



Australian
Human Rights
Commission

Human rights issues raised by the third country processing regime

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Table of Contents

1	Introduction.....	3
2	Background.....	3
2.1	<i>Report of the Expert Panel on Asylum Seekers</i>	<i>3</i>
2.2	<i>Legislation to allow third country processing of asylum seekers' claims for protection</i>	<i>4</i>
2.3	<i>Bill to extend the scope of asylum seekers' liability for transfer to third countries.....</i>	<i>4</i>
2.4	<i>Agreements reached with the Governments of Nauru and Papua New Guinea.....</i>	<i>5</i>
2.5	<i>Designation of Nauru and Papua New Guinea as 'regional processing countries'.....</i>	<i>5</i>
2.6	<i>Transfer of asylum seekers to Nauru and Papua New Guinea</i>	<i>6</i>
3	Australia's international obligations to asylum seekers subject to third country transfer	6
4	Key human rights concerns with the third country processing regime.....	7
4.1	<i>Designation of 'regional processing countries'</i>	<i>7</i>
4.2	<i>Australia's non-refoulement obligations.....</i>	<i>7</i>
4.3	<i>Differential treatment of asylum seekers based on their mode of arrival</i>	<i>8</i>
4.4	<i>Arbitrary detention of asylum seekers</i>	<i>9</i>
4.5	<i>Conditions of detention on Nauru and Manus Island.....</i>	<i>9</i>
4.6	<i>Detention of children</i>	<i>10</i>
4.7	<i>Unaccompanied children.....</i>	<i>10</i>
4.8	<i>Impact on families</i>	<i>11</i>
4.9	<i>Independent monitoring and oversight.....</i>	<i>11</i>
5	People subject to third country transfer who remain in Australia.....	11

1 Introduction

In September 2012, the Australian Government commenced transferring asylum seekers who arrived in Australia by boat to Nauru, and in November 2012, transfers commenced to Manus Island in Papua New Guinea (PNG). Those asylum seekers' claims for protection will be processed under the laws of those third countries. The transfers follow the release of the report of the Expert Panel on Asylum Seekers on 13 August 2012, 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 Australia and PNG.

The Commission recognises the importance of effective border management and recognises that Australia has a right as a sovereign State to exclude non-citizens from its territory. However, Australia also has international obligations in relation to asylum seekers who come here, including those who arrive by boat, which must be observed in its border management practices.¹

This paper provides a brief outline of the recent changes and highlights the key human rights concerns raised by the third country processing regime, including:

- the Australian Government's approach to human rights in the designations of Nauru and PNG as 'regional processing countries'
- the differential treatment of asylum seekers based on their mode of arrival
- the potential for breaches of Australia's *non-refoulement* obligations
- the potential that asylum seekers will be subjected to arbitrary detention
- conditions for asylum seekers on Nauru and Manus Island
- the detention of child asylum seekers
- the impact on families, including potential separation
- the situation of unaccompanied children
- the lack of robust independent monitoring mechanisms.

This paper also briefly outlines key human rights concerns relating to asylum seekers who are subject to third country transfer but who remain in Australia, including the denial of work rights for asylum seekers permitted to reside in the Australian community on bridging visas.

The Parliamentary Joint Committee on Human Rights (JCHR) is currently inquiring into the package of legislation which creates the third country processing regime. Further details of the relevant international human rights obligations and the Commission's concerns regarding Australia's fulfilment of them can be found in the Commission's [submission to that inquiry](#).²

2 Background

2.1 *Report of the Expert Panel on Asylum Seekers*

The Expert Panel on Asylum Seekers was appointed by the Prime Minister in June 2012. It was tasked with recommending policy options to prevent asylum seekers

risking their lives on boat journeys to Australia. The Expert Panel published its report on 13 August 2012.³ The Commission's submission to the Expert Panel is available [here](#).⁴ The Australian Government has taken steps to implement some of the Expert Panel's 22 recommendations, including doubling Australia's refugee resettlement commitment from 6,000 to 12,000 places, and passing legislation to enable third country processing arrangements.

