Parliamentary Joint Committee on Human Rights

Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*

Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation

Ninth Report of 2013

June 2013

ISBN 978-1-74229-872-6

This document was prepared by the Parliamentary Joint Committee on Human Rights and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Membership of the committee

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Functions of the committee

The Committee has the following functions:

a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;

b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;

c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

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Abbreviations

Abbreviation	Definition
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CERD	Convention on the Elimination of all forms of Racial Discrimination
CEDAW	Convention on the Elimination of Discrimination against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DIAC	Department of Immigration and Citizenship
FRLI	Federal Register of Legislative Instruments
IHAG	Immigration Health Advisory Group
IHMS	International Health and Medical Services
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LCA Committee	Senate Legal and Constitutional Affairs Legislation Committee
PNG	Papua New Guinea
PJCHR	Parliamentary Joint Committee on Human Rights
Public Works Committee	Parliamentary Standing Committee on Public Works
Refugee Convention	The 1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol Relating to the Status of Refugees
UNHCR	United Nations High Commissioner for Refugees

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Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation

Introduction

1.1 The Parliamentary Joint Committee on Human Rights (the committee) has been examining the human rights implications of the Migration Regional Processing package of legislation.

1.2 This package of legislation re-establishes offshore processing for those asylum seekers, defined as 'irregular maritime arrivals' who arrived in Australia on or after 13 August 2012. The package comprises:

- *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*;
- Migration Act 1958 - Instrument of Designation of the Republic of Nauru as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958 - September 2012;
- Migration Act 1958 - Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958 - October 2012;
- Migration Amendment Regulation 2012 (No. 5);
- *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013*;
- *Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Act (No. 1) 2012-2013* and *Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Act (No. 2) 2012-2013*;
- Migration Regulations 1994 - Specification under paragraphs 050.613A(1)(b) and 051.611A(1)(c) - Classes of Persons - November 2012; and
- Migration Amendment Regulation 2013 (No 2).[1]

1.3 The committee decided to examine a private Senators' bill as part of the overall package:

- Migration Amendment (Health Care for Asylum Seekers) Bill 2012.

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1 In its *Seventh Report of 2013*, the committee noted its decision to examine this instrument as part of its examination of the Migration Regional Processing package of legislation.

1.4 Details of the legislation under examination, and a brief description of each, are provided at Appendix 1.

Conduct of the examination

1.5 The committee initially wrote to the Minister for Immigration and Citizenship (Immigration Minister) on 22 August and 31 October 2012 seeking information about the human rights compatibility of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012.* The Minister provided a response on 15 November 2012.[2]

1.6 The committee subsequently held two public hearings, the first in Canberra on 17 December 2012 and the second in Melbourne on 19 December 2012. The committee invited the Department of Immigration and Citizenship (Immigration Department) and the Attorney-General's Department to both hearings. The Immigration Department made officials available for both hearings but the Attorney-General's Department declined to attend either hearing. A full list of witnesses who appeared at the hearings is at Appendix 2, and the *Hansard* transcripts are available on the committee's website.[3] The committee sought and received ten written submissions, which are listed at Appendix 3.

1.7 Following the public hearings the committee wrote to the Immigration Minister and the Attorney-General on 12 February 2013 seeking further information on several matters that had been highlighted through the investigation of the legislation.

1.8 On 14 May 2013, the committee received a letter from the Attorney-General advising that he would not be responding to the committee's written questions on notice as his Department 'does not provide legal advice to parliamentary committees' and that the Immigration Minister was best placed to respond to questions relating to the consistency of the legislation with human rights standards.

1.9 On 29 May 2013, the committee received a response from the Immigration Minister, providing information valid as at 14 February 2013. On 3 June 2013, officers from the Immigration Department attended a private briefing with the committee to provide more up to date information.

Acknowledgements

1.10 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

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2 Letter from the Immigration Minister, 15 November 2012: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/activity/migration/correspondence/min_response.pdf.

3 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

Background to the legislative package

1.11 In June 2012, following a political impasse in relation to the government's attempts to respond to 'irregular maritime arrivals',[4] the government formed an Expert Panel to provide it with a report on the best way forward. The panel was made up of the former chief of the Australian Defence Force, the Director of the Victorian Foundation for Survivors of Torture Inc., and the Director of the National Security College at the Australian National University.[5]

1.12 The *Report of the Expert Panel on Asylum Seekers* was released on 13 August 2012 and contained 22 recommendations.[6] The recommendations sought to present an integrated approach to asylum seeker issues by providing disincentives for irregular migration and advancing regional engagement strategies, including regional processing, within a framework which adhered to Australia's international obligations.

1.13 The report was premised on the assumption that action by the Australian Government, including offshore processing and cooperation with regional governments, would have the effect of deterring people from seeking to come to Australia by boat without prior authorisation.

1.14 A central plank of the Expert Panel's recommended approach was a 'no advantage' principle to ensure 'no benefit is gained through circumventing regular migration arrangements'.[7]

Government response

1.15 In response to the report, the government immediately committed to implementing all of the Expert Panel's recommendations. Legislation[8] was introduced to give effect to those aspects of the Expert Panel's recommendations

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4 The government's preferred response involved an arrangement with Malaysia, where up to 800 boat arrivals would be sent directly from Australia to Malaysia, and 4000 refugees would be resettled to Australia from Malaysia over four years. This arrangement was signed by both governments on 25 July 2011. On 31 August 2011, before any transfers had been made, the High Court found it to be invalid: see *Plaintiff M70/2011 v Minister for Immigration and Citizenship*; *Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32. Unable to get support from either the Opposition or the Greens for legislation to enable the arrangement to proceed, the government abandoned it.

5 Air Chief Marshal Angus Houston AC AFC (Ret'd), Mr Paris Aristotle AM and Professor Michael L'Estrange AO, respectively.

6 Report of the Expert Panel on Asylum Seekers, August 2012, see summary of Recommendations, pp 14-19: http://expertpanelonasylumseekers.dpmc.gov.au/.

7 See Report of the Expert Panel on Asylum Seekers, Overview: The Approach Underpinning this Report, para v, p 11.

8 See list in para 1.2 above.

that primarily related to the 'disincentive' elements of the Expert Panel's approach,[9] namely:

- that amendments to legislation be made 'as a matter of urgency' to enable the transfer of people to regional processing arrangements, and that capacity be established in Nauru and Papua New Guinea (PNG) to process asylum seekers;[10]
- that amendments be made to the offshore excision arrangements in the *Migration Act 1958*, to disapply the usual provisions of the Act to anyone arriving in any part of Australia by irregular maritime means;[11] and
- that family reunion concessions for people who arrive in Australia through 'irregular maritime voyages' be removed and future arrivals be barred from sponsoring family members through the Humanitarian Program, so that family members would need to seek a visa under the family stream of the Migration Program.[12]

1.16 The government has stated that the 'no advantage' principle will inform the implementation of these legislative changes.[13] To date, this has included the adoption of measures which are not reflected in the Expert Panel's

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9 The Expert Panel's recommendation that the 2011 Malaysia Agreement be implemented after adding additional safeguards, however, remains unfulfilled as the Coalition, the Greens and key Independents continue to oppose the so-called 'Malaysia Solution': see Report of the Expert Panel on Asylum Seekers, August 2012, recommendation 10.

10 Expert Panel's recommendations 8 and 9, given effect by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* together with *the Migration Act 1958 - Instrument of Designation of the Republic of Nauru as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958 - September 2012*; and the *Migration Act 1958 - Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958 - October 2012*. Funding for these measures was secured by the *Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Act (No. 1) 2012-2013* and the *Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Act (No. 2) 2012-2013*.

11 Expert Panel's recommendation 14, given effect by the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013*.

12 Expert Panel's recommendations 11 and 12, given effect by *the Migration Amendment Regulation 2012 (No. 5)*. The Expert Panel also recommended that possibilities for private sponsorship arrangements for humanitarian visa holders should be explored (see Expert Panel Report, para 3.17). This recommendation is given effect by *the Migration Amendment Regulation 2013 (No. 2)*, which allocates 500 of the 20,000 humanitarian places to offshore refugees who are sponsored by Australian community organisations. Sponsorship requires payment of almost $20,000 per person by the community organisation.

13 See discussion on the 'no advantage' principle below.

recommendations, such as removing work rights for some 'irregular maritime arrivals' living in the Australian community on bridging visas.[14]

1.17 The government has also taken steps to implement various aspects of the Expert Panel's recommendations which relate to advancing regional cooperation, namely:

- that there be an increase in Australia's Humanitarian Program to 20,000 places a year — including 12,000 for refugees, with the program focused on asylum seekers moving through South-East Asia;[15] and
- that capacity building initiatives in the region be extended,[16] bilateral cooperation on asylum seeker issues with Indonesia and Malaysia be advanced,[17] and there be a more effective strategy for dealing with source countries for asylum seekers to Australia.[18]

14 Given effect by the *Migration Regulations 1994 - Specification under paragraphs 050.613A(1)(b) and 051.611A(1)(c) - Classes of Persons - November 2012*.

15 To give effect to the Expert Panel's recommendation 2, the government has committed to increase the special humanitarian program from 13,750 to 20,000 within the 2012-13 financial year. The intake will include over 3000 Burmese and 600 Middle-Eastern refugees who are in Malaysia: see, media release by the Prime Minister and Immigration Minister, 'Refugee Program increased to 20,000 places', 23 August 2012 http://www.pm.gov.au/press-office/refugee-program-increased-20000-places.

16 Joint media release by the Prime Minister and Immigration Minister, 'Refugee Program increased to 20,000 places', 23 August 2012; (corresponding to the Expert Panel's recommendation 3).

17 Media release by the Prime Minister and Immigration Minister, 'Refugee Program increased to 20,000 places', 23 August 2012; (corresponding to the Expert Panel's recommendation 4).

18 See DIAC, Answer to question on notice No 23, in letter dated 29 May 2013; (corresponding to the Expert Panel's recommendation 6).

Overview of the legislation

1.18 The legislative framework for the new regional processing arrangements was established by the following laws:

- the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*; and
- the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013.*

Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012

1.19 The *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*, which commenced on 18 August 2012, amended the *Migration Act 1958* to replace the existing framework for taking irregular maritime arrivals defined as 'offshore entry persons'[19] to a designated 'regional processing country' for assessment of their protection claims.

1.20 Under the Act, the Immigration Minister may make a legislative instrument which designates a country as a 'regional processing country'.[20] The Minister may exercise this power if he or she thinks that the designation is in the national interest.[21] In considering the national interest, the Minister must have regard to whether the country in question has given any assurances that:

- transferred asylum seekers will not be subject to *refoulement* within the meaning of article 33(1) of the Refugee Convention; and
- it will make an assessment, or permit an assessment to be made, of whether transferred asylum seekers are refugees.[22]

1.21 However, the designation of a country 'need not be determined by reference to the international obligations or domestic law of that country'.[23]

1.22 The designation comes into effect as soon as both Houses of Parliament have passed a resolution approving the designation, or, if there has been no resolution

19 An 'offshore entry person' was a person who entered Australia at an excised offshore place (such as Christmas Island, Cocos (Keeling) Islands and Ashmore and Cartier Islands) without a valid visa.

20 *Migration Act 1958*, s 198AB(1).

21 *Migration Act 1958*, s 198AB(2).

22 *Migration Act 1958*, s 198AB(3).

23 *Migration Act 1958*, s 198AA(d).

disapproving the designation, after five sittings days from the date the instrument was tabled.[24]

1.23 An immigration officer must take an offshore entry person to a regional processing centre as soon as 'reasonably practicable'.[25] However, the Immigration Minister has the discretion to determine that it is in the 'public interest' not to transfer a person.[26] The exercise of this power is not subject to the rules of natural justice.[27]

1.24 The *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* also amended the *Immigration (Guardianship of Children) Act 1946* (IGOC Act). The IGOC Act governs the guardianship arrangements for unaccompanied minors seeking asylum in Australia. The Immigration Minister is the legal guardian of such children. The amendments removed the requirement for the Minister to provide his or her written consent to the removal of an unaccompanied minor to a regional processing country.[28]

Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013

1.25 The *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013*, which commenced on 1 June 2013, amended the *Migration Act 1958* to extend the current excision provisions to the whole country. This means that irregular maritime arrivals who arrive anywhere in Australia are subject to the same regional processing arrangements as those who arrive at a previously excised offshore place.

1.26 In addition, the legislation amended the Migration Act to enable the Immigration Minister to revoke or vary a previous determination[29] to exempt a person from being transferred to a regional processing country if he or she considers it is in the public interest to do so.[30] This power will enable a person who had been previously exempted from transfer to be transferred to a regional processing country at a subsequent date. Such determinations are not subject to the rules of natural justice,[31] meaning that a person does not have a right to make representations to the

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24 *Migration Act 1958*, s 198AB(1B).

25 *Migration Act 1958*, s 198AD(2).

26 *Migration Act 1958*, s 198AE(1).

27 *Migration Act 1958*, s 198AE(3).

28 IGOC Act, s 8(2).

29 Made under *Migration Act 1958*, s 198AE(1).

30 *Migration Act 1958*, s 198AE(1A).

31 *Migration Act 1958*, s 198AD(3).

Minister or to be provided with information before the Minister makes his or her decision. A person will not be entitled to be given the reasons for the decision.

1.27 A person will not cease to be a 'transitory person' if they have been assessed to be a refugee.[32] Previously, a 'transitory person' was a person who was transferred offshore for processing and was returned to Australia, but persons already assessed to be refugees and sent to Australia would not be considered a 'transitory'. After these changes, 'transitory persons brought back to Australia would be unlawful non-citizens'.[33] In addition, a person returned from a regional processing country to Australia can now be classified as a 'transitory person' for an indefinite period of time.[34]

Designation of Nauru and Papua New Guinea as 'regional processing countries'

1.28 To date, the Immigration Minister has designated two countries as 'regional processing countries', namely, Nauru and Papua New Guinea.[35] The designations of Nauru and PNG came into effect on 12 September 2012 and 10 October 2012 respectively, having been approved by both Houses of Parliament.[36]

1.29 For both designations, the Minister tabled the relevant instrument and accompanying documents in Parliament, including his statement of reasons for considering that the designation was in the national interest.[37] With regard to Nauru, the Minister stated:

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32 *Migration Act 1958*, s 5AA.

33 See explanatory memorandum to the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, para 131, p. 18.

34 *Migration Act 1958*, s 198AH(2). Previously a person transferred from Nauru or PNG who spent six months or more in Australia would be entitled to an assessment of refugee status in Australia.

35 See: *Migration Act 1958 - Instrument of Designation of the Republic of Nauru as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958 - September 2012* (FRLI and *Migration Act 1958 - Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958 - October 2012*.

36 Prior to this, Australia and Nauru signed a Memorandum of Understanding (MOU) 'Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues' on 29 August 2012; and Australia and PNG signed an MOU 'Relating to the Transfer to and Assessment of Persons in Papua New Guinea, and Related Issues' on 8 September 2012.

37 Under s 198AC(5) of the *Migration Act 1958*, the Minister must provide both Houses of Parliament with the following documents (although a failure to do so does not affect the validity of the designation):

(a) the instrument of designation;

> On the basis of the material set out in the submission from the Department, I think that it is not inconsistent with Australia's international obligations (including but not limited to Australia's obligations under the Refugee Convention) to designate Nauru as a regional processing country.
> ...
>
> However, even if the designation of Nauru to be a regional processing country is inconsistent with Australia's international obligations, I nevertheless think that it is in the national interest to designate Nauru to be a regional processing country.[38]

1.30 The Minister made identical statements with regard to the designation of PNG on 9 October 2012.[39]

UNHCR concerns[40]

1.31 The documents tabled with the instrument of designation of Nauru included a letter from the United Nations High Commissioner for Refugees (UNHCR), responding to a request by the Immigration Minister for his views in relation to the possible designation of Nauru as a 'regional processing country'.[41]

1.32 The UNHCR noted that arrangements to transfer asylum seekers to another country are a 'significant exception' to normal practice, should only be pursued as

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(b) statement of the Minister's reasons for thinking that it is in the national interest to designate the country;

(c) a copy of any written agreement (whether legally binding or not) between Australia and the country;

(d) a statement about the Minister's consultations with the UNHCR;

(e) a summary of any advice received from the UNHCR; and

(f) a statement about any arrangements that are in place or are to be put in place in the country for the treatment of persons taken to that country (s 198AC(2)).

38 Immigration Minister, *Statement of reasons for thinking that it is in the national interest to designate Nauru to be a regional processing country*, September 2012 (Statement of reasons – Nauru), paras 35-36: http://www.minister.immi.gov.au/media/media-releases/_pdf/designation-statement-reasons.pdf.

39 Immigration Minister, *Statement of reasons for thinking that it is in the national interest to designate the independent state of Papua New Guinea to be a regional processing country*, October 2012 (Statement of reasons – PNG), paras 35-36: http://www.minister.immi.gov.au/media/pdf/papua-new-guinea-designation-statement-reasons.pdf.

40 Summary drawn from: Australian Human Rights Commission, *Submission 8*, paras 66-75.

41 A Guterres, United Nations High Commissioner for Refugees, Letter to the Immigration Minister, 5 September 2012: http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=264:unhcr-advice-regarding-nauru&catid=37:submissions&Itemid=61.

part of a burden-sharing arrangement to more fairly distribute responsibilities, and should involve countries with appropriate protection safeguards, including:

- respect for the principle of non-refoulement;
- the right to asylum (involving a fair adjudication of claims);
- respect for the principle of family unity and the best interests of the child;
- the right to reside lawfully in the territory until a durable solution is found;
- humane reception conditions, including protection against arbitrary detention;
- progressive access to Convention rights and adequate and dignified means of existence, with special emphasis on education, access to health care and a right to employment;
- special procedures for vulnerable individuals; and
- durable solutions for refugees within a reasonable period.

1.33 The UNHCR expressed concern 'whether Nauru has presently the ability to fulfil its [Refugee] Convention responsibilities'.[42]

1.34 The UNHCR raised similar concerns in relation to PNG in a letter to the Immigration Minister regarding the designation of PNG as a 'regional processing country', noting that:[43]

- PNG retains seven significant reservations to the Refugee Convention that affect a range of economic, social and cultural rights to which refugees would ordinarily be entitled;
- PNG has no effective legal or regulatory framework to address refugee issues;
- PNG has no immigration officers with the experience, skill or expertise to undertake refugee status determination;
- there remains a risk of refoulement despite written undertakings; and
- the quality of protection currently offered in PNG remains of concern.

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42 A Guterres, United Nations High Commissioner for Refugees, Letter to the Immigration Minister, 5 September 2012, p 3.

43 A Guterres, United Nations High Commissioner for Refugees, Letter to the Immigration Minister, 9 October 2012: http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=272&catid=37&Itemid=61.

1.35 The UNHCR concluded:

> [I]t is difficult to see how Papua New Guinea alone might meet the conditions set out in UNHCR's paper on maritime interception and the processing of international protection claims. ... [I]t is the UNHCR's assessment that Papua New Guinea does not have the legal safeguards nor the competence or capacity to shoulder alone the responsibility of protecting and processing asylum seekers transferred by Australia.[44]

44 A Guterres, United Nations High Commissioner for Refugees, Letter to the Immigration Minister, p 3.

The 'no-advantage' principle

1.36 The Expert Panel recommended the application of a 'no advantage' principle to ensure that no benefit is gained by asylum seekers through circumventing regular migration arrangements.[45] The panel considered that:

> The single most important priority in preventing people from risking their lives on dangerous maritime voyages is to recalibrate Australian policy settings to achieve an outcome that asylum seekers will not be advantaged if they pay people smugglers to attempt dangerous irregular entry into Australia instead of pursuing regular migration pathways and international protection arrangements as close as possible to their country of origin.[46]

1.37 The government has adopted this recommendation and has consistently stated that those who arrive on or after 13 August 2012 will receive 'no advantage' – including that they 'will not be processed any faster than had they waited in a refugee camp overseas'.[47]

1.38 The 'no advantage' principle has been criticised as having no meaning or content under international refugee and human rights law. The President of the Australian Human Rights Commission has stated that 'the difficulty with the no advantage principle is that it appears not to have legal content because it is very unclear what you are comparing it with—no advantage over what?'[48]

1.39 Similarly, the UNHCR has questioned the basis of such a principle, stating that there is no 'average' time for resettlement.[49] The UNHCR has noted that the 'no advantage' principle:

> appears to be based on the 'longer term aspiration that there are, in fact, effective 'regional processing arrangements' in place. … However, for the moment such regional arrangements are very much at their early conceptualization. In this regard, UNHCR would be concerned about any

45 Report of the Expert Panel on Asylum Seekers, August 2012, recommendation 1.

46 Report of the Expert Panel on Asylum Seekers, August 2012, para v, p 11.

47 See media release by the Immigration Minister, 'Families to be considered for bridging visas but 'no advantage' principle applies', 7 May 2013: http://www.minister.immi.gov.au/media/bo/2013/bo202819.htm.

48 G Triggs, President of the Australian Human Rights Commission, before the Legal and Constitutional Affairs Legislation Committee, Senate Estimates, 29 May 2013, *Committee Hansard*, p 50.

49 A Guterres, United Nations High Commissioner for Refugees, Letters to the Immigration Minister, 5 September 2012 and 9 October 2012, discussed above.

negative impact on recognised refugees who might be required to wait for long periods in remote island locations.[50]

1.40 The application of the 'no-advantage' principle has different consequences for people who are transferred to Nauru and Manus Island and for those who remain in Australia. These differences are described briefly below.

Asylum seekers transferred to Nauru or Manus Island[51]

1.41 Under the new regional processing arrangements, any asylum seeker arriving in Australia by boat after 13 August 2012 must be transferred to Nauru or Manus Island for processing, subject to a pre-transfer assessment being conducted by the Immigration Department to determine whether it is 'reasonably practicable' for the person to be transferred.[52] A person may be transferred regardless of whether they come with family, have family already in Australia or are under 18 years old.

