7 January 2013

Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012

Professor Mary E Crock (Professor of Public Law, The University of Sydney); and Hannah Martin (BA (Hons); Law Graduand; Research Assistant, Faculty of Law, The University of Sydney)

Rm 607, Building F10
The University of Sydney NSW 2006

1. EXECUTIVE SUMMARY

We welcome this opportunity to express our concerns about the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (the Bill). This submission sets out the reasons in principle and in practice why the Committee should recommend against the enactment of this Bill. In brief, the Bill puts or risks putting Australia in breach of a number of its international obligations and is founded on a bad faith approach to international law. If passed, the Bill would reduce the scheme for protection of a whole class of asylum seekers to a matter of absolute ministerial discretion. It is a scheme that comes close to removing the management of irregular maritime arrivals from the Rule of Law - reverting to a structure of discretionary protection which has not been seen in Australia since the days of the White Australia Policy.

Our key concerns are that:

- The Bill continues to make arbitrary distinctions between refugees based on their mode and time of arrival on Australian territory. These distinctions lead to real and unjust disparities between asylum seekers in terms of their treatment and the outcomes of their refugee claims;
- The Bill relies on a theory of deterrence which is unproven and unprincipled;
- The Bill facilitates asylum seekers' claims being processed offshore in a system of refugee status determination (RSD) which is likely to be of lesser quality and less subject to independent review or appeal;
- People who arrive by boat but are not transferred for offshore processing will be subjected to an as-yet unclear and almost certainly inferior RSD processes;
- There is insufficient protection for the rights and interests of vulnerable people, particularly children; and
- In total, these measures represent derogation from Australia's international obligations and from the rights of refugees by attempting to 'outsource' management of irregular migration flows to Australia to other countries and by delinking the process of recognising Convention[1] refugees from the grant of Australian visas.

What distinguishes this Bill from the Pacific Solution (version one) is that it deflects not only people who arrive at Australia's 'excised offshore places' (a classification which was always spurious as a matter of international law[2]), but also those who arrive on the Australian mainland. Further, there is now an extra hurdle to making an offshore visa application for those transferred to RPCs, in the form of a requirement for ministerial 'invitation' to apply for an offshore visa.[3]

In sum, the problem with this Bill is that it denies all people who arrive by boat (whether they make contact with Australian soil on the mainland rather than on an offshore territory and whether or not they are transported to a regional processing country) the

[1] Convention Relating to the Status of Refugees ('Refugee Convention'), opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) Art 1A(2) as amended by the Protocol Relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

[2] See Jane McAdam, Submission No 64 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, 22 May 2006, 3 and n 3.

[3] *Migration Regulations* r 2.07AM, sch 1 item 1402(3)(ba).

opportunity to assert a claim to recognition as a refugee and denies them virtually every other right than the basic right not to be refouled. It bolsters a regime of discretionary refugee status and minimal recognition of asylum rights. It is neither good policy nor good law and is an inappropriate example for Australia to be setting to its region.

2. INTRODUCTION

This legislation mirrors the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 which this Committee recommended against passing in its 2006 Report.[4] Some of the observations below are drawn from a submission by Mary Crock to the Committee's 2006 inquiry.[5] We make the same principled arguments against this bill. As in 2006, the proposed changes are without precedent in Australia or internationally. They place Australia in grave danger of breaching fundamental obligations it has voluntarily assumed under international law. Most importantly, the changes will affect the ability of people who are legally entitled to protection (and deserving of compassion) to gain both immediate and long term protection. But since 2006 there have been substantial changes to the framework for offshore processing which make the proposed changes even *less* desirable as a matter of practice. The most important of these changes are:

- The removal, by the *Migration Amendment (Regional Processing and Other Measures) Act 2012* of the section of the *Migration Act* which previously supported offshore processing (s 198A) and its replacement with a new set of provisions (ss 198AA-198AH). These provisions overcome the High Court's decision in *Plaintiff M70/2011*[6] because they contain no requirement that a country designated for regional processing meet any kind of objective standards regarding conditions and processing. Instead, the only condition precedent to a valid designation is that the Minister 'thinks that it is in the national interest'[7] to make the designation;
- The fact that offshore processing now involves not merely a transfer of people, but also a transfer of responsibility to the receiving country. Processing is to be done according to local law by local officials (possibly including contractors and persons seconded from Australia). Under the original Pacific Solution Australia provided or secured the provision of the RSD assessment and other measures that had to be taken, as well as the maintenance in the meantime of those who claimed to be seeking protection.[8] Neither the United Nations High Commission for Refugees (UNHCR)[9] nor the International Organisation for Migration (IOM) will now be involved in processing as they were in offshore processing after 2001;[10]
- Changes to the eligibility criteria for offshore visas which render boat arrivals who are subsequently removed to an RPC ineligible to apply for an offshore visa.

