



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

PO Box A147
Sydney South
NSW 1235
DX 585 Sydney
alhr@alhr.asn.au
www.alhr.asn.au

12 December 2012

Julie Dennett
Committee Secretary
Senate Standing Committees on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Colleague,

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

1.. Introduction

- 1.1. Australian Lawyers for Human Rights (ALHR) thanks the Senate Standing Committee on Legal and Constitutional Affairs for the opportunity to comment on the Inquiry into the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012.
- 1.2. ALHR was established in 1993. ALHR is a network of Australian law students and lawyers active in practising and promoting awareness of international human rights. ALHR has a national membership of almost 2500 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.
- 1.3. Since the amendments to the *Migration Act 1958* (Cth) made by the *Regional Processing Act 2012* (Cth), ‘offshore entry persons’, those persons who enter

Australia at an 'excised offshore place' (a place excised from Australia's migration zone) without a visa are subject to mandatory detention and removal to a regional processing country as soon as reasonably practicable.¹

- 1.4. The Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (the Bill) in effect seeks to extend this regime to any person who arrives without a visa in an excised offshore place or the Australian Mainland by boat. This new class of person will be known as an "unauthorised maritime arrival".²
- 1.5. Currently an offshore entry person cannot make an application for a visa without the Minister's permission and only if he or she thinks it is in the public interest.³ This includes an application for a protection visa.
- 1.6. The effect of the Bill, therefore, is to excise all of Australia from Australia's migration zone and to detain and remove anyone arriving by boat without a visa to a regional processing country whether or not Australia owes the person protection obligations under the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol (the Refugee Convention).
- 1.7. In his second reading speech, the Minister has indicated that the Bill's intention is to "reduce any incentive for people to take even greater risks with their lives by seeking to reach the Australian mainland to avoid being subject to regional processing arrangements."
- 1.8. This is said to implement the so-called 'no advantage' principle to ensure that no benefit is gained through circumventing regular migration pathways and thereby to remove the attractiveness of attempting an expensive and dangerous irregular boat journey to Australia. This recommendation of the Expert Panel report is in recognition of the fact that, since 2001, 964 passengers have died (or gone missing, presumed dead) on irregular maritime ventures directing at reaching some part of Australia (page 75 of report).
- 1.9. However, it does not affect those asylum seekers who have arrived in Australia by air. From 1 July 1998 to 27 July 2012, there were 79,498 applications for a protection visa by persons who arrived in Australia by air. This compares with some 33,412 boat arrivals over the same period, most of whom applied for protection (1.15 of Expert report).
- 1.10. It must, however, be remembered that, currently, close to 90 per cent of all irregular maritime arrivals (IMAs) coming to Australia are successful in being granted a protection visa at either the primary or review stage. For certain cohorts, the success rate has exceeded 95 per cent for particular reporting periods (at 1.24 of the Expert report). It is therefore not true, as may be the popular perception, that a majority or even a significant proportion of these IMAs were only travelling to Australia for economic reasons.
- 1.11. Fundamental to the expert panel's view (stated at 1.28) is that "many of the regular pathways for international protection arrangements in Australia's region are failing to provide confidence and hope among claimants for protection that their cases will be processed within a reasonable time frame and that they will be provided with a durable outcome. For too many, these factors are shifting the balance of risk and

incentive away from regular migration and protection pathways towards irregular migration and dangerous boat voyages.” This view may overstate the relevance of Australia’s refugee processing arrangements to people facing persecution in their country of origin.

- 1.12. By subjecting all “unauthorized maritime arrivals” to regional processing arrangements, the legislation separates decisions on refugee status from decisions relating to the granting of protection visas for all unauthorized maritime arrivals. This may mean that refugees may, ultimately, never be resettled in Australia or any other country. Such refugees may languish in offshore processing centres indefinitely. That this is unjust can be seen from historical experience set out above that over 90% of IMAs have warranted and been granted protection visas.
- 1.13. ALHR does not believe that the current system already in place complies with Australia’s obligations under the Refugee Convention and international law. The Bill will worsen this non-compliance. ALHR recommends that the Bill should not be passed for the following reasons:
 - 1.13.1. The Bill attempts to transfer responsibility for refugees seeking asylum in Australia by boat to regional processing countries. As a matter of law, Australia cannot avoid its obligations in this way.
 - 1.13.2. The Bill attempts to remove the right of refugees who come by boat to claim asylum in Australia and avoid Australia’s obligation to determine the status of refugees who seek asylum by boat here. This is a violation of the refugees’ human rights and a breach of Australia’s obligations under the Refugee Convention.
 - 1.13.3. The Bill attempts to avoid affording refugees the protections and rights required by the Refugee Convention. It fails to carry out Australia’s treaty obligations in good faith and is contrary to international law.
 - 1.13.4. The Bill does not guarantee provision of effective protection by regional processing countries including protections against *refoulement*.
 - 1.13.5. The Bill breaches Australia’s obligations under the Refugee Convention and International Covenant on Civil and Political Rights (ICCPR) by penalising refugees who seek asylum in Australia by boat including by subjecting them to indefinite, arbitrary detention.
 - 1.13.6. The Bill provides for systemic discrimination on the basis of the mode of arrival to Australia and violates the right of non-discrimination under Article 2 of the ICCPR.
 - 1.13.7. The Bill is an attempt by Australia to avoid the intrinsic obligation under the Refugee Convention of conducting refugee status determinations.
 - 1.13.8. The Bill will allow refugees who come to Australia by boat to be treated in ways that are not compatible with Australia’s obligations under human rights law.

