19 December 2012

Ms Jeanette Radcliffe
Committee Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

By email to human.rights@aph.gov.au

Dear Ms Radcliffe

Issues Paper – Implementation of Regional Processing of Asylum Seekers

The LIV has prepared an Issues Paper, which outlines our significant concerns with the government's implementation of regional processing of asylum seekers. A copy is attached.

We hope the Issues Paper will assist the Committee in its examination of the package of relevant legislation that seeks to implement regional processing arrangements for asylum seekers and other aspects of the Expert Panel on Asylum Seekers report.

Please contact Laura Helm, Lawyer for the Administrative law and Human Rights Section, on (03) 9607 9380 or lhelm@liv.asn.au in relation to this submission.

Yours sincerely,

Michael Holcroft
President
Law Institute of Victoria

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Issues Paper – Implementation of Regional Processing of Asylum Seekers

To: Minister for Immigration and Citizenship
Parliamentary Joint Committee on Human Rights
Senate Legal and Constitutional Affairs Committee

19 December 2012

Queries regarding this submission should be directed to:

Contact person *Laura Helm*
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Introduction

The Law Institute of Victoria (LIV) is the peak body for lawyers in Victoria and represents over 15,000 members. The LIV is a strong advocate for refugees and asylum seekers. LIV advocacy is informed by the LIV Refugee/Asylum Seeker Policy of 31 October 2005 (copy attached) and by input from the Refugee Law Reform Committee and Young Lawyers Law Reform Committee. The Refugee Law Reform Committee consists of practitioners who work regularly with refugees and asylum seekers or in the field of migration law generally, whether in a paid or voluntary capacity, and who have a shared interest in promoting and protecting the rights of refugees in accordance with the rule of law. LIV advocacy is therefore informed by our members' experience with the operation and impact of migration law in Australia.

The LIV made a submission to the Expert Panel on Asylum Seekers in which we argued that an effective and sustainable approach to asylum seekers must be based on respect for human dignity and not on political expediency.[1] Any policy options which seek to de-humanise asylum seekers or which effectively punish individual asylum seekers with the aim of general deterrence must be rejected.

The LIV is a constituent body of the Law Council of Australia and regularly provides input to Law Council advocacy and submissions on refugee and asylum issues. The LIV has prepared this Issues Paper to supplement the advocacy of the Law Council on the Migration (Regional Processing) package of legislation.

Executive Summary

The LIV supports efforts to develop a regional approach to refugee protection. A comprehensive regional protection framework must be a multilateral protection regime that ensures the processing of asylum claims meets international standards, that asylum seekers can live in dignity while their claims are determined and that timely resettlement options are available. Australia's recent designations of Nauru and Manus Island as regional processing countries do not, however, meet these requirements and do not constitute a regional approach to protection but rather, are really an attempt at offshore processing by Australia.

In this Issues Paper, the LIV raises a number of concerns with the government's implementation of regional processing:

1. Excision of all Australian territories from the migration zone for unauthorised boat arrivals is a legal fiction

2. Removal of asylum seekers pursuant to s 198AD(3) of the Migration Act breaches Australia's international obligations

3. Discretion to designate a regional processing country risks refoulement of refugees

4. The mechanics of regional processing arrangements are unclear

5. Bar on legal proceedings is contrary to Refugee Convention

[1] LIV submission, Short, medium and long term approaches to assist in the development of an effective and sustainable approach to asylum seekers, 19 July 2012 (available at http://www.liv.asn.au/For-Lawyers/Sections-Groups-Associations/Practice-Sections/Submissions.

6. Transfer of unaccompanied minors would be contrary to the *Convention on the Rights of the Child*

7. Application of the 'no advantage' test to post-13 August arrivals is unworkable

The LIV therefore urges the government to:

- immediately desist from transferring asylum seekers to regional processing centres until a comprehensive regional protection framework has been established;

- process the claims of all asylum seekers who have arrived in Australian territories without delay and according to international law; and

- ensure that people assessed as refugees are provided with durable protection outcomes, either by permanent protection in Australia or by immediate resettlement in a suitable third country.

