Submission to the Parliamentary Joint Committee on Human Rights: Examination of the Migration (Regional Processing) Package of Legislation

1. Introduction – Refugee and Immigration Legal Centre

1.1 The Refugee and Immigration Legal Centre ("RILC") is a specialist community legal centre providing free legal assistance to asylum seekers and disadvantaged migrants in Australia.[1] Since its inception over 23 years ago, RILC and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention.

1.2 RILC specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration's Immigration Advice and Application Assistance Scheme ("IAAAS"). RILC has been assisting clients in detention for over 18 years and has substantial casework experience. We are also a regular contributor to the public policy debate on refugee and general migration matters.

1.3 We welcome the opportunity to contribute to this inquiry. We wish to provide a brief note on the human rights implications of the Legislation Package. We do not confine our comments to the seven human rights treaties under the *Human Rights (Parliamentary Scrutiny) Act 2011*, but refer to the rights and obligations under the Refugee Convention 1951, given its direct application to persons affected by the legislation and its overlapping protections with the other human rights instruments.[2]

1.4 We set out below our key concerns with the Legislation Package.

2. Non-discrimination

2.1 The Legislation Package discriminates against and penalises refugees who have arrived by boat, in contrast to those who arrived by air, whether by regular or irregular means.

2.2 This violates the principle of non-discrimination in human rights treaties[3] to which Australia is a party as well as the express prohibition on penalisation of unauthorised persons under Article 31 of the Refugee Convention.[4]

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[1] RILC is the amalgam of the Victorian office of the Refugee Advice and Casework Service ("RACS") and the Victorian Immigration Advice and Rights Centre ("VIARC") which merged on 1 July 1998. RILC brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

[2] We note in this regard that the Convention on the Rights of the Child refers to other protection instruments in Article 22, which provides: "States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties."

[3] For example, Article 26, the prohibition on discrimination on any ground, of the International Covenant on Civil and Political Rights (ICCPR). Australia owes many of the rights contained in the ICCPR to all people within its territory, regardless of whether they are citizens (Article 2).

3. *Non-refoulement*

Refugee Convention:

3.1 RILC is concerned that the Migration Act (Regional Processing and Other Measures) Act; the Instruments of designation; Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, in providing for transfer to third countries without assessing refugee status, contravene the basic right of a person to seek protection from persecution within the territory to which they flee.[5]

3.2 Although the Refugee Convention does not expressly require the existence of a refugee status determination system or describe its form, its existence is implied, in order that states may fulfil their obligation of *non-refoulement* of refugees in good faith.[6] Because refugee status is declaratory, rather than constitutive, all people who arrive claiming asylum must not be returned to a risk of persecution, or sent to a place from which they may be returned to such risk, without processing.

3.3 Therefore, Australia's fundamental obligations to protect people from future human rights abuse require proper examination, under due process, of whether a person needs protection.

3.4 In transferring asylum seekers before providing access to such procedures, there must be no risk of *refoulement* (return to a threat to life or freedom).[7] Australia, as the state transferring people in its territory and under its jurisdiction, should assure itself that the regional processing country is safe for a particular individual, and know all of the facts relevant to the availability of protection there.[8]

3.5 Nauru has recently enacted laws relating to refugee status determination, but it is not clear that it has the resources and capacity to properly implement them.[9] There are no domestic laws in relation to refugee status determination in PNG, and there is also a lack of capacity to determine refugee status under the Refugee Convention.

3.6 In this context, it is clear that non-binding assurances about processing and protection against *refoulement* do not provide sufficient basis for Australia to transfer asylum seekers to Nauru and PNG. It is particularly concerning that the Instruments of Designation contain the Minister's view that the national interest overrides Australia's international obligations. The

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[4] Article 31(1) prohibits states from imposing penalties for unauthorised entry or presence on refugees coming directly from a territory where their life or freedom was threatened. UNHCR advises that the term "coming directly" covers the situation where a person enters directly from the country of origin or another country where protection, safety or security could not be assured.

[5] Article 14(1), Universal Declaration of Human Rights: "Everyone has the right to seek and to enjoy in other countries asylum from persecution".

