

**AMNESTY  
INTERNATIONAL**



Parliamentary Joint Committee on Human Rights  
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Dear Chair and Members of the Committee,

Amnesty International is pleased to provide comments to the Committee's examination of the human rights implications of the Migration (Regional Processing) package of legislation.

### **Purpose of the legislative package**

Amnesty International understands that the primary objective of the *Migration (Regional Processing) and Other Measures) Act 2012* and related bills and instruments is to deter or prevent people from taking boat journeys to Australia to seek asylum.

Amnesty International maintains that punitive policies aimed at deterring people from seeking asylum are ineffective given the realities of global resettlement and contrary to the spirit of the Refugee Convention, which protects the fundamental right to seek asylum, regardless of mode of arrival.

Some such deterrent policies that Australian Government currently employs include:

- Mandatory indefinite detention of asylum seekers.
- The implementation of the 'no advantage' principle to processing claims.
- Offshore processing in remote third country locations such as Nauru and Manus Island.
- Excising Australian mainland territory from the Migration Zone.
- Issuing Bridging Visas to refugees.
- No work rights for refugees on Bridging Visas.
- No family reunion rights for refugees on Bridging Visas.

There is little conclusive evidence that deterrence measures reduce the numbers of people seeking asylum in Australia. In fact, refugee flows around the world fluctuate in response to a range of complex factors, not simply immigration policies of source countries. Refugees are, by definition, fleeing for their lives, so it is unlikely that punitive policies such as offshore processing have a significant deterrent effect.

Amnesty International shares similar concerns with the UNHCR in relation to the Australian Government and Opposition's preference for deterrence measures, "...that as long as the focus remains primarily on deterrence, the humanitarian, ethical and legal basis of asylum, and the protection of refugees, will be seriously undermined."<sup>1</sup>

Amnesty International contends that the best way to reduce the numbers of people choosing to undertake boat journeys to Australia is to improve conditions for refugees across the Asia-Pacific region. This necessarily includes establishing harmonised refugee laws and policy frameworks in

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<sup>1</sup> UNHCR, 23 November 2012, *UNHCR calls for compassion and legal principles to be at centre of policy responses*, [http://unhcr.org.au/unhcr/index.php?option=com\\_content&view=article&id=278&catid=35&Itemid=63](http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=278&catid=35&Itemid=63).

transit countries, and, critically, providing greater access to safer, official pathways to protection. For this reason, Amnesty International supports the increase to the humanitarian intake program to 20,000 places. Amnesty International's submission to the Houston Panel provides further detail on a genuinely regional approach to managing asylum seekers and how it can be achieved<sup>2</sup>.

### **Compliance with human rights obligations**

Whether the *Migration Amendment (Regional Processing and Other Measures) Act 2012* complies with the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act) is a moot point, as noted by Minister Bowen in his letter to the Committee dated 15 November 2012, having acknowledged that the Act does not apply due to timing issues.

However, in considering the human rights implications of the *Migration Amendment (Regional Processing and Other Measures) Act* and related bills and instruments the Minister cannot rely on only those obligations contained in international human rights instruments specified in the Parliamentary Scrutiny Act, but must consider all of those obligations contained in international treaties ratified by Australia.

One such treaty of particular relevance to the question of whether the package of legislation breaches Australia's human rights obligations is the Refugee Convention 1951 and its 1967 Protocol.

Under that treaty, Australia's obligations are invoked when a refugee enters Australia's territory – regardless of whether that territory has been excised by legislation for migration purposes, but the borders recognised under international law. Australia, having voluntarily assumed these obligations, is not entitled to transfer those legal obligations onto other states.

Amnesty International supports the view of the UNHCR that the responsibility for asylum seekers and refugees transferred from Australia to offshore locations is shared equally between the Australian Government and the Government of the third country.

### **Detention of asylum seekers**

Human rights are universal. State boundaries or passports do not limit observance and protection of asylum seekers by the international community. To call upon traditional concepts of the alien to abrogate these universal rights (absent state emergency) would render the human rights regime nugatory.

This is particularly so in the case of refugees, who by definition, are unable to call upon the protection of the state of which they are nationals. It is thus necessary that protection be afforded to them by states other than those of their nationality. The very existence of the international protection regime pursuant to the Refugee Convention confirms the universality of human rights and further evinces the fact that human rights are afforded to all persons irrespective of citizenship.

