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

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1 INTRODUCTION

1.1 I thank the Senate Legal Constitutional Affairs Committee for the opportunity to provide this submission on the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012* ('the Bill').

1.2 The objective of the Bill is to expand upon the regional processing arrangements that came into effect on 18 August 2012 with the commencement of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* by amending the *Migration Act 1958* (Cth) ('the Act'). The practical effect of the Bill will be to reinstate the Howard government's failed 'Pacific Solution' by subjecting asylum seekers arriving by boat in Australian territory to regional offshore processing, thus removing onshore assessment of asylum seekers who arrive by boat – and not air – altogether. The Bill achieves this through the excise of the Australian mainland from the 'migration zone', in line with recommendation 14 of the report of the Expert Panel on Asylum Seekers[2] ('the report').

1.3 If passed, the legislation will obstruct the right to seek asylum for those who arrive by boat since they will be prevented from making a valid onshore application for protection and from being able to access the statutory refugee status determination ('RSD') process, with all of its legally binding implications, as a consequence of the expansion of Australia's 'zones of exclusion' 'in which the ordinary safeguards enshrined in the onshore domestic system of refugee

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[2] Angus Houston, Paris Aristotle, and Michael L'Estrange, Report of the Expert Panel on Asylum Seekers, August 2012. Australian Government. Available at <http://expertpanelonasylumseekers.dpmc.gov.au/> at 5 December 2012.

protection are intended to be excluded'.[3] The Bill does not provide for any legislated guarantees of effective protection in the offshore processing country. They will be subject to mandatory (not discretionary) detention and will be prevented from instituting or continuing certain legal proceedings.[4] The amendments will not, however, extend to asylum seekers arriving by air. They will still, it seems, be entitled to make a valid onshore claim for protection and will presumably retain their access to judicial and administrative review.

1.4 The Government says it is intended that the Bill act as a disincentive to people to make dangerous journeys to Australia in their efforts to seek our protection, and as a deterrent to people smugglers from making false promises to those seeking our protection that if they reach the Australian mainland they will be able to avail themselves of it.[5] This it will achieve, through the 'fiction' of effectively excising the Australian mainland from the 'migration zone'. In reality, however, the practical effect of the proposed legislative changes will be limited insofar as deterring those in need of protection from seeking it, since it does not address the drivers of displacement that cause the desperate and vulnerable to seek our protection by whatever means possible. The symbolic effect of excision will, however, be pronounced, and, at stark odds with our international legal obligations, will only further damage Australia's international reputation as a nation that places politics dressed up in rhetoric about 'saving lives' above the true humanitarianism that will.

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[3] Michelle Foster and Jason Pobjoy, 'A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia's 'Excised' Territory' (2011) 23(4) *Int'l. J. Refugee Law* 583, 584.

[4] Explanatory Memorandum, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, p. 1.

[5] Ibid; See also Prime Minister Gillard, 'Respecting Fears, Moving Forward with Facts', speech, Lowy Institute, 6 June 2010, reprinted in the *Sydney Morning Herald*, 6 July 2010, in which Prime Minister Gillard, referring to the proposal subsequently articulated in the present Bill, stated that the key aim of such a proposal 'is to remove the incentive for all people smugglers to send boats'.

2 SUMMARY & FOCUS POINTS

2.1 The key issues to be addressed in this submission are:

i The principle and obligation of *non-refoulement*;
ii The obligation not to impose a penalty for unauthorised entry;
iii The obligation of non-discrimination under international human rights law;[6] and
iv The implication of the High Court's recent decision in '*M70*'.

2.2 The submission's arguments and conclusions may be summarised as follows:

i Australia's obligation not to *refoule* applies irrespective of the designation of persons as 'unauthorised maritime arrivals' and the removal of them to offshore processing centres.

ii The legislative and administrative components of the expanded excision scheme as proposed by the Bill, do not provide, but rather erode, adequate substantive and procedural safeguards against *refoulement*, just as the near-identical scheme proposed by the Howard Government in 2006 in the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (and rejected outright by the then Labor Party in Government opposition), also did not so provide.

iii In creating two categories of asylum seekers and denying one of those categories access to the courts, the Bill contravenes the principles of non-discrimination and non-penalisation and undermines core international human rights guarantees and judicial protection of human rights in contravention of Australia's obligations under the Refugee Convention[7] the ICCPR, and other human rights instruments to which Australia is a State Party.

