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Submission to the Parliamentary Joint Committee on Human Rights Examination of the Migration (Regional Processing) package of legislation

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EXECUTIVE SUMMARY

This submission expands on the points made by Professor Crock and Miss Martin to the Committee at the hearing on 17 December 2012.

1 Co-protected rights

The submission begins by explaining why the committee should have regard to Australia's obligations as a signatory to the UN Convention relating to the Status of Refugees (the Refugee Convention) and its related Protocol. Appendix 1 outlines the overlap between the Refugee Convention and the various human rights instruments that are expressly within the remit of the Committee. This document also categorizes the various rights according to the legal status held by refugees using the hierarchy of human rights identified by Professor James Hathaway.

2 The 'No Advantage' principle.

We show that the 'no advantage principle' is a misplaced and confusing basis upon which to construct the edifice of 'regional processing' for asylum seekers presenting as irregular maritime arrivals (IMAs).

3 Australia remains legally and morally responsible for asylum seekers sent to regional processing centres

4 The rights of asylum seekers

We outline the rights enjoyed by asylum seekers and refugees under international law, reflecting on the situation of those sent to Nauru, Manus Island and those processed in Australia. Our major concerns are:

(a) Taken as a whole, the package of legislation shifts refugee protection from a matter of obligation to a matter of discretion. Whether a person is transferred to a regional processing country or remains in Australia, they will not be able to actively seek Australia's protection by applying for a visa unless they get special ministerial dispensation. This is at best, a bad faith approach to Australia's international obligations and, at worst, will lead to serious violations of Australia's obligations under a number of treaties.

(b) The package of legislation contains unsatisfactory mechanisms for ensuring that Australia complies with its human rights obligations. The central problem is a lack of human rights standards enforceable in domestic law. Where they do appear, human rights standards are aspirational rather than enforceable.

(c) It is not acceptable for the Committee to simply find that the regional processing arrangements are a 'work in progress' and that current inadequacies can and will ultimately be remedied. It is our submission that the arrangements are inherently unfair and abusive of human rights.

5 Regional processing is not a deterrent to irregular maritime arrivals

The legislation and regional processing arrangements are not acting as a major deterrent to IMAs and are unlikely ever to have the deterrent effect promised. Rather the regime is operating to compromise Australia's international human rights commitments and the domestic rule of law. It is also a massive waste of money and resources.

1. Co-Protected Rights: the Committee should consider Australia's compliance with the Refugee Convention in addition to the human rights treaties in its Terms of Reference

The Convention relating to the Status of Refugees (Refugee Convention) and its related Protocol are integral to the human rights framework created by the United Nations after World War II. Its provisions are mirrored in later human rights treaties and should therefore be considered by the Committee as a necessary corollary to its explicit terms of reference. The fact that the Refugee Convention's obligations have multiple sources enhances its importance.

Appendix 1 compares the Convention with five other international instruments including the International Covenant on Civil and Political Rights (ICCPR), The International Convention on Economic, Social and Cultural (IESCR); the Convention Against Torture and All Forms of Cruel, Inhuman and Degrading Treatment (CAT), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD). The co-protected rights are organised using the hierarchy identified by Professor James Hathaway which acknowledge that certain rights are affected by the legal status of *refugees* on the territory of a state party.

The authors are particularly concerned that the package of legislation and the 'regional processing' arrangements place Australia in breach of many of the human rights identified, in particular:

- **Non-refoulement**, which is the right not to be returned (directly or indirectly) to a place where a person will face persecution, torture or other gross abuse of human rights. While the scheme does not purport to deny this right, but it runs the risk of people's claims being inadequately considered. A refugee's right to this protection does not inhere in any status determination process. If the procedures established in the regional processing centres fail to identify genuine refugees or persons at genuine risk of serious harm, Australia could be held responsible for their indirect refoulement.

- **Non-discrimination**
  The scheme treats people very differently depending on their mode of arrival, as Appendix 2 demonstrates. It has a disproportionate effect on certain ethnic and national cohorts who tend to arrive by boat. International law recognises that differential treatment may be justified if it is proportionate to achieving a legitimate objective. We argue that the extreme nature of the regional processing scheme is not proportionate even for the putative objective of saving lives at sea.

- **Protection for the special interests** of children and persons with disabilities. Their special status is not being recognised or respected.

2 The Committee should acknowledge that the 'no advantage' principle is a legal nonsense

Whether expressed as a 'test' or a 'principle' or a 'period', the problem with the idea of 'no advantage' on which this entire package of legislation is based is that it mixes up two different elements of Australia's migration program. The first is the grant of asylum to people who arrive irregularly seeking protection. This is a matter that engages Australia's international legal obligations by virtue of the Refugee Convention and the other human rights instruments (see Appendix 1). The second is the conduct of Australia's managed humanitarian migration program which inherently involves matters of choice rather than obligation. Refugees in foreign lands, including people processed by UNHCR in its camps around the world, have no rights claims on Australia and Australia owes them no obligations as a matter of law. In our view the idea that these people have a moral claim on Australia's generosity has been developed as a political and rhetorical device to justify the denial of rights to persons presenting in Australia as asylum seekers and refugees.

