



Australian
Human Rights
Commission

Inquiry into the Migration Amendment (Health Care for Asylum Seekers) Bill 2012

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE
SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEES**

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Committees in the Inquiry into the Migration Amendment (Health Care for Asylum Seekers) Bill 2012.
2. The Commission is established by the *Australian Human Rights Commission Act 1986* (Cth) and is Australia's national human rights institution.

2 Background

3. Over the last decade the Commission has undertaken extensive work in the area of Australian law, policy and practice relating to asylum seekers, refugees and immigration detention. This has involved conducting national inquiries,¹ examining proposed legislation,² monitoring and reporting on immigration detention³ and investigating complaints from individuals subject to Australia's immigration laws and policies.⁴ More specifically, the Commission's work in this area has included engagement regarding the health and mental health impacts of prolonged and indefinite immigration detention⁵ and the risk of breaches of Australia's human rights obligations posed by third-country arrangements for the processing of asylum seekers' claims.⁶ This submission draws upon that body of work.
4. On 18 August 2012, the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) commenced, amending the *Migration Act 1958* (Cth) and the *Immigration (Guardianship of Children) Act 1946* (Cth). The amendments allow the Minister for Immigration and Citizenship to make a further legislative instrument which designates a country as a 'regional processing country' to which asylum seekers who have arrived in Australia's 'excised offshore territory' on or after 13 August 2012 will be sent for the processing of their protection claims. In exercising this power, the only condition is that the Minister thinks the designation is in the national interest.⁷
5. The designations of Nauru and of Papua New Guinea as a 'regional processing country' came into effect on 12 September 2012 and 10 October 2012 respectively, having been approved by both Houses of Parliament.⁸
6. The Australian Government signed memoranda of understanding relating to the transfer of persons with the Governments of Nauru and Papua New Guinea on 29 August 2012 and 8 September 2012 respectively.⁹ Neither memorandum specifies how the respective governments understand legal responsibilities to be apportioned between them.
7. As at 15 October, a total of 292 asylum seekers had been transferred to Nauru under this arrangement and 4 615 people had arrived in Australia's 'excised offshore territory' since 13 August 2012.¹⁰ Some of the people who have arrived to Australia but not been transferred to Nauru have been transferred to the Australian mainland. The Commission understands that all remain liable for transfer to a 'regional processing country'.

3 Summary

8. The Commission has repeatedly raised serious concerns about the health and mental health impacts of prolonged and indefinite immigration detention, particularly where persons who are detained have pre-existing vulnerabilities and/or where detention occurs in a remote location, including under offshore and third-country processing arrangements.
9. The Commission supports the establishment of an independent, expert panel of multidisciplinary health professionals to monitor, assess and report publicly at regular intervals on the health of asylum seekers who are transferred to designated 'regional processing countries'.
10. The Commission notes that considerations relating to the sovereignty of Nauru and Papua New Guinea and the jurisdictional reach of Australia may arise with respect to the establishment and functioning of a panel such as that which is required by the Bill.
11. The Commission considers that the mandate of the panel required by the Bill should be expanded to include the health of asylum seekers who:
 - are in Australia (whether on the mainland or an 'excised offshore place') and are liable to transfer to a designated 'regional processing country'
 - are undergoing transfer to or from a designated 'regional processing country' (including being returned or taken to a country other than Australia)
 - are in Australia, having been returned from a designated 'regional processing country' for reasons other than resettlement.
12. Moreover, the Commission has long been of the view that arrangements for monitoring the provision of health and mental health services across Australia's immigration detention network are inadequate, and that an independent body should be charged with this function and with reporting publicly on its findings.
13. The Australian Government should ensure that independent bodies charged with monitoring the health of asylum seekers and conditions of detention more broadly are adequately resourced to fulfil those functions.