2.. State responsibility

- 2.1. It is a fundament of international law that every internationally wrongful act of a State entails the international responsibility of that State.⁴ An internationally wrongful act of a State is conduct consisting of an action or omission which is:
 - (a) attributable to the State under international law; and
 - (b) constitutes a breach of an international obligation of the State.⁵
- 2.2. A State may not plead a provision of its domestic law as justification for an internationally wrongful act.⁶ A State remains responsible for internationally wrongful acts committed on its behalf or by its agent.
- 2.3. It follows that Australia is unable to delegate its responsibilities towards refugees to third states. Australia remains liable for the treatment of individuals seeking protection from it, whether or not that treatment occurs at the hands of third states offshore. Australia may not avoid its international responsibility by contracting to third states the processing of refugees.

Recommendation 1

The Bill attempts to transfer responsibility for refugees seeking asylum in Australia by boat to regional processing countries. As a matter of law, Australia cannot avoid its obligations in this way. For this reason the Bill should not be passed.

3.. Asylum

- 3.1. Under international law, individuals have a right to seek and enjoy asylum from persecution. The right of an individual to seek and enjoy asylum from persecution is expressed without reservation in Article 14 of the Universal Declaration of Human Rights. Article 14 clearly states a rule of customary international law, binding upon all States.⁷ The existence of a customary right to seek asylum is further confirmed in Article 18 of the EU Charter of Fundamental Rights.
- 3.2. The Refugee Convention further develops the protections to be afforded to persons seeking asylum. It is notable that Australia was one of the 26 States Parties responsible for the drafting of the Refugee Convention and, as such, may be said to have a special responsibility to ensure its legitimate effectiveness.
- 3.3. By placing refugees in the same group as anyone else who comes to Australia by boat without a visa and instituting mandatory detention and transfer to a regional processing country, and by placing their ability to claim their right of asylum at the discretion of the Minister, the Bill attempts to divest Australia of its obligation to determine the status of refugees who arrive in its territory and claim protection. It attempts to treat claims for asylum as just another stream of migration.

Recommendation 2

The Bill attempts to remove the right of refugees who come by boat to claim asylum in Australia and avoid Australia's obligation to determine the status of refugees who seek asylum by boat here. This is a violation of the refugees' human rights and a breach of

Australia's obligations under the Refugee Convention. For this reason the Bill should not be passed.

4.. Good faith

- 4.1. Australia, like all states, must carry out its international obligations in good faith.⁸ This obligation extends to both treaty and customary obligations. Because international law essentially depends for its efficacy upon reciprocity, the obligation of good faith is recognised as the bed rock of international law. The obligation of good faith will be breached if Australia seeks to avoid its international treaty obligations, or does indirectly what a treaty does not permit it to do directly.⁹ The obligation incorporates the duty to interpret a treaty in a way that ensures its effectiveness.¹⁰
- 4.2. Australia cannot choose which of its treaty obligations to fulfil, nor can it choose which to fulfil in good faith. It is bound to give full effect to all of the provisions of the Refugee Convention, and may not seek to avoid, nor to water down, its fulfilment of those provisions by reference to its domestic law.
- 4.3. The Refugee Convention's title indicates that it is a treaty relating to the *status* of refugees. Article 1A defines who a refugee is for the purposes of the Convention. The remaining Articles mostly provide for the treatment to be accorded by States Parties to refugees and the rights of refugees. The preamble to the Convention notes that the United Nations has endeavoured to assure refugees the widest possible exercise of the fundamental rights and freedoms recognised in the United Nations Charter and the Universal Declaration of Human Rights. Importantly, Article 33 prohibits the return of a refugee to the frontiers of a territory where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion (*'refoulement'*).
- 4.4. The object and purpose of the Convention would therefore seem to be to provide for the protection of refugees and to ensure that they enjoy fundamental human rights without discrimination. An importance is placed on refugees having a special status allowing them access to special protection and a prohibition on returning them to a place of persecution. The criteria that need to be met to gain this special status are expressly provided for in Article 1A. A State cannot effectively fulfil its obligations in good faith under the Convention without actively engaging in identifying those who come within the definition of 'refugee'.
- 4.5. By failing to determine a refugee's status, the Bill allows Australia to avoid providing the protections and rights required by the Refugee Convention. The Bill thwarts rather than ensures the effectiveness of the Refugee Convention and means that Australia will not be carrying out its obligations in good faith, which is contrary to international law.