---

[4] Parliament of Australia, Senate Legal and Constitutional Legislation Committee, *Report on Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*.
[5] Mary Crock, Submission No 66 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*.
[6] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 ('*Plaintiff M70*')
[7] *Migration Act* s 198AB(2).
[8] *Plaintiff M70* (2011) 244 CLR 144, 199-200 [128].
[9] Lauren Wilson and Mark Dodd, 'UN won't help with offshore processing', *The Australian* (online) 25 August 2012.
[10] Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration* (Federation Press, 2011) 102 [4.60], 344 [12.49]; *Ruhani v Director of Police (No 2)* 222 CLR 580, 584.

Part 3 of this submission analyses the way this legislation will operate, placing it in the context of Australia's now very complex migration law framework. Part 4 considers whether the law is compliant with Australia's international law obligations. Part 5 critiques some of the other legal issues arising out of the proposal.

3. OPERATION AND EFFECT OF THE BILL

The Bill responds to the recommendation of the Expert Panel on Asylum Seekers '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'.[11] **Schedule 1** sets out how the proposed new reception and protection regime will look for the various classes of irregular migrants to Australia.

3.1. Creation of new classes of irregular arrivals liable to be transferred to RPCs

This Bill builds on the Regional Processing Act by expanding the categories of people who may – and indeed are required to be, so long as it is reasonably practicable[12] – transferred to an RPC. The Bill replaces the old terminology of 'offshore entry persons' with a new, overarching category of 'unauthorised maritime arrivals' which is defined n s 5AA to include a person who arrives without prior authorization and therefore becomes an unlawful non-citizen 'at an excised offshore place' or 'at any other place'. This new legal classification for these asylum seekers denies that they are even 'persons': they are now simply 'arrivals'.

As the *Migration Act* has done since 2006, this Bill operates by conditioning a person's detention, treatment and the validity of their application on the manner of their arrival in 'Australia'. It bolsters a distinction which already exists in Australian migration law between two classes of asylum seeker: those who arrive by plane (and who generally present with some form of documentation) and those who arrive by boat without visas. People in the former group are given access to one of the most sophisticated refugee status determination systems in the world, with access to free assistance where required, oral hearings at both application stage and on appeal and judicial review of decisions. Asylum seekers travelling by plane are generally not detained pending determination of their status as refugees. They are entitled to immediate permanent residence and to an array of assistance measures to settle them into their new country. In contrast, those arriving by boat will have fewer rights and entitlements wherever they end up being processed.

The 2006 version of this legislation would have deemed certain air arrivals (persons who travelled most of the way to Australia by sea but travelled the last leg by air) to be sea arrivals. According to the Explanatory Memorandum (EM), this was intended ensure that the new scheme applied to people who are airlifted to Australia. Proposed s 5AA does not work this way, and might not catch people airlifted to Australia but for the fact that the section covers the circumstances in which this might be likely to happen by including in

---

[11] Angus Houston, Paris Aristotle and Michael L'Estrange, *Report of the Expert Panel on Asylum Seekers* (13 August 2012) Department of the Prime Minister and Cabinet <http://expertpanelonasylumseekers.dpmc.gov.au/report>, Recommendation 14.

[12] *Migration Act* s 198AD.

the definition of UMA persons found on a ship detained under the Act or rescued and brought to Australia.[13]

3.2. Processing and visas

The effect of the Bill is that irregular maritime arrivals (IMAs) (whether they reach the Australian mainland or an excised offshore place or are intercepted before they reach either) will not be eligible to apply for *any* visa within Australia. Instead, their ability to make a visa application will depend on the Minister's exercise of a power to bring these people within the Australian RSD process. The requirement of special ministerial dispensation means that IMAs are unable to positively assert a claim to asylum and are very limited in their access to judicial and merits review.

Offshore applications

A key difference between the proposed 2006 scheme and the Bill as it would operate in the 2012 context is that not only is this new class of persons given 'no advantage' in processing times; they are further and actively disadvantaged because they can now no longer even make a positive claim for an *offshore* visa once they are transferred to an RPC. Prior to 2012, transfer would simply have put people back within the scope of the 'offshore' humanitarian program and its Class XB visas.[14] However in 2012[15] the criteria for grant of a 200 visa were changed to expressly exclude IMAs.[16]

Onshore applications

Under the Bill, anyone who lands on the mainland (or is intercepted by Australian officials in the territorial sea and brought to the mainland) is unable able to positively assert an asylum claim. They will be barred by an extended s 46A. Any processing that is done will be carried out pursuant to the Minister considering *whether* to exercise the statutory bar on such a person making a visa application. Statements made by the Minister suggest that he will not even consider lifting the bar on visa applications until the so-called 'no advantage' period has expired. It is not clear whether this means that there will be no *processing* within that period or whether people will have their claims assessed but not have a visa granted before five years have passed.[17]