The Expert Panel's report is underpinned by the 'no advantage' principle – the idea that asylum seekers should gain no benefit by engaging people smugglers to arrange their passage to Australia by boat, instead of waiting in another country to have their claims assessed, and a durable solution provided, if they are found to be refugees. The Commission has a number of concerns regarding the 'no advantage' principle, as outlined in its [submission to the JCHR](#) (see section 11.2).⁵

2.2 Legislation to allow third country processing of asylum seekers' claims for protection

On 18 August 2012, the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) (the Amendment Act) commenced, amending the Migration Act and the *Immigration (Guardianship of Children) Act 1946* (Cth) (IGOC Act).

The amendments allow the Minister for Immigration and Citizenship to make a further legislative instrument which designates a country as a 'regional processing country'.⁶ The legislation provides that asylum seekers who have arrived unauthorised in Australia's excised offshore territory on or after 13 August 2012 must be sent to a 'regional processing country' as soon as practicable, unless the Minister exercises his discretion to determine that a person does not have to be transferred.⁷ In exercising the power to designate a country as a 'regional processing country', the only condition is that the Minister thinks that the designation is in the national interest.⁸

The amendments also mean that mandatory detention of 'unlawful non-citizens' under the Migration Act has been extended to arrivals at 'excised offshore places', as well as the Australian mainland.⁹

The legislation also amended the IGOC Act.¹⁰ The IGOC Act provides that the Minister for Immigration is the guardian of unaccompanied children who arrive in Australia seeking asylum.¹¹ The effect of the amendments is that the Minister no longer needs to consent in writing to the removal of an unaccompanied child from Australia to a 'regional processing country'.

For further details on the legislation, see the [Commission's submission to the JCHR](#) (section 3).¹²

2.3 Bill to extend the scope of asylum seekers' liability for transfer to third countries

On 31 October 2012, the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 was introduced into the House of Representatives. The Senate Legal and Constitutional Affairs Committee conducted an inquiry into the Bill

and reported on 25 February 2013. The Commission made a [submission to this inquiry](#), recommending that the Bill not be passed.¹³

The Bill seeks to amend the Migration Act to give asylum seekers who reach anywhere on the Australian mainland by boat, without authorisation, the same status under domestic law as those who arrive at an 'excised offshore place'.¹⁴ The effect would be that asylum seekers who arrive by boat on the Australian mainland would also be liable for transfer to a third country.

The Bill provides an express power for the Minister to vary or revoke a determination that a person is exempt from transfer to a third country.¹⁵ This means that at any time, an asylum seeker or refugee living in the Australian community while awaiting the resolution of their case could be un-exempted and transferred to a third country.

The Bill also provides for a person who has been brought to Australia from a third country for a temporary purpose, such as medical treatment, to be returned to the third country even if they have already been recognised as a refugee.¹⁶

2.4 *Agreements reached with the Governments of Nauru and Papua New Guinea*

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'.¹⁷

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'.¹⁸

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.

2.5 *Designation of Nauru and Papua New Guinea as 'regional processing countries'*

On 10 September 2012 the former Minister for Immigration and Citizenship, The Hon Chris Bowen MP, signed a 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 came into effect, having been approved by both Houses of Parliament.

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

Further details of the designations and accompanying documents can be found in the [Commission's submission to the JCHR](#) (see section 7).¹⁹

2.6 Transfer of asylum seekers to Nauru and Papua New Guinea

On 13 September 2012, the first group of asylum seekers was transferred from Christmas Island to Nauru. As of mid-March 2013, there were around 400 asylum seekers detained at the regional processing centre on Nauru.

Processing of asylum seekers' claims for protection under Nauruan law commenced in late March 2013, around six months after the first asylum seekers were transferred to Nauru.

The first group of asylum seekers transferred from Australia to PNG arrived on Manus Island on 21 November 2012. As of mid-March 2013, there were around 250 asylum seekers detained at the regional processing centre on Manus Island, including around 30 children.

The Australian Government has given no indication as to when processing of asylum seekers' claims will begin on Manus Island.

3 Australia's international obligations to asylum seekers subject to third country transfer

The Australian Government has international obligations in respect of asylum seekers and refugees under a number of treaties to which it is a party. These include the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *Convention on the Rights of the Child* (CRC), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and the *Refugee Convention*.²⁰

It is clear that Australia's international human rights obligations apply while asylum seekers are detained in Australia (including on Christmas Island), and during their transfer to a third country. As a matter of international law, Australia's human rights obligations may also extend to its actions outside Australian territory.²¹ 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.²²

Even if Australia 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 that third country; Australia may remain liable for the consequences of its action of transferring them.²³ For example, 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, and this risk could reasonably have been anticipated by the State.²⁴

In particular, the Australian Government has obligations 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 (*non-refoulement* obligations). *Non-refoulement* obligations extend to ensuring a person is not sent to a country which might in turn send that person to a country where they face such a risk.

