To: Senate Legal and Constitutional Affairs Legislation Committee

Submission from ACT Refugee Action Committee concerning Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012– 'excision' of the mainland

… no matter what general stance a country takes towards immigration, the refugee is a moral and legal exception to immigration control.

Penelope Mathew, *Reworking the Relationship between Asylum and Employment*, Routledge, London & New York, 2012, p 4

… the international system of asylum (on which the Refugee Convention is based) usually involves the spontaneous arrival of people at the border of a State seeking access to the territory and a refugee status determination. … The global resettlement programme, under which resettlement countries provide places for refugees in acute need of international protection on a discretionary basis, provides a critical contribution to international refugee protection, but will only ever be able to provide a solution for a small percentage of the world's refugees. (UNHCR Submission to the Expert Panel on Asylum Seekers, 27 July 2012, p 7).

What the Bill does

The present Bill[1] (the UMA Bill) operates by inserting new s 5AA into the Migration Act, thereby extending the definition of "offshore entry person" to include not only such persons "who enter Australia at excised offshore places" (as is currently the case), but also those entering Australia by sea "at any other place at any time on or after the commencement" of the section. Section 198AD of the Migration Act as amended by the 2012 Regional Processing Act[2] now requires that "An officer must, as soon as reasonably practicable, take an offshore entry person to whom this section applies from Australia to a regional processing country" (our emphasis). Offshore processing is thus effectively mandatory for anyone to whom the definition of "offshore entry person" applies, and under this Bill that would now include those who arrive by sea on the mainland or non-excised islands.

Only arrivals by air who claim refugee status on arrival or at a later time would be processed in Australia, have appeal rights to the RRT, and be eligible to apply for a permanent protection visa once found to be a refugee. Those who arrived by boat without Australian "authorisation" would be subjected to the huge disadvantages of offshore processing with lower levels of scrutiny and accountability, together with a "no advantage" period of waiting for resettlement for a lengthy period after recognition as a refugee. Initially it was explained by the Department to people transferred to Nauru that "it is possible that you could be resettled in a country as part of broader regional arrangements, or that you are eventually resettled in Australia". It further explained to people transferred to Nauru that "your individual circumstances will need to be considered as part of any resettlement option. Only a small number of

1 Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth).
2. Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth).

countries have regular resettlement programs", and because of demand in those countries resettlement may take a long time.[3]

Since then the Government seems to have had a change of mind on resettlement. On 26 October 2012 the Minister for Immigration and Citizenship, Chris Bowen, in an ABC interview, answered a question whether recognised refugees who had been processed offshore would "get permanent residency in Australia automatically or are they potentially resettled elsewhere?" The Minister said:

> … the principle is that you will not receive a permanent visa in Australia until you would have under regional processing arrangements, but then you would receive a permanent visa into Australia. I've said that repeatedly, that's not new. The 'no advantage' principle is about resettlement into Australia.[4]

This may have resulted from a recognition that other countries could consider such refugees to be Australia's responsibility, as many did under the former "Pacific Solution". In its report on Nauru on 14 December 2012, the UNHCR may have been unaware of this statement by the Minister.[5]

As the Minister indicated above, the Government will also administratively apply to the newly defined "offshore entry persons" the "no advantage" principle recommended by the Expert Panel on Asylum Seekers Report.[6] At this stage it is far from clear what that means. (See below.)

The Government's case

The Government's case in favour of the UMA in the context of the new regime is based on the Expert Panel's recommendation that "arrival anywhere on Australia by irregular maritime means will not provide individuals with a different lawful status than those who arrive in an excised offshore place". That would "ensure that introduction of processing outside Australia does not encourage asylum seekers to avoid these arrangements by attempting to enter at the Australian mainland. Such attempts would increase the existing dangers inherent in irregular maritime travel. …" (see Report, paras 3.72–3.73, and proposed amendment at Attachment 10).

The Minister stated that the Expert Panel's Report contained an "integrated set of proposals" accepted by the Government. He continued: "To be effective in discouraging asylum seekers from risking their lives, the incentives and disincentives the panel recommended must be pursued in a comprehensive manner" to reduce the motivation "to take even greater risks with their lives to reach the Australian mainland" to avoid regional processing arrangements.[7]

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[3] Department of Immigration and Citizenship (DIAC), "Information for people transferred to Nauru", September 2012, obtained earlier from its website: www.immi.gov.au . To the same effect is a Departmental Fact Sheet, "The Expert Panel on Asylum Seekers and the 'no advantage' principle", referred to by the Australian Lawyers for Human Rights (Submission No 7, note 22). We were unable to access a readable form of the fact sheet.

