Australian National University

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Senate Standing Committees on Legal and Constitutional Affairs
PO Box 6100
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Dear Committee Secretary,

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

Thank you for the opportunity to make a submission to this inquiry. My submission makes six points:

1. The Committee's stance on the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012* ('the Bill') should be consistent with the position it took with respect to the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.*
2. The policy justification for the Bill is flawed.
3. The Bill is likely to result in violation of Australia's *non-refoulement* obligations.
4. The Bill results in prolonged, arbitrary detention and inhumane conditions of detention.
5. The 'no advantage' test is an unlawful penalty and constitutes invidious discrimination.
6. The Bill should not proceed.

1. The Committee's Report on the 2006 Bill

In June 2006, this Committee (differently constituted) undertook an inquiry into the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.* That Bill is in essence the same as the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012*. It is therefore pertinent to revisit the findings by this Committee in 2006.

The report of this Committee, then chaired by Senator Marise Payne, recommended that the Bill should not proceed, although it suggested a number of amendments in case the Bill did in fact proceed. The dissenting reports went even further, rejecting the Bill outright.

The Australian Labor Party members, including the current Chair of the Committee, Senator Trish Crossin, stated their opposition to 'the Bill and its broader policy objectives in absolute terms.'[1] They said that they agreed with

> concerns raised in relation to uncertainty about how the proposed arrangements will work in practice and the lack of accountability mechanisms; domestic policy issues such as the Bill's flagrant incompatibility with the rule of law and the principles of natural justice; and the clear breach of Australia's obligations under international law in several significant areas. The Bill also represents a complete 'about-turn' with respect to a number of recent reforms, including the principle that children should not be held in detention.[2]

I fully concur with the findings of this Committee in 2006. In particular, I support the dissenting members' outright rejection of the Bill. I submit that this Committee should similarly reject the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012.* It would be a complete 'about-turn' if this Bill were to pass.

2. The Bill is based on a Flawed Policy Rationale

Only one policy justification has been put forward for reintroducing legislation to excise Australia from its own migration zone and it is flawed. The premise of the Bill is that asylum-seekers should not have an incentive to bypass the existing offshore entry places such as Christmas Island in order to travel to mainland Australia, thereby increasing the risk of loss of life at sea.[3] Even if accepted on its own terms, that rationale does not withstand scrutiny. In July 2011, it was reported that a group of Sri Lankan asylum-seekers were seeking to travel to New Zealand.[4] Rather than preventing longer journeys, this Bill may encourage them. If preventing arrival on the mainland is really the aim, then the current provisions of the *Migration Act* that excise areas such as Christmas Island should simply be repealed.

The Bill is not an appropriate way of achieving its stated aim of preventing deaths at sea. An appropriate way to avoid refugees making ever-longer journeys in search of protection is to provide them with safe ways to move and to work towards improved protection in countries of first asylum. The Bill is counter-productive as it sends the message that Australia is not prepared to meet its own international legal obligations under the 1951 Convention relating to the Status of Refugees ('Refugee Convention'). This does nothing to encourage other countries to become party to the Refugee Convention or those who are party to comply with its provisions.

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[1] Senate Legal and Constitutional Legislation Committee, *Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (June 2006) [1.1.].
[2] Ibid, Dissenting Report by the Australian Labor Party, [1.3.].
[3] Explanatory Memorandum, *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012,* 1.
[4] ABC news 'New Zealand Shuts Door on Sri Lankans': http://www.abc.net.au/news/2011-07-12/nz-shuts-door-on-sri-lankan-asylum-seekers/2791302

The Bill proceeds on the footing that it is possible to protect people by violating their human rights. The Bill involves the same 'clear breaches' of international law involved in the 2006 Bill, including the possibility of *refoulement*, the imposition of prolonged, arbitrary detention, and the imposition of unlawful penalties and invidious discrimination. The Statement of Compatibility is sadly deficient.

3. Non-Refoulement

The Statement of Compatibility includes a section on Australia's *non-refoulement* obligations. It does not include information with respect to *non-refoulement* under the Refugee Convention as Parliament decided to exclude the Refugee Convention from the new human rights scrutiny arrangements.