For further details, see the Commission's [submission to the JCHR](#) (section 5.1).²⁵

4 Key human rights concerns with the third country processing regime

The Commission is concerned that the treatment of asylum seekers under the third country processing regime may lead to breaches of their fundamental human rights under a number of the treaties to which Australia is a party.

The Commission's key concerns are discussed in the following sections. Further details can be found in the [Commission's submission to the JCHR](#).²⁶

4.1 Designation of 'regional processing countries'

The Commission is concerned that the requirements for designating countries as 'regional processing countries', as well as the actual designations, appear to intend to make compliance with Australia's international human rights obligations discretionary.

The requirement for designating a country is simply that it is in the national interest.²⁷ The former Minister for Immigration and Citizenship said in his statements of reasons tabled in Parliament that even if the designations of Nauru and PNG were inconsistent with Australia's international obligations, he considered that they were nonetheless in the national interest.²⁸

The documents tabled with the instruments of designation of Nauru and PNG included letters from the United Nations High Commissioner for Refugees (UNHCR).²⁹ These letters expressed concerns that neither Nauru nor PNG had the ability to process asylum applications in compliance with international human rights law. Despite the UNHCR's concerns, the former Minister proceeded with the designations.

For further details, see section 7 of the [Commission's submission to the JCHR](#).³⁰

4.2 Australia's non-refoulement obligations

The Commission is concerned that the third country processing arrangements may not protect asylum seekers from *refoulement* in accordance with Australia's obligations under the ICCPR, CRC, CAT and the Refugee Convention. Australia's *non-refoulement* obligations prohibit the removal of anyone from Australia to a country where they are in danger of death, torture or other mistreatment, including arbitrary detention.³¹

The former Minister for Immigration and Citizenship stated that the third country processing arrangements are compatible with Australia's *non-refoulement* obligations because the Minister has the discretion to consider assurances from a country that it will not send asylum seekers to another country where they are at risk of *refoulement*, and the Minister has the discretion to exempt a person from being transferred to a 'regional processing country' if issues arise in relation to obligations under CAT or the ICCPR.³²

The Commission's view is that these discretionary powers may not provide adequate safeguards against breaches by the Australian Government of its *non-refoulement*

obligations. Broad and non-compellable discretionary powers leave it up to the Minister of the day to decide whether or not to expose individual asylum seekers to the risk of violations of their human rights.

In addition, the principle of *non-refoulement* under the Refugee Convention requires States to provide asylum seekers with effective access to ‘fair and efficient asylum procedures’.³³ The Commission is concerned that appropriate procedures and safeguards for determining refugee status may not be provided in Nauru and PNG. After six months, processing in Nauru is just beginning and it is still not clear when it will begin in PNG.

See further, section 8 of the [Commission’s submission to the JCHR](#).³⁴

4.3 Differential treatment of asylum seekers based on their mode of arrival

The Commission is concerned that the third country processing arrangements treat asylum seekers differently based on their mode of arrival in Australia. This may breach article 26 of the ICCPR, which protects the right to equality and non-discrimination. In order for differential treatment to avoid being discriminatory under the ICCPR, the criteria for the differentiation must be ‘reasonable and objective’ and the aim must be ‘to achieve a purpose which is legitimate under the Covenant’.³⁵

The Commission agrees that preventing the loss of lives at sea is a legitimate purpose under the ICCPR, particularly in light of article 6 which protects the right to life. 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 are not a ‘reasonable’ response to this problem for the purposes of article 26 of the ICCPR.

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 third country processing regime is to deny asylum seekers who arrive in 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 human rights violations.

In addition to the prohibition on discrimination under the ICCPR, the Refugee Convention (article 31) prohibits States Parties from penalising asylum seekers on account of their unauthorised arrival when they are coming directly from a territory where their life or freedom was threatened.³⁶ This prohibition ‘denies governments the right to subject refugees to any detriment for reasons of their unauthorized entry or presence in the asylum country’.³⁷

As mentioned above, the third country processing regime creates the significant risk of violations of the human rights of those who seek asylum in Australia by boat. The Commission considers that this differential treatment may be inconsistent with Australia’s obligations under article 31 of the Refugee Convention.