3.3. Transitory persons

Under the Bill a person will not cease to be a transitory person if they have been assessed to be a refugee.[18] They will be liable to be transported (back) to a regional processing country even if they were assessed in that country to be a refugee.[19] This has been included to facilitate the 'no advantage' approach to assessment: it means that a person who has had a positive assessment in Nauru but needs to be brought to Australia for health reasons will not, once in Australia, be able to engage any domestic obligation to recognise their refugee status with a visa. This is clearly an attempt by Australia to avoid

---

[13] Proposed s 5AA(2)(b) and (c).
[14] For which the applicant must be outside Australia: *Migration Regulations* sch 1, item 1402(3).
[15] *Migration Regulations*, sch 1 item 1402(3)(ba).
[16] These are defined in *Migration Regulations* r 2.07AM(5) as a person who, on or after 13 August 2012, (a) became an offshore entry person or (b) was taken to a place outside Australia under paragraph 245F(9)(b) of the Act.
[17] Chris Bowen, 'No advantage onshore for boat arrivals' (Media Release, 21 November 2012) <http://www.minister.immi.gov.au/media/cb/2012/cb191883.htm>.
[18] Bill sch 1, item 6, amending s 5(1) to omit from (c)(iii) of the definition of 'transitory person' the words 'but does not include a person who has been assessed to be a refugee …'
[19] Bill sch 1, item 47 amending s 198AH.

involving itself in creating durable solutions for refugees. Further, the amending Bill also proposes to remove the sections of the Act which allow a person to have their status as a Convention refugee determined by the RRT.

4. AUSTRALIA'S INTERNATIONAL OBLIGATIONS

4.1. Non-refoulement and asylum

International law recognises in individuals a right to seek and enjoy asylum from persecution. That right is protected by the correlative duty of states not to return or 'refoule' a person who is within a state's territory or under its control to a place where there is a real chance they will face persecution for a Convention reason[20] or will face other types of serious harm.[21] Asylum is a peaceful, humanitarian and non-political act. It is not relevant to a person's status as a Convention refugee that they were not invited by Australia to seek protection here or that they arrived irregularly. Irregular movement and lack of documentation does not say anything about the credibility of a protection claim. Nor do they mean that a person is entitled to fewer procedural protections in the assessment of a claim.

Australia cannot, as a matter of international law, pick and choose which Convention refugees it would like to protect. Certainly, it can and has run an extra program of humanitarian migration, but that is a different creature to the grant of asylum to Convention refugees. Yet the thrust of the new regime is that it positions protection (in anything other than its most minimal form) as a matter of discretion for Australia.

Australia's laws pose serious threats to our ability to ensure that refugees are not returned to countries where they face persecution. Even if Nauru and PNG comply with their diplomatic assurances that they will not refoule transferees, there are real questions whether the processes to be undertaken there are sufficient to recognise refugees. If not, they could refoule refugees (in which Australia, as transferring country, would be jointly complicit). It is very likely that this regime will deny protection to individuals who would be recognized as refugees and granted protection in Australia if they were processed onshore.[22]

Non-refoulement is central to the Refugee Convention, but it is not the limit of a nation's obligations. Other incompatibilities between Australia's international obligations and this new scheme include:

- The use of regional processing as a deterrent, with transfers of particular groups at particular risk of transfer (for the sake of sending a message to their national compatriots who might be tempted to try to seek asylum) also places Australia in breach of its international obligations not to discriminate between refugees on the

[20] Refugees Convention art 33.
[21] Convention Against Torture art 3; International Covenant on Civil and Political Rights, art 7.
[22] Compare the recognition rates of refugees, particularly unaccompanied minors, on Nauru and in Australia under the first Pacific Solution. During this time, the percentage of unaccompanied and separated children whose claims were rejected on Nauru was dramatically higher than in Australia. Over thirty unaccompanied children were returned from Nauru to Afghanistan, one of who was subsequently killed. None of the 290 children who made it to Australia during the same period were returned: Mary Crock, *Seeking Asylum Alone: A study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* (Themis Press, 2006), 41-2.

basis of race, religion or country of origin[23] and undermines the case-by-case nature of refugee status assessment.

- By making a blanket distinction between IMAs and asylum seekers travelling by plane, Australia is risking breaching Article 31 of the Refugee Convention which prohibits the penalisation of refugees who come directly from persecution and enter the territory of a state party without authorisation.[24] This is most particularly the case for people for whom Australia is the first country of asylum: they will be caught by the new definition of UMA and subject to transfer.

4.2. State responsibility

UNHCR observed of the 2006 Bill that it would be 'the first time, to our knowledge, that a country with a fully functioning and credible asylum system, in the absence of anything approximating a mass influx, decides to transfer elsewhere the responsibility to handle claims made actually on the territory of the state.'[25] Though the Convention does not prohibit transfer of asylum seekers between states, and even if this law does not put Australia in breach of specific international obligations, it is nevertheless clearly *not* a law enacted in good faith implementation of Australia's international obligations.[26] The law is at odds with the good faith principle that states parties to the Convention should assume full responsibility for refugees on their own territory unless there are serious reasons for alternative arrangements to be made.

