



The Hon Brendan O'Connor MP
Minister for Immigration and Citizenship

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Jenkins,

Thank you for your letter of 12 February 2013 regarding the Parliamentary Joint Committee on Human Rights examination of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* and related legislation.

Please find attached responses to your request for further information on matters related to the legislation.

I trust that you will find the information useful.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Brendan O'Connor', with a large initial 'B' and a long, flowing tail.

BRENDAN O'CONNOR

29 MAY 2013

Question on Notice (No.1)

Question:

How many men and women are currently in the population of persons that come within the scope of the offshore processing regime? How many minor, also broken down by gender?

Answer:

All offshore entry persons who arrived in Australia on or after 13 August 2012 are liable to be taken to a regional processing country.

As at 14 February 2013, there are a total of 416 adult males in Nauru - there are no women or minors in Nauru.

	Male	Female	Total
Adults	416	0	416
Minors	0	0	0
Total	416	0	416

As at 14 February 2013, there are a total of 193 adult males, 47 adult females in family groups, 22 boys and 12 girls (all accompanied minors) on Manus Island. There are no single adult females or unaccompanied minors on Manus Island.

	Male	Female	Total
Adults	193	47	240
Minors	22	12	34
Total	215	59	274

Question on Notice (No.2)

Question:

What is the male/female breakdown of those who have been transferred to Manus Island and Nauru?

Answer:

As at 14 February 2013, there have been a total of 478 males transferred to Nauru – no women have been transferred to Nauru. There have been a total of 218 males and 59 females transferred to Manus Island.

	Male	Female	Total
Manus Island	218	59	277
Nauru	478	0	478
Total	696	59	755

Question on Notice (No.3)

Question:

Please provide an update on how many children have been transferred to Manus Island and to Nauru and whether these include any unaccompanied minors. Please also provide the ages of the child transferees.

Answer:

As at 14 February 2013, 34 accompanied children (i.e. part of a family unit) have been transferred to Manus Island. No unaccompanied children have been transferred to Manus Island. No children (accompanied or unaccompanied) have been transferred to Nauru. The age breakdown is as follows:

Age (Years)	Manus Island		Nauru		Total
	Female	Male	Female	Male	
Seven	0	2	0	0	2
Eight	0	2	0	0	2
Nine	3	1	0	0	4
Ten	4	1	0	0	5
Eleven	1	2	0	0	3
Twelve	0	3	0	0	3
Thirteen	0	1	0	0	1
Fourteen	1	2	0	0	3
Fifteen	0	4	0	0	4
Sixteen	1	3	0	0	4
Seventeen	2	1	0	0	3
Total	12	22	0	0	34

Question on Notice (No.4)

Question:

What are the nationalities of the persons covered by the offshore processing regime?

Answer:

All offshore entry persons who arrived in Australia on or after 13 August 2012 are liable to be taken to a regional processing country.

As at 14 February 2013, those who arrived on or after 13 August 2012 have claimed to be of the following nationalities: Afghan, Albanian, Algerian, Bangladeshi, Belarusian, Egyptian, Indian, Indonesian, Iranian, Iraqi, Jordanian, Kuwaiti, Lebanese, Malaysian, Mongolian, Myanmarese, Nepalese, Pakistani, Palestinian, Russian, Sri Lankan, Sudanese, Syrian, Turkish, Vietnamese and Yemeni.

Refugee Status Assessments for post-13 August 2012 arrivals have not yet commenced.

Question on Notice (No.5)

Question:

What avenues are there for these groups to travel 'lawfully' to Australia? Please provide a summary of the types of visas for which these groups may be eligible, including the number of successful and unsuccessful applications per year.

Answer:

There are many visas for which members of these groups could apply, depending on their individual circumstances. For details of the visas specifically for refugees or people in refugee-like situations who apply under the Humanitarian Program, please refer to the answer to question 24.

The Humanitarian Program in 2012–13 has been increased to 20 000 places. The composition of the offshore (resettlement) component has also been refocused to provide more orderly and safer visa pathways as an alternative to taking a dangerous boat journey to Australia. Further information about the planning levels for the 2012–13 Program is included in the answer to question 23.

Further detailed information on the number of applications lodged and visas granted under Australia's offshore Humanitarian Program for 2011-2012 can be found at http://www.immi.gov.au/media/publications/statistics/immigration-update/australia_offshore_humanitarian_prog_2011-12.pdf.

The Government has also increased the family migration stream by 4000 places per year reserved for family members of irregular maritime arrivals. As a consequence, there are increased opportunities for family reunion.

Family members may of course make use of other avenues for migration available to them in the skill stream of the Migration Program.

Question on Notice (No.6)

Question:

How many post-13 August 2012 arrivals have been assessed to be refugees? How many have been assessed not to be refugees? How many of these decisions are currently the subject of appeal? How many of the persons have been returned?

Answer:

Refugee Status Assessments for post-13 August 2012 arrivals have not yet commenced.

As at 15 February 2013, 193 irregular maritime arrivals have been removed as they were considered to fall within an exempt class having signed a request for removal and being voluntarily removed.

In addition, the Minister has individually exempted 736 Sri Lankan people who were subsequently removed from Australia on the basis that they had been found not to present claims that reasonably engage Australia's protection obligations.

Question on Notice (No.7)

Question:

How many post-13 August 2012 arrivals are currently being processed in the community? How many are still in detention in Australia? Are their claims being processed?

Answer:

Of the post-13 August 2012 irregular maritime arrivals, 5052 are in held detention in Australia, 2263 are in community detention and 3302 are on bridging visas in the community (as at 15 February 2013).

Refugee Status Assessments for post-13 August 2012 arrivals have not yet commenced.

Question on Notice (No.8)

Question:

Given that the number of persons who have arrived after 13 August 2012 exceeds the number of available places on Manus Island and Nauru, what criteria have been used to select persons for transfer to Manus Island and Nauru?

Answer:

There are a number of factors involved in determining who is transferred to Nauru or Manus Island.

All offshore entry persons who arrived in Australia on or after 13 August 2012 are liable to be taken to a regional processing country. Under subsection 198AD(5) of the *Migration Act 1958* (the Act), the Minister for Immigration and Citizenship (the Minister) must direct an officer to take an offshore entry person, or class of offshore entry persons, to a particular regional processing country. On 18 October 2012, the then Minister made a ministerial direction specifying that people will be taken to either Nauru or Papua New Guinea on the basis of a number of operational considerations, including:

- the facilities and services available for the class of person (i.e. family group, adult male or female or unaccompanied minor);
- the availability of accommodation; and
- ensuring that family groups are not split.

