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Committee Secretary
Senate Committee on Legal and Constitutional Affairs
Inquiry into the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012
PO Box 6100
Parliament House
Canberra, ACT 2600

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

Dear Committee Secretary,

Thank you for the opportunity to make a submission to this inquiry.

Humanitarian Research Partners (HRP) is a non-profit human rights and humanitarian research organization that provides community support and specialized research and advocacy services for refugees, asylum seekers and NGOs in Australia. HRP engages in monitoring and analysis of Australian legislation, strategy and policy that regulate refugees and asylum seekers. HRP is also involved in multinational stakeholder submissions to Inter-Governmental Organizations, UN Special Procedures mandate holders and Human Rights Treaty Bodies, as well as collaborative human rights research initiatives throughout the world.

The Government's decision to remove all avenues for maritime arrivals to claim asylum in Australia is of great moral concern. In excising the Australian mainland from the application of the regular provisions of the *Migration Act 1958* (Cth), the Government intends to 'ensure [offshore processing] does not encourage asylum seekers to enter the Australian mainland' directly.[1] In the Minister's words, this new policy is 'all about saving lives'.[2] Today's regional asylum seeker processing policy is no different to the Howard Government's *Pacific Solution*, and has well-documented implications for asylum seekers that violate Australia's international human rights obligations. This move that the Labor Party in 2006 called 'shameful,' 'xenophobic,'[3] and 'a stain on our national character,'[4] is equally unacceptable

1 Explanatory Memorandum to the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012.
2 Ibid.
3 Simon Crean, House of Representatives Hansard, 10 August 2006.
4 Chris Bowen MP, House of Representatives, Hansard, 10 August 2006.

today. 'Australia is better than this Bill… The legislation… is offensive to our decency and makes a mockery of this Parliament.'[5]

Humanitarian Research Partners' submission outlines the most serious human rights issues directly related to the implementation of the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (the Bill). This submission evidences that the Bill will inflict more harm than it could ever prevent by way of deterrence, and is wholly incompatible with Australia's international human rights obligations.

Executive Summary

1. The *Pacific Solution Mark II* (PS2) is incompatible with pre-existing government policy and international human rights law. This Bill entrenches these inconsistencies and extends their application to 'plug the gap' to ensure new processing arrangements apply to all asylum seekers who arrive by boat.
2. The PS2 is a discriminatory policy, and as such the Bill entrenches and encourages social prejudices and stigmatization of asylum seekers.
3. Pre-transfer screening processes are insufficient to protect vulnerable people, and do not take human rights problems into account in a meaningful way.
4. Nauru and Manus Island are inappropriate places to process asylum seekers both environmentally and in terms of capacity to provide meaningful protection.
5. Nauru and Manus Island Regional Processing Centre (RPC) facilities are entirely inadequate and inappropriate for accommodating asylum seekers.
6. Offshore processing under the 'no advantage' principle amounts to arbitrary and indefinite detention of asylum seekers, in violation of Art. 9(1) of the ICCPR and Art. 31 of the Refugee Convention.
7. Australia is failing to respect, protect or fulfill the rights to health and water of asylum seekers at Nauru and Manus Island RPCs, in violation of Art. 12 of the ICESCR.
8. Australia is failing to take account of the best interests of the child when deciding on transfer eligibility, violating Art. 3 of the Convention on the Rights of the Child (CRC). Australia is failing to protect children from mental and physical harm as required by Art. 19 of the CRC, and is not implementing detention for minors as a measure of last resort pursuant to Art. 31 CRC and s 4AA of the *Migration Act*.
9. Action must be taken to alleviate the mental stresses on transferees, to screen out people with particular vulnerabilities from being sent to RPCs, and to treat mental health issues in RPCs.
10. This Bill's Human Rights Compatibility Statement is entirely inaccurate. If the Government did not intend to take human rights compatibility seriously, it should not have submitted a Statement at all. To submit a Statement that fails to consider the human impact of the Bill to be enacted is dishonest and disrespectful of the integrity of this Parliament.

[5] Tony Burke MP, House of Representatives, Hansard, 9 August 2006.

Report: Human Rights analysis of the Bill

1. The Bill in context

The stated goal of the *Pacific Solution Mk II* (PS2) is to deter asylum seekers from making the perilous boat journey from Indonesia to Christmas Island or the Australian mainland.[6] However, given the harsh conditions in Regional Processing Centres (RPCs) and the indeterminacy and arbitrariness of offshore detention, it is debatable whether asylum seekers are more harshly penalized for their flight from persecution than the smugglers who make the journey possible.