[4] Available on the Minister's website: www.immi.gov.au .

[5] UNHCR *Mission to the Republic of Nauru, 3–5 December 2012*, UNHCR Regional Representation, Canberra, 14 December 2012, Executive Summary, paras 23–25, accessible from: www.unhcr.org.au .

[6] *Report of the Expert Panel on Asylum Seekers*, Australian Government, August 2012, available from : www.expertpanelonasylumseekers.dpmc.gov.au .

[7] Minister's Second Reading Speech on the UMA Bill, *Hansard,* House of Representatives, 21 September 2012, p 8.

The "no advantage" principle, the Minister said, "is to ensure that no benefit is to be gained through circumventing regular migration pathways", and together with increased refugee intake from offshore, "is designed to remove the attractiveness of attempting an expensive and dangerous irregular boat journey to Australia".[8] The Minister earlier referred to the fact that each onshore arrival was one less visa to be granted to an offshore claimant for resettlement (note: arrivals by air are included in onshore numbers). In 2011–2012, he said, "more visas were granted to onshore claimants than to offshore claimants", shifting the balance of the program. The new system would change that.[9]

General considerations

The ACT Refugee Action Committee (RAC) urges the Committee to reject the 2012 UMA Bill outright, or at the least recommend it not proceed in the current circumstances.

In broad terms we contend that the Regional Processing Act and its associated administrative measures are, like their predecessors under the Howard Government, unnecessary, punitive and in breach of Australia's international obligations. They will inevitably cause severe mental and physical ill-health to asylum seekers subject to their provisions, as already evidenced among those consigned to Nauru. Neither Government nor Opposition can claim not to be aware of these risks. They cannot be justified by a hope that they will save lives at sea and "smash the people smugglers' business model" – they have already proven ineffective in pursuing those ends, and are morally unjustified. To extend this harsh and at present chaotic regime further to encompass those arriving on the mainland of Australia, as the UMA Bill proposes, is unwarranted.

As the UNHCR, and many other organisations with experience of refugee realities in the Asia Pacific region and elsewhere, submitted to the Expert Panel, what is needed instead is to provide increased refugee protection throughout the region that will remove the need to undertake potentially dangerous sea voyages, without further victimising asylum seekers through drastic measures aimed at deterring them from "onward movement" that results in large part from inadequate refugee protection in transit countries.

The Minister's argument for freeing up offshore resettlement places could be achieved in ways other than by a draconian and very expensive regime of transferring all asylum seekers coming by boat to distant countries for processing and then making them wait an unspecified period to be resettled:

(1) The Government could end the nexus in the Refugee and Humanitarian quota between onshore arrivals (air and boat) and offshore resettlement refugees, which has the effect of reducing resettlement places as a result of onshore claims**.**

(2) As Professor Penelope Mathew rightly contends: "If preventing arrival on the mainland is really the aim, then the current provisions of the *Migration Act* that

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[8] Ibid.

[9] Minister's "Statement of reasons for thinking that it is in the national interest to designate Nauru to be a regional processing country", tabled in the House of Representatives with the designation and other documents on 10 September 2012; see Minister's media release the same day. There is a similar statement of reasons concerning Papua New Guinea: see media release 9 October 2012.

excise areas such as Christmas Island should simply be repealed." (Submission to this Committee, No 6, p 2)

(3) The Government could increase the number of UNHCR-recognised refugees for resettlement under the Refugee and Humanitarian quota to offset arrivals by both boat and air. That is a far better way to provide for Australia resettling more refugees from camps than the "no advantage" principle.

(4) The long-term approach to deaths at sea of asylum seekers should be, as argued elsewhere in this submission, to strengthen refugee protection in the region and to provide pathways to resettlement closer to the sources of asylum seekers and refugees. It is not a full or quick "solution", but it is by far the most effective and humane, and such measures would comply with the Refugee Convention. The Panel favoured that as part of their package, and the Government has already started to act on it by increasing the Refugee and Humanitarian quota to 20,000, with much of the increase in refugee resettlement (from 6,000 to 12,000) in countries closer to the sources or refugees. But the allocation does not include any quota for Sri Lanka, the largest source of asylum seekers, and the increase for Indonesia (up from 400 to 1,000) is not sufficient to clear the backlog of those who have waited many years.

