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

1. Introduction – Refugee and Immigration Legal Centre

1.1 The Refugee and Immigration Legal Centre ("RILC") is a specialist community legal centre providing free legal assistance to asylum seekers and disadvantaged migrants in Australia.[1] Since its inception over 23 years ago, RILC and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention.

1.2 RILC specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration's Immigration Advice and Application Assistance Scheme ("IAAAS"). RILC has been assisting clients in detention for over 18 years and has substantial casework experience. We have often been contacted for advice by detainees from remote centres and have visited Curtin, Perth, Scherger, Darwin, Christmas Island and Nauru immigration detention centres/'facilities' on numerous occasions. We are also a regular contributor to the public policy debate on refugee and general migration matters.

1.3 RILC is the largest provider of refugee and immigration law services in Australia. Each year we assist around 4,000 people. Our clientele largely consists of people from a wide variety of nationalities and backgrounds who cannot afford to pay for legal assistance and are often disadvantaged in other ways. Much of this work involved advice and/or full legal representation to review applicants at the Migration and Refugee Review Tribunals. Due to funding and resource constraints, in recent years we have generally provided advice and assistance at the administrative level only.

1.4 The focus of our submissions and recommendations reflect our experience and expertise as briefly outlined above. We have drawn on our previous submissions from the 2006 Senate Inquiry into the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.*

2. Outline of submission

2.1 We welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012* (the Bill).

2.2 The Bill would amend the *Migration Act 1958* (the Act) to excise the Australian mainland from the migration zone with regards to unauthorised arrivals by boat, with the effect that all boat arrivals are subject to processing outside of Australia, and would repeal s 198C of the Act.

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[1] RILC is the amalgam of the Victorian office of the Refugee Advice and Casework Service ("RACS") and the Victorian Immigration Advice and Rights Centre ("VIARC") which merged on 1 July 1998. RILC brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

2.3 We are extremely concerned that the Bill perpetuates violations of the letter and spirit of Australia's obligations under international refugee and other human rights law. The excision of the Australian mainland is unnecessary, perpetuates a legal fiction which continues to represent no more than an irresponsible avoidance of international obligations to which Australia has committed, and will likely cause damage to those people we have committed to protect. We recommend that the Act not be amended in the way proposed by the Bill.

2.4 Further, we submit that the repeal of s 198C of the Act removes an important protection for vulnerable people who are unable to be processed and remain offshore for reasons, inter alia, of severe mental and physical illness. Our legal centre has previously had experience of the enduring harm caused or contributed to by harsh and uncertain conditions in offshore processing countries and submit that the ability for those who cannot return to an offshore processing country to be assessed for refugee status by the Refugee Review Tribunal (RRT) is crucial. We recommend that the Act not be amended to repeal s198C.

3. Refugee Convention and other human rights obligations

A. Non-discrimination and freedom from penalisation for unauthorised entry

3.1 The Bill perpetuates discriminatory treatment and penalisation of refugees who have arrived by boat, in contrast to those who arrived by air, with or without prior authorisation. This contravenes the principle of non-discrimination in human rights treaties[2] to which Australia is a party as well as the express prohibition on punishment and penalisation of unauthorised persons under Article 31 of the Refugee Convention.[3]

3.2 The Bill, if passed, would unfairly deny access to the Australian legal system and due legal process to people who arrive by boat in Australia seeking protection. This has the potential to result in a breach of Australia's obligation not to *refoule* refugees, whether directly or indirectly.

B. *Non-refoulement* (return to a threat to life or freedom or to torture, cruel, inhuman or degrading treatment)

3.3 As outlined above, the Bill violates Australia's obligations under international refugee and human rights law. In particular, it violates the right of a person to seek protection from persecution, regardless of their means of arrival.[4]

3.4 Although the Refugee Convention does not expressly require the existence of a refugee status determination system or describe its form, the existence of a status determination is implied, because otherwise states could not fulfil the obligation of *non-refoulement* of refugees. Further, because refugee status is declaratory, rather than constitutive, in the absence of a

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[2] For example, Article 26, the prohibition on discrimination on any ground, of the International Covenant on Civil and Political Rights (ICCPR). Australia owes the rights contained in the to all people within its territory, regardless of whether they are citizens (Article 2).

[3] Article 31(1) prohibits states from imposing penalties for unauthorised entry or presence on refugees coming directly from a territory where their life or freedom was threatened. UNHCR advises that the term "coming directly" covers the situation where a person enters directly from the country of origin or another country where protection, safety or security could not be assured.

[4] Article 14(1), Universal Declaration of Human Rights: "Everyone has the right to seek and to enjoy in other countries asylum from persecution".

formalised status determination system, obligations are owed to people who are refugees regardless of whether their claims have been assessed or not.[5]

3.5 Therefore, Australia's fundamental obligations to protect people from future human rights abuse require a fair assessment of whether a person needs protection. This requires that the person seeking protection be able to present his or her claims for protection to authorities and be heard on those claims.