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[6] In the interests of brevity, the question of the legality of detention is not dealt with in this submission. The Australian Human Rights Commission has extensively dealt with the international law issues pertaining to the detention of asylum seekers in previous submissions to Senate Inquiries.

[7] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('Refugee Convention').

iv As 'designated regional processing countries', Nauru and Papua New Guinea (PNG) would likely fail to meet the criteria as laid down in the High Court's decision in '*M70*'[8].

v The proposals enunciated in the Bill thus undermine rather than bolster refugee protection in the region. Accordingly, the Senate Legal and Constitutional Affairs Committee ought therefore recommend that the Senate reject the Bill in its entirety.

3 BACKGROUND

3.1 On 11 May 2006, the Australian Government (then led by Prime Minister John Howard and the Liberal National Party) introduced the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, in an attempt to expand upon the Pacific Solution and extend excision to the Australian mainland. The Bill stated that *all* asylum seekers who arrive without authorisation by boat are to be processed 'offshore' in places like Nauru or Christmas Island. The amendments would result in asylum seekers undergoing an inferior assessment process, with those found to be refugees having no automatic right to refugee protection in Australia.

3.2 Following intense public dissent including from a number of Liberal politicians who 'crossed the floor' and notably, the Labor Party, in government opposition at the time, the Bill was withdrawn on 14 August 2006, merely 3 months after its introduction. Vehemently opposing the Bill in Parliament on 10 August 2006, the now Minister for Immigration and Citizenship, Mr. Chris Bowen, said,

> This is a bad bill with no redeeming features. It is a hypocritical and illogical bill. If it is passed today, it will be a stain on our national character… We will oppose this bill, and I call on members opposite to join us. If it is passed, it will be repealed by an incoming Labor government. Decency and self-respect as a nation would demand nothing less.[9]

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[8] *Plaintiff M70/2011 v Minister for Immigration and Citizenship*; *and Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (Unreported, French CJ, Gummow, Hayne, Heydon, Crennan, Keifel and Bell JJ, 31 August 2011).

[9] Mr. Chris Bowen, Federal Member for McMahon, Minister for Immigration

3.3 In 2007, a report commissioned by Oxfam and A Just Australia, "A Price Too High: Australia's Approach to Asylum Seekers"[10], found that the Pacific Solution failed to reduce the number of people arriving in Australian waters by boat, and in December 2007, the ALP Rudd Government abolished the Pacific Solution, resulting in the closure of detention facilities on Manus Island and Nauru.

3.4 Six years later, the Labor government has introduced a carbon copy of the failed Howard government's Bill, this time presented as a measure intended to 'save lives', rather than 'stop the boats'. The political rhetoric has shifted, but the policy has not.

3.5 If passed, the Bill will effectively undo the single processing system for all asylum seekers – regardless of their mode of arrival – which came into effect on 24 March 2012 following announcement of the system in November 2011 by the current Minister for Immigration and Citizenship. This it will effect by dividing asylum seekers into two categories; those that arrive by boat and those that arrive by air. Such distinctions based solely on mode of arrival are artificial and discriminatory. Currently, only asylum seekers intercepted at sea or at Christmas Island, the Cocos Islands or Ashmore Reef can be sent to Nauru or PNG for processing. If the amendments proposed in the Bill are made, all asylum seekers arriving in Australian territory by boat will be transferred to an offshore processing centre on Nauru or Manus Island and mandatorily detained. It is not clear whether they will be permitted to apply for protection through Australia's offshore humanitarian program, although they clearly will not be able to make valid onshore protection claims.

3.6 The Government says that this Bill is intended to ensure that those

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and Citizenship, 'Coalition attempts to excise Australian mainland from migration zone', Commonwealth, *Parliamentary Debates*, House of Representatives, 10 August 2006. Available at <http://www.chrisbowen.net/media-centre/speeches.do?newsId=2061> at 5 December 2012.

[10] Kazimierz Bem, Nina Field, Nic Maclellan, Sarah Meyer and Dr. Tony Morris, 'A price too high: the cost of Australia's approach to Asylum Seekers: The Australian Government's policy of offshore processing of asylum seekers on Nauru, Manus Island and Christmas Island', Research Project funded by A Just Australia, Oxfam Australia and Oxfam Novib, August 2007. Available at <http://resources.oxfam.org.au/filestore/originals/OAus-PriceTooHighAsylumSeekers-0807.pdf> at 5 December 2012.

in search of protection who arrive in Australia have 'no advantage' over those that arrive at an existing excised offshore place. If the Government's concern is that some asylum seekers have access to certain legal processes that others do not, compliance with Australia's international legal obligations requires that the balance be shifted not by stripping rights, but by affording them to those who are disadvantaged.