Recommendation 3

The Bill attempts to avoid Australia's obligation to determine the status of refugees who seek asylum by boat here and avoid affording them the protections and rights required by the Refugee Convention. It fails to carry out Australia's treaty obligations in good faith, contrary to international law. For this reason the Bill should not be passed.

5.. Effective protection

- 5.1. The transfer of refugees to a third country is permissible under international refugee law but this will only be the case where appropriate ‘effective protection’ safeguards are met.¹¹ Effective protection includes the following safeguards.¹²
- respect for fundamental human rights including no real risk that the person would be subjected to torture or to cruel, inhuman or degrading treatment or punishment;
 - the refugee does not fear persecution in the host state;
 - the person is not at risk of being sent to another State in which effective protection would not be forthcoming;
 - the person has access to means of subsistence sufficient to maintain an adequate standard of living;
 - the State must comply with international refugee and human rights law in practice (not just in theory);
 - the State must grant access to fair and efficient determination procedures which include protection grounds that would be recognized in the State in which asylum was originally sought;
 - the State must take into account any special vulnerabilities of the individual;
 - the prospect of a genuinely accessible and durable solution;
 - the State must not expose the person to arbitrary expulsion and deprivation of liberty.
- 5.2. The Minister has designated Nauru and Papua New Guinea (PNG) as ‘regional processing countries’ under s198AB of the *Migration Act* 1958. Under sub-section (2), the only condition for the exercise of this power is that the Minister thinks that it is in the national interest to do so. None of the considerations referred to above are explicitly required to be taken into account. Indeed, s198AA(d) specifically provides that the designation of a country as a regional processing country need not be determined by reference to the international obligations or domestic law of that country.
- 5.3. Nauru is now a party to the Refugee Convention. PNG is also a party but has imposed reservations that reject Convention rights relating to employment, housing, education, freedom of movement, penalties, expulsion and naturalization. PNG is party to the International Covenant on Economic, Social and Cultural Rights¹³ but Nauru is not. PNG is a party to the ICCPR but not the Convention against Torture. Nauru has signed but not ratified the ICCPR (and is therefore not legally bound) but is a party to the Convention against Torture.
- 5.4. The Obligation to ensure *non-refoulement* is a principle of customary international law that is safeguarded in Article 33 of the Refugee Convention. It has been described as the cornerstone of refugee law.¹⁴ States also have this obligation under the Convention against Torture and the ICCPR.¹⁵ As noted above, a guarantee of *non-refoulement* is necessary for effective protection.
- 5.5. ALHR believes that inadequate steps have been taken to prevent *refoulement*. It is not possible to determine whether a person may be a refugee at risk of *refoulement* until the refugee status of a person claiming asylum has been assessed. As such,

any person presenting themselves and claiming asylum must be given the benefit of the protection against *refoulement* unless and until found not to be in need of international protection. The *non-refoulement* obligation may be considered breached if a person is blocked from entering the putative country of asylum without being given an adequate opportunity to present his or her case.¹⁶ The current Bill effectively does just that – a person arriving by boat in Australia has no real opportunity to make a claim for asylum and will be removed to a regional processing country as soon as reasonably practicable.¹⁷

