



Australian
Human Rights
Commission

Examination of the Migration (Regional Processing) package of legislation

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO
THE PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS**

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List of Abbreviations

Committee	Parliamentary Joint Committee on Human Rights
the compatibility letter	The letter written by the Minister for Immigration and Citizenship to the Committee on 15 November 2012, containing an assessment of the compatibility of the Regional Processing Act with Australia's human rights obligations
CAT	<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i>
CRC	<i>Convention on the Rights of the Child</i>
CRPD	<i>Convention on the Rights of Persons with Disabilities</i>
DIAC	Department of Immigration and Citizenship
HRC	United Nations Human Rights Committee
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i>
IGOC Act	<i>Immigration (Guardianship of Children) Act 1946 (Cth)</i>
IHMS	International Health and Medical Services
Migration Act	<i>Migration Act 1958 (Cth)</i>
the Minister	The Minister for Immigration and Citizenship
PNG	Manus Island, Papua New Guinea
Refugee Convention	The 1951 <i>Convention Relating to the Status of Refugees</i> , as amended by the 1967 <i>Protocol Relating to the Status of Refugees</i>
the Regulation	<i>Migration Amendment Regulation 2012 (No. 5) (Cth)</i>
Regional Processing Act	<i>Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth)</i>
Unauthorised Maritime Arrivals Bill	Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth)
UNHCR	United Nations High Commissioner for Refugees

Executive Statement

The Australian Human Rights Commission welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Human Rights (the Committee) with respect to the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) and related Bills and Instruments (regional processing legislation). This submission draws upon the work undertaken by the Commission on Australian laws and practices as they have evolved over the last ten years with respect to asylum seekers and refugees.

The regional processing legislation establishes a regime to transfer to third countries some of those asylum seekers, defined as ‘unauthorised maritime arrivals’ who arrived in Australia on or after 13 August 2012. This Executive Statement sets out the primary legal issues that arise from the package of legislation, by reference to the human rights treaties that inform the work of the Committee.

The submission examines, in some detail, the legal issues raised by the regional processing legislation. The objective has been to provide a comprehensive analysis of the regime and of the international law and treaty obligations that it engages.

In the Commission’s view, the regional processing regime for asylum seekers arriving by boat on or after 13 August 2012, and the treatment of other asylum seekers detained or otherwise living in Australia, creates a significant risk that Australia may breach some of the human rights treaties with which it has agreed to comply. In particular, the regime risks violation of core human rights principles, most notably the prohibition on arbitrary detention, the right to claim asylum and the rights of children and the family. The regime is also out of step with the asylum laws of those Western nations with which Australian laws are typically compared, and inconsistent with the human rights jurisprudence of international tribunals.

Australia’s continuing responsibility for asylum seekers transferred to Nauru and Manus Island

Australia has a fundamental obligation under the Universal Declaration of Human Rights to allow asylum seekers to claim refugee status. Article 14, for example, provides that “Everyone has the right to seek and to enjoy in other countries asylum from persecution”. Australia also has obligations under the Refugees Convention not to expel or return refugees in any manner whatsoever to territories where their lives or freedom would be threatened. Australia cannot abdicate its responsibilities under international law by transferring asylum seekers, who have arrived in Australia, to other countries in the region, currently Papua New Guinea and Nauru. Australia remains legally bound to ensure that asylum seekers are not returned to a country where their lives and freedoms may be threatened or where there is a real risk that they will be subject to torture or cruel, inhuman or degrading treatment. Moreover, Australia may be liable to provide remedies, including compensation, to asylum seekers for breaches of their human rights in Nauru and Manus Island where Australia has ‘effective control’ over their treatment.

The ‘no advantage’ policy and arbitrary detention

In adopting the policy of ‘no advantage’ the regional processing regime may breach the prohibition on arbitrary detention, contrary to one of the most fundamental rights

set out in the International Covenant on Civil and Political Rights (ICCPR). Those asylum seekers who arrived on or after 13 August 2012 may be subject to prolonged detention, five years being recognised by the Government as a possible length of stay on Nauru or Manus Island. In the Commission's view, the prolonged detention of asylum seekers who have committed no crime, and who may eventually be assessed as refugees, may constitute arbitrary detention. Moreover, the arbitrary nature of Australia's mandatory detention policy is compounded by the failure to provide asylum seekers with effective access to judicial review to challenge the lawfulness at international law of their detention.

The policy of 'no advantage' also risks breaching human rights because there is no regional comparator against which to determine a benchmark for resettlement of asylum seekers. In short, by reference to what standard might an asylum seeker gain an advantage? The policy appears to have no legal content and risks breaching international law by denying the rights of those seeking asylum. It is not acceptable at international law to use some asylum seekers to deter other asylum seekers. While the Commission acknowledges the importance of the aim of saving lives at sea, this legislative regime for asylum seekers may be judged to be a disproportionate response.

Discriminatory treatment of asylum seekers

Australia is bound by treaty law to ensure that all people subject to its jurisdiction are treated humanely and in a non-discriminatory way. The Commission is concerned by the apparently discriminatory means by which the regional processing regime is carried out.

More than 500 asylum seekers, including families and children, have been selected for transfer to Manus Island and Nauru from among the over 8,000 who have arrived in Australia since 13 August 2012. It is unclear why certain asylum seekers are transferred while the overwhelming majority of them are permitted to remain, typically in mandatory detention, on Christmas Island or the Australian mainland. Not only are the circumstances different on Manus Island and Nauru compared with those in Australia, but also the legal conditions differ. Some asylum seekers who arrived after 13 August have been released into the Australian community on bridging visas. Under the terms of these visas these asylum seekers are entitled to limited financial and other assistance (albeit with no entitlement to work). Around 7,000 asylum seekers remain in mandatory detention. The Commission is concerned that, in determining whether an asylum seeker will be transferred for regional processing, held in detention in Australia or released on a bridging visa, the Minister's decision is not transparent and may not be subject to review.

In addition to the differential treatment of asylum seekers who arrived in Australia on or after 13 August 2012, Australia differentiates between asylum seekers depending upon their mode of arrival, by boat or plane. Only those 'unauthorised maritime arrivals' are vulnerable to regional processing. It appears that there may be discrimination among different groups of asylum seekers contrary to the ICCPR. The differential treatment may also amount to penalisation of those arriving by boat, contrary to the Refugees Convention.

Fair and efficient processing of asylum claims

Apart from the legality of the regional processing regime itself, UNHCR has stressed that claims to refugee status should be processed in a fair and effective manner. While the facts are not fully available to the Commission, it appears that thousands of claims to refugee status are not being processed by Australia in a timely or transparent way. This undermines the right of asylum seekers to claim asylum. The Commission is concerned that, where processing is the responsibility of Papua New Guinea or Nauru, these countries do not have the institutional capacity to meet international standards. Many of the over 8,000 asylum seekers arriving since 13 August 2012 have not had their claims processed and live in a legal twilight zone, uncertain about their futures, and may be vulnerable to depression and mental illness.

Rights of children and families

The regional processing regime poses particular legal problems as it applies to children and families. The Convention on the Rights of the Child, for example, requires that the best interests of the child are a primary consideration when decisions are being made that concern them. The Commission finds it hard to accept that the transfer of children and families to Manus Island and Nauru, or their detention in Australia, is in their best interests. Furthermore, the Commission is concerned by the Minister's assertion that 'national interest' considerations such as the integrity of Australia's migration system will 'generally outweigh' the best interests of a child.

Bridging visas

The decision by the Australian Government to release some asylum seekers who arrived by boat on or after 13 August 2012 into the community on bridging visas has been welcomed by the Commission as a humane and legally appropriate response to the growing number of detainees in Australian facilities. However, for the Government to deny this particular group of asylum seekers the right to work, pursuant to the 'no advantage' policy, is likely to breach provisions of the International Covenant on Economic, Social and Cultural Rights. In other contexts, UNHCR has recommended that, at most, asylum seekers might be denied, on a non-discriminatory basis, access to the labour market for no longer than six months. The Commission considers that the regime of forced unemployment for a prolonged period of years may fail the 'necessary and proportionate' test for legitimate limits on asylum seekers' rights.

Recommendations

In light of the legal issues raised by the regional processing package of legislation, the Commission makes several recommendations. The Commission submits that the regional processing regime be dismantled by repealing the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) and that the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 should not proceed. In particular, the Commission urges the Australian Government to ensure that asylum seekers' claims are assessed speedily and fairly under Australian law, that asylum seekers are transferred into the community unless

they pose a specified risk that justifies their continued detention, and that those released on bridging visas are granted the right to work.

Gillian Triggs
President
Australian Human Rights Commission

17th January, 2013

1 Recommendations

Recommendation 1: The *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) should be repealed and the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth) should not proceed.

Recommendation 2: Asylum seekers who arrive in Australia by boat on or after 13 August 2013 should have their claims for protection processed under Australian law, in a timely and efficient manner, and should be transferred into the community on the Australian mainland unless a specified risk justifies their continuing detention in a facility.

Recommendation 3: The *Migration Amendment Regulation 2012 (No. 5)* (Cth) should be amended to ensure greater access to family reunion for unaccompanied minors arriving by boat on or after 13 August 2012.

Recommendation 4: The *Migration Regulations 1994 - Specification under paragraphs 050.613A(1)(b) and 051.611A(1)(c) - Classes of Persons - November 2012* should be repealed. Asylum seekers who arrive in Australia by boat on or after 13 August 2013 and are transferred into the community should be granted permission to work.

2 Introduction

1. The Australian Human Rights Commission makes this submission to the Parliamentary Joint Committee on Human Rights (the Committee) in its *Examination of the Migration (Regional Processing) package of legislation*. The Commission welcomes the Committee's examination of this package of legislation and related bills and instruments, as the package engages a number of fundamental human rights.
2. Over the last decade the Commission has undertaken extensive work in the area of Australian law, policy and practice relating to asylum seekers, refugees and immigration detention. This has involved conducting national inquiries, examining proposed legislation, monitoring and reporting on immigration detention and investigating complaints from individuals subject to Australia's immigration laws and policies.¹ More specifically, the Commission's work in this area has included engagement regarding the health and mental health impacts of prolonged and indefinite immigration detention,² and the risk of breaches of Australia's human rights obligations posed by third country arrangements for the processing of asylum seekers' claims.³ This submission draws upon that body of work.
3. The 'regional processing' regime involves the transfer of asylum seekers, who have arrived in Australia by boat on or after 13 August 2012, to third countries for the processing of their claims for protection under the laws of those third countries. The regime is contained in the *Migration Legislation Amendment (Regional Processing and Other Measures) Act*

2012 (Regional Processing Act) and the related bills and instruments which are under examination by the Committee.

4. This 'regional processing' regime raises a number of questions about whether Australia is complying with its international human rights obligations as set out in the international human rights treaties with which Australia has agreed to comply, including the *International Covenant on Civil and Political Rights* (ICCPR),⁴ the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),⁵ the *Convention on the Rights of the Child* (CRC),⁶ the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT),⁷ and the *Convention Relating to the Status of Refugees* and its Protocol (Refugee Convention).⁸

3 Background

5. In September 2012, the Australian Government commenced transferring asylum seekers who had arrived in Australia by boat at an excised offshore place to Nauru for processing of their claims for protection. In November 2012, the Australian Government commenced the transfer of asylum seekers to Manus Island in Papua New Guinea (PNG). These asylum seekers' claims for protection will be processed under the laws of those third countries.
6. These transfers follow the release of the report of the Expert Panel on Asylum Seekers on 13 August 2012, the passage of amendments to the *Migration Act 1958* (Cth) (Migration Act), the designations of Nauru and PNG as 'regional processing' countries, and the adoption of Memoranda of Understanding between the governments of Australia and Nauru and the governments of Australia and PNG. Further amendments to the Migration Act which are currently before Parliament would extend liability to be transferred to 'regional processing countries' to asylum seekers who arrive by boat on the Australian mainland.
7. The 'regional processing' regime has been established with the aim of implementing the principle of 'no advantage' set out in the report of the Expert Panel on Asylum Seekers. The 'no advantage' principle is the principle that asylum seekers who come to Australia by boat will gain no benefit through doing so, as compared with if they waited elsewhere to have their claims assessed and a durable solution provided if they are found to be refugees.⁹
8. The 'no advantage' principle is intended to apply to any asylum seeker who arrives in Australia by boat without authorisation from 13 August 2012 onwards, whether or not they are sent to a 'regional processing country'. The Australian Government has said that it intends that asylum seekers arriving by boat 'should not be resettled into Australia until they would have under normal regional arrangements.'¹⁰ This will apply even after an asylum seeker is determined under Australian, Nauruan or PNG law to be a refugee. The Australian Government has said it expects this waiting period to be in the order of five years.¹¹ The United Nations High

Commissioner for Refugees (UNHCR) has expressed serious concern about the basis of the ‘no advantage’ principle, explaining that there is no ‘average’ time for resettlement.¹²

9. Below is a chronology of the major events that have culminated in the transfer of asylum seekers to third countries for processing of their claims for protection, including:
- passage of the Regional Processing Act
 - introduction of the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth) (the Unauthorised Maritime Arrivals Bill)
 - the creation of agreements with the Governments of Nauru and PNG
 - the designation of Nauru and PNG as ‘regional processing countries’
 - the transfer of asylum seekers to Nauru and to PNG
 - the treatment of asylum seekers who are subject to the ‘regional processing’ regime but who remain in Australia.

3.1 Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth)

10. On 18 August 2012, the Regional Processing Act commenced, amending the Migration Act and the *Immigration (Guardianship of Children) Act 1946* (Cth) (IGOC Act).
11. Following these amendments, the Minister for Immigration and Citizenship (the Minister) may make a legislative instrument which designates a country as a ‘regional processing country’. Asylum seekers who have arrived unauthorised in Australia’s excised offshore territory on or after 13 August 2012 may be sent to such designated countries to have their claims for protection processed. In exercising this power to designate a country, the only condition is that the Minister thinks that the designation is in the national interest.¹³ In considering the national interest, the Minister must have regard to whether the country in question has given any assurances that:
- transferred asylum seekers will not be subject to *refoulement* within the meaning of article 33(1) of the Refugee Convention
 - it will make an assessment, or permit an assessment to be made, of whether transferred asylum seekers are refugees.¹⁴
12. However, the designation of a country ‘need not be determined by reference to the international obligations or domestic law of that country’.¹⁵
13. There is some parliamentary oversight of the designation process. The Minister must provide both Houses of Parliament with copies of the following documents (although a failure to table these documents does not affect the validity of the designation):¹⁶

- the instrument of designation
 - a statement of the Minister's reasons for thinking that it is in the national interest to designate the country
 - a copy of any written agreement (whether legally binding or not) between Australia and the country
 - a statement about the Minister's consultations with the United Nations High Commissioner for Refugees (UNHCR)
 - a summary of any advice received from the UNHCR
 - a statement about any arrangements that are in place or are to be put in place in the country for the treatment of persons taken to that country.¹⁷
14. The designation comes into effect as soon as both Houses of Parliament have passed a resolution approving the designation, or, if there has been no resolution disapproving the designation, after five sittings days from the date the instrument was tabled.¹⁸ The legislation provides that an officer must take an offshore entry person to a 'regional processing country' as soon as 'reasonably practicable'.¹⁹ However, the Minister has discretion to determine, if it is in the public interest to do so, that a person does not have to be taken to a 'regional processing country'.²⁰
15. The Regional Processing Act also amended the Migration Act to require the mandatory detention of 'unlawful non-citizens' who arrive in 'excised offshore places', as it does for those who arrive on the Australian mainland.²¹ While it has long been Australian Government policy that asylum seekers who arrive unauthorised in excised territories are detained, such detention was previously discretionary under Australian law.
16. Finally, the Regional Processing Act amended the IGOC Act. The IGOC Act provides that the Minister for Immigration and Citizenship is the guardian of 'non-citizen' unaccompanied minors who arrive in Australia.²² However, the IGOC Act has been amended so that the Minister ceases to be the guardian of unaccompanied minors who are taken from Australia to a 'regional processing country' under the Migration Act.²³
17. The IGOC Act was further amended to make clear that it does not affect the operation of migration law.²⁴ This was done in order to give effect to the Australian Government's intention that the Minister's written consent under section 6A of the IGOC Act, as legal guardian of an unaccompanied minor, is not required for that child to be removed, taken or deported from Australia under the Migration Act (including under the 'regional processing' regime).²⁵

3.2 Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012

18. On 31 October 2012, the Unauthorised Maritime Arrivals Bill was introduced into the House of Representatives. This Bill is now the subject

of an Inquiry by the Senate Legal and Constitutional Affairs Committee, which has a reporting date of 5 February 2013. The Commission has made a submission to this Inquiry, recommending that the Bill not be passed.²⁶

19. The Unauthorised Maritime Arrivals Bill seeks to amend the Migration Act to give effect to recommendation 14 of the report of the Expert Panel on Asylum Seekers. The Bill, if passed, will amend the Migration Act so that asylum seekers who reach anywhere on the Australian mainland by boat, without authorisation, will have the same status under domestic law as those who arrive on or after 13 August 2012 at an ‘excised offshore place’. The effect of the amendment will be that asylum seekers who arrive by boat at the Australian mainland will also be liable for transfer to a third country for the processing of their protection claims.
20. If passed, the Bill would also amend s 198AE of the Migration Act. Section 198AE provides the Minister with discretion to exempt a person from transfer to a third country for processing if the Minister thinks it is in the public interest to do so. The Bill would insert a new sub-section clarifying the Minister’s power to revoke or vary a previous determination to exempt a person, if he or she considers it is in the public interest to do so. This power to reverse an exemption has the consequence that an asylum seeker who has been exempted and is living in the Australian community whilst having their claim processed could at any point be ‘unexempted’ and transferred to a ‘regional processing’ country.
21. The Bill also provides for a person who has been brought to Australia from a ‘regional processing country’ for a temporary purpose, such as medical treatment, to be returned to the other country even if they have already been recognised as a refugee.²⁷

3.3 Agreements reached with the Governments of Nauru and Papua New Guinea

22. On 29 August 2012 the Governments of Australia and Nauru signed a Memorandum of Understanding (MOU) ‘Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues’.²⁸ On 8 September 2012 the Governments of Australia and PNG signed an MOU ‘Relating to the Transfer to and Assessment of Persons in Papua New Guinea, and Related Issues’.²⁹ Neither MOU specifies which country has responsibility for the processing of the claims of transferred asylum seekers. Nor does either provide details as to how the respective governments understand the apportionment of legal responsibilities.