4 ISSUES AND ANALYSIS

4.1 This part analyses the implications of the Bill in the context of Australia's obligations under international law, notwithstanding that the Bill's Explanatory Memorandum asserts that the Bill does not engage any obligations under relevant human rights treaties.

4.2 Notwithstanding the Bill's creation of two categories of asylum seekers with access to different rights under the *Migration Act*, Australia continues to be bound by its human rights obligations under the Refugee Convention, the ICCPR, CRoC and other human rights instruments to which Australia is a State Party, which attach to all asylum seekers and refugees in Australian territory, irrespective of their mode of arrival, and regardless of whether they are processed on the mainland or taken to an offshore country for processing. Asylum seekers and refugees in 'excised territories' are still within 'Australian territory', thus subject to Australian jurisdiction and within Australia's sphere of State responsibility.

A The principle and obligation of *non-refoulement*

4.3 The principle of *non-refoulement* is regarded as the 'cornerstone' of the Refugee Convention, prohibiting the expulsion or return ('*refouler*') of a refugee '*in any manner whatsoever*' to 'the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion'.[11]

4.4 The obligation of *non-refoulement* is also expressed in a number of international human rights treaties, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment

[11] Refugee Convention, art. 33(1), emphasis added.

or Punishment (CAT),[12] the International Covenant on Civil and Political Rights (ICCPR)[13] and the Convention on the Rights of the Child (CRoC),[14] all of which Australia is a State Party to.

4.5 The Bill authorises the expulsion of asylum seekers and refugees who arrive by boat in Australian territory, allows their removal to a country for processing of their refugee claims, and denies claimants the right to institute or continue certain legal proceedings, including seeking an assessment of their refugee status from the Refugee Review Tribunal (RRT).[15] These provisions create an increased and ongoing risk of violations of Australia's *non-refoulement* obligations as discussed below.

4.6 Compliance with the obligation of *non-refoulement* under the Refugee Convention requires adequate legal and procedural safeguards to ensure that claimants entitled to refugee status or complementary protection, receive it. Although the Convention does not prescribe a particular procedure, providing asylum seekers with effective access to a fair and efficient asylum procedure where their international protection needs can be properly assessed ensures that the *non-refoulement* principle is respected. UNHCR has suggested that an adequate method of ascertaining to whom a State owes protection obligations is one that affords a refugee claimant 'the opportunity to present evidence', 'receive guidance and advice on the procedure and have access to legal counsel', a written decision, and the 'right to an independent appeal or review against a negative decision.'[16]

4.7 The Bill amends section 198AH of the Act to confirm that an asylum seeker can be taken to a regional processing country whether or not they have been assessed to be a refugee under the

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[12] CAT, opened for signature 10 Dec 1984, 1465 UNTS 85 (entered into force 26 June 1987), art. 3.
[13] ICCPR, opened for signature 16 Dec. 1966, 999 UNTS 171 (entered into force 23 Mar. 1976), arts. 6-7.
[14] CRC, opened for signature 20 Nov. 1989, 1577 UNTS 3 (entered into force 2 Sept. 1990), arts. 6, 37.
[15] The Bill proposes the repealing of sections 198C and 198D of the Act, the effect of which will be to disentitle claimants assessment of their refugee status by the RRT where they remain in Australia for a continuous period of 6 months.
[16] See, UNHCR Global Consultations on International Protection, 2nd Mtg, 'Asylum Process (Fair and Efficient Asylum Procedures)', EC/GC/01/12 (31 May 2001) [12], [13].

Convention. The systems in place for processing asylum seekers' claims in the declared offshore processing places of Nauru and PNG lack many of the basic safeguards afforded to asylum seekers on the Australian mainland, potentially increasing the risk of *refoulement* as a result of incorrect decision-making. Indeed, there have been documented cases of people, including children, who were detained on Nauru being killed upon return to their countries of origin.[17] Notwithstanding Nauru's recent accession to the Refugee Convention, as at late 2011, there were no RSD procedures established in that jurisdiction.[18] When coupled with the lack of RSD procedures on Nauru, such rejection at the border or point of entry may amount to *refoulement*, as the risk of sending people back to danger is increased.