- 5.6. Further, the protection from *non-refoulement* and compliance with human rights law in practice offered by PNG and Nauru is questionable. Both nations have only recently become parties to the human rights treaties mentioned above (between 2008 and 2012). Nauru only ratified the Refugee Convention and Protocol in 2011. It only passed legislation on the assessment of refugee status in October 2012.¹⁸ Human rights abuses in PNG have been well-documented, including the use of torture by police and its laws do not provide for the granting of asylum or refugee status.¹⁹
- 5.7. The UNHCR assumes primary responsibility for processing refugees in the region in the absence of appropriate national systems. It is hampered by a lack of resources, security considerations and the limited parameters in which UNHCR can operate in some countries.
- 5.8. While UNHCR has developed refugee status determination (RSD) procedural standards, it has not had the resources to comply with this across the board. ALHR has within its membership individuals who are familiar with RSD procedures in a number of countries, including Africa (including North Africa) and Asia. From their experience, it is clear that UNHCR determination procedures are often inconsistent from country to country, office to office. The UNHCR is often unable to maintain the high standards of procedural fairness which Australia can and should provide. This is therefore an inferior and inadequate model as distinct from the well-established, fairer and more efficient model used onshore.
- 5.9. There is better access to legal representation when a refugee is processed in Australia, including a clearly defined process for the provision of interpreters, migration agents, solicitors and barristers. Historically, legal assistance to offshore detainees in declared countries is not only unavailable – it has been actively blocked. Between August 2001 and March 2003, ALHR tried unsuccessfully to get a team of lawyers to Nauru to provide legal assistance to refugees detained there. The aim of the project was to extend to the refugees in Nauru the right to legal advice such as they would have had if their claims had been processed in Australia. Many lawyers volunteered to travel, and many organisations committed their support to the project. However, visa applications were refused by Nauru twice even with support from UNHCR. No reasons were given.
- 5.10. Amnesty has described the conditions on Nauru for refugees transferred from Australia as a “toxic mix of uncertainty, unlawful detention and inhumane conditions”.²⁰ Manus Island is a remote location and, while the World Health Organisation has declared PNG the highest-risk country in the western Pacific region for malaria, Manus Island has the highest rate of probable and confirmed malaria cases in PNG.²¹

- 5.11. The remoteness and distance of regional processing countries makes the immigration detention operations there less visible and transparent to the Australian public and less accessible for external scrutiny bodies. This is particularly problematic where the policy will inevitably involve detention of unaccompanied children. It is difficult to make an assessment of the standards of detention due to the extremely limited access permitted to the media, NGOs and lawyers.
- 5.12. Further, there is no prospect of a genuinely accessible and durable solution. Even if refugees sent to these countries had their status determined, the Australian Government's policy is clear that there is no guarantee they will ever be resettled in Australia.²² Indeed, it is not at all clear when or where they will ever be resettled. This could result in "refugee warehousing" with the refugees kept 'in protracted situations of restricted mobility, enforced idleness, and dependency—their lives on indefinite hold—in violation of their basic rights under the 1951 UN Refugee Convention.'²³
- 5.13. ALHR submits that Australia could not be satisfied that the requirements for effective protection are met by either Nauru or PNG. Any failure on behalf of PNG or Nauru to provide effective protection including *non-refoulement* will ultimately be Australia's responsibility and a breach of Australia's international law obligations.

Recommendation 4

As effective protection cannot be guaranteed in PNG or Nauru including protections against *refoulement*, and the *Migration Act* does not provide that 'regional processing countries' must provide effective protection, the Bill should not be passed.

6.. Penalties

- 6.1. Article 31(1) of the Refugee Convention provides that States must not impose penalties on refugees for illegal entry or presence, provided that they have come directly from a territory where their life or freedom was threatened, present themselves without delay to the authorities, and show good cause for their illegal entry or presence. Having a well-founded fear of persecution would constitute 'good cause'.²⁴
- 6.2. The term 'penalties' is not defined in article 31. However, it is said to include prosecution, fine and imprisonment but not administrative detention.²⁵ The period during which the refugee's movement may be restricted is limited in Article 31(2) to what is 'necessary'. The restrictions are only to be applied until status in the country of refuge is regularised or admission is obtained to another country. Contracting States are to allow refugees a reasonable period and all necessary facilities to obtain admission to another country.²⁶
- 6.3. The Human Rights Committee has reasoned that the term 'penalty' in article 15(1) of the ICCPR must be interpreted in light of that provision's object and purpose.²⁷ Similarly, ALHR submits that the term 'penalties' in article 31 should receive an interpretation in accordance with the article's object and purpose, namely, that refugees should not be punished for illegal entry or presence.

- 6.4. ALHR submits that the overwhelming purpose of the Bill is to discourage refugees from seeking asylum in Australia by boat by treating them less favourably than those who seek asylum by other means. ALHR submits that this in itself is a penalty.²⁸ In addition, refugees caught by the provisions of the Bill will be transferred to countries which will not provide effective protection; into 'inhumane conditions';²⁹ and will be detained for an indeterminate period under the 'no advantage' principle. This Bill therefore violates Australia's obligations under Article 9 of the ICCPR by subjecting refugees to arbitrary detention, something for which Australia has previously been criticised by the United Nations Human Rights Committee.³⁰ ALHR submits that this Bill therefore explicitly provides for the imposition of penalties on refugees in violation of international law.

Recommendation 5

As the Bill breaches Australia's obligations under the Refugee Convention and ICCPR by penalising refugees who seek asylum in Australia by boat and by subjecting them to indefinite, arbitrary detention, it should not be passed.