In the Government's eyes, this Bill is merely the completion of a logical process recommended by the Expert Panel. Yet it is no wonder that media commentators and critics in the refugee support community have referred to this measure as the "excision of the mainland". While the Bill doesn't use that language, Australia has in effect excised the central element of the Refugee Convention, to provide a positive response to "the spontaneous arrival of people at the border of a State seeking access to the territory and a refugee status determination process".[10] The Howard Government excised islands from the migration zone, without being able to evade Australia's international obligations, in order to deflect asylum seekers coming by boat to other countries for processing. Now, in the words of commentator Waleed Aly: "It's excising the whole damn country. For boat people, Australia will effectively no longer exist."[11]

It would be impossible for the global refugee system to operate with any effectiveness if all countries that are parties to the Refugee Convention were to, in effect, "excise" their countries from the Convention's operation in relation to asylum seekers at the border.[12] While Australia has gone a long way towards this, there is no genuine compulsion to complete it. Very few boats have made it to the mainland in the past 12 years, and the Border Protection Command is geared to preventing boats reaching the mainland.[13]

Prevention of asylum seekers dying at sea?

Contentions that these measures are designed to, and will, achieve a reduction in the deaths of asylum seekers arriving by sea are unconvincing. Since the new policy was

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[10] UNHCR Submission to the Expert Panel on Asylum-seekers, 27 July 2012, p 7, accessible from: www.unhcr.org.au .

[11] Waleed Aly, "Imagine there's no haven – it's easy if you try to ignore the helpless", *Sydney Morning Herald*, 2 November 2012.

[12] As noted by UNHCR Regional Representative, Ric Towle, in his address to the UNHCR/Freilich Foundation Public Forum: Boats, Asylum and Public Perceptions, 14 November 2012, available on ANU YouTube, accessible from the Freilich Foundation's website at: freilich.anu.edu.au/ .

[13] See Tony Kevin, *Reluctant Rescuers*, above, p 14.

announced, thousands of asylum seekers have arrived in Australian waters. The debate continues on the question of whether the "Pacific Solution" "stopped the boats" or not, but there is strong evidence, as former Secretary of the Prime Minister's Department John Menadue has shown, that the substantial (but temporary) reduction in asylum seekers from some main sources such as Afghanistan played a decisive role.[14] Moreover, former Immigration Secretary, Andrew Metcalfe, is correct that even if the "Pacific Solution" "worked" the first time, offshore processing in Nauru won't work a second time because (as now confirmed by the Minister) asylum seekers who heard about the policy – not forgetting that people smugglers have an interest in not telling the truth here – will know they will eventually gain citizenship.[15] Before the political necessity for compromise in mid-year, Labor ministers were convinced by this advice,[16] and even now it is clear that Labor regards detaining asylum seekers on Nauru and Manus Island as a poor substitute for its Malaysian Arrangement which the High Court ruled against and the Opposition and the Greens refuse to support.

The error of offshore policies designed to prevent boat arrivals goes even deeper than that. ANU political scientist Dr Kim Huynh is surely correct when he writes, in the context of the inability of Australia to exercise total control over its borders:

> … deterrence is largely delusional. For deterrence to work, it requires Australia to inflict a degree of harm upon asylum seekers that is greater than the harm from which they are escaping. Even with the best cooperation and increased capacity building, conditions for asylum seekers in south-east Asia are not going to improve in the near or intermediate future to the extent that people will no longer feel compelled to make the journey to Australia by boat. …
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> It follows that references to once for all solutions are at best naïve and often misleading.[17]

Virtually all NGOs and other community organisations with experience of supporting and advocating for refugees, including the UNHCR and the Refugee Council of Australia, similarly doubt the ability of the offshore measures to stop attempts to reach the only country in the region that is a full party to the Refugee Convention.[18] And they deplore the harm that will be done to those subject to this regime. There is little or no reference in the Panel's Report to the agreement on these issues among such organisations.

We are also not aware of any public evidence that the government has addressed the issues raised by former ambassador Tony Kevin concerning the need for Australia's "border control" personnel to reorient their mission to undertake a more active role in monitoring boats and rescuing asylum seekers and crew members in distress.[19] We note that Marg Hutton, who runs the sievx.com website, states in her submission to

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[14] See John Menadue, "The Pacific Solution didn't work before and it won't work now", ABC, *The Drum*, 14 March 2012.
[15] Referred to by John Menadue in ibid.
[16] See eg the Minister's interview on 26 November 2012.
[17] Kim Huynh, "Boat people are merely pawns", *Canberra Times*, Opinion, 30 November 2012, p 19.
[18] See also Professor William Maley, "Need for mature asylum policy, not political point-scoring", *Canberra Times*, Opinion, 27 June 2012, page 9; note that PNG has entered seven significant reservations to the Refugee Convention. However, in December 2011 the PNG Government committed to withdrawing the reservations.
[19] Tony Kevin, *Reluctant Rescuers*, Canberra, 2012, p 15.

the Panel that, possibly shaken by the recent tragedies, especially that of 21 June 2012, "Australia is now much quicker to respond to distress calls from asylum seeker vessels".