4 Recommendations

14. **Recommendation 1:** That the Bill be passed, subject to any considerations relating to sovereignty and jurisdiction that may arise.
15. **Recommendation 2:** That the Bill be amended to expand the mandate of the panel to include monitoring and publicly reporting upon the health of people who:
 - are in Australia (whether on the mainland or an 'excised offshore place') and are liable to transfer to a designated 'regional processing country'

- are undergoing transfer to or from a designated ‘regional processing country’ (including being returned or taken to a country other than Australia)
- are in Australia, having been returned from a designated ‘regional processing country’ for reasons other than resettlement.

5 Mental and physical health impacts of prolonged and indefinite immigration detention

16. Under international human rights standards, all people have a right to the highest attainable standard of physical and mental health.¹¹
17. Each person in detention is entitled to medical care and treatment provided in a manner which is culturally appropriate, and of a standard which is commensurate with that provided in the general community. This should include preventive and remedial medical care and treatment including dental, ophthalmological and mental health care.¹²
18. It is well established that holding people in immigration detention, particularly for prolonged and indefinite periods, can have devastating impacts upon their mental and physical health.¹³ It is also widely acknowledged that detention in remote, climatically harsh and overcrowded conditions can be particularly harmful.¹⁴
19. Over many years of visiting facilities across Australia’s immigration detention network, the Commission has heard from numerous people about the psychological harm that prolonged and indefinite detention was causing them. For instance, people have frequently reported experiencing sleeplessness, loss of concentration, feelings of hopelessness and powerlessness, and thoughts of self-harm or suicide. Many people have also expressed frustration and incomprehension at their prolonged and indefinite detention and apparent delays or perceived injustices in the processing of their claims. This appears to have contributed to marked levels of anxiety, despair and depression, which has in turn led, at times, to high use of sedative, hypnotic, antidepressant and antipsychotic medications, as well as serious self-harm incidents.¹⁵
20. The impact that long-term detention had on the physical and mental health of asylum seekers who were detained in Nauru and Papua New Guinea when these facilities were last used is also well documented.¹⁶ Some people were diagnosed with a range of mental illnesses, including depression, anxiety, post-traumatic stress disorder, adjustment disorder and acute stress reaction.¹⁷ There were also high levels of actual and threatened self-harm among these people.¹⁸
21. The Commission criticised the use of Nauru and Manus Island as places to process the claims of asylum seekers under the former Australian Government’s ‘Pacific Solution’,¹⁹ as the arrangements undermined Australia’s international human rights obligations, including those relating to: access to health and mental health care;²⁰ conditions of detention;²¹ and arbitrary detention.²²

22. With respect to current arrangements, the Commission holds serious concerns about the length of time that asylum seekers and refugees could potentially have to stay in designated 'regional processing countries'.²³
23. The Commission is concerned that the long-term detention of asylum seekers in Nauru, Papua New Guinea and other designated 'regional processing countries' could once again detrimentally affect their physical and mental health, and might amount to arbitrary detention.
24. The Commission is aware that the Australian Government has said that asylum seekers will not be detained on Nauru. However, the Commission considers that, even if asylum seekers have freedom of movement around Nauru, the conditions under which people transferred to third countries are held could be characterised as deprivation of liberty amounting to detention.²⁴
25. The Commission further notes that it appears that people transferred to Nauru to date have been largely confined to the facility in which they are being held, with no announcement as to when they will be granted freedom of movement.
26. Furthermore, it appears that all people in Australia who are liable to transfer remain in closed immigration detention.