The Statement of Compatibility does direct attention to Australia's other *non-refoulement* obligations in relation to the right to life and the prohibition on torture. These obligations are obviously relevant and indeed may now found claims to 'complementary protection' under Australian law.[5] However, the Statement of Compatibility does not address the issue of compatibility with these obligations. Instead it says that

> the Bill does not contain or amend any existing provisions which relate to removal that already exist within the Act (as amended by the Regional Processing Act). To that extent, the provisions in the Bill only contemplate increasing the scheme to those people who arrive directly at the Australian mainland.

At best, this is *not* a statement of compatibility: it is a statement about nothing. At worst, the Statement of Compatibility is an implicit admission of incompatibility.

A Statement of Compatibility was not prepared for the *Regional Processing Act.*[6] The Statement of Compatibility for the present Bill effectively acknowledges that if there were any human rights violations involved in the *Regional Processing Act*, they are extended by the present legislation to a larger number of people. Humphrey Appleby would be proud. But Humphrey Appleby is not the benchmark for a Statement of Compatibility. A Statement of Compatibility is supposed to be a transparent assessment of a Bill's compliance with Australia's international human rights obligations.

The Edmund Rice Centre documented cases where refugees were returned to their deaths under the first iteration of the Pacific Solution.[7] There is a clear danger that *refoulement* to places of death, torture and persecution will occur again this time round.

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[5] *Migraton Amendment (Complementary Protection) Act 2011 (Cth)*.
[6] *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*.
[7] Edmund Rice Centre, *Deported to Danger II: The Continuing Study of Australia's Treatment of Rejected Asylum-seekers* (September 2006).

To begin with, the amendments introduced by the *Regional Processing Act* have removed almost all the protection that the *Migration Act*, as interpreted by the High Court of Australia,[8] provided against such a result. The one requirement for designation of a country as a 'regional processing country' under new section 198AB(2) of the *Migration Act* is that the Minister thinks that it is in the national interest. When making a decision that it is in the national interest, the Minister must have regard to 'assurances' that the asylum-seekers sent to the regional processing country will not be subject to *refoulement* (as defined under the Refugee Convention, not the International Covenant on Civil and Political Rights 'ICCPR' or the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 'CAT') and that there will be a process of refugee status determination.[9] These 'assurances' need not be legally binding. However, in order to rely on Nauru and PNG for the purposes of meeting Australia's international obligations, both countries ought to have relevant legal obligations as a matter of international law or domestic law, and they must be able to implement those obligations in practice.

Nauru is not party to the ICCPR, and neither Papua New Guinea nor Nauru are party to CAT. This is clearly a factor that should have been mentioned in the Statement of Compatibility. Australia will be sending asylum-seekers to Nauru when it has not even accepted the relevant treaty obligations that the Statement of Compatibility should be addressing. Nauru and Papua New Guinea are bound by customary international legal obligations with respect to torture and related ill-treatment, however it is foolhardy to rely on mere obligation alone and essential to ensure that the obligations are respected in practice.

Australia is relying on the procedures for determination of refugee status in PNG and Nauru to ensure that Australia's own *non-refoulement* obligations are met under the Refugee Convention. In theory, these procedures would also go some way to ensuring that Australia's *non-refoulement* obligations under the ICCPR and CAT are met too. However, Papua New Guinea and Nauru do not presently have the capacity to determine refugee status fairly and efficiently. UNHCR has written to the Minister of Immigration, advising him of its concern that Nauru does not have the necessary expertise or experience to carry out refugee status determination for the numbers of asylum-seekers likely to be held on Nauru.[10] The High Commissioner has voiced similar concerns with respect to Papua New Guinea.[11]

Furthermore, as detailed below, the conditions of detention on Nauru violate the prohibition on inhuman and/or degrading treatment, meaning that Australia has violated its international obligations simply by sending asylum-seekers to be 'accommodated' there.

[8] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.
[9] Section 198AB(3) *Migration Act*.
[10] Letter from High Commissioner, Mr Antonio Guterres to Minister Chris Bowen dated 5 September 2012.
[11] Ehssan Veiszadeh, 'PNG not ready for refugee transfers': UNHCR *Sydney Morning Herald* (October 12, 2012) http://news.smh.com.au/breaking-news-national/png-not-ready-for-refugee-transfers-unhcr-20121012-27hh8.html.