3.4 Designation of Nauru and Papua New Guinea as ‘regional processing countries’

23. On 10 September 2012 the Minister signed the legislative instrument designating Nauru as a ‘regional processing country’ under the Migration Act. The Minister tabled the instrument and accompanying documents in

Parliament, including his statement of reasons for thinking that the designation was in the national interest. On 12 September 2012, the designation of Nauru as a ‘regional processing country’ came into effect, having been approved by both Houses of Parliament.

24. On 9 October 2012, the Minister signed the legislative instrument designating PNG as a ‘regional processing country’ under the Migration Act and tabled the legislative instrument and the accompanying documents in Parliament. On 10 October 2012, the designation of PNG as a ‘regional processing country’ came into effect, having been approved by both Houses of Parliament.

3.5 Transfer of asylum seekers to Nauru and Papua New Guinea

25. On 13 September 2012 transfers began under the new regime, with a group of 30 asylum seekers being sent from Christmas Island to Nauru.³⁰ As at 5 December, the UNHCR reported that there were 387 asylum seekers in Nauru,³¹ comprising adult men from a range of countries, including Sri Lanka, Afghanistan, Iran and Iraq.
26. On 10 September 2012 the Australian Government announced that it was contracting Transfield Services, International Health and Medical Services (IHMS) and the Salvation Army to provide a range of services in relation to the transfer arrangements, and that the operation of the three contracts would be jointly overseen by the governments of Australia and Nauru.³² It announced that:
- Transfield Services would provide catering, cleaning, security, transport and other services relating to facilities
 - IHMS would provide medical support, including mental health services
 - the Salvation Army would provide case management, community liaison, and programs and activities.
27. On 21 November 2012, the Australian Government announced that Canstruct had been contracted by the Department of Immigration and Citizenship (DIAC) to undertake construction services of more permanent facilities. As at late December 2012, the asylum seekers were being accommodated in tents, pending the construction of the more permanent facilities. The Commission understands that the asylum seekers have not been granted freedom of movement on Nauru.
28. The Commission understands that as at 3 December 2012 processing of asylum seekers’ claims under Nauruan legislation had not commenced, but that preliminary interviews were being conducted by staff of DIAC. The Australian Government has said that it expects ‘assessment of claims’ of asylum seekers on Nauru to commence in early 2013.³³
29. Following the designation of PNG, the first group of asylum seekers arrived on Manus Island on 21 November 2012. This group was comprised of seven families, including 15 adults and four children of Sri

Lankan and Iranian nationalities.³⁴ Further transfers followed, with the result that, on 5 January 2013, it was reported that there were 155 asylum seekers on Manus Island, including 30 children.³⁵

30. The Minister has announced that 'operations at the centre will be overseen by both the Australian and PNG governments'. The Minister has also said that welfare services will be provided by the Salvation Army, health services by IHMS, operational support services by G4S and specialised children's services including child protection and education activities by Save the Children.³⁶
31. The centre in which asylum seekers are housed on Manus Island is 'currently a combination of temporary and refurbished structures'.³⁷ The Commission understands that the asylum seekers have not been granted freedom of movement on Manus Island.
32. The Australian Government has given no indication as to when processing of asylum claims under PNG law will begin for those on Manus Island.

3.6 Asylum seekers who are subject to the 'regional processing' regime but who remain in Australia

33. As the Minister has acknowledged, the number of asylum seekers who have arrived by boat to Australia on or after 13 August 2012 is significantly greater than the number of people who will be able to be accommodated on Nauru or on Manus Island.³⁸ In November 2012 it was reported that around 8000 asylum seekers had arrived to Australia by boat since mid-August 2012.³⁹ By contrast, it has been reported that the collective maximum capacity of the facilities on Nauru and Manus Island will be about 2,100 people.⁴⁰
34. Consequently, a large number of asylum seekers who have arrived in Australia by boat on or after 13 August 2012 remain in Australia. The majority of the people who remain in Australia are currently in detention either on Christmas Island, or on the Australian mainland.
35. On 21 November 2012, the Minister announced that some asylum seekers who had arrived since 13 August 2012 would be given bridging visas and permitted to live in the community while their claims for protection were assessed.⁴¹ However, the Minister made clear that those asylum seekers who were given bridging visas would remain subject to the 'no advantage' principle in that:
 - while on the bridging visa they 'will have no work rights and will receive only basic accommodation assistance, and limited financial support'
 - they would not be issued with a permanent protection visa if found to be a refugee 'until such time that they would have been resettled in Australia after being processed in our region'.⁴²

36. The Minister also indicated that those asylum seekers who are permitted to remain in Australia on bridging visas remain liable to transfer to a third country at any point unless and until they are granted a permanent protection visa.⁴³

4 The objectives of the *Migration (Regional Processing and Other Measures) Act 2012 (Cth)*

37. The Regional Processing Act inserted s 198AA into the Migration Act, setting out the reason for enacting a regime of third country processing. Section 198AA provides:

This Subdivision is enacted because the Parliament considers that... people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed.

38. To address these problems, the Australian Government, through passage of the Regional Processing Act and the other instruments being examined by the Committee, adopted measures which, as is evident from the description above, have altered the system for processing asylum seekers' claims for protection, based on mode of arrival. The rationale for this response is that it may change the thinking of asylum seekers as to whether to board a boat to Australia,⁴⁴ and (consequently) to engage a people smuggler for this purpose.
39. The Commission agrees with the Australian Government that the loss of the lives of asylum seekers at sea is a serious problem. The Commission emphasises, however, that the measures adopted to address this problem must be consistent with Australia's international human rights obligations.
40. In the Commission's submission to the Expert Panel, the Commission set out a range of measures which the Australian Government could adopt to provide better protection to asylum seekers and refugees in the region, which would be consistent with Australia's human rights obligations.⁴⁵
41. The impact of the Australian Government's new 'regional processing' regime extends far beyond addressing the immediate risk to the safety of certain asylum seekers at sea. In the Commission's view, the Australian Government's creation of a new 'regional processing' regime exposes asylum seekers who arrive in Australia by boat to significant risk of violations of multiple human rights under various human rights treaties (as discussed below).

5 The human rights obligations Australia owes to asylum seekers who are subject to the ‘regional processing’ regime

5.1 *Australia’s obligations to those who have been transferred outside of its territory*

(a) *Question of effective control*

42. It is clear that Australia’s obligations under the ICCPR and other international instruments apply while persons are detained in Australia (including on Christmas Island), and during their transfer to a third country. Also, as a matter of international law, Australia’s human rights obligations may extend to its actions outside Australian territory.⁴⁶ If Australia has ‘effective control’ over the treatment of asylum seekers whom it has transferred to another country, then it is obliged to continue to treat them consistently with the human rights obligations it has agreed to be bound by.⁴⁷ The Commission is currently seeking legal advice on the question of whether the Australian Government has effective control over the treatment of asylum seekers in Nauru and PNG under the current arrangements.

(b) *Responsibility for extra-territorial violations flowing from Australia’s actions*

43. Even if a State does not have effective control over a situation in another State’s territory, it cannot avoid its own international law obligations by transferring asylum seekers to a third country;⁴⁸ it may remain liable for the consequences of its action of transferring them. The UN Human Rights Committee (HRC) has stated that a State Party will be responsible for extra-territorial violations of the ICCPR if its actions expose a person to a ‘real risk’ that his or her rights will be violated,⁴⁹ and this risk could reasonably have been anticipated by the State.⁵⁰ A State may be responsible if it is ‘a link in the causal chain that would make possible violations in another jurisdiction.’⁵¹ The HRC has noted that ‘the risk of an extra-territorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time’.⁵²

44. The Australian Government has acknowledged that it has obligations under articles 6 and 7 of the ICCPR and article 3 of CAT not to send any person to a country where they are at a ‘real risk’ of ‘arbitrary deprivation of life, torture or cruel, inhuman or degrading treatment or punishment (also referred to as ‘*non-refoulement* obligations under the ICCPR and CAT’).⁵³

45. The Commission notes that Australia also owes *non-refoulement* obligations in relation to the rights protected under the CRC. The Committee on the Rights of the Child has stated that:

[I]n fulfilling obligations under the Convention, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in

the country to which removal is to be effected or in any country to which the child may subsequently be removed. Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction.⁵⁴

46. In light of these obligations, the Australian Government will need to carefully assess and monitor the situation in Nauru and PNG to determine whether there is a real risk of violations of rights in the ICCPR, CAT or CRC. If a real risk is determined to exist, the Australian Government should not proceed with the transfer.

(c) *Australia's responsibility to implement treaty obligations in good faith*

47. In addition, a basic principle of international law is that States have a responsibility to interpret and implement their treaty obligations in good faith.⁵⁵ This duty is breached if a combination of acts or omissions has the overall effect of rendering the fulfilment of treaty obligations obsolete, or defeating the object and purpose of a treaty. Australia's specific international human rights obligations to asylum seekers are detailed in the following sections.

5.2 Summary of the human rights obligations engaged by the 'regional processing' regime

48. The Australian Government has acknowledged that the 'regional processing' regime engages a significant number of human rights.⁵⁶ The Commission is concerned that the treatment of asylum seekers under this regime may lead to breaches of their fundamental human rights under a number of the treaties to which Australia is a party.
49. Specifically, the Commission is concerned that the arrangements under the Regional Processing Act to transfer asylum seekers, who arrive in Australia by boat, to 'regional processing countries' (currently Nauru and PNG) for the processing of their claims for protection:
- may lead to breaches of Australia's *non-refoulement* obligations under the ICCPR, CAT, CRC and the Refugee Convention
 - may be inconsistent with Australia's other obligations under the ICCPR and CAT, as they:
 - provide for the differential treatment of asylum seekers depending on their mode of arrival, which may breach the right in article 26 of the ICCPR to equal protection of the law and non-discrimination
 - provide for mandatory and/or prolonged detention of asylum seekers who arrive by boat, and therefore expose both those asylum seekers transferred to third countries and those in Australia who remain liable to transfer to the risk of arbitrary detention, which may violate article 9(1) of the ICCPR

- fail to provide asylum seekers deprived of their liberty with effective access to judicial review of the lawfulness (including arbitrariness) of their detention, as required by article 9(4) of the ICCPR
 - allow asylum seekers transferred to third countries, who are deprived of their liberty, to be held in conditions which may breach their right to be treated with humanity and with respect for their inherent dignity, contrary to article 10 of the ICCPR
 - expose asylum seekers who are subject to prolonged detention under the ‘no advantage’ principle to the risk of cruel, inhuman or degrading treatment (article 7 of the ICCPR and article 16 of CAT)
 - may affect families in a way which raises issues in relation to the right to freedom from arbitrary or unlawful interference with family (article 17 of the ICCPR)
 - may breach Australia’s obligation under article 31 of the Refugee Convention not to ‘penalise’ asylum seekers for arriving in Australia unauthorised, because the arrangements only apply to asylum seekers who arrive unauthorised and by boat
 - to the extent that the arrangements allow for the detention and transfer from Australia of child asylum seekers (including unaccompanied minors) who arrive by boat, are inconsistent with Australia’s obligations under the CRC, as they:
 - breach the right of children to enjoy all the rights in the CRC without discrimination of any kind (article 2 of the CRC)
 - fail to treat the best interests of the child as a primary consideration in all decision-making concerning children (article 3(1) of the CRC)
 - may breach the right of children to preserve their identity, including family relations, without unlawful interference (article 8(1) of the CRC)
 - fail to respect the right of unaccompanied minors to be provided with special protection and assistance (article 20 of the CRC)
 - fail to ensure that child asylum seekers receive appropriate protection and humanitarian assistance (article 22 of the CRC)
 - breach the right of children to only be detained as a measure of last resort, and for the shortest appropriate period of time (article 37(b) of the CRC).
50. The Commission is also concerned about the effects of the *Migration Amendment Regulation 2012 (No. 5)* (Cth) on the ability of asylum seekers who arrive by boat to reunify with their family in Australia. The Commission is concerned that as this regulation makes family reunification more difficult, and in the case of unaccompanied minors, practically impossible, it may be inconsistent with:

- the requirement in article 3(1) of the CRC to treat a child's best interests as a primary consideration
 - the right to protection of the family in article 23 of the ICCPR
 - the right of a child in article 10(1) of the CRC to have applications for family reunification dealt with in a positive, humane and expeditious manner.
51. The Commission also has serious concerns about the *Migration Regulations 1994 - Specification under paragraphs 050.613A(1)(b) and 051.611A(1)(c) - Classes of Persons - November 2012*. This legislative instrument gives effect to the Australian Government's intention that asylum seekers who arrived on or after 13 August 2012 will not have any work rights if they are granted a bridging visa to stay in Australia. The Commission is concerned that the prohibition on work may breach the right to work in article 6 of the ICESCR, and, as a consequence, may also result in breaches of the right to an adequate standard of living (article 11).

5.3 The nature of Australia's obligations under the Refugee Convention

52. The Refugee Convention is the principle international instrument that sets out Australia's obligations in relation to people seeking asylum. Although the Commission recognises that the Refugee Convention is not listed in s 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Commission considers that the full human rights impact of the Bill cannot be considered in the absence of reference to this Convention. The Refugee Convention contains obligations which are binding on Australia, and the Migration Act, through an 'elaborated and interconnected set of statutory provisions', is designed to respond to Australia's obligations under that Convention.⁵⁷ The High Court has observed that the Refugee Convention informs the construction of the Migration Act and the *Migration Regulations 1994* (Cth).⁵⁸
53. Australia's obligations under the Refugee Convention include to:
- respect the principle of *non-refoulement* (article 33)
 - ensure that asylum seekers are not penalised for unauthorised arrival (article 31).
54. Further to these obligations, the Refugee Convention sets out a number of civil, political, social and economic rights which accrue to refugees once they are lawfully present or lawfully staying in a country. In *Plaintiff M70/2011 v Minister for Immigration and Citizenship*⁵⁹ the High Court observed that obligations of signatories to the Refugee Convention other than *non-refoulement* include:⁶⁰
- to apply the provisions of the Convention to refugees without discrimination as to race, religion or country of origin

- to accord to refugees within a signatory's territory treatment at least as favourable as that accorded to its nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children
 - to accord to refugees free access to the courts of law
 - to accord to refugees lawfully staying in its territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances as regards the right to engage in wage-earning employment
 - to accord to refugees the same treatment as is accorded to nationals with respect to elementary education
 - to accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.
55. The Refugee Convention does not guarantee a person the right to be granted asylum, and is silent on the procedures by which refugee status is determined. However, it is well accepted that the principle of *non-refoulement* requires 'access to fair and effective procedures for determining status and protection needs'.⁶¹
56. There is considerable overlap between the seven human rights treaties and the Refugee Convention. UNHCR has stated that 'international refugee law and international human rights law are complementary and mutually reinforcing legal regimes'.⁶² Key areas of overlap are illustrated in the table below.