[6] Article 26, Vienna Convention on the Law of Treaties 1969.

[7] As well as access to other Convention rights, see 5.1 – 5.6 of this submission.

[8] Article 33, Refugee Convention: "No Contracting State shall expel or return ("refouler") a refugee **in any manner whatsoever** to the frontiers of territories where his life or freedom would be threatened…" [emphasis added]; and *Michigan Guidelines on Protection Elsewhere* (2007), at [3].

[9] See UNHCR, "UNHCR Mission to the Republic of Nauru: 3-5 December Report", at [38]: [T[here are: …no experienced refugee status determination decision makers in the Government of Nauru [and] no pool of persons identified to do the independent reviews on the tribunal envisaged by the recently enacted *Refugees Convention Act 2012*".

only protection against *refoulement* in Australia is a non-compellable, non-reviewable discretion in the hands of the Minister for Immigration and Citizenship.[10]

3.7 RILC is concerned that transfer to Nauru and Papua New Guinea (PNG) may risk *refoulement* of refugees. If due process fails in these remote locations, if decision making is not competent, or a restrictive or wrong refugee definition is applied,[11] a person could be wrongly denied refugee protection and expelled to torture or death in their homeland. Under international law, Australia is responsible for this indirect *refoulement*.[12]

3.8 There are insufficient safeguards in Australia to prevent such risk. Firstly, in relation to a designation of an offshore processing country, we note that the Expert Panel recommended that amendments to the *Migration Act 1958* (the Act) "should ensure that any designation of a location as a place where asylum seekers may be transferred is a disallowable instrument."[13] The Act provides in s 198AB for the "disapproval" of the instrument of designation within 5 sitting days of its tabling. The Legislative Instruments Act 2003 provides a timeframe of 15 days for disallowance in s 42. It is not apparent to us why the ordinary mechanism of scrutiny and disallowance is not applied. We are concerned that the Act does not provide for proper consideration of human rights and other issues. It is not clear why there would need to be particular urgency in the case of instruments of designation.

3.9 The Memorandum of Understanding (MOU) agreed between PNG and Australia states that "all activities undertaken in relation to this MOU will be conducted in accordance with international law" and that the "Participants will ensure that Transferees will be treated with dignity and respect and that human rights standards are met".[14] The MOU with Nauru also commits to meet human rights standards.[15] We note however, that the Statement of Reasons which accompanied the Instruments of Designation in relation to both Nauru and PNG stated that the Minister had chosen not to have regard to the international obligations of Nauru and PNG[16] and that the "content of Australia's international obligations is contestable".[17] We are concerned that the MOUs do not provide sufficient safeguard given these expressed views,

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[10] Section 198AE of the *Migration Act 1958*.
[11] M. Foster, "Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State" (2006-07) 28 Mich. J. Intl. L 246; *Michigan Guidelines on Protection Elsewhere* (2007), at [4]. See also the decision by the UK House of Lords in *Regina v Secretary of State for the Home Department ex parte Yogathas* [2002] UKHL 36.
[12] Confirmed by leading academics and commentators in international law, as well as international jurisprudence. See for example M. Foster, "Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State" (2006-07) 28 Mich. J. Intl. L 223; *Michigan Guidelines on Protection Elsewhere* (2007), at [6] and [7]. See also the decision by the European Court of Human Rights in *T.I. v United Kingdom* (43844/98, 7 March 2000).
[13] Attachment 10, Report of the Expert Panel on Asylum Seekers, August 2012.
[14] See Preamble and [15] of the Memorandum of Understanding Between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to and Assessment of Persons in Papua New Guinea, and Related Issues.
[15] At [12], Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer To and Assessment of Persons in Nauru, and Related Issues.
[16] See Statement of Reasons For Thinking That It Is In the National Interest to Designate Nauru to be a Regional Processing Country, at [37] and Statement of Reasons For Thinking That It Is In the National Interest to Designate The Independent State of Papua New Guinea to be a Regional Processing Country, at [37].
[17] Ibid, at [34].

