ADDRESS TO FECCA CONGRESS FROM JOHN GIBSON, PRESIDENT, REFUGEE COUNCIL OF AUSTRALIA – 29 OCTOBER 2009

I would like to address the issue of human rights for refugees and asylum seekers. In the context of the current furore about asylum seeker boat arrivals, there are obvious questions raised regarding the type of nation we want to be, with ramifications for the issue of social inclusion.

I'll begin with a catalogue of limitations, restrictions, exclusions and differential treatment imposed upon asylum seekers and refugees – some from the time of Paul Keating, the vast majority from the time of John Howard. They include derogations from rights granted under treaty and denial of rights which non-asylum seekers dealing with governments have.

I'll examine briefly the pendulum shift that began in 2005 under the Coalition government, including the Department of Immigration and Citizenship's cultural reforms, and the significant legislative and administrative reforms introduced under Labor since 2007 and the movement from a punitive system based essentially on deterrence to one based on broad human rights and humanitarian values.

Finally, in light of the current 'debate' (I use that word advisedly), I'll make some observations on where we stand as a nation and what approach we might take if we are intending to adhere to our international and domestic human rights obligations and our 'core values'.

The features of the old system included the following:

- Mandatory detention for all unauthorised arrivals (families, unaccompanied minors, women, men) – introduced under Labor in 1994, with its purpose honed and developed under Howard;

- The introduction of Temporary Protection Visas in 1999 – under which recognised refugees were not permitted to bring out their families – and which contributed to a dramatic increase in the number of boat arrivals, along with external political factors;

- The arbitrary 45-day rule for asylum seekers in the community – under which people lodging protection claims more than 45 days after arrival did not receive work rights or access to Medicare, generating destitution and heavy reliance on charity;

- The imposition of detention charges on asylum seekers – a practice unique to Australia, arguably placing us in breach of the Refugee Convention;

- Restrictive judicial review rights, introduced under Labor in 1994 – such that, unlike all other areas of public administrative law, there is no remedy for a breach of the rules of natural justice or denial of procedural fairness. Continued amendments by the Coalition government in this area also departed from common law rules of natural justice;

- The imposition of arbitrary time limits for bringing Court proceedings challenging refusals, which was struck down by the High Court as unconstitutional;

- The raft of legislation associated with the Tampa episode: transferring responsibilities arbitrarily to third States, beyond the reach of Australian domestic law; excising parts of the Australian territory from the Migration Zone; paying those foreign states to house asylum seekers (under the so-called Pacific Solution); adopting a flawed Refugee Status Determination process, without legal representation or support for asylum seekers; and involving prolonged detention, refoulement of unaccompanied minors, harsh conditions and isolation. A number of asylum seekers that were detained on Nauru have returned to seek asylum, been processed on Christmas Island and have been granted protection;

- The practice of interceptions – Operation Relex – involving the towing of boats back into international waters; not recognising asylum claims; and physical repulsion, including firing across bows of boats;

- The narrowing of the definition of the Convention for onshore processing to depart from recognised protections under the Refugee Convention where the government felt that certain categories were not deserving of protection;

- The placement of Airport Liaison Officers in all Asian airport hubs, screening and preventing the boarding of 'suspect' travellers – a practice which still continues.

Add to that catalogue of measures that were implemented, the following: -

- The failed attempt by Phillip Ruddock in 1998 to abolish the right to a hearing before the Refugee Review Tribunal (not sought to be removed in relation to migration cases), because of the opposition of Petro Georgiou in the Coalition party room;

- The failed attempt to invalidate all asylum claims by those arriving without evidence of identity (a breach of the Refugee Convention) in 2003 because the Senate Legal and Constitutional Affairs Committee recommended deletion of that clause from the Bill;

- The failed attempt to excise the whole of Australia from the Migration Zone (under the Designated Unauthorised Arrivals Bill 2006) and force all asylum seekers arriving by boat to go to Nauru, because of a groundswell of public opposition, a united stand by all non-government parties and the principled stance taken by a good number of politicians on the conservative side, including John Forrest (Member for Mallee) who had come to recognise the important contribution made by Temporary Protection Visa holders in rural and regional areas. If this had succeeded in the case of West Papuan refugees, it would have been a clear breach of Article 31 of the Refugee Convention;

- The failed attempt to remove from judicial scrutiny of migration cases, including visa decisions affecting members of established and newly-arrived migrant and refugee communities, through the use of privative clauses, because the High Court asserted its inherent jurisdiction to grant relief to those who have been denied procedural fairness and natural justice. It operated for 16 months;

- The refoulement of 14 Kurdish asylum seeker boat people to Indonesia and then to Turkey in late 2003 over objections from the United Nations High Commissioner for Refugees; and

- The fourteen complaints upheld by the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights for violations caused by detention conditions and length of unreviewed detention.

I will also mention one of the most repugnant episodes reflecting appallingly on the politicians and bureaucrats responsible: the Tampa asylum seekers travelling on the tank deck of the Manoora for two and a half weeks instead of in the troop quarters, that lawyers in the case believed they would occupy. These were young children, women and men, nearly half of whom did eventually come to Australia despite the statement they would never set foot on our shores.

Add to all the above, the language employed by Government to demonise asylum seekers and refugees – illegals, queue jumpers, children overboard – the latter in many ways being the defining moment of the Howard Government.

There were also the 200 plus cases of Australian citizens and permanent residents found by the Commonwealth Ombudsman to have been unlawfully detained – one of them for 1000 days.