Certain classes of person will not be sent to a regional processing country, including crew of people smuggling vessels who do not have protection claims and irregular maritime arrivals who wish to return home voluntarily. These persons are exempted from transfer by the Minister under his intervention power in section 198AE of the Act. This power allows the Minister to make a determination that a person is exempt from transfer to a regional processing country.

Specific client circumstances or special needs identified through a pre-transfer assessment may also mean it is not reasonably practicable to transfer a person to a regional processing country at that time and their transfer may be delayed. Considerations include health issues (e.g. whether appropriate services are in place at the regional processing centres) or availability of other services available to manage particular special needs. In exceptional circumstances, such cases will be referred to the Minister for consideration to exempt a person, or class of persons, from transfer under section 198AE of the Act.

Question on Notice (No.9)

Question:

What avenues are available for persons to challenge a decision to transfer them to Nauru or Manus Island?

Answer:

It is a legislative requirement under section 198AD of the *Migration Act 1958* (the Act) that all offshore entry persons who arrive in Australia from 13 August 2012 must be taken from Australia to a regional processing country.

Under section 198AE of the Act, the Minister has a power to exempt offshore entry persons from being taken to a regional processing country, if he thinks it is in the public interest to do so. Ministerial Guidelines have been issued to the department outlining the circumstances in which individual cases will be considered by the Minister. The guidelines make it clear that the Minister will only consider cases that the department brings to his attention.

A pre-transfer assessment of clients subject to be taken to a regional processing country allows the department to bring relevant cases to the Minister's attention as soon as practicable, in line with the section 198AE guidelines.

Question on Notice (No.10)

Question:

How long are persons being detained in Australia prior to being transferred to Nauru or Manus Island?

Answer:

All offshore entry persons who arrived on or after 13 August 2012 are liable to be taken to a regional processing centre (RPC), other than those for which the Minister has made a determination under section 198AE that they are exempt from being taken to an RPC. Where a person cannot be taken to an RPC due to issues raised in a pre-transfer assessment their transfer may be delayed as not being reasonably practicable at the time. Accordingly, there is potential for transferees to have spent some time in the Australian immigration detention network prior to transfer.

As at 14 February 2013, the average time people spent in Australia prior to being transferred to Nauru or Manus Island was 31 days.

Question on Notice (No.11)

Question:

Who is responsible for carrying out the physical transfer of persons to Manus Island and Nauru?

Answer:

The Department of Immigration and Citizenship is responsible for managing the physical transfer of persons to Manus Island and Nauru. The department negotiates with air transport service providers to provide suitable charter aircraft to facilitate transfers to regional processing centres. The department works with its service providers such as Serco, International Health and Medical Services (IHMS) and interpreters to ensure that they have an appropriate presence during each transfer flight. The department also works cooperatively with other agencies such as the Australian Federal Police as required to manage escort arrangements.

Question on Notice (No.12)

Question:

What standards and procedures are in place to ensure that persons being transferred are treated with dignity and humanity, and are informed of what is happening to them? Please provide a copy of the relevant procedures for the committee's consideration.

Answer:

The process for transfers to Regional Processing Centres (RPCs) has been developed in accordance with legislation, the Immigration Detention Values and through consultation with relevant contracted service providers such as Serco and IHMS. The process aims to maintain the dignity and welfare of people in immigration detention, while also managing operational risks such as self-harm and destructive behaviours. To date, all transfers have been monitored by departmental officers with health professionals also present.

Since 13 August 2012, all offshore entry persons who are not otherwise exempt have been informed that they are subject to transfer to a regional processing country such as Nauru or Papua New Guinea. This communication occurs within the first 24-48 hours of being detained. General fact sheet information (translated into languages) about each of the regional processing countries is also available, should clients seek more detail about those locations and arrangements. As a matter of course, staff provide clients with verbal briefings supported by translated written materials (given literacy barriers and to help clients' understanding). A pre-transfer assessment process identifies whether there are any issues that may prevent a person from being transferred. The assessment focusses on the availability of suitable accommodation, facilities and services available at the RPC to support each individual's circumstances and care needs, including health care needs.

People who are then identified for transfer are informed of this prior to their physical transfer to the chosen RPC. The flights and details of their transfer process are verbally explained with the assistance of interpreters. They are also provided with the relevant country fact sheet information. Following their arrival in the RPC and transfer to the centre on island, an induction and further fact sheet information is provided to clients about their immigration status on island and prospects for having their claims processed (the latter is under development with the respective country governments).

The Departmental Guidelines for Assessment of Persons Prior to Transfer Pursuant to Section 198AD(2) of the Migration Act 1958 are available on the department's website at: http://www.immi.gov.au/visas/humanitarian/_pdf/s198ad-2-guidelines.pdf

Attached Fact Sheets:

- *Transfer to Manus, Papua New Guinea*
- *Being in Manus, Papua New Guinea*
- *Transfers to Nauru*
- *Information for people transferred to Nauru*



Transfer to Manus, Papua New Guinea

Information for people who arrived by boat

The Australian Government is transferring you to the regional processing country of Papua New Guinea (PNG). This is because you arrived by boat without a valid visa since 13 August 2012.

Both the Australian and PNG Governments are committed to giving you care and support while you are in Manus, PNG.

PNG has committed to treating you with dignity and respect, in line with human rights standards. You will be subject to PNG laws while you are there. You will be expected to depart PNG if you are found not to be a refugee.

What is Manus like?

The province of Manus is part of PNG, which is a country north east of Australia. It is made up of many islands – Manus Island being the biggest. Being a tropical island it is hot and humid all year round. Daily temperatures average 30 degrees (86°F). People in Manus use Papua New Guinean currency called 'Kina'. Most people speak some English – the other two official languages are New Guinea Pidgin and Hiri Motu.

How will I get there?

You will go by plane from Christmas Island or mainland Australia. It will take about eight hours from Christmas Island or 4 hours from Darwin.

You cannot take food in your luggage but you can pack a limited amount of cigarettes. Your belongings will be stored on the plane. Do not bring food, water, cigarettes or hand luggage when you get on the plane. You can take a jacket or sweater as the plane can be cold.

An Australian Immigration officer will look after your bags and personal items, including money, medication and medical records during the flight. These will be available to you after you arrive in PNG. Some items will be stored in a safe place for you while you are at the regional processing centre.