3.6 While Australia's international obligations do not prevent transfers of asylum seekers, there must be no resulting risk of *refoulement* and denial of certain other Refugee Convention rights.[6] This is why transfers are usually exceptional measures, and are undertaken where transferees have residency or other rights to live in a third country. Transfers should take place between countries with experience in refugee status determination and access to rights owed under the Refugee Convention.

3.7 Australia, as the state transferring people in its territory and under its jurisdiction, should assure itself that the third country is safe for a particular individual, and be aware of all of the facts relevant to the availability of protection there. Australia also has responsibilities to monitor arrangements to ensure that protection continues to be accessible and available to refugees.

3.8 While there is a lack of transparency and scrutiny in relation to the regional arrangements, it is clear that Australia is exercising effective or de facto control of the people staying in offshore processing countries,[7] further affirming the Australian government's responsibilities to people transferred.[8]

3.9 It remains unclear who will undertake the refugee processing on Nauru under Nauru's new legislation. The capacity of Nauru to undertake the refugee status determination without Australian or other support and assistance must be considered highly doubtful. The situation in Papua New Guinea is even less clear, as the intended domestic laws have not yet come into force. And yet, there have been transfers to both of these countries, and the protection of hundreds of people – putative refugees – is contingent on these arrangements.

3.10 It is not clear that transfer to Nauru and Papua New Guinea (PNG), would result in a robust assessment of refugee protection claims with access to adequate independent merits and judicial review. Conditions are unlikely to encourage or allow engagement with the refugee system and deny basic rights. If due process fails or miscarries in these remote locations, or a

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[5] Hathaway, J., *Rights of Refugees under International Law* (Cambridge University Press, 2004), at 184.

[6] It is arguable that other Convention rights should also be guaranteed by a receiving State, see Hathaway, J., *Rights of Refugees under International Law* (Cambridge University Press, 2004), at 278 ff; *Michigan Guidelines on Protection Elsewhere* (2007), at [8]; and see *M.S.S. v. Belgium and Greece*, ECHR (30696/09, 21 January 2011).

[7] For example, we know that: Australia is responsible for the transfer of people from its territory to a third country; Australia is funding the arrangements; Australia's contractors manage the detention centre and provide security services; Australia's contractors provide case management and health care; and Australia is responsible for the transfers or resettlement of people from third countries.

[8] Australia further owes the obligation of *non-refoulement* to people who are under its de facto or effective control: Hathaway, J., *The Rights of Refugees under International Law* (Cambridge University Press, 2004), at 169-170. See the International Law Commission Articles on State Responsibility, GA Res. 56/83, Annex, U.N. Doc. A/RES/56/83 (January 28, 2002) for principles relating to state responsibility for actions in international law.

restrictive refugee definition is applied,[9] a person could be wrongly refused refugee protection and expelled to the real prospect of torture or death in their homeland. Under international law, Australia would be responsible for any indirect *refoulement* that occurred from PNG or Nauru.[10]

3.11 Moreover, there appears to be no provision for status or rights to be accorded on the basis of complementary protection in offshore processing countries. Protection pursuant to the obligations in the Convention Against Torture (CAT), the ICCPR and the Convention on the Rights of the Child (CRC) is available to people processed in Australia. We note that Nauru has not acceded to the ICCPR, and PNG is not a party to the CAT. It is not clear what capacity officials on Nauru or Manus Island will have to ensure that no-one is returned to torture, cruel, inhuman or degrading treatment.

3.12 RILC continues to be concerned that the current arrangements do not satisfactorily guard against the risk of *refoulement*, prohibited by the Refugee Convention, the ICCPR, the CAT and the CRC, from the offshore processing countries. We oppose the proposal to further extend the excision zone, and with it, the number of people potentially subject to transfer to offshore processing countries.

C. Other rights

3.13 Under the Refugee Convention, individuals who enter Australia's territory and are under their jurisdiction are owed additional rights to protection against *refoulement*. These include non-discrimination, freedom of religion, education, and access to courts. States should also facilitate naturalisation in the host country. Any person transferred should benefit from all of the rights owed at the time of transfer, as well as those rights that adhere as immigration status is regularised.[11]

3.14 It is not clear that individuals transferred to offshore processing countries will be able to access the rights owed to them once recognised as refugees. People who arrive by boat to the mainland of Australia would also be denied a durable solution,[12] in contrast to those who arrive by air. Durable solutions provide certainty, as opposed to a long and indeterminate wait in limbo, which on previous experience and evidence is likely to be severely harmful to mental health.[13] The guiding test of the Expert Panel's recommendations and this proposed amendment – 'no advantage' – necessarily implies a long, indefinite and uncertain wait.

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[9] M. Foster, "Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State" (2006-07) 28 Mich. J. Intl. L 246; *Michigan Guidelines on Protection Elsewhere* (2007), at [4]. See also the decision by the UK House of Lords in *Regina v Secretary of State for the Home Department ex parte Yogathas* [2002] UKHL 36.