As a matter of international law, Australia cannot simply delegate or contract out[27] to Nauru and PNG the responsibilities it has in respect of refugees who arrive at its borders. The Australian government clearly hopes that in practice, RSD in those countries will be compliant with international law, but there is no mechanism to ensure that this is so. If either Nauru or PNG establish inferior status determination processes, Australia could indeed become jointly and severally complicit in the indirect refoulement of refugees that as a matter of international law were and remain its responsibility, or could be complicit in breaches committed during processing of other treaties such as the Convention Against Torture or the Convention on the Rights of the Child. In particular, since the government has stated that part of the 'no advantage principle' requires people to be held in regional processing countries for at least five years, there is a 'clear risk of indefinite and prolonged detention, under conditions which might well amount to subjection to inhuman and degrading treatment.'[28]

---

[23] Refugees Convention, art 3.

[24] See Guy Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non Penalisation, Detention and Protection', paper prepared for UNHCR Global Consultations, October 2001, available at <http://www.unhcr.org/419c778d4.html >.

[25] Jennifer Pagonis (UNHCR spokesperson) 'Australia: Proposed new border control measures raise serious concerns', *UNHCR Briefing Notes*, 18 April 2006 < http://www.unhcr.org/4444cb662.html>.

[26] See Jane McAdam, Submission No 64 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, 22 May 2006, 4.

[27] Note that at any rate, the 'contracts' are in the form of Memoranda of Understanding and therefore have dubious legal strength. As a matter of Australian law, it is very clear that there is now *no* requirement that the RPC meet any objective standards and that arrangements between the two countries need not be legally binding: see s 198AB and compare the High Court's interpretation of s 198A in *Plaintiff M70*.

[28] Michelle Foster, 'The Pacific Solution Mark II: Responsibility Shifting in International Refugee Law', *Melbourne Journal of International Law Symposium* 13(1), 16 November 2012 <http://opiniojuris.org/2012/11/16/mjil-symposium-the-pacific-solution-mark-ii-responsibility-shifting-in-international-refugee-law/>.

Though the legislation is now caste in the legitimizing terminology of 'regional' rather than 'offshore' processing, there is nothing truly regional about the scheme. It is a clear case of burden *shifting* rather than burden *sharing*.[29] It is not implemented pursuant to a wider regional agreement and nor do the receiving states undertake any reciprocal obligation to grant visas to recognised refugees.[30]

4.3. The 'no advantage' approach

The 'no advantage' approach has no foundation in fact or in law. It is a very blunt instrument for making a political point and is void of legal content. It fails to recognise that the movement of refugees necessarily falls outside of 'regular' migration pathways. Under international law asylum is a human rights remedy rather than an alternative and less-legitimate migration pathway.[31] The idea that there is a standard time for the processing of refugee claims in refugee receiving countries has no basis in fact. The ultimate problem with the 'no advantage' principle is that the ultimate 'carrot' is the grant of refugee status. Such status can only be denied if the person does not meet the Convention definition of a refugee, whether or not the government thinks that the person 'deserves' protection. As long as there is the possibility of protection – which Australia cannot avoid without repudiating the Convention – people with genuine need will seek protection.

The assumption underlying the 'no advantage' test is that refugees recognized through processes conducted offshore can be grouped together with those recognized by UNHCR in the course of its fieldwork operations. It is predicated on the ability to find some approximation of the timing of UNHCR assessment and resettlement to these people. But these groups are not in the same position in international law for the simple reason that no obligations attach to the resettlement process. The time it takes for resettlement referrals by UNHCR in Southeast Asia or elsewhere is an unsuitable comparative measure.[32] To begin with, there is no standard resettlement period for refugees processed by UNHCR anywhere in the world. Resettlement is governed in large measure by the receiving states and covers only a tiny percentage of the world's refugees. Some refugees are resettled speedily, while others are never considered suitable – for a great variety of reasons.

Even if the two groups could and should be compared, determining the relevant time period is impossible, since, as the Minister has recognised, there are no published benchmarks.[33] From an international perspective, the effect of Australia's policy is summed up in this observation of Jane McAdam, made in respect of the 2006 Bill:

---

[29] See Michelle Foster, 'The Pacific Solution Mark II: Responsibility Shifting in International Refugee Law', *Melbourne Journal of International Law Symposium* 13(1), 16 November 2012 < http://opiniojuris.org/2012/11/16/mjil-symposium-the-pacific-solution-mark-ii-responsibility-shifting-in-international-refugee-law/>.