1.42 Transfers to Nauru commenced on 14 September 2012 and transfers to Manus Island commenced on 21 November 2012. As of 27 May 2013, there were 302 people, including 34 children, on Manus Island and 430 in Nauru under these arrangements. To date, 61 people have been removed voluntarily from Nauru and 2 from Manus Island.[53]

1.43 Asylum seekers transferred to Nauru or Manus Island will have their protection claims assessed by the government of the host country, under that country's legal framework. The Immigration Department has stated that 'claims assistance will be available to asylum seekers and merits review will also be available

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50 A Guterres, United Nations High Commissioner for Refugees, Letters to the Immigration Minister, 5 September 2012 and 9 October 2012, discussed above. The Refugee Council of Australia (RCOA) has also observed that the 'no advantage' principle is 'premised on the assumption that asylum seekers who seek to enter Australia irregularly by boat should instead have applied though 'regular migration arrangements'….Currently, such arrangements do not exist in the Asia-Pacific region and the [Expert] Panel itself acknowledges that any changes to protection standards in the region are likely to be incremental. RCOA finds it very troubling that asylum seekers attempting to enter Australia by boat will face indefinite exile in offshore processing facilities on the basis that they have 'circumvented' a 'managed regional system' which as yet is non-existent.' See Refugee Council of Australia, *Analysis of the recommendations of the Expert Panel on asylum seekers*, August 2012, p 3: http://www.refugeecouncil.org.au/r/rpt/2012-Expert-Panel.pdf.

51 Summary drawn from J Phillips and H Spinks, 'Boat arrivals in Australia since 1976', Parliamentary Library, 29 January 2013: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/BoatArrivals.

52 See DIAC Guidelines for Assessment of Persons Prior to Transfer Pursuant to section 198AD(2) of the *Migration Act 1958*, made available 14 October 2012 (in use since 12 September 2012), p 5: http://www.immi.gov.au/visas/humanitarian/_pdf/s198ad-2-guidelines.pdf.

53 See M Bowles, Secretary, DIAC, before the Legal and Constitutional Affairs Legislation Committee, Senate Estimates, 27 May 2013, *Committee Hansard*, p 19.

to all asylum seekers who are processed in a regional processing country'.[54] Processing of claims had begun by March 2013 in Nauru but has not commenced on Manus Island.[55]

1.44 The Immigration Minister has stated that people transferred to Nauru or Manus Island will be subject to a 'no advantage' principle, meaning that they will not be resettled any sooner than they would have been had they not travelled to Australia by boat. The government has not specified how long people may have to wait for resettlement but the previous Immigration Minister suggested:

> Five years could be an accurate reflection of how long people would wait, depending on their individual circumstances in relation to how long they would have waited at a regional processing centre around the South-East Asia region.[56]

1.45 A person transferred to Nauru or Manus Island will not be able to make a valid application for an Australian offshore protection visa until invited by the Immigration Minister to do so.[57]

Asylum seekers processed in Australia

1.46 It is estimated that over 18,000 people have arrived in Australia by boat since 13 August 2012. Due to the high number of arrivals, the government has acknowledged that it will not be possible to transfer everyone to Nauru or Manus Island in the immediate future.[58]

1.47 However, the Immigration Minister has made clear that asylum seekers subject to the new arrangements who are processed in Australia will also be subject to the 'no advantage' principle:

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54 V Parker, First Assistant Secretary, Expert Panel Recommendations, DIAC, *Committee Hansard*, 19 December 2012, pp 41-42.

55 M Bowles, Secretary, DIAC, before the Legal and Constitutional Affairs Legislation Committee, Senate Estimates, 27 May 2013, *Committee Hansard*, p 33. Mr Bowles expressed hopes that processing on Manus Island may commence in June or July 2013.

56 Minister Bowen, Doorstop interview, 22 November 2012: http://www.minister.immi.gov.au/media/cb/2012/cb191923.htm.

57 See *Migration Regulations 1994*, regulation 2.07AM, as inserted by the *Migration Amendment Regulation 2012 (No. 5)*, dated 27 September 2012. This differs from the situation under the previous 'Pacific Solution' when a person on Nauru or Manus Island was able to make an application for an Australian offshore protection visa at any time.

58 It is understood that Nauru and Manus Island currently have capacity for around 1,000 people and a projected capacity of 2,100. Current capacity is for around 500 people on Nauru: see Minister Bowen's comments on 22 November 2012: http://www.minister.immi.gov.au/media/cb/2012/cb191923.htm). Current capacity on Manus Island is around 500: see Parliamentary Standing Committee on Public Works inquiry into Manus Island Regional Processing Centre Project, DIAC, *Submission 1*, p 8.

> Consistent with 'no advantage', people from this cohort going onto bridging visas will have no work rights and will receive only basic accommodation assistance, and limited financial support…. However, consideration can be given to transfer these people offshore at a future date. Their status as offshore entry people is unchanged.[59]

1.48 Since 13 August 2012, around 7000 people have been released into the community on bridging visas while their asylum claims are processed. Another 8000 or more people remain in detention.

1.49 Asylum seekers released on bridging visas are not allowed to work but will be eligible to receive a support payment the equivalent of 89% of the minimum Newstart allowance.[60]

1.50 Asylum seekers who remain in Australia will have their protection claims assessed by the Immigration Department and the Immigration Department have said they will have access to some form of independent merits review.[61] Processing of claims has not yet begun for this group.[62]

1.51 A person subject to these arrangements will not be able to apply for a protection visa unless invited by the Immigration Minister to do so.[63] Such persons will remain liable to be transferred to Nauru or Manus Island at any point up until the point they are granted a protection visa.[64]

1.52 People arriving by boat after 13 August 2012 will also be barred from proposing family members under the Humanitarian Program. Family members will need to seek a visa under the family stream of the Migration Program instead.[65] In addition, all such applications will now be given lower processing priorities.

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59 Minister Bowen, Doorstop interview, 22 November 2012: http://www.minister.immi.gov.au/media/cb/2012/cb191923.htm.

60 This is likely to be support under the Asylum Seeker Assistance Scheme (ASAS) which provides basic living expenses, equivalent to 89 per cent of the Centrelink Special Benefit allowance (usually the same rate as Newstart) and general healthcare through Medicare. Currently this amounts to $442 a fortnight for singles (or $31.50 a day) and $478 a fortnight ($34 a day) for families with children.

61 Access to the Refugee Review Tribunal processes under the *Migration Act 1958* only apply once a person has been allowed to make a valid application for a visa.

62 M Bowles, Secretary, DIAC, before the Legal and Constitutional Affairs Legislation Committee, Senate Estimates, 27 May 2013, *Committee Hansard*, p 9. Mr Bowles expressed hopes that processing would commence 'very shortly'.

63 *Migration Act 1958*, s 46A(2).

64 See discussion in para 1.27 above.

65 *Migration Regulations 1994*, Schedule 2, clauses 202.222 and 202.225, as inserted by items 12 and 13 of the *Migration Amendment Regulation 2012 (No. 5)* dated 27 September 2012.

Asylum seekers who are not subject to the 'no-advantage' principle

1.53 To understand the nature and extent of these new arrangements, it is useful to briefly describe the processes that apply to asylum seekers who arrived before 13 August 2012 and the processes that apply to asylum seekers who arrive by air.

Asylum seekers who arrive by air

1.54 Asylum seekers who arrive by air and who clear Australian customs are entitled to make an application for a protection visa at any time while in Australia.[66] Applicants will remain on any substantive visa that they held at the time of lodging their application until that visa ceases to be in effect (eg, they will remain on their student or tourist visa). Once that expires they are eligible for a bridging visa while waiting for their application to be decided. The bridging visa allows the person to remain living in the Australian community until their application for a protection visa has been finally determined. Those granted a bridging visa generally have permission to engage in work.[67] Since July 2009, the Immigration Department's policy has been to grant permission to work to all protection visa applicants who arrived by air on a valid visa.[68]

1.55 Once an application for a protection visa is made, the Migration Act requires that a decision on the application be made within 90 days.[69] Those applicants who are refused in the first instance (which in 2011-12 was 75 per cent of all applicants[70]) have the right to apply to the Refugee Review Tribunal (RRT) for review of the decision. Almost all unsuccessful applicants choose the option of appealing to the RRT,[71] and around one-quarter[72] have their case remitted back to the Immigration Department for reconsideration. Once the RRT has considered the case, the applicant also has the right to appeal a decision to the Federal Court of Australia or the Federal Magistrates Court and, at any time after the initial decision, has the ability to apply to the High Court of Australia.[73]

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66 See section 46 of the *Migration Act 1958* which allows a person to make an application for a visa, and section 36 which establishes the class of visa known as protection visas.

67 See DIAC,' Fact Sheet 62 – Assistance for Asylum Seekers in Australia': http://www.immi.gov.au/media/fact-sheets/62assistance.htm.

68 See DIAC, 'New Permission to work arrangements': http://www.immi.gov.au/refugee/permission/.

69 *Migration Act 1958*, s 65A.

70 See DIAC,' Asylum Trends – Australia: 2011-12 Annual Publication', 2012, p 12.

71 In 2011-12, 90% of refused applicants appealed to the RRT. See DIAC,' Asylum Trends – Australia: 2011-12 Annual Publication', 2012, p 16.

72 In 2011-12, 28% of RRT reviews were remitted to DIAC (up from 20% in 2007-08). See DIAC, 'Asylum Trends – Australia: 2011-12 Annual Publication', 2012, p18.

73 Under the High Court's original jurisdiction under the Constitution.

1.56 Those granted protection visas are entitled to remain in Australia indefinitely[74] and have access to all the benefits of a permanent resident. This includes access to Medicare and the public health system, permission to work, access to welfare benefits, the ability to sponsor (or propose) certain relatives for entry to Australia, to travel and re-enter Australia, and eligibility to apply for Australian citizenship. They will also be eligible for assistance through the Humanitarian Settlement Services program (which helps with accommodation, household goods and other services) and help with learning English if necessary.[75]

Asylum seekers who arrived before 13 August 2012

1.57 Those who arrived by boat at an excised offshore place (but not the Australian mainland) before the new regional processing system came into effect, were not automatically entitled to make an application for protection.[76] Instead, the Immigration Minister could decide that an application could be made if it was in the public interest to do so.[77] However, from 24 March 2012[78] Ministerial guidelines were amended to provide that the Minister would likely allow a valid application to be made when a person arriving by boat raised claims that 'prima facie, engage Australia's protection obligations'.[79] Following this, the application would be considered by a Departmental officer, and if a negative decision were made, the applicant had the right to seek merits review by the RRT and judicial review by the federal courts. Once a valid application was made, the Migration Act provides that a decision on the application must be made within 90 days[80] (although failure to comply with this timeframe does not affect the decision).[81]

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74 A Protection (Class XA) visa is a permanent visa for people in Australia found to be a person to whom Australia has protection obligations*: Migration Regulations 1994*, Schedule 1, Part 4, item 1401 which prescribes the subclass 866 (Protection) visa within the Protection (Class XA) visa class.

75 Under the Adult English Migrant Program.

76 *Migration Act 1958*, s 46A (introduced in 2001 by *the Migration Amendment (Excision from Migration Zone) Act 2011*, Act 127 of 2001.

77 *Migration Act 1958*, s 46A(2).

78 Before 24 March 2012 claims were first assessed by a Departmental officer and, if a negative assessment was made, by an independent protection assessor. Only if a person was considered under that process to have engaged Australia's protection obligations would the Minister consider exercising his or her discretion to allow a valid application for a protection visa to be made. There was no access to merits review by the RRT or judicial review by the Federal Court or Federal Magistrates Court. The constitutional right to apply to the High Court remained; see section 75(v) of the Constitution of the Commonwealth of Australia.

79 DIAC, Procedural Advice Manual (PAM3): Act - Minister's Guidelines on ministerial intervention under s 46A(2), 2012.

80 *Migration Act 1958*, s 65A.

81 *Migration Act 1958*, s 65A(2).

1.58 All those arriving by boat were automatically required to be placed in detention until they were either removed from Australia or granted a visa.[82] From October 2010, the government expanded the program of community detention, with many families and children moved from immigration detention facilities to community detention.[83] In November 2011, the Immigration Department began to release people seeking asylum on bridging visas into the community pending determination of their claims.[84] It remained in the Immigration Minister's discretion whether to grant a bridging visa,[85] including the discretion whether to impose a visa condition allowing the person to work while in the community. From 24 March 2012, the Immigration Minister specified that holders of these bridging visas were a specific class of persons who would have the right to work.[86]

1.59 Those found to be refugees (over 90 per cent of applicants) were entitled, immediately on finalisation of their application, to be granted a permanent protection visa. However, as part of the new regional processing legislative package, while people arriving by boat before 13 August 2012 remain entitled to sponsor family members for entry into Australia under the Humanitarian Program, the 'family reunion concession' has been removed.[87]

Asylum seekers who arrive by air vs boat: numbers and rate of success

1.60 In 2011-12 around half of all people seeking asylum in Australia arrived by boat,[88] and over 90% were ultimately recognised to be refugees and granted

82 *Migration Act 1958*, s 178.

83 See joint media release by the Prime Minister and the Immigration Minister, 'Government to move children and vulnerable families into community-based accommodation', 18 October 2010: http://www.minister.immi.gov.au/media/cb/2010/cb155484.htm.

84 See Immigration Minister, 'Bridging visas to be issued for boat arrivals', 25 November 2011: http://www.minister.immi.gov.au/media/cb/2011/cb180599.htm.

85 *Migration Act 1958*, ss 37 and 73, *Migration Regulations 1994*, reg. 2.20, Bridging Visa E (Class WE) (subclasses 050 and 051).

86 See *Migration Regulations 1994 – Specification under paragraphs 050.613A(1)(b) and 051.611A(1)(c) – Classes of Persons*, IMMI 11/078, F2012L00784, made 27 March 2012, commencing 24 March 2012.

87 See *Migration Amendment Regulation 2012 (No. 5)*, item 8, 17 and 21 of Schedule 2. Under the previous arrangements, family members of irregular maritime arrivals were considered to automatically meet the 'compelling reasons' criterion of the subclass 202 Global Special Humanitarian Visa, but that concession has now been removed.

88 In 2011-12 there were 14,415 people who sought asylum in Australia: 49% arrived by air and 51% by boat. In 2008-09 the numbers were much different, with 88% of applicants arriving by air and less than 12% arriving by boat. See DIAC, 'Asylum Trends – Australia: 2011-12 Annual Publication', 2012, p 2.

protection visas.[89] The other half arrived by air, with the majority of those entering on student visas or visitor visas.[90] Fewer than 50% were ultimately successful in seeking refugee status in 2011-12.[91]

1.61 A summary of the operation of the new arrangements, along with key differences to the previous regime and the regime that applies to asylum seekers who arrive by air is set out below in Table 1:

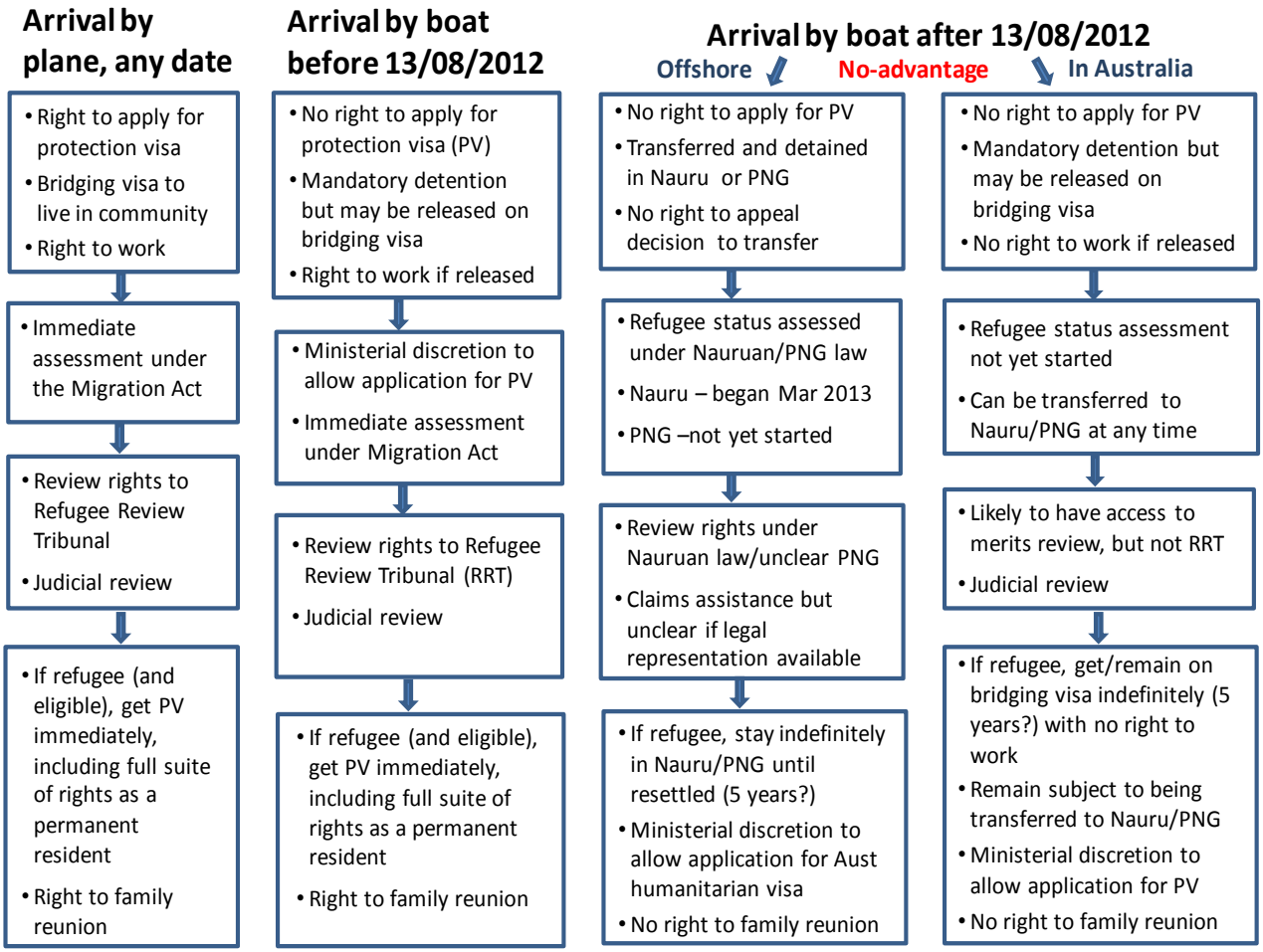

Table 1: Processes that apply to persons seeking asylum

89 In 2011-12, 4,766 protection visas were granted to people arriving by boat, amounting to 91% of all applications following a primary decision, review by the RRT and/or consideration by the courts. See DIAC, 'Asylum Trends – Australia: 2011-12 Annual Publication', 2012, p 31.

90 In 2011-12, 47% of asylum seeker applicants arriving by air arrived on student visas, and 35% arrived on visitor visas. See DIAC, 'Asylum Trends – Australia: 2011-12 Annual Publication', 2012, p 5.

91 In 2011-12, 2,272 protection visas were granted to people arriving by air, amounting to 44% of all applications following a primary decision, review by the RRT and/or consideration by the courts. See DIAC, 'Asylum Trends – Australia: 2011-12 Annual Publication', 2012, p 19.

Related parliamentary inquiries

1.62 Concurrent with the committee's examination of this legislation, related inquiries and scrutiny into particular aspects of the legislative package have been conducted by other parliamentary committees:

- The Senate Legal and Constitutional Affairs Legislation Committee reported on the Migration Amendment (Health Care for Asylum Seekers) Bill 2012 on 7 December 2012.
- The Senate Legal and Constitutional Affairs Legislation Committee reported on the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 on 25 February 2013.
- The Senate Standing Committee for the Scrutiny of Bills reported on the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 on 27 February 2013.[92]
- The Parliamentary Standing Committee on Public Works reported on the proposed permanent regional processing centre at Manus Island in Papua New Guinea on 15 May 2013.

1.63 These inquiries have elicited a broad range of evidence relevant to this committee's inquiry and have been drawn on in this report where appropriate.

Senate Legal and Constitutional Affairs Legislation Committee inquiry into Migration Amendment (Health Care for Asylum Seekers) Bill 2012

1.64 On 13 September 2012, the Senate referred the Migration Amendment (Health Care for Asylum Seekers) Bill 2012, to the Senate Legal and Constitutional Affairs Legislation Committee (LCA Committee). This bill was introduced by Senators Hanson-Young and Di Natale and seeks to create an independent panel of medical, psychological and other health experts to monitor, assess and report to the Parliament on the health of persons seeking asylum who are taken to regional processing countries.

1.65 The inquiry attracted 20 submissions from individuals and organisations and received evidence from eleven organisations (and the Immigration Department) at a public hearing in Canberra on 23 November 2012, including a number of health professionals. The committee tabled its report on 7 December 2012.

1.66 The LCA Committee's majority report concluded that the current oversight and monitoring of health services provided to persons transferred to regional processing countries is inadequate.[93] However, it did not support passage of this bill

92 Senate Standing Committee for the Scrutiny of Bills, *Report No. 2 of 2013*, 27 February 2013.

93 Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Health Care for Asylum Seekers) Bill 2012*, December 2012, para 3.18.

due to concerns as to whether a new health panel would be 'the appropriate mechanism to address this deficiency'.[94]

1.67 Instead, the LCA Committee recommended that the terms of reference of the soon-to-be established Immigration Health Advisory Group (IHAG) should explicitly state that its role includes the oversight and monitoring of health services to persons in regional processing countries.