States, including Australia, are therefore exhorted to observe human rights and refrain from arbitrarily detaining all people within their territory, whether they arrive in the country lawfully or otherwise.

The detention of asylum-seekers becomes unlawful when it takes on the character of arbitrariness. Amnesty International contends that the mandatory and indefinite nature of the detention of asylum seekers and refugees, and particularly in the context of the application of the 'no advantage' principle to processing claims constitute arbitrary detention and breach Australia's obligations under

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<sup>2</sup> Amnesty International Australia, 19 July 2012, *Submission to the Expert Panel on Asylum Seekers*, <http://expertpanelonasyumseekers.dpmc.gov.au/sites/default/files/public-submissions/AmnestyInternational.pdf>.

the principal international instruments which deal with proscriptions against arbitrary detention – the Refugee Convention, ICCPR and UDHR.

To date the asylum seekers held in Nauru have been unable to apply for refugee status. The Australian Government has transferred these men to a country that currently does not have the capability to process refugees.

Furthermore, despite assurances from the Expert Panel and the Australian Government that the asylum seekers on Nauru would not be detained but housed in an open facility, it is now clear the asylum seekers will remain detained on Nauru. The new visa conditions imposed by the Nauruan Government restrict asylum seekers to the camp unless supervised. Even once found to be found genuine refugees, they are likely to remain detained in the camp.

Without refugee processing underway, there are no grounds under international law for the continued detention of the 386 men. Amnesty International believes they are currently unlawfully detained by the Australian Government, in breach of article 9 of the International Covenant of Civil and Political Rights.

Furthermore, Amnesty International considers that the Nauru detention regime amounts to a penalty for seeking asylum. The combination of no refugee processing, implementation of the 'no advantage rule' and harsh detention conditions, amounts to a clear penalty for seeking asylum in Australia by boat. This contravenes article 31 of the 1951 UN Refugee Convention.

The UNHCR Revised Guidelines deal with the imposition of detention on asylum-seekers and refugees. They provide, in general terms, situations in which the 'necessity', as referred to in Article 31 (2) of the Refugee Convention, for detention can be justified.

The UNHCR Revised Guidelines categorically state in its introduction that the 'detention of asylum-seekers is, in the view of UNHCR inherently undesirable'<sup>3</sup>. Consistent with Article 31 of the Refugee Convention, and the acknowledgement of the necessary detention of refugees in exceptional circumstances<sup>4</sup>, the UNHCR Revised Guidelines state that detention should not be 'automatic or unduly prolonged'<sup>5</sup>. As can be seen from Guideline 2, reproduced below, detention should be used only as a last resort.

## **Guideline 2: General Principle**

### **As a general principle asylum-seekers should not be detained**

According to Article 14 of the Universal Declaration of Human Rights, the right to seek and enjoy asylum is recognised as a basic human right. In exercising this right asylum-seekers are often forced to arrive at, or enter, a territory illegally. However, the position of asylum-seekers differs fundamentally from that of ordinary immigrants in that they may not be in a position to comply with the legal formalities for entry. This element, as well as the fact that asylum-seekers have often had traumatic experiences, should be taken into account in determining any restrictions on freedom of movement based on illegal entry or presence.

It also recommended to such states employing the practice of detention due to the absence of an asylum-seekers' identity documents or the use of fraudulent ones, to recognise the unique circumstances of asylum-seekers in a situation of flight from persecution. As such, it observed, the use of detention 'should not routinely be judged necessary'. Furthermore, a system of 'prompt,

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<sup>3</sup> UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999, available online at <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf>.

<sup>4</sup> The limited necessary and exceptional circumstances relating to the determination of elements of the claim for asylum, where the asylum-seeker has destroyed travel documents or used fraudulent ones, to verify identity or to protect national security or public order – Guideline 3.

<sup>5</sup> *ibid* [3]

mandatory and periodic review of all detention orders' should be provided for and 'before an independent and impartial body'.

## **Children**

Amnesty International shares the serious concerns of UNICEF Australia and the National Children's and Youth Law Centre (NCYLC) for the welfare of children sent to third country offshore processing locations.<sup>6</sup>

Sending children, including unaccompanied minors, to be detained in remote locations, such as Manus Island, Papua New Guinea, without independent oversight of the agreements, standards and monitoring systems that have been implemented to safeguard the 'best interests' of the children, jeopardises Australia's legal obligations under the Convention on the Rights of the Child (CRC).