The 'no advantage' principle has no meaning or content under international refugee and human rights law because:

- The principle improperly conflates two very different groups of people: people processed by UNHCR in its camps around the world and categorised by that agency as suitable candidates for resettlement in third countries; and people who have actually arrived at the territory of a Convention party and have therefore engaged its international obligations;
- Insofar as the principle plays out in the reduction of entitlements in refugees under Australia's care and control, the no advantage test threatens to place Australia in breach of a range of obligations assumed under international Law.
- UNHCR's processing and resettlement times provide no valid benchmark against which to set domestic policy timelines. This is because there is no way in practice to fairly and accurately assess the waiting period for 'UNHCR refugees': there is a huge variety in waiting times around the world and for refugees of different ethnicities. Not only is there no refugee 'queue' in practice; there is also no standard waiting time for resettlement.

Imposing a 'no advantage' test on boat arrivals (particularly if the Bill currently before Parliament passes) could amount to a penalty in breach of art 31 of the Refugee Convention and also of the ICCPR art 26. It will certainly amount to a discriminatory measure, putting Australia in breach of a range of instruments. Because of the hardships visited on IMA refugees in Australia, it will place the country in breach of a range of other obligations (see Appendix 1).

3 Australia's responsibility for protecting the human rights of IMA asylum seekers

Australia cannot avoid ongoing responsibility for people transferred to Nauru and PNG following interdiction as IMAs.[1] Australia cannot divest itself of any obligation to these people by physically moving them to another country where, though they are subject to and assessed under local law, their ultimate destiny remains in Australian hands.

[1] Note the decision of the European Court of Human Rights in *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012.

The basic principles of international law are that every internationally wrongful act of a state entails international responsibility of the state.[2] A wrongful act is one which is attributable to the state under international law and constitutes a breach of international law. A state cannot plead its domestic law in response to an alleged breach of international law.

If Australians process the asylum claims of IMAs transferred to Nauru and/or PNG, the people there will be 'as much an Australian responsibility as if they were sitting in Federation Square in Melbourne'.[3] But even without this level of Australian involvement, international responsibility may still be vested in Australia. First, Australia appears to have *effective control* over the processing[4] and therefore over the extent to which people are provided with rights they are owed under international human rights law.[5] While processing will be done under local law and people will be detained as an exercise of PNG or Nauruan sovereignty, there are other factors which suggest that Australia does have *de facto*, if not *de jure*, control of the process. These include the engagement of Australian officials and the total financial reliance of Nauru and PNG on Australia with respect to the entire program (from establishment of the facilities to visa costs to the costs of processing and review). Even on the terms of the relevant memoranda of understanding, the ultimate resettlement obligation with respect to those whose refugee claims are successful remains with Australia.

Even if Australia's involvement is not so great as to amount to effective control, Australia can still be responsible for actions occurring within the territorial sovereignty of Nauru and PNG because international law recognises joint and several liability.[6]

As a matter of international law, the better view is that Australia's international obligations are engaged in respect of activities occurring in regional processing countries. Accordingly, legal responsibility for the care and protection of all transferees remains equally with Australia and the RPC. If Nauru or PNG establish inferior status determination systems and as a result they *refoule* or return refugees (or people who, under the CAT and ICCPR, should not be returned to certain other harmful situations), Australia will be complicit. This is so by

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[2] See International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001.

[3] James Hathaway quoted in Bernard Lagan, 'Smuggled by boat, banished by plane and the decision over your life a hot potato', *The Global Mail* (online), 20 September 2012. <http://www.theglobalmail.org/feature/smuggled-by-boat-banished-by-plane-and-the-decision-over-your-life-a-hot-potato/388/>. See also *Plaintiff M 61/2010E v The Commonwealth of Australia* (2010) 243 CLR 319.

[4] Factors relevant to this will be that the government of Australia bears all costs associated with processing in RPCs, that the ultimate resettlement obligation of those found to be refugees attaches to Australia, that contractors providing services are contractors of DIAC, that there is a visible DIAC presence and that approval to enter regional processing centres is controlled by DIAC, not the local government: see UNHCR, *Report of UNHCR Mission to the Republic of Nauru, 3-5 December 2012*, 14 December 2012, UNHCR Regional Office Australia, New Zealand, Papua New Guinea and the Pacific <http://unhcr.org.au/unhcr/images/2012-12-14%20nauru%20monitoring%20report%20final.pdf>.

[5] Extraterritorial human rights obligations have been recognised by the International Court of Justice: see ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, 9 July 2004, Advisory Opinion paras 109-112; ICJ, *Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v Uganda*, ICJ Reports 2005, judgment of 19 December 2005, pars 216 and 220. In the refugee context, see Committee Against Torture, General comment No. 2 (2007), CAT/C/GC/2/CRP.1/Rev.4, para. 16 and Kees Wouters and Maarten Den Heijer, 'The *Marine I Case: a Comment*' (2010) 22(1) *International Journal of Refugee Law* 1, 8-11.

[6] See UNHCR Statement: Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, UNHCR Regional Office, 31 October 2012 <http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=277&catid=35&Itemid=63>; arts 16-18, 47 of the ILC's Draft Articles on State Responsibility.

virtue of both its reliance on inferior processes used by another government and through its own involvement, since transferring people to the RPC in the first place will have been an act of indirect refoulement.[7]

4 The Rights of asylum seekers

4.1 International law: hierarchies of status and rights

Different rights are owed to a person under international human rights and refugee law depending on their status and degree of attachment to the country where they are. Professor James Hathaway has explained the stratification this way: a refugee may be physically present, lawfully present, lawfully staying or durably resident. As a refugee moves up that incremental hierarchy of status, they are owed more and more rights. As Hathaway describes it, the Convention grants enhanced rights 'as the bond strengthens between a particular refugee and the state party in which he or she is present'.[8] The rights are grouped in Appendix 1 according to Hathaway's refugee rights hierarchy, setting out the different levels of status and the rights attaching to that status.