6 Australia's international human rights obligations with respect to asylum seekers who are transferred to third countries

27. The Commission has considered Australia's international human rights obligations with respect to asylum seekers who are transferred to third countries.²⁵
28. It is uncontroversial that Australia's human rights obligations will apply in relation to asylum seekers who are subject to transfer to a third country, during the period of their detention on either Christmas Island or the mainland, prior to their transfer. They will also apply to the conduct of agencies of or engaged by the Australian Government during the transfer.
29. Australia's human rights obligations also extend to acts done in the exercise of Australian jurisdiction, even if these acts occur outside Australian territory.²⁶ If Australia has 'effective control' over the people it has transferred to another country, then it is obliged to continue to treat them consistently with the human rights obligations it has agreed to be bound by.²⁷
30. In the Commission's view, States cannot avoid their international law obligations by transferring asylum seekers to a third country.²⁸ Under international law, Australia will be in breach of its obligations under the ICCPR if it removes a person to another country in circumstances where there is a 'real risk' that their rights under the ICCPR will be violated.²⁹ The United Nations Human Rights Committee has said that responsibility for extra-territorial violations of human rights will arise when a country's act of removing someone from its territory is 'a link in the causal chain that would make possible violations in another jurisdiction'.³⁰ There is a responsibility on States

to exercise 'due diligence' in determining whether the requisite level of risk exists, particularly in cases that may involve serious threats to physical integrity.³¹

31. In addition, a basic principle of international law is that States have a responsibility to implement their treaty obligations in good faith.³² This duty is breached if a combination of acts or omissions has the overall effect of rendering the fulfilment of treaty obligations obsolete, or defeating the object and purpose of a treaty.
32. The Commission holds serious concerns about the approach taken to Australia's international obligations in the designations of Nauru and Papua New Guinea as a 'regional processing country'.³³

7 Independent monitoring of conditions of detention

33. Given that Australia retains some responsibility for the treatment of asylum seekers transferred to third countries, and given that it is well documented that the prolonged detention of asylum seekers and refugees in remote locations may have a detrimental impact on their physical and mental health, the Commission encourages the Australian Government to take necessary steps to establish a mechanism to monitor the health and mental health of people transferred to third countries for processing of their claims for protection.
34. It is well established that regular independent monitoring of immigration detention facilities is essential in order to ensure compliance with international legal principles and accepted human rights standards.³⁴ Independent monitoring of immigration detention facilities should include but not be limited to the areas of health and mental health care. Where independent monitors report publicly on their findings, this increases transparency and accountability.
35. The Commission is of the view that there is a need for rigorous, independent and ongoing monitoring of the delivery of health and mental health services in immigration detention facilities on the Australian mainland, in Australia's 'excised offshore territory', and in third countries to which Australia has transferred asylum seekers for the processing of their claims for protection.
36. The Commission shares the view expressed by previous inquiries that there is a need for more comprehensive monitoring of health and mental health services across Australia's immigration detention network.³⁵

¹ See Human Rights and Equal Opportunity Commission, *A last resort?* (National Inquiry into Children in Immigration Detention) (2004), at

http://www.humanrights.gov.au/human_rights/children_detention_report/report/index.htm (viewed 16 July 2012); and Human Rights and Equal Opportunity Commission, *Those who've come across the seas: Detention of unauthorised arrivals* (1998), at

http://www.humanrights.gov.au/human_rights/immigration/seas.html (viewed 16 July 2012). See also Australian Human Rights Commission, *An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children* (2012), at <http://www.humanrights.gov.au/ageassessment/report/index.html> (viewed 11 October 2012).

² The Commission's submissions on matters relating to asylum seekers are available at <http://humanrights.gov.au/legal/submissions/indexsubject.html#refugees> (viewed 16 July 2012).

³ See detailed reports on the Commission's visits to immigration detention facilities at http://www.humanrights.gov.au/human_rights/immigration/detention_rights.html#9_3 (viewed 11 October 2012).

⁴ Reports are available at http://humanrights.gov.au/legal/HREOCA_reports/index.html (viewed 16 July 2012).

⁵ See, for example, Australian Human Rights Commission, Submission to the Joint Select Committee on Australia's Immigration Detention Network (August 2011), at http://www.humanrights.gov.au/legal/submissions/2011/201108_immigration.html (viewed 11 October 2012), and the Commission's immigration detention monitoring reports at http://www.humanrights.gov.au/human_rights/immigration/detention_rights.html#9_3 (viewed 11 October 2012).