[10] Confirmed by leading academics and commentators in international law, as well as international jurisprudence. See for example M. Foster, "Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State" (2006-07) 28 Mich. J. Intl. L 223; *Michigan Guidelines on Protection Elsewhere* (2007), at [6] and [7]. See also the decision by the European Court of Human Rights in *T.I. v United Kingdom* (43844/98, 7 March 2000).

[11] Refer footnote 10 above.

[12] See Article 34 of the Refugee Convention: States should facilitate naturalisation.

[13] See for example Silove, Austin, and Steel, "No refuge from terror: the impact of detention on the mental health of trauma-affected refugees seeking asylum in Australia", Transcultural Psychiatry, Vol. 44, 2007; Z. Steel and D. Silove, "The mental health implications of detaining asylum seekers", Medical Journal of Australia, Vol. 175, 2001; A. Sultan and K. O'Sullivan, "Psychological disturbances in asylum seekers held in longterm

3.15 Moreover, the Memoranda of Understanding (MOUs) agreed with Nauru and Papua New Guinea (PNG) do not contain a finite timeframe of stay for people entering those countries. They refer to "as short a time as is reasonably necessary, bearing in mind the objectives set out in the Preamble and Clause 1." The Preambles of both MOUs recognise "the need to ensure, so far as is possible, that no benefit is gained through circumventing regular migration arrangements". Clause 1 refers to deterring or combating people smugglers. A policy of deterrence and of punishment involves a level of cruelty and uncertainty that will almost certainly inflict mental harm and suffering.

3.16 We further refer to the letter from the United Nations High Commissioner for Refugees, Antonio Guterres, of 5 September 2012, in relation to the fundamentally flawed nature of the no advantage test. The High Commissioner noted that the policy contemplates a time-frame comparable to UNHCR resettlement periods, which he explains "may not be a suitable comparator", because there is "no 'average' time for resettlement"; UNHCR resettles on the basis of vulnerability rather than time spent awaiting resettlement; and because the 'no advantage' test is based on aspirations to an effective regional processing system, which is not yet in existence.

3.17 In light of past experience of similar practices, consignment to this limbo is likely to cause harm to physical and mental well-being. There is clear evidence of the harm suffered by those who were detained on Nauru and PNG in past years.[14] The substandard living conditions and inadequate access to medical assistance[15] have been well-documented.[16]

3.18 Further, during our previous experience on Nauru during 2006 and 2007, we observed first hand the severely detrimental effects on mental health of the conditions, exacerbated by the uncertainty of duration of stay.

D. Section 198C of the Act

3.19 The Act currently provides that a person brought back to Australia from an offshore processing country, and remaining in Australia for a continuous period of 6 months may apply for assessment by the RRT. This section is critical to ensuring that those who cannot be returned to an offshore processing country are able to access a fair assessment process and are not left in indefinite limbo without recognition of refugee status and accompanying rights. It is necessary given the harsh conditions and the potential for adverse effects on mental and

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detention: a participant-observer account", Medical Journal of Australia, Vol. 175, 2001, 593–6; Z. Steel et al., "Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia", Australian & New Zealand Journal of Public Health, Vol. 28, 2004, 527–36; Final report, Senate Legal and Constitutional hearings into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, June 2006, section 3.51, pp24-25.

[14] Parliamentary Library, "Background Note: the 'Pacific Solution revisited' – a statistical guide to the asylum seeker case loads on Nauru and Manus Island (4 September 2012), page 7.

[15] The conditions also call into question Australia's ability to meet its obligations under the International Covenant on Economic, Social and Cultural Rights, for example Article 12, the right to enjoyment of the highest attainable standard of physical and mental health.

[16] Documented by the Royal Australian and New Zealand College of Psychiatrists, published in Final report, Senate Legal and Constitutional hearings into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, June 2006, at 25.

physical health, compounded by the lack of transparency and mechanism to review decisions to send vulnerable people offshore in the first place.

3.20 We note that in Australia there has been serious questions about whether effective treatment of existing or new psychological disorders can occur in the detention environment,[17] and ethical concerns about treating people in detention.[18]

3.21 In our view, the repeal of this section is likely to cause a situation where those people who have asked for our protection, and who may have suffered further harm in an offshore processing country, are faced with an unenviable dilemma: to remain in a harm-perpetuating or harm-causing environment in order to have refugee status assessed (the ability to effectively engage in which may be jeopardised by poor health) or to be removed to a safer environment with access to treatment but without the ability to have status regularised.

4. Conclusion

4.1 In light of the above, RILC remains seriously concerned that the proposed amendments to the bill will further punish refugees and asylum seekers who arrive to the Australian mainland seeking protection and will inhibit Australia's ability to comply with its international refugee and human rights obligations. Australia's international reputation would be further undermined.

Refugee and Immigration Legal Centre Inc.
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[17] Submissions by STARTTS to the Joint Select Committee on Australia's Immigration Detention Network (August 2011). See also Public Hearing Transcript, Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Health Care for Asylum Seekers) Bill 2012, (23 November 2012), page 2.
[18] L. Newman, M. Dudley and Z. Steel, "Asylum, Detention and Mental Health in Australia" (2008) 27(3) RSQ 110, at page 114.