Critically, the absolute and most basic of these rights – non-discrimination, non-refoulement, the right to life and the right to freedom from torture and other cruel and degrading treatment or punishment – arise as soon as a person comes within a state's jurisdiction. Refugees are protected whether they are inside the state's physical territory or not.[9] Thus refugees who are within Australia's jurisdiction but outside its territory are owed those most basic rights, particularly non-refoulement. Similarly, art 2(1) of the ICCPR requires nations to afford the rights to persons within their *jurisdiction* as well as within their *territory*.

As a matter of international law, a state cannot avoid its obligations simply by designating all arrivals as 'illegal' and denying them lawful presence. International deference to national standards of lawfulness cannot be absolute, for that would undermine the entire scheme of international protection and the tenor of the Convention itself.[10] A person is lawfully present if admitted to a state's territory for a fixed period of time and thereby has their presence officially sanctioned.[11]

Enjoyment of other human rights is similarly affected by a person's status: the rights conferred by the ICCPR to freedom of movement (art 12) and regarding the expulsion of aliens (art 13) are also owed to persons lawfully in a country.

There is, however, one situation in which status is irrelevant: the situation of children seeking asylum. Uniquely among the human rights instruments, article 22 of the CRC uses the term 'refugee' children to refer to both recognised (Convention) refugees and those seeking

[7] The non-refoulement obligation under art 33 of the Refugees Convention extends to actions of indirect refoulement.
[8] Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2009), 154.
[9] Ibid, 154, 163.
[10] Ibid, 177-178; see also *A v Australia*, UNHRC Comm No. 560/1993, UN Doc. CCPR/C/59/D/560/1993, decided 30 April, 1997, in which the Human Rights Committee made clear that there must be objective, international standards against which to assess such matters. Just as a nation cannot claim that a law passed by its parliament is never arbitrary, a nation cannot plead its domestic law (the law which makes people illegal) in defence of a breach of international law.
[11] Hathaway, above n 8 174.

asylum. It obliges states to afford the same protections to children irrespective of whether they are lawfully or unlawfully present or resident.

4.2 The regional processing scheme impermissibly attempts to deny these obligations

It has been recognised in both international and domestic law[12] that a Convention state must *consider* the claim of a person who seeks asylum because a state cannot effectively fulfil its international obligation without engaging in status determination. Yet Australian refugee law in 2012 is predicated on the notion that Australia can pick and choose the people whose claims we would even like to consider, and that refugee status and entitlements are not a right but are something to be granted at the discretion of the Minister. Australia is failing to engage in status determination and is then relying on that failure to deny providing refugees with other protections and rights to which they are entitled. This is a regime that denies that asylum seekers have any *rights* or agency in the protection process, not even the right to ask for protection and to have that request considered in a procedurally fair manner. Instead, they are to be shifted to another country to have their claims assessed or are to remain in limbo in Australia.

The difference between this so-called regional processing package of legislation and a genuine regional cooperation framework is that a genuine framework of regional cooperation would involve burden sharing, including mutual resettlement obligations and cooperation with UNHCR.[13] Schemes which involve regional cooperation and sharing of responsibility – including the responsibility for resettlement – are certainly within the spirit of the Convention. This scheme, on the other hand, simply outsources the responsibility to assess the claims of those who arrive in Australia's jurisdiction or at its borders to poor, under-resourced and remote areas. It assumes, but does not guarantee, resettlement for people who are assessed to be refuges. There is a total lack of reciprocal obligations or resettlement undertakings on the part of receiving countries because the ultimate obligation to resettle those recognised as refugees remains with Australia (where, as explained above, the grant of a protection visa is now a matter of discretion rather than obligation).

Taken as a whole, the scheme breaches Australia's international obligation of good faith. The obligation of good faith is a corollary of the fundamental rule of treaty law *pacta sunt servanda*: agreements are to be kept.[14] While the regime enacted by the conservative government in 2001 at least enabled some lively sophistry about compliance with the Convention,[15] this time the Minister has made it clear that the regime is being adopted in potential defiance of international law. This in itself is a clear departure from Australia's obligation to implement its treaty obligations *in good faith*. Good faith requires that Australia avoid in a way which may be compliant with the letter of the treaty but which undermines its overall object and purpose. We cannot try to do indirectly what, as a signatory, we could not do directly.[16]

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[12] *Minister for Ethnic Affairs v Mayer* (1985) 157 CLR 290 at [300] (Mason, Deane and Dawson JJ) 305 (Brennan J), reiterated in *Plaintiff M70* [215] (Kiefel J).

[13] On cooperation with UNHCR, see the Refugee Convention art 35.

[14] Vienna Convention on the Law of Treaties adopted 23 May 1969, entered into force 27 January 1980), art 26.