and because MOUs are typically "arrangements of less than treaty status", and therefore do not have binding effect.[18]

3.10 Moreover, pre-transfer analyses are conducted without legal representation, and it is questionable whether they are as robust and comprehensive as a refugee status determination under law. UNHCR has raised questions about their effectiveness.[19]

Other human rights treaties:

3.11 Relevant protection from return to torture, or to cruel, inhuman or degrading treatment is provided in Article 7 of the International Covenant on Civil and Political Rights (ICCPR), Article 3 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment (CAT), and Article 37 of the Convention on the Rights of the Child (CRC). Australia may violate these obligations if it sends people to countries where there is a 'real risk' or 'danger' that these rights will be violated.[20]

3.12 Further, Australia's obligations extend to those people transferred offshore, because a) Australia's act in sending them offshore leads to harm being suffered[21] and/or b) because Australia is exercising effective control over the people in offshore countries.[22]

3.13 While there is a lack of transparency and scrutiny in relation to the regional arrangements, it appears that Australia is exercising effective or de facto control of the people staying in regional processing countries.

3.14 For example, Australia is responsible for the transfer of people from its territory to an offshore processing country; Australia is funding the arrangements; Australia's contractors manage the detention centre and provide security services; Australia's contractors provide case management and health care; and Australia is responsible for the transfers or resettlement of people from regional processing countries. UNHCR has also recently reported that DIAC officials, seconded to Nauru, are currently undertaking registration interviews on Nauru.[23]

3.15 Moreover, there appears to be no provision for status or rights to be accorded on the basis of complementary protection in offshore processing countries. This may give rise to a risk of indirect *refoulement*, given that Nauru has not acceded to the ICCPR, and PNG is not a party to the Convention Against Torture (CAT). Again, it is not clear what capacity officials on Nauru or Manus Island will have to ensure that no-one is sent to torture, cruel, inhuman or degrading treatment.

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[18] Moreover, "the rigorous scrutiny of the treaty-making process is not appropriate for them": Department of Foreign Affairs and Trade, *Review of the Treaty Making Process*, August 1999, at [7.15].
[19] UNHCR, "UNHCR Mission to the Republic of Nauru: 3-5 December Report", at [58]-[60].
[20] See section 4 below – conditions on Nauru and Manus Island.
[21] See for example, *Soering v United Kingdom* (1989) 11 EHRR 439; *ARJ v Australia*, Communication No 629/1996, UN Doc CCPR/C/60/D/692/1996 (1997); *T v Australia*, Communication No 706/1996, UN Doc CCPR/C/61/D/706/1996 (1997).
[22] General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), at [10]; and International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, ICJ Reports (9 July 2004), European Court of Human Rights, *Bankovic v Belgium* [2001] ECHR 890.
[23] See UNHCR, "UNHCR Mission to the Republic of Nauru: 3-5 December Report", at [31].

4. Arbitrary detention

4.1 RILC is concerned that the circumstances in Australia, pre-transfer and in Nauru and PNG may constitute breaches of the following rights:

- To be free from arbitrary detention (article 9(1) ICCPR)
- To be treated with humanity and with respect for the inherent dignity of the human person while deprived of liberty (article 10 ICCPR).

4.2 Detention is arbitrary where it is not necessary, reasonable or proportionate.[24] There has been no assessment on an individual basis that detention is necessary, there is no finite length of detention, and its purpose is punitive: 'no advantage'. Detention on the basis of health, identity or security checks must be justified on an individual basis and for a limited initial period.[25] UNHCR's Guidelines on Detention of Asylum Seekers provides that "detention that is imposed in order to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is inconsistent with international norms."[26]

4.3 The UN Standard Minimum Rules for the Treatment of Prisoners provide content for assessing whether Article 10(1) is being met (and whether Article 7 of the ICCPR – the prohibition on torture or cruel and inhuman treatment – is being violated).[27] The premise of the rules is that the detention environment must not aggravate the suffering inherent in such a situation. The rules emphasise the dignity of prisoners as human beings. For example, they stipulate minimum floor space, lighting, heating, ventilation and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed, and provision of food of nutritional value adequate for health and strength.[28]

4.4 Amnesty International has described the conditions on Nauru, noting the lack of privacy, overcrowding in leaking tents, harsh heat and prevalence of phosphate and construction dust.[29] They have described Nauru as a "toxic mix of uncertainty, unlawful detention and inhumane conditions".