⁶ See, for example: Australian Human Rights Commission, 'Human rights issues raised by the transfer of asylum seekers to third countries', October 2012, at

http://www.humanrights.gov.au/human_rights/immigration/transfer_third_countries.html (viewed 15 October 2012); 'Offshore processing arrangements carry serious human rights concerns' (Media Release, 14 September 2012), at

http://www.humanrights.gov.au/about/media/media_releases/2012/78_12.html (viewed 11 October 2012); 'Migration Act stripped of human rights protections' (Media Release, 17 August 2012), at http://www.humanrights.gov.au/about/media/news/2012/81_12.html (viewed 11 October 2012);

Australian Human Rights Commission, Submission to the Expert Panel on Asylum Seekers (July 2012), at http://www.humanrights.gov.au/legal/submissions/2012/20120720_asylum_seekers.html (viewed 11 October 2012); Australian Human Rights Commission, Submission to the Senate Standing Committees on Legal and Constitutional Affairs Inquiry into Australia's agreement with Malaysia in relation to asylum seekers (September 2011), at

http://www.humanrights.gov.au/legal/submissions/2011/20110914_asylum_seekers.html (viewed 11 October 2012); Australian Human Rights Commission, Inquiry into Australia's agreement with Malaysia in relation to asylum seekers: Australian Human Rights Commission's response to questions on notice (29 September 2011), at

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/malaysia_agreement/submissions.html (viewed 11 October 2012); Submissions on behalf of the

Australian Human Rights Commission (intervening), in Plaintiff M106/2011 v Minister for Immigration and Citizenship, at http://www.hcourt.gov.au/assets/cases/m70-2011/M106-2011_HRC.pdf (viewed 11 October 2012); Australian Human Rights Commission, Submission to the Inquiry of the Senate Legal and Constitutional Legislation Committee on the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (May 2006), at

<http://www.humanrights.gov.au/legal/submissions/migration20060522.html> (viewed 11 October 2012); 'Commission warns against revisiting aspects of "Pacific Solution"' (Media Release, 22 August 2011), at

http://humanrights.gov.au/about/media/media_releases/2011/75_11.html; 'Sending asylum seekers to Malaysia is not the answer to addressing people smuggling' (Media Release, 25 July 2011), at

http://humanrights.gov.au/about/media/media_releases/2011/61_11.html; 'More detail needed on new asylum seeker policy' (Media Release, 6 July 2010), at

http://humanrights.gov.au/about/media/media_releases/2010/71_10.html; 'HREOC welcomes end of Pacific Solution' (Media Release, 5 February 2008), at

http://humanrights.gov.au/about/media/media_releases/2008/12_08.html; 'Australia's treatment of refugees still has a long way to go' (Media Release, 17 June 2007), at

http://humanrights.gov.au/about/media/media_releases/2007/41_07.html; '“Pacific Solution” still poses human rights risks' (Media Release, 19 September 2006), at

http://humanrights.gov.au/about/media/media_releases/2006/75_06.htm (all viewed 23 August 2011);

A last resort?, note 2, sections 6.4.4, 6.6.4, 6.7.8, 6.7.9, 7.8.1, 7.8.2, 7.8.3, 16.2.2, 17.4.9; and J von Doussa, 'Human rights and offshore processing' (2007) 9 UTS Law Review 41.

⁷ *Migration Act 1958* (Cth) (Migration Act), s 198AB(2).

⁸ A designation comes into effect as soon as both Houses of Parliament have passed a resolution approving the designation, or after five sittings days from the date when the instrument was tabled if there has been no resolution disapproving the designation.

⁹ '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', (unsigned and undated version), at <http://www.minister.immi.gov.au/media/cb/2012/cb189579.htm> (viewed 14 October 2012), and '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 Nauru, and Related Issues', (unsigned and undated version), at <http://www.minister.immi.gov.au/media/cb/2012/cb189719.htm> (viewed 14 October 2012).