[15] See Department of Immigration, Multicultural and Indigenous Affairs (DIMIA), *Interpreting the Refugees Convention* (Canberra: DIMIA, 2002). See also Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Sydney: Federation Press, 2011), ch 4.3.3.

[16] See Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 6th ed, 2003), 400, 423, 426-7, 444; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) 84.

The Convention does not expressly require a signatory to process refugees on its territory, but to try to make Australia 'off limits' to anyone who arrives by boat defeats the purpose of the Convention. The effect of the regional processing legislation is to try to block access to Australia and to divert asylum flows from inside Australia's jurisdiction to other states. This undermines the essence of the Refugees Convention notion of asylum, which recognises that people may travel irregularly and that they have the capacity to make choices about when and where to flee.

Further, the countries to which Australia now sends its asylum seekers are not required to be countries which have comparable, or indeed any, human rights standards. International law requires that if refugees are to be transferred to a third country, that country must actually provide effective protection.[17] Effective protection includes, but is not limited to, non-refoulement. Now even refoulement is a risk: Appendix 3 demonstrates that neither PNG nor Nauru is bound by the same full range of international human rights instruments as Australia. Real effective protection would require fair, efficient and timely status assessments, treatment in accordance with international human rights standards and access to durable solutions. But since the August 2012 amendments to the Migration Act 1958, there is no way of enforcing a requirement that a designated country will actually protect of human rights. Section 198AB(3) of the *Migration Act* only requires the Minister to have regard to, if they exist, 'assurances' that the country will not refoule a person and that it will process their refugee claim or allow it to be processed. The validity of a designation will not be affected if those assurances do not exist, let alone that they are not legally binding. The only limit on designation is the Minister's personal perception of the national interest.

The government clearly hopes that treatment in regional processing countries will occur in accordance with human rights and Nauruan and PNG have, to varying degrees, indicated that they will comply with some rights standards. But that is the limit of human rights protection in this scheme. There are few or no enforceable standards of rights, protection or processing in RPCs. The Memoranda of Understanding between Australia and Nauru and Australia and PNG contain very vague human rights commitments, and are not internationally legally binding anyway.[18] In particular, it remains unclear the extent to which processing will be open to scrutiny by merits reviewers in PNG,[19] to which processing decisions and detention will be reviewable by the judiciary and also whether there will be a role for independent non-government observers such as the Australian Human Rights Commission.

4.3 What is the status and what rights are given to people subject to regional processing?

[17] See UNHCR Executive Committee Conclusion No 85 (1998); Executive Committee Conclusion No 87 (1999).

[18] Whether an instrument constitutes a treaty as defined by the Vienna Convention on the Law of Treaties depends on its terms. These MOUs do not appear in the Australian Treaty Series and, most crucially, do not suggest an intention to be bound by international law: see Gillian Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis, 2006), 499-500.

[19] The *Refugees Convention Act 2012* (Nauru) provides for the establishment of a Refugee Status Review Tribunal. That body has not yet been constituted, and there has been no indication of who its members might be. There is no equivalent (either current or publicly proposed) in PNG.

1. *People transferred to Nauru*: Transferees to Nauru receive a visa upon arrival in Nauru. A special visa class has been created in the Nauruan Immigration Regulations for this purpose: the Australian Regional Processing Visa. Holders of this type of visa are undoubtedly lawfully present in Nauru: their presence is sanctioned by the grant of a visa for a set period (initially three months, but renewable indefinitely as long as the Australian government continues to pay the $1000 per month visa charge). As a result, and irrespective of whether Australia has ongoing obligations, people in Nauru are also owed rights by that government.

2. *People transferred to PNG*: The status of transferees to PNG is less clear. There is no visa equivalent to the Australian Regional Processing Visa. At best, it seems that they are without status, and are simply tolerated by the government in fulfilment of its diplomatic promises to Australia. Nevertheless, this tolerance should also support an argument that transferees to Manus Island are lawfully present in PNG. At worst, they are simply present and are even then entitled to the most basic protections.

3. *People remaining in Australia*: Many people who have been exempted from offshore processing have been released into the Australian community on bridging visas. The government announced in late 2012 that these people will not have their claims assessed for the same 'no advantage' period as will apply to people transferred offshore. Grant of a bridging visa makes its holder lawfully present in Australia. The status of others who remain in detention is contentious. Hathaway argues that 'the stage between "irregular" presence and the recognition or denial of refugee status … is also a form of "lawful presence" and hence that only those whose applications have been rejected are unlawfully present.[20] Although this must be the better view as a matter of international law (as Hathaway explains, it is the reading of the Convention most consistent with principles of treaty interpretation), the Australian government has not accepted that even detainees are lawfully present, and has refused to accept that they are owed the rights attaching to lawful presence.[21] But as Hathaway observes: 'if a state opts not to adjudicate the status of persons who claim to be Convention refugees, it must be taken to have acquiesced in the asylum-seekers' assertion of entitlement to refugee rights, and must immediately grant them those Convention rights defined by the first three levels of attachment'.[22]

4.4 Does the regional processing scheme give people the rights they are owed?

The following section outlines the rights to which refugees are entitled at each location given the operation of relevant domestic laws and their interaction with international human rights law.

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[20] Hathaway, above n 8, 174, 183; see also *Rajendran v Minister for Immigration and Multicultural Affairs* (1998) 166 ALR 619 (Full Federal Court).