1.68 It also recommended that the IHAG should have access to facilities in Nauru and Manus Island, the ability to meet with asylum seekers in Nauru or Manus Island and have a role in the development and design of the policy to send people to those countries.[95]

1.69 In a dissenting report, the Australian Greens supported the passage of the bill, subject to amendments to, among other things, clarify the powers and functions of the independent panel, provide for its establishment under the office of the Commonwealth Ombudsman, and to allow for disability experts to be represented on the panel.[96] They, however, agreed that the role of IHAG should be strengthened:[97]

> [T]he terms and composition of the Immigration Health Advisory Group [should] be amended so that its reports and recommendations to the Minister are tabled in Parliament; that the Minister is obliged to respond to those recommendations; and that IHAG must be consulted on the design of the offshore processing regime.[98]

Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012

1.70 On 1 November 2012, the Senate referred the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 to the Senate Legal

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94 Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Health Care for Asylum Seekers) Bill 2012*, December 2012, para 3.18.

95 Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Migration Amendment (Health Care for Asylum Seekers) Bill 2012*, December 2012, recommendations 1-3 at paras 3.31-3.33.

96 Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Migration Amendment (Health Care for Asylum Seekers) Bill 2012*, December 2012, recommendations 1-5 (Dissenting Report by the Australian Greens).

97 Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Migration Amendment (Health Care for Asylum Seekers) Bill 2012*, December 2012, para 1.20 (Dissenting Report by the Australian Greens).

98 Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Migration Amendment (Health Care for Asylum Seekers) Bill 2012*, December 2012, recommendation 6 (Dissenting Report by the Australian Greens) .

and Constitutional Affairs Legislation Committee. This bill proposed extension of the application of the regional processing regime on excised offshore places such as Christmas Island to the Australian mainland.[99]

1.71 The inquiry received 36 submissions and held a public hearing in the Canberra on 31 January 2013. The committee tabled its report on 25 February 2013.

1.72 All of the submissions, except for those from the Immigration Department and the Australian Customs and Border Protection Service (which presented a description of the amendments), opposed the bill. Most of the objections focused on the human rights implications of the amendments and expressed concerns about the damage prolonged detention in offshore facilities could cause.[100] A number of submissions argued that the rationale for the bill was flawed and that the policy of regional processing does not deter asylum seekers from undertaking maritime journeys to Australia.[101]

1.73 The LCA Committee ultimately recommended the passage of the bill subject to an amendment to require the Immigration Minister to report annually to Parliament on issues such as refugee status determination procedures and their outcomes, as well as arrangements for the accommodation, health care and education of asylum seekers in regional processing countries.[102] The government agreed to these changes and moved the necessary amendments prior to the bill's passage through the Senate on 16 May 2013.

1.74 The Australian Greens did not support passage of the bill. In a dissenting report, they stated that:

> This Bill has been heavily criticised by a wide range of legal and human rights experts who submitted to the inquiry. The Australian Greens concur

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99 The Bill is identical in effect to the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, which sought to extend the 2001 excision regime to the whole country. That Bill was opposed by the Australian Labor Party together with certain Coalition members who crossed the floor. While that Bill was passed by the House of Representatives, it was never debated in the Senate following the Senate Legal and Constitutional Legislation Committee's recommendation that the Bill not proceed.

100 See, for example, Law Council, *Submission 13*; Australian Human Rights Commission, *Submission 20*; NSW Council for Civil Liberties, *Submission 3*; Commissioner for Children and Young People, Western Australia, *Submission 12*; Humanitarian Research Partners, *Submission 19*; Office of the Commissioner for Equal Opportunity (SA), *Submission 21*; Refugee Council of Australia (RCOA), *Submission 26*; Law Institute of Victoria (LIV), *Submission 31*.

101 See, for example, NSW Council for Civil Liberties, *Submission 3*; T Penovic, Castan Centre for Human Rights, *Committee Hansard*, 31 January 2013; P Mathew, *Committee Hansard*, 31 January 2013.

102 Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012*, February 2013, para 2.41.

> with their views that this Bill is inconsistent with the spirit and purpose of the Refugee Convention to which Australia is party and undermines Australia's obligations under international law.[103]

Senate Standing Committee for the Scrutiny of Bills report on the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012

1.75 The Senate Standing Committee for the Scrutiny of Bills reported on the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 on 27 February 2013.[104]

1.76 The Scrutiny of Bills Committee noted that the bill would enable the Immigration Minister to vary or revoke an initial determination not to send a person to Nauru or Manus Island and that such decisions would not be subject to the rules of natural justice:

> Although such a declaration is conditioned on the Minister's consideration of the public interest, the revocation of a determination … that the provisions for taking an offshore entry person to a regional processing country not apply, will operate to frustrate expectations such a person may reasonably hold based on the initial determination. In such circumstances it may be thought that fairness should require that persons affected be entitled to rely on the common law rules of natural justice that would entitle them to a fair, unbiased hearing. The explanatory memorandum simply states that the rules of natural justice will be excluded, but offers no justification for the approach.[105]

1.77 In response to the Committee's concerns, the Immigration Minister provided the following justification:

> The Government is focused on creating an effective regional processing framework, which allows for the transfer of persons to designated regional processing countries for the processing of their protection claims. To discourage persons from undertaking hazardous sea voyages to Australia, the transfer process needs to be as efficient and streamlined as possible.
>
> Under current section 198AE, the Minister may exempt a person from transfer, for example, where they have a particular vulnerability that cannot be accommodated in the regional processing country at that

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103 Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012*, February 2013, at para 1.4 (Dissenting Report by the Australian Greens).

104 Senate Standing Committee for the Scrutiny of Bills, *Report No. 2 of 2013*, 27 February 2013. The Scrutiny of Bills Committee reported on the Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2011 on 22 August 2012: *Report No. 9 of 2012*, 22 August 2012.

105 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 14 of 2012*, 21 November 2012.

> particular time. Where circumstances change and it becomes possible to transfer the person, it is consistent with the objectives of the regional processing framework that this occurs quickly and efficiently, in the same way that transfers take place where a person is not exempted under section 198AE.[106]

1.78 The Committee noted the Minister's explanation but concluded that it retained concerns about the abrogation of natural justice:

> If a decision to revoke a determination [to exempt a person from transfer] is based on individual considerations (for example, a changed assessment as to whether an individual is subject to a 'particular vulnerability'), fairness may require that the affected person be given the opportunity to be heard prior to the decision being made.[107]

Parliamentary Standing Committee on Public Works inquiry into the proposed permanent regional processing centre at Manus Island

1.79 On 21 March 2013, the Parliamentary Standing Committee on Public Works (Public Works Committee) commenced an inquiry into the proposed infrastructure and upgrade works to establish a regional processing centre on Manus Island, Papua New Guinea, on referral by the Special Minister of State.

1.80 The inquiry received one submission and eleven supplementary submissions (seven of which were confidential) from the Immigration Department, and a further three submissions from other organisations. The inquiry held a public hearing and an in-camera hearing on 1 May 2013 in Melbourne. The committee tabled its report on 15 May 2013.

1.81 The report noted that the purpose of the project was to establish the capacity to process asylum seekers at permanent facilities on Manus Island.[108] The permanent facilities will replace the temporary facility currently in use and include the following facilities:

- a 600 person regional processing centre able to accommodate families and other vulnerable groups and other cohorts if required;
- health, welfare and recreational facilities;
- staff accommodation for 200; and

106 Senate Standing Committee for the Scrutiny of Bills, *Report No. 2 of 2013*, 27 February 2013, p 52.

107 Senate Standing Committee for the Scrutiny of Bills, *Report No. 2 of 2013*, 27 February 2013, p 52.

108 House Standing Committee on Public Works, *Report on the proposed permanent regional processing centre at Manus Island*, May 2013, para 8.2.

- all engineering infrastructure to support the facility.[109]

1.82 The Public Works Committee was satisfied that there was a need for the works, noting that:

> The existing temporary facility has a very limited life span, provides little amenity for transferees, and does not have the adequate infrastructure required to support the processing of claims.[110]

1.83 With regard to the upgrade of facilities in Nauru, the Public Works Committee noted:

> The facilities in Nauru were subject to an urgency motion in the House of Representatives, thus excluding them from an inquiry by the Committee. Despite this, DIAC has provided to the Committee regular updates on the progress of the works in Nauru. The Committee thanks DIAC for enabling scrutiny of the project in this manner.
>
> Given DIAC's experience in delivering these projects, and the fact that this project is based on the ones in Nauru, the Committee expects that it will also be delivered on time, on budget and fit-for-purpose.[111]

1.84 The submissions from other stakeholders, including the Australian Human Rights Commission, expressed concerns about the closed nature of the proposed facilities and recommended that the construction of the facilities should take account of the vulnerabilities and special needs of children and be informed by the Australian Human Rights Commission's guide, 'Human Rights Standards for Detention', which sets out the relevant international human rights and detention standards.[112] The Public Works Committee did not expressly refer to these submissions in its report but stated that it:

> expects DIAC to continue [to engage in consultation regarding the design of the facility] and to enable increased consultation wherever possible, particularly with the organisations that provided submissions to this inquiry.[113]

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109 House Standing Committee on Public Works, *Report on the proposed permanent regional processing centre at Manus Island*, May 2013, para 8.14.

110 House Standing Committee on Public Works, *Report on the proposed permanent regional processing centre at Manus Island*, May 2013, para 8.11.

111 House Standing Committee on Public Works*, Report on the proposed permanent regional processing centre at Manus Island*, May 2013, paras 8.36-8.37.

112 See submissions by the Australian Human Rights Commission, *Submission 2*; ChilOut - Children Out of Immigration, *Submission 3*; and Save the Children Australia, *Submission 4*.

113 House Standing Committee on Public Works, *Report on the proposed permanent regional processing centre at Manus Island*, May 2013, para 8.32.

Human Rights Issues

The committee's mandate

2.1 The committee's remit is to consider bills and legislative instruments introduced into the Parliament for compatibility with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*, as well as to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on these matters.

2.2 The Act defines human rights by reference to the rights and freedoms contained in seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- Convention on the on the Elimination of All Forms of Discrimination against Women (CEDAW);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- Convention on the Rights of the Child (CRC); and
- Convention on the Rights of Persons with Disabilities (CRPD)

2.3 In interpreting the treaties the consistent practice of the committee has been to draw on the views of human rights treaty bodies, international and comparative human rights jurisprudence and general international law sources where these are relevant and appropriate. At the same time, the committee considers that its interpretation of these rights and freedoms must have relevance within an Australian context.

Relevance of the Refugee Convention

2.4 The Refugee Convention and its Protocol[1] are not among the treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011* as treaties against which the committee is mandated to measure the human rights compatibility of bills, Acts and

1 Australia acceded to the 1951 Convention Relating to the Status of Refugees on 17 January 1954, and acceded to its 1967 Protocol on 13 December 1973.

legislative instruments. However, a number of submissions to this committee and to other Parliamentary committees which have examined the regional processing legislation have referred to the Refugee Convention, arguing that the measures are inconsistent with Australia's obligations under that treaty.[2]

2.5 The committee notes that the Refugee Convention is a specialised body of law which can inform the general guarantees of the human rights treaties (and vice versa). For example:

- the provisions of the Refugee Convention and its associated jurisprudence may provide a guide to what constitutes 'arbitrary detention' under article 9 of the ICCPR as applied to asylum seekers or refugees, who may be detained for certain purposes which may not be applicable to citizens or other non-citizens present in a State;
- the rights of refugees to work and to access education guaranteed by the Refugee Convention may be relevant to determining whether it is permissible to limit the enjoyment of the general right to work guaranteed by article 6 of the ICESCR or to limit the access to schooling of refugee children; and
- the different treatment of refugees or asylum seekers compared with other categories of persons who may have arrived in a country without immigration permission, may give rise to issues of equality and non-discrimination, which references to the rights of refugees under the Refugee Convention might help to resolve (their status and the applicable international obligation may provide an 'objective and reasonable justification' for the differential treatment and thus be permissible differentiation).

National interests and human rights

2.6 The committee recognises that under international law every State has the sovereign right to determine who may enter its territory. However, the exercise of

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2 See, for example, B Saul, *Submission 2*; Law Institute of Victoria, *Submission 4*; Refugee & Immigration Legal Centre, *Submission 5*; Australian Human Rights Commission, *Submission 8*; Amnesty International, *Submission 9*; and Refugee Council of Australia, *Submission 10*. See also submissions to the LCA Committee inquiry on the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, for example: G Appleby, A Reilly and M Stubbs, *Submission 2*; P Mathew, *Submission 6*; J McAdam, *Submission 11*; Law Council of Australia, *Submission 13*; Castan Centre for Human Rights, *Submission 17*.

These submissions generally argued that the regional processing arrangements amounted to a 'penalty' for those asylum seekers arriving by boat after 13 August 2012, contrary to article 31(1) of Refugee Convention and were also contrary to non-refoulement obligations in article 33(1) of the Refugee Convention.

this right is subject to any obligations the State accepts under international treaties (including human rights treaties) or by which it is bound under customary international law.

2.7 The committee acknowledges that the setting of immigration policies may involve judgments about the national interest. These national interest considerations may properly be taken into account in determining whether any restrictions on human rights resulting from the implementation of immigration policy are permissible. A State may derogate from some of its obligations under article 4 of the ICCPR in 'time of public emergency which threatens the life of the nation and which is officially proclaimed'. However, in the absence of a permitted derogation, it will be necessary to show that any immigration measure restricting rights pursue a legitimate goal in a rational and proportionate manner.

2.8 The goals pursued by immigration policies will generally involve the pursuit of a legitimate objective. Nonetheless, such measures must also be demonstrated to be rationally connected to the achievement of that objective and also to be a proportionate means of pursuing it, in order to be permissible under human rights law.

The nature and territorial scope of Australia's human rights obligations

2.9 In the materials before the Parliament and those submitted to the committee in relation to its examination of the human rights compatibility of the regional processing legislation, there has been much discussion of the extent of Australia's obligations under the applicable human rights treaties (and the Refugee Convention). In particular, the issue has been raised whether Australia's obligations under the applicable human rights treaties apply to the treatment of asylum seekers once they have been transferred to Manus Island and Nauru.

Australia's human rights obligations in relation to actions inside Australia

2.10 Australia's obligations under the relevant human rights treaties will apply to circumstances where asylum seekers are present on Australian territory (including Christmas Island and other offshore territories) or in Australian territorial waters. That will include:

- the period during which they are under the control of Australian customs and border control authorities in Australian maritime zones;
- when they are held in detention in Australia or released into the Australian community; and
- when they are subject to decisions to remove them from Australia that may give rise to their rights being violated outside Australia.

2.11 It is uncontested that Australia's human rights obligations will apply while a person is detained in Australia or released into the community, and to the actions taken to transfer them to another country.

Australia's human rights obligations in relation to actions outside Australia

'Effective control'

2.12 The question of how far Australia's obligations under the relevant human rights treaties extend to asylum seekers outside its territory is more complex.[3]

2.13 The UN Human Rights Committee has stated that:

3 The scope of a State party's obligations under human rights treaties extends to all those within the State's 'jurisdiction'. For instance, article 2(1) of the ICCPR requires states parties 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'.

> [A] State party must respect and ensure the rights laid down in the [ICCPR] to anyone within the power or effective control of the State Party, even if not situated within the territory of the State Party.[4]

2.14 While the outer limits of the extraterritorial applicability and relevance of a State's obligations are not yet agreed, it is now well-accepted in international jurisprudence that the human rights obligations of a State extend to persons who are outside the territory of the State but 'under the effective control' of the authorities of the State. While the applicability of a particular treaty or right may depend on the specific wording of the relevant provisions, this position has also been accepted in relation to the other UN human rights treaties.[5]

2.15 Australia's obligations under the relevant human rights treaties will therefore apply to those situations where asylum seekers are under the 'effective control' of Australian authorities outside Australian territory. If Australia has 'effective control' over asylum seekers outside Australian territory, it must treat them consistently with its human rights obligations.[6]

2.16 The government has accepted that its human rights obligations extend outside Australian territory where it exercises 'effective control'. This position was set out, in relation to the ICCPR, in Australia's formal statement to the UN Human Rights Committee in 2009:

> Australia accepts that there may be exceptional circumstances in which the rights and freedoms set out under the Covenant may be relevant beyond the territory of a State party (although notes that the jurisdictional scope of the Covenant is unsettled as a matter of international law). Although Australia believes that the obligations in the Covenant are essentially territorial in nature, Australia has taken into account the Committee's views in general comment No. 31 on the circumstances in which the Covenant may be relevant extraterritorially.

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4 UN Human Rights Committee General Comment No 31, (2004), para 10; To similar effect, the UN Committee against Torture has stated that a State party's jurisdiction 'includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law', including 'not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control', and 'must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention.' See UN Committee against Torture, General Comment No 2, (2007), para 16.

5 See generally Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, 2009).

6 See, for example, the decisions of the European Court of Human Rights in *Banković v Belgium* [2001] ECHR 890 and *Al-Skeini v United Kingdom* [2011] ECHR 1093.

> Australia believes that a high standard needs to be met before a State could be considered as effectively controlling territory abroad. It is not satisfied in all, or necessarily any, cases in which Australian officials may be operating beyond Australia's territory from time to time. The rights under the Covenant that a State party should apply beyond its territory will be informed by the particular circumstances.[7]

2.17 The government also agrees that its human rights obligations will extend to asylum seekers who are under its 'effective control' outside Australian territory.[8] It is also not contested that Australia's human rights obligations will apply, for example:

- during the period that asylum seekers are under the control of Australian customs and border control authorities after being rescued on the high seas;[9] and
- to the conduct of Australian authorities when transporting asylum seekers to offshore centres.[10]

2.18 The question of *whether* Australia is exercising 'effective control' over the asylum seekers in Nauru or on Manus Island, however, is contested. The disagreement has been as to whether asylum seekers transferred to the regional processing centres remain under the 'effective control' of Australia once they arrive in Papua New Guinea and Nauru.

2.19 The Immigration Department has maintained that asylum seekers in the regional processing centre in Manus Island and Nauru are not under the 'effective control' of Australian authorities and that Australia's obligations under the ICCPR (and other treaties) do not apply to them. The Department's view is that:

> [The] regional processing centres are a matter for the Nauruan and Papua New Guinean governments as these centres are located in their sovereign territory'.

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7 *Replies to the List of Issues (CCPR/C/AUS/Q/5) To Be Taken Up in Connection with the Consideration of the Fifth Periodic Report of the Government of Australia (CCPR/C/AUS/5)*, paras 16-17, UN Doc CCPR/C/AUS/Q/5/Add.1 (5 February 2009).

8 See, for example, DIAC, Answers to questions on notice, 30 January 2013.

9 UN Committee against Torture, *P.K. et al. v. Spain*, Communication No. 323/2007, U.N. Doc. CAT/C/41/D/323/2007, para 8.2 (2008) (rescue by Spanish ship of 'immigrants' at sea, taken to Mauretania under diplomatic agreement). The European Court of Human Rights reached a similar conclusion in relation to Somali and Ethiopian asylum seekers who were taken on board Italian ships but then refouled to Libya in violation of article 3 of the European Convention: *Hirsi Jamaa v Italy*, App 27765/09, European Court of Human Rights, judgment of 23 February 2012.

10 See, for example, DIAC, Answer to question on notice No 11, in letter dated 29 May 2013.

> It is in relation to a centre that is being run in another sovereign nation where any powers to detain, where the lawfulness of the people in Nauru or Papua New Guinea depend upon the laws of another sovereign nation. Australia does not, in fact, have the effective control that would be necessary to mean that our human rights obligations are transferred when the people are taken to Nauru or PNG.[11]

2.20 The 'effective control' test is essentially one of sufficient control and the question as to whether Australia is exercising sufficient control and authority is a question of fact and degree.[12] It is possible for Australia to be in 'effective control' of persons even if formal legal authority over those persons lies with another State.[13]

2.21 The government has agreed that the question of whether 'effective control' exists will depend on the facts in the particular circumstances. In its response to the UN Human Rights Committee set out above, the government stated:

> The rights under the [ICCPR] that a State party should apply beyond its territory will be informed by the particular circumstances. Relevant factors include the degree of authority and degree of control the State party exercises, and what would amount to reasonable and appropriate measures in those circumstances.[14]

2.22 The government's statement above also suggests that it accepts that the 'effective control' test is not predicated on a State's capacity to fulfil all of its human

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11 V Parker, First Assistant Secretary, Expert Panel Recommendations, DIAC, *Committee Hansard*, 19 December 2012, pp 41-42.

12 See, for example, *Al-Jedda v United Kingdom* [2011] ECHR 1092; and *Al-Skeini v United Kingdom* [2011] ECHR 1093. In both these cases, the European Court of Human Rights noted that whether the UK was exercising jurisdiction extra-territorially must be determined by reference to the particular facts of the case. In both cases, the Court held that the conduct fell within the jurisdiction of the UK.

13 In 'effective control' cases, a State can be held accountable for violation of rights 'of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State': see *Issa v Turkey* (Judgment of 16 November 2004); see also *Őcalan v Turkey* (Judgment 12 May 2005); and *Ilascu v Moldova & Russia* (Judgment of 08 July 2004). In *Issa*, the European Court of Human Rights said 'Accountability in such situations', 'stems from the fact that [the jurisdictional scope of the European Convention on Human Rights (which is analogous to the jurisdictional scope of the international human rights treaties)] cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.'