[30] Note that under both the Memoranda of Understanding with both PNG and Nauru, the ultimate resettlement obligation attaches to Australia, not to the RPC itself (other than where it is acting on behalf of Australia).

[31] See James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) , 5.

[32] Letter from Antonio Guterres to Chris Bowen, attachment to Instrument of Designation of Nauru; Letter from Antonio Guterres to Chris Bowen, attachment to Instrument of Designation of Papua New Guinea.

[33] Australian Broadcasting Corporation', 'Expert panel report, offshore processing legislation, Nauru, Papua New Guinea, Malaysia, humanitarian program', *ABC News 24*, 15 August 2012 (Chris Bowen).

Without having sought guarantees for international responsibility sharing and durable solutions, Australia has made a unilateral decision to offload refugees for which it is responsible onto the international community.[34]

5. OTHER ISSUES

5.1. Gaps and uncertainties in processing arrangements

Processing in Nauru and PNG

This Bill asks the Committee to consign even more people to a system of RSD which is uncertain and untested. As was the case in 2006 there is 'only a minimalist framework for the proposed system' of offshore processing.[35] Whilst this Committee is not examining the framework itself – which is now law – it is very relevant for the Committee to consider how processing is actually being done (or not being done, as the situation seems currently to be) on Nauru and Manus Island because this Bill asks the Parliament to endorse and expand this system.

It remains unclear how refugee status determination procedures will actually work for people who are transferred offshore and whether people will have access to proper legal assistance and review mechanisms. The Australian government has consistently asserted that processing will be done under Nauruan and Papua New Guinean law. Nauru now has a legislative footing for refugee status determination and a defined merits review structure,[36] although its Refugee Status Review Tribunal has not yet been constituted. Yet it attaches no visa consequence to a positive assessment. Refugee status in PNG is on an even less secure footing: it is mentioned only in the *Migration Act 1978* as a determination which the Minister may make.[37] Neither country has had reason so far to develop expertise in the area of RSD. Both will certainly lean heavily on Australian personnel and resources.

There is also no detail on resettlement of those who are found to be refugees. As we will explain further below, even if a person is accepted as a refugee in Nauru or PNG, there is no enforceable legal obligation on the Australian government, let alone the Nauruan or PNG governments, to ensure that the person is resettled in Australia or anywhere else.[38]

Processing in Australia of those not transferred

Boat arrivals who are not transferred will remain in Australia as unlawful non-citizens who must be detained (at least initially, with some scope but no requirement for alternative arrangements to be made[39]). It is simply not clear how the government intends

---

[34] Jane McAdam, Submission No 64 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, 22 May 2006, 6.

[35] Parliament of Australia, Senate Legal and Constitutional Legislation Committee, *Report on Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* [3.197] 59.

[36] *Refugees Convention Act 2012* (Nauru)

[37] *Migration Act 1978* (Papua New Guinea) s 15A.

[38] Although note that the Memoranda of Understanding Australia has signed with Nauru and PNG respectively clearly do envisage that an ultimate resettlement obligation does attach to Australia. Australia is likely to comply with this as a matter of practicality: certainly Nauru cannot keep all the people sent there by Australia. Whether Australia could be compelled to honour that resettlement obligation as a matter of domestic law is another question.

[39] *Migration Act* Part 2, Divison 7, ss 197AAff.

to approach processing of asylum seekers who are not transported, though that is already a very large group. So far, the practical effect of the Regional Processing Act has been to (re)institute a freeze on status processing within Australia.[40] People in Australia, as in Nauru and PNG, now have no idea of when their claims might be processed.

Surely, given Australia's stated intention to comply with its obligations under the Convention – the obligation not to refoule people – the Minister will at least have to consider exercising his discretion in respect of people who arrive by boat but are not transferred to a regional processing country. If this is so, then the new legislation will shift what is now a prescriptive process in respect of mainland boat arrivals into the realm of ministerial discretion. As *Plaintiff M61* shows, this may not be enough to exempt those making the decisions under even this process from the obligation to afford procedural fairness.

The Minister has now announced that irregular maritime arrivals who are released on bridging visas and processed in the community will not be issued with a permanent Protection visa if found to be a refugee, 'until such time that they would have been resettled in Australia after being processed in our region'.[41] This is basically a non-statutory form of temporary protection. But unlike TPVs used between 1999 and 2007, people on these visas will have no work rights. Further, they remain liable to be transferred to an RPC if space becomes available there, as they will remain 'offshore entry persons' (or UMAs under the Bill) under the *Migration Act*.