1.1. Immigration detention policy

In 2006, Chris Bowen (in opposition) stated that the first *Pacific Solution* (PS1) was a 'stain on our national character' that amounted to an illogical, tragic and discriminatory disgrace.[7] Today Minister Bowen is comfortable that the PS2 is necessary 'to save lives', despite the human rights consequences.[8]

In 2008 the Immigration Minister (then Chris Evans) announced the *New Directions in Detention* policy, which was formalized by the Department of Immigration and Citizenship's (DIAC) *Fact Sheet 82 on Immigration Detention* (FS82). FS82 explains the Government's key immigration detention values, which include:

3) Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre.
4) Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review.
5) Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.
6) People in detention will be treated fairly and reasonably within the law.
7) Conditions of detention will ensure the inherent dignity of the human person.

Value 3 has been legislatively entrenched in s 4AA of the *Migration Act*, which provides for the detention of minors as a last resort in accordance with international law.[9] However, under the PS2 unaccompanied minors and children with family are subject to the same regional processing measures as adults. These two policies are mutually exclusive.

DIAC's *Departmental Guidelines for Assessment Prior to Transfer to a Regional Processing Country* and the *Pre-Transfer Assessment Form* seem to reflect the key immigration values. The form poses 'natural justice questions' relating to the risk factors of sending an asylum seeker to an RPC, asking whether a person has any special health risks, special needs or

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6 Minister Chris Bowen interview with Tony Jones, *Lateline*, Australian Broadcasting Commission (ABC), 21 October 2012.
7 Parliament of Australia, House of Representatives Hansard, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, Second Reading Speech, 10 August 2006, pp15-16.
8 Minister Bowen interview with Tony Jones, *Lateline*, ABC, 21 October 2012.
9 UNHCR ExCom, *Conclusion on Detention of Refugees and Asylum-Seekers*, No. 44 (XXXVII) –1986, para. (b), available at: http://www.unhcr.org/refworld/docid/3ae68c43c0.html

reasons to fear transfer to an RPC. If these risks are present, a transfer will be deemed 'not immediately reasonably practicable,' although this assessment does not preclude transfer altogether. So far, asylum seekers who have suffered prior torture or trauma, women and children have been sent to RPCs, presumably having been assessed as not particularly vulnerable. The UNHCR has called for pre-transfer assessments to be comprehensively reviewed to take into account vulnerabilities raised by asylum seekers, and for the Government to provide proper legal advice and representation to all arrivals.[10]

The Expert Panel on Asylum Seekers recommended the government adopt a policy of 'adherence' to Australia's international obligations.[11] Although the government announced its acceptance of all of the Expert Panel's recommendations, and assures human rights compatibility in the Explanatory Memorandum to this Bill, the analysis below shows the emptiness of these statements.

At a time of global financial upheaval when the Government is determined to return the national budget to surplus, it is important not to waste money on policies that do not work. This Bill is fiscally irresponsible. Forward estimates released in August put RPC facilities at a cost of $1.3bn.[12] This is conservative to say the least. Community detention is exponentially less expensive than offshore processing. Although not ideal, community detention arrangements 'entail fewer risks to the health, mental health, safety and wellbeing of asylum seekers, refugees and stateless persons, they are likely to lead to lower rates of suicide and self-harm.'[13] The Government should justify its decision to enact regional processing arrangements as fiscally responsible and in the national interest.

1.2. Fundamental problems with the Bill

The Bill's stated purpose is to deter asylum seekers from attempting to reach mainland Australia by boat to circumvent regional processing arrangements. The Government may believe it is preventing dangerous boat journeys, however according to the ABC only two asylum seeker boats have reached the mainland since 2008,[14] begging the question: is this Bill necessary?

The Bill amends s 4(5) of the *Migration Act* to refer to 'boat people' as *Unauthorised Maritime Arrivals* (UMAs). Although the change from 'Offshore Entry Person' may seem trivial, it is the latest in a long line of stigmatising and de-humanising labels the Government has applied to asylum seekers who arrive by sea. De-humanising language cloaks inhumane treatment as acceptable and encourages prejudice, with the 'perverse effect' of rendering people and their

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10 UNHCR, *Mission to the Republic of Nauru 3-5 December: Report*, 14 December 2012 (UNHCR Report), available online at: http://unhcr.org.au/unhcr/images/2012-12-14%20nauru%20monitoring%20report%20final.pdf

11 Recommendation 1, *Report of the Expert Panel on Asylum Seekers*, Australian Government: Canberra, 2012.

12 Liam Fox, 'Labor faces billion dollar offshore processing cost,' *Lateline*, ABC, 23 August 2012, available online at: http://www.abc.net.au/lateline/content/2012/s3574816.htm

13 Australian Human Rights Commission, *Community arrangements, asylum seekers, refugees and stateless persons*, AHRC: Sydney, 2012, at 5.1.