[21] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 (5 October 2012). In that case, a majority seemed to prefer the view that where Australia's laws did not authorise presence for the purposes of pursuing a claim to refugee status, asylum-seekers are not lawfully present and cannot therefore claim the rights attaching to the 'lawful presence' level of attachment, and thereby deferred to national rather than international understandings of lawful presence, although Haydon J did not criticise, but distinguished, *Rajendran* (at [253]).

[22] Hathaway, above n 8, 185, ie rights up to and including those attaching to lawful presence.

1. Transferees to Nauru

Non-refoulement: If Nauru's status determination procedures are inferior or do not include adequate access to merits and judicial review, people with genuine claims may be refouled. This is particularly the case for people whose claims are founded in the ICCPR or CAT prohibitions on non-refoulement. Nauru has given diplomatic assurances that they will not return people to torture, but the assessment to be undertaken there is only according to the Convention definition of a refugee and not with reference to non-refoulement obligations under other treaties. This creates a real risk that people will fall through the cracks. Further, recognition as a refugee under the *Refugees Convention Act 2012* (Nauru) has no consequences in domestic law as far as visas are concerned: instead recognised refugees must either be resettled by or on behalf of Australia, or must remain in Nauru on Australian Regional Processing Visas (at cost to Australia).

Arbitrary detention: The government contends that conditions on Nauru and PNG do not amount to detention, or that if they do, the detention is not arbitrary. There is arguably a disjunct between what the government has promised, what is stated 'on paper' and what is happening on the ground. One of the hallmarks of arbitrary detention is that it is applied to people irrespective of their circumstances and vulnerabilities. This is certainly the case with the arrangements on Nauru and PNG. A second characteristic of arbitrary detention is that a person who is detained does not have the ability to challenge the legality of their detention. Nauru and PNG both have constitutions which protect individual rights and which prohibit arbitrary detention, but whether detained individuals have a functional ability to challenge their detention is another matter. In the absence of access to the facilities by independent third parties or legal advisers, that chance would seem slim.

Harms to persons with disability: There are very serious gaps in the extent to which disability is capable of being, and is in fact, taken into account in assessment of 'reasonable practicability' of transfer, which is the only precondition to mandatory transfer of boat arrivals. The Minister also has, by virtue of s 198AE, a personal non-compellable power to determine in writing that s198AD does not apply to an offshore entry person, if the Minister thinks it is in the public interest to do so. The rules of natural justice are also excluded from this power so it is difficult to see how a person with a disability could effectively assert any right to have their circumstances considered, and would therefore be relying entirely on the ability of officers of the department to pick up on any vulnerabilities. The pre-transfer assessment forms and guidelines go some way to identifying vulnerability, but they are hardly comprehensive and are entirely unenforceable. A person whose disability is unnoticed or is not considered sufficiently serious to prevent transfer and is sent offshore will have access to fewer services and support systems than they would in Australia. There are potential issues with access to services and facilities and there are no guarantees that a person's special needs or vulnerabilities will be adequately assessed and accommodated there.

Harms to health: We note that the government has given some attention to staffing arrangements in regional processing countries to ensure that there are some medical professionals, but we would query whether there are enough services in those places

to guarantee that Australia is fulfilling art 12(2)(d) of the IESCR. Evidence from Nauru suggests otherwise, particularly because people are most concerned about the lack of processing and the absence of any definite timeline for consideration of their claims.

Harms to children: Australia's MOUs with Nauru and PNG contain a commitment by both Australia and the host country that they will develop 'special arrangements for vulnerable cases including unaccompanied children'. The fact of these special arrangements, let alone a requirement that they meet any particular standard, is not a condition precedent to transfer, but a matter entirely for diplomatic negotiation afterwards. The consequence of the amendments to the Australian *Immigration (Guardianship of Children) Act 1946* (Cth) is that there is no additional oversight mechanism for unaccompanied minors beyond the general ability of the Parliament to disallow the Designation. There is no enforceable obligation on the Minister to consider the best interests of the child. No unaccompanied minors have yet been sent to Nauru or PNG, but minors are in PNG as part of family groups. Even accompanied children are given special status under the CRC, yet there is scant recognition of this in the regional processing arrangements.

Work rights: Only people whose refugee status has been confirmed will have access to work rights. Yet even those who are being assessed are lawfully present because they hold a visa, and should therefore also have work rights.

2. Transferees to PNG: As above for Nauru, plus:

Non-refoulement: PNG's status determination procedure is even less well-developed than Nauru's, particularly its (lack of) review procedures. There is no statutory procedure for consideration or review of refugee status, and the only mention of refugee status in PNG law is as a decision made by the Minister after which a person's presence is tolerated.[23] Nor is PNG a signatory to the CAT, which means that people transferred there are at even greater risk of being refouled to torture.

Work rights: PNG has reservations against the articles of the Refugee Convention relating to employment (and also those relating to education) and there is no indication that any transferee to PNG will have work rights.

3. People in Australia

Arbitrary detention: The Human Rights Committee has found that Australia's system of mandatory detention is a breach of the prohibition on arbitrary detention because it is applied to all undocumented arrivals without justification with reference to their individual circumstances and where the aims pursued by the detention are achievable by less restrictive means. Though the system has been modified to allow for residence determinations, people – including children – are still detained. Absent special Ministerial intervention,[24] the scheme does not make accommodations for the particular conditions or vulnerabilities of persons with disabilities.