14 *Replies to the List of Issues (CCPR/C/AUS/Q/5) To Be Taken Up in Connection with the Consideration of the Fifth Periodic Report of the Government of Australia (CCPR/C/AUS/5)*, para 17, UN Doc CCPR/C/AUS/Q/5/Add.1 (5 February 2009).

rights obligations extra-territorially. The obligations may extend to the protection only of certain rights that are appropriate for application in the circumstances.[15]

2.23 Multiple submissions to this committee argued that Australia is likely to have 'effective control' over the asylum seekers in the regional processing centres in Nauru and on Manus Island. These submissions pointed to the level of Australia's involvement in relation to the care for, the processing of and the resettlement or achievement of a durable solution for those asylum seekers, as well as its involvement in the construction, maintenance and operation, funding, staffing and contractual arrangements for managing the facilities and providing services at the processing centres.

2.24 For example, the Refugee and Immigration Legal Centre submitted:

> While there is a lack of transparency and scrutiny in relation to the regional arrangements, it appears that Australia is exercising effective or de facto control of the people staying in regional processing countries.
>
> For example, Australia is responsible for the transfer of people from its territory to an offshore processing country; Australia is funding the arrangements; Australia's contractors manage the detention centre and provide security services; Australia's contractors provide case management and health care; and Australia is responsible for the transfers or resettlement of people from regional processing countries. UNHCR has also recently report[ed] that DIAC officials, seconded to Nauru, are currently undertaking registration interviews on Nauru.[16]

2.25 Another submission noted that:

> While processing will be done under local law and people will be detained as an exercise of PNG or Nauruan sovereignty, there are other factors which suggest that Australia does have de facto, if not de jure, control of the process. These include the engagement of Australian officials and the total financial reliance of Nauru and PNG on Australia with respect to the entire program (from establishment of the facilities to visa costs to the costs of processing and review). Even on the terms of the relevant memoranda of understanding, the ultimate resettlement obligation with

15 See, for example, *Banković v Belgium* [2001] ECHR 890 and *Al-Skeini v United Kingdom* [2011] ECHR 1093. The key criterion identified in these cases for the extraterritorial application of human rights obligations was that the measure of effective control exercised by the state should entail the capacity to secure rights guaranteed by the European Convention on Human Rights.

16 Refugee and Immigration Legal Centre, *Submission 5*, paras 3.13-3.14.

> respect to those whose refugee claims are successful remains with Australia.[17]

2.26 In evidence to this committee, the President of the Australian Human Rights Commission expressed the view that:

> My own view, as an international lawyer—and the view of the team of legal lawyers at the Australian Human Rights Commission—is that Australia is internationally responsible for the activities in relation to these asylum seekers on Nauru and Manus Island and that these are acts for, on behalf of, the Commonwealth and we therefore have a jurisdiction.[18]

2.27 While the issue of whether Australia is exercising 'effective control' over (asylum seekers in) an area outside its territory has generated a great deal of discussion, it is not the exclusive basis by which Australia may have responsibility with regard to the treatment of asylum seekers in Nauru and Manus Island.

Joint or accessory responsibility

2.28 In addition to any responsibility that may arise if Australia is considered to be in 'effective control' of transferees, Australia may also be jointly responsible with Nauru and Papua New Guinea for any violations that take place in Nauru or on Manus Island, especially where Australia is in joint control of the arrangements that are in place,[19] pursuant to the respective memoranda of understanding with Nauru and Papua New Guinea.[20]

2.29 By providing aid and assistance to Nauru or PNG, Australia may also be liable if that aid or assistance contributes to the commission of human rights breaches.[21]

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17 M Crock and H Martin, *Submission 7*, p 5. See also Human Rights Law Centre, Answer to question on notice, 19 December 2012.

18 G Triggs, President of the Australian Human Rights Commission, *Committee Hansard*, 19 December 2012, p 38.

19 See International Law Commission, *Articles on State Responsibility: Commentaries*, article 6, para 3; Chapter IV, paras 3 and 4; Permanent Court of Arbitration, *Eurotunnel Arbitration* (*Channel Tunnel Group Ltd and France-Manche SA v France and UK)* (Partial Award) (30 January 2007), paras 165-69; International Court of Justice, *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240.

20 Under each MOU a Joint Committee is to be established to oversee the 'practical arrangements to implement this MOU including issues relating to the duration of stay of Transferees.

21 See International Law Commission, *Articles on State Responsibility*, article 16, and *Second report on State responsibility by Mr James Crawford, Special Rapporteur*, UN Doc A/CN.4/498/Add.1, para 159.

2.30 The bases for these liabilities arise under the international legal principles of state responsibility as they apply to Australia's primary obligations under the applicable human rights treaties (and the Refugee Convention). These may give rise to liability, irrespective of whether Australia has 'effective control' over those asylum seekers in relation to the acts in question.

2.31 The Expert Panel's report acknowledges that the law of state responsibility is relevant to the implementation of regional processing arrangements:

> If a breach of an international obligation (such as a human rights obligation) occurs, international law prescribes rules which determine when a particular State is responsible for that breach. Key principles of state responsibility include:
>
> - A State is responsible for conduct that may be attributed to it. The basic principle is that a State will be responsible for any actions of its officials to the extent that they are acting in a government capacity.
> - The conduct of bodies which are not, or persons who are not, State organs may also be attributed to a State if, for example, the State instructs or directs or controls that conduct.
> - In addition, a State may be responsible for wrongful conduct committed by another State, where the first State knowingly aids or assists in that conduct.[22]

2.32 Various submissions to the committee agreed that even if Australia's involvement did not amount to effective control, Australia can still be responsible for actions occurring within the territorial sovereignty of Nauru and PNG because international law recognises joint and several liability.[23] For example, one submission noted that:

> Liability for breaches of international law can be both joint and several. Any State that aids or assists, directs or controls, or coerces another State to commit an internationally wrongful act is also responsible if it knows the circumstances of the wrongful act, and the act would be wrongful if that State committed it itself. Furthermore, an internationally wrongful act is attributable to a State if it is committed by a legislative, judicial or executive organ of government, or a person or entity which, although not a government organ, has nonetheless been delegated certain aspects of governmental authority (even if that person or entity exceeds the actual authority they have been given or goes against instructions). In other words, States cannot 'contract out' of their international responsibilities.

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22 *Expert Panel Report*, p 84. These categories reflect, but do not comprehensively restate, the accepted principles of State responsibility which are set out in the ILC's *Articles of State Responsibility and Commentaries.*

23 See, for example, M Crock and H Martin, *Submission 7*, p 5.

> This was recently emphasized by the Grand Chamber of the European Court of Human Rights in respect of Italy's transfer of irregular migrants to Libya, where it stated that Italy could not contract out of its international obligations via a bilateral agreement with another State [*Hirsi Jamaa v Italy* (App No 27765/09, European Court of Human Rights, Grand Chamber, 23 February 2012) para 129].[24]

2.33 The Immigration Department accepted the potential for such liability to arise but maintained that it would depend on the facts of a particular breach of human rights:

> The application of the principles of state responsibility is highly dependent on the circumstances of the alleged breach in question. In the absence of specific details of an alleged breach of human rights, it is difficult to make definitive conclusions on the operation of the doctrine of state responsibility. Notwithstanding this, the Government has sought to ensure human rights are adequately protected in the context of the regional processing arrangements.[25]

Australia's involvement in Nauru and on Manus Island

2.34 While the regional processing centres are physically located in Nauru and on Manus Island, Papua New Guinea, as discussed above, stakeholders have suggested that Australia has exercised and will continue to exercise a significant degree of control over the centres and the asylum seekers sent there.[26] The following section sets out the nature and extent of that involvement.

Funding and lease arrangements for regional processing centre sites

2.35 Australia has had significant involvement in the creation of temporary regional processing centres and the establishment of permanent centres in both Nauru and Manus Island. According to the Immigration Department, 'the processing centres are funded by the Australian government' and are 'under the control of service providers'.[27] Contracts to provide these facilities and services include contracts involving significant public expenditure: $184.3 million for Transfield for construction on Nauru; $74.9 million for the Salvation Army for welfare; $80.5 million for G4S for security; $496,000 for Maximus to look after children; $63.1 million for International Health and Medical Services for health care; $8 million for

24 J McAdam, *Submission 6*, para 8.

25 DIAC, Answer to question on notice No 18, in letter dated 29 May 2013.

26 For an overview, see Human Rights Law Centre, Answer to question on notice, pp 2–3.

27 DIAC, *Committee Hansard*, 17 December 2012, p 3.

Save the Children for care for children on Manus Island.[28] In addition, the operating expenditure for Nauru up to 30 April 2013 was $112.9 million and for Manus Island was $49.1 million.[29] This totals $573.296 million – with 795 people transferred, this equates to approximately $721,000 per asylum seeker thus far.

2.36 Australian responsibility for funding is confirmed in the memoranda of understanding between Australia and PNG and Nauru which both specify that the Australian government will bear all costs incurred under the MOUs. In relation to the MOU with PNG the parties also agreed to 'develop a package of assistance focused on Manus Province and other bilateral cooperation, which will be in addition to the current allocation of Australian development cooperation assistance to PNG'.[30]

2.37 In relation to the establishment of a permanent regional processing centre on Manus Island the Australian Government recently nominated its preferred site for the centre to the PNG Government and will lease approximately half of the site from the PNG Government for 15 years.[31] Similarly, the Australian Government has already negotiated a 20-year lease with the Nauruan Government for regional processing centre site in Nauru.[32]

Australian staff at the regional processing centres

2.38 In evidence to the committee, the Immigration Department noted that the composition of staff working at the regional processing centres currently includes some Australian public servants, while the majority are staff working for service providers contracted by the department.[33] As at 16 January 2013, 43 per cent of service provider staff working on Nauru were Nauruan citizens, while 70 per cent of

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28 M Cahill, Acting Deputy Secretary, Immigration Status Resolution Group, DIAC, before the Legal and Constitutional Affairs Legislation Committee, Senate Estimates, 28 May 2013, *Committee Hansard*, p 29.

29 M Bowles, Secretary, DIAC, before the Legal and Constitutional Affairs Legislation Committee, Senate Estimates, 28 May 2013, *Committee Hansard*, p 29.

30 Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia relating to the transfer to and assessment of persons in Nauru and related issues, dated 29 August 2012, p 3. Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Commonwealth of Australia relating to the transfer to and assessment of persons in Papua New Guinea and related issues, dated 8 September 2012, p 3.

31 Parliamentary Standing Committee on Public Works inquiry in relation to the Manus Island Regional Processing Centre Project, DIAC, *Submission 1*, p 7; and *Submission 1.3*, p 1.

32 Parliamentary Standing Committee on Public Works inquiry in relation to the Manus Island Regional Processing Centre Project, *Committee Hansard*, 1 May 2013, p 5.

33 DIAC, *Committee Hansard*, 17 December 2012, p 3.

service provider staff working on Manus Island were PNG citizens.[34] Services provided by Australian contractors are diverse and include, for example, a formal education programme at Manus Island in which Save the Children Australia teaches the Australian English as a Second Language curriculum to children at the centre.[35]

2.39 In its mission to the regional processing centre at Nauru, the UNHCR noted that there was not 'a regular presence of Nauruan Government' at the centre, while there was a 'fairly high visibility (and level of control) by Australian officers, notwithstanding messaging to the effect that responsibility for the asylum seekers had purportedly been transferred to the Government of Nauru.' The UNHCR also reported that the primary contact of the asylum seekers on Nauru has been through organisations contracted by the Immigration Department.[36]

2.40 The UNHCR noted that the Immigration Department officially coordinates the implementation of service provider contracts in Nauru and:

> appeared to be in effective control of management of the [regional processing centre]. While not housed within the perimeter of the Centre, the DIAC presence was very visible, with a number of DIAC officials in DIAC visibility attire. In addition a number of DIAC staff seconded to the Government of Nauru to undertake 'transferee' (essentially registration) interviews are present, though without identifying attire. Approval to enter the [regional processing centre] appears to be controlled by DIAC, and not the Government of Nauru.[37]

Access to the regional processing centres

2.41 An SBS journalist reported on 28 May 2013 that he had obtained permission to visit the Manus Island facilities from the PNG Prime Minister and the centre administrator but that Australian contractors providing security to the centre refused him access, citing their contracts with the Immigration Department.[38] Similar reports have been made by journalists in relation to access to the regional processing centre in Nauru.[39]

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34 DIAC, Answer to question on notice, p 2.

35 UNHCR Mission to Manus Island, Papua New Guinea, 15–17 January 2013, *Report*, p 16.

36 UNHCR Mission to the Republic of Nauru, 3–5 December 2012, *Report*, p 6.

37 UNHCR Mission to the Republic of Nauru, 3–5 December 2012, *Report*, p 8.

38 SBS, *Dateline*, 'Keep Out!', 28 May 2013, transcript available at: http://www.sbs.com.au/dateline/story/transcript/id/601696/n/Keep-Out

39 ABC, *Four Corners*, 'No Advantage', 6 May 2013, transcript available at: http://www.abc.net.au/4corners/stories/2013/04/29/3745276.htm

2.42 On 5 June 2013 the Prime Minister was asked in Parliament whether journalists were being prevented by the Immigration Department and its contractors from accessing the regional processing centre on Manus Island.[40] The Prime Minister said that 'PNG is a sovereign nation so it has the ability to control who gets visas and who enters PNG' but that the Australian Government was 'in the business of enabling there to be transparency about what is happening in detention centres'.[41]

Australian involvement in the processing of asylum claims

2.43 In evidence to the committee the Immigration Department stated that while processing of claims would be undertaken under the respective laws of PNG and Nauru, there would be 'assistance from the Australian government in terms of helping to provide capacity'.[42] Both MOUs provide that Nauru and PNG will undertake to make an assessment, or permit an assessment to be made, of transferees' claims for refugee status.[43]

2.44 The Immigration Department noted that 'the refugee status determination processes will be governed by the regional processing country's domestic legislation as opposed to Australian legislation'. However, it is not clear what level of involvement Australia has had or is having in the development of these processes. In this regard, the committee notes that the Immigration Department was able to advise that the processes under development would include claims assistance and merits review.[44] In relation to claims assistance, the Immigration Department advised that it was finalising a tender process for the provision of independent claims assistance and that the people providing the assistance 'could be Australian people or it could be international people'.[45]

2.45 As noted above, in Nauru the UNHCR reported that 'transferee interviews' to collect preliminary registration information were conducted by three DIAC officials seconded to the Government of Nauru. The UNHCR also reported that asylum seekers:

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40 Question from Mr Wilkie (Denison) to the Prime Minister, *Hansard*, House of Representatives, 5 June 2013, p 51.

41 Answer from the Prime Minister, *Hansard*, House of Representatives, 5 June 2013, p 51.

42 DIAC, *Committee Hansard*, 17 December 2012, p 3.

43 MOU between the Republic of Nauru and the Commonwealth of Australia relating to the transfer to and assessment of persons in Nauru and related issues, dated 29 August 2012, p 4. MOU between the Government of the Independent State of Papua New Guinea and the Commonwealth of Australia relating to the transfer to and assessment of persons in Papua New Guinea and related issues, dated 8 September 2012, p 5.

44 DIAC, *Committee Hansard*, 19 December 2012, pp 41–42.

45 DIAC, *Committee Hansard*, 19 December 2012, p 42.

> …are confused as to whether the Government of Australia or Nauru has ultimate responsibility for assessing their claims to international protection and seeking permanent solutions. This situation is compounded by the conflation of procedures in that previously collected information by the Government of Australia is offered to the applicant for clarification, and additional documentation submitted by an applicant is submitted through a DIAC email address.[46]

2.46 Further, the UNHCR reported that the Government of Nauru was not present at the regional processing centre at the time of their visit and had no direct involvement in the scheduling, notification and/or interviewing of the transferees (which was completed by Australian officials on behalf of Nauru). The UNHCR was, however, of the understanding that Nauruan officials from the Department of Justice and Border Control would participate in transferee interviews after 5 December 2012.[47] It is not clear from other evidence provided to the committee whether this has occurred.

2.47 In relation to Manus Island, the UNHCR reported that:

> DIAC had advised of its intention to send two officials to the Centre in the near future to begin conducting initial interviews with asylum seekers, with PNG officials attending the interviews for professional development purposes. These interviews are understood to be preliminary in nature and will not form part of a formal refugee status determination, although transcripts of the interviews will be shared with decision-makers once the formal process commences.[48]

2.48 The Immigration Department also advised the committee that if Nauru or PNG did not uphold the assurances in the MOUs 'that transferees will be treated with dignity and respect and that the relevant human rights standards are met' then it may be possible for Australia 'to take the people back'.[49]

Australian involvement in resettlement

2.49 Australia has undertaken a number of specific commitments under the MOUs, including that it 'will make all efforts to ensure' that persons transferred to PNG or Nauru 'will have left within as short a time as is reasonably necessary for the implementation' of the MOUs.

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46 UNHCR Mission to the Republic of Nauru, 3–5 December 2012, *Report*, pp 10–11.

47 UNHCR Mission to the Republic of Nauru, 3–5 December 2012, *Report*, p 11.

48 UNHCR Mission to Manus Island, Papua New Guinea, 15–17 January 2013, *Report*, p 8.

49 DIAC, *Committee Hansard*, 19 December 2012, p 44.

2.50 The MOU with PNG confirms that it is Australia's responsibility 'to arrange for the resettlement or transfer from Papua New Guinea of all persons entering Papua New Guinea under this MOU'.[50]

Joint monitoring and oversight

2.51 Both MOUs also provide for the establishment of a 'Joint Committee with responsibility for the oversight of practical arrangements required to implement this MOU including issues relating to the duration of stay of transferees.' Under the memoranda 'joint cooperation' is to be facilitated;[51] the Joint Committees must meet at least once per month and are co-chaired, in the case of Nauru 'by mutually agreed representatives of the Australian High Commission Nauru and the Republic of Nauru', and in the case of PNG 'by mutually agreed representatives of the Australian High Commission Port Moresby and the PNG Immigration and Citizenship Service'.[52]

2.52 The UNHCR stated in its report on its mission to Nauru that 'the composition of the oversight body [the Joint Committee], together with the de facto areas of control exercised by Australian officials and contractors, reinforces UNHCR's clear view that both States are equally responsible for the care, welfare and protection of all transferred persons.'[53]

2.53 Similarly, in relation to Papua New Guinea, the UNHCR concludes that:

> The terms under which transfers have taken place and will continue to take place as well as the significant de facto control exercised by Australian officials and contractors on Manus Island reinforce UNHCR's view that legal responsibility under international law for the care and protection of all transferees from Australia to PNG remains with both contracting States.[54]

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50 MOU between the Government of the Independent State of Papua New Guinea and the Commonwealth of Australia, 8 September 2012, p 4.

51 MOU between the Government of the Independent State of Papua New Guinea and the Commonwealth of Australia, 8 September 2012, clause 2; MOU between the Republic of Nauru and the Commonwealth of Australia, 29 August 2012, clause 2.

52 MOU between the Republic of Nauru and the Commonwealth of Australia, 29 August 2012, p 5. MOU between the Government of the Independent State of Papua New Guinea and the Commonwealth of Australia, 8 September 2012, p 5.

53 UNHCR Mission to the Republic of Nauru, 3–5 December 2012, *Report*, p 12.

54 UNHCR Mission to Manus Island, Papua New Guinea, 15–17 January 2013, *Report*, pp 7-8.

Committee view

2.54 The committee notes that Australia's involvement in the arrangements relating to the detention, upkeep and provision of services to persons transferred from Australia for the processing of asylum claims in Manus Island and Nauru is significant.

2.55 The committee notes that the evidence demonstrates that Australia could be viewed as exercising 'effective control' of the arrangements relating to the treatment of persons transferred to Manus Island or Nauru.

2.56 Whether or not Australia's involvement is sufficient to reach the level of 'effective control', the committee considers that the level of Australia's involvement gives rise to Australia's responsibility under international law in relation to internationally wrongful acts that may be involved in the treatment of asylum seekers in those countries. Such responsibility arises irrespective of whether Papua New Guinea or Nauru might also be jointly responsible in relation to the same acts.

2.57 The committee reaches its conclusion on the basis of the establishment in each case of a Joint Committee, the role of which is to agree on the arrangement in the two countries and oversee their implementation. The joint nature of the arrangements in each case is made clear by the provision of the two MOUs, in particular by the references to the objective of joint cooperation, the procedures for agreement on arrangements and their implementation, and the extent and nature of the financial and practical steps taken to give effect to the two MOUs.[55]

2.58 The committee considers that the nature and extent of Australian involvement in, and financial and other support for, the treatment of transferees in Manus Island and Nauru may also constitute providing aid and assistance in the commission of human rights breaches, if such acts have occurred.

55 That Australia's involvement goes beyond the membership of a joint organ (in itself enough to engage Australia's responsibility) is underlined by the provision relating to the financial support to be provided by Australia for the implementation of the MOUs.

Relevant rights

2.59 The arrangements for dealing with 'irregular maritime arrivals' engage a range of rights, including:

- the prohibition against sending a person to a country where there is a real risk that they will be subjected to torture (article 3 of the CAT and article 7 of the ICCPR) or to cruel, inhuman or degrading treatment or punishment (article 7 of the ICCPR and possibly article 16 of the CAT);
- right to humane treatment in detention (article 10 of the ICCPR);
- right to health (article 12 of the ICESCR);
- the prohibition against arbitrary detention (article 9 of the ICCPR)
- the rights of children in the CRC;
- family rights (articles 17 and 23 of the ICCPR);
- the right to work (article 6 of the ICESCR)/ adequate standard of living (article 11 of the ICESCR)/social security (article 9 of the ICESCR); and
- the right to non-discrimination (articles 2 and 26 of the ICCPR, etc).

Prohibition against torture or cruel, inhuman or degrading treatment or punishment and obligations of non-refoulement

2.60 Australia has obligations under a number of the UN human rights treaties not to send a person to a country where there is a real or substantial risk that the person may be subject to particular forms of human rights violations.[56] There is a clear obligation under article 7 of the ICCPR and article 3 of the Convention against Torture, not to send a person to a country where there is a real risk that they will be subjected to torture or cruel, inhuman or degrading treatment. Article 16 of the CAT arguably prohibits return where there is a real risk of cruel, inhuman or degrading treatment.