Right	Refugee Convention provision	Other human rights treaty provisions
<i>Non-refoulement</i>	Art 33(1)	CAT art 3(1) ICCPR art 7 CRC arts 6 and 37
Non-penalisation/Non-discrimination	Art 31(1)	ICCPR arts 2, 26 ICESCR art 2 CRC art 2 ICERD arts 1,2
Access to courts/due process	Art 16 Art 32(2)	ICCPR arts 13, 14 and 26
Freedom of movement/ right to liberty	Art 31(2)	ICCPR art 12 ICCPR art 9

Freedom of association	Art 15	ICCPR art 22
Right to work/ Just and favourable conditions of work	Art 17(1) Arts 17(2)-(3), 18 and 24(1)	ICESCR art 6 ICESCR art 7
Housing/adequate standard of living	Art 21	ICESCR art 11
Social security and welfare	Art 24(1)(b)	ICESCR art 9
Education	Art 22	ICESCR art 13

5.4 Australia's obligations to provide effective remedies for breaches of human rights

57. Australia has either explicit or implicit obligations under the ICCPR, ICESCR, CAT, and the CRC to ensure that any person whose rights are violated has access to an effective remedy, including, if necessary, a judicial remedy.⁶³
58. According to the HRC, an 'effective remedy' requires reparation to the person whose rights have been violated. Reparations can 'involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices'.⁶⁴
59. The HRC has the function of hearing complaints lodged by individuals alleging violation of their rights under the ICCPR, and providing views as to whether the author's rights were breached. If the HRC finds that there has been a rights violation, it can provide views as to what steps the State Party should take to fulfil its obligation to provide an effective remedy.
60. In its comments regarding two separate communications from persons held by Australia in immigration detention, after finding Australia in breach of the authors' rights under the ICCPR, the HRC specifically stated that in order to fulfil its obligation to provide an effective remedy Australia should, amongst other measures, pay 'adequate' or 'appropriate' compensation to the victims of the violations.⁶⁵
61. In the case of the rights in the ICESCR, the UN Committee on Economic, Social and Cultural Rights has noted that although administrative remedies can sometimes be enough, 'whenever a Covenant right cannot

be made fully effective without some role for the judiciary, judicial remedies are necessary'.⁶⁶

6 The Australian Government's approach to the human rights engaged by the Regional Processing Act

62. On 15 November 2012, at the request of the Parliamentary Joint Committee on Human Rights, the Minister wrote a letter containing the Australian Government's views as to the compatibility of the Regional Processing Act with its human rights obligations (the compatibility letter).⁶⁷ In the compatibility letter the Minister confirms 'the Government's clear view that the Act complies with Australia's human rights obligations'. There are a number of aspects of this letter (which is effectively a retrospective Statement of Compatibility for the Regional Processing Act) upon which the Commission wishes to comment.
63. The Minister rightly points out that in order for Australia to meet its human rights obligations, it is not sufficient that the relevant legislation governing an area of policy is judged to be consistent with its international obligations. Rather, the way that the legislation is administered, and the policies and practices which are implemented, must also be scrutinised. In this respect, the Commission notes that a lack of publically available information regarding the administration of regional processing measures makes it difficult to assess whether the Australian Government's non-legislative conduct complies with Australia's human rights obligations.
64. In terms of the specific human rights discussed in the compatibility letter, the Commission has concerns about various aspects of the Australian Government's reasoning which led it to the conclusion that the Regional Processing Act is consistent with Australia's human rights obligations. These include:
- the Australian Government's interpretation of the right to liberty and security in article 9 of the ICCPR, specifically in terms of when detention will not be 'arbitrary', and what is required under article 9(4) in terms of a right to challenge the legality of detention
 - the Australian Government's view as to what safeguards are adequate to ensure that Australia does not breach its *non-refoulement* obligations under articles 6 and 7 of the ICCPR and article 3 of CAT when transferring asylum seekers to 'regional processing countries'
 - the Australian Government's understanding of the type of 'best interests' analysis that is required under article 3(1) of the CRC for all actions concerning children
 - the failure of the Australian Government to address the fact that other rights under the CRC (such as articles 10, 20, 22 and 37(b)) are engaged and potentially violated by the Regional Processing Act

- the Australian Government's interpretation of what limitations on the right to protection of the family in articles 17 and 23 of the ICCPR are permissible.

65. The Commission will further elaborate on its views as to the specific contents of the compatibility letter in the course of discussing the human rights concerns raised by the 'regional processing' regime in the sections below.

7 The Australian Government's approach to human rights in the instruments of designation

7.1 The designations of Nauru and Papua New Guinea

66. As noted above, the designations of Nauru and of PNG as 'regional processing countries' came into effect on 12 September 2012 and 10 October 2012 respectively, having been approved by both Houses of Parliament.⁶⁸

67. On 10 September 2012 the Minister signed the legislative instrument designating Nauru as a 'regional processing country' under the Migration Act. The Minister tabled the instrument and accompanying documents in Parliament, including his statement of reasons for thinking that the designation was in the national interest, in which he stated:

On the basis of the material set out in the submission from the Department, I think that it is not inconsistent with Australia's international obligations (including but not limited to Australia's obligations under the Refugee Convention) to designate Nauru as a regional processing country ... However, even if the designation of Nauru to be a regional processing country is inconsistent with Australia's international obligations, I nevertheless think that it is in the national interest to designate Nauru to be a regional processing country.⁶⁹

68. The statement of reasons continued:

In considering whether I think it is in the national interest to designate Nauru to be a regional processing country, in addition to the matters outlined above I have:

- had regard to the UNHCR advice;
- chosen not to have regard to the international obligations or domestic law of Nauru.⁷⁰

69. The Minister made identical statements regarding his choice not to consider international obligations in relation to the designation of PNG on 9 October 2012.⁷¹

70. The documents tabled with the instrument of designation of Nauru included a letter from the United Nations High Commissioner for Refugees (UNHCR), António Guterres, responding to a request by the Minister for his views in relation to the possible designation of Nauru as a 'regional processing country'. The UNHCR letter outlined the 'general

principle that asylum-seekers arriving at the frontier of a Convention State fall within the responsibility of that State, which includes their access to a fair and effective process'.⁷²

71. The UNHCR noted that arrangements to transfer asylum seekers to another country are a 'significant exception' to normal practice, should only be pursued as part of a burden-sharing arrangement to more fairly distribute responsibilities, and should involve countries with appropriate protection safeguards, including:
- respect for the principle of *non-refoulement*
 - the right to asylum (involving a fair adjudication of claims)
 - respect for the principle of family unity and the best interests of the child
 - the right to reside lawfully in the territory until a durable solution is found
 - humane reception conditions, including protection against arbitrary detention
 - progressive access to Convention rights and adequate and dignified means of existence, with special emphasis on education, access to health care and a right to employment
 - special procedures for vulnerable individuals
 - durable solutions for refugees within a reasonable period.⁷³
72. The UNHCR's letter further stated that 'it is not clear from the information available to us that transfer of responsibilities for asylum seekers to Nauru is fully appropriate'.⁷⁴ The letter included a recommendation that the legal responsibilities of the Australian and the Nauruan Governments be very clearly set out in the formal arrangements, and that oversight mechanisms be established to ensure their full implementation in practice.⁷⁵ The UNHCR made an identical recommendation in a letter of 9 October 2012 in relation to the designation of PNG (discussed further below).
73. In relation to the designation of Nauru, the UNHCR noted the apparent contradiction between the tenor of the MOU (that legal responsibility would be shared) and the Australian Government officials' indications that Australia did not see itself as having any legal responsibilities under the Convention after an asylum seeker has been transferred to Nauru. The UNHCR proceeded to question 'whether Nauru has presently the ability to fulfil its Convention responsibilities'.⁷⁶
74. The UNHCR raised similar concerns in relation to PNG in a letter to the Minister regarding the designation of PNG as a 'regional processing country'. In that letter the UNHCR reiterated the earlier advice provided in relation to the designation of Nauru, and raised the following specific concerns with regard to the designation of PNG:

- that PNG, while having acceded to the Refugee Convention, retains seven significant reservations that affect a range of economic, social and cultural rights to which refugees would ordinarily be entitled under the Convention
- that there is in PNG no effective legal or regulatory framework to address refugee issues
- that PNG has no immigration officers with the experience, skill or expertise to undertake refugee status determination under the Refugee Convention
- that there remains a risk of refoulement despite written undertakings
- that the quality of protection currently offered in PNG remains of concern.⁷⁷

75. The UNHCR concluded that:

it is difficult to see how Papua New Guinea alone might meet the conditions set out in UNHCR's paper on maritime interception and the processing of international protection claims... it is the UNHCR's assessment that Papua New Guinea does not have the legal safeguards nor the competence or capacity to shoulder alone the responsibility of protecting and processing asylum-seekers transferred by Australia.⁷⁸

7.2 The Commission's concerns regarding the designations of Nauru and Papua New Guinea

76. Despite the concerns expressed by the UNHCR, the Minister proceeded with the designations of Nauru and PNG. The Statements of Reasons, the Memoranda of Understanding and the Statements about Arrangements all make clear that the practical arrangements concerning the situation of asylum seekers transferred to Nauru and PNG are yet to be finalised. In particular, the apportionment of legal responsibilities between Australia and the two 'regional processing countries' has not been addressed in any of the documents tabled in Parliament.
77. As noted above, the only condition for the exercise of the Minister's power to designate a country as a 'regional processing country' under section 198AB of the Migration Act is that the Minister thinks it is in the national interest to do so.⁷⁹ Although when considering the national interest the Minister must have regard to any assurances concerning *non-refoulement* and assessment of claims for asylum, the designation of a country 'need not be determined by reference to the international obligations or domestic law of that country'.⁸⁰
78. The reasons given for the designations being in the 'national interest' and therefore permitted by the legislation despite the real risk of breaches of Australia's international obligations, as identified by the UNHCR, included:
- Nauru and PNG have given Australia the assurances referred to in section 198AB(3)(a)(i) and (ii) of the Migration Act, and other assurances.

- The Minister considers that designating Nauru and PNG as regional processing countries will ‘discourage irregular and dangerous maritime voyages and thereby reduce the risk of the loss of life at sea’.
 - The Minister considers that designating Nauru and PNG will promote the maintenance of a fair and orderly Refugee and Humanitarian Program that retains the confidence of the Australian people.
 - The Minister considers that designating Nauru and PNG will promote regional cooperation in relation to irregular migration and address people smuggling and its undesirable consequences.
 - The Minister considers that the arrangements that are already in place and are proposed to be put in place in Nauru and PNG are satisfactory. In both Statements of Reasons the Minister notes that the arrangements are still the subject of negotiations and that facilities in both ‘regional processing countries’ are still being established.⁸¹
79. The Commission is concerned that the requirements for a designation of a ‘regional processing country’, as well as the actual designations and supporting documentation, appear to intend to make compliance with Australia’s international human rights obligations discretionary. Under s 198AB of the Migration Act the Minister is not required to consider Australia’s obligations under international human rights treaties in designating a country. In practice, the two countries which the Minister has designated are countries about which the UNHCR has expressed significant concerns, in terms of the safeguards in place in those countries to prevent violations of the rights of asylum seekers who are sent there.
80. Further, the Minister has stated, in designating Nauru and PNG as ‘regional processing countries’, that even if he thought that the decision to designate those countries was ‘inconsistent with Australia’s international obligations’, he nevertheless would proceed with the designations, because to do so was ‘in Australia’s national interest’.
81. The Commission considers that a blanket statement that Australia’s ‘national interest’ may justify the limitation of human rights goes beyond the circumstances in which the rights set out in the treaties to which Australia is a party may be limited. For example, article 4 of the ICCPR contemplates that some (but not all) rights may be limited (or ‘derogated from’) in a ‘time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed’.
82. It is difficult to see how the arrival of asylum seekers to Australia, by boat, could be conceived of as a public emergency that threatens the life of the nation. The Australian Government has made no suggestion to that effect, nor has there been any official proclamation or notification to the Secretary-General of the United Nations that Australia intends to derogate from its obligations under any human rights instruments.

83. An additional concern for the Commission is that the safeguard of parliamentary scrutiny of designations is not assured by the legislation. As discussed above, in designating a ‘regional processing country’, the Minister is required by s 198AC of the Migration Act to lay before Parliament five documents, which may provide for a level of parliamentary scrutiny of the reasoning behind the designation.⁸² However, failure to lay the additional documents before Parliament with the Instrument of Designation, or indeed the non-existence of some or all of the documents, does not affect the validity of the designation.⁸³

8 Australia’s obligations in relation to *non-refoulement*

8.1 *Non-refoulement obligations under the ICCPR, CAT and CRC*

84. As discussed above,⁸⁴ Australia has broad *non-refoulement* obligations under the ICCPR, CRC and CAT,⁸⁵ which prevent the removal of anyone from Australia to a country where they are in danger of death, torture or other mistreatment, including arbitrary detention.⁸⁶ Australia has incorporated these *non-refoulement* obligations, also known as ‘complementary protection’, into domestic law through the *Migration Amendment (Complementary Protection) Act 2011* (Cth). The principle of *non-refoulement* is non-derogable,⁸⁷ and is widely recognised as customary international law.⁸⁸
85. In the compatibility letter, the Minister acknowledges Australia’s *non-refoulement* obligations under the ICCPR and CAT, and addresses the compatibility of the ‘regional processing’ regime with these obligations by stating that:
- in designating a country he is permitted, under s 198AB(3)(b) of the Migration Act, to have regard ‘to any other matter which, in the opinion of the Minister, relates to the national interest’, and that this could include assurances from that country that it will not send asylum seekers to a country where they are at risk of breaches of article 6 or 7 of the ICCPR
 - under s 198AE of the Migration Act the Minister has a personal, non-compellable discretion to decide to exempt persons from being transferred to a ‘regional processing country’ for processing of their claims for protection, and the Minister could use this power in the event that ‘issues arise in relation to obligations under CAT or ICCPR’.⁸⁹
86. The Commission’s view is that these discretionary powers of the Minister to have regard to Australia’s obligations under the ICCPR and CAT may not provide adequate safeguards against breaches by the Australian Government of its obligations under those treaties. Such broad Ministerial discretions leave it up to the Minister of the day whether or not to expose asylum seekers to the risk of violations of articles 6 and/or 7 of the ICCPR, and article 3 of CAT.

8.2 *Non-refoulement obligations under the Refugee Convention*

87. As noted above, Australia is prohibited under article 33(1) of the Refugee Convention from expelling or returning refugees in any manner whatsoever to territories where their lives or freedom would be threatened on the basis of their race, religion, nationality, membership of a particular social group or political opinion. The protection against *refoulement* applies to refugees recognised under the Refugee Convention, as well as to asylum seekers, pending a final determination of their status.⁹⁰
88. The principle of *non-refoulement* requires Australia to provide asylum seekers with effective access to fair and efficient asylum procedures. While the Refugee Convention does not elaborate on asylum processes, the UNHCR states that measures to ensure asylum procedures are fair and effective include:
- submission of protection claims to a specialised and professional first instance body and individual interview
 - independent review of negative decisions
 - confidentiality of information received from applicants
 - availability of legal advice and interpreters.⁹¹
89. As discussed above, in designating a country as a 'regional processing country' for the purposes of the 'regional processing' regime, the Minister must have regard to whether the country in question has given any assurances that:
- transferred asylum seekers will not be subject to *refoulement* within the meaning of article 33(1) of the Refugee Convention
 - it will make an assessment, or permit an assessment to be made, of whether transferred asylum seekers are refugees.⁹²
90. However, as noted above, in designating a country, the Minister is not required to have regard to the international obligations or domestic law of that country.⁹³ Indeed, in relation to the two designations made to date, the Minister has chosen not to consider these matters.
91. Nauru has given undertakings that it will respect the principle of *non-refoulement*, and that it will make an assessment, or permit an assessment to be made, of whether a person who is transferred meets the definition of a refugee as set out in the Refugee Convention.⁹⁴
92. However, the UNHCR has expressed concern about whether Nauru will be able to provide appropriate safeguards. The UNHCR observes that in Nauru, 'there is no domestic legal framework, nor is there any experience or expertise to undertake the tasks of processing and protecting refugees on the scale and complexity of the arrangements under consideration in Nauru'.⁹⁵
93. While the Nauruan *Refugee Convention Act 2012* has since been certified by the Nauruan Parliament, and an announcement has been

made that the processing of claims for asylum will be undertaken under Nauruan law, a number of matters relating to the timing and procedures for the determination of asylum seekers' claims remain unclear.⁹⁶ For instance, it is not known when the assessment of asylum seekers' claims will commence, the extent of legal assistance that will be provided to them, and whether the process will include a complementary protection assessment or an adequate approach to determining whether a person is stateless.