Once you arrive at the airport, you will be driven by bus to the regional processing centre. At the centre, you will find out more about PNG, the laws on the island and what your life will be like while you are there. You will be given basic clothes, toiletries, footwear and items for your bed. You will also be able to make a phone call to your family or a friend to tell them you have arrived safely.

Where will I live?

You will need to live at the regional processing centre on Los Negros Island. This island is connected by a bridge to Manus Island. You will live in temporary accommodation, tents or small rooms, while permanent accommodation is being built.

What is available at the centre?

There is an area for food and recreation. You will be provided with meals and snacks. There are computers with limited internet access, phones, postal services and a laundry. Any phone cards you already have will not work in PNG.

There is a canteen where you can buy small personal items. To make purchases you will be allocated points after you arrive in PNG. This is a different system to Christmas Island and mainland Australia. You will not be able to transfer any points you have now.

Will I be able to come and go from the centre?

The ability to come and go from the centre is linked to health and security checks you will complete after you arrive. If you pass these checks, you will be able to leave the centre during the day for escorted excursions and activities.

What support services will be available?

There will be two charity organisations there to provide support services, like counselling, and recreation activities. They are both non-government charities that will support your welfare and emotional wellbeing while you are in PNG.

The International Health and Medical Services staff will support any medical needs, including hospital or emergency treatment. At the centre, you will be told who you can talk to.

Can I work?

Do not expect to work.

Can I practice my religion?

You are free to practice your religion in PNG. The local people are mostly Christian, but some follow other religions. There is a multi-faith prayer room at the centre you can use.

Who will process my refugee claims?

The PNG Government will assess your refugee claims. You will find out more about this after you arrive in Manus.

Can I go home from PNG?

Yes. This is an important decision, so the International Organization for Migration (IOM) is available if you want to talk with them about going home. IOM is independent from the governments of Australian and PNG.



Being in Manus, Papua New Guinea

Information for people who arrived by boat

You have been transferred to the province of Manus, which is in the regional processing country of Papua New Guinea.

The Papua New Guinean Government has committed to treating all people who have been transferred from Australia with dignity and respect in line with human rights standards. Both the Australian and Papua New Guinean governments are committed to giving you care and support.

You will be subject to the laws of Papua New Guinea while you are here. You will be expected to depart if you are found not to be a refugee.

Who will assess my refugee claim?

This process is still being developed and agreed by the governments of Australia and Papua New Guinea. Your claims will be assessed under Papua New Guinean law.

How long will it take to hear my claim?

It is not known how long it will take to hear and assess your refugee claim. The refugee status assessment process first needs to be developed and implemented, and qualified staff need to be recruited. These processes need to be established before the first assessments can occur.

How long will I remain in Papua New Guinea?

It is not possible to say precisely how long you will need to stay in Papua New Guinea. Remember you can decide to leave voluntarily at any time. If you choose to stay, you should expect to be here for as long as several years.

If you are found to be a refugee, your individual circumstances will need to be considered as part of any resettlement option. Only a small number of countries have regular resettlement programs.

With millions of refugees worldwide, the demand for places in these resettlement countries is always greater than the number of places available. This is the reason that it takes a long time.

People who arrived in Australia by boat do not gain any advantage over other asylum seekers and refugees in the region who are awaiting processing and resettlement. It doesn't matter if you are processed in Australia, Nauru or Papua New Guinea – there is no faster processing.

If you are found not to be a refugee, you will be expected to leave Papua New Guinea and return home.

Will I be resettled in Australia?

If you are found to be a refugee, you will not get to choose where or when you are resettled. It is possible that you could be resettled in a country as part of broader regional arrangements, or that you are eventually resettled in Australia. However, you will not have priority if resettlement in Australia is considered in your case. You will have to wait the same amount of time as other people do who apply for refugee status from outside of Australia.

Where will I live?

You will need to live at the regional processing centre on Los Negros Island, in Manus province. This island is connected by a bridge to Manus Island, which is the main island of Manus province.

You will live in temporary accommodation until permanent accommodation is built.

Will I be able to come and go from the centre?

You will not be able to leave the centre for at least a month while you undergo administrative checks. After these checks have been completed, and with the permission of the Papua New Guinean Government, you may be able to leave the centre for supervised outings.

Can I be transferred back to Australia?

No. You have already been transferred to a regional processing centre. Transfers to Nauru and Papua New Guinea will continue.

Can I go home?

Yes. This is an important decision, so the International Organization for Migration (IOM) is available if you want to talk with them about going home. IOM is independent from the governments of Australia and Papua New Guinea.

You may also be eligible for support to help you re-establish yourself in your home country. This may include training, help to find a job or start a small business, and a small amount of cash. Talk to IOM to find out more about what kind of help would be best for you.

If I have family in another resettlement country (not Australia), can they sponsor me to go there?

You would have to meet the visa and entry requirements of that country.



Transfers to Nauru

Information for people who arrived by boat

The Australian Government is transferring you to the regional processing country of Nauru. Both the Australian Government and the Nauruan Government are committed to giving you care and support while you are in Nauru.

Nauru has committed to treating you with dignity and respect, in line with human rights standards. You will be subject to Nauruan laws. You will be expected to depart Nauru if you are found not to be a refugee.

What is Nauru like?

It is a small island in Micronesia located 42kms (26 miles) south of the Equator, north east of Australia. Being a tropical island in the Pacific Ocean, it is hot and humid all year round. Daily temperatures can exceed 30 degrees (86 °F). People on Nauru use Australian dollars. They speak their own Nauruan language, but most people also speak English.

How will I get there?

You will be flown from Christmas Island or mainland Australia. This will take about nine hours.

You cannot take food in your luggage but you can pack a limited amount of cigarettes. Your belongings will be stored on the plane. Do not bring food, water, cigarettes or hand luggage when you get on the plane. You can take a jacket or sweater as the plane can be cold.

An Australian Immigration officer will look after your bags and personal items, including money, medication and medical records during the flight. These will be available to you after you arrive in Nauru. Some items will be stored in a safe place for you while you are at the regional processing centre.

Once you arrive at the airport, you will be driven by bus to the regional processing centre. At the centre, you will find out more about Nauru, the laws on the island and what your life will be like while you are there. You will be given basic clothes, toiletries, footwear and items for your bed. You will also be able to make a phone call to your family or a friend to tell them you have arrived safely.

Where will I live?

You will live at the regional processing centre on Nauru.

What is available at the centre?