4.8 It is curious and concerning, therefore, that the *only* mention of the Refugee Convention in the Bill's Statement of Compatibility with Human Rights, attached to the Explanatory Memorandum to the Bill, is a cursory statement that notes it is not one of the treaties specified in the definition of 'human rights' in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

4.9 The proposed repeal of sections 198C and 198D of the Act to remove the ability of a claimant to seek an assessment of their refugee status from the RRT further removes safeguards that have been developed to protect against the possibility of *refoulement*, and which remain in place for those able to make valid onshore claims for protection. In its submission to the 2006 Senate Inquiry into the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, UNHCR pointed out that,

> Barring access to the RRT and national courts would seem to be a serious flaw in the off-shore processing regime, given that the RRT and the national courts of Australia, being independent of DIMA, are key bodies guaranteeing the accuracy of asylum decisions and therefore important legal

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[17] Edmund Rice Centre for Justice and Community Education, 'Deported to Danger II: The continuing study of Australia's treatment of rejected asylum seekers (2006)'. Available at <http://www.erc.org.au/index.php?module=documents&JAS_DocumentManager_op=downloadFile&JAS_File_id=153> at 5 December 2012.

[18] Foster and Pobjoy, above n 3, 623. See also *Ruhani v Director of Police (No. 2)* (2005) 222 CLR 580, 584 [9].

safeguards against *refoulement*.[19]

4.10 As was emphatically pointed out by the Australian Human Rights and Equal Opportunity Commission (HREOC, as it was then known) in its submission to the 2006 Senate Inquiry, this 'heightens the risk in reality of decisions being made that are wrong' and that it would only be by 'good fortune' that Australia did not breach its obligations under the Refugee Convention.[20]

4.11 Moreover, the Bill provides that all arrivals in Australia by irregular maritime means cannot make a valid application for a visa 'unless the Minister personally thinks it is in the public interest to do so.' Restricting access to protection via a discretionary power (rather than an obligation to grant protection to those who satisfy the definition of 'refugee') not only ignores the fact that the majority of those who approach Australia by boat have historically been found to be refugees within the meaning of the term under international law,[21] but also risks narrowing the protection gates and thus increasing the risk of *refoulement*, as asylum seekers who reach the mainland will be denied onshore processing of their refugee claims.

4.12 Turning now to Australia's *non-refoulement* obligations under CAT, ICCPR and CRoC, Article 3 of CAT provides an express prohibition against the expulsion, return ('*refouler*') or extradition of a person to a place they would be in danger of being subject to torture. This right to resist expulsion is not contingent upon satisfaction of the Refugee Convention definition of 'refugee'.

4.13 Article 7 of the ICCPR provides that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. This has been interpreted by the UN Human Rights Committee to require that 'States Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*'[22]

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[19] UNHCR Submission to the 2006 Senate Inquiry.
[20] HREOC Submission to the 2006 Senate Inquiry.
[21] Refugee Council of Australia, Submission to the Expert Panel on Asylum Seekers, Opening Observations, p. 1.
[22] Human Rights Committee, General Comment 20, 1992, paragraph 9. Available at

4.14 Moreover, the UN Human Rights Committee has pointed out that in relevant circumstances, placing a person at risk of torture or cruel, inhuman or degrading treatment or punishment by another country will be a breach of Article 7 as much as if the first country had committed the act of torture itself.[23] The right afforded by Article 7 is not contingent upon satisfaction of the Refugee Convention definition of 'refugee'.

4.15 Article 22 of the CRoC provides comprehensive and special protection for children who are refugees or who are seeking refugee status. They are to 'receive appropriate protection and humanitarian assistance in the enjoyment of [their CRoC rights and also other human rights and humanitarian instruments to which the State Party is a party]'. Thus CRoC Article 22 explicitly includes Australia's obligations to asylum seeker children under the Refugee Convention.

4.16 Like the ICCPR, CRoC protects children from torture and other cruel, inhuman and degrading treatment and punishment (Article 37) and recognises the child's inherent right to life (Article 6). Again there is an obligation not to expel, return or extradite a child to another country where he or she will be subjected to or at risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment or of death.

4.17 Fulfilment of Australia's obligation against *refoulement* under the Refugee Convention, CAT, the ICCPR and CRoC, imposes upon Australia an obligation to ensure – for every individual claimant – that upon being transferred to Nauru or Manus Island, there is no risk of *refoulement*. The Bill, if passed, will deny asylum seekers the right to appeal decisions to higher authorities, making the refugee application process less accountable and more susceptible to error, with all the dangers of *refoulement* that that brings.