94. As noted above, there are similar uncertainties and concerns regarding PNG.
95. In the absence of this information, the Commission shares the concerns of the UNHCR that the processing of refugee claims on Nauru and PNG may contain inadequate safeguards, leading to a risk that refugees will be returned to a situation where their life or freedom may be threatened.

9 Australia's obligations in relation to equal protection of the law and non-discrimination

96. As mentioned above, the 'regional processing' regime is targeted at those asylum seekers who have arrived by boat to Australia on or after 13 August 2012. It does not apply to asylum seekers who arrive on or after 13 August by other means (that is, by plane).
97. Article 26 of the ICCPR provides:

All 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.
98. The HRC has emphasised that the right to equality and non-discrimination in article 26 extends to all 'aliens' (that is, non-citizens, including asylum seekers).⁹⁷ The HRC has interpreted the terms 'discrimination' and 'other status' in article 26 very broadly, and in such a way that those terms effectively do not limit the type of differential treatment which may fall foul of article 26.⁹⁸
99. The reference in article 26 to 'equal protection of the law' 'without any discrimination' translates into a requirement that States not discriminate in their laws, whether those laws affect rights protected by the ICCPR, rights in other human rights instruments, or any other legal duties or rights.⁹⁹ The HRC has specifically recognised that laws which distinguish between different categories of aliens engage article 26.¹⁰⁰
100. However, the HRC has held that a differentiation of treatment will not constitute discrimination within the meaning of article 26 'if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.¹⁰¹

101. As mentioned earlier in this submission, the Australian Government has defined the problem which it is seeking to address by creating the 'regional processing' regime as 'people smuggling, and its undesirable consequences including the resulting loss of life at sea'.¹⁰² Its response is to create a different, third country system for processing asylum seekers' claims for protection, based on mode of arrival, in the hope of influencing an asylum seeker's decision to attempt to travel to Australia by boat, and (consequently) to engage a people smuggler. The impact of the 'regional processing' regime on people smugglers is, therefore, only indirect.
102. The Commission agrees that preventing the loss of the lives of asylum seekers at sea is a legitimate purpose under the ICCPR, particularly in light of article 6 which protects the right to life.
103. However, to the extent that the aim of the Australian Government's differential treatment of maritime asylum seekers is said to be prevention of loss of life, the Commission is concerned that the measures adopted by the Australian Government are not a 'reasonable' response to this problem for the purposes of article 26.
104. The impact of the Australian Government's response has much wider implications than addressing the immediate risk to the safety of certain asylum seekers at sea. The effect of the Australian Government's 'regional processing' regime is to deny asylum seekers who arrive to Australia by boat access to the Australian system of processing of protection claims, and instead subject them to a processing regime which places them at risk of multiple human rights violations.
105. In order to discharge its obligations under article 26, the Australian Government must establish that there is a 'reasonable' basis for subjecting asylum seekers who arrive (unauthorised) by boat to Australia to all the different aspects of the 'regional processing' regime, when asylum seekers who arrive by plane are not subjected to the same treatment.
106. Particularly, the Australian Government must be able to justify the measures (discussed in the following sections of this submission) which:
 - expose unauthorised boat arrivals, who are transferred to Nauru or PNG for the processing of their claims for protection, to the risk of violations of their rights under numerous human rights treaties to which Australia is a signatory¹⁰³
 - deny unauthorised boat arrivals, who are permitted to stay in Australia on bridging visas, the right to work for a prolonged period of time, and grant them only limited accommodation and financial assistance, potentially in violation of rights in the ICESCR¹⁰⁴
 - deny unauthorised boat arrivals who arrive on or after 13 August 2012 access to family reunification through the class of Refugee and Humanitarian visas available in the Special Humanitarian Program,

and thereby potentially undermine the right to protection of the family in the ICCPR, particularly for unaccompanied minors.¹⁰⁵

107. The Commission's view is that there is a real question as to whether the measures constituting the Australian Government's differential treatment of asylum seekers who arrive (unauthorised) by boat can be said to be 'reasonable', and therefore avoid violating article 26 of the ICCPR.
108. The Australian Government's differential treatment of asylum seekers who arrive by boat also raises issues under article 31 of the Refugee Convention.
109. Article 31 of the Refugee Convention prohibits States Parties from penalising asylum seekers on account of their unauthorised arrival in a country when they are coming directly from a territory where their life or freedom was threatened. Giving 'penalty' its plain meaning, article 31 'denies governments the right to subject refugees to any detriment for reasons of their unauthorized entry or presence in the asylum country'.¹⁰⁶
110. As mentioned above, the Australian Government's creation of a 'regional processing' regime creates the significant risk of multiple violations of the rights of those who seek asylum in Australia via boat. The Commission is concerned that this treatment may be inconsistent with Australia's obligations under article 31 of the Refugee Convention.

10 The detention of asylum seekers subject to the 'regional processing' regime

111. As at mid-December 2012, the vast majority of asylum seekers who have arrived in Australia on or after 13 August 2012 are in immigration detention. The majority of these people remain subject to mandatory detention in Australia, and are currently being held in immigration detention facilities either on Christmas Island or on the Australian mainland. However, some asylum seekers subject to the 'regional processing' regime have been released on bridging visas into the Australian community.¹⁰⁷
112. DIAC has reported that as at 31 October 2012, there were 7633 people in immigration detention facilities and alternative places of detention,¹⁰⁸ the majority of whom were asylum seekers who had arrived by boat.
113. As at mid-December 2012, over 400 people had been transferred to facilities in either Nauru or PNG. It is the Commission's view that these people are all currently being detained within the meaning of article 9 of the ICCPR.
114. In a statement about the arrangements regarding the designation of PNG and the transfer of asylum seekers to Manus Island,¹⁰⁹ the Minister appears to acknowledge that people transferred to Manus Island will be held in detention. In that statement the Minister states that 'transferees in the process of having their claims to protection assessed, or who have

been determined to be a refugee, will be permitted to leave the Centre with an escort for approved activities'.¹¹⁰

115. In terms of Nauru, it appears that as of mid-December, asylum seekers transferred to Nauru have been largely confined to the facility in which they are being held. There is no clear time-frame as to when they will be granted freedom of movement.
116. Furthermore, the Commission considers that, even if asylum seekers have freedom of movement around Nauru, the conditions under which people transferred to 'regional processing countries' are held could be characterised as deprivation of liberty amounting to detention.
117. The HRC has observed that the term 'detention' is not to be narrowly understood, and that article 9 applies to all forms of detention or deprivations of liberty, whether they are criminal, civil, immigration, health, or vagrancy related.¹¹¹ The distinction between measures which constitute a 'deprivation of' liberty, as opposed to a 'restriction upon' liberty, is one of degree or intensity, and not one of nature or substance. Nor does it depend in any way upon the labeling of something as 'detention'. Rather, it will depend upon criteria such as the type, duration, effects and manner of implementation of the measure in question.¹¹²
118. The Commission considers that the circumstances in which people are held on Nauru or Manus Island might be characterised as detention if, for example, people are subject to a legal requirement that they must live in a particular processing centre; if they are confined to the processing centres for certain periods each day; if they are only permitted to leave for certain periods of time; and/or if they are subject to supervision and monitoring by security guards.

11 Australia's obligations to ensure protection from arbitrary detention

119. If asylum seekers transferred to 'regional processing countries' spend long periods of time held in circumstances which can be characterised as detention, without justification, this will likely lead to breaches of article 9(1) of the ICCPR.¹¹³
120. Article 9(1) of the ICCPR provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
121. The following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:
 - 'detention' includes immigration detention¹¹⁴

- lawful detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to a legitimate aim¹¹⁵
 - arbitrariness is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability¹¹⁶
 - detention should not continue beyond the period for which a State Party can provide appropriate justification.¹¹⁷
122. In *Van Alphen v The Netherlands*,¹¹⁸ the HRC found detention for a period of two months to be arbitrary because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime. Similarly, the HRC has considered that detention during the processing of asylum claims for periods of three months in Switzerland was 'considerably in excess of what is necessary'.¹¹⁹
123. The HRC has held in several cases that there is an obligation on the State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party's immigration policy (for example, the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was arbitrary.¹²⁰
124. The HRC has also emphasised that people who are administratively detained must have access to judicial review of the substantive justification of detention, as well as sufficiently frequent review of the ongoing circumstances in which they are detained, in accordance with the rights recognised under article 9(4) of the ICCPR.¹²¹

11.1 The mandatory detention in Australia of people who are subject to the 'regional processing' regime

125. The Commission has repeatedly raised concerns that the system of mandatory detention under the Migration Act leads to breaches of Australia's international human rights obligations.¹²² Following the recent amendments to that Act, the legislative basis for Australia's system of mandatory detention has been expanded. The Migration Act now requires the detention of all non-citizens who arrive unauthorised anywhere in Australia.¹²³
126. While some asylum seekers who arrived in Australia on or after 13 August 2012 have been released into the community on bridging visas, the majority are currently held in closed immigration detention facilities either on Christmas Island or on the mainland.
127. In the compatibility letter the Minister states that the Australian Government's policy of mandatory detention for asylum seekers who arrive unauthorised in an 'excised offshore place' (reflected in sub-s 189(3) of the Migration Act):

is consistent with Government policy that, in the absence of specific reasons not to detain, all [offshore entry persons] should be detained for identity, security and other relevant checks.¹²⁴

128. The Minister clarifies that the ‘primary purpose of the temporary detention of [offshore entry persons] under this amendment is to facilitate their removal to a regional processing country’.¹²⁵ The Minister concludes that to the extent that the Migration Act facilitates the detention of asylum seekers for the purpose of identity and security checks and to facilitate their transfer to a ‘regional processing country’, ‘the Act cannot be said to be arbitrary or unreasonable’.¹²⁶
129. However, in contrast to the views expressed in the compatibility letter, the Commission considers that the policy of mandatory detention of asylum seekers who arrive without authorisation may be arbitrary, and consequently contrary to article 9(1) of the ICCPR, article 37(b) of the CRC and article 31(2) of the Refugee Convention.
130. The Commission recognises that immigration detention may be legitimate for a strictly limited period of time. However, as noted above, the HRC has stated that to avoid being arbitrary, detention must be a proportionate means to achieve a legitimate aim, and reasonable and necessary in all the circumstances.¹²⁷ In determining whether detention meets this test, consideration must be given to the availability of alternative means for achieving that end which are less restrictive of the person’s rights.¹²⁸
131. Accordingly, in order to avoid detention being arbitrary, there must be an individual assessment of the necessity of detention for each person, as soon as possible after a person is taken into detention. A person should only be held in an immigration detention facility if they are individually assessed as posing an unacceptable risk to the Australian community, and that risk cannot be managed in a less restrictive way. Otherwise, they should be permitted to reside in community arrangements while their immigration status is resolved – if necessary, with appropriate conditions imposed to mitigate any identified risks.
132. Consequently, the Commission considers that the mandatory detention provisions in s 189 of the Migration Act create the very real risk of breaches of article 9(1) of the ICCPR.
133. For similar reasons, the mandatory detention provisions raise issues under article 31(2) of the Refugee Convention. Article 31(2) provides that Contracting States shall not apply restrictions to the movements of refugees (including refugees who have not yet been recognised as such) ‘other than those which are necessary’. Accordingly, although detention of refugees may be permitted under article 31(2), ‘automatic detention clearly cannot be justified under Art. 31(2)’,¹²⁹ because it does not ‘engage with the requirement of....Art 31(2)...that provisional detention be demonstrably ‘necessary’’.¹³⁰

134. In addition, the Commission considers that the mandatory detention of children breaches the requirement of the CRC that children are detained only as a measure of last resort and for the shortest appropriate period of time (article 37(b)) (as discussed below in paragraphs 166-172).

11.2 Duration of stay in a third country or in detention in Australia under the ‘no advantage’ principle

135. The Commission holds serious concerns about the length of time that asylum seekers and refugees could potentially have to stay in a ‘regional processing country’, or in immigration detention in Australia. The Commission is concerned that the consequence of the application of the ‘no advantage’ principle for some asylum seekers and recognised refugees might be very long periods of time in detention, which might amount to arbitrary detention.

136. In the compatibility letter the Minister states that:

Continuing detention may be arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention but whether proper grounds for the detention continue to exist.¹³¹

137. The HRC has stated that even if the initial decision to detain a person can be considered a proportional response in light of a particular aim, ‘in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification’.¹³² Article 9(1) of the ICCPR therefore imposes an ongoing obligation on the Australian Government to assess whether the detention of an individual continues to be justified. This periodic assessment must be made ‘in light of the passage of time and [any] intervening circumstance’, and must involve consideration of the availability of less invasive means of achieving the objective of the detention.¹³³

138. As has been discussed, the Australian Government has announced that people subjected to the new ‘regional processing’ regime, pursuant to the principle of ‘no advantage’, may be held in conditions which amount to detention for a period of up to five years.¹³⁴ It is not apparent to the Commission what justification is said to exist for the prolonged detention of these individuals. The Commission considers that this raises serious issues as to compatibility with Australia’s obligation to avoid arbitrary detention under article 9(1) of the ICCPR.

11.3 Ability to challenge the decision to detain in court

(a) Article 9(4) of the ICCPR

139. In the compatibility letter the Minister states that asylum seekers who arrive at an ‘excised offshore place’ ‘can challenge the lawfulness of their detention in the High Court in accordance with the requirements of Article 9(4) of the ICCPR.’¹³⁵

140. Under Australia’s international human rights obligations, any person deprived of their liberty should be able to challenge the lawfulness of their detention. Article 9(4) of the ICCPR requires that this review be conducted by a court, while article 37(d) of the CRC mandates review before a court or another competent, independent and impartial authority.¹³⁶
141. The HRC has declared that for detention to be ‘lawful’ in this context, it must not only comply with domestic law but also must not be arbitrary.¹³⁷ Accordingly, in order to guarantee the prohibition on arbitrary detention in article 9(1) of the ICCPR (and article 37(b) of the CRC), judicial review of the decision to detain, or to continue to detain, is essential.¹³⁸ A court must have the power to review the lawfulness of detention under both domestic legislation and Australia’s binding international obligations, including, under article 9(1) of the ICCPR and article 37(b) of the CRC, the obligation not to subject anyone to arbitrary detention. That court must also have the authority to order the person’s release if the detention is found to be arbitrary, even if it is lawful under domestic law.¹³⁹
142. Currently, Australia does not provide access to such review. People in immigration detention may be able to challenge the lawfulness of their detention under domestic law by applying for judicial review of the decision. However, as the HRC noted in *A v Australia*,¹⁴⁰ Australian courts performing judicial review have no authority to order that a person be released from detention on the grounds that the person’s continued detention is in breach of the ICCPR or the CRC, because it is arbitrary.
143. In *A v Australia*,¹⁴¹ the HRC observed that judicial review of immigration detention decisions by Australian courts was limited to the question whether detention was lawful in accordance with domestic law, not whether it was in accordance with article 9(1) of the ICCPR (including whether it was arbitrary). This inability of the courts performing judicial review to order release if a person’s detention was inconsistent with article 9(1) of the ICCPR meant that there was a breach of article 9(4) of the ICCPR. In *A v Australia* the HRC explained that the problem with the judicial review available to the detainee was that:

the author could, in principle, have applied to the court for review of the grounds of his detention 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.¹⁴²

144. The HRC concluded that such a review was not sufficient to meet the requirements of article 9(4), as:

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...what is decisive for the purposes of article 9, paragraph 4, is that

[court review of administrative detention] is, in its effects, real and not merely formal.¹⁴³

145. The HRC explained that the term ‘not lawful’ in article 9(4) was to be interpreted as including detention which is ‘incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant.’¹⁴⁴ The HRC concluded that because the court review available to the detainee in *A v Australia* 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 author’s right, under article 9, paragraph 4, to have his detention reviewed by a court, was violated.¹⁴⁵

146. In *C v Australia, Bakhtiyari v Australia, Baban v Australia* and *Shams v Australia*, the HRC confirmed its view that an inability to challenge detention that is incompatible with article 9(1) of the ICCPR will result in a breach of Australia’s obligations relating to review of the lawfulness of detention under article 9(4).¹⁴⁶

(b) *Article 14 of the ICCPR*

147. The Committee has raised the question of the application of article 14(1) of the ICCPR in the context of challenging arbitrary detention before a court. Article 14(1) provides:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...