Mr Kevin argues in his book that "the central issue for the border protection culture now is the need to make international safety-of-life-at-sea obligations explicit and binding on all Customs-coordinated SIEV intelligence collection and assessment operations, and on all BPC operations to surveil, detect and intercept SIEVs at sea" (RR, p 129).[20] If he is right, changes in attitudes and protocols in relation to safety of life at sea and responding to distress could reduce deaths at sea very considerably, certainly more than a return to offshore processing.

"No advantage" principle

"The 'no advantage' concept is simply a reworked version of the discredited notion of a smoothly flowing queue, and is designed to punish refugees who arrive without a visa. However, there is nothing unlawful about seeking asylum. Provided refugees have good reasons for entering without a visa – such as lack of protection in other countries – the law requires that they be protected by Australia, not punished." (Professors Bill Maley and Penelope Mathew, "Bowen's asylum line is illegal", opinion piece, *Canberra Times*, 27 November 2012)

Presumably in order to avoid the situation referred to by Mr Metcalfe (above), and in a misplaced attempt to achieve equitable treatment of both asylum seekers arriving by boat and those seeking resettlement from transit countries (but not those arriving by air, who are exempt from it), the Expert Panel proposed a "no advantage" principle. Those sent to designated countries who are found to be refugees will have to wait for an equivalent time that they could have expected to wait for resettlement if they had not come by boat (the impracticality of this test is discussed below.) However, it is impossible to give effect to this principle without severely penalising a large group of asylum seekers and acknowledged refugees in order to discourage/deter other asylum seekers seeking to come by boat. The Expert Panel avoided using the language of deterrence, but that is essentially what they recommended in the short-term.

The December 2012 UNHCR Report on its Mission to the Republic of Nauru repeats its earlier advice that:

> The insertion of the 'no advantage' concept as a basis for delaying or postponing the proper and timely assessment of refugee claims is not appropriate and is inconsistent with both States' responsibilities under the Refugee Convention to accord refugees with the full protection of rights set out in the Convention.[21] (emphasis in original)

The Minister has said that, as suggested by the Shadow Minister, the principle could lead to those sent offshore – or remaining in Australia because of lack of room in the Regional Processing Centres – having to wait up to five years after being found to be refugees.

Somewhat differently, Paris Aristotle, one of the panel members, says the purpose of the principle is not to "prevent people fleeing persecution or receiving protection", but "to create great fairness for as many people as possible including vulnerable refugees who are not within our immediate gaze." His view on the application of the principle is as follows:

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[20] Ibid, p 129.

[21] *UNHCR Mission to the Republic of Nauru, 3–5 December 2012: Report,* UNHCR Regional Representation, Canberra, 14 December 2012, Executive Summary, p 1.

> This principle does not come with an exact mathematical formula and should be applied on a case by case basis incorporating issues such as vulnerability and need, as well as the length of time a person has been awaiting protection.

He refers to the similar considerations the UNHCR is faced with in relation to resettlement all over the world. That would still be almost impossible to apply, and is wrong in principle – those found to be refugees should be granted a visa without delay.

Either approach will result in unnecessarily "warehousing" already recognised refugees rather than beginning to help with their integration into the Australian community. Research has shown that the earlier this starts the more likely it is to be successful.

The proposed solution is in effect to make all refugee intake come through a resettlement process. Rather than creating greater equity, the resettlement of those found to be refugees will be at the unconstrained discretion of the Australian authorities, precisely the result the Refugee Convention was designed to avoid.

The application of the principle is unclear and would in any case be a complete repudiation of Australia's responsibilities. The Committee should not agree to it being extended to further groups of recognised refugees.

Obligations to regional refugees

The DUA Bill 2006 was prompted by the arrival of 43 West Papuan asylum seekers coming directly from West Papua[22] without transiting any other country.