2.61 The obligation in these types of cases do not involve the extraterritorial application of obligations – the obligation is not to send a persons who is in Australia to a country where there is a real risk of suffering the rights violations in question.

56 See, for example: UN Human Rights Committee, *GT v Australia*, (2007), [8.1]; *ARJ v Australia*, (1997); *C v Australia*, (2002); *Kindler v Canada*, (1993), [13.1]-[13.2]; *Ng v Canada*, (1993), [14.1]-[14.2]; *Cox v Canada*, (1994), [16.1]-[16.2]; *Judge v Canada*, (2003), [10.2]-[10.7]; *Nakrash and Qifen v Sweden*, (2008), [7.3]; *Bauetdinov v Uzbekistan*, (2008), [6.3]; *Aumeeruddy-Cziffra v Mauritius*, (1990), [9.1]. See also UN Human Rights Committee, General Comment 31[80] - Nature of the General Legal Obligation Imposed on States Parties to the Covenant, (2004), [12].

Obligations also arise under article 6 of the ICCPR to not send a person to a country where they are at real risk of the death penalty or arbitrary deprivation of life.

2.62 Australia is not relieved of its human rights obligations in this regard by the receipt of assurances from the receiving country; it must ensure that processes, such as monitoring of the treatment of returnees, are put in place to ensure compliance with those assurances.

2.63 These obligations are analogous to and overlap with, but are not identical to, the obligation of non-refoulement under article 33 of the Refugee Convention which provides that 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.'

Right to humane treatment/right to health

2.64 Article 10 of the ICCPR provides that all persons in detention must be treated humanely. This provision overlaps with Article 7 of the ICCPR which prohibits torture and related forms of ill-treatment. Provision of decent accommodation is one aspect of humane treatment in detention.

2.65 Article 12 of the ICESCR recognises 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' and requires steps to be taken to achieve the full realisation of this right.

Prohibition against arbitrary detention

2.66 Article 9 of the ICCPR provides that no one may be subjected to arbitrary arrest or detention, and no one may be deprived of liberty except on such grounds and in accordance with such procedures as are established by law. Article 9 of the ICCPR applies to all deprivations of liberty and is not limited to criminal cases. Detention must not only be lawful but reasonable and necessary in all the circumstances. The principle of arbitrariness includes elements of inappropriateness, injustice and lack of predictability.

2.67 The UN Human Rights Committee has held in a number of cases, including cases brought against Australia, that prolonged mandatory detention of asylum seekers may violate the guarantee against arbitrary detention in article 9 of the ICCPR.[57]

57 See, for example, UN Human Rights Committee, *A v Australia*, Communication No 560/1993 (3 April 1997); *D and E v Australia*, Communication No 1050/2002 (9 August 2006).

2.68 In order for detention not to be arbitrary, it must be necessary in the individual case (rather than the result of a mandatory, blanket policy); subject to periodic review by an independent authority with the power to release detainees if detention cannot be objectively justified; be proportionate to the reason for the restriction; and be for the shortest time possible.

Right to work/social security/adequate standard of living

2.69 Article 6 of the ICESCR guarantees the right to work. The UN Committee on Economic, Social and Cultural Rights (CESCR) has described the right to work as 'essential for realising other human rights and . . . an inseparable and inherent part of human dignity'.[58]

2.70 The rights to social security and an adequate standard of living are protected in articles 9 and 11 of the ICESCR, respectively. The CESCR has stated that social security should be available, adequate and accessible. Adequacy means that:

> … the benefits must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care, as contained in articles 10, 11 and 12 of the [ICESCR]. States parties must also pay full respect to the principle of human dignity contained in the preamble of the Covenant, and the principle of non-discrimination, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided'.

Family rights

2.71 Articles 17 and 23 of the ICCPR protect family rights. Article 17 of the ICCPR prohibits arbitrary interference with the family, while article 23 of the ICCPR affirms the right of families to protection by 'society and the State'. In a general comment on the rights of non-citizens, the UN Human Rights Committee stated that:

> The [ICCPR] does not recognise the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.[59]

58 UN Committee on Economic, Social and Cultural Rights, General Comment No. 18 (2005), para 1. The right of refugees to work is also protected in article 17(1) of the Refugee Convention.

59 UN Human Rights Committee, General Comment 15 (1986).

Children's rights

2.72 Article 3(1) of the CRC requires that, 'in all actions concerning children ... the best interests of the child shall be a primary consideration.' The UN Committee on the Rights of the Child has stated that the best interests of the child principle requires:

> active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.[60]

2.73 The CRC also requires that:

- applications for family reunification are dealt with in a positive, humane and expeditious manner (article 10, CRC);
- unaccompanied children are provided with special protection and assistance (article 20, CRC);
- child asylum seekers receive appropriate protection and humanitarian assistance (article 22, CRC); and
- children are detained only as a measure of last resort, and for the shortest appropriate period of time (article 37(b), CRC).

Right to non-discrimination

2.74 Article 26 of the ICCPR guarantees the right to non-discrimination and equal protection of the law. It prohibits discrimination in law or in practice.[61]

2.75 Discrimination means any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of all rights and freedoms.

2.76 The grounds of prohibited discrimination are not closed, and include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The UN Human Rights Committee has not issued any specific guidance on the meaning of 'other status' but has treated it on a case by case

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60 UN Committee on the Rights of the Child, General Comment 5 (2003), para 12.

61 The right to non-discrimination is also protected in article 2(2) of the ICESCR and article 2 of the CRC, as well as in the other human rights treaties.

basis. It has nevertheless indicated that a clearly definable group of people linked by their common status is likely to fall within the category of 'other status'.[62]

2.77 A difference in treatment on prohibited grounds, however, will not be directly[63] or indirectly[64] discriminatory provided that it is (i) aimed at achieving a purpose which is legitimate; (ii) based on reasonable and objective criteria, and (iii) proportionate to the aim to be achieved.[65]

62 The UN Human Rights Committee has recognised that laws which distinguish between different categories of non-citizens engage article 26: See, for example, *Karakurt v Austria*, Communication No. 965/2000, (2002), para 8.4. See also, *General Comment No. 15: The position of aliens under the Covenant*, (1986).

63 Direct discrimination occurs where a person is subject to less favourable treatment than others in a similar situation because of a particular characteristic.

64 Indirect discrimination occurs where apparently neutral criteria are applied to make decisions but which have a disproportionate impact on persons who share a particular characteristic.

65 UN Human Rights Committee, General Comment No.18, (1989), paragraph 13.

The committee's assessment

Statement of compatibility

2.78 A key element in the committee's consideration of human rights in the legislative process is the statement of compatibility. The *Human Rights (Parliamentary Scrutiny) Act 2011* requires all bills and disallowable legislative instruments introduced into the Parliament to be accompanied by a statement of compatibility.[66]

2.79 Some of the pieces of legislation making up the package of legislation under examination by the committee were accompanied by statements of compatibility but others were not.[67] The reasons for these omissions varied.

2.80 For example, the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* did not have a statement of compatibility as the original bill was introduced into the Parliament before the *Human Rights (Parliamentary Scrutiny) Act 2011* came into force and the amendments to this bill introduced by the government in August 2012 to give effect to the Expert Panel's recommendations were not subject to the statement requirement.[68]

2.81 The instruments designating Nauru and PNG as 'regional processing countries' were not accompanied by a statement of compatibility because they were not 'disallowable legislative instruments', subject to the statement requirement.[69] For similar reasons, the instrument which removed work rights for particular classes of asylum seekers on bridging visas did not have a statement of compatibility.[70]

2.82 These omissions were criticised by various stakeholders. For example, in evidence to this committee, Father Frank Brennan said:

> I think it is troubling…that in relation to both instruments of designation of Nauru and Papua New Guinea the executive has provided you with a

66 See section 8.

67 For details, see Appendix 1.

68 Amendments to bills are not technically required to be accompanied by a statement of compatibility under section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

69 These instruments do not come within the definition of a disallowable legislative instrument under section 42 of the Legislative Instruments Act 2003 (LI Act). Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* only requires statements for legislative instruments within the meaning of section 42 of the LI Act. The committee's mandate to examine legislative instruments, however, is not tied to the section 42 definition.

70 *Migration Regulations 1994 - Specification under paragraphs 050.613A(1)(b) and 051.611A(1)(c) - Classes of Persons - November 2012*.

> statement to say that there was no need for a statement of compatibility here in this instance, because, to quote, 'Under section 44 of the Legislative Instruments Act, this instrument is not subject to disallowance' … I think it should be acknowledged that it is essential, particularly when we are going to be concerned about whether or not the conditions in offshore processing are human rights compliant, that all due process be followed by the executive in providing the necessary statements of compatibility and that there be due acknowledgement of the parliament to be properly informed in order to decide whether to disapprove or to disallow such a declaration.[71]

2.83 The Immigration Minister subsequently provided an assessment of the human rights compatibility of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*, following a request from the committee for such an assessment.[72] The letter stated that the legislation raised a number of human rights considerations, including in relation to detention, non-refoulement, family and children but 'confirm[ed] the Government's clear view that the Act complies with Australia's human rights obligations'.[73] The letter stated that the government considered it was complying with human rights obligations in practice as well:

> While the Act does not breach any of Australia's human rights obligations, as you would appreciate, the absence of inconsistency alone does not guarantee compliance with human rights standards. Rather, compliance with Australia's international obligations extends to what Australia does *in toto* by way of legislation, administration and practice. The Government considers that the actions taken under the Act to date also comply with Australia's international obligations.[74]

2.84 While the other pieces of legislation were accompanied by statements of compatibility, the statement that was provided for the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* has been criticised for its analysis of the human rights impact of extending the regional processing regime to asylum seekers arriving by boat anywhere in Australia (rather than just to

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71 F Brennan, *Committee Hansard*, 17 December 2012, p 46. See also media release by the Human Rights Law Centre: http://www.hrlc.org.au/parliamentary-joint-committee-on-human-rights-calls-on-immigration-minister-to-justify-offshore-processing.

72 Letter from the Immigration Minister, 15 November 2012: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/activity/migration/min_response.pdf.

73 Letter from the Immigration Minister, 15 November 2012, p 1.

74 Letter from the Immigration Minister, 15 November 2012, p 1.

those who arrive at offshore excised places).[75] The statement noted that Australia has human rights obligations in relation to non-refoulement, detention, families and children but suggested that the amendments did not engage any of these rights because removal arrangements already existed pursuant to *the Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*. The statement concluded that the amendments did 'not engage any human rights obligations' because extending these measures to a wider group of people did not alter the current substantive law:

> [T]he Bill does not contain or amend any existing provisions which relate to removal that already exist with the Act (as amended by the Regional Processing Act). To that extent, the provisions in the Bill only contemplate increasing the scheme to those people who arrive directly at the Australian mainland. They do not affect the substantive current operation of the Act in relation to removal or regional processing arrangements nor impact on the protections…which already exist in legislation, policies and procedures.[76]

Committee view

2.85 The committee regrets that the government did not provide Parliament with statements of compatibility for particular pieces of this legislative package. While the committee acknowledges that statements were not strictly required in those instances, the committee has consistently indicated that it would be good practice to do so, particularly where the legislation has the potential to impact on human rights.

2.86 The committee welcomes the fact that the government subsequently provided an assessment of the human rights compatibility of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*. This information, along with the information contained in the statements of compatibility for the other pieces of legislation, has assisted the committee in its examination of this package of legislation.

2.87 The committee, however, is disappointed by the inadequacy of the human rights analysis contained in the statement of compatibility for the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013*. The committee has previously expressed its expectation that where a bill or legislative instrument expands the operation of existing legislation, the relevant statement of

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75 Various submitters to the LCA Committee inquiry on the bill were critical of the statement: see, for example, P Mathew, *Submission No 6*; and Castan Centre for Human Rights, *Submission No 17*.

76 Statement of compatibility, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, pp 3-4.

compatibility should include an examination of the compatibility of the existing legislation with human rights. The committee considers that an analysis of the legal effect and practical impact of these amendments require consideration of the statutory framework of which they form part.

Framework for analysis

2.88 Most of the rights engaged by these measures (as outlined in the previous section above) are not absolute and may be subject to permissible limitations. However, the prohibition against sending a person to a country where there is a real risk that they will be subjected to torture, cruel, inhuman or degrading treatment is absolute and may not be subject to any limitations.

2.89 With regard to rights that may be subject to limitations, the inquiry into whether the limitations are permissible is three-fold:

- whether the measure is aimed at achieving a legitimate objective;
- whether there is a rational connection between the measure and the objective; and
- whether the measure is proportionate to that objective.

2.90 Restrictions which meet these three criteria will be likely to be compatible with human rights.

2.91 The committee has consistently applied this framework for analysing limitations of rights and has emphasised that the government bears the onus of demonstrating that a limitation is justifiable.[77]

Legitimate objective

2.92 A legitimate objective is one that addresses an area of public or social concern that is pressing and substantial enough to warrant limiting the right.

Preventing deaths at sea

2.93 The government has stated that the purpose of these measures is to prevent asylum seekers risking their lives on dangerous boat journeys to Australia.[78]

77 See, for example, PJCHR, *Fifth Report of 2013*: Final Report on the *Social Security Legislation Amendment (Fair Incentives to Work) Act 2012*.

According to the government, more than 1,000 asylum seekers and crew are estimated to have died at sea on boats en-route to Australia from 2001 to August 2012.[79] Of these, around 700 people have lost their lives since October 2009.[80]

2.94 The measures are based on the recommendations of the Expert Panel, which stated that:

> The loss of life on dangerous maritime voyages in search of Australia's protection has been increasing. The number of irregular maritime arrivals who have arrived in Australia in the first seven months of 2012 (7,120) has exceeded the number who arrived in total in 2011 (4,733) and 2010 (6,850). The likelihood that more people will lose their lives is high and unacceptable. These realities have changed the circumstances that Australia now faces. They are why new, comprehensive and integrated strategies for responding are needed. Those strategies need to shift the balance of Australian policies and regional arrangements to give greater hope and confidence to asylum seekers that regional arrangements will work more effectively, and to discourage more actively the use of irregular maritime voyages.[81]

2.95 Various stakeholders acknowledged that preventing the loss of lives at sea is a legitimate purpose, and is arguably supported by article 6 of the ICCPR which requires governments to take positive steps to protect the right to life.[82] Similarly, in its inquiry into extension of the regional processing regime, the Senate Legal and Constitutional Affairs Legislation Committee concluded that it 'support[ed] the intent

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78 For example, the Immigration Minister has stated that the regional processing arrangements would 'discourage irregular and dangerous maritime voyages and thereby reduce the risk of the loss of life at sea': see Statement of reasons for thinking that it is in the national interest to designate Nauru to be a regional processing country, 10 September 2012, para 13; and Statement of reasons for thinking that it is in the national interest to designate the independent state of Papua New Guinea to be a regional processing country, 9 October 2012, para 13. See also section 198AA of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* which states that the reason for enacting the law is because 'people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed'.

79 Immigration Minister, Statement of reasons, para 22 in both documents above.

80 DIAC, *Committee Hansard*, 19 December 2012, p 1.

81 Report of the Expert Panel on Asylum Seekers, August 2012, p 7.

82 See, for example, Refugee Council of Australia, *Submission 10,* para 10.1; Australian Human Rights Commission, *Submission 8*, para 39; see also, A Houston, *Committee Hansard*, 17 December 2012, p 11.

of the [measures] because 'any loss of life at sea by persons seeking asylum is simply not acceptable'.[83]

Preventing people smuggling operations

2.96 A related, ancillary objective of these measures is to discourage *irregular* maritime voyages to Australia for the purpose of claiming protection or seeking asylum, that is, to disrupt people smuggling operations:

> Australia is committed to breaking the people smugglers' business model and the trade in human misery on which the smugglers rely.[84]

2.97 In his letter to the committee relating to the compatibility of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* with human rights, the Immigration Minister similarly stated that:

> [T]hese measures seek to achieve a legitimate purpose of preventing unlawful non-citizens from travelling to Australia by irregular means.[85]

Committee view

2.98 The committee notes that these objectives are directed at pressing and substantial concerns and are therefore likely to be legitimate.

Rational connection

2.99 The key issue here is whether the measures in question are likely to be effective in achieving the objective being sought. It is not sufficient to put forward a legitimate objective if, in fact, the measure limiting the right will not make a real difference in achieving that aim. In other words, the objective might be legitimate but unless the proposed measure will actually go some way towards achieving that objective, the limitation is not likely to be permissible.

2.100 These measures have been operating since September 2012. From 1 September 2012 to 16 April 2013, there were approximately 90 estimated deaths at sea – about 0.7 percent of the total number of asylum seekers who arrived by boat

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83 Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012*, February 2013, para 2.38.

84 DIAC, '*No advantage*' brochure: http://www.immi.gov.au/managing-australias-borders/border-security/irregular-entry/no-people-smuggling/_pdf/no-advantage-brochure-english.pdf .

85 Letter from the Immigration Minister, 15 Nov 2012, p 5: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/activity/migration/min_response.pdf.

during that time. This can be contrasted with the estimated 700 deaths between October 2009 and August 2012 – roughly 2-3 % of the total number of boat arrivals for the corresponding period.[86] On one view, the reduction in deaths at sea might be attributed to success in intercepting and rendering assistance to or rescuing boats. However, it is not clear that these figures provide a sound empirical basis for drawing that conclusion.

2.101 While the deaths at sea fell soon after the new arrangements commenced, the number of boat arrivals, however, has continued to rise – it is estimated that over 18,000 people have arrived since August 2012. The Refugee Council of Australia has noted:

> Indeed, in the six months since the release of the Panel's report, the total number of asylum seekers who have arrived in Australia by boat was greater than for any previous six-month period in Australian history – and, in fact, higher than any previous annual total. Between 13 August 2012 and 11 April 2013, 14,184 asylum seekers reached Australian territory by boat, well exceeding the previous annual record of 8,092 in 2011-12.[87]

2.102 The UNHCR representative in Australia, Mr Richard Towle, has emphasised the need for a regional approach:

> [T]he best way to deal with [these] issues is to improve the quality of refugee protection and security for asylum seekers in other parts of the region, to provide them with a real option other than to take these dangerous and difficult journeys to Australia…[T]he proper and the most sensible investment is in South-East Asia. The key lies in South-East Asia, where people are coming from, buttressed by robust, fair asylum procedures in Australia…Unilateral approaches that divert refugee populations on to other countries, particularly poor and under-resourced Pacific island states, do not really deal with the root causes of the problem.[88]

2.103 The Immigration Department has acknowledged that the new 'no-advantage' arrangements have not as yet proved to be an effective disincentive and the high number of arrivals has to be considered within the broader context of refugee movements:

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86 The numbers of deaths at sea peaked from December 2011 to August 2012 (ie, the period during which these new arrangements were conceived) - it is estimated that 515 people drowned in eight reported events representing 5.2 per cent of the 9,922 boat arrivals in that period.

87 Refugee Council of Australia, *Submission 10,* para 1.7.

88 Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012*, *Committee Hansard*, 31 January 2013, pp 1, 5-6.

> Senator HANSON-YOUNG: The main pillar of this policy was promoted as 'no advantage'. … That policy is in place.
>
> Mr Bowles: It still is, Senator.
>
> Senator HANSON-YOUNG: Yet, we have not even seen a decrease; we have seen an increase of people coming.
>
> Mr Bowles: That is true. It is evident, if we have got the number of people arriving. However, we still need to remember the context in which we are living, and the context is shifting quite dramatically in this particular space. There is something like 45 million displaced people around the world, including 15 million refugees and probably close to two million asylum seekers at the moment, with the significant changes around what is happening in places like Syria. Asylum seekers have been growing in the last couple of years in particular. You have also seen impacts on that due to further civil unrest and conflict and economic conditions, quite frankly.
>
> Senator HANSON-YOUNG: So a 'no advantage' rule is not really going to work to deter those people from seeking safety, is it?
>
> Mr Bowles: It is one of the measures that we believe will have an impact in the longer term. We also must understand that we are operating in a global context at the moment.[89]

2.104 The Immigration Department noted that the government was still in the process of implementing the suite of measures recommended by the Expert Panel and that the actual effect of some of those measures, such as the increase in Australia's humanitarian intake, would take some time to realise:

> The humanitarian increase is part of a suite of measures under the Expert Panel on Asylum Seekers. The greatest thing is to confirm, by the lived experience, to people who are coming irregularly that there is another mechanism for them to get here. Let us not forget that this is the first year that this program has operated in this way with this number. Once we get through this—and we are confident that we will reach the 20,000 target this year, with significant increases of people, particularly out of the Middle East region—we will actually have an impact. But a lot of this is about the lived experience, and people believing that it will happen. Clearly, we are nine months into a program. Actually it is less than nine months because this was only announced in August and, by the time we ramped it up, it is probably about six months old.[90]

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89 Senate Legal and Constitutional Affairs Legislation Committee, Senate Estimates, 27 May 2013, *Committee Hansard*, p 23.

90 M Bowles, Secretary, DIAC, before the Senate Legal and Constitutional Affairs Legislation Committee, Senate Estimates, 27 May 2013, *Committee Hansard*, p 23.

Committee view

2.105 The committee notes that the increase in boat arrivals since the implementation of these measures may cast some doubt over their effectiveness in discouraging asylum seekers from undertaking irregular maritime travel. However, the committee acknowledges that it may be too early to conclusively determine these matters as complementary initiatives such as the increase in Australia's humanitarian program intake may take some time to have an effect.