148. The Commission submits that the HRC’s approach in *A v Australia* supports the view that in this specific context, resort to article 14(1) of the ICCPR is unnecessary.¹⁴⁷ This is because article 9(4) deals more specifically with the right to challenge the legality of a person’s detention before a court, and clearly provides all asylum seekers with the right to access a court capable of ruling upon the legality of their detention.

12 Australia’s obligations to ensure people deprived of their liberty are treated humanely and do not suffer cruel, inhuman or degrading treatment

149. As the Minister identifies in the compatibility letter, under article 10 of the ICCPR Australia has an obligation to ensure that all persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person.
150. The Commission is concerned that asylum seekers transferred to regional processing centres in Nauru and PNG are being exposed to conditions which might breach Australia’s obligations under article 10.

151. For example, the Commission considers that detaining asylum seekers in a camp that is not yet completed, where they must live in tents in harsh weather, with very basic facilities, for a prolonged period of time, raises real questions about compliance with the obligation to treat people with respect for the dignity of the human person.
152. In November 2012, Amnesty International researchers conducted a three-day inspection of the Nauru facility. They found the facility to be ‘totally inappropriate and ill-equipped, with 387 men cramped into 5 rows of leaking tents, suffering from physical and mental ailments - creating a climate of anguish as the repressively hot monsoon season begins’.¹⁴⁸ Amnesty researchers also visited the local prison and hospital. They reported concerns that:
- the capacity of essential services in Nauru such as specialist health care, and law enforcement to ensure safety, will not be able to cope with the needs of asylum seekers on the island, especially if 1500 are placed there. There are currently 56 beds in the Nauruan hospital and it relies heavily on specialists that fly in several times a year.¹⁴⁹
153. The HRC has previously found Australia to be in breach of its obligations under article 10 in relation to the treatment of persons in immigration detention. For example, in *Madafferi v Australia* the HRC found that Australia breached its obligations when it returned the applicant to detention contrary to expert medical advice that further time in immigration detention would risk further deterioration of his mental health.¹⁵⁰
154. Connected to the obligation under article 10 is the obligation under article 7 of the ICCPR to ensure that no one is subject to torture or to cruel, inhuman or degrading treatment or punishment.
155. The Commission is concerned that people subject to the ‘no advantage’ principle implemented as part of the ‘regional processing’ regime might be exposed to prolonged or indefinite detention, the mental health effects of which, as discussed below, are known to be severe. In addition to potentially breaching the right to health under article 12 of the ICESCR (if Australia is found to be in ‘effective control’ of the treatment of asylum seekers on Nauru and PNG),¹⁵¹ this could put Australia in breach of its obligations under article 7 of the ICCPR.
156. In this context, the Commission notes the finding by the HRC in *C v Australia*.¹⁵² In relation to that communication, the HRC concluded that the continued detention of the complainant in immigration detention (in total for over two years) when the Australian Government was aware that his detention was contributing to his development of a psychiatric illness, constituted a violation of article 7 of the ICCPR.¹⁵³
157. The Commission views the length of time for which a person is detained as directly connected to their right not to be subjected to cruel, inhuman or degrading treatment. It is well established that holding people in immigration detention, particularly for prolonged and indefinite periods,

can have devastating impacts upon their mental and physical health.¹⁵⁴ It is also widely acknowledged that detention in remote, climatically harsh and overcrowded conditions can be particularly harmful.¹⁵⁵

158. Over many years of visiting facilities across Australia's immigration detention network, the Commission has heard from numerous people about the psychological harm that prolonged and indefinite detention was causing them. For instance, people frequently reported experiencing sleeplessness, loss of concentration, feelings of hopelessness and powerlessness, and thoughts of self-harm or suicide. Many people also expressed frustration and incomprehension at their prolonged and indefinite detention and apparent delays or perceived injustices in the processing of their claims. This appears to have contributed to marked levels of anxiety, despair and depression, which has in turn led, at times, to high use of sedative, hypnotic, antidepressant and antipsychotic medications, as well as serious self-harm incidents.¹⁵⁶
159. The impact that long-term detention had on the physical and mental health of asylum seekers who were detained in Nauru and PNG when these facilities were last used is also well-documented.¹⁵⁷ Some people were diagnosed with a range of mental illnesses, including depression, anxiety, post-traumatic stress disorder, adjustment disorder and acute stress reaction. There were also high levels of actual and threatened self-harm among these people.¹⁵⁸
160. The Commission is of the opinion that, as the evidence regarding the health impacts of lengthy periods of detention in Nauru, PNG and Australia is well-documented, the Australian Government can be considered to be 'on notice' as to the real risk that prolonged detention may cause serious health problems.
161. Given the demonstrated risk to mental (and physical) health posed by long-term detention, the Commission's view is that the 'regional processing' regime raises the significant prospect of violations of article 7 of the ICCPR.

13 Australia's obligations in relation to the rights of children and families

13.1 Specific rights of children engaged by the 'regional processing' regime

162. In the compatibility letter, the Minister acknowledges that Australia has an obligation to treat the best interests of the child as a primary consideration in all actions concerning children (article 3 of the CRC). However, the Minister fails to identify a number of other obligations which Australia has under the CRC which are relevant to the 'regional processing' regime. These include Australia's obligations to ensure that:

- the rights in the CRC are enjoyed by all children without discrimination (see the discussion on discrimination in paragraphs 96-110 of this submission)
- the right of the child to preserve his or her identity, including family relations, without unlawful interference, is respected (article 8)
- applications for family reunification are dealt with in a positive, humane and expeditious manner (article 10)
- unaccompanied minors are provided with special protection and assistance (article 20)
- child asylum seekers receive appropriate protection and humanitarian assistance (article 22)
- children are detained only as a measure of last resort, and for the shortest appropriate period of time (article 37(b)).

(a) *The best interests of the child as a primary consideration*

163. In the compatibility letter the Minister states:

Article 3 of CROC does not create any specific rights in respect of immigration. Consideration of the best interests of a child does not necessarily require a decision to allow the child or the child's family to remain in Australia and may be outweighed by other primary considerations.

An important competing consideration is one of the central objectives underlying the [Regional Processing] Act, which is to prevent children from taking the dangerous boat journey to Australia. Further, national interest considerations, including the integrity of Australia's migration system, are primary considerations which in this context will generally outweigh the preference and interests of the child to remain in Australia.¹⁵⁹

164. The Commission has concerns about the Australian Government's approach to the balancing act required under article 3 of the CRC. The CRC does not require that the 'best interests' of the child are the sole or paramount consideration in all decision-making. However, it does expressly require Australia's parliament, executive (including private institutions acting on its behalf) and judiciary to ensure that the best interests of the child are a primary consideration in all actions concerning children. The Commission is concerned by the Minister's assertion that considerations such as the integrity of Australia's migration system 'will generally outweigh' the best interests of a child.

165. While there is no one definition of what will be in the best interests of each child, a good indication of whether a child's best interests are being met is the child's ability to enjoy all of his or her rights in a given environment.¹⁶⁰ States Parties are obliged to ensure the rights in the CRC to all children within their jurisdiction (article 2 of the CRC).

(b) *Detention of children*

166. Article 37(b) of the CRC provides:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

167. The Commission considers that the mandatory detention of asylum seeker children under the new regime breaches the requirement of article 37(b) that children are detained only as a measure of last resort, and for the shortest appropriate period of time.
168. While there is no set definition of the 'shortest appropriate period', when read with the 'last resort' principle it is clear that the Australian Government must consider any less restrictive alternatives that may be available in relation to an individual child when deciding whether and/or for how long that child should be detained.
169. The Commission notes that asylum seeker children have been transferred to Manus Island, with one media report placing the number of children on Manus Island as at 5 January 2013 at 30.¹⁶¹ As discussed above in paragraphs 113 to 118, the Commission considers that the conditions in which those children are living amount to detention.
170. The Australian Government has said that under the 'no advantage' principle, asylum seekers arriving by boat can expect to remain in designated 'regional processing countries' (currently Nauru and PNG) for around five years.¹⁶² The purpose behind this policy is that those asylum seekers gain 'no advantage' by undertaking the boat journey, the intention being to deter others from taking such journeys.
171. The Commission is of the view that if, under the 'no advantage' principle, children are subjected to prolonged detention in 'regional processing countries', this will breach the requirement in article 37(b) of the CRC that children are detained only as a measure of last resort and for the shortest possible time.
172. Further, aspects of the conditions of detention for child asylum seekers in third countries may lead to breaches of other rights, for example their right to the highest attainable standard of health and access to health care services (article 24 of the CRC),¹⁶³ and their right to education (article 28 of the CRC).

(c) *Protection and guardianship of unaccompanied minors seeking asylum*

173. The CRC recognises the particular vulnerability of children who are without the support of their parents. Articles 20 and 22 of the CRC together require the Australian Government to ensure that children who are unaccompanied by their parents, especially those who are seeking asylum, receive particular protection and assistance.¹⁶⁴
174. Effective guardianship is an important element of the care of unaccompanied minors. As mentioned earlier in this submission, under the IGOC Act, the Minister is the guardian of unaccompanied minors who

arrive in Australia as ‘non-citizens’.¹⁶⁵ Article 18(1) of the CRC states that ‘the best interests of the child will be [the legal guardian’s] basic concern’. Therefore, article 18(1) suggests that, for a decision made by a person acting as a child’s legal guardian, the best interests of an unaccompanied child must not only be a primary consideration (as suggested by article 3(1)), but **the** primary consideration. For a range of reasons, it is difficult to see how, in the vast majority of cases, transferring unaccompanied minors to a third country for processing of their claims for protection could be in their best interests.

175. The Commission therefore considers that, despite the fact that the transfer of unaccompanied minors seeking asylum to a third country may be lawful under Australian law, it may breach Australia’s international human rights obligations under the CRC.
176. Further, the Commission has concerns regarding the arrangements for the care and custody of unaccompanied minors transferred under the arrangement. As mentioned earlier, the Minister ceases to be the guardian of unaccompanied minors who are taken from Australia to a ‘regional processing country’ pursuant to the Migration Act.¹⁶⁶ It is unclear what arrangements will be put in place for the guardianship of any unaccompanied minors transferred to these countries.

13.2 Australia’s obligations to refrain from unlawful or arbitrary interference with family

177. The ICCPR and CRC both provide a right to freedom from arbitrary or unlawful interference with the family.¹⁶⁷ Article 8(1) of the CRC states that ‘States Parties undertake to respect the right of the child to preserve his or her identity, including...family relations as recognized by law without unlawful interference.’ Article 17 of the ICCPR provides for the right of every person to be protected against arbitrary or unlawful interference with his or her privacy, family, home or correspondence as well as against unlawful attacks on his or her honour and reputation.
178. Australia is therefore ‘under a duty not to take steps which arbitrarily interfere with a refugee’s family unity.’¹⁶⁸ The HRC has previously found Australia to be in breach of its obligations under article 17 in relation to its attempt to deport the wife and children of a refugee who had arrived separately to him and been detained for nearly three years.¹⁶⁹
179. The Minister’s compatibility letter states that ‘interference with the family is permissible where it is not arbitrary and where it is lawful at domestic law’.¹⁷⁰
180. The Commission notes that the use of the term ‘unlawful’ in article 17 of the ICCPR means that no interference can take place except in cases envisaged by the law, but that law itself ‘must comply with the provisions, aims and objectives of the Covenant’.¹⁷¹ Further, the HRC has explained that:

the introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.¹⁷²

181. In the compatibility letter the Minister gives two practical reasons why he considers that the measures under the Regional Processing Act do not amount to separation of family. Firstly, ‘persons who travel to Australia together will not ordinarily be separated when taken to a regional processing country’.¹⁷³ Secondly, the new subsection 199(4) of the Migration Act:

provides a mechanism for the spouse or de facto partner of an [offshore entry person] who is being taken, or about to be taken, to a regional processing country, to request that they also be taken or for an [offshore entry person] to request that a dependent child or children be taken to a regional processing country with them.¹⁷⁴

182. The Minister’s comments excerpted in the passage above suggest that family members in detention or in different stages of processing their protection applications might in fact be separated. If asylum seekers who are transferred to a ‘regional processing country’ already have family members in Australia, they face indefinite separation from those family members under the ‘no advantage’ principle. This suggests that article 17 could be engaged. The Minister has not addressed how the implications for families and children in particular are ‘reasonable in the particular circumstances’. The Commission does not consider that a ‘choice’ to request that additional family members be transferred to detention in Nauru or PNG would mitigate what would otherwise constitute interference with the family.¹⁷⁵

13.3 Australia’s obligations to protect and support families

(a) The effect of the Migration Amendment Regulation 2012 (No. 5) (Cth)

183. The *Migration Amendment Regulation 2012 (No. 5) (Cth)* (the Regulation), which was registered on 27 September 2012, addresses the situation when an asylum seeker who arrives by boat in Australia is granted a protection visa and wishes to sponsor family members to reside in Australia.
184. The Regulation amends the *Migration Regulations 1994 (Cth)*, and in effect makes family reunion in Australia more difficult for refugees who arrive unauthorised by boat (called ‘irregular maritime arrivals’ in the Regulation) by:
- removing ‘family union concessions’ (by requiring more criteria to be considered) for ‘irregular maritime arrivals’ (other than unaccompanied minors) who arrived before 13 August 2012 and wish to propose family members for entry to Australia on a Refugee and Humanitarian (Class XB) visa

- providing that any ‘irregular maritime arrivals’ who arrive to Australia on or after 13 August 2012 cannot propose family members for entry to Australia on a Refugee and Humanitarian visa.
185. Those refugees who can no longer propose family members for entry to Australia through the Special Humanitarian Program following these amendments can only seek family reunion through the family stream of the Migration Program.
186. In the Statement of Compatibility which was prepared in relation to the Regulation the Minister acknowledges that:
- As refugees are unable to return to their country of origin, if family reunification is not available there is the potential that some refugees may be permanently separated from their family...[and, following the Regulation] there may be cases where, as a consequence of the amendment and ineligibility for other visas, family reunion will not be possible.¹⁷⁶

187. The Minister also acknowledges the particularly detrimental impact this will have on unaccompanied minors who arrive (unauthorised) to Australia by boat (referred to as ‘UHMs’) on or after 13 August 2012. The Minister explains in the Statement of Compatibility that ‘family reunion prospects for future UHMs (and those arriving on or after 13 August 2012) are likely to become more difficult with the proposed changes’ because:

unlike adult proposers of partners or children, UHMs will not have ready access to family reunion through the Family Migration stream. This is because Parent visa applications will be subject to either long visa processing times or a significant Visa Application Charge, depending on which subclass of visa is applied for. In addition, applications for family reunion under the Parent visa stream must meet eligibility requirements such as the balance of family test which requires that the majority of the parent’s children reside permanently and lawfully in Australia rather than in any country overseas.¹⁷⁷

(b) The right to protection of the family in article 23 of the ICCPR

188. The Commission is concerned that, by the Minister’s own assessment, the effect of the Regulation is to make family reunification for refugees who arrive unauthorised by boat, especially unaccompanied minors, more difficult, if not impossible.
189. Article 23 of the ICCPR relevantly provides:
1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
 2. The right of men and women of marriageable age to marry and **to found a family** shall be recognized. (Emphasis added)
190. The HRC has confirmed that article 23 places positive obligations on States Parties to adopt legislative, administrative and other measures to

ensure the protection provided for in that article.¹⁷⁸ The HRC has also stated that:

The right to found a family implies, in principle, the possibility to procreate and live together...the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.¹⁷⁹

191. The Commission acknowledges that article 23 does not equate to a right to family reunification. However, the protection article 23 affords to the existence of the family requires States Parties to take steps to support families to reunify, because:

Since life together is an essential criterion for the existence of a family, members of a family are entitled to a stronger right to live together than other persons.¹⁸⁰

192. As the Minister points out in the Statement of Compatibility, the Regulation has the deliberate effect of making family reunification harder for asylum seekers who arrive by boat, and, in the case of unaccompanied minors, practically impossible. To this extent the Commission is concerned that the Regulation may be inconsistent with Australia's obligations under article 23.