See further, section 9 of the [Commission’s submission to the JCHR](#).³⁸

4.4 Arbitrary detention of asylum seekers

The Commission is concerned about the detention of thousands of asylum seekers in Australia, on Nauru and on Manus Island, PNG. Most asylum seekers subject to third country transfer are held in closed immigration detention facilities on Christmas Island or the Australian mainland, while some are permitted to reside in community detention or in the community on bridging visas. As of 31 January 2013, there were 5697 people in immigration detention facilities in Australia, most of whom were asylum seekers who had arrived by boat.³⁹ In addition, as of March 2013, over 650 asylum seekers had been transferred to detention facilities on Nauru and Manus Island.

The Commission is concerned about the potential that these asylum seekers will be subjected to arbitrary detention, in breach of Australia's obligations under the ICCPR and the CRC. In particular, the Commission is concerned about the following aspects of Australia's detention policy regarding asylum seekers who arrive by boat:

- the fact that detention is mandatory and does not provide for individual assessment of the necessity of detaining each person
- the fact that there is no time limit on how long a person may be detained, either in Australia or in a third country
- the fact that some asylum seekers subject to third country transfer (or already transferred to Nauru or Manus Island) have been detained for prolonged periods, and the prospect that some may spend years in detention
- the lack of judicial oversight of asylum seekers' detention.

See further, section 11 of the [Commission's submission to the JCHR](#).⁴⁰

4.5 Conditions of detention on Nauru and Manus Island

The Commission is concerned that asylum seekers transferred to regional processing centres on Nauru and Manus Island are being exposed to conditions which might breach Australia's obligations under the ICCPR to ensure that persons deprived of their liberty are treated with humanity and respect for their inherent dignity.

For example, the Commission considers that detaining asylum seekers in temporary facilities where some of them must live in tents, are subjected to harsh weather, have very little privacy, and access to only very basic facilities, for a prolonged period of time might breach the obligation to treat people with respect for the dignity of the human person.

The harsh conditions of detention may also lead to breaches of other human rights, such as rights to an adequate level of health care and to education.

See further, section 12 of the [Commission's submission to the JCHR](#).⁴¹

4.6 Detention of children

The Commission is particularly concerned that as of March 2013 there were around 30 asylum seeker children being detained on Manus Island, having been transferred by the Australian Government. Additionally, as of 31 January 2013, there were 1000 children in Australian immigration detention facilities, the vast majority of whom arrived in Australia by boat as asylum seekers and are subject to third country transfer.⁴²

The detention of these children, which is mandatory and indefinite in nature, breaches Australia's obligations under the CRC to only detain children as a measure of last resort and for the shortest appropriate period of time.

Additionally, the conditions of detention for child asylum seekers, particularly those detained on Manus Island, may lead to breaches of other children's rights, for example their right to the highest attainable standard of health and access to health care services, and their right to education.⁴³

See further, section 13 of the [Commission's submission to the JCHR](#).⁴⁴

4.7 Unaccompanied children

As of March 2013, the Commission understands that no unaccompanied children had been transferred to Nauru or Manus Island. However, the Commission is concerned that unaccompanied children who have arrived in Australia by boat since 13 August 2012 remain liable for transfer. If this was to occur, it may breach Australia's obligations under the CRC.

Unaccompanied children seeking asylum are particularly vulnerable and the CRC requires the Australian Government to ensure that they receive special protection and assistance.⁴⁵

Effective guardianship is an important element of the care of unaccompanied children. Under the *Immigration (Guardianship of Children) Act 1946* (Cth), the Minister for Immigration and Citizenship is the legal guardian of unaccompanied children who arrive in Australia seeking asylum.⁴⁶ Article 18(1) of the CRC states that 'the best interests of the child will be [the legal guardian's] basic concern'. This suggests that, for a decision made by a person acting as an unaccompanied child's legal guardian, the best interests of that child must not only be a primary consideration (as required by article 3 of the CRC), but **the** primary consideration. It is difficult to see how transferring unaccompanied children to third countries such as Nauru or Papua New Guinea for processing of their refugee claims could be in their best interests.

Further, the Minister ceases to be the guardian of unaccompanied children who are transferred from Australia to a third country.⁴⁷ It is not yet clear what guardianship arrangements will exist on Nauru or Manus Island for unaccompanied children seeking asylum.