7.. Non-discrimination

- 7.1. Article 3 of the Refugee Convention prohibits States from discriminating between refugees on the basis of race, religion or country of origin. The Bill may have the practical effect of targeting only a particular group or groups of refugees contrary to Article 3 if only refugees from particular regions are attempting to access Australia by boat. As detailed in this submission, the Bill treats these refugees less favourably than those seeking asylum by other means and, therefore, it may violate Article 3.
- 7.2. More obviously, however, ALHR submits that the Bill provides for systemic discrimination on the basis of the mode of arrival to Australia and violates the right of non-discrimination under Article 2 of the ICCPR.
- 7.3. In general, differential treatment is allowed where the distinction pursues a legitimate objective, has a reasonable and objective justification,³¹ and the differential treatment is proportional to the objective.³²
- 7.4. One object of the Bill is to prevent refugees taking "even greater risks with their lives"³³ by travelling by boat to the Australian mainland to avoid excised offshore places and thus being transferred to regional processing countries. Another object of the Bill is to prevent boat arrivals from obtaining a perceived advantage that is not available to refugees who apply for asylum offshore.³⁴
- 7.5. Preventing refugees drowning at sea may be seen as a legitimate objective. However, ALHR submits that the means by which the Bill seeks to achieve this is not proportionate to the objective. ALHR submits that attempting to prevent the drowning of refugees coming to Australia by boat is not a reasonable and objective justification to subject the overwhelming majority who do not drown to indefinite, arbitrary detention in inhumane conditions in countries that cannot guarantee effective protection. This is clearly is not a proportionate response.

- 7.6. Refugees arriving in Australia by boat or by plane are in materially identical circumstances – they are seeking asylum onshore under the Refugee Convention. Australia has equal obligations to both. However, those who arrive by boat, if this Bill is passed, will be sent to “regional processing countries” for an indefinite period with no guarantee of effective protection and be subject to arbitrary detention.
- 7.7. The ‘no advantage’ principle as explained by the Department of Immigration means that a person’s claim will not be processed faster than if they had used “regular options”.³⁵ The only regular option listed is applying for an offshore visa. The Bill therefore seeks to treat a person seeking asylum onshore as someone seeking asylum offshore purely on the basis that they arrived by boat and not by plane. ALHR submits that this is clearly discriminatory and the only objective is to stop refugees seeking asylum in Australia by boat. ALHR submits that this is not a legitimate objective but an arbitrary one lacking a reasonable and objective justification.

Recommendation 6

The Bill provides for systemic discrimination on the basis of the mode of arrival to Australia and violates the right of non-discrimination under Article 2 of the ICCPR. For this reason it should not be passed.

8.. Refugee status determination

- 8.1. ALHR submits that the object and purpose of the Refugee Convention is to provide for the protection of refugees and to ensure that they enjoy fundamental human rights without discrimination. Importance is placed on refugees having a special status allowing them access to special protection and a prohibition on returning them to a place of persecution. The criteria that need to be met to gain this special status are expressly provided for in Article 1A. A State cannot effectively fulfil its obligations in good faith under the Convention without actively engaging in identifying those who come within the definition of ‘refugee’.
- 8.2. The Bill amends the *Migration Act* to allow refugees who arrive in Australia by boat to be transferred to a regional processing country. They have no right to apply for a protection visa unless the Minister considers it in the public interest to do so.³⁶ The MoU with Nauru provides that Nauru will “make an assessment, or permit an assessment to be made” of whether a person is a refugee within the meaning of the Refugee Convention and its Protocol.³⁷ Nauru has only, very recently, on 10 October 2012, enacted legislation providing for a scheme to determine refugee status.³⁸ The Nauruan Government has indicated that it will be six months before refugee determinations will begin.³⁹
- 8.3. It is yet to be seen whether the Nauruan refugee determination procedures will satisfy even the basic requirements of accepted practice.⁴⁰ Even less is known about how refugee status determinations will be undertaken in PNG. More importantly, however, refugees who arrive in Australia by boat seek asylum *in Australia* and engage *Australia’s* responsibilities under the Convention, including the responsibility to determine the person’s refugee status. This Bill will allow those persons to be removed from Australia to a regional processing country

without any legally binding control by Australia over the person's refugee determination. ALHR submits it is a blatant attempt by Australia to relieve itself of an intrinsic obligation under the Refugee Convention.

Recommendation 7

The Bill is an attempt by Australia to avoid the intrinsic obligation under the Refugee Convention of conducting refugee status determinations and for this reason it should not be passed.