(c) *Articles 3(1), 10(1), 20 and 22 of the CRC*

193. The Commission is concerned by the particular impact the Regulation will have on unaccompanied minors who arrive by boat to Australia, and how this fits with Australia's obligations under the CRC. As mentioned above, article 3(1) of the CRC requires the best interests of the child to be a primary consideration 'in all actions concerning children'. The Commission questions whether the formulation of a policy which effectively prevents a child who is declared to be a refugee from being able to be reunited with his or her parents in Australia is primarily informed by a concern for the child's best interests.
194. More specifically, article 10(1) of the CRC provides that 'applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner'.
195. The Commission notes that the wording of article 10 does not guarantee a right to reunification. However, the requirement that applications for family reunification must be dealt with in a 'positive' and 'humane' manner suggests a level of engagement with the question of what is the impact on the child of a denial of reunification in the circumstances.¹⁸¹ The children who will be most adversely affected by the Regulation are unaccompanied refugee children, to whom Australia owes particular protection and assistance under articles 20 and 22 of the CRC.¹⁸² The effect of the Regulation is that these particularly vulnerable children are

denied the ability to reunify with their parents in Australia, at least in any sort of timely manner, if not completely.

196. The Commission therefore is concerned that the Regulation may be inconsistent with Australia's obligations under the CRC.
197. The fact that the effect of this Regulation on child refugees differs depending on their mode of arrival to Australia raises the question of whether it is discriminatory, contrary to article 2 of the CRC, as well as article 26 of the ICCPR. The question of discrimination is addressed above in paragraphs 96-110 of this submission.

14 Australia's obligations to ensure respect for the right to work and other related rights

14.1 The effect of the Migration Regulations 1994 – Specification under paragraphs 050.613A(1)(b) and 051.611A(1)(c) - Classes of Persons – November 2012

198. As mentioned above,¹⁸³ on 21 November 2012 the Minister announced that asylum seekers who arrived by boat to Australia on or after 13 August 2012 and remained in Australia would be considered for the grant of bridging visas, but they would not be given permission to work and would only be given 'basic accommodation assistance, and limited financial support'. The Minister also confirmed, pursuant to the 'no advantage' principle, that such persons would not be issued with a permanent protection visa if found to be a refugee 'until such time that they would have been resettled in Australia after being processed in our region'.¹⁸⁴
199. Consistent with this announcement, on 20 November 2012 the legislative instrument *Migration Regulations 1994 - Specification under paragraphs 050.613A(1)(b) and 051.611A(1)(c) - Classes of Persons - November 2012* was registered.¹⁸⁵ Through this instrument the Australian Government removed the exemption from the 'no work' condition on 'Bridging E' visas for asylum seekers arriving at offshore entry places after 13 August 2012.¹⁸⁶
200. The Commission has concerns that the placing of asylum seekers on bridging visas for an indeterminate period of time (or for an arbitrarily set period of time) with no right to work and 'limited financial support' is not consistent with Australia's international obligations under the ICESCR. Further, preventing asylum seekers who have been determined to be refugees from receiving a visa which would allow them to work would be contrary to article 17 of the Refugee Convention.

14.2 The right to work for asylum seekers

201. Article 6, paragraph 1 of the ICESCR provides:

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

202. The United Nations Committee on Economic, Social and Cultural Rights has stated that article 6(1) does not translate into an absolute and unconditional right to obtain employment.¹⁸⁷ Also, the ICESCR allows for the progressive realisation of the enjoyment of everyone of the full rights in that instrument.¹⁸⁸
203. However, States Parties do have immediate, core obligations in relation to the right to work, including 'refraining from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups'.¹⁸⁹ This is supported by the right to non-discrimination in the enjoyment of ICESCR rights in article 2(1) of the Covenant. As the prohibition on working announced by the Minister is only aimed at those asylum seekers who arrive in Australia by boat, it may breach this core 'non-discrimination' aspect of the right to work.¹⁹⁰
204. Beyond the non-discrimination element of the right to work, the Commission acknowledges that under article 4 of the ICESCR States Parties are permitted to limit the rights in that Covenant, including article 6, but to be valid these limitations must fulfil criteria of legality, necessity and proportionality.¹⁹¹ In announcing the decision to deny unauthorised boat arrivals the right to work, the Minister referred to the Australian Government's aim of 'breaking the people smugglers' business model and save [sic] lives at sea'.¹⁹²
205. The Commission emphasises that even if this is a legitimate reason under article 4 to permit restrictions on asylum seeker's rights to work under article 6, the restriction must be a necessary and proportionate response to achieve that aim. The Commission questions whether the Minister's policy will satisfy this test.
206. It cannot be proportionate, for example, to restrict the right to work to such an extent that, as a result, asylum seekers who come by boat become destitute.¹⁹³ This would violate the right in article 11 of the ICESCR to an adequate standard of living, including 'adequate food, clothing and housing' for a person and his or her family.¹⁹⁴ A government may address this by providing adequate social security to forcibly unemployed asylum seekers, but the Australian Government has only committed to providing 'limited' financial support in the absence of a right to work.
207. Whether an asylum seeker can enjoy an adequate standard of living (whether through earning an income or relying on social security) in turn can impact on his or her right to physical and mental health under article 12 of the ICESCR.
208. A key issue with the policy announced by the Minister on 21 November 2012 is the length of time for which the asylum seekers to whom the

policy applies will be denied the right to work. The longer they must wait until they can gain access to the employment market, the more likely the limitation is a breach of article 6. The UNHCR has raised concerns about the ‘negative impact of an extended period of insecurity’ and has suggested (in relation to Europe) that asylum seekers should not be denied access to the labour market for any longer than six months.¹⁹⁵

209. As mentioned earlier, the Australian Government has indicated that under the ‘no advantage’ principle, asylum seekers who have arrived by boat to Australia may have to wait up to five years until they receive a protection visa and can be allowed to work.¹⁹⁶ In the Commission’s view, the forced unemployment of these asylum seekers for such a prolonged period of time, a period which is not rationally connected to the amount of time necessary to process their claims for protection, may fail the ‘necessary and proportionate’ test for a legitimate limitation. The Australian Government’s policy therefore may lead to breaches of the right to work in article 6 of the ICESCR.

14.3 The right to work for declared refugees

210. Once an asylum seeker has been found to be a refugee, and therefore someone to whom Australia owes protection obligations under the Refugee Convention, the right to work crystallises more fully.¹⁹⁷ Article 17 of the Refugee Convention requires States Parties to afford refugees who are ‘lawfully staying’ in their territory the same right to work as that which is granted to other foreign nationals in the same circumstances.
211. Therefore, the Australian Government’s intention to deny persons found to be refugees work rights under the ‘no advantage’ principle may violate both article 6 of the ICESCR, and article 17 of the Refugee Convention.

15 Australia’s obligations to respect and protect the rights of people with disability

212. The Commission is concerned that the ‘regional processing’ regime, in addition to raising the prospect of multiple violations of human rights as discussed above, may be inconsistent with Australia’s obligations in relation to people with disability.
213. The Australian Government agreed to take all appropriate measures to promote, protect and respect the rights of people with disability when it ratified the *Convention on the Rights of Persons with Disabilities* (CRPD).¹⁹⁸ Article 11 of the CRPD places a positive obligation on States Parties to take ‘all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk’.
214. For the reasons explained in the preceding sections, the Commission has concerns that the Australian Government’s ‘regional processing’ regime, including the granting to some asylum seekers of bridging visas without the right to work for up to five years, may violate a number of the

rights to which persons with disabilities are specifically entitled under the CRPD. These include the rights of people with disability to:

- liberty and security of person (including freedom from arbitrary detention) (article 14)
- freedom from torture and cruel, inhuman or degrading treatment or punishment (article 17)
- protection against arbitrary or unlawful interference with the family (article 22)
- health and access to health services (article 25)
- work and employment (article 27)
- an adequate standard of living, and social protection (article 28).

215. Under s 198AE of the Migration Act, the Minister has a discretionary power to exempt a person or persons from transfer to a designated ‘regional processing country’.¹⁹⁹ However, as discussed in greater detail below,²⁰⁰ the Commission has concerns about the extent to which reliance on the exercise of discretionary Ministerial power is a sufficient safeguard against particularly vulnerable individuals being exposed to harm through the ‘regional processing’ regime. In the case of asylum seekers with some form of disability, the harm may include aggravation of their disability through the transfer to a ‘regional processing country’ with inadequate capacity to provide the requisite treatment and support. In order for the Australian Government to avoid breaching its obligations under the CRPD, it is crucial that adequate pre-transfer vulnerability assessments are conducted.

216. Also, the Commission emphasises the need for appropriate post-transfer vulnerability assessment procedures in the ‘regional processing countries’ to which asylum seekers are sent. The Commission has noted above in this submission the strong link between prolonged detention and the development (or exacerbation) of mental health problems.²⁰¹ The Commission therefore stresses that the Australian Government must develop adequate post-transfer vulnerability assessments to ensure that people with a pre-existing disability, or who develop a disability post-transfer, are provided with appropriate care and accommodation of their disability, and, where required, are returned to Australia within an appropriate timeframe.

16 Safeguarding the rights of people subject to the ‘regional processing’ regime

217. The Commission believes that specific measures should be taken to safeguard the rights of all people subject to the ‘regional processing’ regime, including appropriate pre- and post-transfer risk assessment procedures, and adequate independent oversight of the regional processing arrangements into which Australia has entered.

16.1 Pre- and post-transfer risk and vulnerability assessment procedures

218. The Commission considers that there should be an appropriate pre-transfer risk and vulnerability assessment process, to ensure that people with particular vulnerabilities are not placed into a situation where their rights are likely to be breached in a ‘regional processing country’.
219. On 13 October 2012, DIAC posted pre-transfer assessment guidelines on its website,²⁰² along with guidelines for the exercise of the Ministerial discretion under s 198AE of the Migration Act to exempt a person or persons from transfer to a designated ‘regional processing country’.²⁰³
220. In order to protect against the breach of a person’s human rights, pre-transfer assessment procedures should include a thorough assessment of the *non-refoulement* obligations owed by Australia to each individual under the ICCPR, CAT, CRC and the Refugee Convention.²⁰⁴ In addition, the procedures should include a thorough assessment of the individual’s circumstances pertaining to their physical and mental health, so as to consider whether the right to freedom from cruel, inhuman or degrading treatment under the ICCPR and CAT might be engaged. Further, the procedures should include an assessment of the best interests of the child, and the impact of transfer on an individual’s right to family life.
221. The Commission has serious concerns that the published guidelines do not provide the necessary guidance to ensure that a robust assessment is made of any protection claims that may be raised against the intended processing country. Counter to internationally established processes for the assessment of claims for protection, the guidelines indicate that ‘assurances given by the [regional processing country]’ should be taken into account in assessing a claim for protection against this country. In addition, the guidelines do not indicate that the person making the assessment should have any appropriate training to consider protection claims, nor do they give any guidance as to the circumstances in which advice should be sought from a suitably experienced officer.²⁰⁵
222. The pre-transfer assessments do appear to include procedures to identify vulnerable individuals, including unaccompanied minors, families with children, pregnant women, people with serious health issues, and survivors of torture and trauma. This consideration is undertaken as part of an assessment as to whether it is ‘reasonably practical’ to take a person to a ‘regional processing country’. The Minister has asked that cases be referred to him for consideration of the exercise of his power to exempt people from transfer to a third country where it is not reasonably practical to take a person to a ‘regional processing country’ now or in the foreseeable future (for example, as a consequence of physical or mental impairments that are permanent and acute).²⁰⁶
223. The Minister has also asked that cases be referred to him for consideration of the exercise of his exemption power in circumstances where:

- a person has made a credible claim that his life or freedom would be threatened or he would be subject to ‘torture, cruel, inhumane or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty’ in the ‘regional processing country’
 - an assessment has been made that it would be in the best interests of an unaccompanied minor to remain in Australia
 - a person has a spouse/partner, father, mother or child in Australia who will not be taken to a ‘regional processing country’ with the offshore entry person.²⁰⁷
224. The Commission believes that transfer should not proceed if:
- a pre-transfer assessment identifies an unacceptable risk that a person’s human rights would be breached as a consequence of transfer to a ‘regional processing country’
 - the person has a particular vulnerability that cannot be adequately managed in a ‘regional processing country’, or
 - transfer of the person would lead to separation from immediate family.
225. Where pre-transfer risk assessments indicate that it is not appropriate for people to be transferred to a ‘regional processing country’, those people should have their claims for protection processed in Australia, expeditiously.
226. The Commission also believes that a vulnerability assessment process should operate in countries to which asylum seekers have been transferred, to enable their return to Australia if their specific vulnerability cannot be adequately managed in that country.

16.2 Independent monitoring and oversight of ‘regional processing’ arrangements

227. Regular independent monitoring of immigration detention facilities is essential in order to ensure compliance with international legal principles and accepted human rights standards.²⁰⁸
228. The Commission notes that there is a need for a more comprehensive monitoring mechanism for Australia’s immigration detention facilities, particularly those in remote locations such as Christmas Island. Currently, there is no monitoring body with all of the key features necessary to be fully effective, that is:
- independence from DIAC
 - adequate funding to fulfil the role
 - the capacity to maintain an ongoing or regular presence in the large number of immigration detention facilities in Australia
 - a specific statutory power to enter immigration detention facilities
 - comprehensive public reporting for transparency

- the capacity to require a public response from government.
229. In addition, the Commission believes that there should be adequate independent oversight of conditions of detention in ‘regional processing countries’. The Commission notes that a joint advisory committee jointly chaired by Nauruan and Australian officials, and which includes a number of members of the Minister’s Council on Asylum Seekers and Detention (MCASD), has recently been appointed.²⁰⁹ The Commission understands that the appointment of this committee is an interim measure until a monitoring committee can be established.
230. The Commission is of the view that such a committee does not amount to independent monitoring, as membership largely comprises of either officials of the Australian and Nauruan Governments or members of MCASD. The Commission believes that there should be independent monitoring and reporting on conditions of detention in any third countries to which Australia has sent asylum seekers.
231. The Commission welcomes the visits of the Australian Red Cross, Amnesty International and the UNHCR to facilities accommodating asylum seekers on Nauru. The Commission urges that regular independent monitoring occur by an organisation which has an appropriate mandate and the capacity to make public reports on conditions of detention. Where independent monitors report publicly on their findings, this increases transparency and accountability.
232. Independent monitoring of immigration detention facilities should include, but not be limited to, the areas of health (including mental health) care. The Commission believes that there is a need for rigorous, independent and ongoing monitoring of the delivery of health and mental health services in immigration detention facilities on the Australian mainland, in Australia’s ‘excised offshore territory’, and in third countries to which Australia has transferred asylum seekers for the processing of their claims for protection.

¹ The Commission’s national inquiry reports are: Australian Human Rights Commission, *A last resort? National Inquiry into Children in Immigration Detention* (2004). At http://humanrights.gov.au/human_rights/children_detention_report/index.html (viewed 8 November 2012); Australian Human Rights Commission, *Those who’ve come across the seas: Detention of unauthorised arrivals* (1998). At http://humanrights.gov.au/human_rights/immigration/seas.html (viewed 8 November 2012). Further details about the Commission’s work in this area are available at http://humanrights.gov.au/human_rights/immigration/detention_rights.html (viewed 10 January 2013).