¹⁰ Commonwealth, *Legal and Constitutional Affairs Legislation Committee Estimates*, Senate, 15 October 2012, p 81 (Mr Martin Bowles PSM, Acting Secretary Department of Immigration and Citizenship) and p 101 (Mr Matt Cahill, First Assistant Secretary, Status Resolution Services Division, Department of Immigration and Citizenship), at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Festimate%2Fa41a5fdb-967c-42a4-b0f4-6ac936ebb9dc%2F0001;query=id%3A%22committees%2Festimate%2Fa41a5fdb-967c-42a4-b0f4-6ac936ebb9dc%2F0000%22> (viewed 19 October 2012)

¹¹ See *International Covenant on Economic, Social and Cultural Rights* (1966), art 12, at <http://www2.ohchr.org/english/law/cescr.htm> (viewed 14 October 2012); *Convention on the Rights of the Child* (1989), note 9, art 24, at <http://www2.ohchr.org/english/law/crc.htm> (viewed 14 October 2012).

¹² See Human Rights and Equal Opportunity Commission, *Immigration Detention Guidelines* (2000), section 13, at http://www.hreoc.gov.au/human_rights/immigration/idc_guidelines2000.html (viewed 12 October 2012).

¹³ See, for example, Joint Select Committee on Australia's Immigration Detention Network, *Joint Select Committee on Australia's Immigration Detention Network: Final Report* (2012), chapter 5, at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=immigration_detention_ctte/immigration_detention/report/index.htm (viewed 16 October 2012), *A last resort*, note 1, chapter 9; GJ Coffey, I Kaplan, RC Sampson and MM Tucci, 'The meaning and mental health consequences of long-term immigration detention for people seeking asylum' (2010) 70(12) *Social Science & Medicine* 2070.

¹⁴ See Joint Select Committee on Australia's Immigration Detention Network, above, and Australian Human Rights Commission, Submission to the Joint Select Committee on Australia's Immigration Detention Network, note 5, section 16.

¹⁵ See Australian Human Rights Commission, Submission to the Joint Select Committee on Australia's Immigration Detention Network, note 5, section 12.

¹⁶ See Australian Human Rights Commission, Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into Australia's agreement with Malaysia in relation to asylum seekers (September 2001), para 76. At http://www.hreoc.gov.au/legal/submissions/2011/20110914_asylum_seekers.html#fnB72 (viewed 27 September 2012).

¹⁷ Above

¹⁸ Above.

¹⁹ See Australian Human Rights Commission, Submission to the Senate Standing Committees on Legal and Constitutional Affairs Inquiry into Australia's agreement with Malaysia in relation to asylum seekers, note 6, section 11.1

²⁰ See *International Covenant on Economic, Social and Cultural Rights*, note 65, art 12; *Convention on the Rights of the Child*, note 20, art 24.

²¹ *International Covenant on Civil and Political Rights*, note 20, arts 7 and 10; *Convention on the Rights of the Child*, note 20, art 37(c).

²² *International Covenant on Civil and Political Rights*, note 20, art 9(1); *Convention on the Rights of the Child*, note 20, art 37(b).

²³ The Australian Government has stated that it will implement the principle of 'no advantage' – the concept that asylum seekers who come to Australia by boat will gain no benefit through doing so