14 Simon Cullen, 'Australia to remove mainland from migration zone', *Australia Network News*, 30 October 2012, available online at: http://www.abc.net.au/news/2012-10-30/an-australia-to-remove-migration-zone/4342058

needs invisible to society.[15] For example, criminalizing the act of seeking asylum in Australia has changed the public discourse, which now broadly accepts incarceration of asylum seekers as 'par for the course' of their supposedly criminal behavior. This is unacceptable.

The Bill amends section 5(1) of the *Migration Act* to change the definition of 'transitory person' to include a person who has been formally determined to be a refugee. This means that a person can be sent to an RPC for an indeterminate period of time after having been found to require international protection due to a legitimate fear of persecution based on their race, religion, nationality, membership of a particular social group or political opinion. This is internationally unlawful and contrary to Governmental policy.[16]

Systematic stigmatization and de-humanisation often manifest as discrimination or a violation of human dignity, and are prohibited by international law.[17] Section 189(2) mandates detention of UMAs without exception, including pregnant women and children. This is incompatible with Australia's obligations under the CRC, and violates the ICCPR Article 26 prohibition on discrimination. The rights of the child and discrimination are discussed below at 3.6. and 3.7.

The Bill repeals s 198C, which strips a 'transitory person' of the right to appeal their refugee status determination. Effectively, people who are deemed transitory but are unable to be processed in an RPC pursuant to s 198 will be unable to access the Australian justice system. The Bill's proposed changes to s 494AA similarly pervert access to justice for asylum seekers by removing their right to have the decisions to detain them and process them in an RPC reviewed by a court. Recent evidence suggests that under PS2 arrangements, some asylum seekers have only given five minute refugee status interviews,[18] which falls short of discharging Australia's obligation to assess claims for protection on an individual basis. Removing the right to an appeal is unconscionable as well as internationally unlawful,[19] especially when refugee status determination processes are so fundamentally flawed.

2. The Facts

2.1. Manus Island

Manus Island is home to the world's deadliest strain of malaria, *Plasmodium falciparum*, which is endemic to Papua New Guinea (PNG) and resistant to artemesinin (anti-malarial) treatments.[20] In the *World Malaria Report 2011* the World Health Organisation concluded that 94% of PNG's population was at high risk of malaria infection,[21] where transmission is

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15 Report of the Special Rapporteur on the human right to safe drinking water and sanitation, *Stigma and the realization of the human rights to water and sanitation*, (Stigma Report) 21st Session of the UN Human Rights Council, 2 July 2012, UN Doc. A/HRC/21/42.

16 See above **1.1**

17 Stigma Report, Part V.

18 'Asylum denied, a penalty waits at home', *Newcastle Herald*, 8 December 2012, available online at: http://www.theherald.com.au/story/1173226/asylum-denied-a-penalty-waits-at-home/

19 Articles 9 and 10, *International Covenant on Civil and Political Rights* (ICCPR).

20 World Health Organisation, *World Malaria Report 2011,* WHO: Geneva 2012. See also Alexandra Phelan, *'Malaria on Manus Island; a threat to human rights?'* The Drum Online, 20 August 2012, available online at: http://www.abc.net.au/unleashed/4209230.html

21 World Health Organisation, *World Malaria Report 2011,* WHO: Geneva, 2012, page 152.

described as 'intense'.[22] Eighty per cent of the infected population suffer from malaria due to the *P. falciparum* strain.[23] Manus Island has the highest number of suspected and reported cases of malaria in the country.[24] Transferees and Australian-employed support staff are extremely likely to contract *P. falciparum* malaria.[25]

2.2. Nauru

PS1 saw asylum seekers processed at Nauru and on Manus Island. Reports consistently noted little drinkable water in Nauru's (then) immigration detention facilities, with 'no water for washing clothes, flushing the toilet or for taking a shower, creating unsanitary conditions.'[26] Former immigration detainees have described physical conditions at Nauru during PS1 as 'appalling', describing extended periods without sufficient clean water, electricity or air conditioning.[27] Independent refugee and human rights experts have confirmed these reports first hand, noting toilets were often 'full' and in 'pretty gross' condition due to water curfews being operational between 9am and 5pm.[28]

According to recent reports, the situation is no better today than it was a decade ago.[29] Nauru is described as being 'chronically short of clean water', with 'tainted groundwater making some of its citizens so sick that the country's diarrhea incidence rate is twice that of other Pacific Island Nations.'[30] Nauru has about 1000 cesspits, most of which have no lining at the base to prevent groundwater contamination, and no national building code to regulate such matters.[31] According to International Committee of the Red Cross, a large proportion of detainee illnesses are caused by poor sanitation conditions such as these.[32] Existing problems will only be exacerbated by an increase in population of at least 20% by way of transferees and support staff.