<http://www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5> at 5 December 2012.

[23] Ibid.

B The Bill denies access to the courts, contravenes the principles of non-discrimination and non-penalization and erodes universal application of human rights

4.18 It is a fundamental right that all persons have the right to seek asylum and to undergo individual RSD. Each claim must be determined on its own merits, and not against negative and discriminatory presumptions deriving from personal attributes of the claimant having nothing to do with the notion of refugee, such as their mode of arrival. Hence, as discussed below, the practical application of the 'no advantage' test proposed in the Bill does not comfortably align with Australia's obligations under the Refugee Convention[24] and appears to be a discriminatory and punitive measure aimed at those seeking protection, designed to deter others from doing the same.

The Bill contravenes Article 16(1) of the Refugee Convention

4.19 Access to justice for refugees is one of the most basic of all rights, and alongside the fundamental prohibition on forcible return, reflects its centrality to international protection. This right is codified in Article 16 of the Refugee Convention, which guarantees that '[a] refugee shall have free access to the courts of law on the territory of all Contracting States', and applies irrespective of whether or not a claimant has been admitted into a State. This right, as Grahl-Madsen put it in his commentary on the Convention, 'is of an absolute character'.'* Because refugee status is a declaratory status, like the principle of non-refoulement and a range of other rights provided for under the Convention, it is a right that unquestionably applies to asylum seekers who have not yet had their status finally determined.[25]

4.20 Thus, the removal of asylum seekers' right to access merits review and judicial review processes, as proposed by the Bill (Item 48),

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[24] UNHCR, 'UNHCR calls for compassion and legal principles to be at centre of policy responses' Media release, 23 November 2012. Available at <http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=278&catid=35&Itemid=63> at 5 December 2012.

[25] Australian Lawyers for Human Rights, Inquiry into the Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010, Submission to the Senate Committee on Legal and Constitutional Affairs, 4 July 2011. Available at <http://www.alhr.asn.au/getfile.php?id=204> at 5 December 2012.

contravenes the right to 'free access to the courts of law' accorded to all refugees under the Convention. Such an amendment is also at odds with certain core processing requirements identified by UNHCR[26] including, *inter alia*, a right of review before an independent body, an opportunity to present a case, and reasons for the decision and consideration of whether any claim to protection is warranted under the ICCPR. Removal of these opportunities by the Bill further undermines Australia's adherence to our international obligations arising under the Refugee Convention, the ICCPR and various other international treaties to which Australia is party.

4.21 The existence of an independent judicial body able to scrutinize the legality of administrative decisions is a cornerstone of the rule of law. This much is recognized in our own constitutional system, reflected in s75(v) of the Constitution and repeatedly affirmed by the High Court as one of the safeguards against the abuse of executive power. For government delegates and administrative tribunals, the oversight of the judiciary is perhaps the most important check on the legality, quality and credibility of their decisions. For the refugee, it is the final guarantee that a decision will be made that is legal and, in particular, fair and untainted by bias, and where they have had an opportunity to present their claim and be heard. It is of great concern, therefore, that this Bill seeks to exclude the courts and administrative oversight altogether from anything but the narrowest grounds of review, as outlined in Item 48 of the Bill, regarding access to merits and judicial review processes as an 'advantage' rather than a right.

The Bill breaches the principle of non-penalisation and non-discrimination

4.22 Non-penalisation is crucial to the protection regime established by the Refugee Convention and, read alongside the *non-refoulement* obligation, ensures that the realities of departure from a refugee's country origin – often in flight – are recognized, not penalized. Article 31(1) of the Refugee Convention provides that:

> The Contracting States shall not impose penalties on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was

[26] UNHCR, Global Consultations on International Protection, above n 16, [43], [45-6], [50].

threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

4.23 Yet, penalisation is precisely the effect of subjecting asylum seekers who arrive by boat to an inferior offshore RSD process, and may constitute a 'penalty' and amount to a violation of Article 31(1).

4.24 Consistent with Australia's international obligations not to discriminate against or penalize non-citizens, it is imperative that all asylum seekers be provided with a full, fair, effective and expeditious asylum procedure, with due process, as soon as possible, and that any detention of asylum seekers be strictly in accordance with Australia's refugee and wider human rights law obligations. Removing access to merits and judicial review processes may also constitute a 'penalty', amounting to a violation of Article 31(1).