5.2. Discretion

Both the onshore and offshore systems now distance the process of refugee status determination from the grant of an Australian visa. If this Bill is enacted, anyone who arrives anywhere in Australia by boat will be subject to an extraordinary range of Ministerial powers which are largely unfettered and unreviewable. It will be a matter of ministerial discretion to grant even the privilege of asking for protection to anyone who arrives by boat. Those people may now be taken to a regional processing country (or not), allowed to apply for a visa (or not) and have their claims considered (or not), all at the Minister's pleasure in the exercise of powers which the Minister has no obligation to exercise or even to consider exercising. This will further personalise power, remove safeguards and deny effective remedies to people who are deserving of at least Australia's compassion and perhaps also its protection. The new discretion described above means that the Minister cannot be compelled as a matter of domestic law to grant a visa to a person who is recognized as a refugee in an RPC.

5.3. Access to merits and judicial review

People who are transferred

---

[40] Three and six month freezes were placed on the processing of Sri Lankan and Afghan asylum seeker claims in 2009. The policies had no impact on the rate of boat arrivals.

[41] Chris Bowen, 'No advantage onshore for boat arrivals' (Media Release, 21 November 2012) <http://www.minister.immi.gov.au/media/cb/2012/cb191883.htm>. People have so far been released on Bridging Visa E (class WE). An amendment to the *Migration Regulations* which would have allowed delegates of the Minister to keep renewing/re-granting BVFs under s 195A ad infinitum without the person having to be re-detained or the Minister having to reconsider his non-compellable power, and also without the Minister having to lay before each House of Parliament a statement under section 195A setting out the reasons for granting the visa for each subsequent grant, was disallowed by the Senate on 21 November 2012: see Migration Amendment Regulation 2012 (No. 6), Select Legislative Instrument 2012 No 237/ F2012L02021.

By allowing for the placement of all IMAs into the offshore processing scheme this Bill moves people into a processing regime of which there is no effective independent oversight. From the Australian end, there seems to be no mechanism for ensuring accountability and quality in processing. Transferees have no access to merits review by the RRT or MRT. In Nauru there is now a statutory system of refugee status determination including merits and judicial review. There is no such system in PNG.

People who are not transferred

Because of the de facto freeze on processing since 13 August 2012 it is unclear whether and how merits review will be conducted within Australia of the cases of people who arrive after 13 August. The RRT's involvement in review of the claims of those not transported will be conditional on the government continuing – as a matter of policy – the 'Single Statutory Protection Visa Process' which it implemented after the High Court's decision in *Plaintiff M61 and Plaintiff M69.* That process involved applying the onshore arrangements for application and independent review through the Refugee Review Tribunal (RRT) system to all people seeking asylum in Australia, regardless of their mode of arrival.[42] The law has taken a dramatic turn away from the notion that people should be treated the same irrespective of the form of transport they used to get to Australia. Combined with the no-advantage principle, this suggests that the government will be unlikely to give broad access to merits review.

6. CONCLUSION AND RECOMMENDATION

The original aim of offshore processing was to isolate arrivals to particular parts of Australia and render them liable to a different, harsher and supposedly more deterrent claims process. This bill renders the distinction between excised places and the rest of the migration zone irrelevant and instead normalizes a lesser set of rights and an inferior form of processing to an even broader class of 'arrivals'. It would cement 'regional processing' as the overarching legal framework for Australian refugee law. The Bill continues to create arbitrary distinctions between people who seek Australia's protection. Those distinctions have no foundation in international law and they have very real and deleterious effects on people's rights and interests. The apparently noble goals of 'consistency' and 'equal status', are in fact not being used to protect asylum seekers or their rights, but to disadvantage and undermine them.

This law would isolate Australia further from comparable countries' approach to refugee processing. Although Australia identifies as a member of the United Nation's 'Western European and Others' Group (WEOG), it has now enacted laws that are quite unlike the approach of those countries to managing asylum flows and are more consistent with those of Asian nations. Unlike the WEOG countries, few Asian nations are party to the UN Refugee Convention, or to any of the major human rights conventions other than the Convention on the Rights of the Child. Most countries in this region understand and (generally) conform with the non-refoulement obligation enshrined in s 33 of the Refugees Convention, but they will not entertain the notion that refugees on their territories enjoy any economic or social rights. Australia, too, now seems determined to take an approach of 'all care but no responsibility' towards asylum seekers: it will merely

[42] See Minister for Immigration, 'New Single Protection Visa Process Set to Commence' (Media Release, 19 March 2012) < http://www.minister.immi.gov.au/media/cb/2012/cb184344.htm>.

tolerate them until they are removed and will deny them the chance to make any direct claims to Australia's protection, let alone to any other rights. This may be the 'Asian Century', but our region's customary approach to refugees is not a policy which Australia should seek to emulate.

In 2006, this Committee noted concerns raised in response to the bill into which it was inquiring, specifically into 'uncertainty about how the proposed arrangements will actually work; domestic policy issues such as the Bill's broad incompatibility with the rule of law; the potential breach of Australia's obligations under international law in a number of key areas; and arguments that the Bill is an inappropriate response to what is essentially a foreign policy issue'.[43] All of these concerns remain in 2012.