There is an area for meals and recreation, televisions, DVDs, video games and gym equipment. You will be provided with meals and snacks. There are computers with internet access, phones and postal services. Any phone cards you already have will not work on Nauru.

There is a canteen where you can buy small personal items. To make purchases you will be allocated points when you arrive on Nauru. This is a different system to Christmas Island and mainland Australia. You will not be able to transfer any points you have now.

Will I be able to come and go from the centre?

A program of activities is being developed and will include escorted excursions and sporting activities. In the meantime, the ability to come and go from the centre will be linked to the conditions of the Australian Regional Processing visa issued by the Nauruan Government. These conditions depend on health and security checks being finalised.

What support services will be available?

The Salvation Army is a non-government charity that will support your welfare and emotional wellbeing while you are in Nauru. The Salvation Army provides counselling and recreational opportunities, such as English classes. It is not part of a military organisation in any way.

Can I work?

No. There may be opportunities to do unpaid work voluntarily at the centre.

Will I have access to medical facilities in Nauru?

Yes. International Health and Medical Services (IHMS) staff will help you access what you need, including hospital or emergency treatment. At the centre, you will be told who you can talk to.

Can I still practice my religion?

You are free to practice your religion on Nauru. Nauruans are mostly Christian, but some follow other religions. There is a multi-faith prayer room at the centre and opportunities to attend Christian church services on Sundays.

Who will process my refugee claims?

The Nauruan Government will assess your refugee claims. You will find out more about this after you arrive in Nauru.

Can I go home from Nauru?

Yes. The International Organization for Migration (IOM) is available if you want to talk with them any time about going home. You may be able to return home with a package of assistance to help you re-establish yourself in your home country. This assistance could include training, help to find a job or starting a small business, and a small amount of cash.



Information for people transferred to Nauru

You have been transferred to the regional processing country of Nauru, because you arrived by boat in Australia without a visa on or after 13 August 2012.

The Nauruan Government has committed to treating all people who have been transferred from Australia with dignity and respect, in line with human rights standards.

You will be subject to Nauruan laws while you are here. This means that you will be expected to depart Nauru if you claim refugee status but are found not to be a refugee.

Both the Australian Government and the Nauruan Government are committed to giving you care and support while you are in Nauru.

Who will process refugee claims and when will this begin?

The Nauruan Government has decided that claims for refugee status will be assessed under Nauruan law. This will be against the definition of 'refugee' in the *Refugees Convention*, as amended by the *Refugees Protocol*.

The process to assess refugee claims is still being agreed and developed by the Australian and Nauruan governments. This will take several months.

After a process to determine refugee status is agreed, it will be necessary to recruit qualified staff and arrange accommodation for them. Interpreters will also be needed.

It is intended that assistance will be provided so that refugee claims are made properly. A contract will be required to provide this assistance. This contract cannot be put in place until the governments of Nauru and Australia have first reached agreement.

All of these steps and people are needed before the first interviews for refugee status can occur.

How long will it take to assess my refugee claim?

It is not known, at this stage, exactly how long it will take to hear and assess your refugee claim once the process has been established.

How long will I need to remain on Nauru?

It is not possible to say precisely how long you may need to remain on Nauru. Remember that you can decide to leave Nauru voluntarily at any time.

If you are found to be a refugee, your individual circumstances will need to be considered as part of any resettlement option. Only a small number of countries have regular resettlement programs.

With millions of refugees worldwide, the demand for places in these resettlement countries is always greater than the number of places available. This is the reason that it takes a long time.

You will also need to wait and see how the "no advantage" principle applies to your case. This principle ensures that people who arrived unlawfully in Australia by boat, and who are processed in a regional processing country, do not gain any advantage over other refugees outside of Australia who are awaiting resettlement.

Overall you can 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. This will be regardless of when you may be determined to be a refugee, and in accordance with the no advantage principle.

If you are found not to be a refugee, you will be expected to leave Nauru and return home. Information and help to do this will be available to you at any time.

Will I be resettled in Australia if I'm found to be a refugee?

If you are found to be a refugee, it is possible that you could be resettled in a country as part of broader regional arrangements, or that you are eventually resettled in Australia. However, you will not have priority if resettlement is considered in your case. You will have to wait the same amount of time other people do who apply for refugee status from outside of Australia.

Where do I live on Nauru?

You will need to reside at the regional processing centre.

Will I be able to come and go from the regional processing centre?

You will be able to leave the centre for certain activities. In the meantime, the ability for you to come and go from the centre will be linked to the visa conditions imposed by the Nauruan Government. These conditions vary depending on health and security checks, which are still being finalised.

Can I go home from Nauru?

Yes. This is an important decision, so the International Organization for Migration (IOM) is available if you want to talk with them about going home. IOM is independent from the Australian and Nauruan governments.

You also can return with a package of assistance to help you re-establish yourself in your home country. This assistance may include training, help to find a job or start a small business, and a small amount of cash. Talk to IOM to find out more about what kind of help would be best for you.

If I have family in another resettlement country (not Australia), can they sponsor me to go there?

You would have to meet the visa and entry requirements of that country.

Question on Notice (No.13)

Question:

Have any complaints been received from persons transferred about the mode in which this transfer has taken place? If so, what action has been taken in response?

Answer:

There are no records of any complaints registered with the department regarding the mode of transfer from persons transferred to Manus Island or Nauru Regional Processing Centres.

Question on Notice (No.14)

Question:

Please outline the extent or any restrictions placed on the liberty and freedom of movement of persons transferred to Manus Island or Nauru and the reasons for any such restrictions. Are persons free to come and go from the processing centres unescorted? Under what circumstances would they be permitted to leave Nauru or Manus Island?

Answer:

Offshore entry persons who are transferred to regional processing centres (RPC) in Papua New Guinea (PNG; Manus Island) or Nauru are not currently able to come and go from the centres unescorted. While an 'open centre' is envisaged for the RPC in Nauru, arrangements at the RPC on Manus Island are different.

Upon their arrival in Nauru, transferees are granted an Australian Regional Processing Visa (Offshore Entry Person) to which certain conditions are attached.

Pending completion of health and security checks, transferees are required to reside at the RPC, except in cases of emergency or extraordinary circumstances, or where the visa holder is in the care and control of a service provider or a person authorised by the service provider. During this time, transferees are permitted to leave the RPC on escorted excursions, e.g. for shopping, sport, recreation and religious services.