Nauru's National Integrated Water Resources Management Coordinator recently explained that groundwater resources are indeed highly contaminated with fecal matter and e-coli bacteria, and that the island is consequently 'heavily reliant' on diesel-powered desalination

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22 Ibid at 68.
23 Ibid at 152.
24 Ibid at 152.
25 The Global Human Rights Clinic, *Urgent Appeal regarding the Australian Commonwealth Government's Proposed Offshore Processing of Asylum Seekers on Manus Island*, 25 September 2012, available online at: www.humanitarianresearchpartners.org/publications.html
26 Dr. Caroline Fleay, *Repeating Despair on Nauru: The Impacts of Offshore Processing on Asylum Seekers,* 12 September 2012, available online at: http://blogs.curtin.edu.au/human-rights-education/files/2012/09/Nauru-report-12-Sept-2012.pdf
27 Edmund Rice Centre for Justice and Community Education, *Deported to Danger: A Study of Australia's Treatment of 40 Rejected Asylum Seekers,* September 2004, available online at: http://www.erc.org.au/research/pdf/1096416029.pdf (at p.26).
28 Debra Jopson, 'Asylum Seekers Everywhere But Not a Drop to Drink,' *The Global Mail,* 27 September 2012, available online at: http://www.theglobalmail.org/feature/asylum-seekers-everywhere-but-not-a-drop-to-drink/397/ accessed 29/09/2012.
29 *Report to the Minister of Immigration and Citizenship dated 25 January 2012*, §12, 35, 36.
30 Jopson, 2012 (FN5).
31 Jopson, 2012 (FN5).
32 Pier Giorgio Nembrini, *Water, Sanitation, Hygiene and Habitat in Prisons,* International Committee of the Red Cross: Geneva, 2005 (p. 58).

units that produce drinking water.[33] Water supply from desalination plants is dependent on imported diesel fuel. Of Nauru's 1000 rainwater tanks, approximately one quarter are in need of repair or replacement. These tanks are useless in times of drought, which can often last for up to five years.[34]

2.3. Detention, or not detention? That is not the question.

It is immaterial, for the purposes of ascertaining Australia's normative obligations, to identify whether transferees under s498AD of the *Migration Act 1958* (Cth) are in *immigration detention*. Under the UNHCR's *New Guidelines on Detention*, the key criterion for determining whether a person is in detention is whether that person is deprived of their liberty de facto and unable to leave voluntarily; location and conditions of detention are irrelevant.[35] Transferees have been, and will be transferred to Nauru by virtue of the *Migration Act*. Australia has direct control over the length of stay of transferees through operation of the 'no advantage' policy entrenched in the preamble to Australia's Memoranda of Understanding with Nauru and Papua New Guinea signed in 2012.[36]

It is clear from the facts that transferees to Nauru are effectively being deprived of their liberty,[37] despite Governmental assurances they would be 'free' to roam the island during the day. Transferees have no control over where they are going or how long they will be there. Until such a time as Australia decides to grant the transferee a visa, they will be unable to leave except if they agree to voluntary repatriation.[38]

Furthermore, UN High Commissioner for Refugees António Guterres, in his letters to Minister Bowen of 5 September and 9 October 2012, stated that Australia's responsibility accrues from maritime interception of asylum seekers. Commissioner Guterres endorsed the UNHCR's opinion that Australia and regional processing countries 'accept shared and joint legal responsibility for the protection of refugees' under PS2 arrangements.

Australia has effective jurisdiction and imputed authority over transferees at Nauru irrespective of whether they are classed as *detainees*. Jurisdiction and authority extend to any support staff Australia has employed or caused to be employed there.

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33 Haseldon Buraman speaking to Geraldine Coutts on Radio Australia, 4 July 2012, available online at: http://www.radioaustralia.net.au/international/radio/program/pacific-beat/nauru-trying-to-combat-water-levels-and-safety-issues/972854

34 Jopson, 2012 (FN5).

35 UNHCR, *New Guidelines on Detention 2012*, UNHCR: Geneva, 2012, Page 9 [§5].

36 Memoranda of Understanding between the Commonwealth of Australia and the Republic of Nauru, and the Commonwealth of Australia and the Independent State of Papua New Guinea, 29 August and 8 September 2012 respectively, available online at http://www.minister.immi.gov.au/media/cb/2012/cb189579.htm; and http://www.minister.immi.gov.au/media/cb/2012/cb189719.htm

37 UNHCR Report 2012, Paras 30-32.

38 'Asylum Seekers head home after refusing Nauru,' *ABC News*, 23 September 2012, available online at: http://www.abc.net.au/news/2012-09-22/asylum-seekers-sent-home-after-refusing-nauru/4275488. Similar arrangements prevailed under the PS1 with disastrous consequences.