Parliamentary inquiries

The LIV welcomes the opportunity to provide input to the following parliamentary inquiries currently considering matters relevant to the government's implementation of regional processing of asylum seekers:

Parliamentary Joint Committee on Human Rights inquiry

The Parliamentary Joint Committee on Human Rights (the Committee) is currently examining the following Bills as part of the package of relevant legislation that seeks to implement regional processing arrangements for asylum seekers and other aspects of the Expert Panel on Asylum Seekers report (the Migration (Regional Processing) package of legislation):

- *Migration Legislation (Regional Processing and Other Measures) Act 2012* (Regional Processing Act)

- *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) Bill 2012* (Unauthorised Maritime Arrivals Bill)

- *Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Bill (No. 1) 2012-2013* and *Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Bill (No. 2) 2012-2013*

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

Senate Legal and Constitutional Affairs Committee

On 1 November 2012, the Senate referred the *(Unauthorised Maritime Arrivals Bill)* for inquiry and report.

List of Issues of Concern

1. Excision of all Australian territories from the migration zone for unauthorised boat arrivals is a legal fiction

Excising the mainland creates a legal fiction that no one is in Australia until they have been immigration cleared. The Unauthorised Maritime Arrivals Bill changes the concept of the 'migration zone', so that whether a person is in the migration zone depends not on their location but rather, on their mode of arrival and their national identity.

Excising all Australian territories clearly discriminates between asylum seekers based on their means of conveyance – that is, whether they arrive by boat or by plane – and is inconsistent with the 1951 Convention relating to the Status of Refugees (the Refugee Convention), which prohibits punishment of asylum seekers where they enter unlawfully but present themselves without delay (under Article 31). The LIV considers that discrimination based on mode of arrival cannot be justified on the basis that the government seeks to save lives at sea, because alternative arrangements could be made to assist people enter Australia by means other than by boat (for example, by issuing temporary visas which allow them to enter lawfully). Further, the Expert Panel's report shows that asylum seekers arriving by boat are overwhelmingly more likely to be found to be refugees.[2]

Excising all Australian territories is also racially discriminatory and therefore in breach of Article 3 of the Refugee Convention, because asylum seekers arriving by boat generally have no opportunity to apply for visas to arrive by air because of their national identity.[3] Countries which produce a large number of refugees generally don't have an Australian embassy or high commission at which to apply for a visa, and do not have access to online applications for tourist visas (which are one of the most common visas used to travel to Australia to apply for asylum). Accordingly, people from countries most likely to produce refugees are the least likely to have the means to obtain visas to arrive by air. Australian migration law and policy therefore prevents certain classes of asylum seekers from entering Australia other than by 'unlawful' means.

2. Removal of asylum seekers pursuant to s 198AD(3) of the Migration Act breaches Australia's international obligations

The Regional Processing Act inserted new provisions into the Migration Act to implement regional processing (ss198AA – 198AH).

As a signatory to the Refugee Convention, Australia owes certain protection obligations to a person who fulfils the criteria contained in the definition of "refugee" in the Refugee

[2] See Report of the Expert Panel on Asylum Seekers, August 2012, esp Table 15 and Table 16 A, available at http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert_panel_on_asylum_seekers_full_report.pdf
[3] Arising under the application of Public Interest Criterion 4011, *Migration Regulations,* Sch 4, cl 4011.

Convention[4] and who is within territory Australia has the right to control.[5] Under international law, Australia's treaty obligations apply to 'its entire territory'.[6]

It is a person's circumstances, not the official validation of those circumstances, that means a person is a refugee.[7]

Therefore, Australia owes certain protection obligations to persons who fulfil the criteria contained in the definition of "refugee" in the Refugee Convention, prior to any assessment of their claim, who are within Australia's territory. Australia's territory, for the purposes of the Refugee Convention, includes Christmas Island, Ashmore and Cartier Islands, Cocos (Keeling) Islands and the sea within Australia's jurisdiction.

Critically, to such people Australia owes the following protection obligations under the Refugees Convention:

(a) Article 3 - non-discrimination;
(b) Article 13 - movable and immovable property;
(c) Article 16(1) - access to courts;
(d) Article 20 – rationing;
(e) Article 22 – education;
(f) Article 29 - fiscal charges
(g) Article 33 - non-refoulement
(h) Article 34 – nationalisation

Australia owes these protection obligations. Australia must act in a way that realises these protection obligations.