Once health and security clearances are granted by Nauru, transferees will be permitted to leave the RPC unescorted between the hours of 7am to 7pm and subject to any Nauruan visa conditions. This requirement by Nauru for transferees to remain in the RPC each night is for the transferees' safety and wellbeing.

The Department of Immigration and Citizenship (the department) is currently in discussions with the Government of Nauru regarding the practical arrangements for the operation of the RPC as an 'open facility'.

Following their arrival on Manus, transferees are subject to a 30 day 'quarantine' period while health checks are conducted, including vaccinations. Transferees are not able to leave the RPC during this time, even if escorted, except in cases of emergency or extraordinary circumstances. At the end of the 30 day quarantine period – and at the discretion of the PNG Chief Migration Officer – transferees can participate in escorted excursions outside the RPC, including attendance at church or visits to a local beach. To safeguard the security of the local community, non-compliant behaviour by a transferee may affect their involvement in these excursions.

The Government continues to discuss freedom of movement arrangements with the PNG Government.

Transferees to PNG or Nauru can leave voluntarily at any time. The department has engaged the International Organization for Migration (IOM) to provide advice and assistance packages for those who choose to return to their home country. IOM is

independent of the Australian, Nauru and PNG governments. Reintegration assistance packages are available to help transferees re-establish themselves in their home country, and may include training, help to find employment or to start a small business, and a small amount of cash.

Transferees may also be transferred temporarily to Australia for medical treatment. Once they are assessed as fit to travel, they are returned to the RPC.

There are no restrictions on a transferee departing PNG or Nauru of their own volition and traveling to a third country of their choice if they have the appropriate travel documents and undertake the travel lawfully.

Question on Notice (No.15)

Question:

What access to legal or migration advice do persons transferred to Manus Island and Nauru have? How does this compare with that which might be available to onshore applicants/detainees?

Answer:

In line with the recommendations of the Report of the Expert Panel on Asylum Seekers, persons transferred to a regional processing country who undertake a refugee status determination will be provided with protection claims assistance.

On 7 January 2013, the Department of Immigration and Citizenship published a Request for Tender (RFT) for a Protection Claims Assistance Service to persons transferred to a regional processing country. The RFT closed on 25 January 2013. The Government will fund the provision of this service.

Due to issues of probity it is not possible to provide any further comment on this matter at this time, however it is anticipated that contracts with a successful tender/s will be executed shortly. A protection claims assistance service will be delivered in line with refugee status determination commencement in the respective regional processing countries.

Question on Notice (No.16)

Question:

What avenues are there for persons to challenge the fact or conditions of any detention, or the procedure for determination of refugee status before the courts of PNG or Nauru?

Answer:

Avenues available to asylum seekers to challenge the fact or conditions of detention and/or the procedure of determination of refugee status fall under the domestic legislation of the Republic of Nauru (Nauru) and the Independent State of Papua New Guinea (PNG).

Question on Notice (No. 17)

Question:

The committee has been told that drug-resistant malaria is present on Manus Island, as well as dengue fever. Is this the case and, if so, could you explain how it could be consistent with Australia's Obligations under article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), article 10 of the International Covenant on Civil and Political Rights (ICCPR) and article 24 of the Convention on the Rights of the Child to send persons, in particular minors, to such an environment?

Answer:

Australia will only owe human rights obligations extraterritorially if it is exercising extraterritorial jurisdiction. Further, article 12 of the ICESCR, article 10 of the ICCPR and article 24 of the CROC do not give rise to non-refoulement obligations.

Whilst conditions relating to transferees on PNG are under the control of the PNG government, and despite having no obligation to do so, Australia has entered into comprehensive agreements with PNG regarding the treatment of transferees, including measures to provide irregular maritime arrivals (IMAs) with an appropriate level of health care.

Four species of malaria occur in PNG, including Manus Island. Most cases are due to the *P. falciparum* and *P. vivax* species.

In PNG resistance to the medication chloroquine occurs with both species and resistance to the medication sulfadoxine-pyrimethamine occurs with *P. falciparum*. Chloroquine and sulfadoxine-pyrimethamine are therefore not recommended for use in PNG, either for prophylaxis or treatment.

Dengue fever is also present in PNG, including Manus Island.

Three medications are considered by clinicians in the care of people being transferred to Manus Island. These are atovaquone + proguanil (brand name "Malarone"), doxycycline and mefloquine. The department's contracted health services provider, International Health and Medical Services (IHMS), has recommended Malarone as the standard malaria prophylaxis for transferees to Manus Island, except those who are pregnant. Pregnant transferees are typically provided with mefloquine.

The risks of malaria and dengue fever are additionally managed through vector control services, provided on Manus Island by IHMS. Vector-control services on Manus Island comprise:

- o the removal or reduction of stagnant water;
- o the use of larvicides and insecticides to control mosquito populations. This includes fogging; and

- o the reduction of human/mosquito contact through measures such as resident education, provision of bed-nets and window screens.

To date, the department has not been advised of any transferees contracting malaria or dengue fever on Manus Island.

Question on Notice (No. 18)

Question:

Your department has suggested that, once legal and other arrangements are fully in place in PNG and Nauru, Australia will not have 'effective control' of transferees. This argument does not address the issue of whether Australia might nevertheless be liable jointly with PNG and Nauru, or liable for aiding or assisting, for any human rights violations because of its level of involvement in the whole process. The latter is a distinct issue from effective control, as set out in article 17 of the International Law Commission's *Articles on State Responsibility*. Have you considered whether Australia could be held jointly responsible for any violations or liable for aiding or assisting in such violations? If so, what conclusions have you drawn regarding Australia's liability for any violations?

Answer:

The issue of state responsibility was considered as part of the Expert Panel on Asylum Seekers Report (see page 84) which forms the basis for the regional processing legislative framework.

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.

Question on Notice (No. 19)

Question:

Does Australia have human rights obligations with respect to persons during the process of transferring them to Nauru or Manus Island? If not, who does?

Answer:

Under current transfer arrangements, all stages of the transfer process are conducted by officers of Australian government agencies or companies contracted to carry out stages of the transfer process on behalf of Australian Government agencies.

As such, Australia has under the current arrangements, human rights obligations to persons during the process of transferring them to a regional processing country.

Question on Notice (No. 20)

Question:

PNG is a party to the Refugee Convention and has accepted the obligation of non-refoulement, but has entered reservations to that convention in relation to rights to work, education and other articles. Given that Australia has accepted those obligations, the result is that persons transferred to PNG may enjoy less extensive rights than if they had remained in Australia. Do you agree that this is the case?