3. Australia's International Obligations

3.1. Extraterritorial responsibility

3.1.1. When responsibility accrues

Internationally wrongful acts and omissions automatically entail state responsibility where the act or omission is attributable to a state, and constitutes a breach of the state's international obligations.[39] It is impossible to shirk this primary responsibility; it cannot be transferred to a third country in the same way as people or goods.

3.1.2. Human rights obligations outside Australia

Australia has concurrent international obligations to respect, protect and fulfil both civil and political rights,[40] *and* economic, social and cultural rights extraterritorially.[41] Australia's extraterritorial obligations are triggered in accordance with principle 9(a) of the Maastricht Principles to '…respect, protect and fulfil economic, social and cultural rights [including the rights to health and water] in… situations over which it exercises authority or effective control'.[42] The UNHCR's December Report suggests that high level of visibility and control by Australian officials, combined with the 'absence of a regular presence of the [local] government', indicate that Australia is exercising effective control over the RPC at Nauru.[43] Facilities at Manus Island are similarly run.

A state is obliged to respect economic, social and cultural rights extraterritorially where that state '…is in a position to exercise decisive influence or to take measures to realize…' these rights in accordance with international law.[44] There is an overriding obligation to avoid causing harm and risk impairing or violating these rights extraterritorially where such a risk is foreseeable.[45] State responsibility will attach to Australia due to the foreseeable nature of

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39 ILC Articles on State Responsibility, Article 7; *Phosphates in Morocco*, Judgment, 1938, P.C.I.J., Series A/8, No. 74, at p.28; *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A' No. 9'p.21l' Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits' Judgment, I.C.J. Reports 1986,p. 14, at p. 142.

40 UN Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* CCPR/C/21/Rev.1/Add. 13, 26 May 2004.

41 Principle 1(3), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997. These extraterritorial obligations have more recently been reaffirmed in Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, Maastricht, September 28, 2011 ("Maastricht Principles"). See also the International Court of Justice's Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (9 July 2004), paras 109-111.

42 Principle 9(a), Maastricht Principles.

43 UNHCR Report 2012.

44 Principle 9(c), Maastricht Principles.

45 Principle 13, Maastricht Principles: "States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct. Uncertainty about potential impacts does not constitute justification for such conduct."

human rights consequences of its actions to asylum seekers and support staff.[46] Furthermore, the Australian Government has the responsibility to find durable solutions for those found to be refugees, without delay.[47]

3.2. Refugee Law

Receiving states have a positive obligation to consider applications for asylum without undue delay. It is impossible to discharge this responsibility without considering each case on its merits. If an asylum seeker is found to be a refugee, Australia must offer international protection as a signatory to the Refugee Convention. Again, this obligation accrues at first contact. Under s 46A(2) of the *Migration Act*, only the Minister can declare it 'in the public interest' that an asylum seeker be allowed to apply for refugee status. This Bill allows for the transfer of an asylum seeker to a regional processing country without a refugee status determination.

Article 31(1) of the Refugee Convention prohibits the application of any penalty on asylum seekers for their mode of travel. Although the Government proposes administrative detention is not 'punishment' per se, it certainly amounts to a *collective penalty* in the form of deprivation of liberty for an indeterminate length of time. The UNHCR and Amnesty International agree.[48]

The UNHCR's December 2012 report on Nauru detention conditions[49] reiterated a number of the Commissioner's concerns already communicated to the Australian Government. The report notes insufficient human rights safeguards, inadequate and inhumane detention conditions and a policy that does not adhere to the spirit and intendment of the Refugee Convention.

The PS2 does not pursue regional processing arrangements as part of a burden-sharing arrangement to more fairly distribute responsibilities and enhance protection space. Instead, the PS2 seeks to circumvent Australia's protection obligations by transferring them to the regional processing country at the same time as asylum seeker transfer. The report states this is not possible, and that responsibility remains joint and shared.[50]

The quality of protection able to be provided at RPCs 'remains of concern' to the UNHCR. Both Nauru and PNG have very limited capacity to assess claims for refugee protection and provide 'very limited opportunities for sustainable local integration for refugees'.[51] PNG has lodged several reservations to the convention itself that put in doubt its intention to honour its international protection obligations. In the UNHCR's assessment, neither Nauru nor PNG has the legal safeguards, competence or capacity to handle RPC transferee protection in line with international standards.

See also Principles 8, 13 and 14, Maastricht Principles.

46 Art. 2, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001.

47 UNHCR Report 2012, Executive Summary and Para 23.

48 UNHCR Report 2012; Amnesty International, *Nauru Offshore Processing Facility Review*, 23 November 2012, available online at: http://www.amnesty.org.au/news/comments/30533/ (Amnesty Review).