The Solon and Rau cases led to the Palmer and Comrie reports condemning bureaucratic neglect and incompetence, in turn leading to the cultural reform program begun under Minister Vanstone and the new departmental secretary Andrew Metcalfe, in October 2005, which has substantially altered the way the Department does business with its client groups and raised its responsiveness to a high level.

Liberal moderates, in 2005, were influential in achieving:

- the detention of children only as a measure of last resort;
- the release from detention of families with children;
- the Commonwealth Ombudsman having oversight of detention;
- the processing of the Temporary Protection Visa caseload within a set time;
- time limits for the processing of claims at first instance and merits review; and
- the establishment of an Inter-Departmental Committee to oversee the Department of Immigration's reform process.

So where are we now? The Pacific Solution has effectively ended (with bipartisan support). Excision, however, remains. The Human Rights Commissioner Catherine Branson has recommended the abolition of the two system approach.

The operation of excision policy is now a far more humane system, albeit without the protection of the Australian legal system. There is now more transparent decision-making and legal representation. Welfare support is provided to asylum seekers, and detention conditions are more humane and the duration of detention less prolonged.

We have seen:

- the abolition of detention debt and provisions imposing charges;
- the abolition of Temporary Protection Visas (accepted by the Opposition); and
- the abolition of the 45-day rule

The New Directions in Detention policy onshore shifts the onus onto Government to justify detention and set up humane detention policies, although this has not yet been translated into law (and we are waiting to see whether it will involve the right to challenge detention).

There is the proposal to introduce complementary protection to enable those victims of female genital mutilation and rape (whose claims do not fall within the Refugee Convention) do obtain protection if they are facing serious harm, including death or torture.

That brings me to the current issue of unauthorised boat arrivals or irregular maritime arrivals.

Australians accept the connection between turmoil in countries like Afghanistan, Iraq and Sri Lanka and the flight from persecution seeking safety. There are 'root' causes for movement of peoples around the world.

There are complex push factors and refugees face expulsions from as well as instability within transit countries (such as Iran and Pakistan). Cambodia and Timor Leste are the only Convention states between Afghanistan and Australia.

Any so-called 'pull factors' or 'softening' should more properly be seen as 'humanising' policy towards asylum seekers.

We have seen anti-people smuggling rhetoric merged again as it was under Howard with negative language towards asylum seekers (illegals, terrorists, queue-jumpers and diseased).

Remember that our international obligations like some 150 other signatories under the Refugee Convention are to those who arrive at our borders. Resettlement is an adjunct part of international burden-sharing. It is not a substitute for the Refugee Convention obligations we undertake.

As far as numbers go, compare the approximately 1,800 boat arrivals to Australia this year with the 50,000 to 60,000 arrivals to one of the poorest countries in the world, Yemen. People smuggling is an appalling trade, in that are we are aware of asylum seekers having been pushed off boats, raped and hundreds have died.

There is no queue. Talk of a 'queue' assumes an endpoint; that, if one waits, one will get somewhere. The reality is that for the vast majority there is no solution. Last year approximately 750,000 refugees were identified for possible resettlement. 200,000 people needed resettlement urgently. 89,000 were resettled.

Asylum seekers are not "illegals". They commit no crime in seeking asylum; in that respect Michael Danby's intervention last week was both correct and timely.

Despite in many respects a greater level of sophistication and understanding of issues in many newspapers and sections of the media, we have witnessed from some of our politicians and media commentators shrill invective, fear and scaremongering, 'dog whistle' politics and whiffs of xenophobia directed at boat arrivals. (Yet until recently, 96% of people seeking protection arrived by plane with not a concern being raised, as the Sunday Telegraph pointed out last Sunday.)

The Minister for Immigration, Senator Chris Evans, has repeatedly stressed the importance of strong border protection but of humane treatment once people arrive on our shores. The Refugee Council of Australia takes the view that if arrangements are to be made in partnership with Indonesia and the United Nations High Commissioner for Refugees then minimum standards of fair and humane reception, credible refugee status

determination, safe and dignified return for those found not to be owed protection and resettlement within reasonable a timeframe for those found to be refugees must be met.

Despite what has happened in recent weeks, I firmly believe that the fair-minded majority of Australians do not want a return to the divisive and destructive debate of Tampa and the erosion of the human rights of asylum seekers. We are entitled to expect from our leaders and all the political class maturity, decency and bipartisanship on this issue.

There is a strong historical precedent for this – waves of Indochinese boat arrivals in the early 1980s. Labor in Opposition supported Coalition Government in a bipartisan manner to contribute to effective regional solutions. This led to a program of resettlement of 100,000 plus Vietnamese – some of whom are here today.

As the adjunct to our Refugee Convention obligations to consider claims made by 'spontaneous arrivals', our refugee and humanitarian program has been (apart from the aberrant statements regarding African refugees and humanitarian entrants by Kevin Andrews in the run-up to the 2007 elections) the subject of genuine bipartisanship and political and policy commitment shared by both major parties for a long time. This degree of bipartisanship should be a model on which our approach to asylum seekers and refugees who arrive by boat is also based. 90% plus are recognised as in need of protection, just as with the 1999-2001 boat arrivals.

As the Age editorialised last Saturday, "There should be an end to politics based on manipulation of fear". Such an approach diminishes the rights of asylum seekers and refugees and diminishes us all as Australians.