[23] *Migration Act 1978* (PNG) s 2.
[24] In the form of a residence determination: see *Migration Act* s 197AAff.

Work rights: people released on bridging visas are routinely denied work rights.[25] This is a breach of the Convention even on the Australian government's own interpretation of lawful presence.

Non-discrimination; penalties: The scheme actively discriminates against people based on their mode (boat) and time (after August 13) of arrival. In doing so it discriminates against the particular national and ethnic groups who are more likely to travel by boat. It also imposes penalties (namely a more protracted status determination procedure and fewer entitlements to work rights, welfare and family reunion[26]), which are illegitimate to the extent that they breach Article 31, which applies to refugees coming directly from persecution. This would certainly include refugees coming directly from Sri Lanka, and may also (on some interpretations) include people who transit through Indonesia.

Harms to family life: Changes to the Migration Regulations which prevent persons who became 'irregular maritime arrivals' from being eligible to propose family members for entry to Australia under the Humanitarian Program, and specifically, the Refugee and Humanitarian (Class XB) visa (Class XB visa) interfere with this right. The government refused to accept that Arts 17 and 23 were engaged, because 'there has been no positive action on the part of Australia to separate the family. An IMA becomes separated from their family when they choose to travel to Australia without their family '. This is disingenuous as it denies the very nature of forced migration (particularly in the case of children, whose travel is often decided upon by their parents). It also denies the fact that by refusing to accept split family applications, Australia is complicit in ongoing separation of families.

Harms to children: Unaccompanied children who remain in Australia and satisfy the requirements in the *Immigration (Guardianship of Children) Act* will continue to have the Minister as guardian, however there remain serious conflicts in the Minister's role, since the same person is responsible for enforcing the child's detention and for their welfare.

5 Regional processing is not a deterrent to irregular maritime arrivals

It is time to name the elephant in the room. The regional processing scheme is not going to achieve its objectives and has already been shambolic in its effect. Few asylum seekers are being deterred, and many are likely to be hurt. Thousands of IMAs have made it to Australia since the strategy was announced in August 2012, the most rapid rate of boat arrivals ever seen in Australia.

Professor Crock's research in Indonesia in 2012 suggests that asylum seekers in that country do not see Nauru and PNG not as a deterrent. First, these people recognise that the capacity of the regional processing countries is limited and believe that even people processed there will end up in Australia anyway. For some the measures are not a deterrent because the ability to join any real 'queue' is regarded as a bonus. Many see the policy for what it is, a

[25] Migration Regulations 1994 - Specification under paragraphs 050.613A(1)(b) and 051.611A(1)(c) - Classes of Persons - November 2012 operates to make work rights discretionary for persons granted a BVE Subclass 050 or a BVE Subclass 051 visa under Section 195A of the Migration Act 1958.

[26] On what constitutes a penalty, see Executive Committee Conclusion No 22 (1981).

political and rhetorical measure designed as much for domestic political ends as for any real deterrent effect.[27]

The regional processing scheme does not address the systemic 'push' factors in both source countries (where decisions to travel are made, especially by the parents of minors) or in transit countries like Indonesia (where processing times are extremely slow and where shelters are filled to capacity). This scheme is exorbitantly expensive. That money could be spent far more effectively dealing with the situations which push people to get on leaky boats in the first place.

CONCLUSION

In short, in the authors' view the regional processing scheme has nothing to recommend it. By voluntarily signing up to the Convention, Australia signalled its 'preparedness to grant rights to refugees who reach its jurisdiction'.[28] This scheme does the opposite: it takes away from the Australian government the obligation to recognise refugee status, let alone rights preliminary to recognition of that status, and replaces them with a purported shift of the burden and a system of discretionary status recognition where the Minister's attention must be directed not to a person's circumstances or to Australia's international obligations, but to the 'national interest'. Rather than bringing Australia into line with comparable European countries, it adopts the approach to refugees taken by Australia's Asian neighbours, which tend not to be Convention signatories (see Appendix 3).

[27] See Mary Crock and Daniel Ghezelbash, "Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals" (2010) 19 *Griffith Law Review* 238 – 287.
[28] Hathaway, *The Rights of Refugees Under International Law*, 184.

Appendix 1: The rights of refugees

Type of presence and relevant rights	Refugee Convention	ICCPR	CAT	CRC	CRPD	ICESCR
Simple Presence						
Non-refoulement	Art 33(2)	Arts 6, 7	Art 3	Art 37		
No arbitrary detention	Art 31	Arts 9, 10		Art 37(b), (d)		
Right to life	Art 33	Art 6		Art 6	Art 10	
Freedom from torture, cruel inhuman and degrading treatment		Arts 7, 10	Art 16	Art 37	Arts 15, 16	
Special rights of children		Art 24(1)		Esp Arts 2, 3	Art 7	Art 10(3)
Non-discrimination and penalisation for illegal entry	Arts 3, 31	Art 26		Art 2	Art 5	Art 2
Liberty and security of the person				Art 3	Arts 14, 17	
Freedom from deprivation	Art 20	Arts 6(1), 7, 9(1), 10(1)			Art 28	Arts 11, 2(1)
Access to healthcare					Art 25	Art 12(1)
Moveable and immovable property rights	Arts 13				Art 12	Art 15
Tax equity	Art 29					
Family unity	Recognised in resolution of the Conference of Plenipotentiaries,	Arts 17, 23(1)-(2), 24(1)		Arts 8, 9, 10.	Art 23	Art 10(1)