4. Prolonged, arbitrary detention and inhumane conditions of detention

The Statement of Compatibility makes the extraordinary claim that amending section 189(2) of the *Migration Act* so that unauthorised maritime arrivals *may* rather than *must* be detained 'does not engage Article 9(1) of the ICCPR.' With respect, this fails to address the continuing failure of the *Migration Act* to provide any guidance as to how to avoid arbitrary detention and the Act's express denial in s 196(3) of the courts' powers to order a person's release once a person is detained. In addition to the mandatory nature of Australia's detention regime for unauthorised boat arrivals, these failures have been a central feature of the adverse findings against Australia by the UN Human Rights Committee. In the first of the many 'views' handed down by the Committee with respect to complaints about mandatory detention, the Committee stated that

> every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal. In the instant case, the State party has not advanced any grounds particular to the author's case, which would justify his continued detention for a period of four years, during which he was shifted around between different detention centres. The Committee therefore concludes that the author's detention for a period of over four years was arbitrary within the meaning of article 9, paragraph 1.
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> The Committee observes that the author could, in principle, have applied to the court for review of the grounds of his detention before the enactment of the Migration Amendment Act of 5 May 1992; after that date, the domestic courts retained that power with a view to ordering the release of a person if they found the detention to be unlawful under Australian law. In effect, however, the courts' control and power to order the release of an individual was limited to an assessment of whether this individual was a "designated person" within the meaning of the Migration Amendment Act. If the criteria for such determination were met, the courts had no power to review the continued detention of an individual and to order his/her release. In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release "if the detention is not lawful', article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant. This conclusion is supported by article 9, paragraph 5, which obviously governs the granting of compensation for detention that is "unlawful" either under the terms of domestic law or within the meaning of the Covenant. As the State party's submissions in the instant case show that court review available to A was, in fact, limited to a formal assessment of the self-evident

> fact that he was indeed a "designated person" within the meaning of the Migration Amendment Act, the Committee concludes that the author's right, under article 9, paragraph 4, to have his detention reviewed by a court, was violated.[12]

The Statement of Compatibility also fails to deal with the fact that in practice unauthorised maritime arrivals may be sent to Nauru or Papua New Guinea and detained there. Australia retains liability for this detention. Under the memoranda of understanding Australia undertakes to remove the individuals from Nauru and Papua New Guinea.[13] Consequently, refugee status determination is undertaken by these two countries not solely on their own behalf, but on behalf of Australia. Furthermore, Australia is paying for the arrangements. Therefore, Australia may be regarded as retaining 'effective control' over the asylum-seekers and refugees in the detention centres on Nauru and Papua New Guinea consonant with the UN Human Rights Committee's statements concerning the extra-territorial application of the ICCPR.[14] Under this interpretation of the facts, Australia is responsible for violating its own obligations under the ICCPR.

An alternative construction of the arrangements is that Australia is, at the very least, assisting Nauru and Papua New Guinea to violate international legal obligations owed by all three countries to the refugees and asylum-seekers.[15] Papua New Guinea and Australia are both party to the ICCPR and bound to respect the prohibition on arbitrary detention in Article 9. Nauru, Australia and Papua New Guinea are all bound by the customary international legal prohibition on arbitrary detention.[16] All three are bound by the Convention on the Rights of the Child which prohibits detention of children except as a 'last resort'.

The Statement of Compatibility also fails to deal with the question of conditions on Nauru and Papua New Guinea. Article 10 of the ICCPR provides that all persons in detention must be treated humanely. This provision overlaps with Article 7 of the ICCPR which prohibits torture and related forms of ill-treatment. The prohibition on torture and related ill-treatment is accepted as a norm of customary international law, binding on all countries. Accommodation is one aspect of humane treatment in detention.

The only protection for asylum-seekers sent to Nauru and Papua New Guinea are the weak and general terms of the memoranda of understanding – which in Australia's practice are non-binding

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[12] *A v Australia* (560/1993) 3 April 1997 UN Doc. CCPR/C/59/D/560/1993 [9.4] and [9.5].

[13] See Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the Transfer to and Assessment of Persons in Nauru, and related issues, 29 August 2012, cl. 11; Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the Transfer to and Assessment of Persons in Papua New Guinea, and related issues, 8 September 2012, cl. 13 and 14.

[14] Human Rights Committee, General Comment No 31, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add. 13 [10].

[15] See Article 16 of the International Law Commission's Articles on State Responsibility: ILC, *Draft Articles on State Responsibility for Internationally Wrongful Acts, Report of the International Law Commission to the General Assembly*, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10, ch IV.E.1.