4.5 RILC remains concerned that the detention of asylum seekers in offshore processing countries is arbitrary and unlawful at international law, and that conditions in which detention occurs adversely impact on the human dignity of detainees and may amount to cruel, inhuman or degrading treatment.

5. Other rights

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[24] UN High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 4, available at: http://www.unhcr.org/refworld/docid/503489533b8.html.
[25] Ibid, at [24]-[29].
[26] Ibid, at [32].
[27] See for example, *Mukong v Cameroon,* UNHRC, Communication No. 458/1991.
[28] Rules 10, 12, 17, 19 and 20.
[29] Amnesty International, "Nauru camp a human rights catastrophe with no end in sight", and "Nauru Offshore Processing Facility Review 2012: Media Briefing", 23 November 2012.

Refugee Convention:

5.1 Under the Refugee Convention, individuals who enter Australia's territory and are under their jurisdiction are owed additional rights to protection against *refoulement*.[30] These include non-discrimination,[31] freedom of religion,[32] education,[33] and access to courts.[34] States should also facilitate naturalisation to the host country.[35] Any person transferred should benefit from all of the rights owed at the time of transfer, and, progressively, those rights that adhere as immigration status is regularised.[36]

5.2 It is not clear that individuals transferred to offshore processing countries will be able to access the rights owed to them during their initial stay, and once they are recognised as refugees. These rights include the right to work and to freedom of movement.[37]

5.3 People who arrive by boat to Australia would also be denied a durable solution within a reasonable timeframe,[38] in contrast to those who arrive by air. Durable solutions provide certainty of protection, as opposed to a long wait in limbo.

5.4 We note that the provision of rights, including the right to work and to a durable solution within a reasonable time are also not guaranteed to those who arrive by boat post-August 13 and who are processed in Australia. Prohibitions on the right to work and to volunteer restrict opportunities to participate and to meaningfully engage in the community.

5.5 This wait in limbo, without rights, is deliberate, under the 'no advantage' test. The MOUs agreed with Nauru and PNG do not contain a finite timeframe of stay for people entering those countries. They refer to "as short a time as is reasonably necessary, bearing in mind the objectives set out in the Preamble and Clause 1." The Preambles of both MOUs recognise "the need to ensure, so far as is possible, that no benefit is gained through circumventing regular migration arrangements". Clause 1 refers to deterring or combating people smugglers. A policy of deterrence and of punishment involves a level of cruelty and uncertainty that will almost certainly inflict mental harm and suffering.

5.6 We refer to the letter from the United Nations High Commissioner for Refugees, Antonio Guterres, of 5 September 2012, in relation to the fundamentally flawed nature of the no advantage test. The High Commissioner noted that the policy contemplates a time-frame comparable to UNHCR resettlement periods, which he explains "may not be a suitable

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[30] See Hathaway, J., *Rights of Refugees under International Law* (Cambridge University Press, 2004), at 278 ff; *Michigan Guidelines on Protection Elsewhere* (2007), at [8]; and see *M.S.S. v. Belgium and Greece*, ECHR (30696/09, 21 January 2011).
[31] Article 3, Refugee Convention.
[32] Article 4, Refugee Convention.
[33] Article 22, Refugee Convention.
[34] Article 16(1), Refugee Convention.
[35] Article 34, Refugee Convention.
[36] Refer to footnote 11 above.
[37] This also includes rights such as the right to housing (Article 21) and to social security (Article 24), matters which were not included in the Expert Panel's recommendations in relation to Nauru and PNG – see Report of the Expert Panel on Asylum Seekers, August 2012, at [3.46]-[3.57].
[38] See Article 34 of the Refugee Convention: States should facilitate naturalisation.

comparator", because there is "no 'average' time for resettlement"; UNHCR resettles on the basis of vulnerability rather than time spent awaiting resettlement; and because the 'no advantage' test is based on aspirations to an effective regional processing system, which is not yet in existence.