9.. Statement of compatibility

9.1. Although not forming a substantive part of the Bill, the Statement of Compatibility with Human Rights prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is worthy of comment. The Statement shows not only a restrictive interpretation of human rights law but a failure to address a number of issues on the basis that the Bill does not substantially alter the current status quo except to now include those who arrive on the mainland by boat. ALHR submits that it gives an incorrect impression of the Bill's compatibility with human rights law.

Articles 12 and 13 ICCPR

- 9.2. The Minister claims that the Bill is compliant with Articles 12 (freedom of movement) and 13 (expulsion of aliens) of the ICCPR on the basis that the protections of those articles extend only to persons "lawfully" in the State. The Minister claims that, because unauthorised maritime arrivals, by virtue of the Bill, will be "unlawful non-citizens", the articles will not apply to them.
- 9.3. The Human Rights Committee has commented that the question whether an alien is "lawfully" within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations.⁴¹ ALHR submits that those obligations include those under Article 31 of the Refugee Convention that penalties shall not be imposed on account of a refugee's illegal entry or presence. This is in addition to the person's right to seek asylum under Article 14(1) of the Universal Declaration of Human Rights.⁴²
- 9.4. ALHR submits that a person seeking asylum in Australia should be subject to the protections of Article 12 ICCPR. Article 12(3) authorises the State to restrict the right to liberty and freedom of movement only to protect national security, public order (ordre public), public health or morals and the rights and freedoms of others. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognised in the ICCPR.⁴³ The laws authorising the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution. Restrictive measures must conform to the principle of proportionality - they must be proportionate to the interest to be protected.⁴⁴

- 9.5. ALHR submits that the unfettered discretion of the Minister to expel refugees from Australia to regional processing countries only because they have arrived by boat imposes restrictions on a refugee's right to liberty and freedom of movement for a reason not allowed for in Article 12. Even if such action was considered to be for the purposes of protecting national security, public order (ordre public), public health or morals and the rights and freedoms of others, ALHR submits that sending refugees to inhumane detention camps for an indefinite period is not proportionate to these aims and, as submitted above, violates other rights recognised in the ICCPR.
- 9.6. Given ALHR's view on the lawful status of refugees, ALHR submits that the protections of Article 13 ICCPR should also be accorded to refugees and they should be allowed to submit reasons why they should not be expelled to the minister. As the Bill does not allow for this, ALHR submits it is not compliant with human rights law.

Article 9 ICCPR

- 9.7. The Minister's Statement completely sidesteps the issues in relation to Article 9 ICCPR that ALHR has raised in these submissions. The Minister only refers to the amendments made by the Bill which allow for discretionary detention of those persons not claiming asylum but who have, nonetheless, entered Australian territory unlawfully.
- 9.8. ALHR submits that, even if the only change the Bill makes is to add to the class of person who can be removed to a regional processing country, it affects this new class of person and gives the Minister a power he did not previously have. It affects the human rights of a group of people who were not previously affected. Furthermore, as submitted above, it will subject them to arbitrary detention in violation of Article 9. ALHR submits that the Bill is not compatible with human rights law.

Complementary protection

- 9.9. The Minister, in dealing with Australia's *non-refoulement* obligations under treaties other than the Refugee Convention, again refers to the fact that the Bill does nothing more than add a new class of persons subject to removal to regional processing countries. He refers to current protections against *non-refoulement* existing in legislation, policies and procedures.
- 9.10. ALHR submits that the conditions in Nauru, the poor human rights record of PNG and lack of effective protection available in both countries as outlined above would not satisfy the Minister that Australia's *non-refoulement* obligations would be upheld by sending refugees to these countries. ALHR submits that, as this Bill allows for a new cohort of people to be sent to these countries, the Minister's Statement should have squarely addressed these concerns in greater detail. In ALHR's submission, the Bill is not compatible with Australia's human rights obligations.