The Expert Panel on Asylum Seekers recommended that adherence by Australia to its international protection obligations be one of the principles that should shape Australian policymaking on asylum seeker issues.[8]

The LIV agrees with the UNHCR that the obligations under the Refugee Convention are non-delegable.[9] Yet protections that were in s 198A of the *Migration Act* 1958 (Cth) do not exist in relation to the regional processing arrangements established under the Regional Processing Act. The *Migration Act* no longer contains statutory provisions directed towards Australia complying with its international obligations under the Refugees Convention.[10]

The amendments under the Unauthorised Maritime Arrivals Bill further undermine Australia's international obligations by preventing any person arriving by boat in Australian territory from apply for a protection visa without the Minister's approval under s48B. Further, the redefinition of 'transitory person' will further erode Australia's international responsibilities, by precluding persons who have been found to be refugees from seeking a protection visa.

[4] Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979; UNHCR "Note on International Protection," UN Doc. A/Ac.96/815 (1993), at para 11; *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533 per Gleeson CJ at [5] and Callinan J at [162].
[5] Hathaway, J, *The Rights of Refugees under International Law* pp 156 – 173
[6] Article 29 of the 1969 Vienna Convention on the Law of Treaties.
[7] Hathway, J, p 158 referring to E. Lauterpacht and D. Bethlehem, "The Scope and Content of the Principle of *Non-Refoulement*" in E. Feller et al. Eds., *Refugee Protection in International Law* 87 (Lauterpacht and Bethlehem, *"Non-Refoulement")*, at para. 90.
[8] Expert Panel Report, Recommendation 1
[9] UNHCR Statement, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, 31 October 2012.
[10] Compare, Plaintiff M61/2010E v the Commonwealth (2010 272 ALR 14, 21.

Australia cannot be confident that asylum seekers will receive adequate protection or welfare in Papua New Guinea or Nauru. Further, Australia has expressly disavowed the relevance of the international obligations and domestic law of these countries in s 198AA(d) of the Migration Act, introduced by the Regional Processing Act, which specifically provides that "the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country".

3. Discretion to designate a regional processing country risks refoulement of refugees

(a) Discretion

The LIV is concerned that the discretion to designate a country a regional processing country is constrained only by the requirement that the Minister considers it to be in the national interest.[11]

The Second Reading Speech for the Regional Processing Act provides:

> "The only condition for the designation of a country is that the minister thinks that it is in the national interest to make the designation. In forming this view, the minister must have regard to whether or not the country has provided assurances to the effect that it will not refoule those transferred and will make – or permit to be made – an assessment of a transferee's claims to be a refugee."[12]

The LIV notes that the Minister is still required to exercise the power reasonably, as the legislature is taken to intend that the discretion be so exercised.[13] Mere assurances, however, are not legally binding and this puts Australia at risk of breaching the obligation of non-refoulement under Article 33 of the Refugee Convention because the Australian government is not able to guarantee the safety of a refugee seeking its protection.

(b) No sunset clause

The LIV is concerned that there is no legislative mechanism to review a designation of a regional processing country under s 198AB. A designation remains in place unless and until it is revoked under 198AB(6) of the *Migration Act.* There are no statutory criteria for the revocation of a designation. The *Migration Act* expressly provides that a designation need not be determined by reference to the international obligations or domestic law of the designated country. It would follow, that international obligations or domestic law may not relevant be in determining whether to revoke a designation.

4. The mechanics of regional processing arrangements are unclear

(a) Lack of transparency in processing claims

There is a lack of clarity about the system to be adopted to process claims for asylum in Nauru and Papua New Guinea, despite the memorandum of understanding between the

[11] Migration Act, s198AB(2).
[12] Second Reading Speech, *Hansard* 21 September 2011, page 10945 .
[13] *Kruger v Commonwealth* (1997) 190 CLR 1 referring to Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 at 234; Water Conservation and Irrigation Commission (NSW) v Browning (1947) 74 CLR 492 at 505.

Australian government and those countries. Where asylum seekers have entered Australia's territory, Australia must to ensure that asylum seekers' have access to an adequate processing system for claims for asylum.[14]

The LIV submits that such a system requires, as a minimum and consistent with procedural fairness requirements:

- Provision of accurate information about the application process;
- Access to legal assistance during the preparation of protection claims;
- Decisions made within a specified, reasonable time frame;
- Written reasons for an adverse determination;
- An effective, transparent and impartial appeal procedure; and
- All information, advice, decisions, reasons and procedures must be communicated to the person in a language the person understands.