	B.					
Freedom of thought, conscience and religion	Art 4	Art 18		Arts 13, 14, 15	Art 21	Art 13(3)
Education	Art 22				Art 24	Art 13
Documentation of identity and status	Art 27			Art 7		
Judicial and administrative assistance	Arts 16(1), 25	Art 14(1)			Arts 12, 13	
Lawful Presence – as above, plus:						
Protection from expulsion	Art 32	Art 13				
Procedural rights	Art 32	Arts 13, 14			Art 12	
Freedom of residence and internal movement	Art 26	Art 12			Art 18	
Self-employment	Art 18				Art 27(1)(f)	
Lawful Stay - as above, plus:						
Wage earning employment	Art 17				Art 27	Art 6
Fair working conditions	Art 24				Art 27(1)	Art 7
Social security	Art 24					Art 9
Professional practice	Art 23					
Public relief and assistance	Art 23					
Housing	Art 21					Art 11(1)
Intellectual property rights	Art 14				Art 12	Art 15(1)(c)
International travel	Art 28, Schedule				Art 18	

Appendix 2: Comparison of reception and assessment processes and conditions

	Plane arrival on mainland	IMA - mainland (currently)	IMA - mainland (proposed[29])	IMA - excised offshore place	RPC transferee to Australia (currently)	RPC transferee to Australia (proposed)	Transferee to Nauru	Transferee to PNG
Legal status and classification	Unlawful non-citizen	Unlawful non-citizen. *Not* an offshore entry person.	Unlawful non-citizen, and unauthorized maritime arrival: see proposed s 5AA(2).	Unlawful non-citizen. OEP - 'unauthorised maritime arrival' See proposed s 5AA(2).	Unlawful non-citizen and a transitory person: s 198B	Unlawful non-citizen and a transitory person: s 198B	See Australian Regional Processing Visa (ARPV): *Immigration Regulation 2000* (Nauru) r 2, 9A.	No visa/entry permit status in PNG. 'Refugee' is defined in the *Migration Act* 1978 (PNG) s 2.
Detention	Mandatory under s 189(1), but generally released pending RSD.	Mandatory under s 189(1), but generally released pending RSD.	Mandatory under s 189(1), but generally released pending RSD.	Mandatory under s 198(3) (Note exempted categories: s 189(3A))	Mandatory under s 189(1), but generally released pending RSD.	Mandatory under s 189(1), but generally released pending RSD.	*Australian law*: deemed not in detention: ss 5(1), 198AD(11). *Local law* Movement restricted by conditions on their ARPV, with a sliding scale: *Immigration Regulations (2000)* (Nauru) r 9A(3), (4).	*Australian law*: deemed not in detention: ss 5(1), 198AD(11). *Local law Migration Act* 1978 provides for-'relocation centres' for the accommodation of non-citizens who claim to be refugees: s 15B.
Liability to transfer to either RPC[30]	Not liable to be transferred s 5(1)/proposed s 5AA(2)(a) and 198AD).	Not liable to be transferred: s 5(1) and 198AD.	Mandatory if 'reasonably practicable': s 198AD.	Mandatory if 'reasonably practicable': s 198AD.	Section 198AD - transfer back to an RPC if no s198C assessment/ s 198D certificate in force: s 198AH.	Liable to be transferred: section198AD to allow transfer irrespective of assessment as a refugee: see s198AH(2).	N/A	N/A
Status procedure/claim assessment	Lodgment of application form; payment of application charge; DIAC	Lodgment of application form; payment of application charge; DIAC	Cannot make a valid visa application: s 46A	Cannot make a valid visa application: s 46A	May apply for RRT assessment of Convention refugee status if the person has	No possibility of RRT application.	Pursuant to *Refugees Convention Act 2912* (Nauru): person may apply to	No specific refugee legislation or administrative procedure

[29] Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012)

[30] To which of the designated RPCs the person is transferred is a decision of the Minister: s 198AD(5).

	officer assesses application. Person must be given an oral hearing if a positive decision cannot be made on the papers.	officer assesses application. Person must be given an oral hearing if a positive decision cannot be made on the papers.			been continually present in Australia for six months: s 198C		the Secretary to be recognized as a refugee (s 5).	relating to the determination of refugee status. UNHCR has been 'obliged to exercise its mandate to determine asylum seekers' need for protection'.[31]
Access to legal assistance	Yes, including free access if required via IAAAS.	Yes, including free access if required via IAAAS.	Yes, including free access if required via IAAAS.	Yes, including free access if required via IAAAS.	No/unclear	No/unclear	Unclear	Unclear
Merits review	Access to merits review by RRT	Access to merits review by RRT.	Unclear after 13 August 2012.	If arrived before 13 August, merits review by RRT. Unclear after 13 August 2012.	Section 198C - RRT review	N/A	Access to merits review by Nauruan Refugee Status Review Tribunal: *Refugees Convention Act 2012* (Nauru) ss 11, 42, 47.	Unclear
Judicial review	Yes	Yes	Yes	Yes	Yes	Yes	Appeal on a point of law (*Refugees Convention Act 2012* (Nauru): s 43). s 44(c) *Appeals Act 1972* an appeal lies to the High Court of Australia.	Unclear. Lawyers in PNG are preparing for appeals to be lodged,[32] PNG has privative clause preventing appeal against a Ministerial decision: *Migration Act 1978* s 19.
Guardianship of unaccompanied children	Minister for Immigration is the guardian of wards,	Minister for Immigration as per previous	Minister for Immigration until transferred.	Minister for Immigration as for column 1, but	Unclear; likely the Minister as per column 1	Unclear, likely the Minister as per column 1	*Australian law* Australian Minister's	*Australian law* Australian Minister's