Other human rights treaties:

5.7 Under the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), Australia owes obligations with respect to work,[39] education,[40] and the highest attainable standard of health possible.[41]

5.8 RILC is concerned about the ability for Nauru and PNG to meet these minimum requirements. The risks to mental and physical health in Nauru and PNG have been well-documented in the past,[42] as has the substandard care available in such remote locations.[43]

5.9 There is a lack of opportunities for local integration in both Nauru and PNG, with extremely limited options for education, work and other meaningful activities. It also remains unclear whether people recognised as refugees will have freedom of movement necessary to access any opportunities that may arise.

6. Family unity

6.1 Australia has obligations to protect against interference with family under Article 23 of the ICCPR. Australia could breach this obligation if those people transferred to an offshore processing country have family members in Australia.[44]

6.2 The CRC provides in relation to children that "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner." The no advantage principle, as well as the *Migration Amendment Regulation 2012 (No. 5),* may breach this obligation.

6.3 The Conference that adopted the Refugee Convention also adopted Recommendation B, the principle of family unity. They considered that 'the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee' and urged governments to 'take the necessary measures for the protection of the refugee's family'.

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[39] Article 6, ICESCR.
[40] Article 13 ICESCR and ICCPR.
[41] Article 12 ICESCR.
[42] Final report, Senate Legal and Constitutional hearings into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, June 2006.
[43] Documented by the Royal Australian and New Zealand College of Psychiatrists, published in Final report, Senate Legal and Constitutional hearings into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, June 2006, section 3.52, p25
[44] Australian Human Rights Commission, "Human Rights Issues Raised by the Transfer of Asylum Seekers to Third Countries, (15 November 2012), at page 16. **Contrary to min view in letter ****

6.4 In our experience, family reunion is critical to the support, well-being and settlement of refugees in Australia, particularly given the trauma of past persecution and fleeing the home country which is often present.

7. Particular issues relating to children

7.1 In addition to the issues outlined above which also affect children, such as rights to *non-refoulement*, education, health care, and family unity, particular obligations arise in relation to children. The recent amendments to the *Immigration Guardianship of Children Act 1946*[45] clearly permit the transfer of unaccompanied children to offshore processing countries, despite the requirement under international law for the Minister for Immigration and Citizenship, their legal guardian under domestic law, to consider their best interests in all decisions relating to them.[46]

7.2 Other child-specific obligations under the CRC that the transfer of minors to offshore processing countries may breach are as follows:

- Article 10: states should deal with applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification in a positive, humane and expeditious manner;
- Article 20: A child temporarily or permanently deprived of his or her family environment… shall be entitled to special protection and assistance provided by the State;
- Article 22: Children who are seeking refugee status or who are refugees shall receive appropriate protection and humanitarian assistance in the enjoyment of rights under the CRC and other international human rights instruments;
- Article 37(b): Detention should only be a measure of last resort and for the shortest appropriate period of time.

8. Diversion of aid funding

8.1 We refer to the recent announcement by Foreign Minister Bob Carr that $375 million from the foreign aid budget will be diverted to pay for asylum expenses on the Australian mainland.[47] It is not yet clear which aid programs will be affected. However, it appears likely that this move will affect the amount of money Australia provides to refuge producing countries.[48]

8.2 This recent announcement again reveals the Australia-centric focus of asylum seeker policy and law making, without addressing the root causes of refugee movement. In our view, foreign aid funding could be used more effectively in the region and globally to promote refugee protection in Asia and elsewhere.

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[45] Sections 6(2) and 8(2) and (3).
[46] Article 3, Convention on the Rights of the Child.
[47] ABC News, "Australia to cut aid to fund asylum seeker costs", December 18 2012.
[48] Ibid.

9. Conclusion

9.1 In sum, RILC is profoundly concerned that the legislative package places the government's ability to meet its international refugee and human rights obligations under threat, and removes the protections of Australian law which ordinarily safeguard against undue interference with individual rights.