Proportionality

2.106 Proportionality requires that even if the objective of the limitation is of sufficient importance and the measures in question are rationally connected to the objective, it may still not be justified, because of the severity of the effects of the measure on individuals or groups. The inclusion of adequate safeguards will be a key factor in determining whether the measures are proportionate, including whether there are procedures for monitoring the operation and impact of the measures, and avenues by which a person may seek review of an adverse impact.

2.107 The following discussion sets out the effect of the measures as they apply to:

- people subject to the new arrangements who remain in Australia;
- the transfer of people from Australia to Nauru or Manus Island; and
- people subject to the new arrangements who are in Nauru or onManus Island.

People subject to the new arrangements who remain in Australia

2.108 As noted above, a large number of asylum seekers who have arrived in Australia by boat since 13 August 2012 have not been transferred to Nauru or Manus Island and currently remain in Australia.

2.109 The majority of this cohort (estimated at being over 8,000 people) is currently in detention either on Christmas Island or on the Australian mainland.

2.110 It is estimated that an additional 7,000 people from the post-13 August cohort have been given bridging visas and are permitted to live in the community while their claims for protection are assessed. As at 24 May 2013, this included 295 people in family groups with children aged 16 years and under.

2.111 Those asylum seekers who remain in Australia are subject to the 'no advantage' principle in that:

- they will not be issued with a permanent protection visa if found to be a refugee 'until such time that they would have been resettled in Australia after being processed in our region';

- they remain liable to transfer to a regional processing country at any point unless and until they are granted a permanent protection visa;
- those who are determined to be refugees and who are granted a protection visa will only be able to bring their families to Australia through the regular family stream of the Migration Program, and not under the Humanitarian Program;
- those who are released on bridging visas while their protection claims are being assessed and who remain on bridging visas after their refugee status has been determined 'will have no work rights and … receive only basic accommodation assistance, and limited financial support'; and
- their bridging visa will lapse if they travel out of Australia and they will not be permitted to re-enter Australia or have their protection claims assessed.[91]

2.112 The Refugee Review Tribunal has advised that none of this caseload has come before the tribunal and 'no formal announcement has been made as to what role, if any, the tribunal might play in relation to arrivals post 13 August [2012]'.[92] If valid applications for a protection visa will not be allowed until the end of the 'no advantage' period, it seems unlikely that applicants will have access to the tribunal during this time.

2.113 The key human rights issues that arise in relation to asylum seekers subject to the new arrangements who remain in Australia relate to the right to work and the right to an adequate standard of living, family and children's rights, and the prohibition against arbitrary detention.

Arbitrary detention

2.114 The government's position is that the detention of individuals requesting protection is neither unlawful nor arbitrary per se under international law.[93] However, the government accepts that continuing detention without proper justification may become arbitrary after a certain period of time. The determining

91 DIAC, 'Bridging Visas – Information for people who arrived by boat', tabled on 28 May 2013 (item 7), Senate Legal and Constitutional Affairs Legislation Committee, Senate Estimates, 27-28 May 2013.

92 K Ransome, Principal Member, Migration Review Tribunal and Refugee Review Tribunal, before the Senate Legal and Constitutional Affairs Legislation Committee, Senate Estimates, 27 May 2013, *Committee Hansard*, p 9.

93 See letter from the Immigration Minister to the committee, 15 Nov 2012, p 4. See also, DIAC, Answer to question on notice No 21, in letter dated 29 May 2013.

factor is not the length of detention, but whether the grounds for the detention are justifiable.[94]

2.115 The Secretary of the Immigration Department has said that under the current policy, Australia holds asylum seekers in detention only as long as it takes to conduct health and security checks.[95] But he also confirmed that the Department has not commenced processing the protection claims of arrivals post 13 August 2012:

> With regard to processing post 13 August people, we have not got into the refugee status determination process. We are still in the interim phases around entry interviews and the like with that cohort. We expect to be starting actual processing around RSD very shortly.[96]

2.116 The Secretary said the government hoped to begin processing people on Christmas Island and on the mainland soon but did not clarify when, or how, that was to occur.[97]

2.117 Various submissions to the committee have considered that the 'no-advantage' principle would lead to asylum seekers being detained indefinitely, contrary to article 9 of the ICCPR:

> Many people are actually being released into the community now from detention. But were they to be held, as they have been in the past, in indefinite detention, our key submission would be that [it is] unjustifiable and unlawful. It does not take away from this fact: it would be unjustifiable and unlawful … to detain someone indefinitely in those circumstances. … The no-advantage concept is driven by a deterrence imperative which does not have a particular connection to that individual but rather is designed to stop others coming; I think that is clear. If we accept that, then it follows that one of the key purposes of the policy—and, indeed, the detention—is punitive. And detention which is punitive of an innocent person seeking asylum is prohibited under international law. It is unlawful.[98]

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94 See letter from the Immigration Minister to the committee, 15 Nov 2012, p 4. See also, DIAC, Answer to question on notice No 21, in letter dated 29 May 2013.

95 M Bowles, Secretary, DIAC, before the Senate Legal and Constitutional Affairs Legislation Committee, Senate Estimates, 27 May 2013, *Committee Hansard*, p 21.

96 M Bowles, Secretary, DIAC, before the Senate Legal and Constitutional Affairs Legislation Committee, Senate Estimates, 27 May 2013, *Committee Hansard*, p 9.

97 M Bowles, Secretary, DIAC, before the Senate Legal and Constitutional Affairs Legislation Committee, Senate Estimates, 27 May 2013, *Committee Hansard*, p 9.

98 D Manne, RILC, *Committee Hansard*, 19 December 2012, p 32. See also Australian Human Rights Commission, *Submission 8*, pp 32-37.

Right to work, right to social security and the right to an adequate standard of living

2.118 For those released into the community, the government has stated that '[c]onsistent with 'no advantage', people from this cohort going onto bridging visas will have no work rights and will receive only basic accommodation assistance, and limited financial support.'[99] The prohibition on the right to work will also apply to a person who has been assessed to be a refugee but remains on a bridging visa:

> So some people who arrived in Australia after 13 August will be processed in Australia and processed in the community, but will remain on bridging visas, even after they are regarded, through the process, as refugees.[100]

2.119 The decision to release asylum seekers into the community on bridging visas has been welcomed by the Australian Human Rights Commission as a 'humane and legally appropriate response to the growing number of detainees in Australian facilities'.[101] However, the Commission has expressed concern that denying this particular group of asylum seekers the right to work, pursuant to the 'no advantage' policy, is likely to breach provisions of the ICESCR:

> In other contexts, UNHCR has recommended that, at most, asylum seekers might be denied, on a non-discriminatory basis, access to the labour market for no longer than six months. The Commission considers that the regime of forced unemployment for a prolonged period of years may fail the 'necessary and proportionate' test for legitimate limits on asylum seekers' rights.[102]

2.120 The government did not provide any assessment of the human rights compatibility of these measures when they were introduced.[103] However, in response to a question on notice, the Immigration Department provided the following explanation:

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99 Media release by Minister Bowen, 'No advantage onshore for boat arrivals', 21 November 2012, available at: http://www.minister.immi.gov.au/media/cb/2012/cb191883.htm. This is likely to be support under the Asylum Seeker Assistance Scheme (ASAS) which provides basic living expenses, equivalent to 89 per cent of the Centrelink Special Benefit allowance (usually the same rate as Newstart) and general healthcare through Medicare..

100 See interview by Minister Bowen on 22 November 2012, available at: http://www.minister.immi.gov.au/media/cb/2012/cb191923.htm. This position was also confirmed by DIAC in answer to question on notice No 26, in letter dated 29 May 2013: 'IMAs who arrive on and after 13 August 2012 and who are granted a substantive visa will be allowed to work'.

101 Australian Human Rights Commission, *Submission 8*, p 7.

102 Australian Human Rights Commission, *Submission 8*, p 7.

103 *Migration Regulations 1994 - Specification under paragraphs 050.613A(1)(b) and 051.611A(1)(c) - Classes of Persons - November 2012*.

> [T]he right to work may be limited where such limitations are provided for by legislation, necessary to achieve the desired purpose and proportionate to the need on which the limitation is predicated.
>
> Asylum seekers who are subject to the post-13 August 2012 arrangements who do not have permission to work in Australia will have access to alternative support services, including Medicare, and income support payments through the Community Assistance Support (CAS) or Asylum Seeker Assistance Scheme (ASAS) programs (which is capped at 89% of Centrelink Special Benefit [equivalent to Newstart Allowance]
>
> The department considers the [bridging visa] measures to be a necessary element of a package of measures designed to achieve the legitimate aim of discouraging asylum seekers from making the dangerous journey to Australia by boat. Financial support will be provided by the Australian Government to asylum seekers to provide appropriate support and care while they wait for their claims for protection to be assessed.[104]

2.121 The restrictions on work rights do not appear to stem from any recommendations of the Expert Panel. A member of the panel, Paris Aristotle, for example, has described the work ban as inconsistent with the 'no advantage' principle.[105]

2.122 The evidence suggests that many asylum seekers on bridging visas face poverty and homelessness and are dependent on community services for their basic subsistence.[106] Charities have said they are being forced to bear the cost of caring for asylum seekers in the community, with many unable to pay for rent, essential medication, utilities and food.[107]

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104 DIAC, Answer to question on notice No 28.

105 See, Sydney Morning Herald, 'Backlash forces retreat on refugee work rights', 27 November 2012: http://www.smh.com.au/opinion/political-news/backlash-forces-retreat-on-refugee-work-rights-20121126-2a3wq.html

106 See for example, The Age, ' Accidental underclass', 31 May 2013: http://www.theage.com.au/national/accidental-underclass-20130531-2nhek.html; See also media release by the Asylum Seeker Resource Centre, along with a statement signed by over 1300 people including former Prime Minister Malcolm Fraser and Professor Patrick Mc Gorry, and endorsed by 60 not for profit organisations, businesses and community groups: http://www.asrc.org.au/media/documents/media-release-right-work.pdf. For a description of previous experience with bridging visas, see Australian Human Rights Commission, Factsheet: The Impact of Bridging Visa Restrictions on Human Rights (June 2008): http://www.hreoc.gov.au/Human_Rights/immigration/bridging_visas_factsheet.html.

107 See, for example, Sydney Morning Herald, ' No-benefit policy puts 20,000 in oblivion', 28 May 2013: http://www.smh.com.au/opinion/political-news/nobenefit-policy-puts-20000-in-oblivion-20130527-2n7kd.html.

2.123 As the committee has previously noted, human rights concerns will arise if the total support package available to disadvantaged individuals is not sufficient to satisfy minimum essential levels of social security as guaranteed in article 9 of the ICESCR and the minimum requirements of the right to an adequate standard of living in Australia as guaranteed in article 11 of the ICESCR.[108]

2.124 Human rights case law has also established that where basic benefits are evidently insufficient with regard to the actual needs of those concerned, and combined with restrictions on the right to work, such measures may be inconsistent with the prohibition against degrading treatment in article 7 of the ICCPR.[109] For example, the House of Lords in the United Kingdom has found that treatment is inhuman or degrading if an asylum seeker:

> ... with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life'.[110]

Family and children's rights

2.125 Irregular maritime arrivals after 13 August 2012 will not have the right to sponsor family members under the Humanitarian Program and will have to seek family reunion through the family stream of the migration program.[111] To accommodate the expected increase in demand for visas in the family migration stream the government announced it would increase the number of family stream

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108 See, for example, PJCHR, *Fifth Report of 2013*: Final Report on the *Social Security Legislation Amendment (Fair Incentives to Work) Act 2012*.

109 See for example, *Secretary of State for the Home Department v Limbuela* [2004] EWCA Civ 540 and *R v Secretary of State for the Home Department, ex parte Adam* [2005] UKHL 66. In *Limbuela*, the court held that the removal of subsistence support from asylum seekers resulting in their destitution was a breach of their right not to be subjected to inhuman or degrading treatment under article 3 of the European Convention on Human Rights (equivalent to article 7 of the ICCPR). See also https://www.bundesverfassungsgericht.de/en/decisions/ls20120718_1bvl001010en.html

110 *R v Secretary of State for the Home Department, ex parte Adam* [2005] UKHL 66.

111 *Migration Amendment Regulation 2012 (No. 5)*. The Expert Panel recommended that irregular maritime arrivals should only be eligible to sponsor family within the family stream of the Migration Program and not through the Humanitarian Program. This change was proposed by the Panel to relieve backlogs and delays in the Humanitarian Program that 'could exceed twenty years' due to the increase in boat arrivals. It was also designed to discourage families from sending single adult males and unaccompanied minors who then go on to apply for family reunion.

places by 4000 per year which will be quarantined specifically for humanitarian entrants (including irregular maritime arrivals).[112]

2.126 While refugee advocates have welcomed the increase in family reunion options for humanitarian entrants, they have expressed concerns that the strict eligibility requirements and high application costs under the migration program will effectively prevent access to family reunion for most irregular maritime arrivals.[113] The statement of compatibility for these amendments acknowledged that:

> As refugees are unable to return to their country of origin, if family reunification is not available there is the potential that some refugees may be permanently separated from their family...[and] there may be cases where, as a consequence of the amendment and ineligibility for other visas, family reunion will not be possible.[114]

2.127 Although stating that refugees are in a unique position of not being able to return to their home country, the statement, nevertheless, goes on to conclude that the changes are justifiable because Australian citizens and permanent residents are subject to the same requirements for family reunion:

> Australia considers that changes to family reunification do not amount to a separation of the family as there has been no positive action on the part of Australia to separate the family. An [irregular maritime arrival] becomes separated from their family when they choose to travel to Australia without their family. To this end, Australia does not consider that Articles 17 and 23 [of the ICCPR] are engaged. Even if Articles 17 and 23 were engaged, the change does not seek to remove the ability of [irregular maritime arrivals] in Australia to achieve family reunification; it simply places [them] on an equal footing with all other Australian citizens and permanent residents wanting their family to join them in Australia.

2.128 The statement of compatibility also acknowledged that for unaccompanied minors wanting to sponsor their parents under the family migration stream, eligibility requirements may mean that family reunion is no longer possible. The statement

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112 Media release by the Immigration Minister,' Government implements Expert Panel's family reunion recommendation', 22 September 2012.

113 Under the previous arrangements, family members of irregular maritime arrivals were considered to automatically meet the 'compelling reasons' criterion of the subclass 202 Global Special Humanitarian Visa, but that concession has now been removed. All applications will also now be given lower processing priorities. There is no application fee in the Humanitarian Program. The application fee for a partner visa is $2680 and most child visas are $2060 depending on the visa subclass. Humanitarian Program visa holders are eligible for support services under the Humanitarian Settlement Services (HSS) program but Family Migration visa holders are not.

114 Statement of compatibility for the *Migration Amendment Regulation 2012 (No. 5)*, pp 2-3.

explained that 'family reunion prospects for [unaccompanied minors] are likely to become more difficult with the proposed changes' because:

> unlike adult proposers of partners or children, [unaccompanied minors] will not have ready access to family reunion through the Family Migration stream. This is because Parent visa applications will be subject to either long visa processing times or a significant Visa Application Charge, depending on which subclass of visa is applied for. In addition, applications for family reunion under the Parent visa stream must meet eligibility requirements such as the balance of family test which requires that the majority of the parent's children reside permanently and lawfully in Australia rather than in any country overseas. The test is intended to ensure that the limited number of parent places available go to those who have the strongest connection with Australia.[115]

2.129 The statement of compatibility noted that article 10 of the CRC requires applications for family reunification made by minors or their parents to be treated in a positive, humane and expeditious manner but justified these restrictions on the following basis:

> [The] considerable limitations on the family reunification options available to [unaccompanied minors] … exist for the legitimate purpose of maintaining the integrity of Australia's migration program and deterring minors from risking their lives by travelling to Australia by irregular means in order to sponsor their family to Australia. The Australian Government will not provide a separate pathway to family reunification that will allow people smugglers to exploit children and encourage them to risk their lives on dangerous boat journeys. Creating a priority channel and/or an exemption from the balance of family test in the Parent visa stream of the Migration Program would be counter to achieving this policy goal by recreating the incentive for children to be used as 'anchors' for their family to migrate to Australia. As such, to the extent that the rights under Article 10 are limited by this Legislative Instrument, Australia considers that these limitations are necessary, reasonable and proportionate.[116]

2.130 The Immigration Department has previously acknowledged that more families began to arrive by boat due to the lack of family reunion options under the former Temporary Protection Visa (TPV) regime.[117]

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115 Statement of compatibility for the *Migration Amendment Regulation 2012 (No. 5)*, p 3.

116 Statement of compatibility for the *Migration Amendment Regulation 2012 (No. 5)*, p 4.

117 See A Metcalfe (Secretary, DIAC), Senate Legal and Constitutional Affairs Legislation Committee, Supplementary Budget Estimates 2011–12, 17 October 2011, pp 35-36: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2Fc41d33f3-455d-4f98-ba56-42dc68511fc3%2F0002%22

2.131 The Australian Human Rights Commission has expressed concern that the changes may be inconsistent with Australia's obligations under article 23 of the ICCPR and recommends that the *Migration Amendment Regulation 2012 (No. 5)* be amended to ensure greater access to family reunion for unaccompanied minors arriving by boat after 13 August 2012.[118]

Transfer of persons from Australia to Nauru or Manus Island

2.132 As discussed above, under the new regional processing arrangements all irregular maritime arrivals who arrive after 13 August 2012 must be transferred to a regional processing country to have their protection claims assessed unless they are granted an exemption by the Immigration Minister.

2.133 Various submissions to the committee emphasised that Australia has international obligations to ensure that:

- it does not send asylum seekers to countries where they are at risk of refoulement;[119] and
- it does not knowingly send asylum seekers to conditions which do not meet minimum human rights guarantees.[120]

2.134 These obligations relate to the right of non-refoulement and the prohibition against torture, cruel, inhuman and degrading treatment, which are absolute rights and may not be subject to any limitation.

2.135 In his letter to this committee regarding the compatibility of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*, the Immigration Minister agreed that Australia had obligations under articles 6 and 7 of the ICCPR and article 3 of the CAT not to send a person to a country where they are at real risk of the death penalty, arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment; or to a country which would send the person to another country where they would face such a risk.

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118 Australian Human Rights Commission, *Submission 8*, p 9.

119 Including, for example, because of inadequate refugee processing systems which cannot adequately assess protection claims.

120 See, for example, J McAdam, *Submission 6*, p 7. Professor McAdam noted that the European Court of Human Rights found that Belgium violated its non-refoulement obligations by returning an asylum seeker to Greece, because it 'knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment.' The conditions of detention in Greece 'were well known before the transfer of the applicant and were freely ascertainable from a wide number of sources': *MSS v Belgium and Greece*, [367].

2.136 The concerns raised by stakeholders primarily relate to:

- the process for designating a country as a 'regional processing country';
- the lack of human rights safeguards in relation to decisions to transfer asylum seekers; and
- the inability of the currently designated countries (Nauru and Papua New Guinea) to ensure sufficient human rights guarantees.

The designation process

2.137 Stakeholders are concerned that the following aspects of the designation process do not adequately reflect Australia's obligations under articles 6 and 7 of the ICCPR and article 3 of the CAT:

- The only condition which must be met if the Immigration Minister is to designate a country for regional processing is that he or she believes it is in the national interest to do so. In considering the national interest, the Minister must have regard to whether the designated country has provided assurances (which need not be legally binding) that it will comply with the principle of non-refoulement under the Refugee Convention and allow access to refugee status determination procedures.

- The Immigration Minister is not required to consider any other human rights criteria and the designated country need not provide any assurances that asylum seekers' claims will be considered against the non-refoulement obligations under human rights law.[121] Concerns have been expressed that this automatically heightens the risk of refoulement on account of arbitrary deprivation of life or the infliction of torture, or cruel, inhuman or degrading treatment or punishment.[122]

2.138 The compatibility letter from the Immigration Minister notes that while the only condition for designating a 'regional processing country' is for the Minister to think that it is in the national interest to do so (which includes having regard to the

121 In his statement of reasons for designating Nauru and PNG as regional processing centres, the Immigration Minister stated that 'even if the designation of [Nauru/PNG] to be a regional processing country is inconsistent with Australia's international obligations, I nevertheless think that it is in the national interest to designate [Nauru/PNG] to be a regional processing country.'

122 J McAdam, *Submission 6*, p 7. Professor McAdam points out that human rights case law has established that ''[i]t is a matter for the State carrying out the return to ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed to his country of origin without an assessment of the risks faced', see *Hirsi Jamaa v Italy* (2012).

non-refoulement obligations under the Refugee Convention), the Minister nevertheless has the discretion to take account of other matters which the Minister thinks is in the national interest.[123] The letter suggests that this could include whether the country has given assurances with regard to non-refoulement obligations under articles 6 and 7 of the ICCPR and article 3 of the CAT.[124]

2.139 The compatibility letter further argues that the legislation provides the Minister with the discretion to exempt individuals from being transferred if it is in the public interest to do,[125] and that this power could be exercised should issues arise in relation to obligations under the CAT or the ICCPR.[126]

2.140 In its submission to this committee, the Australian Human Rights Commission expressed concern about the discretionary nature of human rights considerations in the designation process:

> [T]he requirements for a designation of a 'regional processing country', as well as the actual designations and supporting documentation, appear to intend to make compliance with Australia's international human rights obligations discretionary. Under s 198AB of the Migration Act the Minister is not required to consider Australia's obligations under international human rights treaties in designating a country. In practice, the two countries which the Minister has designated are countries about which the UNHCR has expressed significant concerns, in terms of the safeguards in place in those countries to prevent violations of the rights of asylum seekers who are sent there.[127]

2.141 The Commission noted that:

> a blanket statement that Australia's 'national interest' may justify the limitation of human rights goes beyond the circumstances in which the rights set out in the treaties to which Australia is a party may be limited. … [A]rticle 4 of the ICCPR contemplates that some (but not all) rights may be … 'derogated from' in a 'time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'. ... The Australian Government has made no suggestion to that effect, nor has

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123 *Migration Act 1958*, s 198AB(3), as amended by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*. See letter from the Immigration Minister, 15 Nov 2012, p 4: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/activity/migration/min_response.pdf.