Answer:

Yes.

However, this fact alone does not result in Australia breaching any of its international obligations, in particular its non-refoulement obligations.

Further, please note that the Government of PNG has, under the Memorandum of Understanding with the Australian Government, committed to ensuring that transferees will be treated with dignity and respect and that relevant human rights standards will be met.

Question on Notice (No. 21)

Question:

The committee is concerned that a practical consequence of the application of the 'no advantage principle' would appear to be either a deliberate slowing down of processing applications for refugee status or deliberate delays in resettlement or transfer once a person has been determined to qualify as a refugee. In each case the person would remain on Nauru or Manus Island for longer than would otherwise have been necessary. Could you indicate why this is not arbitrary detention within the meaning of article 9 of the ICCPR or a penalty under the Refugee Convention?

Answer:

Australia will only owe human rights obligations extraterritorially if it is exercising extraterritorial jurisdiction. Further, article 9 of the ICCPR and article 31 of the Refugees Convention do not give rise to non-refoulement obligations.

The department is currently in discussions with the governments of Nauru and PNG regarding the practical arrangements for the operation of the regional processing centres (RPCs).

A primary question in relation to article 9 of the ICCPR is whether the above 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 conditions relating to RPCs amount to detention. Upon their arrival in Nauru, transferees are granted an Australian Regional Processing Visa (Offshore Entry Person) to which certain conditions are attached.

Transferees on PNG are exempted from the requirement to hold a valid visa by way of a determination made under the Papua New Guinea *Immigration Act 1978*.

Pending completion of health and security checks, transferees in Nauru are required to reside at the RPC, except in cases of emergency or extraordinary circumstances, or where the visa holder is in the care and control of a service provider or a person authorised by the service provider. During this time, transferees are permitted to leave the RPC on escorted excursions, e.g. for shopping, sport, recreation and religious services.

Once health and security clearances are granted by Nauru, transferees will be permitted to leave the RPC unescorted between the hours of 7am to 7pm and subject to any Nauruan visa conditions. This requirement by Nauru for transferees to remain in the RPC each night is for the transferees' safety and wellbeing.

Following their arrival on Manus Island, transferees are subject to a 30 day 'quarantine' period while health checks are conducted, including vaccinations. Transferees are not able to leave the RPC during this time, even if escorted, except in cases of emergency or extraordinary circumstances. At the end of the 30 day quarantine period – and at the discretion of the PNG Chief Migration Officer – transferees can participate in escorted excursions outside the RPC, including

attendance at church or visits to a local beach. To safeguard the security of the local community, non-compliant behaviour by a transferee may affect their involvement in these excursions.

The Government continues to discuss freedom of movement arrangements with the PNG Government.

In practice, all transferees to both Nauru and Manus Island are currently residing at the RPC (and are escorted when they leave the centre).

Under international law, the position in relation to article 9 of the ICCPR is that the detention of individuals requesting protection is not arbitrary per se. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable.

The key elements in determining whether detention is arbitrary are whether the detention is reasonable and necessary in all of the circumstances and proportionate to the end sought. The issue of whether detention is or becomes arbitrary must be assessed on a case-by-case basis, in light of all the relevant circumstances, which includes an examination of the particular factors justifying detention.

In relation to article 31 of the Refugees Convention, the department interprets the word "penalty" as the imposition of criminal sanctions as contemplated in the travaux preparatoires relating to article 31.

Question on Notice (No. 22)

Question:

Has the processing of asylum seekers' claims in Nauru and Manus Island commenced? If not, when is processing expected to commence?

Answer:

No, the processing of asylum seekers' claims in Nauru and Manus Island has not commenced. The arrangements for processing are currently being discussed with both the governments of Nauru and Papua New Guinea. Both countries are still developing their frameworks, guidelines and processes for conducting refugee status determination. The Department is currently unable to give an estimate of when the assessment process will begin.

Although not a part of the assessment process for protection claims, transferee interviews have commenced in the regional processing countries. The focus of these interviews is the collection of comprehensive information in respect of transferees' biographical particulars, including any family links, reasons for travel and travel information.

In line with the recommendations of the Report of the Expert Panel on Asylum Seekers, persons transferred to a regional processing country who undertake a refugee status determination will be provided with protection claims assistance.

On 7 January 2013, the Department of Immigration and Citizenship published a Request for Tender (RFT) for a Protection Claims Assistance Service to persons transferred to a regional processing country. The RFT closed on 25 January 2013. The Government will fund the provision of this service.

Due to issues of probity it is not possible to provide any further comment on this matter at this time, however it is anticipated that contracts with a successful tender/s will be executed shortly. A protection claims assistance service will be delivered in line with refugee status determination commencement in the respective regional processing countries.

Question on Notice (No.23)

Question:

What steps have been taken to progress a 'managed regional system', which was a central plank of the Expert Panel's model for addressing irregular entry into Australia?

Answer:

The Australian government has allocated a \$10 million 'down payment' to strengthen the regional cooperation framework through capacity building initiatives that enhance protection for asylum seekers and displaced persons in the region. This is an initial response to the issues raised by the recent Report of the Expert Panel on Asylum Seekers.

As an example, a proportion of this funding will expand the capacity of international organisations and non-government organisations to increase asylum seeker registrations and undertake timely Refugee Status Determination, and increase protection support for displaced persons and asylum seekers in the region.

In addition, these initiatives complement the Regional Cooperation Framework (RCF) which was established on 30 March 2011 at the Fourth Ministerial Conference of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (the Bali Process). The RCF enables States in the region to improve cooperation by entering into practical bilateral or multilateral arrangements on a voluntary basis having regard to the following principles:

- upholding the need to promote human life and dignity;
- access to consistent asylum procedures and outcomes;
- burden-sharing; and
- collective responsibility.

The RCF is being further developed through the Regional Support Office (RSO) that was officially opened in Bangkok on 10 September 2012. Its objective is to provide a policy, coordination and operational hub to take forward ideas for practical implementation of the RCF. Two foundation projects for the RSO, proposed and funded by Australia, are:

- a regional data management initiative to promote further harmonisation of information management; and
- a voluntary repatriation capacity building and support project to raise awareness of voluntary repatriation opportunities for irregular migrants and enhance the capacity of governments to facilitate voluntary returns.