The present Bill would catch up such asylum seekers fleeing persecution, whether from Papua New Guinea, Timor Leste, or from Indonesia, particularly its provinces in West Papua. While that is unlikely to occur at present in relation to most of those countries, it is still a possible development in the future – there have been recent problems in each of them that could have led to people fleeing persecution. In the case of West Papua there is a very strong possibility that the violent responses of Indonesian troops to the Independence movement and other dissent could again trigger the flight of refugees to Australia.[23] Many have fled in the past to Papua New Guinea,[24] which had considerable problems dealing with that inflow.

Even if the general policy of offshore processing were justifiable, there can be no justification by a party to the Refugee Convention for including in that policy those

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[22] "West Papua" is used as a convenient term to describe the two Indonesian provinces of West Papua and Papua.

[23] For articles indicating the continuance of violence between Indonesian authorities and independence groups see eg "Indonesia: Lift Restrictions on Reporting, Access to Papua: Invite UN Rights Experts to Increasingly Violent Eastern Province", Human Rights Watch News, 13 June 2012: www.hrw.org/news/2012/06/13/indonesia-lift-restrictions-reporting-access-papua ; "Indonesia: Surging Sectarian Violence, Papua Crackdown: Hold Abusers to Account, Free Political Prisoners", Human Rights Watch, News, 24 January 2012: www.hrw.org/new/2012/01/23/indonesia-surging-sectarian-violence-papua-crackdown ; for further background, see Jim Elmslie and Camellia Webb Gannon with Peter King, *Get up, stand up: West Papua stands up for its rights*, A report prepared for the West Papua Project at the Centre for Peace and Conflict Studies, The University of Sydney, July 2010.

[24] The UNHCR states that there are "some 9,380 refugees in [PNG], the majority of whom are West Papuans who came to the country mainly during 1984–86." UNHCR *Refugee Newsletter*, No. 1/12, June 2012, p 28.

who have completed a journey to the mainland directly from a regional neighbour, in order to access protection from the nearest full adherent to the Convention.

Very importantly, asylum seekers coming directly from any of those neighbouring countries, or from more distant source countries like Sri Lanka, do not fit neatly within the rationale for the new regime, namely that there should be "no advantage" from leaving a transit country from which resettlement could (perhaps) eventually take place. Australia would be the first place reached, or the first place where asylum seekers could have their claims processed by any means. They would become subject not just to offshore processing, instead of determination of refugee status in Australia – with strong rights to merits review and judicial supervision to ensure against legal error, together with other accountability mechanisms such as the Ombudsman – but also to a long, indefinite wait for resettlement after recognition of their refugee status. This is an unnecessary and unacceptable abdication from our obligations.

Equally significant is the fact that in the past Australian governments have tended to be embarrassed by arrivals from such countries as Indonesia, because of the supposed or actual effect on our relations with that country from granting refugee protection to its nationals. This looked to be the case in 2006 with the 43 West Papuans who arrived directly by boat, but eventually the Howard Government accepted that it was bound by the centrally important distinction between government foreign policy and the separate legal process of granting refugee status on the basis of the Refugee Convention. The dangers of such pressures would be magnified if this Bill becomes law, since there would be no judicial review by the Australian courts, and the proposed administrative review process (very vague at present) is untested and almost certainly less independent than the RRT (a panel of two senior Departmental officers and one NGO representative has been suggested).

Of course, similar objections would apply to imposing offshore processing and lengthy detention on such regional asylum seekers who were intercepted at sea and taken to an "excised offshore place", or who landed there. That is not a reason to accept this extension of the current legal regime to those who reach the mainland.

We should not repeal their existing rights to refugee status determination by Australia (a central element of the Refugee Convention) carried out by Australia in accord with its obligations under the Convention, including providing protection visas without lengthy delay.

Specific criticisms of the implementation of the new offshore regime

Members of the Committee will be aware of the premature application of the renewed offshore policy without proper processing or housing arrangements being in place, contributing to the distress, anger and self-harm of many asylum seekers because of the failure to commence processing on Nauru and Manus Island and the prospect of uncertain periods of detention. These issues are strongly emphasised in the recent UNHCR report on Nauru, and are discussed in detail in a later section and Attachment 1.

In our view it would be unwarranted to extend the reach of a floundering offshore processing system to another category of future arrivals, a number of whom could be expected to be outside the attempted ethical justification for not giving an advantage to those who take boats from transit countries.