The net effect of this Bill and the legislation on which it builds is a regime of refugee law which his squarely at odds with the all but the most basic tenets of refugee and human rights law. The protection of affected refugees has shifted from a right which they can assert to a privilege to be granted at the absolute (non-reviewable and non-compellable) discretion of the Minister for Immigration. This is not a forward step for Australia, but a very big backwards stride. It takes Australia back to an era before it became a world leader in quality and procedurally fair onshore refugee status determination. It derogates not only from Australia's international obligations but also from the rule of law.

Recommendation: We recommend that the Committee oppose this Bill in its entirety.

[43] Parliament of Australia, Senate Legal and Constitutional Legislation Committee, *Report on Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, 59 [3.196].

SCHEDULE 1: COMPARISON OF RECEPTION AND ASSESSMENT PROCESSES AND CONDITIONS

	Plane arrival on mainland	IMA - mainland (currently)	IMA - mainland (proposed)	IMA - excised offshore place	RPC transferee to Australia (currently)	RPC transferee to Australia (proposed)	Transferee to Nauru	Transferee to PNG
Legal status and classification	Unlawful non-citizen	Unlawful non-citizen. *Not* an offshore entry person.	Unlawful non-citizen, and unauthorized maritime arrival: see proposed s 5AA(2).	Unlawful non-citizen. OEP - 'unauthorised maritime arrival' See proposed s 5AA(2).	Unlawful non-citizen and a transitory person: s 198B	Unlawful non-citizen and a transitory person: s 198B	See Australian Regional Processing Visa (ARPV): *Immigration Regulation 2000* (Nauru) r 2, 9A.	No visa/entry permit status in PNG. 'Refugee' is defined in the *Migration Act* 1978 (PNG) s 2.
Detention	Mandatory under s 189(1), but generally released pending RSD.	Mandatory under s 189(1), but generally released pending RSD.	Mandatory under s 189(1), but generally released pending RSD.	Must be detained: 198(3) (Note exempted categories: s 189(3A))	Mandatory under s 189(1), but generally released pending RSD.	Mandatory under s 189(1), but generally released pending RSD.	*Australian law*: deemed not in detention: ss 5(1), 198AD(11). *Local law* Movement restricted by conditions on their ARPV, with a sliding scale: see *Immigration Regulations (2000)* (Nauru) r 9A(3), (4).	*Australian law*: deemed not in detention: ss 5(1), 198AD(11). *Local law Migration Act* 1978 - 'relocation centres' for the accommodation of non-citizens who claim to be refugees: s 15B.
Liability to transfer to RPC[44]	Not liable to be transferred s 5(1)/proposed s 5AA(2)(a) and 198AD).	Not liable to be transferred: s 5(1) and 198AD.	Must be transferred if 'reasonably practicable': s 198AD.	Must be transferred if 'reasonably practicable': s 198AD.	Section 198AD -transfer back to an RPC if no s198C assessment/ s 198D certificate in force: s 198AH.	Liable to be transferred: section198AD to allow transfer irrespective of assessment as a refugee: see s198AH(2).	N/A	N/A

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

	Plane arrival on mainland	IMA - mainland (currently)	IMA - mainland (proposed)	IMA - excised offshore place	RPC transferee to Australia (currently)	RPC transferee to Australia (proposed)	Transferee to Nauru	Transferee to PNG
Status procedure/claim assessment	Person must lodge application form and pay non-refundable application charge. Departmental officer will assess the application individually. The person must be given an oral hearing if a positive decision cannot be made on the papers.	Person must lodge application form and pay non-refundable application charge. Departmental officer will assess the application individually. The person must be given an oral hearing if a positive decision cannot be made on the papers.	Cannot make a valid visa application; assessment will occur as part of a statutory process pursuant to Minister's consideration of whether to exercise non-compellable non-reviewable discretion to lift the s 46A bar.	Cannot make a valid visa application; assessment occurs as part of a statutory process pursuant to Minister's consideration of whether to exercise non-compellable non-reviewable discretion to lift the s 46A bar.	May apply for RRT assessment of Convention refugee status if the person has been continually present in Australia for six months: s 198C	No possibility of RRT application.	Pursuant to *Refugees Convention Act 2912* (Nauru): person may apply to the Secretary to be recognized as a refugee (s 5). Note that the application must be in a form prescribed by the Regulations, but regulations have yet to be made.	No specific refugee legislation or administrative procedure relating to the determination of refugee status. UNHCR has been 'obliged to exercise its mandate to determine asylum seekers' need for protection'.[45]
Access to legal assistance	Yes, including free access if required via IAAAS.	Yes, including free access if required via IAAAS.	Yes, including free access if required via IAAAS.	Yes, including free access if required via IAAAS.	No/unclear	No/unclear	Unclear	Unclear
Merits review	Access to merits review by RRT	Access to merits review by RRT.	Unclear after 13 August 2012.	If arrived before 13 August, merits review according to single statutory protection visa process including merits review by RRT.	Section 198C - RRT review	N/A	Access to merits review by Nauruan Refugee Status Review Tribunal: *Refugees Convention Act 2012* (Nauru) ss 11, 42, 47.	Unclear

[45] Letter from Antonio Guterres to Chris Bowen, attachment to Instrument of Designation of Papua New Guinea, 2.