4.25 The Bill also offends the basic tenet of human rights that such rights should be applied equally, without distinction. Everyone within Australian territory is entitled to have his or her human rights respected and protected and Australia has undertaken to ensure the rights in the ICCPR[27] and CRoC[28] apply to all persons within its territory. However, excision of the mainland will create and thus discriminate between two categories of asylum seekers in Australian territory with access to different legal rights and processes: in the offshore camp there will be those who arrive by boat and in the other, there will be those who arrive by plane. The effect this will be to deny those who arrive in Australian territory by boat the opportunity to make an onshore protection claim, amounting to arbitrary discrimination on the basis of mode of arrival alone and having no bearing on the notion of what constitutes a 'refugee'. It will effectively strip the rights of those whose journeys in seek of our protection give meaning to our anthem's lyrical description of 'a land girt by sea' as it will make it much more difficult for people seeking asylum to exercise their fundamental right to seek asylum. Moreover, it will create a legal divide and a significant difference in how people are treated in offshore centres as opposed to those released into and processed

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[27] See, in particular, arts. 2(1) and 26.
[28] Art. 2(1).

within the Australian community on bridging visas,[29] something which is likely to happen increasingly as offshore processing centres exceed capacity.

4.26 Excising the mainland will thus discriminate against one type of asylum seeker entirely on the basis of mode of arrival. The Government contends that the purpose of creating these two different legal categories of rights-seekers is to ensure that individuals who arrive in Australia by irregular maritime means will not 'be advantaged' by a different lawful status than those who arrive at an excised offshore place. If the purpose of this Bill is to treat all asylum seekers in Australia the same, then this Bill does more to divide and undermine than universalize rights. As stated above, if the Government's concern is that some asylum seekers have access to certain legal processes that others do not, the balance must be shifted not by stripping rights, but by affording them to those who are disadvantaged.

C Implications of the recent High Court decisions in *M61*[30] and *M70*[31]

4.27 As the High Court unanimously and categorically pointed out in *M61*, the offshore regional processing of RSD in Australia's excised offshore places is inherently flawed and raises serious questions as to its validity at international law. In that case, which concerned Sri Lankan plaintiffs who had arrived at Christmas Island by boat without a valid visa to enter Australia and were thus immediately detained, the High Court rejected the notion that such zones can validly operate outside the (domestic) rule of law, thus dismantling, 'to some degree, the government's attempt to construct a system intended to operate entirely outside the more robust onshore RSD process.'[32]

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[29] Peter, Cullen, 'Detainee condemns 'slaughterhouse' Nauru', *ABC News*, 3 December 2012. Available at http://www.abc.net.au/news/2012-12-03/detainee-condemns-slaughterhouse-nauru/4404600 at 5 December 2012.
[30] *Plaintiff M61/2010E v Commonwealth*; *Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 272 ALR 14 ('M61').
[31] *Plaintiff M70/2011 v Minister for Immigration and Citizenship*; *and Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (Unreported, French CJ, Gummow, Hayne, Heydon, Crennan, Keifel and Bell JJ, 31 August 2011).
[32] Foster and Pobjoy, above n 3, 615.

4.28 Although the High Court was called upon to address the legality of the offshore RSD process in the case of *M61*, the more recent decision in *M70* has wider implications for Australia's offshore processing scheme where claimants are removed to another State for that process, i.e. Nauru or PNG.

4.29 *M70* concerned the declaration of Malaysia (a country not party to the 1951 Refugee Convention or its Protocol) as a country to which asylum seekers who enter Australia at Christmas Island – an excised offshore place – can be taken for processing of their asylum claims. The case established criteria that an offshore processing country must meet before the Minister can validly declare a country as a country to which asylum seekers can be taken for processing. The majority of the High Court concluded that the Minister could only validly declare a country under s 198A of the *Migration Act* as a country to which asylum seekers can be taken for the processing of their claims if that country satisfies the criteria set out in that section as a matter both of law and of objective fact. Namely, the Court held that the offshore processing country is legally bound to meet the following three criteria:

(i) The country must be legally bound by international law or its own domestic law to provide access for asylum seekers to effective procedures for assessing their need for protection;
(ii) The country must be legally bound by international law or its own domestic law to provide protection for asylum seekers pending determination of their refugee status; and
(iii) The country must be legally bound by international law or its own domestic law to provide protection for persons given refugee status pending their voluntary return to their country of origin or their resettlement in another country.