In our submission, even if the general policy were supportable, there are strong reasons for refusing to proceed with the UMA Bill at this time, just as a majority of this Committee as it was then constituted recommended that the Howard Government's similar DUA Bill of 2006 should not proceed.[25]

One reason for that recommendation was stated to be the "limited information available to the Committee". In the present case, it is similarly far too early to have any clear idea of how this attempt to revive "the Pacific Solution" will work out in practice. The Committee should not give a blank cheque to extending a rushed policy with predictably cruel outcomes and already proven to be an ineffective deterrent.

These reasons are very similar to those given in 2006 by every submission to the Committee except that from the then Department of Immigration and Multicultural Affairs.

The UNHCR's recent report on Nauru is highly critical of the present conditions on Nauru:

> Assessed as a whole, UNHCR is of the view that the transfer of asylum-seekers to what are currently harsh and unsatisfactory temporary facilities, within a closed detention setting, and in the absence of a fully functional legal framework and adequately capacitated system to assess refugee claims, do not currently meet the required protections standards.[26]

Where possible, the UNHCR report's main points have been referred to in the discussion in Attachment 1 of the details of the regime that raise concerns. One deeply disturbing finding we would mention here is that the report found a number of transferees on Nauru "are suffering the effects of pre-existing trauma and torture" (Executive Summary, p 2, dot point 6). As the report comments, this raises very serious questions about the adequacy of the pre-transfer assessments at the moment.

The Committee should not be diverted by the Minister's automatic rejection of the report, which the UNHCR delivered in good faith in its capacity to supervise "the application of the provisions of [the] Convention" (Art. 35).

It is also evident that the new regime is not successful at this point in deterring/discouraging boat arrivals. Since 13 August a very large number of boats and asylum seekers has arrived. The panel expected that the package as a whole would need to be implemented before there would be significant change. That is certain to take a considerable time. In the meantime, we submit that there is a real question mark over the prospects of the new offshore regime, and it should not be extended.

Attachment 1A contains a discussion of some of the detailed issues concerning the regime that we submit should lead the Committee to recommend the Bill not proceed.

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[25] Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth); Senate Legal and Constitutional Legislation Committee, *Report on the Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, June 2006. The Bill was ultimately withdrawn by the Howard Government in view of the indication by Senator Troeth that she would oppose the Bill in what would have been a finely balanced vote.

[26] UNHCR Nauru Report, note 5 above, Executive Summary, p 1.

Disregard of Australia's international obligations

The Refugee Convention is premised on the understanding that states will protect refugees in their territories, or cooperate with other states to find durable solutions for them (local integration, voluntary repatriation, and resettlement). Transferring asylum seekers to offshore processing centres was not a durable solution …. (Assoc. Prof. Jane McAdam & Kate Purcell, 2008, on the Howard Government's "Pacific Solution")[27]

The Refugee Convention, signed in 1951, was initially limited in its application in time place. As extended by the 1967 Protocol without limitation of time or place, the Convention forms the basis of the global refugee system. That system depends on the ability of refugees to seek refugee protection, status determination and a durable solution at the borders of parties to the Convention even if they do not meet the normal entry requirements of that those States. Without that underpinning, refugees driven to flee their own country would have no secure rights to be considered for asylum or while they are awaiting recognition as refugees or for integration in the country of refuge or resettlement elsewhere. In the words of the current UNHCR High Commissioner for Refugees, Antonio Guterres, "The Refugee Convention is a contemporary and 'living instrument' that lies at the heart of protection for millions of refugees around the world today."[28] The UNHCR would also have no ground on which to stand in advocating for States to adhere to the international refugee system.

The current Bill and the Regional Processing Act evade both the spirit and the law of the Convention and the global system built on it, paring back the refugee rights they establish. Equally, the implementation of these measures is likely to breach many of our other human rights obligations.

These concerns are reflected in the Australian Human Rights Commission's (AHRC) comprehensive report on "Human rights issued raised by the transfer of asylum seekers to third countries" (15 November 2012).[29] The AHRC has substantial concerns in almost every area of the new regime, and is in particular concerned that the arrangements to transfer asylum seekers to third countries may:

- undermine the principle of *non-refoulement*;
- undermine Australia's obligations under the ICCPR (the International Covenant on Civil and Political Rights) because of the risk of breaching asylum seekers' right to be treated with humanity and respect for their inherent dignity, and exposure to the risk of arbitrary detention;
- breach Australia's obligations under the CRC (Convention on the Rights of the Child), including obligations with respect to the best interests of the child, special protection for unaccompanied children, applications for family reunification, appropriate protection and humanitarian assistance for child asylum seekers, and detention of children only as a last resort.