	Plane arrival on mainland	IMA - mainland (currently)	IMA - mainland (proposed)	IMA - excised offshore place	RPC transferee to Australia (currently)	RPC transferee to Australia (proposed)	Transferee to Nauru	Transferee to PNG
				Unclear after 13 August 2012.				
Judicial review	Yes	Yes	Yes	Yes	Yes	Yes	Appeal on a point of law (*Refugees Convention Act 2012* (Nauru): s 43). s 44(c) *Appeals Act 1972* an appeal lies to the High Court of Australia.	Lawyers in PNG are preparing for appeals to be lodged,[46] PNG has privative clause preventing appeal against a Ministerial decision: *Migration Act 1978* s 19.
Guardianship of unaccompanied children	Minister for Immigration is the guardian of wards, defined in s 4AAA of the *IGOC Act* Day to-day guardianship may be delegated.	Minister for Immigration as per previous column.	Minister for Immigration until transferred. Nothing in the *IGOC Act* affects the Minister's powers under the *Migration Act* to remove a non-citizen child from Australia: *IGOC Act* s 8.	Minister for Immigration as for column 1, but delegated to senior staff on Christmas Island. Minister is *NOT* required to give permission to transfer.	Unclear; likely the Minister as per column 1	Unclear, likely the Minister as per column 1	*Australian law* Australian Minister's guardianship obligations end once the child leaves the country. *Local law* Unclear	*Australian law* Australian Minister's guardianship obligations end once the child leaves the country. *Local law* Unclear Save the Children providing 'child protection services'.
Potential visas	Onshore protection (Class XA, subclass 855)	Onshore protection (Class XA, subclass 855)	If Minister lifts the bar, relevant class is onshore protection (Class XA,	If Minister lifts the bar, relevant class is onshore protection (Class XA,	*Onshore* Barred by s 46B but if person is found by RRT under s 198C to	*Onshore* Barred by s 46B. Bill repeals ss 198C and 198D.	No defined path to local visa in Nauru, and indeed the holder of an	No defined path to local visa in PNG. May only apply

[46] 'Nauru amending laws for refugee determination', *Australia Network News (ABC Australia)*, 9 October 2012.

	Plane arrival on mainland	IMA - mainland (currently)	IMA - mainland (proposed)	IMA - excised offshore place	RPC transferee to Australia (currently)	RPC transferee to Australia (proposed)	Transferee to Nauru	Transferee to PNG
			subclass 855)	subclass 855)	be a Convention refugee they may make a valid application (unbarred by s 46B) for a relevant class of visa: s 198C. This is subject to the potential for the Secretary of the Department to avoid the application by issuing a certificate of non-compliance under s 198D. *If returned offshore* Cannot make visa application unless invited to do so: *Migration Regulations* r 2.07M, sch 1 item 1402(3)(ba).	*If returned offshore* Cannot make visa application unless invited to do so: *Migration Regulations* r 2.07M, sch 1 item 1402(3)(ba).	ARPV is prohibited from applying for a visa of any other class: *Immigration Regulations 2000* (Nauru) r 13(4). The other class of visa for which people could otherwise apply is a special purpose visa which can be granted to a person 'whom the Principal Immigration Officer considers should be regarded as a refugee' (*Immigration Regulations 2000* (Nauru) **r 8(h)**). May only apply for Australian offshore visa by invitation.	for Australian offshore visa by invitation.
Work rights	Person may be given a bridging visa which includes work rights.	Person may be given a bridging visa which includes work rights.	No	No	No	No	Work rights after a positive refugee status assessment.	No

	Plane arrival on mainland	IMA - mainland (currently)	IMA - mainland (proposed)	IMA - excised offshore place	RPC transferee to Australia (currently)	RPC transferee to Australia (proposed)	Transferee to Nauru	Transferee to PNG
Education: Language Primary Secondary Tertiary	Children in detention have access to primary and secondary schooling, including English language classes; children released on bridging visas will have access to public education; adults may undertake education at their own cost.	Children in detention have access to primary and secondary schooling, including English language classes.	Children in detention have access to primary and secondary schooling, including English language classes.	Children in detention have access to primary and secondary schooling, including English language classes.	Children in detention have access to primary and secondary schooling, including English language classes.	Children in detention have access to primary and secondary schooling, including English language classes.	(Currently no children transferred to Nauru)	NGO Save the Children is providing education services to children in Manus Island.