rather than waiting in another country to have their claims assessed, and a durable solution provided if they are found to be refugees. See also, for example, The Hon. Chris Bowen MP, Minister for Immigration and Citizenship, 'Asylum seeker transfer to Nauru, Expert Panel recommendations, 'no advantage' principle, Tony Abbott' (Press Conference, 14 September 2012). At <http://www.minister.immi.gov.au/media/cb/2012/cb189879.htm> (viewed 27 September 2012). This concept underpins the report of the Expert Panel on Asylum Seekers, as expounded in the report of the Expert Panel on Asylum Seekers. Report of the Expert Panel on Asylum Seekers (August 2012), see especially 'Overview: the approach underpinning this report' pp10-13, and recommendation 1 p14, at <http://expertpanelonasylumseekers.dpmc.gov.au/report> (viewed 12 October 2012). The UNHCR has expressed serious concern about the basis of such a principle, explaining that there is no 'average' time for resettlement. Mr António Guterres, United Nations High Commissioner for Refugees, Correspondence to The Hon. Chris Bowen MP, Minister for Immigration and Citizenship of Australia, 5 September 2012. The Commission is concerned that the consequence of the application of the 'no advantage' principle for some asylum seekers might be very long periods of time in detention in third countries.

²⁴ The Human Rights Committee has observed that 'detention' is not to be narrowly understood, and that article 9 applies to all forms of detention or deprivations of liberty, whether they are criminal, civil, immigration, health, or vagrancy related. Human Rights Committee, General Comment No 8: Right to liberty and security of persons (Art. 9) (1982), [1]. The distinction between measures which constitute a 'deprivation of' liberty, as opposed to a 'restriction upon' liberty, is one of degree or intensity, and not one of nature or substance. Nor does it depend in any way upon the labelling of something as 'detention'. Rather, it will depend upon criteria such as the type, duration, effects and manner of implementation of the measure in question. See, in the context of the European Convention on Human Rights, *Amuur v France* (1992) 22 EHRR 533, [42]. The Commission considers that the circumstances in which people are held on Nauru or another third country might be characterised as detention if, for example, people are subject to a legal requirement that they must live in a particular processing centre; if they are confined to the processing centres for certain periods each day; if they are only permitted to leave for certain periods of time; if they have no control over their accommodation; or if they are subject to supervision and monitoring by security guards. See 'Human rights issues raised by the transfer of asylum seekers to third countries', note 6.

²⁵ Australian Human Rights Commission, 'Human rights issues raised by the transfer of asylum seekers to third countries', October 2012. At http://www.humanrights.gov.au/human_rights/immigration/transfer_third_countries.html, viewed 18 October 2012.

²⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (dealing in particular with rights under the ICCPR and the CRC).

²⁷ See the decisions of the European Court of Human Rights in *Banković v Belgium and others* (dec.) [GC] no. 52207/99, [2001] ECHR 890 and *Al-Skeini v United Kingdom* [GC] no. 55721/07, [2011] ECHR 1093.

²⁸ G Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd ed., 2007), pp 408-411.

²⁹ See the following decisions of the Human Rights Committee: *GT v Australia*, Communication No. 706/1996, UN Doc CCPR/C/61/D/706/1996 (2007), [8.1]; *ARJ v Australia*, Communication No. 692/1996, UN Doc CCPR/C/60/D/692/1996 (1997); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Kindler v Canada*, Communication No. 470/1991, UN Doc CCPR/C/48/D/470/1991 (1993), [13.1]-[13.2]; *Ng v Canada*, Communication No. 469/1991, UN Doc CCPR/C/49/D/469/1991 (1993), [14.1]-[14.2]; *Cox v Canada*, Communication No. 539/1993, UN Doc CCPR/C/52/D/539/1993 (1994), [16.1]-[16.2]; *Judge v Canada*, Communication No. 829/1998, UN Doc CCPR/C/78/D/829/1998 (2003), [10.2]-[10.7]; *Nakrash and Qifen v Sweden*, Communication No. 1540/2007, UN Doc CCPR/C/94/D/1540/2007 (2008), [7.3]; *Bauetdinov v Uzbekistan*, Communication No. 1205/2003, CCPR/C/92/D/1205/2003 (2008), [6.3]; *Aumeeruddy-Cziffra v Mauritius*, Communication No. 35/1978, UN Doc CCPR/C/12/D/35/1978 (1990), [9.1]. See also Human Rights Committee, *General Comment 31[80] - Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), [12]; and, under similar provisions in the *European Convention on Human Rights*, see *Hirsi Jamaa and Others v Italy* (European Court of Human Rights, Grand Chamber, Application no. 27765/99, 23 February 2012) [114]ff.