The Government is also using strategic resettlement in the region. The caseload composition of the 2012–13 offshore Program reflects the recommendations of the Expert Panel on Asylum Seekers and has been refocused to target asylum populations who may otherwise seek to engage people smugglers for a boat journey to Australia. The increased number of places in the 2012-13 Program provides more orderly and safer visa pathways for these refugee groups.

The three main priorities for the 2012–13 offshore Program are:

- increased resettlement of asylum populations directly from countries of first asylum in the Middle East and South West Asia (in particular Afghans from Pakistan and Iran and Iraqis from Syria, Jordan, Turkey and Lebanon);
- in our immediate region, increased resettlement from Indonesia (Afghans, Iraqis and Iranians) and maintaining a significant intake of refugees from Malaysia (Myanmarese, Afghans, Iranians, Iraqis); and
- responding to other refugee groups in need globally based on UNHCR resettlement priorities (refugees in Africa, the Middle East and elsewhere in Asia, including Myanmarese from Thailand and India, Bhutanese from Nepal and a range of African nationalities from Africa).

Three main priorities for the 2012–13 offshore Program

Priority	Target population/s	Planning Level in 2012–13
1. Targeting asylum populations closer to 'source'	Afghan refugees in Pakistan and Iran	up to 2000 places ¹
	Iraqi refugees in Syria, Jordan, Lebanon and Turkey	around 3500 places ²
2. Resettlement of asylum populations in our immediate region	UNHCR referred refugees in Indonesia	600 ³
	UNHCR referred refugees in Malaysia	1350 ⁴
3. UNHCR identified populations in need elsewhere	Includes Bhutanese, Myanmarese, and a range of nationalities from Africa	No specific planning levels set for individual groups

The Government is on target to fully deliver the increased Humanitarian Program of 20,000 places.

¹ More than a threefold increase on the 2011-12 intake (570 persons)

² Includes commitment by Australia to resettle 1000 additional refugees from Syria (primarily Iraqis)

³ Planning level in 2012–13 is 400 additional places to 2011–12 level of 200 places

⁴ Continues Australia's commitment to resettle 4000 additional UNHCR referred refugees from Malaysia over four years (1000 average per year)

Question on Notice (No. 24)

Question:

Please outline the scope and operation of the new family reunion regime, including the scope and impact of the changes introduced by the Migration Amendment Regulation 2012 (No. 5).

Answer:

Since July 1997, there have been family reunion ('split family') provisions in each subclass of visa class XB (Refugee and Humanitarian). These are concessions for immediate family members of Humanitarian Program visa holders. 'Immediate family member' includes dependent children, partner and parents if the proposer (sponsor) is under 18.

Class XB is the visa class used to resettle applicants who are refugees or in refugee-like circumstances, outside Australia and usually outside their home country. It comprises five permanent subclasses: 200 (*Refugee* – for applicants who are outside their home country and subject to persecution in their home country); 201 (*In-country Special Humanitarian* – for applicants who are in their home country and subject to persecution in their home country); 202 (*Global Special Humanitarian* or SHP – for applicants who are outside their home country, subject to gross human rights violations in their home country and with a connection to Australia); 203 (*Emergency Rescue* – for applicants who are subject to persecution in their home country and in urgent need of resettlement); and 204 (*Woman at Risk* – for female applicants who are outside their home country, subject to persecution, without the protection of a male relative and in danger of victimisation, harassment or serious abuse because of their sex).

A criterion that is unique to Class XB and common to all its subclasses is the 'compelling reasons' criterion, which requires the decision-maker to take into account four factors (degree of persecution or discrimination; extent of connection to Australia; alternative resettlement options; and capacity of Australian community) in assessing whether there are compelling reasons for giving special consideration to granting the applicant a visa.

Before 28 September 2012, applicants who qualified for consideration under the 'split family' provisions did not have to present claims of persecution or gross human rights violations to be granted a visa. Further, as a matter of policy, the 'compelling reasons' criterion was usually taken to be satisfied on the sole basis of the connection to Australia through the immediate family member.

Under the 'split family' provisions, visas are granted in the same subclass as the visa of the immediate family member who holds a Class XB visa and who is the applicant's proposer. Subclass 202 is a little different in this respect from the other subclasses. Subclass 202 visas are granted not only to 'split family' of subclass 202, but also to 'split family' of subclass 866 (Protection) and 851 (Resolution of Status) visa holders, as these onshore subclasses do not contain their own 'split family' provisions or offshore equivalents.

As a result of the recommendations of the Expert Panel on Asylum Seekers, the Government made a number of regulation and policy changes to the 'split family' provisions with effect from 28 September 2012. These changes are intended to reduce the attractiveness of irregular maritime arrival relative to regular migration and resettlement pathways. The changes affect all subclasses except 201 and both undecided and new applications.

The regulation changes may be summarised as follows:

- people who became irregular maritime arrivals on or after 13 August 2012 cannot be proposers for the purpose of Class XB applications;
- people who became irregular maritime arrivals before 13 August 2012 can still be proposers, but the applications must be assessed in full against all four factors of the 'compelling reasons' criterion
 - there is a concession for applications proposed by subclass 866 or 851 visa holders who are under 18 at the time of application; and for holders of offshore humanitarian visas (subclasses 200, 202, 203 and 204): they must be assessed against a new, single-factor 'compelling reasons' criterion on the basis of their connection to Australia only.

The policy changes concern the prioritisation of applications for subclass 202 visas. In general, these applications are to be dealt with in the following order:

1. 'Split family' of subclass 202 visa holders
2. 'Split family' of unaccompanied minors who hold a subclass 866 or 851 visa and are under 18 at the time of application
3. 'Claims-based' (non-'split family')

Priority 1 - proposed by a partner, child, parent or sibling;

Priority 2 - proposed by a grandparent, grandchild, aunt, uncle, niece, nephew or cousin;

Priority 3 - proposed by a friend, distant relative or organisation

4. 'Split family' of subclass 866 and 851 visa holders.

Undecided applications made before 28 September 2012 by 'split family' of subclass 866 and 851 visa holders (group 4) which, at the time of application, would have been assessed against the 'compelling reasons' criterion only in relation to their connexion to Australia, must now be assessed against all four factors of that criterion. As most such applicants will not have supplied claims, the department is advising them in writing of the changes to the processing of their applications and giving them the opportunity to present claims.

The Government has increased the size of the Humanitarian Program from 13 750 to 20 000 places per year, and increased the family migration stream by 4000 places per year reserved for family members of irregular maritime arrivals. As a consequence, there are increased opportunities for family reunion.