The AHRC's report indicates multiple ways in which Australia's international obligations may be breached in the implementation of the new regime. This is very disturbing. These are not just theoretical breaches, they are fundamental breaches involving potential mistreatment or *refoulement* of "transferees" as well as deprivations of vital human rights protective of their wellbeing.

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[27] Jane McAdam & Kate Purcell, "Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum", (2008) 27 *Australian Year Book of International Law*, 87–113, 104.
[28] Quoted in the *UNHCR Submission to the Expert Panel on Asylum-seekers,* note 10 above.
[29] Accessible at AHRC website: www.humanrights.gov.au/ .

Other commentaries show the hollowness of the Government's claims that these measures are compatible with Australia's international human rights obligations.[30]

The report of the Expert Panel (which included no lawyers) (Attachment 3 to the report, "Australia's International Law Obligations with respect to Refugees and Asylum Seekers"), contains the following section:

> *Where does the Refugees Convention apply?*
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> There are a range of views within the international law community on this issue.
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> The position of successive Australian Governments has been that the Refugees Convention only applies to persons within Australia's territorial boundaries (that is, landward of the outer limits of the territorial seas).

On the contrary, there is substantial academic opinion that, in the event of a transfer of asylum seekers to another country, Australia cannot shed its international obligations in respect of them, including those under the Refugee Convention. In the words of 14 distinguished refugee law academics who wrote to the Expert Panel: "Australia cannot use arrangements such as the Malaysia Arrangement or the Pacific Solution to 'contract out' of its international legal obligations".[31] Similarly, the AHRC, chaired by distinguished international lawyer Professor Gillian Triggs, notes that "States cannot avoid their international law obligations by transferring asylum seekers to a third country", citing the leading text by G Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed, 2007, pp 408–411, and the UNHCR's statement on the present UMA Bill.[32] This is not simply an issue on which opinions can legitimately differ, as suggested by both the Minister and the Panel.

The decision of the High Court in *M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32, also strongly supports the view that our obligations under international law extend much more widely than the Minister's and Expert Panel's interpretations allow.

The Regional Processing Act (RPA), supported by both Labor and the Coalition, repealed s 198A(3) of the Migration Act that the High Court had found was the "reflex of" the international obligations that Australia assumes when asylum seekers in its territory or jurisdiction claim to be refugees under the Convention. By doing so, the RPA effectively scrapped Australian observance of the carefully worked out principles and processes that had evolved in international law to preserve refugee rights and protection in the event of a transfer to another country as a matter of burden-sharing.[33]

The Act thus removed from the Migration Act any objective standards that could be applied to the designation of a country as an offshore processing country, so that even countries like Malaysia, which is not a party to the Convention and has no internal laws protecting asylum seekers and refugees, could be so designated. That was the

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[30] See in particular Professor Penelope Mathew' submission to this Committee (No 6).
[31] Submission from Professor Jane McAdam et al to the Expert Panel on Asylum Seekers (11 July 2012), also attaching the previous submission to this Committee concerning the Malaysian Arrangement. See: www.expertpanelonasylumseekers.dpmc.gov.au/published-submissions .
[32] See full web reference at p 36 of the Expert Panel Report.
[33] See Michelle Foster on these principles and standards in her recent article, "The Implications of the Failed 'Malaysia Solution': The Australian High Court and Refugee Responsibility Sharing at International Law", (2012) 13 (1) Melbourne Journal of International Law 1-29.

Government's and Opposition's intention, subject to the need to table a disallowable instrument designating any country thought by the Minister to be in the national interest, which would enable the Opposition and the Greens to block the Malaysia Arrangement.

It seems the Government doesn't care if it breaches its international obligations. That is implicit in the Minister's astonishing statement that he believed the new regime was in accordance with Australia's international obligations, but if it wasn't the national interest overrode those obligations.[34] In Professor Crock's words, "this time round the Minister has made it clear that the regime is being adopted in potential defiance of international law".[35]

If we are going to transfer refugees, we should rather, in the words of the group of refugee law academics, "ensure that the other country respects the international and human rights standards by which Australia is bound".[36]

One major feature of the Refugee Convention is that it contains a number of refugee rights (Articles 2–32) that are intended to secure fair dealing and decent conditions for asylum seekers and refugees after they have arrived and when waiting for status determination or, following recognition of their refugee status, seeking a durable solution. These rights contain various graded qualifications concerning the asylum seeker or refugee's connection with the country of origin and the standard of rights conferred. But they are vital ingredients in attempting to ensure that refugees are not marginalised in countries of refuge in connection with (1) substantive civil rights such as access to courts, discrimination on grounds of race, religion or country of origin, freedom of religious practice, freedom of movement, and rights relating to the standards of living and social engagement, including a qualified right to engage in employment (particularly vital for asylum seekers and refugees who come with nothing), education rights and so on.