The LIV is deeply concerned that Papua New Guinea and Nauru do not have the capacity, infrastructure or resources to facilitate an adequate system to process claims for asylum. The LIV is particularly concerned that asylum seekers might not have access to legal advice to apply for protection, or to pursue an appeal in the event of an adverse determination.

(b) No time limit

Under the regional processing arrangements, there is no time limit within which a person's claim for asylum will be assessed. The lack of time limit for processing undermines the claim that regional processing is within a protection framework. If there is no time limit within which a claim must be assessed, then protection becomes entirely a matter of discretion, rather than in accordance with the Migration Act or Refugee Convention.

Further, there is no mechanism for review of a person's detention after a certain period of time, to confirm that detention is necessary and a last resort. A person would appear not to have any right of review in the domestic courts of the regional processing country and has no right of review in any Australian court. This breaches Australia's obligations under Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which prohibits arbitrary detention and requires that, in determining a person's rights and obligations, the person must have access to the courts and to a full and fair hearing. The lack of review rights, leads to the possibility of indefinite detention.

The LIV is particularly concerned about the impact of indefinite detention on the mental health of asylum seekers. Numerous mental health studies[15] have shown that it is seriously damaging for a person to be incarcerated in circumstances where they cannot know when, if ever, they will be released. The effect is magnified for people whose

[14] UNHCR Statement: Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (31 October 2012) confirms that: "If asylum-seekers are transferred to another country, the legal responsibility for those asylum-seekers may in some circumstances be shared with that other country, but such an arrangement would not relieve Australia of its own obligations under the Convention".

[15] See e.g. "Prolonged Immigration Detention Puts Detainees At Higher Risk Of Mental Illness" Prof Kathy Eagar, *Medical Journal of Australia* 17/01/2010; "Long-term immigration detention and mental health" (below n14); B McSherry, "The government's duty of care to provide adequate health care to immigration detainees" *Journal of Law & Medicine* 13(3):281-4, 2006; D Silove and Z Steel (eds), *The Mental Health and Well-being of On-shore Asylum Seekers in Australia*, University of New South Wales, Psychiatry Research and Teaching Unit, Sydney, (1998), A Sultan and K O'Sullivan, "Psychological Disturbances in Asylum-seekers Held in Long Term Detention: A Participant Observer Account" (2001) 175 *MJA* 593; Z Steel, S Momartin, C Bateman, A Hafshejani, D Silove, N Everson, K Roy, M Dudley, L Newman, B Blick and S Mares, "Psychiatric Status of Asylum-seeker Families Held for a Protracted Period in a Remote Detention Centre in Australia" (2004) 28 (6) *Australian and New Zealand Journal of Public Health* 527; S Mares, L Newman and M Dudley, "Seeking Refuge, Losing Hope: Parents and Children in Immigration Detention" (2002) 10 *Australasian Psychiatry* 91; D Silove, P McIntosh, R Becker, Risk of re-traumatisation of asylum-seekers in Australia. (1993) *Aust N Z J Psychiatry*; 27: 606-612.

English is limited or non-existent, because they will be less likely to understand what is happening to them.

(c) "No advantage principle" – ambiguous and unfair

The LIV is particularly concerned about the application of the "no advantage principle" to regional processing arrangements. The Government's position is that an asylum seeker will wait as long as it would have taken if applied in places like Jakarta and Kuala Lumpur and Pakistan.[16]

With respect, the "no advantage principle" does not create a clear time period for assessing claims. There is no "average" time for resettlement.[17]

The LIV submits that the period for processing claims should be determined according to clear, concrete timeframes within which claims will be determined, to avoid arbitrary detention.

5. Bar on legal proceedings is contrary to Refugee Convention

The LIV considers that amendments to s 494AA of the Migration Act in the Unauthorised Maritime Arrivals Bill, to extend the bar on legal proceedings to all 'unauthorised maritime arrivals', breaches Article 16 of the Refugees Convention, which guarantees free access to the courts.

Further, s494AA fundamentally undermines the principle of the rule of law by permitting the Commonwealth government and its officers to avoid the scrutiny of the courts in circumstances where they are exercising executive power. It is unclear, for example, whether s494AA will extend to matters such as personal injury clams, where the Commonwealth might cause significant psychiatric injury to a person by subjecting them prolonged detention in a regional processing country, without review or control of conditions of detention.