² See the Australian Human Rights Commission’s reports regarding conditions of immigration detention in Australia, available at http://www.humanrights.gov.au/human_rights/immigration/index.html (viewed 10 January 2013) under ‘Publications’. See also Australian Human Rights Commission, *Submission to the Senate*

- Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Health Care for Asylum Seekers) Bill 2012 (October 2012). At http://www.humanrights.gov.au/legal/submissions/2012/20121025_asylum_health.html (viewed 13 December 2012).
- 3 See Australian Human Rights Commission, *Human rights issues raised by the transfer of asylum seekers to third countries*, Discussion Paper (November 2012). At http://www.humanrights.gov.au/human_rights/immigration/transfer_third_countries.html (viewed 13 December 2012).
- 4 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR). At <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 17 January 2013).
- 5 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (ICESCR). At <http://www2.ohchr.org/english/law/cescr.htm> (viewed 10 January 2013).
- 6 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (CRC). At <http://www2.ohchr.org/english/law/crc.htm> (viewed 17 January 2013).
- 7 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (CAT). At <http://www2.ohchr.org/english/law/cat.htm> (viewed 17 January 2013).
- 8 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137, (entered into force 22 April 1954), as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (Refugee Convention). At <http://www.unhcr.org/3b66c2aa10.html> (viewed 10 January 2013).
- 9 A Houston, Air Chief Marshall AFC (Ret'd), P Aristotle and M L'Estrange, *Report of the Expert Panel on Asylum Seekers* (August 2012), p 14, recommendation 1. At <http://expertpanelonasylumseekers.dpmc.gov.au/report> (viewed 10 January 2013). See also, for example, the Hon C Bowen MP, Minister for Immigration and Citizenship, 'Asylum seeker transfer to Nauru, Expert Panel recommendations, "no advantage" principle, Tony Abbott' (Press Conference, 14 September 2012). At <http://www.minister.immi.gov.au/media/cb/2012/cb189879.htm> (viewed 17 January 2013).
- 10 The Hon C Bowen MP, Minister for Immigration and Citizenship, 'Asylum seeker transfer to Nauru, Malaysia arrangement, people smugglers' (Interview with Marius Benson, 11 September 2012). At <http://www.minister.immi.gov.au/media/cb/2012/cb189779.htm> (viewed 19 December 2012).
- 11 The Hon C Bowen MP, Minister for Immigration and Citizenship, 'Offshore processing, boat arrivals, Sri Lankan returns, increase in humanitarian intake, "no advantage" principle, Nauru, Manus Island', (Interview with Marius Benson, 22 November 2012) at <http://www.minister.immi.gov.au/media/cb/2012/cb191935.htm> (viewed 5 December 2012).
- 12 A Guterres, United Nations High Commissioner for Refugees, Correspondence to The Hon C Bowen MP, Minister for Immigration and Citizenship of Australia, 5 September 2012 (Nauru correspondence). At http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=264:unhcr-advice-regarding-nauru&catid=37:submissions&Itemid=61 (viewed 10 January 2013).
- 13 *Migration Act 1958* (Cth) (Migration Act), s 198AB(2).
- 14 Migration Act, s 198AB(3).
- 15 Migration Act, s 198AA(d).
- 16 Migration Act, s 198AC(5).
- 17 Migration Act, s 198AC(2).
- 18 Migration Act, s 198AB(1B).
- 19 Migration Act, s 198AD(2). The legislation specifies at s 198AF that this obligation does not arise if there is no designated 'regional processing country'.
- 20 Migration Act, s 198AE.
- 21 Migration Act, s 189(3).
- 22 *Immigration (Guardianship of Children) Act 1946* (Cth) (IGOC Act), s 6(1).
- 23 IGOC Act, sub-ss 6(1) and (2)(b).
- 24 IGOC Act, s 8(2).

- 25 See Revised Explanatory Memorandum, Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012 (Cth), para 294.
- 26 Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012* (17 December 2012). At http://humanrights.gov.au/legal/submissions/2012/20121217_migration_amendment.html (viewed 7 January 2013).
- 27 Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, schedule 1, item 6.
- 28 The Hon C Bowen MP, Minister for Immigration and Citizenship, 'Australia signs Memorandum of Understanding with Nauru', (Media Release, 29 August 2012). At <http://www.minister.immi.gov.au/media/cb/2012/cb189579.htm> (viewed 17 January 2013).
- 29 The Hon C Bowen MP, Minister for Immigration and Citizenship, 'Australia and Papua New Guinea sign updated memorandum of understanding', (Media Release, 8 September 2012). At <http://www.minister.immi.gov.au/media/cb/2012/cb189719.htm> (viewed 17 January 2013).
- 30 The Hon C Bowen MP, Press Conference, 14 September 2012, note 9.
- 31 United Nations High Commissioner for Refugees, *UNHCR Mission to the Republic of Nauru: 3-5 December 2012*, Report (14 December 2012), para 27. At <http://www.unhcr.org/50cb0f759.html> (viewed 11 January 2013).
- 32 The Hon C Bowen MP, Minister for Immigration and Citizenship, 'Designating Nauru as a regional processing country, transfers to Nauru, asylum seeker boats, the Greens' (Press conference, 10 September 2012). At <http://www.minister.immi.gov.au/media/cb/2012/cb189747.htm> (viewed 17 January 2013).
- 33 The Hon C Bowen MP, Minister for Immigration and Citizenship, 'First transfer to Papua New Guinea', (Media Release, 21 November 2012). At <http://www.minister.immi.gov.au/media/cb/2012/cb191879.htm> (viewed 3 December 2012).
- 34 The Hon C Bowen MP, above.
- 35 B Hall, 'Smuggled photos shed light on realities of Manus', *The Sydney Morning Herald*, 5 January 2013. At <http://www.smh.com.au/opinion/political-news/smuggled-photos-shed-light-on-realities-of-manus-20130104-2c8w0.html> (viewed 7 January 2013).
- 36 The Hon C Bowen MP, 'First transfer to Papua New Guinea', note 33.
- 37 The Hon C Bowen MP, above.
- 38 The Hon C Bowen MP, Minister for Immigration and Citizenship, 'No advantage onshore for boat arrivals', (Media Release, 21 November 2012). At <http://www.minister.immi.gov.au/media/cb/2012/cb191883.htm> (viewed 14 December 2012).
- 39 See The Hon C Bowen MP, Interview with Marius Benson, 22 November 2012, note 11; N Butterly and A Tillett, 'Asylum seekers headed for suburbs', *The West Australian*, 22 November 2012. At <http://au.news.yahoo.com/thewest/a/-/breaking/15440812/asylum-seekers-headed-for-suburbs/> (viewed 7 January 2013).
- 40 J Stewart, 'Manus Island and Nauru may be full within months', *ABC Lateline*, (12 October 2012). Transcript at <http://www.abc.net.au/lateline/content/2012/s3609981.htm> (viewed 11 January 2013); B Packham and L Vasek, 'Asylum-seeker flood sinks Labour's offshore processing policy', *The Australian*, 21 November 2012. At <http://www.theaustralian.com.au/national-affairs/immigration/asylum-seeker-flood-sinks-labors-offshore-processing-policy/story-fn9hm1gu-1226521224068> (viewed 11 January 2013).
- 41 The Hon C Bowen MP, 'No advantage onshore for boat arrivals', note 38.
- 42 The Hon C Bowen MP, above.
- 43 The Minister expressly stated that 'consideration can be given to transfer these people offshore at a future date. Their status as offshore entry people is unchanged': see The Hon C Bowen MP, above.
- 44 See, for example, The Hon C Bowen MP, Minister for Immigration and Citizenship, Correspondence to H Jenkins MP, Chair, Joint Parliamentary Committee on Human Rights, 15 November 2012. Available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/activity/migration/min_response.pdf (viewed 10 January 2013). This letter reflects the Government's view as to the compatibility of the Regional Processing Act with Australia's human rights obligations, and contains the statement that 'one of the central objectives underlying the Act...is to prevent children from taking the dangerous boat journey to Australia.'

- 45 Australian Human Rights Commission, *Submission to the Expert Panel on Asylum Seekers* (July 2012). At http://humanrights.gov.au/legal/submissions/2012/20120720_asylum_seekers.html (viewed 9 January 2013).
- 46 See the decision of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 (dealing in particular with rights under the ICCPR and the CRC)
- 47 See the decisions of the European Court of Human Rights in *Banković v Belgium and others* (dec.) [GC] [2001] ECHR 890 and *Al-Skeini v United Kingdom* [GC] [2011] ECHR 1093.
- 48 G Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd ed, 2007), pp 408-411.
- 49 See Human Rights Committee, *General Comment No 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 12. At <http://www.unhcr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f> (viewed 11 January 2013), and the following decisions of the Human Rights Committee: *Kindler v Canada*, Communication No. 470/1991, UN Doc CCPR/C/48/D/470/1991 (1993), paras 13.1-13.2. At http://www.unhcr.org/refworld/publisher,CAN_SC,USA,3ae6b6ed0,0.html (viewed 11 January 2013); *Ng v Canada*, Communication No. 469/1991, UN Doc CCPR/C/49/D/469/1991 (1993), paras 14.1-14.2. At <http://www1.umn.edu/humanrts/undocs/html/dec469.htm> (viewed 11 January 2013); *Cox v Canada*, Communication No. 539/1993, UN Doc CCPR/C/52/D/539/1993 (1994), paras 16.1-16.2. At <http://www.unhcr.org/refworld/publisher,HRC,USA,4028ba144,0.html> (viewed 11 January 2013); *ARJ v Australia*, Communication No. 692/1996, UN Doc CCPR/C/60/D/692/1996 (1997), paras 6.6 - 6.14. At <http://www.unhcr.org/refworld/country,,HRC,,AUS,,4028adfa7,0.html> (viewed 11 January 2013); *Judge v Canada*, Communication No. 829/1998, UN Doc CCPR/C/78/D/829/1998 (2003), paras 10.2-10.7. At <http://www.unhcr.org/refworld/docid/404887ef3.html> (viewed 11 January 2013); *GT v Australia*, Communication No. 706/1996, UN Doc CCPR/C/61/D/706/1996 (2007), para 8.1. At <http://www.unhcr.org/refworld/country,,HRC,,AUS,,4ae9acbfd,0.html> (viewed 11 January 2013); *Nakrash and Qifen v Sweden*, Communication No. 1540/2007, UN Doc CCPR/C/94/D/1540/2007 (2008), para 7.3. At <http://www.unhcr.org/refworld/country,,HRC,,CHN,,4a93a2362,0.html> (viewed 11 January 2013); *Bauetdinov v Uzbekistan*, Communication No. 1205/2003, CCPR/C/92/D/1205/2003 (2008), para 6.3. At http://www.worldcourts.com/hrc/eng/decisions/2008.04.04_Yakupova_v_Uzbekistan.htm (viewed 11 January 2013); *Munaf v Romania*, Communication No. 1539/2006, UN Doc CCPR/C/96/D/1539/2006 (2009), para 14.2. At <http://www.unhcr.org/refworld/publisher,HRC,,ROM,4acf500d2,0.html> (viewed 11 January 2013).
- 50 Human Rights Committee, *Munaf v Romania*, above, para 14.2 (and the jurisprudence cited therein).
- 51 Human Rights Committee, *Judge v Canada*, note 49, para 10.6; Human Rights Committee, *Munaf v Romania*, above.
- 52 Human Rights Committee, *Munaf v. Romania*, above.
- 53 The Hon C Bowen MP, Correspondence to H Jenkins MP, note 44, p 3.
- 54 Committee on the Rights of the Child, *General Comment No 6 - Treatment of unaccompanied and separated children outside their country of origin*, UN Doc CRC/GC/2006/6 (2005), para 27. At <http://tb.ohchr.org/default.aspx?Symbol=CRC/GC/2005/6> (viewed 7 January 2013).
- 55 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), arts 26 and 31.
- 56 See, for example, the Hon C Bowen MP, Correspondence to H Jenkins MP, note 44.
- 57 *Plaintiff M61/2010E v Commonwealth of Australia, Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 243 CLR 319, 339 [27]; *Plaintiff M70/2011 v Minister for Immigration and Citizenship, Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 189 [90].
- 58 *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 (5 October 2012) [12] (per French CJ).
- 59 *Plaintiff M70/2011 v Minister for Immigration and Citizenship, Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.
- 60 Above, [117].
- 61 United Nations High Commissioner for Refugees, *Addendum to the report of the United Nations High Commissioner for Refugees*, UN Doc A/53/12/Add.1 (30 October 1998), p 8. At <http://www.unhcr.org/refworld/docid/3ae68c950.html> (viewed 11 January 2013).

- 62 United Nations High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (26 January 2007), para 34. At <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45f17a1a4&page=search> (viewed 11 January 2013).
- 63 ICCPR, art 2(3); CAT art 14; CRC arts 4, 39; ICESCR art 2(1). In relation to States' obligations to provide a remedy under art 2 of ICESCR, see Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties obligations*, UN Doc E/1991/23 (1990), para 5. At <http://www2.ohchr.org/english/bodies/cescr/comments.htm> (viewed 20 December 2012).
- 64 Human Rights Committee, *General Comment No. 31*, note 49, para 16.
- 65 Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997), para 11. At <http://www.unhcr.org/refworld/docid/3ae6b71a0.html> (viewed 20 December 2012). Human Rights Committee, *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002), para 10. At <http://www.unhcr.org/refworld/docid/3f588ef00.html> (viewed 20 December 2012).
- 66 Committee on Economic, Social and Cultural Rights, *General Comment No 9: The domestic application of the Covenant*, UN Doc E/C.12/1998/24 (1998), para 9. At [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4ceb75c5492497d9802566d500516036?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4ceb75c5492497d9802566d500516036?Opendocument) (viewed 20 December 2012).
- 67 The Hon C Bowen MP, Correspondence to H Jenkins MP, note 44.
- 68 A designation comes into effect as soon as both Houses of Parliament have passed a resolution approving the designation, or after five sittings days from the date when the instrument was tabled if there has been no resolution disapproving the designation: Migration Act, s 198AB(1B).
- 69 The Hon C Bowen MP, Minister for Immigration and Citizenship, *Statement of reasons for thinking that it is in the national interest to designate Nauru to be a regional processing country*, September 2012 (Statement of reasons – Nauru), paras 35 and 36. At http://www.minister.immi.gov.au/media/media-releases/_pdf/designation-statement-reasons.pdf (viewed 11 January 2013).
- 70 The Hon C Bowen MP, above, para 37.
- 71 The Hon C Bowen MP, Minister for Immigration and Citizenship, *Statement of reasons for thinking that it is in the national interest to designate the independent state of Papua New Guinea to be a regional processing country*, October 2012 (Statement of reasons – PNG) paras 35 and 36. At <http://www.minister.immi.gov.au/media/pdf/papua-new-guinea-designation-statement-reasons.pdf> (viewed 11 January 2013).
- 72 A Guterres, Nauru correspondence, note 12, p 2.
- 73 A Guterres, above.
- 74 A Guterres, above.
- 75 A Guterres, above, p 3.
- 76 A Guterres, above.
- 77 A Guterres, United Nations High Commissioner for Refugees, Correspondence to The Hon C Bowen MP, Minister for Immigration and Citizenship of Australia, 9 October 2012, pp 2-3. At http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=272&catid=37&Itemid=61 (viewed 7 January 2013).
- 78 A Guterres, above, p 3.
- 79 Migration Act, sub-s 198AB(2).
- 80 Migration Act, s 198AA.
- 81 The Hon C Bowen MP, Statement of reasons – Nauru, note 69, para 13; the Hon C Bowen MP, Statement of reasons – PNG, note 71, para 13.
- 82 See the list of documents in paragraph 13 of this submission.
- 83 Migration Act, sub-ss 198AC(5) and (4).
- 84 See paragraphs 43-46 of this submission.
- 85 ICCPR, arts 6 and 7; CRC, arts 6 and 37; CAT, art 3 and art 16.
- 86 In relation to the operation of the ICCPR in this regard, see the decisions of the Human Rights Committee referred to in note 49 above. In relation to the operation of the CRC in this regard, see Committee on the Rights of the Child, *General Comment No 6*, note 54.
- 87 United Nations High Commissioner for Refugees, *Advisory Opinion*, note 62, para 12.

- 88 See E Lauterpacht and D Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion', in E Feller, V Turk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), para 216.
- 89 The Hon C Bowen MP, Correspondence to H Jenkins MP, note 44, p 4.
- 90 United Nations High Commissioner for Refugees, *Advisory Opinion*, note 62, para 6.
- 91 United Nations High Commissioner for Refugees, above, paras 19-20.
- 92 Migration Act, sub-s 198AB(3).
- 93 Migration Act, s 198AA.
- 94 See the *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, para 14. At http://www.minister.immi.gov.au/media/media-releases/_pdf/australia-nauru-mou-regional-processing.pdf (viewed 11 January 2013).
- 95 A Guterres, Nauru correspondence, note 12, p 2.
- 96 The Hon C Bowen MP, Minister for Immigration and Citizenship, 'Asylum seeker transfers to Nauru, Papua New Guinea, Enterprise Migration Agreements, Sydney protests' (Press Conference, 18 September 2012). At <http://www.minister.immi.gov.au/media/cb/2012/cb189959.htm> (viewed 17 January 2013).
- 97 Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant*, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (1986), paras 2, 5, 7, 9 and 10. At <http://www2.ohchr.org/english/bodies/hrc/comments.htm> (viewed 5 December 2012). See also Human Rights Committee, *Karakurt v Austria*, Communication No. 965/2000, UN Doc CCPR/C/74/D/965/2000 (2002), paras 8.3 and 8.4. At <http://www.unhcr.org/refworld/country,,HRC,,AUT,,3f588ef13,0.html> (viewed 5 December 2012).
- 98 See Human Rights Committee, *General Comment No.18: Non-discrimination*, UN Doc CCPR/C/21/Rev.1/Add. 1 (1989), para 7. At <http://www2.ohchr.org/english/bodies/hrc/comments.htm> (viewed 11 January 2013); M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005), pp 626-8.
- 99 M Nowak, above, p 608. In relation to the right of children to freedom from discrimination, article 2 of the CRC requires States Parties to respect and ensure the rights in the CRC 'to each child within their jurisdiction without discrimination of any kind', including discrimination on the grounds set out in article 26 of the ICCPR. Particularly relevantly, article 2 of the CRC prohibits discrimination on the basis of 'other status'.
- 100 Human Rights Committee, *Karakurt v Austria*, note 97, paras 8.3 and 8.4.
- 101 Human Rights Committee, *General Comment No. 18*, note 98, para 13.
- 102 Migration Act, sub-s 198AA(a).
- 103 For a list of the rights which the Commission is concerned may be violated by the 'regional processing' arrangements, see paragraph 49 of this submission.
- 104 See *Migration Regulations 1994 - Specification under paragraphs 050.613A(1)(b) and 051.611A(1)(c) - Classes of Persons - November 2012*, Instrument IMMI 12/114. At <http://www.comlaw.gov.au/Details/F2012L02201> (viewed 12 December 2012). See further the discussion in section 14 of this submission.
- 105 See the discussion in section 13.3 of this submission.
- 106 J Hathaway, *The Rights Of Refugees Under International Law* (2005), pp 410-11.
- 107 The Hon C Bowen MP, 'No advantage onshore for boat arrivals', note 38.
- 108 Department of Immigration and Citizenship, *Immigration Detention Statistics Summary* (31 October 2012), p 4. At <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/> (viewed 7 January 2013).
- 109 The Hon C Bowen, Minister for Immigration and Citizenship, *Statement about arrangements that are in place, or are to be put in place, in the Independent State of Papua New Guinea for the treatment of persons taken to Papua New Guinea*, House of Representatives Miscellaneous Paper No. 12719, 9 October 2012.
- 110 The Hon C Bowen MP, above, para 2(b).
- 111 Human Rights Committee, *General Comment No 8: Right to liberty and security of persons (Art. 9)* UN Doc A/37/40, Annex V (1982), para 1. At [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/f4253f9572cd4700c12563ed00483bec?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument) (viewed 19 December 2012).
- 112 See, in the context of the *European Convention on Human Rights*, *Amuur v France* (1992) 22 EHRR 533, [42].