Family members may of course make use of other avenues for migration available to them in the skill stream of the Migration Program.

Question on Notice (No. 25)

Question:

Please provide an outline of the operation of the new bridging visa regime and its associated work restrictions. Do the work restrictions apply only to asylum seekers who are waiting for their claims to be processed?

Answer:

Irregular maritime arrivals (IMAs) who arrived before 13 August 2012 who satisfy initial health, security and identity checks are considered on a case-by-case basis for the grant of a Bridging visa E (BVE) while their protection claims are assessed. Initial priority was given to longer-term cases and vulnerable people. Other key considerations include cooperation with the department and behaviour while in detention. People who pose an unacceptable risk to the community will remain in an immigration detention facility.

A community based processing (CBP) model took effect from 11 October 2012. Under this model the then Minister for Immigration and Citizenship initially granted 6-8 week BVEs to allow asylum seekers to apply for a Protection visa in the community.

On 21 November 2012, the then Minister announced that the Government would release IMAs who arrived on or after 13 August 2012 on BVEs without work rights.

Asylum seekers who are subject to the post-13 August 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).

The purpose of the policy relating to work rights is to minimise incentives for people to risk their lives in dangerous travel to Australia in order to work and raise money.

The arrangements put in place by the Government provide asylum seekers with suitable support and care, while they await their claims for protection to be assessed.

IMAs who arrived before the announcement on 13 August 2012 released on BVEs will continue to have work rights while in the community, consistent with the then Minister's announcement in November 2011.

Question on Notice (No. 26)

Question:

Does the legislation ensure that those whose claims have been approved will be allowed to work?

Answer:

Irregular maritime arrivals (IMAs) who arrived before 13 August 2012 are given permission to work while undergoing assessment and this continues where they are found to be owed protection up until the grant of a Protection visa.

IMAs who arrived on and after 13 August 2012 and who are granted a substantive visa will be allowed to work.

Question on Notice (No.27)

Question:

How has the disallowance of the Migration Amendment Regulation 2012 (No. 6) affected these measures?

Answer:

The disallowed regulation enabled delegated departmental officers to grant subsequent Bridging E visas (BVEs) to irregular maritime arrivals (IMAs) who had previously been granted a BVE by the Minister personally using his non-compellable power under section 195A of the *Migration Act 1958* (the Act).

The regulation was part of a community based processing (CBP) model for IMAs, introduced, with the first release of IMAs under these arrangements, on 11 October 2012. Under this model the then Minister for Immigration and Citizenship initially granted 6-8 week BVEs to allow asylum seekers to apply for a Protection visa in the community. The regulation enabled the department to grant a subsequent BVE in association with that Protection visa application, when lodged, to keep the applicant lawful throughout processing.

The immediate impact of the disallowance was that the department lost the ability to grant BVEs in association with Protection visa applications to IMAs who had been released to apply for Protection visas in the community.

As a result of the disallowance further BVEs may be granted using the personal ministerial power under section 195A of the Act.

Question on Notice (No.28)

Question:

Are the [BVE] measures consistent with article 6 of ICESCR (relating to the right to work)? To what extent might the measures raise issues vis-à-vis article 7 of the ICCPR – for example, if the work ban combined with minimal support results in destitution?

Answer:

In its General Comment on the Right to Work (General Comment No. 18), the Committee on Economic, Social and Cultural Rights states that:

The right to work should not be understood as an absolute and unconditional right to obtain employment.

Article 4 of ICESCR provides that:

The States Parties to the present Covenant recognise that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

As such, the 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).

The department considers the BVE 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.

Article 7 of the ICCPR prohibits torture and cruel, inhuman or degrading treatment or punishment.

Whether treatment or punishment violates article 7 depends on all of the circumstances of the individual case, including the duration and manner of the treatment, its physical and mental effect as well as the sex, age and state of health of the victim.

The UN Human Rights Committee has not found that a deprivation of the right to work could amount to cruel, inhuman or degrading treatment or punishment in violation of article 7.

Question on Notice (No.29)

Question:

The Committee has heard that Australia's differential treatment of asylum seekers based on their method of arrival may be inconsistent with the right to equality and non-discrimination in article 26 of the ICCPR. Do you agree with this assessment/view? If not, on what legal basis do you reach a different conclusion? In addition, have you considered whether transferring some post-13 August 2012 arrivals to Nauru and PNG but permitting others within the same cohort to be processed in Australia is consistent with the right to equality and non-discrimination in article 26 of the ICCPR?

Answer:

In relation to the first part of this question, the department does not agree with this assessment.

Article 26 of the ICCPR relates to discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status. The department's position is that mode of arrival when seeking asylum does not fall within the definition of 'other status' so as to amount to a prohibited ground of differential treatment under article 26.

Further, not all treatment that differs among individuals or groups on the grounds mentioned above will amount to prohibited discrimination. Where the treatment is based on reasonable and objective criteria, is aimed at achieving a legitimate purpose under the ICCPR, and is proportionate to that aim, that differential treatment will not amount to discrimination under international law.

The Expert Panel on Asylum Seekers was tasked with recommending an integrated approach of measures to discourage asylum seekers risking their lives on dangerous boat journeys to Australia. It is well recognised that the risks of seeking asylum by boat are far greater than doing so by air.

In the department's view, in the context of the rights articulated in the ICCPR, the integrated package of measures introduced under the regional processing framework are based on reasonable and objective criteria (mode of arrival) and for the legitimate purpose of avoiding the further loss of life at sea.

In relation to transferring some post-13 August 2012 arrivals to Nauru and PNG, the department's view is that the same rationale applies. The *Migration Act 1958* (the Act) requires that an officer must, as soon as reasonably practicable, take an offshore entry person to whom subsection 198AD(2) of the Act applies from Australia to a regional processing country (RPC). This provision forms the cornerstone of the integrated package of measures recommended by the Expert Panel of Asylum Seekers to discourage asylum seekers from risking their lives at sea.

In addition, each person subject to transfer will be subject to a pre-transfer assessment designed to take into account each individual's circumstances, including any vulnerability that cannot be managed in an RPC. The assessment also considers whether taking the person to an RPC would be consistent with Australia's international obligations and leads to a conclusion as to whether it is reasonably practicable to take a person to an RPC at that time.

Subsection 198AE(1) of the Act provides for an exemption from transfer to an RPC where the Minister thinks it is in the public interest to do so. As part of assessing the public interest in relation to an exemption, the Minister may consider various international human rights treaties though the Minister is not obligated to do so.