See further, section 13 of the [Commission's submission to the JCHR](#).⁴⁸

4.8 Impact on families

The Commission is concerned that there is the potential for asylum seekers with family members in Australia to be transferred to third countries, thereby separating families. If this was to occur, it could be inconsistent with the ICCPR and the CRC, which provide that everyone has the right to freedom from arbitrary or unlawful interference with their family.⁴⁹

The Commission is also concerned that amendments to the *Migration Regulations 1994* (Cth) make family reunion in Australia substantially more difficult for refugees who arrived unauthorised by boat, including unaccompanied children. This may be inconsistent with Australia's obligations under the ICCPR and the CRC which include protection of the family, treating the best interests of the child as a primary consideration, and taking steps to support families to reunify.⁵⁰

See further, section 13 of the [Commission's submission to the JCHR](#).⁵¹

4.9 Independent monitoring and oversight

The Commission is concerned about the lack of independent monitoring and oversight of the conditions and treatment of asylum seekers transferred to third countries by the Australian Government.

There is currently no body or mechanism with all of the features necessary to effectively monitor the regional processing centres on Nauru and Manus Island to ensure that international human rights standards are complied with.⁵² These features would include independence from government, adequate funding, statutory powers, and public reporting functions. See further, section 16.2 of the [Commission's submission to the JCHR](#).⁵³

5 People subject to third country transfer who remain in Australia

As of March 2013 there are thousands of asylum seekers who have arrived in Australia by boat since 13 August 2012 who are subject to third country transfer but who remain in Australia because there is insufficient capacity on Nauru and Manus Island. Some of those asylum seekers are detained in immigration detention facilities, some have been placed in community detention, and others have been granted bridging visas which allow them to reside in the community on a temporary basis.

As of 31 January 2013, there were 5697 people in immigration detention facilities in Australia, most of whom were asylum seekers who had arrived by boat.⁵⁴ As discussed above, the Commission is concerned about the potential that these asylum seekers will be subjected to arbitrary detention, in breach of Australia's obligations under the ICCPR and the CRC.

The Commission supports the use of community detention and bridging visas to enable asylum seekers to live in the community while their refugee claims are assessed. However, the Commission has some concerns about conditions for asylum seekers who arrived after 13 August 2012 who are granted bridging visas.

Those concerns are addressed in further detail in the [Commission's submission to the JCHR](#), and include:

- that asylum seekers on bridging visas do not have the right to work and are only provided with 'basic accommodation assistance, and limited financial support'⁵⁵
- that asylum seekers found to be refugees will not be granted permanent protection visas 'until such time that they would have been resettled in Australia after being processed in our region,' potentially leaving refugees on bridging visas with no work rights for years.⁵⁶

See further, section 14 of the [Commission's submission to the JCHR](#).⁵⁷

¹ *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 25 March 2013); *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 25 March 2013); *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 25 March 2013); *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 25 March 2013); *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 25 March 2013).

² Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Human Rights, Examination of the Migration (Regional Processing) package of legislation* (January 2013). At http://www.humanrights.gov.au/legal/submissions/2013/20130211_migration.html (viewed 25 March 2013).

³ A Houston, Air Chief Marshall AFC (Ret'd), P Aristotle & M L'Estrange, *Report of the Expert Panel on Asylum Seekers*, Australian Government (2012). At <http://expertpanelon asylumseekers.dpvc.gov.au/report> (viewed 25 March 2013).

⁴ Australian Human Rights Commission, *Submission to the Expert Panel on Asylum Seekers* (July 2013). At http://www.humanrights.gov.au/legal/submissions/2012/20120720_asylum_seekers.html (viewed 25 March 2013).

⁵ Australian Human Rights Commission, note 2.

⁶ *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth), sch 1, amending the *Migration Act 1958* (Cth) (Migration Act 1958), s 198AB(1).

⁷ Migration Act 1958, ss 198AD(2) and 198AE.

⁸ Migration Act 1958, s 198AB(2).

⁹ Migration Act 1958, s 189(3).

¹⁰ *Immigration (Guardianship of Children) Act 1946* (Cth) (IGOC Act), as amended by the *Migration Legislation Amendment (Regional Processing and other Measures) Act 2012* (Cth), sch 2.

¹¹ IGOC Act, s 6(1).

¹² Australian Human Rights Commission, note 2.

¹³ 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 25 January 2013).