6. Transfer of unaccompanied minors would be contrary to the Convention on the Rights of the Child

The Minister is the legal guardian of all unaccompanied minors who enter Australian territory.[18] Under the *Immigration (Guardianship of Children) Act 1946,* the Minister is required to act in the "best interests" of the child. This obligation is also found in the *Convention on the Rights of the Child*.[19]

Section 4AA of the *Migration Act* 1958 affirms the principle that a minor shall only be detained as a measure of last resort.

The Minister is required to consider the particular circumstances of each child seeking asylum in Australia. The LIV cannot conceive any circumstances where it would be in a child's best interests for an unaccompanied minor to be removed to a regional processing centre.

[16] http://www.minister.immi.gov.au/media/cb/2012/cb189319.htm
[17] Mr António Guterrres, United Nations High Commissioner for Refugees, Correspondence to The Hon. Chris Bowen MP, Minister for Immigration and Citizenship of Australia, 5 September 2012. referred to at footnote 68, Australian Human Rights Commission, Human rights issues raised by the transfer of asylum seekers to third countries, 15 November 2012.
[18] Section 6(1) *Immigration (Guardianship of Children) Act 1946*
[19] Article 3, *Convention on the Rights of the Child*.

The LIV reiterates its long-standing view that it is vital that an independent guardian be appointed for unaccompanied humanitarian minors and that those children must be provided with appropriate support to ensure that Australia complies with its obligations under the *Convention on the Rights of the Child*.

Under the arrangements put in place by the Regional Processing Act, once a child is taken to a "regional processing country", the Minister ceases to be the child's guardian.[20]

The LIV is deeply concerned about who will be the guardian for unaccompanied children in regional processing countries.

In the LIV's view, the current arrangements breach Australia's obligations under the *Convention on the Rights of the Child*, particularly Article 3 (the best interests of the child must be a primary consideration), Article 10 (to deal with applications for family reunification in a positive, humane and expeditious manner), Article 20 (obligation to provide special protection and assistance), Article 22 (to provide appropriate protection and humanitarian assistance to asylum seekers), Article 37 (detain children only as a measure of last resort, for the shortest time appropriate).

7. Application of the 'no advantage' test to post-13 August arrivals is unworkable

The LIV is extremely concerned about the fate of asylum seekers who are in in legal limbo following the announcement that because the detention centres on Nauru and Manus Island are at capacity, people will have their asylum claims processed while on bridging visas in the Australian community. Even where people are found to be refugees, they will not be issued with a permanent protection visa "until such time that they would have been resettled in Australia after being processed in our region",[21] on the justification that they should have 'no advantage' by travelling to Australia by boat.

This policy is unworkable, because there is no average time for resettlement or processing in our region and there remains no "queue" offshore for protection in Australia.

The LIV in concerned about the welfare of asylum seekers released on bridging visas, which according to the Minister's media release of 21 November 2012, will have no work rights and will receive only basic accommodation assistance, and limited financial support. Having people remain on Bridging Visas for lengthy periods without work rights means that people are ostracised from being part of the community, limits their ability to integrate and improve their English skills, contrary to Article 34 of the Refugee Convention.

We are concerned that lack of work rights could lead to long-term welfare burden and unemployment and that the burden for support will fall on charitable and not-for-profit organisations, which already are over stretched.

Conclusion

The package of legislation that seeks to implement regional processing arrangements for asylum seekers raises serious human rights concerns and appears to be inconsistent with international law, breaching aspects of the Refugee Convention, the ICCPR and the Convention on the Rights of the Child.

[20] Section 6(2)(b) *Immigration (Guardianship of Children) Act 1946*
[21] http://www.minister.immi.gov.au/media/cb/2012/cb191883.htm.

In addition, due to the volume of asylum seekers that have arrived since 13 August 2012, the vast majority of people will never be transferred to a regional processing centre for assessment of their refugee claim. This calls into questions the utility of the government's arrangements with Nauru and Papua New Guinea, under which only a small number of asylum seekers will have their claims processed.

The LIV therefore urges the government to:

- immediately desist from transferring asylum seekers to regional processing centres until a comprehensive regional protection framework has been established;
- process the claims of all asylum seekers who have arrived in Australian territories without delay and according to international law; and
- ensure that people assessed as refugees are provided with durable protection outcomes, either by permanent protection in Australia or by immediate resettlement in a suitable third country.