124 Letter from the Immigration Minister, 15 Nov 2012, p 4.

125 *Migration Act 1958*, *s* 198AD, as amended by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012.*

126 Letter from the Immigration Minister, 15 Nov 2012, p 4.

127 Australian Human Rights Commission, *Submission 8*, para 79.

> there been any official proclamation or notification to the Secretary-General of the United Nations that Australia intends to derogate from its obligations under any human rights instruments.[128]

Decisions to transfer asylum seekers

2.142 As noted above, the legislation provides the Immigration Minister with discretion to exempt a person from transfer to a third country for processing if the Minister thinks it is in the public interest to do so.[129] The Minister also has the power to revoke or vary a previous determination to exempt a person, if he or she considers it is in the public interest to do so.[130]

2.143 Neither of these powers is subject to the rules of natural justice,[131] meaning that a person does not have a right to make representations to the Minister or to be provided with information before the decision is made or to be given the reasons for the decision. Ministerial guidelines issued by the Immigration Minister state that:

> A request for the exercise of my public interest power under section 198AE can only be made by the department.
>
> I will not consider a request to exercise my public interest power under section 198AE from a person or persons other than an officer of my department.[132]

2.144 Several stakeholders have expressed concerns that asylum seekers may be involuntarily transferred to a regional processing country with no right of appeal and with insufficient safeguards to protect their rights.

2.145 The Australian Human Rights Commission observed that:

> The power to reverse an exemption has the consequence that an asylum seeker who has been exempted and is living in the Australian community whilst having their claim processed could at any point be 'unexempted' and transferred to a 'regional processing' country.

2.146 The Law Council remarked on the potential impact on individuals subject to such determinations:

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128 Australian Human Rights Commission, *Submission 8*, para 81.

129 *Migration Act 1958*, s 198AE(1), as amended by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2013*.

130 *Migration Act 1958*, s 198AE(1A), inserted by item 31 of schedule 1 of the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013.*

131 *Migration Act 1958*, s 198AE(3).

132 Ministerial Guidelines for Consideration of Cases under Section 198AE of the *Migration Act 1958*, in use since 12 September 2012, para s 25-26 http://www.immi.gov.au/visas/humanitarian/_pdf/s198ae-guidelines.pdf.

> The effect of these amendments is to invest the Minister with a broad power to reverse a decision that prevents a person from being transferred offshore – without requiring that this decision be made in accordance with the rules of natural justice. Any individual subject to these provisions will be placed in a precarious situation where decisions that could have a highly significant impact on their visa status and well-being can be made and changed without regard to basic principles of fairness and justice.[133]

2.147 Before a decision is made to transfer a person, the Immigration Department conducts a pre-transfer assessment to determine whether it is 'reasonably practical' for the person to be transferred.[134] In determining if it is 'reasonably practicable' to transfer a person, the following considerations may be taken into account:

- the physical or mental health of the person to be taken;
- special needs that are identified, including torture and trauma history;
- their fitness to travel assessment;
- vulnerabilities the person may have, including their age;
- the resources and facilities available in Nauru or Manus Island to receive the person and to respond to any health issues, vulnerabilities or special needs they may present (now and in the future);
- capacity to accommodate additional persons at any centre in Nauru or Manus Island;
- whether the person has a spouse or partner or dependent child in Australia.[135]

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133 LCA Committee inquiry on the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, *Submission 13*, p 8. As discussed above, the Senate Standing Committee for the Scrutiny of Bills expressed similar concerns, see: *Alert Digest No. 14 of 2012*, 21 November 2012.

134 DIAC has put in place a Pre-Transfer Assessment process in order to determine whether: (a) the person falls within any of the classes of persons in relation to which the Minister has exercised his power to determine that section 198AD does not apply; (b) the case is one that the Minister has indicated in his section 198AE guidelines should be referred to him to consider whether he will exercise his section 198AE power; or (c) there are specific personal circumstances or special needs that mean it is not reasonably practicable to transfer the person to a regional processing country at this time. See DIAC, Guidelines for Assessment of Persons Prior to Transfer Pursuant to section 198AD(2) of the *Migration Act 1958*, in use since 12 September 2012: http://www.immi.gov.au/visas/humanitarian/_pdf/s198ad-2-guidelines.pdf

135 DIAC, Guidelines for Assessment of Persons Prior to Transfer Pursuant to section 198AD(2) of the Migration Act 1958, 12 September 2012, p 5.

2.148 In the case of children, a Best Interest Assessment (BIA) is also undertaken as part of the pre-transfer assessment.

2.149 UNHCR has reviewed a sample of pre-transfer assessments of asylum seekers transferred from Australia to Nauru and Manus Island, and is concerned:

> by the rigid proforma template which appears to restrict the scope of questioning and limit the assessment to a record of comments rather than any analysis of needs.[136]

2.150 According to the UNHCR, the Pre-Transfer Assessment Forms contained no evidence of the interview, or any external information intended to inform the assessment, such as the International Health and Medical Services (IHMS) health assessment:

> [T]he sample reveals that the Assessment Forms do not contain any substantive analysis of the factors affecting the reasonable practicability of transfer to the [regional processing centre], notably the physical and mental characteristics (physical or mental health of the persons, special needs identified, fitness to travel, and other vulnerabilities) or logistical considerations (resources and facilities available in the RPC to accommodate the needs of the person and physical capacity to accommodate the person). UNHCR is concerned that potential survivors of torture and trauma may not be identified until after transfer, at which point the quality and availability of support services is significantly diminished.[137]

2.151 In the case of children, the UNHCR considered that a BIA should result in an individualised assessment of the situation of the child and include recommendations on protection and care interventions.[138] In relation to decisions to transfer children to Manus Island, the UNCHR stated:

> In view of UNHCR's findings in this Report, including that the legal framework and detention environment at the Centre on Manus Island fall short of international standards of protection, it is difficult to see how the 'best interests' of transferee children could have been appropriately

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136 UNHCR, Report of the UNHCR Mission to the Republic of Nauru, 3-5 December 2012, para 50: http://unhcr.org.au/unhcr/images/2012-12-14%20nauru%20monitoring%20report%20final.pdf; and UNHCR, Report of the UNHCR Mission to Manus Island, Papua New Guinea, 15-17 January 2013, para 114 http://unhcr.org.au/unhcr/images/2013-02-04%20Manus%20Island%20Report%20Final.pdf.

137 UNHCR, Report of the UNHCR Mission to the Republic of Nauru, 3-5 December 2012, para 50; Report of the UNHCR Mission to Manus Island, Papua New Guinea, 15-17 January 2013, para 114.

138 UNHCR, Manus Island report, para 115.

> weighed, and led to a conclusion that adequate and appropriate levels of care and support are currently available on the island.[139]

2.152 The UNHCR called for the review of pre-transfer assessments in Australia to ensure that these fully take into account vulnerabilities of individuals who may have suffered torture or trauma and include a realistic assessment of the quality of support and capacities of service providers at the centres.[140]

2.153 The shortcomings identified by the UNHCR in the pre-transfer assessment processes are heightened by the discretionary and non-compellable nature of the Minister's powers to make or vary exemptions to transfer people. The Law Council of Australia recommended that the Immigration Minister should be required to:

> …have regard to the full range of Australia's human rights obligations and [be] bound by the rules of natural justice when making decisions under section 198AE to exempt certain people from being transferred to a regional processing country, or to vary or change such an exemption, and to allow for judicial review of such decisions.[141]

Capacity for Nauru and PNG to guarantee human rights

2.154 For the purposes of meeting Australia's international obligations, Nauru and PNG must have relevant legal obligations under international law or domestic law, and they must be able to implement those obligations in practice.

2.155 With regard to Nauru, Professor McAdam submitted that:

> Nauru acceded to the Refugee Convention in 2011 but has only recently sought to establish national refugee status determination procedures. As such, there is no expertise within that country for determining refugee claims. As the UN High Commissioner for Refugees wrote to the Immigration Minister, there is no 'experience or expertise to undertake the tasks of processing and protecting refugees on the scale and complexity of the arrangement under consideration in Nauru.' Furthermore, Nauru is not a party to the ICESCR, ICCPR or CAT. This means that it has not agreed to respect the human rights set out in those instruments, including non-refoulement obligations based on the right to life and the right to be free from torture or cruel, inhuman or degrading treatment or punishment.[142]

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139 UNHCR, Manus Island report, para 116.

140 UNHCR, Nauru report, p 62; UNHCR, Manus Island report, p 22.

141 LCA Committee inquiry, Law Council of Australia, *Submission 13*, p 7.

142 J McAdam, *Submission 6*, para 5.

2.156 In relation to Papua New Guinea, Professor McAdam explained:

> Although Papua New Guinea is a party to the ICCPR, ICESCR, CERD, the CRC and CEDAW, it has a significant reservation to the Refugee Convention. This provides that Papua New Guinea does not accept the obligations set out in articles 17(1) (work rights), 21 (housing), 22(1) (education), 26 (freedom of movement), 31 (non-penalization for illegal entry or presence), 32 (expulsion) and 34 (facilitating assimilation and naturalization). This means that there is a significant curtailment of the rights of refugees and asylum seekers in Papua New Guinea. … As the UN High Commissioner for Refugees wrote to the Immigration Minister in October 2012, 'PNG does not have the legal safeguards nor the competence or capacity to shoulder alone the responsibility of protecting and processing asylum seekers transferred by Australia.'[143]

2.157 The key concerns about the capacity for Nauru and Papua New Guinea to meet the required standards relate to:

- the inadequacy of current mechanisms for refugee status determination and protection;
- the inadequate facilities to deal with vulnerable groups such as children, unaccompanied minors, pregnant women, people with disabilities or other complex health needs, or survivors of torture and trauma;[144] and
- the lack of independent monitoring and oversight.[145]

People subject to the new arrangements who are in Nauru or on Manus Island

2.158 There are currently 732 people who are living in Nauru and on Manus Island under the new arrangements, including 34 children on Manus Island. This comprises approximately 4% of the number of people who have arrived in Australia since 13 August 2012.

2.159 The main issues of concern expressed by many stakeholders revolves around:

- the conditions at the regional processing centres;

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143 J McAdam, *Submission 6*, para 6.

144 For a description of the conditions in Nauru and on Manus Island, see section below.

145 Stakeholders have expressed concerns that the Interim Joint Advisory Committee established to monitor conditions in the Nauru facility is not sufficiently robust or transparent and that there is as yet no monitoring body tasked with overseeing conditions in the Manus Island facility.

- the physical and mental health impacts of detention on those held in the centres; and
- the lengthy periods of time that many asylum seekers may spend on Nauru and Manus Island while their claims were being processed and subsequently, as a result of the 'no advantage' principle.

2.160 The key human rights issues that arise in connection with asylum seekers who are located in Nauru or Manus Island relate to the right to humane treatment, the right to health, children's rights and the prohibition against arbitrary detention.

Impact on physical and mental health

2.161 A number of submissions were made to the LCA Committee inquiry into the Migration Amendment (Heath Care for Asylum Seekers) Bill 2012 that considered the effect of offshore processing and detention on the health of asylum seekers. The Australian Medical Association noted:

> The physical conditions and remoteness of Nauru and Manus Island present particular service challenges, constraining access to health and mental health providers, posing barriers to recruiting onsite staff, and limiting the ability to refer detainees to external health services, including specialist mental health treatment. [146]

2.162 The Immigration Department has advised this committee that four species of malaria and dengue fever are present on Manus Island. Asylum seekers transferred to the island are required to take anti-malarial medication. Vector-control services are undertaken on Manus Island to remove or reduce stagnant water, use larvicides and insecticides to control mosquito populations and through bed-nets and window screens.[147]

2.163 The Australian Medical Association's submission to the LCA Committee inquiry noted that when Nauru was last used as an offshore processing centre '[u]nsanitary conditions and a lack of access to fresh water contributed to diarrhoea and other gastrointestinal diseases, skin and eye infections, and dengue fever'. [148] In relation to Manus Island, the AMA submitted:

> While the conditions on Manus were marginally better, a malaria outbreak prompted the Royal College of Physicians to call for an immediate evacuation of all asylum seekers from the island, citing particular concern

146 LCA Committee inquiry on the Migration Amendment (Health Care for Asylum Seekers) Bill 2012, Australian Medical Association, *Submission 20*, pp 5-6.

147 DIAC, Answer to question on notice No 17, in letter dated 29 May 2013.

148 LCA Committee inquiry on the Migration Amendment (Health Care for Asylum Seekers) Bill 2012, Australian Medical Association, *Submission 20*, pp 5-6.

> for pregnant women and children, neither of whom are able to take most malaria prophylaxis. The World Health Organisation has identified Papua New Guinea as the highest risk country in the Western Pacific Region for malaria, and categorises Manus Island as having the highest numbers of probable and confirmed malaria cases in all of Papua New Guinea.[149]

2.164 Once a person arrives in Nauru or Manus Island they are provided by the Immigration Department with a fact sheet that explains their immigration status on the island. The fact sheets explain that the process of who will assess their refugee claim is still being developed and agreed, that it is not known how long it will take to hear and assess claims and that it is 'not possible to say precisely how long you will need to stay' in PNG or Nauru and that even if a person is found to be a refugee it is unclear where or when they may be resettled.[150] The fact sheet for Manus Island informs people that they 'should expect to be here for as long as several years' and the fact sheet for Nauru tells people to 'expect it may take several years, from when you first arrived in Nauru, to being potentially resettled if you are found to be a refugee'.

2.165 A number of submitters to the committee raised concerns about the effects of offshore processing on a person's mental health. The Refugee Council of Australia submitted:

> Australia's previous experience with offshore processing under the Pacific Solution has shown this policy approach to be extremely detrimental to the mental health of asylum seekers and refugees. Throughout the life of the Pacific Solution, there were multiple incidents of self-harm, 45 detainees engaged in a serious and debilitating hunger strike and dozens suffered from depression or experienced psychotic episodes …the factors which had the greatest impact on mental health in the past – isolation, limited services and support, restricted freedom of movement, separation from family members and constant uncertainty – remain features of the current model. As such, there is little reason to believe that the mental health impacts can be avoided under the new regime, particularly in light of the fact that hunger strikes, self-harm and suicide attempts have already occurred in the new facilities.[151]

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149 LCA Committee inquiry on the Migration Amendment (Health Care for Asylum Seekers) Bill 2012, Australian Medical Association, *Submission 20*, pp 5-6. See also, the Global Human Rights Clinic's submission to the PJCHR: *Submission 1*.

150 DIAC, *Being in Manus, Papua New Guinea*, December 2012 and *Information for people transferred to Nauru*, September 2012: see, DIAC, Answer to Question on notice No 12.

151 Refugee Council of Australia, *Submission 10*, para 3.6. See also St Vincent de Paul Society, National Council, *Submission 3*; and evidence provided by the Salvation Army, *Committee Hansard*, 17 December 2012, pp 55-62.

2.166 In submissions to the LCA Committee inquiry on the Migration Amendment (Heath Care for Asylum Seekers) Bill 2012, the Australian Psychological Society submitted:

> Long-term indefinite immigration detention has been shown to have serious adverse effects on the mental health and wellbeing of those detained, with these impacts lasting well beyond the period of detention, particularly for those who are detained in remote and/or offshore detention facilities.[152]

2.167 A group of Australian health and mental health professional organisations also submitted:

> The current offshore processing policy for irregular maritime arrivals raises risks of incidents of violence, self-harm and suicide attempts in both on and offshore detention facilities due to the potential for loss of hope in individuals who are typically already psychologically vulnerable added to the potential for prolonged periods of time in detention.[153]

2.168 There is evidence that asylum seekers currently in offshore detention are self-harming or attempting suicide.[154] According to stakeholders, the evidence suggests that the circumstances of the detention also risk inflicting serious psychological harm, contrary to the right to humane treatment in article 10(1) of the ICCPR. Such harm cumulatively arises because of the conditions of detention. These conditions include inadequate physical and mental health services; exposure to unrest and violence in detention; and risks of experiencing or witnessing self-harm. Cases before the courts in the UK and Europe concerning asylum seekers' living

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152 LCA Committee inquiry on the Migration Amendment (Health Care for Asylum Seekers) Bill 2012, Australian Psychological Society, *Submission 13*, p 2.

153 LCA Committee inquiry on the Migration Amendment (Health Care for Asylum Seekers) Bill 2012, Independent group of health experts representing key Australian health and mental health professional organisations, *Submission 12*, p 4. This submission is a consensus statement written on behalf of: The Royal Australian and New Zealand College of Psychiatrists (RANZCP); The Royal Australasian College of Physicians (RACP); Royal Australian College of General Practitioners (RACGP); Australian Psychological Society (APS); Australian College of Nursing (CAN); and the Public Health Association of Australia (PHAA).

154 A SBS *Dateline* report reported guards at the Manus Island facility as saying that a number of detainees 'once or twice a week' try to hang themselves 'They go crazy, cutting themselves up, trying to hang themselves up' while another guard said 'some of them just harm themselves... with razor blades they cut their hands' : SBS, *Dateline*, Mark Davis, 'Keep Out', 28 May 2013, transcript available at: http://www.sbs.com.au/dateline/story/transcript/id/601696/n/Keep-Out.

An ABC *Four Corners* report found similar problems at the Nauru processing centre, with reports of self-harming, suicide attempts and hunger strikes: ABC, *Four Corners*, Debbie Whitmont, 'No Advantage', 29 April 2013, transcript available at: http://www.abc.net.au/4corners/stories/2013/04/29/3745276.htm#transcript

conditions suggest that the cumulative impact of such conditions could further amount to inhuman or degrading treatment, contrary to article 7 of the ICCPR.[155]

Conditions in Nauru

2.169 A UNHCR team visited Nauru on 3-5 December 2012. Assessed as a whole, UNHCR was of the view that the transfer of asylum seekers to what are currently harsh and unsatisfactory temporary facilities, within a closed detention setting, and in the absence of a fully functional legal framework and adequately capacitated system to assess refugee claims, do not currently meet the required protection standards.[156]

2.170 At a hearing at 17 December 2012, the Immigration Department confirmed to the committee that:

> All of the people on Nauru at present are accommodated in tents. As time has progressed we have put in place, in conjunction with them, a number of measures which help to make the tents more liveable than was first the case, where they did flood regularly when the heavy rains come … There is no doubt that the tents are, at best, a temporary measure and hence we are moving as quickly as we can to replace them with the permanent structure.[157]

2.171 The UNCHR told the committee that:

> The conclusion we have reached is that, as of today, the international standards that we would expect to see by Australia and Nauru have not been met; and I think the logical conclusion from that is that transfers of people to those circumstances was premature.[158]

2.172 The Immigration Department has advised that all asylum seekers in Nauru have now been moved out of tents into fixed accommodation.[159]

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155 See *R v Secretary of State for the Home Department, ex parte Adam* [2005] UKHL 66; *MSS v Belgium and Greece* (European Court of Human Rights, Grand Chamber, App No 30696/09, 21 January 2011.

156 UNHCR Mission to Nauru, 3-5 December 2012, *Report*: http://unhcr.org.au/unhcr/images/2012-12-4%20nauru%20monitoring%20report%20final.pdf.

157 K Douglas, First Assistant Secretary, Detention Infrastructure and Services Division, DIAC, *Committee Hansard*, 17 December 2012, p 9.

158 R Towle, Regional Representative for Australia, New Zealand, Papua New Guinea and the Pacific, United Nations High Commissioner for Refugees, *Committee Hansard*, 17 December 2012, p 26.

159 DIAC, information provided to the PJCHR at a private briefing on 3 June 2013.

Conditions on Manus Island

2.173 In a submission to the Public Works Committee inquiry, the Immigration Department acknowledged that asylum seekers may spend extended periods of time on Manus Island:

> Transferees may be accommodated on Manus Island for an extended period in consideration of the 'no advantage' principle which states that Refugee Status Determination (and re-settlement of those found to be refugees) will not receive a higher priority than for refugees in transit countries. As a result, there is an urgent need to establish permanent facilities.[160]

2.174 In the same submission, the Immigration Department identified the following concerns with the current Manus Island facility:

> **Problematic living arrangements and limited amenity**: Living arrangements for transferees at the temporary facility are problematic. The facilities predominantly consist of military tents with wooden floors, each with camp beds/stretchers. This presents key risks in terms of safety and health management. The facilities have a useful life of 12 months and are subject to degradation from humidity and high use. The existing buildings, some constructed in WWII, have high maintenance costs. The canvas tents and wooden floor boards deteriorate quickly, and each tent has reticulated 240v power which can be unsafe in the wet conditions.
>
> **Health and well-being risks given the climatic conditions**: 240v pedestal fans have been provided to each tent, humidity is high and the tents are still very hot due to the average daytime temperature ranging between 26 and 38 degrees centigrade. Transferees have complained about the heat which is a contributing factor to behavioural issues. In addition the site is in a low lying swampy area subject to localised inundation which encourages mosquito breeding.
>
> **Limited recreational activities**: The temporary centre is cramped and recreation facilities are limited and in a poor state. Transferees are subject to boredom which contributes to a focus on the progress of their Refugee Status Determination. Activities that provide exercise and limit frustration, divert attention from processing and support mental health outcomes of transferees.
>
> **A potential for increased tension and problematic behaviour:** This includes an increased risk of self-harm, mental health problems, and problematic behaviour. Past experience in the Australian immigration detention network indicates that limited amenity and space quickly leads

160 Parliamentary Standing Committee on Public Works inquiry in relation to the Manus Island Regional Processing Centre Project, DIAC, *Submission 1*, p 5.