¹⁴ Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, sch 1, items 1 and 8.

¹⁵ Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, item 31.

¹⁶ Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, item 6.

¹⁷ 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 25 March 2013).

¹⁸ 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 25 March 2013).

¹⁹ Australian Human Rights Commission, note 2.

²⁰ See note 1.

²¹ 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).

²² 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.

²³ G Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd ed, 2007), pp 408-411.

²⁴ 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 25 March 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 25 March 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 25 March 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 25 March 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 25 March 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 25 March 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 25 March 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 25 March 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 25 March 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 25 March 2013).

²⁵ Australian Human Rights Commission, note 2.

²⁶ Australian Human Rights Commission, note 2.

²⁷ Migration Act 1958, s 198AB.

²⁸ *Statement of reasons for thinking that it is in the national interest to designate Nauru to be a regional processing country*, September 2012, paras 35-37. At <http://www.minister.immi.gov.au/media/media-releases/pdf/designation-statement-reasons.pdf> (viewed 18 April 2013); *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, paras 35-37. At

<http://www.minister.immi.gov.au/search/cache.cgi?collection=immirss&doc=2012%2Fcb190599.xml> (viewed 18 April 2013).

²⁹ 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. At http://unhcr.org.au/unhcr/index.php?option=com_content&view=category&layout=blog&id=37&Itemid=61 (viewed 25 March 2013); 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. At http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=272&catid=37&Itemid=61 (viewed 25 March 2013).

³⁰ Australian Human Rights Commission, note 2.

³¹ See for example, 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 6. At <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45f17a1a4&page=search> (viewed 25 March 2013). In relation to the operation of the ICCPR in this regard, see the decisions of the Human Rights Committee referred to in note 25 above. In relation to the operation of the CRC in this regard, see 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 25 March 2013).

³² Migration Act 1958, s 198AB(3)(b); Migration Act 1958, s 198AE; 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_cte/activity/migration/min_response.pdf (viewed 25 March 2013).

³³ UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001, paras. 4–5. See also Executive Committee, Conclusion No. 81 (XLVIII) “General” (1997), para. (h); Conclusion No. 82 (XLVIII), “Safeguarding Asylum” (1997), para. (d)(iii); Conclusion No. 85 (XLIX), “International Protection” (1998), para. (q); Conclusion No. 99 (LV), “General Conclusion on International Protection” (2004), para. (l).

³⁴ Australian Human Rights Commission, note 2.

³⁵ See Human Rights Committee, *General Comment No.18: Non-discrimination*, UN Doc CCPR/C/21/Rev.1/Add. 1 (1989), para 13. At <http://www2.ohchr.org/english/bodies/hrc/comments.htm> (viewed 25 March 2013).

³⁶ Under guidelines issued by the United Nations High Commissioner for Refugees, this provision covers ‘a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured.’ It also covers ‘a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there.’ See UNHCR’s *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers* (February 1999), para 4. At <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3c2b3f844> (viewed 25 March 2013).

³⁷ J Hathaway, *The Rights Of Refugees Under International Law* (2005), pp 410-11.

³⁸ Australian Human Rights Commission, note 2.

³⁹ Department of Immigration and Citizenship, *Immigration Detention Statistics Summary* (31 January 2013), p 3. At <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/> (viewed 25 March 2013).

⁴⁰ Australian Human Rights Commission, note 2.

⁴¹ Australian Human Rights Commission, note 2.

⁴² Department of Immigration and Citizenship, note 39.

⁴³ Articles 24 and 28 of the CRC.

⁴⁴ Australian Human Rights Commission, note 2.

⁴⁵ Articles 20(1) and 22(1) of the CRC.

⁴⁶ IGO Act, s 6(1).

⁴⁷ IGO Act, sub-ss 6(1) and (2)(b).

⁴⁸ Australian Human Rights Commission, note 2.

⁴⁹ Article 17 of the ICCPR; article 9 of the CRC.

⁵⁰ Article 23 of the ICCPR; article 10(1) of the CRC.

⁵¹ Australian Human Rights Commission, note 2.

⁵² 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 25 March 2013).

⁵³ Australian Human Rights Commission, note 2.

⁵⁴ Department of Immigration and Citizenship, note 39.

⁵⁵ *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 25 March 2013). See 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 25 March 2012).

⁵⁶ The Hon C Bowen MP, above.

⁵⁷ Australian Human Rights Commission, note 2.