- 113 This will also likely breach article 37(b) of the CRC: see the discussion in paragraphs 166-172 of this submission.
- 114 UN Human Rights Committee, *General Comment No 8* (1982), note 111, para 1. See also Human Rights Committee, *A v Australia*, note 65; Human Rights Committee, *C v Australia*, note 65; Human Rights Committee, *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003). At <http://www.unhcr.org/refworld/docid/404887ee3.html> (viewed 11 January 2013).
- 115 Human Rights Committee, General Comment No. 31, note 49, para 6. See also Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights Cases, Materials and Commentary* (2nd ed, 2004), p 308.
- 116 *Manga v Attorney-General* [2000] 2 NZLR 65, paras 40-42 (per Hammond J). See also the views of the Human Rights Committee in: *Van Alphen v The Netherlands*, Communication No. 503/1988, UN Doc CCPR/C/39/D/305/1988 (1990). At <http://sim.law.uu.nl/SIM/CaseLaw/fulltextccpr.nsf/160f6e7f0fb318e8c1256d410033e0a1/f85ddea1b472abe141256d6600303b7b?OpenDocument> (viewed 14 January 2013); *A v Australia*, note 65; *Spakmo v Norway*, Communication No. 631/1995, UN Doc CCPR/C/67/D/631/1995 (1999). At <http://www1.umn.edu/humanrts/undocs/session67/view631.htm> (viewed 14 January 2013).
- 117 Human Rights Committee, *A v Australia*, note 65 (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); Human Rights Committee, *C v Australia*, note 65.
- 118 Human Rights Committee, *Van Alphen v The Netherlands* note 116.
- 119 Human Rights Committee, *Report of the Human Rights Committee*, UN Doc CCPR/A/52/40 (1997), para 100. At <http://www.bayefsky.com/getfile.php/id/138/misc/reports> (viewed 19 December 2012).
- 120 Human Rights Committee, *C v Australia*, above 65; *Shams & Ors v Australia*, Communication No. 1255/2004, UN Doc CCPR/C/90/D/1255/2004 (2007). At http://www.bayefsky.com/pdf/australia_iccpr_t5_1255-56-59-60-66-68-70-88_2004.pdf (viewed 14 January 2013); *Baban v Australia*, note 114; *D and E v Australia*, Communication No. 1050/2002, UN Doc CCPR/C/87/D/1050/2002 (2006). At <http://www.unhcr.org/refworld/country,,HRC,,IRN,,47975af63,0.html> (viewed 14 January 2013).
- 121 *Mansour Ahani v Canada*, Communication No. 1051/2002, UN Doc CCPR/C/80/D/1051/2002 (2004), para 10.2. At <http://www.unhcr.org/refworld/country,,HRC,,IRN,,4162a5a50,0.html> (viewed 14 January 2013). See the discussion concerning the requirements of article 9(4) in paragraphs 139-146 of this submission.
- 122 See for example, Australian Human Rights Commission, *Submission to the Joint Select Committee on Australia's Immigration Detention Network* (August 2011), paras 17 – 28. At http://humanrights.gov.au/legal/submissions/2011/201108_immigration.html#s4 (viewed 10 December 2012); Australian Human Rights Commission, *Immigration detention at Curtin: Observations from visit to Curtin Immigration Detention Centre and key concerns across the detention network* (2011). At http://humanrights.gov.au/human_rights/immigration/idc2011_curtin.html#_Toc302979143 (viewed 10 December 2012).
- 123 Migration Act, s 189.
- 124 The Hon C Bowen MP, Correspondence to H Jenkins MP, note 44, p 2.
- 125 The Hon C Bowen MP, above, p 2.
- 126 The Hon C Bowen MP, above, p 2.
- 127 Human Rights Committee, *Van Alphen v Netherlands*, note 116, para 5.8.
- 128 See Human Rights Committee, *A v Australia*, note 65, para 9.2.
- 129 J Hathaway, note 106, p 428.
- 130 J Hathaway, above, p 435.
- 131 Emphasis added.
- 132 Human Rights Committee, *C v Australia*, note 65, para 8.2.
- 133 Human Rights Committee, *C v Australia*, above.
- 134 See the discussion in section 3 of this submission, paras 7 and 8.
- 135 The Hon C Bowen MP, Correspondence to H Jenkins MP, note 44, p 2.
- 136 ICCPR, art 9(4); CRC, art 37(d).
- 137 See *A v Australia*, note 65, para 9.5.

- 138 The CRC allows for review by ‘other competent, independent and impartial authorit[ies]’ than courts. However, it is not clear whether any such authority that can make enforceable orders currently exists in Australia. In the Commission’s view, the most appropriate authority to review the detention of children is a court.
- 139 Human Rights Committee, *A v Australia*, above, note 65.
- 140 Human Rights Committee, *A v Australia*, above.
- 141 Human Rights Committee, *A v Australia*, above.
- 142 Human Rights Committee, *A v Australia*, above, para 9.5.
- 143 Human Rights Committee, *A v Australia*, above.
- 144 Human Rights Committee, *A v Australia*, above.
- 145 Human Rights Committee, *A v Australia*, above.
- 146 Human Rights Committee, *C v Australia*, note 65, para 8.3; Human Rights Committee, *Bakhtiyari v Australia*, Communication No 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (2003), para 9.4. At <http://www.unhcr.org/refworld/docid/404887ee3.html> (viewed 17 January 2013); Human Rights Committee, *Baban v Australia*, note 114, para 7.2. At <http://www.unhcr.org/refworld/docid/404887ee3.html> (viewed 17 January 2013); Human Rights Committee, *Shams & Ors v Australia*, note 120, para 7.3.
- 147 Human Rights Committee, *A v Australia*, note 65, paras 9.4 - 9.7.
- 148 Amnesty International Australia, ‘Nauru camp a human rights catastrophe with no end in sight’ (Media Release, 23 November 2012). At <http://www.amnesty.org.au/news/comments/30533/> (viewed 13 December 2012).
- 149 Amnesty International Australia, ‘Nauru Offshore Processing Facility Review 2012’, (Media Briefing, 23 November 2012). At <http://www.amnesty.org.au/news/comments/30533/> (viewed 13 December 2012).
- 150 Human Rights Committee, *Madaffer v Australia*, Communication No. 1011/2001, UN Doc CCPR/C/81/D/1011/2001 (2004), para 9.3. At <http://www.unhcr.org/refworld/country,,HRC,,ITA,,4162a5a36,0.html> (viewed 20 December 2012).
- 151 See paragraph 42 of this submission.
- 152 Human Rights Committee, *C v Australia*, note 65, para 8.4.
- 153 Human Rights Committee, *C v Australia*, above, para 8.4.
- 154 See, for example, Joint Select Committee on Australia’s Immigration Detention Network, *Joint Select Committee on Australia’s Immigration Detention Network: Final Report* (2012), chapter 5. At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=immigration_detention_ctte/immigration_detention/report/index.htm (viewed 17 January 2013); Human Rights and Equal Opportunity Commission, *A last resort? The National Inquiry into Children in Immigration Detention* (2004), chapter 9. At http://www.humanrights.gov.au/human_rights/children_detention_report/report/index.htm (viewed 17 January 2013); GJ Coffey, I Kaplan, RC Sampson and MM Tucci, ‘The meaning and mental health consequences of long-term immigration detention for people seeking asylum’ (2010) 70(12) *Social Science & Medicine* 2070.
- 155 See Joint Select Committee on Australia’s Immigration Detention Network, above, and Australian Human Rights Commission, *Submission to the Joint Select Committee on Australia’s Immigration Detention Network*, note 122, Section 16.
- 156 See Australian Human Rights Commission, *Submission to the Joint Select Committee on Australia’s Immigration Detention Network* above, Section 12.
- 157 See Australian Human Rights Commission, *Submission to the Senate Standing Committees on Legal and Constitutional Affairs Inquiry into Australia’s agreement with Malaysia in relation to asylum seekers* (September 2011), para 76. At http://humanrights.gov.au/legal/submissions/2011/20110914_asylum_seekers.html (viewed 12 December 2012).
- 158 Australian Human Rights Commission, above.
- 159 The Hon C Bowen MP, Correspondence to H Jenkins MP, note 44, pp 4 - 5.
- 160 UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, 2007), pp 37-38. At http://www.unicef.org/publications/index_43110.html (viewed 7 January 2013).
- 161 B Hall, ‘Smuggled photos shed light on realities of Manus’, *The Sydney Morning Herald*, 5 January 2013. At <http://www.smh.com.au/opinion/political-news/smuggled-photos-shed-light-on-realities-of-manus-20130104-2c8w0.html> (viewed 7 January 2013).

- 162 The Hon C Bowen MP, Interview with Marius Benson, 22 November 2012, note 12.
- 163 See the discussion in paragraphs 157-161 of this submission.
- 164 Article 20(1) of the CRC provides: ‘A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.’ Article 22(1) provides: States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.’
- 165 IGOC Act, s 6(1).
- 166 IGOC Act, sub-ss 6(1) and (2)(b).
- 167 ICCPR, arts 17(1) and 23(1); CRC, art 8(1).
- 168 J Hathaway, note 106, p 546.
- 169 Human Rights Committee, *Bakhtiyari v Australia*, note 146, para 9.6.
- 170 The Hon C Bowen MP, Correspondence to H Jenkins, MP, note 44, p 5.
- 171 Human Rights Committee, *General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)*, UN Doc CCPR/C/21/Rev.1, 19 (1988), para 3. At <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=453883f922> (viewed 17 December 2012).
- 172 Human Rights Committee, *General Comment No. 16*, above, para 4.
- 173 The Hon C Bowen MP, Correspondence to H Jenkins, MP, note 44, p 6.
- 174 The Hon C Bowen MP, Correspondence to H Jenkins, MP, above, p 6.
- 175 See the comments of the HRC in relation to a similar such ‘choice’ in Human Rights Committee, *Madafferi v Australia*, note 150, para 9.8.
- 176 Statement of Compatibility, *Migration Amendment Regulation 2012 (No. 5) (Cth)*. At <http://www.comlaw.gov.au/Details/F2012L01961/Explanatory%20Statement/Text> (viewed 17 December 2012).
- 177 Above.
- 178 Human Rights Committee, *General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses (Art. 23)*, UN Doc HRI/GEN/1/Rev.6, 149 (1990), para 3. At <http://www2.ohchr.org/english/bodies/hrc/comments.htm> (viewed 17 December 2012).
- 179 Human Rights Committee, *General Comment No. 19*, above, para 5.
- 180 M Nowak, note 98, p 519.
- 181 See UNICEF, note 160, pp 136 to 138.
- 182 See the reference to these articles in paragraph 173 of this submission (and the related endnote).
- 183 See paragraph 51 of this submission.
- 184 The Hon C Bowen MP, ‘No advantage onshore for boat arrivals’, note 38.
- 185 *Migration Regulations 1994 - Specification under paragraphs 050.613A(1)(b) and 051.611A(1)(c) - Classes of Persons - November 2012*. At <http://www.comlaw.gov.au/Details/F2012L02201> (viewed 12 December 2012).
- 186 *Migration Regulations 1994 - Specification under paragraphs 050.613A(1)(b) and 051.611A(1)(c) - Classes of Persons - November 2012*. At <http://www.comlaw.gov.au/Details/F2012L02201> (viewed 12 December 2012).
- 187 Committee on Economic, Social and Cultural Rights, *General Comment No 18: Article 6 of the Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/18 (2005), para 6. At <http://tb.ohchr.org/default.aspx?Symbol=E/C.12/GC/18> (viewed 13 December 2012).
- 188 ICESCR, art 2(1).
- 189 Committee on Economic, Social and Cultural Rights note 187, paras 19, 23 and 31.
- 190 See further the discussion on non-discrimination in paragraphs 96-110 of this submission.
- 191 P Mathew, *Reworking the Relationship between Asylum and Employment* (2012), p 114.
- 192 The Hon C Bowen MP, ‘No advantage onshore for boat arrivals’, note 38.
- 193 P Mathew, note 191, p 117.
- 194 The Committee on Economic, Social and Cultural Rights has explained that ‘[t]he right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity...The right to work contributes...to the survival of the individual and to that of his/her family’: see Committee on Economic, Social and Cultural Rights, note 187, para 1.

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- 195 United Nations High Commissioner for Refugees, *Note on the Integration of Refugees in the European Union* (May 2007), paras 10 and 14. At <http://www.unhcr.org/refworld/docid/463b24d52.html> (viewed 13 December 2012). See further on this point the discussion in P Mathew, note 191, pp 115-117.
- 196 See the discussion in paragraphs 7-8 of this submission.
- 197 'The Michigan Guidelines on the Right to Work' (2010) 31 *Michigan Journal of International Law* 293, 298.
- 198 Opened for signature 30 March 2007, 2515 UNTS 3, (entered into force 3 May 2008).
- 199 For further detail as to how this exemption power may be exercised, see Department of Immigration and Citizenship, *Minister's Determination Power Under Section 198AE of the Migration Act 1958 to Determine that Section 198AD Does Not Apply* (2012). At www.immi.gov.au/visas/humanitarian/_pdf/s198ae-guidelines.pdf (viewed 17 January 2013).
- 200 See paragraphs 217-226 of this submission.
- 201 See paragraphs 157-161 of this submission.
- 202 Department of Immigration and Citizenship, *Departmental Guidelines for Assessment of Persons Prior to Transfer Pursuant to Section 198AD(2) of the Migration Act 1958* (2012). At www.immi.gov.au/visas/humanitarian/_pdf/s198ad-2-guidelines.pdf (viewed 17 January 2013).
- 203 Department of Immigration and Citizenship, *Minister's Determination Power Under Section 198AE*, note 199.
- 204 For discussion of these obligations, see paragraphs 84-95 of this submission.
- 205 Department of Immigration and Citizenship, *Departmental Guidelines for...Section 198AD(2)*, note 201, p 8.
- 206 Department of Immigration and Citizenship, *Minister's Determination Power Under Section 198AE*, note 199, p 5.
- 207 Department of Immigration and Citizenship, *Minister's Determination Power Under Section 198AE*, above, p 6.
- 208 See for example, United Nations High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), Guideline 10. At <http://www.unhcr.org/refworld/docid/503489533b8.html> (viewed 14 December 2012).
- 209 The Hon C Bowen MP, Minister for Immigration and Citizenship, 'Sri Lankan returns, Afghan return, Manus Island, Nauru, 'no advantage' principle for people onshore, humanitarian intake' (Doorstop interview, Sydney, 22 November 2012).At <http://www.minister.immi.gov.au/media/cb/2012/cb191923.htm> (viewed 14 December 2012).