49 UNHCR Report 2012.

50 Ibid, page 1.

51 UN High Commissioner Guterres, Letter to Minister Bowen 9 October 2012.

The risk of constructive *refoulement* of refugees from PNG 'persists in spite of [PNG's] written undertakings to [honour convention obligations].[52] The Edmund Rice Centre's 2004 *Deported to Danger* report outlines several risk factors present in RPCs, including the coercive effects of RPC conditions.[53] Freedom From Torture has documented numerous cases of Sri Lankan Tamils tortured on their return from the UK, and are putting pressure on the British Government to suspend forcible returns until such a time as it can better investigate claims for protection.[54] Some Sri Lankan asylum seekers have opted to go home and face persecution rather than being indefinitely detained at Nauru or Manus Island.[55] This Bill exacerbates the coercive effect of detention by extending the application of the offshore processing policy to all UMAs for several years.

The 'no advantage policy' has no legal content.[56] The policy is incompatible with Australia's international obligations and is detrimentally affecting the health and wellbeing of transferees.[57] Transferee processing must be undertaken in a 'fair, humane, expeditious and timely way'.[58]

3.3. Freedom from arbitrary detention

Arbitrary detention is inhumane, and is prohibited by international law. The Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 Human Rights Compatibility Statement states that the Bill 'does not engage Article 9(1) of the ICCPR'. This view is misinformed and does not take note of CCPR General Comments, other treaty-based obligations or soft-law responsibilities. If any one or more of the following six tests are not satisfied, detention is arbitrary and therefore internationally unlawful:

1. Detention must have a *clear legal basis*. Immigration detention is mandated by the *Migration Act 1958* (Cth).
2. Detention must have a *legitimate purpose*. The High Commissioner for Refugees António Guterres, amongst others, has stated that asylum seeker deterrence is not a legitimate purpose for immigration detention. To date, the Government has not expressed a lawful legitimate purpose for its policies.
3. Detention must be *definite*, as opposed to indefinite. No information is forthcoming regarding how long any given transferee will remain at an RPC before they have their claim for asylum processed, although the Minister has stated it will be somewhere in between 'a few years' and 'indefinitely'.[59] Transferees are currently unaware of the

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52 Ibid.

53 Edmund Rice Centre for Justice and Community Education, *Deported to Danger: A Study of Australia's Treatment of 40 Rejected Asylum Seekers*, Edmund Rice Centre, 2004.

54 Freedom From Torture, Briefing, 13 September 2012, available online at: www.freedomfromtorture.org/news-blogs.html

55 Sarah Hawke, 'More asylum seekers opt to return to Sri Lanka,' *ABC News*, 30 September 2012, available online at: http://www.abc.net.au/news/2012-09-29/asylum-seekers-head-home-to-avoid-offshore-processing/4287404

56 Prof. Gillian Triggs, President of the Australian Human Rights Commission, Senate Legal and Constitutional Affairs Committee Hansard, 16 October 2012, page 18.

57 UNHCR Report 2012.

58 Ibid.

59 Minister Bowen interview with Tony Jones, *Lateline*, ABC, 21 October 2012.

proposed length of their detention, to their detriment.

4. A person who has been deprived of their liberty must be brought before a competent court without delay, and decisions must be reviewable. A decision to send transferees to an RPC is excluded from processes of natural justice by operation of s198AD(9). This Bill's amendments to ss 198C and 494AA of the *Migration Act* bar decisions from being brought before an Australian court for review.
5. Detention must be appropriate and just. It does not seem reasonably appropriate, or at all just, to detain a person for at least five years on a remote island for having attempted to seek asylum in Australia. Moreover, collective punishment such as this is a prohibited penalty under Article 31(1) of the Refugee Convention.
6. Detention must be justifiably proportionate. To combat the 'scourge of people smuggling', the government has imposed a hefty penalty on asylum seekers that poses an immediate threat to their human rights. Indefinite detention in inhumane conditions is unjustifiably disproportionate to the act of seeking asylum.

These conditions amount to arbitrary detention; Article 9(1) of the ICCPR *is* engaged.

3.4. The right to health

The right to the 'highest attainable standard of health' is protected by Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). States must use all available resources to protect, respect and fulfill the right to health without discrimination of any kind. A grave violation of the right to health can amount to cruel, inhuman or degrading treatment, i.e. *torture*, which is prohibited by Article 16 of the Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment.

3.4.1. Physical Health

Asylum seekers at both Nauru and Manus Island RPCs are currently being accommodated in army tents. Amnesty International's review of Nauru RPC conditions revealed that tents are overcrowded and inappropriate for local conditions, leading to skin irritation and higher disease transfer rates.[60] Tents provide virtually no vector protection from mosquito-borne diseases such as malaria and provide no private space for transferees, which is an affront to their human dignity. Amnesty's review noted that tents become so hot during the day that they are uninhabitable, and monitors observed leaks in every tent used for accommodation at the time of their visit.

