the UNHCR's global priorities. RILC remains concerned about the risk of Australia's geo-

political considerations, particularly in the Asia-Pacific region, assuming disproportionate influence in the determination of resettlement priorities under the program.

#### **4.5 Settlement services**

- RILC acknowledges that under Government policy, comprehensive and well-resourced resettlement services are provided in Australia. However, RILC notes that the settlement experience continues to pose substantial challenges for new arrivals, and there remains significant room for continued improvement in areas of housing support, English language and other education, employment and income support, the provision of specialist refugee and humanitarian entrant health services, and enhanced social inclusion measures, if they are to be adequately addressed.