4.30 Importantly, those criteria must be more than merely transient; each of those criteria must be a present and continuing circumstance,[33] indicative of 'enduring legal frameworks'.[34] In applying those criteria to Malaysia, the High Court found that

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[33] *Plaintiff M70/2011 v Minister for Immigration and Citizenship*; *and Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (Unreported, French CJ, Gummow, Hayne, Heydon, Crennan, Keifel and Bell JJ, 31 August 2011) [61] (French CJ).
[34] Ibid [66].

Malaysia was not, and is not, obliged under law to provide these protections. Malaysia is not a party to the Refugee Convention or its 1967 Protocol; and the arrangement between the Australian and Malaysian Governments, and the purported protections contained therein, were not legally binding. Further, domestic Malaysian law does not recognise the status of refugees.

4.31 Additionally, the Court held that the *Migration Act 1958* (Cth) requires that the country meet 'certain human rights standards' in providing that protection. Moreover, as French CJ observed,

> There are examples around the world of governments whose implementation of human rights standards fall short of the authoritative legal texts, be they constitutional or statutory, or embedded in treaties and conventions which, on the face of it, bind them. The existence of a relevant legal framework which on paper would answer the criteria in s 198A(3) cannot therefore always be taken as a sufficient condition for the making of a declaration. The Minister must ask himself the questions required by the criteria on the assumption that the terms "provide" and "meet" require consideration of the extent to which the specified country adheres to those of its international obligations, constitutional guarantees and domestic statues which are relevant to the criteria.[35]

4.32 Thus, in light of *M70*, the legality of the proposal to take asylum seekers from Australia to either Nauru or to PNG for determination of their refugee status as set out in the Bill is dependent upon the satisfaction of each criterion set out in *M70* as a matter of objective fact to the satisfaction of a court.

4.33 The recent accession of Nauru to the Refugee Convention and its 1967 Protocol on 28 June 2011 is thus no guarantee in and of itself that Nauru satisfies the relevant criteria. The Minister must be satisfied, based on objective facts, that appropriate arrangements are in place to ensure practical compliance by Nauru with its obligations under the Convention and the Protocol; and, secondly, that Nauru in its treatment of asylum seekers and refugees complies in practice with human rights standards acceptable at least to the UNHCR.[36]

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[35] Ibid [67].

[36] Gageler, Stephen, Lloyd, Stephen and Kennett, Geoffrey, Solicitor-General's Opinion In the Matter of the Implications of Plaintiff M70/2011 v

4.34 Whilst Nauru's accession to the Refugee Convention and its Protocol is a welcome development in the region, it must be borne in mind that such accession was very recent (June 2011), and thus Nauru's engagement with the rights laid out in the Convention is nascent. It is also of great concern that as at late 2011, there were no RSD procedures established in Nauru.[37] It is thus difficult to conceive that Nauru satisfies each of the criteria identified in *M70* and that those criteria are indicative of 'enduring legal frameworks'.

4.35 Applying the HCA's test in *M70*, it is thus highly questionable whether Nauru, as a country to which Australia sends refugee claimants to be processed, would pass that test.

5 RECOMMENDATIONS

5.1 In its report, the Expert Panel on Asylum Seekers acknowledged that "evidence on the drivers and impacts of forced migration is incomplete and more intuitive than factual".[38] Given this acknowledgement, it is surprising that the Panel has been so unequivocal in its recommendations for addressing the drivers of irregular movement to Australia.

5.2 It has been well documented that the growth in the numbers of asylum seekers entering Australian waters by boat is not unique to Australia, but part of a global phenomenon in which increasing numbers of asylum seekers are traveling far from countries of first asylum to countries which they believe will offer them the protection they are not currently receiving. Over the past five years, there have been considerable increases in asylum claims in South Africa, Europe and North America[39] as the numbers of people

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Minister for Immigration and Citizenship for Offshore Processing of Asylum Seekers under the Migration Act 1958 (Cth), SG No. 21 of 2011, 2 September 2011. Available at < http://www.minister.immi.gov.au/media/media-releases/_pdf/SG21-implications-of-migration-decision.pdf> at 5 December 2012.

[37] Foster and Pobjoy, above n 3, 623. See also *Ruhani v Director of Police (No. 2*) (2005) 222 CLR 580, 584 [9].

[38] The Report, above n 2, 46 [3.38].