[31] Letter from Antonio Guterres to Chris Bowen, attachment to Instrument of Designation of Papua New Guinea, 2.
[32] 'Nauru amending laws for refugee determination', *Australia Network News (ABC Australia)*, 9 October 2012.

	defined in s 4AAA of the *IGOC Act* Day to-day guardianship may be delegated.	column.	Nothing in the *IGOC Act* affects the Minister's powers under the *Migration Act* to remove a non-citizen child from Australia: *IGOC Act* s 8.	delegated to senior staff on Christmas Island.			guardianship obligations end once the child leaves the country. *Local law* Unclear	guardianship obligations end once the child leaves the country. *Local law* Unclear Save the Children is providing 'child protection services'.
Potential visas	Onshore protection (Class XA, subclass 855)	Onshore protection (Class XA, subclass 855)	If Minister lifts the bar, relevant class is onshore protection (Class XA, subclass 855)	If Minister lifts the bar, relevant class is onshore protection (Class XA, subclass 855)	*Onshore* Barred by s 46B but if person is found by RRT under s 198C to be a Convention refugee they may make a valid application (unbarred by s 46B) for a relevant class of visa: s 198C. *If returned offshore* Cannot make visa application unless invited to do so: *Migration Regulations* r 2.07M, sch 1 item 1402(3)(ba).	*Onshore* Barred by s 46B. Bill repeals ss 198C and 198D. *If returned offshore* Cannot make visa application unless invited to do so: *Migration Regulations* r 2.07M, sch 1 item 1402(3)(ba).	No defined path to local visa in Nauru. Holder of an ARPV is prohibited from applying for a visa of any other class: *Immigration Regulations 2000* (Nauru) r 13(4). May only apply for Australian offshore visa by invitation.	No defined path to local visa in PNG. May only apply for Australian offshore visa by invitation.
Work rights	Person may be given a bridging visa which includes work rights.	Person may be given a bridging visa which includes work rights.	No	No	No	No	Work rights after a positive refugee status assessment.	Unclear/no
Education:	Children in	Children in	Children in	Children in	Children in	Children in	(Currently no	NGO Save the

Language Primary Secondary Tertiary	detention have access to primary and secondary schooling, including English language classes; children released on bridging visas will have access to public education; adults may undertake education at their own cost.	detention have access to primary and secondary schooling, including English language classes.	detention have access to primary and secondary schooling, including English language classes.	detention have access to primary and secondary schooling, including English language classes.	detention have access to primary and secondary schooling, including English language classes.	detention have access to primary and secondary schooling, including English language classes.	children transferred to Nauru)	Children is providing education services to children in Manus Island.

Appendix 3: Treaty commitments of countries in Australia's region

Treaty	Indonesia	Malaysia	Nauru	PNG
CERD	Acceded 25 June 1999; reservation against art 22.		Signed 12 November 2001	Acceded 27 January 1982; reservations against art 4
ICESCR	Acceded 23 February 2006; declaration re right of self-determination			Acceded 21 July 2008
ICCPR	Acceded 23 February 2006; declaration re right of self-determination		Signed 12 November 2001	Acceded 21 July 2008
CEDAW	Signed 29 July 1980, ratified 13 September 1984; reservation against art 29	Acceded 5 July 1995; declarations and reservations against arts 31, 36, 56, 70	Acceded 23 June 2011	Acceded 12 January 1995
CAT	Signed 23 October 1985, ratified 28 October 1998; declaration re arts 1-3, reservation against art 30		Signed 12 November 2001, ratified 26 September 2012	
CRC	Signed 26 January 1990, ratified 5 September 1990; reservation and declaration re arts 1, 14, 16, 17, 21, 22 and 29	Acceded 17 February 1995; reservations against arts 2, 7, 14, 28(1)(a) and 37, declaration re art 28	Acceded 27 July 1994	Signed 30 September 1990, ratified 2 March 1993
CRPD	Signed 30 March 2007, ratified 30 November 2011	Signed 8 April 2008, ratified 19 July 2010; reservations against arts 15 and 18, declaration re Arts 3(b), 3(e) and 5(2)	Acceded 27 June 2012	Signed 2 June 2011
Refugees Convention and Protocol			Acceded to the Convention and Protocol 28 June 2011	Acceded to the Convention and Protocol 17 July 1986.

Note on signature, accession and ratification: Signature, accession and ratification are different ways of states giving their consent to by bound by a multilateral treaty. In brief, a state will be bound – on the international plane – if it has either signed and ratified, or has acceded to, a treaty. Simple signature does not bind a state as a matter of international law.[33]

[33] See further the *Vienna Convention on the Law of Treaties* art 11 and Anthony Aust, *Modern Treaty Law and Practice* (Cambridge, 2nd ed, 2007).