3.4.2. Mental Health

Arbitrary and indefinite detention is a well-established cause of mental illness and trauma, and is strictly forbidden under international law. Numerous Non-Government Organizations, the UNHCR, UN Working Group on Arbitrary Detention, Australian Human Rights Commission and even Parliamentary Inquiries have confirmed that immigration detention is arbitrary and indefinite, and all have recognized its negative mental health impact. Importantly, reports note *collective depressive syndrome* - a common consequence of

[60] Amnesty Review 2012.

indefinite detention - and recent high instances of attempted suicide, hunger strikes (10 and 25 respectively in one week in November) and self-harm.

Mental health issues are further exacerbated by a lack of adequate treatment. Earlier this year the Australian Human Rights Commission described onshore immigration detention mental health services as 'entirely inadequate'.[61] Mental health services in RPCs are, as a rule, less accessible than in onshore facilities.[62] Action must be taken to alleviate the mental stresses on transferees, to screen out people with particular vulnerabilities from being sent to RPCs, and to treat mental health issues in RPCs.

3.5. The right to water and sanitation

Australia's international obligations regarding the right to adequate and safe drinking water and sanitation stem from the right to life,[63] the right to an adequate standard of living, and the right to the highest attainable standard of health.[64] The right to adequate and safe drinking water and sanitation entails several obligations incumbent on states. These include obligations to:

1. ensure sufficient, safe and acceptable water supplies that are accessible to all persons within a state's jurisdiction;[65]
2. protect all such persons from contamination and arbitrary interference with availability of water supply, which includes an entitlement to sustainable supply management;[66]
3. prevent third parties from interfering with water quality or supply;[67]
4. carefully consider and justify any retrogressive measures;[68] and
5. do all of the above on a non-discriminatory basis.[69]

The UN Human Rights Council has affirmed the right to water as essential for the full enjoyment of life and human rights. In doing so, it specified that states have a primary responsibility to ensure realization of this fundamental right, and that delegation of water obligations to a third party does not exempt states from human rights obligations.[70] The CESCR in General Comment 15 was equally clear when it defined the responsibility to

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61 Australian Human Rights Commission, *Community arrangements, asylum seekers, refugees and stateless persons*, AHRC: Sydney, 2012.

62 Rosemary Nairn, *Notes on Health and Mental Health for Asylum Seekers and Refugees held in Immigration Detention Centres and Living in the Community*, Refugee Action Committee (ACT), 2012.

63 Article 6, *International Covenant on Civil and Political Rights*, 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967) (ICCPR).

64 Articles 11 and 12, *International Covenant on Economic, Social and Cultural Rights*, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967) (ICESCR).

65 CESCR*, General Comment 15: The right to water (arts 11 and 12 of the ICESCR),* UN Doc. E/C.12/2002/11, 20 January 2003, §2, 12.

66 Ibid, at §10

67 *Ibid, at §23; Human Rights Committee, Report of the Independent Expert on Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation,* UN Doc. A/HRC/12/24, 1 July 2009 (Expert's Report), at §64.

68 GC15 at §19*;* Expert's Report at §64.

69 Ibid at §13; Art 2 ICESCR; Arts 2, 26 ICCPR.

70 *Human Rights and Access to Water and Sanitation*, A/HRC/15/6/14, 24 September 2010, affirming UN General Assembly Resolution A/RES/64/292 of 8 July 2010.

protect as inclusive of the obligation to prevent third party interference in water quality or availability.[71] This responsibility is not being adequately discharged under the PS2.[72]

Australia has failed to ensure Nauru was capable of supplying adequate and safe drinking water and sanitation to transferees before implementing the agreement. Australia has failed to act in good faith, as required under international law,[73] to take concrete steps towards the realization of the right to adequate and safe drinking water and sanitation of transferees by sending them to Nauru.[74]

3.6. Rights of the Child

The Bill's human rights compatibility statement recognizes Australia's responsibility to act in the best interests of the child. However, the statement comes to the conclusion that, because this Bill does not alter PS2 policy, there is no violation of Australia's human rights obligations. This view is inaccurate.

This Bill enables the application of PS2 policy to a wider group than before, ergo the PS2 has broader human rights implications than before. Under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Government is obliged to consider whether this Bill is compatible with Australia's human rights obligations. This necessarily entails consideration of the human rights consequences of this Bill and the PS2 policy as a whole.