[39] Refugee Council of Australia, Submission to the Expert Panel on Asylum Seekers, July 2012. Available at <http://www.refugeecouncil.org.au/r/sub/1207-Expert-Panel.pdf> at 5 December 2012.

globally in need of asylum fluctuate in response to the levels of persecution in various regions, and as violent conflicts ignite or are resolved.[40]

5.3 Accordingly, measures to discourage asylum seekers from undertaking dangerous sea journeys in their quest to seek protection should focus on addressing the 'push' and 'pull' factors that compel refugees and asylum seekers to take desperate measures to secure protection and safety. Penalising asylum seekers and refugees as proposed in the Bill in order to deter others from seeking our protection not only contravenes our international legal obligations; it also will prove ineffective in achieving its stated aims. Moreover, it ensures that those who do survive the leaky boats and dangerous voyage will be further denied effective protection and the procedural safeguards underpinning it.

6 CONCLUSION

6.1 The Bill mirrors many of the proposals put forward by the Howard Government in 2006 in the widely-rejected *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* and as such represents a revival of the failed 'Pacific Solution'. Despite a shift in the political rhetoric accompanying the policy – from 'stopping the boats' to 'saving lives at sea' – the policy remains strikingly similar. The Government contends that the impetus for the Bill is the protection of life of those seeking asylum, however the proposals enunciated in the Bill undermine rather than bolster refugee protection in the region.

6.2 The RSD system established on Nauru during the Howard government was subject to widespread criticism for its inferior process and safeguards as compared to the onshore RSD system, lack of access to legal representation, and the indefinite mandatory detention of all asylum seekers on an isolated island with limited facilities.[41] As Dr. Jane McAdam pointed out to the Senate Legal and Constitutional Legislation Committee in 2006, in the Inquiry into the *Migration Amendment (Designated Unauthorised Arrivals)*

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[40] Emma Larking, 'Realism and Refugees', Regarding Rights, 28 November 2012. Available at < http://cigj.wordpress.com/2012/11/28/realism-and-refugees/#more-147> at 5 December 2012.
[41] See, Foster and Pobjoy, above n. 3, 588.

Bill 2006, in relation to that Bill's proposal to excise the Australian mainland from the migration zone,

> Effectively if every party to the refugee convention did what Australia is doing here we would make a nonsense of the multilateral treaty regime. As I have mentioned, under international law, no matter where you put a refugee, if they have come within your territory, you are ultimately the country that is responsible for them. Devising offshore processing regimes does not absolve you of your international commitments. Whether we see that in relation to substantive provisions of international treaties or as part of the obligation to act in accordance with the international treaty regime more broadly, Australia is clearly risking acts of bad faith in relation to what it is proposing here.[42]

6.3 The present Bill, if enacted, will 'rebirth' that scheme without addressing any of its shortcomings that were identified back in 2006. Ostensibly, the Pacific Solution that so shocked the ALP once, no longer seems so shocking.[43]

6.4 Excision legislation does not give Australia a legal excuse to breach its international obligations, yet the expanded scheme proposed by the Bill raises serious questions as to its compliance with Australia's obligations at international law, as discussed in this submission and in contrast to the Government's cursory Statement of Compatibility with Human Rights attached to the Bill's Explanatory Memorandum. In a region marked more by the absence – rather than adherence – of States party to the Refugee Convention, Australia 'stands out as a country with a generous offshore resettlement scheme and an impressive onshore system of refugee status processing'.[44] Should the Senate pass this Bill, Australia will be shirking in its shouldering of the responsibility to provide refugee protection to those who seek it from us, and will be setting a detrimental precedent for the 'regional framework' it has spoken of formulating.

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[42] Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 6 June 2006, 5 (Dr. Jane McAdam). Available at <http://www.aph.gov.au/binaries/hansard/senate/commttee/s9421.pdf> at 5 December 2012.

[43] Emma Larking, above n 40.

[44] Foster and Pobjoy, above n 3, 631.

6.5 As Dr Graham Thom of Amnesty International (Australia) has aptly pointed out,

> The short-term, Australia-focused deterrent policies being enacted by the government right now are actually undermining the long-term regional protection policies that will actually work. After all, if Australia is willing to go to such extreme lengths to avoid protecting refugees, why should Malaysia, Thailand or Pakistan do any better?[45]

6.6 I implore the Senate Legal and Constitutional Affairs Committee to recommend to the Senate that this Bill be rejected in its entirety.

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[45] Graeme Thom, 'Amnesty: There is nothing 'good' about excision policy', Crikey, 2 November 2012. Available at < http://www.crikey.com.au/2012/11/02/amnesty-there-is-nothing-good-about-excision-policy/> at 5 December 2012.