Despite the fact that Nauru and Papua New Guinea have become parties to the Convention (in 2012 and 2008 respectively), there is little sign that they have at this point the laws or administrative processes that could implement these rights. Papua New Guinea, of course, has made reservations in relation to seven of the rights in the Convention, though it has recently committed to removing them.

The right of *non-refoulement* in Art 33 is the central right in the Convention, and Australia has always claimed that it carries out its obligation not to *refoule* asylum seekers and refugees. (In the light of experience of return of Aghanis under the previous and present governments, and of Sri Lankans without assessment of their claims under the precent government, this is now a dubious claim.) There are similar requirements in other conventions to which Australia is a party, such as the Convention Against Torture and Other Cruel, Inhuman and Degrading Punishment.

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[34] See the Minister's "Statement of Reasons for Thinking that it is in the National Interest to designate Nauru to be a Regional Processing Country", paras 35–36, tabled in the Parliament with the designation of Nauru (10 September 2012), and accessible in the Minister's media statement, "Nauru designated for regional processing", 10 September 2012. There is a similar Statement of Reasons for Papua New Guinea – see Minister's media statement 9 October 2012, available from www.minister.immi.gov.au .

[35] See "Symposium: The Pacific Solution Mark II: Responsibility Shifting in International Refugee Law", (2012) 13(1) *Melbourne Journal of International Law*, available online at: http://opiniojuris.org.2012/11/16/mjil-symposium-the-pacific-solution-mark-ii

[36] Note 31 above, p 5.

There are significant gaps in each of Nauru's and PNG's accession to human rights treaties. There is no statement by the Government about whether it will seek to have the processing regime to be conducted under Nauruan law consider complementary rights of protection as would now be the case under Australian law. Professor Mathew has expressed the view that in light of the evidence of refoulement from Nauru under the "Pacific Solution": "There is a clear danger that *refoulement* to places of death, torture and persecution will occur again this time round" (Submission No. 6, p 3).

We also submit that the revived offshore processing scheme breaches Article 31 of the Refugee Convention, which prohibits imposition of penalties on refugees just because their entry or presence is not authorised under a state's domestic law. This is a central provision of the Convention to protect asylum seekers, who will very often be unable to enter a place of refuge according to domestic law.

The Australian Government has previously argued that the requirement in Art. 31 that refugees be 'coming directly from a territory where their life or freedom was threatened' excluded Article 31 in relation to Iraqis, Iranians, Afghans and so on arriving by boat from Indonesia, Malaysia etc. We disagree with that view,[37] but in any case it can have no application to refugees who come directly to Australian territory, such as those regional refugees discussed above. We contend that the package as a whole, including application of the "no advantage" principle, constitutes a penalty on refugees and asylum seekers on account of their illegal entry or presence. A breach of Article 31 is a serious derogation from the international refugee protection system.

In short, the actual or potentially transgressive character of this scheme should again lead the Committee to the conclusion that its scope should not be extended to those who arrive at our borders in order to seek protection under the Refugee Convention, including refugee status determination.

Conclusion

The Parliament and the Committee are being asked to give a green light to extension to an additional class of persons, including some who would not meet the stated justification for offshore processing with a "no advantage" principle, of a system that in our view and that of knowledgeable and respected organisations such as the UNHCR and the Refugee Council of Australia among many others, is wrong in principle and unproven in practice.

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[37] That approach is not consistent with specific consideration 10, paras (b) & (c) of the UNHCR's summary conclusions on Article 31 in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, ed Erika Feller et al, Cambridge University Press, Cambridge, 2003, p 255: "10. In relation to Article 31(1): … (b) Refugees are not required to have come directly from territories where their life or freedom was threatened. (c) Article 31(1) was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries or who are unable to find effective protection in the first country or countries to which they flee. The drafters only intended that immunity from penalty should not apply to refugees who found asylum, or who were settled, temporarily or permanently, in another country. The mere fact of UNHCR being operational in a certain country should not be used as a decisive argument for the availability of effective protection in that country."

As in the case of the similar Howard Government Bill, the Committee should recommend that the Bill should not proceed.