Children and families

- 9.11. Of great concern is the Minister's failure to address what ALHR submits is a complete failure to comply with Australia's requirements under Article 3 of the Convention on the Rights of the Child (CRC), namely, that the best interests of the child is the primary consideration.
- 9.12. The Minister again merely refers to current protections in existing legislation, policies and procedures without addressing what they are or how they will protect children now being sent to countries that cannot offer effective protection, provide inhumane conditions and have highly questionable human rights records. ALHR submits that transferring children to such places is not in their best interests and is not compatible with Australia's obligations under the CRC.
- 9.13. The Minister also refers to Articles 17 and 23 of the ICCPR preventing unlawful or arbitrary interference with the family. This Bill extends a policy which ALHR submits violates these rights to those refugees who arrive on the mainland by boat. The Minister, however, does nothing more than refer to existing protections without more.
- 9.14. People who come by boat will no longer be able to propose their families through the Humanitarian Program.⁴⁵ One purpose of the scheme now in force under the *Migration Act* and sought to be extended by this Bill is to prevent the reunion of families of those refugees who arrive by boat in order to discourage refugees from coming to Australia by boat. As ALHR has submitted above, this not only is a violation of obligations under the Refugee Convention but a violation of the right against discrimination under the ICCPR.
- 9.15. The Human Rights Committee has commented that even interference provided for by law should be in accordance with the provisions, aims and objectives of the ICCPR and should be, in any event, reasonable in the particular circumstances. Otherwise, it will be considered arbitrary.⁴⁶ ALHR submits that to prevent a person reuniting with their family for some indefinite period is a substantial penalty and interference with their family life. ALHR submits that it is unreasonable to do so merely to stop a minority of refugees drowning or merely because someone has exercised their right to claim asylum by travelling by boat instead of by plane. The discriminatory nature with which this policy is to be applied is not in accordance with the provisions, aims and objectives of the ICCPR. ALHR submits that this Bill will allow an interference with family life to be imposed on refugees who come to Australia by boat which is arbitrary and is not compatible with Australia's human rights obligations.

Recommendation 8

The Bill will allow refugees who come to Australia by boat to be treated in ways that are not compatible with Australia's obligations under human rights law and for this reason it should not be passed.

Yours faithfully,

Stephen Keim SC
President, Australian Lawyers for Human Rights

Contributors: Nathan Kennedy, Christopher Ward, Soruban Sivaloganathan

¹ See sections 189, 198AD of the *Migration Act 1958* (Cth).

² Sch 1 [8] of the Bill.

³ S46A *Migration Act 1958* (Cth).

⁴ ILC Articles on State Responsibility, Article 1; *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 10, at p. 28.; *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 142.

⁵ ILC Articles on State Responsibility, Article 2.

⁶ ILC Articles on State Responsibility, Article 3; *S.S. "Wimbledon", 1923, P.C.I.J., Series A, No. 1*, p. 15, at p. 30.

⁷ In 1992, the UNHCR Executive Committee stated that "the institution of asylum, which derives directly from the right to seek and enjoy asylum set out in Article 14(1) 1 of the Universal Declaration of Human Rights, is among the most basic mechanisms for the international protection of refugees" (Conclusion N° 28(c))."; Lillich, "Civil Rights" in Meron (ed) *Human Rights in International Law: Legal and Policy Issues*, Vol 1 Clarendon Press: Oxford 1984, 116.

⁸ Article 31 of the 1969 Vienna Convention on the Law of Treaties; See the *SS Lotus 1927 PCIJ Ser A No.10*.

⁹ Arguments presented by UNHCR as intervener in *R (European Roma Rights Centre) v Sect'y of State for the Home Dept* [2003] EWCA Civ 785; UNHCR Skeleton Argument for the Court of Appeal, [18]; UNHCR Written Case for the House of Lords, [32].

¹⁰ James C. Hathaway, *The Rights of Refugees under International Law* (2005) 62.

¹¹ Executive Committee Conclusion No 85 (1998), Executive Committee Conclusion No 87 (1999). Conclusion No 85 provides that the host country must treat the asylum seeker in accordance with accepted international standards, ensure protection against *refoulement* and provide the asylum seeker with the possibility to seek and enjoy asylum.

¹² Lisbon Expert Roundtable 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers' (9–10 December 2002) para 15(b). The third State must be a signatory to the 1951 Convention and/or 1967 Protocol and comply with those instruments, or at least demonstrate that it has developed a practice akin to what those instruments require: para 15(e); Erika Feller (DIP): UN Doc A/AC.96/SR.585 (2004) [28].

¹³ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

¹⁴ see Bethlehem, D. & Lauterpacht, E., *The Scope and Content of the Principle of Non-refoulement*, in *Refugee Protection in International Law*, Feller, E., Türk, V., and Nicholson, F. (eds) p. 111.

¹⁵ Article 3, Convention against Torture; Article 7, ICCPR.

¹⁶ Plender and Mole, "Beyond the *Geneva Convention*: constructing a *de facto* right of asylum from international human rights instruments" Nicholson and Twomey (eds) *Refugee rights and realities*, 81 p.82 According to UNHCR, "[e]xcept in situations of large-scale influx where individual determination of asylum claims may not be practical, all asylum-seekers should, in principle, have access to individual refugee status

determination procedures.” UNHCR, *Note on International Protection*, A/AC.96/914, 7 July 1999, [16]. Pallis further argues that this is a component of the non-refoulement obligation as “the only way to determine who is a refugee is to conduct a status determination, thus RSD becomes a necessary condition in meeting the obligation” Pallis, “Obligations of States Towards Asylum Seekers at Sea” 14 *IJRL* no.2/3 2002 p.287; Amnesty International, “Refugees: human rights have no borders” (1997) Section 4 p346. See also *Haitian Centre for Human Rights et al v US* Case 10/675 report no 51/96, 13 March 1997, 5 IHRR 1998, [155]; *Vic Council for Civil Liberties Inc v MIMIA* [2001] FCA 1297 (11 Sept 201) [75].