> to behavioural changes which in turn can lead to substantial increases in health and security costs.
>
> **Inefficient processing:** Private interview rooms at the temporary facility do not have adequate infrastructure to support processing of refugee status assessments. …[161]

2.175 In a supplementary submission to the Public Works Committee inquiry, the Secretary of the Immigration Department sought to clarify that the Department's initial submission did not reflect current arrangements in the Manus Island facility and provided the following updates:

- The department has an ongoing process for monitoring, repairing and replacing electrical items as needed. G4S, the garrison services provider, is contracted to provide facilities maintenance services at the site, and to monitor, report on, and address any issues of concern;
- A rigorous mosquito vector control program was implemented when the centre was established in late 2012, and drainage is monitored on an ongoing basis to identify and rectify any potential issues. Health Services are well established, covering both primary and mental health care services.
- A range of recreation and educational services are now provided by service providers, including English language classes and handicraft classes. To support this, the school room has been upgraded and air conditioned and a library is in place. Internet access is provided for up to nine hours per day.
- Service providers have established incident management protocols and procedures.
- Appropriate infrastructure is being put in place to support the commencement of the PNG refugee status determination process. This will include air-conditioned interviewing facilities.[162]

2.176 The submission, however, concluded that 'the need for permanent facilities remains high, given temporary facilities are not sustainable in the medium to long term'.[163]

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161 Parliamentary Standing Committee on Public Works inquiry in relation to the Manus Island Regional Processing Centre Project, DIAC, *Submission 1*, p 8.

162 Parliamentary Standing Committee on Public Works inquiry in relation to the Manus Island Regional Processing Centre Project, DIAC, *Supplementary submission 01.2*.

163 Parliamentary Standing Committee on Public Works inquiry in relation to the Manus Island Regional Processing Centre Project, DIAC, *Supplementary submission 01.2*.

2.177 A UNHCR team visited Manus Island from 15-17 January 2013 to assess how Australia and PNG are implementing their obligations and to review the conditions at the facility.[164]

2.178 The report noted that at the time of the visit, the living conditions for most detainees at the centre were harsh and, for some, inadequate, and recommended that no further transfers of children to Manus Island should occur until all appropriate legal and administrative safeguards for their processing and treatment were in place, including their placement in an open centre as opposed to the current environment of detention.[165] The UNHCR stated that:

> The situation of children transferred to Manus Island gives particular cause for concern. The lack of any appropriate legal or regulatory framework for their treatment (in what UNHCR finds to be a mandatory, arbitrary and indefinite detention setting), and on-going delays in establishing any procedures to assess children's refugee protection needs, and broader best interests, is particularly troubling.[166]

2.179 Similar concerns have also been expressed by Paris Aristotle, a member of the Expert Panel, who said that the safeguards the panel insisted on have not been implemented on Manus Island, in particular that children should not be detained on Manus Island and that there should be an independent review board to oversee the detention centre.[167]

Arbitrary detention

2.180 In response to a question by the committee as to whether the application of the 'no advantage' principle, with the consequence that people would remain in Nauru and on Manus Island for longer than would otherwise have been necessary, was compatible with the prohibition against arbitrary detention in article 9 of the ICCPR, the Immigration Department said:

> A primary question in relation to article 9 of the ICCPR is whether the … circumstances for transferees in regional processing countries amount to detention.
>
> Given the fluid nature of arrangements on both Nauru and Manus Island, the department is unable to make a definitive statement on whether the

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164 UNHCR Mission to Manus Island, Papua New Guinea, 15–17 January 2013, *Report*: http://unhcr.org.au/unhcr/images/2013-02-04%20Manus%20Island%20Report%20Final.pdf.

165 UNHCR Mission to Manus Island, Papua New Guinea, 15–17 January 2013, *Report*, pp 1, 3.

166 UNHCR Mission to Manus Island, Papua New Guinea, 15–17 January 2013, *Report*, p 2.

167 ABC, *AM – News and Current Affairs Radio*, ' Asylum expert calls for children to be freed from Manus Island', 5 April 2013, transcript available at: http://www.abc.net.au/am/content/2013/s3730243.htm.

> conditions relating to [regional processing centres] amount to detention.[168]

2.181 The Department noted that the government was 'continu[ing] to discuss freedom of movement arrangements with the PNG Government' but acknowledged that:

> In practice, all transferees to both Nauru and Manus Island are currently residing at the [regional processing centre] (and are escorted when they leave the centre).[169]

2.182 The UNHCR's report on Manus Island considered that the current policy and practice of detaining all asylum seekers, including children, on a mandatory and indefinite basis, without an individual assessment or possibility for review, amounted to arbitrary detention which was inconsistent with the obligations of both Australia and PNG under international human rights law.[170] The UNHCR noted that it has since been advised that escorted visits and excursions for some transferees, including children, have begun, but they did not 'resolve UNHCR's underlying concerns about the arbitrary character of the detention at the Centre'.[171]

2.183 According to the Immigration Department, negotiations are underway with the PNG government to begin processing at Manus Island 'at the end of June or early July'.[172] The Department has advised that processing of refugee claims for the 430 men in Nauru began on 19 March 2013, but no claims have been finalised as yet.[173]

Committee view

2.184 In light of this evidence, the committee makes the following conclusions on these measures, as set out below.

168 See DIAC, Answer to question on notice No 23, in letter dated 29 May 2013.

169 DIAC, Answer to question on notice No 23, in letter dated 29 May 2013.

170 UNHCR Mission to Manus Island, Papua New Guinea, 15–17 January 2013, *Report*, p 1.

171 UNHCR Mission to Manus Island, Papua New Guinea, 15–17 January 2013, *Report*, p 2.

172 W Southern, Deputy Secretary, DIAC, before the Legal and Constitutional Affairs Legislation Committee, Senate Estimates, 27 May 2013, *Committee Hansard*, p 73.

173 W Southern, Deputy Secretary, DIAC, before the Legal and Constitutional Affairs Legislation Committee, Senate Estimates, 27 May 2013, *Committee Hansard*, p 73.

The committee's conclusions

2.185 The committee does not underestimate the scale of the challenge facing the government. Prior to August 2012, the estimated fatality rate for people seeking to reach Australia's shoreline was around 20 to 30 deaths per thousand asylum seekers arriving by sea. The committee is in no doubt that the risks faced by people seeking Australia's protection by irregular maritime travel is significant and it is a legitimate and pressing objective for the government to explore all reasonable solutions to reduce such risks. Effective polices to dissuade asylum seekers from contemplating the dangerous journey by sea are understandably at the frontline of efforts to reduce the number of asylum seekers and hence the number of fatalities.

2.186 The committee notes that the work of the Expert Panel in 2012 is the most recent of a series of efforts over the years to reduce the number of irregular maritime arrivals seeking Australia's protection. The underlying logic appears sound. That is, by reducing the relative attractiveness of undertaking an unauthorised journey by sea, fewer lives will be lost. Such an outcome would also reduce pressure on Australia's annual humanitarian intake.

2.187 However, the data available in the period since the government accepted and acted upon the recommendations of the Expert Panel shows mixed or even contradictory results.

2.188 The rate of irregular maritime arrivals has not let up, and indeed has reached unprecedented levels. Forecasts from the Immigration Department indicate that around 25,000 asylum seekers will arrive by boat in 2012-13. The committee, however, notes that this forecast still represents only around one per cent of the global refugee population.

2.189 Despite the high number of arrivals, the rate of known fatalities appears to have declined. It is too soon to say whether this decline is statistically significant or if it will be sustained.[174] Nonetheless, the continued high rate of arrivals raises doubts about the effectiveness of the newest policies to achieve a reduction in the number of people travelling by sea (and therefore at great personal risk) to seek Australia's protection.

2.190 The 'no advantage' policy is central to the Expert Panel's recommendations and was adopted by the government to remove any incentive for people to come to Australia by sea. The committee is concerned by several aspects of this underlying policy, as given effect through the suite of legislation examined by the committee.

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174 The recent news in June 2013 that another boat has capsized with an estimated loss of 55 lives suggests the inherent unreliability of these statistics, in particular, their ability to quickly change.

2.191 The first is in relation to the way the government intends to translate the idea of 'no advantage' into its procedures for processing individuals seeking asylum. The government has been unable to provide any details as to how the 'no advantage' policy will operate in practice. It remains a vague and ill-defined principle that risks creating a complex framework with insufficient transparency. It has resulted in a confusing array of measures focused not so much on the status of the person as their mode and date of arrival in Australia.

2.192 Moreover, in seeking to apply the 'no advantage' principle, the measures may have unintended consequences. The removal of family reunion rights, for example, may provide greater incentive for all family members (including children) to seek to travel together by boat, and thereby increase demand for people smugglers' services. In that regard, the committee recommends that the government monitor and report whether there have been changes to the composition of asylum seekers that would indicate whether family units are now more likely to risk the journey than was the case previously.

2.193 Finally, the evidence suggests that the government's approach to 'no advantage' has gone further than that which was originally contemplated by the Expert Panel to actively create *disadvantage*.

2.194 The committee's primary concern is how this impacts on Australia's fulfilment of its human rights treaty obligations. Australia has international obligations in relation to asylum seekers who come to Australia, regardless of their mode of arrival. These obligations are set out in the Refugee Convention and also in the international human rights treaties to which Australia is a party, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, and the Convention against Torture.

2.195 Specifically, the committee is concerned by:

- The absence of any human rights criteria in the process for designating regional processing countries. The committee shares the concerns raised by numerous stakeholders that the regional processing arrangements do not ensure that Australia's non-refoulement obligations will be respected.
- The absence of safeguards in the pre-transfer processes by which people are selected to be transferred to offshore processing locations and that children and vulnerable individuals are among those being transferred. The committee notes the concerns raised by numerous stakeholders that the current conditions in Manus Island are unfit for children and vulnerable individuals, and fall short of the standards of treatment required under the Convention on the Rights of the Child and the ICCPR. The committee considers that all children and vulnerable individuals

should be returned to Australia as a matter of urgency and further transfers of such individuals be suspended until more appropriate living conditions are established.

- The absence of legally-binding requirements relating to minimum conditions in regional processing facilities. The committee recognises that detention necessarily involves constraints on the full enjoyment of rights by detainees. However, in view of the material presented to the committee by government and others and even accepting that conditions may have improved since the first transfers of asylum seekers, the committee does not consider that the government has demonstrated that the conditions are consistent with the provisions of the ICCPR, the ICESCR, the CRC, and the CAT.
- The cumulative effect of the arrangements, which is likely to have a significant impact on the physical and mental health of asylum seekers, contrary to the right to health in article 12 of the ICESCR and the prohibition against degrading treatment in article 7 of the ICCPR.

2.196 The committee is concerned about the practical consequence of the application of the 'no advantage principle', which would appear to be either a deliberate slowing down of processing applications for refugee status or deliberate delays in resettlement once a person has been determined to qualify as a refugee, inconsistent with the prohibition against arbitrary detention in article 9 of the ICCPR. In this respect the committee notes that as of late May 2013, some nine months after the adoption of the policy, processing of the claims of those who arrived by boat has not commenced in Australia or PNG and that there have been only preliminary interviews of some of those who have been transferred to Nauru. A failure to put in place such procedures for persons held in detention for such periods appears to the committee to constitute arbitrary detention of those who have been held for an extended period.

2.197 The committee is also concerned that the removal of work rights combined with the provision of minimal support for asylum seekers on bridging visas in Australia risks resulting in their destitution, contrary to the rights to work and an adequate standard of living in articles 6 and 11 of the ICESCR and potentially the prohibition against inhuman and degrading treatment in article 7 of the ICCPR.

2.198 Finally, the committee is concerned that the overall regime which differentiates between asylum seekers on the basis of their mode and date of arrival has a disproportionate impact on asylum seekers (in particular children) who arrive by boat after 13 August 2012, inconsistent with the right to non-discrimination.

2.199 In summary, the committee recognises the seriousness of the challenge facing government on the question of irregular maritime arrivals. While the committee considers that seeking to reduce the incentives – the so-called 'pull

factors' – to travel to Australia in this way are a legitimate goal, there remain serious concerns about the way that the 'no advantage' principle is being applied.

2.200 The evidence that this approach will work is not yet supported by any downward trend in boat arrivals. While the committee is sympathetic to the view that this is still a 'work in progress', it is not the committee's role to assess on a hypothetical basis whether implementation of the Expert Panel's recommendations in their entirety at some point in the future would satisfactorily meet Australia's human rights obligations. On the basis of the evidence before it, the committee considers that the measures as currently implemented carry a significant risk of being incompatible with a range of human rights. To the extent that some of those rights may be limited, the committee considers that the reasonableness and proportionality of those limitations have not been clearly demonstrated.

Mr Harry Jenkins MP
Chair

Appendix 1: Details of legislation under consideration by the committee

Name of legislation	Effect	Statement of compatibility	Date in force
Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012	• Allows the Immigration Minister to designate any country as a regional processing country if in the national interest, and anyone arriving by boat on or after 13/08/12 must be taken to a regional processing country unless the Minister grants an exemption. • Removes the duty on the Immigration Minister to act as the legal guardian of unaccompanied minors who are sent to a regional processing country.	Not required. The original *Migration Legislation (Regional Processing and Other Measures) Bill* was introduced into Parliament in September 2011, ie prior to the passage of the *Human Rights (Parliamentary Scrutiny) Act 2011* (HR(PS) Act). Government amendments to the bill (to enable offshore processing in a designated 'regional processing country' in line with the expert panel recommendations) were introduced on 14 August 2012. Amendments to bills are not technically required to be accompanied by a statement of compatibility under section 9 of the HR(PS) Act; however the committee has indicated that it would be good practice to do so particularly where the amendments have the potential to impact on human rights .	17 Aug 2012
Migration Act 1958 - Instrument of Designation of the Republic of Nauru as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958 - September 2012 [F2012L01851]	• Designates Nauru as a regional processing country to which asylum seekers can be sent.	Not required. The instrument does not come within the definition of a disallowable legislative instrument under section 42 of the *Legislative Instruments Act 2003* (LI Act). Section 9 of the HR(PS) Act only requires statements for legislative instruments within the meaning of section 42 of the LI Act. The committee's mandate to examine legislative instruments, however, is not tied to the section 42 definition.	12 Sep 2012

Migration Act 1958 - Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958 - October 2012 [F2012L02003]	• Designates Papua New Guinea as a regional processing country to which asylum seekers can be sent.	Not required. The instrument does not come within the definition of a disallowable legislative instrument under section 42 of the *Legislative Instruments Act 2003* (LI Act). Section 9 of the HR(PS) Act only requires statements for legislative instruments within the meaning of section 42 of the LI Act. The committee's mandate to examine legislative instruments, however, is not tied to the section 42 definition.	10 Oct 2012
Migration Amendment Regulation 2012 (No. 5) [F2012L01961]	• Prevents people arriving by boat after 13/08/12 from applying for family reunion through the Humanitarian Program. • Changes the criteria for determining existing family reunion visa applications (so family reunion concessions only apply to persons who arrived by air or under the offshore humanitarian program).	Yes. In, Report 6 of 2012, the committee indicated its intention to defer its consideration of this regulation to enable closer examination of the issues as part of the broader package of amendments arising from the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*.	27 Sep 2012
Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Act (No. 1) 2012-2013 *Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Act (No. 2) 2012-2013*	• Sought appropriation authority for the additional expenditure of money from the consolidated revenue fund to provide additional appropriation to the Immigration Department to address the increased costs of irregular maritime arrivals, including capital works and services for regional processing facilities on Nauru and Manus Island. • The total appropriation was $1,674,982,000.	Yes. In Report 7 of 2012 the committee indicated its intention to defer its consideration of these bills to enable closer examination of the issues as part of the broader package of amendments arising from the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*.	28 Nov 2012

Migration Regulations 1994 - Specification under paragraphs 050.613A(1)(b) and 051.611A(1)(c) - Classes of Persons - November 2012	• Provides that bridging visas granted to people who arrived before 13/08/12 can include a condition allowing for work rights, but the right to work does not apply to people arriving by boat on or after 13/08/12.	Not required. The instrument does not come within the definition of a disallowable legislative instrument under section 42 of the Legislative Instruments Act 2003 (LI Act). Section 9 of the HR(PS) Act only requires statements for legislative instruments within the meaning of section 42 of the LI Act. The committee's mandate to examine legislative instruments, however, is not tied to the section 42 definition.	20 Nov 2012
Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013	• Expands the scope of persons that fall within the scope of the regional processing regime by providing that all irregular maritime arrivals will have the same legal status regardless of where they arrive in Australia.	Yes. In Report 7 of 2012 the committee indicated its intention to defer its consideration of this bill to enable closer examination of the issues as part of the broader package of amendments arising from the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*.	1 Jun 2013
Migration Amendment Regulation 2013 (No. 2) (F2013L00795)	• Introduces a Community Proposal Pilot which sets aside 500 of the 20,000 Refugee and Humanitarian (Class XB) visa places to persons outside Australia in need of humanitarian assistance who are sponsored by an approved community organisation and upon payment of almost $20,000.	Yes.	16 May 2013
Migration Amendment (Health Care for Asylum Seekers) Bill 2012 (Introduced by Senators Hanson-Young and Di Natale)	• Proposes to amend the *Migration Act 1958* to require the Immigration to establish an independent expert panel to monitor and report to Parliament at least twice a year on the health of asylum seekers in regional processing countries.	Yes. The committee considered this bill in its Report 3 of 2012. The committee's view was that the bill did not appear to raise any human rights concerns.	Not in force

Appendix 2: Witnesses who appeared before the committee

Canberra, 17 December 2012

ARISTOTLE, Mr Paris, Private capacity

BRENNAN, Father Frank, Private capacity

BUDAVARI, Ms Rosemary, Co-Director, Criminal Law and Human Rights, Law Council of Australia

CONSTANTINOU, Katie, Assistant Secretary, Department of Immigration and Citizenship

CROCK, Professor Mary, Private capacity

DOUGLAS, Mr Kenneth, First Assistant Secretary, Detention Infrastructure and Services Division, Department of Immigration and Citizenship

HANSEN, Ms Ellen, Senior Protection Officer for Australia, New Zealand, Papua New Guinea and the Pacific, United Nations High Commissioner for Refugees

HOUSTON, Air Chief Marshal Angus (Retired), Private capacity

L'ESTRANGE Professor Michael, Private capacity

MARTIN, Miss Hannah, Private capacity

MORGAN, Ms Lucy, Information and Policy Officer, Refugee Council of Australia

MOULDS, Major Paul, Director, Social Mission and Resources, The Salvation Army Australia Eastern Territory

MOULDS, Ms Sarah, Senior Policy Lawyer, Criminal Law and Human Rights, Law Council of Australia

PARKER, Ms Vicki, First Assistant Secretary, Expert Panel Recommendations, Department of Immigration and Citizenship

POPE, Ms Kate, PSM, First Assistant Secretary, Community Programs and Children Division, Department of Immigration and Citizenship

SOUTHERN, Dr Wendy, PSM, Deputy Secretary, Policy and Program Management Group, Department of Immigration and Citizenship

TOWLE, Mr Richard, Regional Representative for Australia, New Zealand, Papua New Guinea and the Pacific, United Nations High Commissioner for Refugees

Melbourne, 19 December 2012

ANDERSON, Ms Adrienne, Policy Officer and Solicitor and Migration Agent, Refugee and Immigration Legal Centre Inc.

CONSTANTINOU, Ms Katie, Assistant Secretary, Community Support and Children, Department of Immigration and Citizenship

DOUGLAS, Mr Kenneth, First Assistant Secretary, Detention Infrastructure and Services Division, Department of Immigration and Citizenship

JOSEPH, Professor Sarah, Director, Castan Centre for Human Rights Law

KARAPANAGIOTIDIS, Mr Kon, Chief Executive Officer, Asylum Seeker Resource Centre

KNEEBONE, Professor Susan York, Emeritus Associate, Castan Centre for Human Rights Law

LYNCH, Mr Philip, Executive Director, Human Rights Law Centre

MANNE, Mr David, Executive Director and Principal Solicitor and Migration Agent, Refugee and Immigration Legal Centre Inc.

PARKER, Ms Vicki, First Assistant Secretary, Expert Panel Recommendations, Department of Immigration and Citizenship

PENOVIC, Ms Tania, Deputy Director, Castan Centre for Human Rights Law

POPE, Ms Kate, PSM, First Assistant Secretary, Community Programs and Children Division, Department of Immigration and Citizenship

TRIGGS, Professor Gillian, President, Human Rights Commission

WEBB, Mr Daniel John, Senior Lawyer, Human Rights Law Centre

Appendix 3: Submissions received

Submission Number	Submitter
1.	Global Human Rights Clinic
2.	Dr Ben Saul
3.	St Vincent de Paul Society, National Council
4.	Law Institute of Victoria
5.	Refugee & Immigration Legal Centre Inc (RILC)
6.	Professor Jane McAdam
7.	Professor Mary Crock and Ms Hannah Martin
8.	Australian Human Rights Commission
9.	Amnesty International
10.	Refugee Council of Australia

Additional Information Received

1. Response to questions on notice provided by Father Frank Brennan on 18 January 2013
2. Response to questions on notice provided by United Nations High Commissioner for Refugees (UNHCR) on 22 January 2013
3. Response to questions on notice provided by Human Rights Law Centre on 23 January 2013
4. Response to questions on notice provided by Refugee & Immigration Legal Centre on 24 January 2013
5. Response to questions on notice provided by Department of Immigration and Citizenship on 30 January 2013
6. Response to questions on notice provided by the Attorney-General on 14 May 2013
7. Response to questions on notice provided by Minister for Immigration and Citizenship on 29 May 2013