³⁰ *Munaf v Romania*, Communication No. 1539/2006, UN Doc CCPR/C/96/D/1539/2006 (2009), [14.2]; *Judge v Canada*, Communication No. 829/1998, UN Doc CCPR/C/78/D/829/1998 (2003), [10.6].

³¹ *Ahani v Canada*, Communication No. 1051/2002, UN Doc CCPR/C/80/D/1051/2002 (2004), [10.7]. See also, in the context of the *European Convention on Human Rights*, *Hirsi Jamaa and Others v Italy* (European Court of Human Rights, Grand Chamber, Application no. 27765/99, 23 February 2012) [117], [133] and [156]-[157] ('In order to ascertain whether or not there was a risk of ill-treatment, the Court must examine the foreseeable consequences of the removal of an applicant to the receiving country in the light of the general situation there as well as his or her personal circumstances'. Also, in the context of return to Libya of persons seeking asylum in Italy: 'the Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees').

³² Vienna Convention on the Law of Treaties, adopted 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 26 and 31.

³³ In his statement of reasons for thinking that the designation of Nauru is in the national interest, the Minister for Immigration and Citizenship stated: "I think that it is not inconsistent with Australia's international obligations (including but not limited to Australia's obligations under the Refugees Convention) to designate Nauru as a regional processing country However, even if the designation of Nauru to be a regional processing country is inconsistent with Australia's international obligations, I nevertheless think that it is in the national interest to designate Nauru to be a regional processing country." The Honourable Chris Bowen, Minister for Immigration and Citizenship, Statement of reasons for thinking that it is in the national interest to designate Nauru to be a regional processing country, September 2012, para 35. At <http://www.minister.immi.gov.au/media/cb/2012/cb189739.htm> (viewed 27 September 2012). Equivalent language is used in the statement relating to Papua New Guinea. The Commission considers that a blanket statement that the 'national interest' may justify the limitation of rights goes beyond the circumstances in which rights set out in the treaties to which Australia is a party may be limited. For example, article 4 of the International Covenant on Civil and Political Rights (1966) (ICCPR) contemplates that some (but not all) rights may be limited in 'time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'. Further, Australia has not given any notification to the Secretary-General of the United Nations that it intends to derogate from its obligations under any human rights instruments. See, for example, the process described in article 4(3) of the ICCPR.

³⁴ See for example, 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 10 at <http://www.unhcr.org/refworld/docid/503489533b8.html>

³⁵ See, for example MJ Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (2005) (Palmer report), recommendations 6.11, 6.12, 6.13, at www.immi.gov.au/media/publications/pdf/palmer-report.pdf (viewed 10 August 2010); The 2005 Palmer Report recommended the establishment of an independent Immigration Detention Health Review Board. In her review of the implementation of the Palmer Report, Elizabeth Proust observed that '[w]hile the Department of Immigration and Citizenship regards the arrangements via the [Detention Health Advisory Group (DeHAG)] to meet this recommendation, DeHAG itself believes that an independent body is still needed'. E Proust, *Evaluation of the Palmer and Comrie Reform Agenda – including related Ombudsman Reports* (2008) at <http://www.immi.gov.au/about/departments/perf-progress/evaluation-report/> (viewed 10 August 2010). This was also noted by the Joint Standing Committee on Migration in its inquiry into immigration detention in Australia. Joint Standing Committee on Migration, *Immigration detention in Australia: Facilities, services and transparency - Third report of the inquiry into immigration detention in Australia* (2009) p.91 at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=mig/detention/report3.htm#chapters (viewed 14 October 2012)