¹⁷ S198AD(2) *Migration Act 1958* (Cth).

¹⁸ *Refugee Convention Act 2012* (Nauru).

¹⁹ US Dept of State *Country Reports on Human Rights Practices 2011* ‘Papua New Guinea’ <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186299>.

²⁰ Amnesty International, *Amnesty International Media Release & Nauru Brief*, 23 November 2012.

²¹ Refugee Council of Australia, *Manus Island Is No Place For Refugee Families*, 21 November 2012 http://refugeecouncil.org.au/n/mr/121121_Manus.pdf.

²² DIAC, Fact Sheet The Expert Panel on Asylum Seekers and the ‘no advantage’ principle http://www.immi.gov.au/managing-australias-borders/border-security/irregular-entry/no-people-smuggling/_pdf/fact-sheet-english.pdf.

²³ M Smith ‘Warehousing Refugees: A Denial of Rights, A Waste of Humanity’ in US Committee for Refugees *World Refugee Survey 2004* 38; see also G Chen ‘A Global Campaign to End Refugee Warehousing’ in US Committee for Refugees *World Refugee Survey 2004* 21.

²⁴ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed, 2007) 521.

²⁵ *Ibid* 522.

²⁶ *Ibid*.

²⁷ *Van Duzen v Canada* Comm No 50/1979, UN Doc CCPR/C/15/D/50/1979 (7 April 1982) [10.2].

²⁸ e.g. Decision of the Social Security Commissioner (UK) in Case No CIS 4439/98 (25 November 1999) [16], where Commissioner Rowland found that *treatment* less favourable than that accorded to others, which is imposed on account of illegal entry, constitutes a penalty under article 31, unless it is objectively justifiable on administrative grounds.

²⁹ Amnesty International, *Amnesty International Media Release & Nauru Brief*, 23 November 2012.

³⁰ *A. v. Australia*, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 30 April 1997 [9.4].

³¹ Human Rights Committee ‘General Comment 18: Non-Discrimination’ (10 November 1989) [13].

³² ECOSOC Commission on Human Rights ‘Prevention of Discrimination: The Rights of Non-Citizens’ (26 May 2003) E/CN.4/Sub.2/2003/23 [6].

³³ Explanatory Memorandum, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, 1.

³⁴ Explanatory Memorandum, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, [32].

³⁵ DIAC, Fact Sheet The Expert Panel on Asylum Seekers and the ‘no advantage’ principle http://www.immi.gov.au/managing-australias-borders/border-security/irregular-entry/no-people-smuggling/_pdf/fact-sheet-english.pdf.

³⁶ Section 46A(2) *Migration Act 1958* (Cth).

³⁷ ‘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, <http://www.minister.immi.gov.au/media/media-releases/_pdf/australia-nauru-mou-regional-processing.pdf>.

³⁸ *Refugee Convention Act 2012* (Nauru).

³⁹ Simon Cullen, ‘Nauru hunger strike drags on’, ABC News Online, 7 November 2011, <<http://www.abc.net.au/news/2012-11-07/nauru-hunger-strike-drags-on/4358490>>.

⁴⁰ See: UNHCR (Global Consultations on International Protection) ‘Asylum Processes (Fair and Efficient Asylum Procedures)’ UN Doc EC/GC/01/12 (31 May 2001); *Handbook on Procedures and Criteria for Determining Refugee Status* UN Doc. HCR/IP/4/Eng/REV.1.

⁴¹ Human Rights Committee ‘General Comment 27: Freedom of Movement’ (2 November 1999) [4].

⁴² Adopted 10 Dec. 1948, GA Res.217A (III), UN Doc a/810, at 71 (1948).

⁴³ Human Rights Committee ‘General Comment 27: Freedom of Movement’ (2 November 1999) [11].

⁴⁴ Human Rights Committee ‘General Comment 27: Freedom of Movement’ (2 November 1999) [13] – [14].

⁴⁵ DIAC, Fact Sheet The Expert Panel on Asylum Seekers and the ‘no advantage’ principle http://www.immi.gov.au/managing-australias-borders/border-security/irregular-entry/no-people-smuggling/_pdf/fact-sheet-english.pdf.

⁴⁶ Human Rights Committee 'General Comment 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation' Freedom of Movement' (8 April 1988) [4].