

23 January 2013

Jeanette Radcliffe
Committee Secretary
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Ms Radcliffe

Examination of *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* and related bills and instruments - answer to question taken on notice at public hearing

I refer to your letter of 14 January 2013. We reiterate our thanks to the Committee for the opportunity to appear in person on 19 December 2012. In relation to the question taken on notice from Mr Wyatt (see Hansard p.14), we do not propose to add anything further to the answer provided at the hearing.

However, at the hearing we offered to provide further written submissions on whether Australia's human rights obligations are engaged extraterritorially in Nauru and Manus islands. Our offer was accepted by the Chair (see Hansard at p. 16) and we now provide those further written submissions.

The legal basis for extraterritorial application of Australia's human rights obligations

Under Article 26 the *Vienna Convention on the Law of Treaties*, Australia is obliged to perform its human rights obligations in good faith. It cannot avoid or divert the obligations it has accepted by contracting them out or otherwise. Further, and as the Minister for Immigration has been advised by the UN High Commissioner for Refugees, Antonio Guterres, "as a general principle, asylum seekers arriving at the frontier of a Convention State fall within the responsibility of that state."¹

As a principle of international law, states must avoid acts and omissions that create a real and foreseeable risk of nullifying or impairing the enjoyment of human rights extraterritorially.² International law also provides that states have an obligation to conduct due diligence to identify the risks and

¹ See the letter from Antonio Guterres to Minister Bowen, dated 5 September 2012, 'Attachment C' to the Minister's Statement of Reasons for thinking it in the national interest to designate Nauru.

potential extraterritorial impacts of their laws, policies and practices on the enjoyment of human rights.³ Further, Article 2(1) of the *International Covenant on Civil and Political Rights* has been interpreted as giving the Covenant extraterritorial application in a range of circumstances, including where agents of a State party are involved, directly or indirectly, in the violation of rights in a foreign territory.⁴ Indeed, the Human Rights Committee's General Comment No 31 on the nature of the general legal obligation imposed on States parties provides, at para 10, that:

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. (emphasis added)

The Human Rights Committee has elaborated on the meaning of "power or effective control", stating in *Manuf v Romania* that "a State party may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction."⁵ The Committee has also stated in *Lopez Burgos v Uruguay* that "it would be unconscionable... to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."⁶

As such, and fundamentally, Australia's human rights obligations do not end at our borders. Australia is responsible for those who are within its effective jurisdiction or control even if those people have been transferred abroad.

The factual basis for extraterritorial application of Australia's human rights obligations

The following considerations demonstrate that asylum seekers currently detained on Nauru and Manus islands are within Australia's effective jurisdiction and control:

- under the offshore processing reforms, the asylum seekers arrive and are taken by Australian authorities to Australian immigration detention;
- the decision is then taken under Australian law to transfer them offshore;
- that decision is taken by the Minister for Immigration to give effect to Federal Government policy;
- once transferred offshore, transferees are detained at facilities funded by the Australian Government;
- while detained, transferees receive services pursuant to contracts between the Australian Government and service providers;
- as confirmed by representatives from the Department of Immigration and Citizenship (DIAC) to the Committee, once refugee status determination processing has commenced "[t]here will

² Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, 2011, ('Maastricht Principles'), paragraph 13.

³ Maastricht Principles, paragraph 14.

⁴ See for example *Lopez Burgos v Uruguay*, No. 52/1979.

⁵ *Munaf v Romania*, CCPR/C/96/D/1539/2006, 21 August 2009 at 14.2.

⁶ *Lopez Burgos v Uruguay* at 10.3.

- be Australian officers involved in the assessment. They will be making a recommendation to a Nauruan official who will make a decision on refugee status” (see Hansard at p.7); and
- also as confirmed by DIAC to the Committee, once the period of ‘no-advantage’ has run its course, it is likely that most will be transferred back to Australia (see Hansard at p.7).

From the moment they arrive to the moment they are returned to Australia, returned to their country of origin or resettled elsewhere, transferees are effectively subject to Australia’s control. That practical reality translates under international law to a legal one, such that Australia retains human rights obligations to asylum seekers it transfers offshore.

We thank the Committee again for the opportunity to appear in person and provide these further written submissions. We would welcome the opportunity to assist the Committee further should that be required.

Yours sincerely

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