[16] Regarding the status of Article 9 of the ICCPR as customary international law, see Human Rights Committee, General Comment 24, [8].

instruments – that say that relevant human rights will be met.[17] This is not good enough, and it is already clear that the rights of asylum-seekers are being violated. Amnesty International has recently visited Nauru and confirmed that asylum-seekers are detained in a closed detention centre, and that the conditions are deplorable. According to Amnesty, the detention centre on Nauru, in which the asylum-seekers are 'accommodated' in tents, is crowded, unbearably hot, subject to flooding and rodent and pest infestations and there is no meaningful recreation.[18]

5. 'No advantage' is an unlawful penalty in contravention of Article 31 of the Refugee Convention and invidious discrimination

Under Article 31 of the Refugee Convention, asylum-seekers whose entry to or presence in Australia was not compliant with the *Migration Act* are, subject to some provisos, immune from penalties and unnecessary restrictions on freedom of movement.

> Article 31. - Refugees unlawfully in the country of refuge
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> 1. 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 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.
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> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

UNHCR has consistently taken the view that detention which is imposed on asylum-seekers solely because of unlawful entry or presence is a breach of Article 31.[19]

Furthermore, the entire scheme of the *Regional Processing Act* and the present Bill, which envisages that asylum-seekers will be held on Nauru or Papua New Guinea indefinitely in order to ensure that they get 'no advantage' from coming to Australia by boat, constitutes a penalty for unauthorised arrival.

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[17] For example, see Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the Transfer to and Assessment of Persons in Papua New Guinea, and related issues, 8 September 2012, cl. 15.

[18] Amnesty International, 'Nauru Camp a Human Rights Catastrophe with No End in Sight', 23 November 2012, AI Index: ASA 42/002/2012.

[19] See for example, UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), Guideline 2 [13] and [14]. The Guidelines also state that asylum-seekers are to be considered 'lawfully' in state territory and that they benefit from Article 26 of the Convention which provides for freedom of movement and choice of residence for refugees lawfully in state territory.

The strict conditions imposed by Article 31 before a penalty may be imposed have not been met. Asylum-seekers coming directly from places in which their lives or freedom was threatened, and in some cases, directly from their countries of origin, have been sent to Nauru and Papua New Guinea regardless of their reasons and without an opportunity to present a case against this penalty. In practice, the penalty is indefinite detention. This is completely disproportionate to any 'offence'.

Despite the fact that many Sri Lankans have come directly from Sri Lanka, Sri Lankans were among the first asylum-seekers sent to Nauru and Papua New Guinea. In any event, Article 31 does not require that refugees come directly from their country of origin. As stated by the eminent refugee law scholar, Professor Guy Goodwin-Gill,

> refugees are not required to have come directly from their country of origin. Article 31 was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries, who are unable to find protection from persecution in the first country or countries to which they flee, or who have 'good cause' for not applying in such country or countries.[20]

Refugees who briefly transit another country *en route* to Australia or who have not been able to secure protection – for example, because the country concerned is not party to the Refugee Convention – must not be penalised simply for unlawful entry or presence. Procedurally, they must be given a chance to show 'good cause' for their unlawful entry or presence. However, under the *Regional Processing Act* and the present Bill, asylum-seekers will be sent to Nauru or Papua New Guinea regardless of their reasons for arriving without a visa. This is because Australia has determined that they will get 'no advantage' for arriving without a visa. In other words, Australia has determined that the terms of Article 31 will simply be ignored and the individuals concerned *must* be punished.

The Statement of Compatibility does not raise the question of equal protection under the law. Article 26 of the ICCPR states that

> [a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The *Regional Processing Act* and the present Bill discriminate against 'unauthorised maritime arrivals' as compared with other asylum-seekers who have arrived lawfully or by air.

[20] Guy Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection' in Erika Feller, Volker Turk and Frances Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP, 2003) 218.

6. Conclusion

The international legal position has not changed since the first iteration of the Pacific Solution, and neither should the conclusions of this Committee. What has changed is the political party in office and its perception of the ability to retain government in the absence of punitive measures against unauthorised boat arrivals. It is extremely sad that Parliament is considering enacting a legal fiction whereby Australia hides from the obligations it owes to unauthorised boat arrivals. Australia was not elected to the Security Council in order to be absent when called upon to take responsibility. The Committee should recommend that the Bill does not proceed. The Committee should also recommend the repeal of the *Regional Processing Act*.

Yours sincerely,

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