Australia has obligations to take all measures required to protect children from mental and physical harm under Article 19(1) of the CRC. Under Article 31 of the CRC and s 4AA of the *Migration Act*, detention of minors must be a measure of last resort. Children are treated no differently to adults under the PS2. Unaccompanied minors and children in families are liable to be transferred to an RPC, where detention conditions are particularly hostile and numerous environmental health risks are present. Special notice should be taken of the deleterious effects of 'having to live surrounded by razor wire 24 hours a day' and the 'sight of acts of self-mutilation' that are becoming more and more frequent in RPCs.[75] Article 3 of the CRC is engaged and obligations thereunder are not discharged.

3.7. Freedom from discrimination

This Bill entrenches an existing government policy of systemic discrimination against asylum seekers based on their mode of travel to Australia. As Labor MP Simon Crean noted in 2006, this policy is a 'xenophobic… vindictive measure to take against unfortunate and desperate people.'[76] Discriminatory treatment such as this violates ICCPR Art. 2.

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71 At §23.

72 Humanitarian Research Partners, *The Right to Adequate and Safe Drinking Water and Sanitation for Asylum Seeker Transferees at Nauru*, 22 November 2012, available online at: www.humanitarianresearchpartners.org/publications.html

73 Article 31, Vienna Convention on the Law of Treaties 1969.

74 CESCR GC15 at §§40-43.

75 UN Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention, Addendum: Visit to Australia*, 24 October 2002, UN Doc. E/CN.4/2003/8/Add.2

76 House of Representatives Hansard, 10 August 2006.

Asylum seekers transferred to RPCs face harsher and less humane detention conditions, less access to healthcare services, and greater environmental threats to their health and human rights than their onshore counterparts. Those processed in onshore detention facilities face diminished access to services and less humane treatment than asylum seekers living in the community.

This Bill entrenches indirect discriminatory treatment of asylum seekers within the UMA sub-group. At 31 October 2012 there were 9449 asylum seekers in Australia's immigration detention network.[77] With an absolute maximum of only 2500 places in RPCs, around 7000 current immigration detainees will have to be processed either in onshore facilities or under community detention arrangements. Some asylum seekers have already been transferred into the community under such arrangements.[78]

4. Conclusions

This Report only adds to the great volume of criticism of Australia's refugee and asylum seeker policy since the *Pacific Solution* was first implemented in 2001. This Bill is essentially identical to its 2006 counterpart, and HRP finds the Government's patent hypocrisy and disregard for the human consequences of its policy to be unconscionable.

The PS2 is an attempt to evade Australia's international obligations to treat people in a humane, dignified and respectful manner. It is especially concerning that Australia is prepared to subject children to such conditions.

Since the PS2 was implemented in August this year, over 7000 asylum seekers have arrived in Australia and the immigration detention network is overloaded. The deterrence factor supposedly created by the PS2 has not had any effect in stopping the boats, while the Government ignores proven, more humane and less costly strategies to stem the flow of asylum seekers.

This Bill helps to remove avenues for asylum seekers to appeal decisions made to detain them and send them offshore. This is fundamentally incompatible with the rights to due process and equality before the law. Moreover, it is repugnant to the core Australian value of 'a fair go.'

This Bill entrenches the Government's illogical and inhumane scheme that is directly and indirectly discriminatory, and encourages social prejudice in the Australian community.

HRP concludes that this Bill and the PS2 in general are incompatible with Australia's international human rights obligations, and urges the Government to reconsider its policy.

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77 DIAC, *Immigration Detention Statistics*, 31 October 2012, available online at: http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/

78 Verity Edwards, 'Asylum seekers' release into community expedited', *The Australian*, 20 August 2012, available online at: http://www.theaustralian.com.au/national-affairs/immigration/asylum-seekers-release-into-community-expedited/story-fn9hm1gu-1226453661598

5. Recommendations

1. The Committee should accept this Committee's 2006 dissenting reports in the inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.
2. The Committee should reject the Bill's Human Rights Compatibility Statement.
3. The Committee should recommend that the Bill not proceed to a second reading.
4. The Committee should recommend the immediate repeal of the Offshore Processing Act 2012 and all other legislation related to the regional processing of asylum seekers.

Should the Bill proceed

5. The Committee should require that the Government respond honestly and comprehensively to substantiated allegations of human rights violations, and re-submit its Human Rights Compatibility Statement addressing such concerns, before the Bill can proceed.
6. The Committee should require that the Government prepare an accurate cost analysis of the regional processing regime and of alternatives thereto, enabling this Committee to conduct a thorough cost/benefit analysis of the policy.
7. The Committee should require that a one-year sunset clause be entrenched in the Bill.
8. The Committee should require that Asylum Seeker Pre-Transfer Assessment Guidelines and Forms be passed through the Parliament as legislation rather than issued as regulation.

Respectfully,

Humanitarian Research Partners

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