Amnesty International rejects the Minister's argument that the best interests of the child can generally be outweighed by other 'primary considerations' such as the 'national interest'.<sup>7</sup> Prioritising in this way may be convenient for the Government, however when it comes to protecting the human rights of children, who have special needs, the CRC specifies that the priority must be the best interests of the child.

In 2011, the President of the Human Rights Commission Catherine Branson QC said, "It is not easy to imagine a case where it will be in the best interests of an unaccompanied minor to be sent offshore to have their asylum claims processed rather than processing their claims here in Australia".<sup>8</sup> This is particularly true of unaccompanied minors, who, upon being transferred to a third country, would no longer have a legal guardian. Detention conditions are not suitable for children, particularly in remote island facilities where it is unlikely their special needs can be met.

## **Non-refoulement**

The *Migration Legislation (Regional Processing and Other Measures) Act 2012* removed Section 198A of the Migration Act, which contained important human rights protections.

These protections are now replaced by 'assurances' made by third countries not to send transferred individuals to other countries where there is a real risk that the person will be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life, or the imposition of the death penalty. Such assurances are contained in the instruments designating Nauru and Papua New Guinea as offshore processing places.

Amnesty International considers such assurances insufficient in place of legislated protections. In the absence of legislated protections (in Australia, Nauru and Papua New Guinea), Amnesty International considers that refugees sent to third countries have no genuine protection from *refoulement*.

## **Health**

Amnesty International representatives visited the detention facility on Nauru during November 2012 to observe conditions for asylum seekers and refugees transferred there from Australia.

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<sup>6</sup> UNICEF Australia, media release, 21 November 2012, "Serious concerns" for children sent to Manus Island, available online at <http://www.unicef.org.au/Media/Media-Releases/November-2012/-Serious-concerns--for-children-sent-to-Manus-Island.aspx>.

<sup>7</sup> Minister for Immigration letter to the Parliamentary Joint Committee on Human Rights, 15 November 2012, available online at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=humanrights\\_cte/activity/migration/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_cte/activity/migration/index.htm).

<sup>8</sup> Australian Human Rights Commission, 31 August 2011, High Court reinforces responsibility to protect the rights of children, available online at [http://humanrights.gov.au/about/media/media\\_releases/2011/77\\_11.html](http://humanrights.gov.au/about/media/media_releases/2011/77_11.html).

Amnesty International's report from the visit concluded that conditions in the camp are inappropriate.

Currently accommodated in tents that are unsuitable for the hot conditions and which leak during rain, detainees reported not being able to sleep well due to the heat, the damp and complained of a lack of privacy with up to sixteen people housed in one tent. Detainees reported developing skin irritations and infections due to the conditions.

Amnesty International is concerned that the accommodation on Nauru may breach the UN Standard Minimum Rules for the Treatment of Prisoners, in particular that "all accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions".

Furthermore, the combination of the harsh physical conditions, the indefinite nature of their detention under the 'no advantage' principle and lack of information about their asylum claims is causing mental illness among detainees, some of whom have already exhibited behaviours such as self-harm, hunger striking, and attempted suicide. Keeping asylum seekers in conditions that cause mental illness is not consistent with Australia's legal obligations to protect the right to health under article 12 of the ICESCR and to treat persons deprived of their liberty with humanity and respect for the inherent dignity of the person under article 10(1) of the ICCPR. Refugees detained on Nauru are not being treated with humanity if the manner of treatment exacerbates mental health problems.

### **Work rights**

On 21 November 2012, the Minister announced that some asylum seekers who arrived in Australia by boat after 13 August 2012 would not be issued with a permanent protection visa if they are found to be a refugee 'until such time that they would have been resettled in Australia after being processed in [the] region' and would be released on bridging visas with no work rights and only basic accommodation assistance and limited financial support.<sup>9</sup>

These penalties only apply to asylum seekers who arrive by boat and so discriminate against asylum seekers based on their mode of arrival. Furthermore, the Refugee Convention guarantees refugees the right to wage-earning employment under article 17.

### **Conclusion**

Amnesty International considers the suite of measures implemented by the Government through the *Migration (Regional Processing) and Other Measures) Act 2012* and related bills and instruments contravene several international human rights instruments, including the Refugee Convention.

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<sup>9</sup> Minister for Immigration and Citizenship, 21 November 2012, No advantage onshore for boat arrivals, available online at <http://www.minister.immi.gov.au/media/cb/2012/cb191883.htm>.