



Australian
Human Rights
Commission

Human rights issues raised by the transfer of asylum seekers to third countries

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Table of Contents

Introduction	3
Summary	3
Background	4
<i>Report of the Expert Panel on Asylum Seekers</i>	<i>4</i>
<i>Legislation to allow third country processing of asylum seekers' claims for protection</i>	<i>5</i>
<i>Agreements reached with the Governments of Nauru and Papua New Guinea</i>	<i>6</i>
<i>Designation of Nauru as a 'regional processing country'</i>	<i>7</i>
<i>Designation of Papua New Guinea as a 'regional processing country'</i>	<i>8</i>
<i>Transfer of asylum seekers to Nauru</i>	<i>8</i>
<i>Bill to extend the scope of asylum seekers' liability for transfer to third countries and related matters</i>	<i>9</i>
What are Australia's international obligations to asylum seekers who are subject to transfer to third countries?	9
<i>Refugees Convention.....</i>	<i>11</i>
<i>International Covenant on Civil and Political Rights.....</i>	<i>11</i>
<i>Convention on the Rights of the Child.....</i>	<i>11</i>
What are the Commission's key concerns about the third-country processing arrangements?	12
<i>The differential treatment of asylum seekers based on their mode of arrival</i>	<i>12</i>
<i>The detention of asylum seekers who are liable for transfer to a third country</i>	<i>13</i>
<i>Pre- and post-transfer risk and vulnerability assessment procedures.....</i>	<i>13</i>
<i>The detention of asylum seekers in third countries.....</i>	<i>15</i>
<i>Refugee status determination processes on Nauru</i>	<i>15</i>
<i>The potential for family separation</i>	<i>16</i>
<i>The situation of unaccompanied children.....</i>	<i>17</i>
<i>Conditions on Nauru</i>	<i>17</i>
<i>Duration of stay in a third country</i>	<i>17</i>

Introduction

In September 2012, the Australian Government commenced transferring asylum seekers, who have arrived in Australia by boat, to Nauru for processing of their claims for asylum. The Australian Government has also announced its intention to commence transferring asylum seekers to Manus Island in Papua New Guinea shortly. These developments follow the release of the report of the Expert Panel on Asylum Seekers on 13 August 2013, the passage of amendments to the Migration Act, the designations of Nauru and Papua New Guinea as ‘regional processing countries’, and the adoption of Memoranda of Understanding between the governments of Australia and Nauru and the governments of Australia and Papua New Guinea.

The transfer of asylum seekers to third countries for the processing of their claims for protection raises a number of questions about whether in doing so, Australia is complying with its international human rights obligations. As Australia’s national human rights institution, the Australian Human Rights Commission is mandated to monitor the Australian Government’s compliance with the obligations set out in the international human rights treaties to which Australia is a party. This paper provides an outline of the recent changes and an analysis of human rights issues raised by the transfer of asylum seekers to third countries.

The Commission recognises the importance of effective border management and recognises that Australia has a sovereign right as a State to exclude non-citizens from its territory. However, Australia also has international obligations in relation to asylum seekers who come to Australia, including those who arrive by boat, which must be observed in its border management practices. These obligations are set out in the *Convention Relating to the Status of Refugees* and its Protocol (Refugees Convention)¹ and in the international human rights treaties with which Australia has agreed to comply, including the *International Covenant on Civil and Political Rights* (ICCPR),² the *Convention on the Rights of the Child* (CRC)³ and the *Convention Against Torture* (CAT).⁴

Summary

This paper discusses a number of the Commission’s concerns about the transfer of asylum seekers to third countries for the processing of their claims for protection, and outlines the human rights issues that arise within each area of concern. These areas of concern include:

- the differential treatment of asylum seekers based on their mode of arrival
- the detention of asylum seekers who are liable for transfer to a third country
- the conduct of pre- and post-transfer risk and vulnerability assessments
- the detention of asylum seekers and refugees in third countries
- the procedures for and delays in determining the protection claims of asylum seekers transferred or liable to transfer to a third country

- the potential for family separation
- the situation of unaccompanied children
- the prevailing conditions in Nauru
- the potentially protracted duration of stay in a third country.

The Commission is concerned that the arrangements to transfer asylum seekers to third countries may:

- undermine the principle of *non-refoulement* (the obligation not to return a refugee to a situation where his or her life or freedom would be threatened, and not to return a person to a country where there are substantial grounds for believing that he or she would be in danger of being tortured)
- undermine Australia's compliance with the Refugees Convention, including by breaching the obligation to ensure that asylum seekers are not penalised for arriving in Australia unauthorised
- undermine Australia's obligations under the ICCPR, by:
 - exposing asylum seekers transferred to third countries to the risk of breach of their right to be treated with humanity and with respect for their inherent dignity
 - exposing asylum seekers transferred to third countries to the risk of arbitrary detention
- breach Australia's obligations under the CRC, including the obligations to:
 - treat the best interests of the child as a primary consideration when making decisions about them
 - ensure that unaccompanied children are provided with special protection and assistance
 - ensure that applications for family reunification are dealt with in a positive, humane and expeditious manner
 - ensure that child asylum seekers receive appropriate protection and humanitarian assistance
 - ensure that children are detained only as a measure of last resort, and for the shortest appropriate period of time.

Background

Report of the Expert Panel on Asylum Seekers

On 28 June 2012, the Prime Minister of Australia, The Hon Julia Gillard MP, appointed an Expert Panel on Asylum Seekers to provide recommendations to the Australian Government on policy options to prevent asylum seekers risking their lives on dangerous boat journeys to Australia.⁵ The Expert Panel received over 500 written submissions addressing its terms of reference and consulted widely with parliamentarians and government and non-government experts in this area. The Commission's submission to the Expert Panel is available [here](#).

The Expert Panel published its report on 13 August 2012.⁶ The Australian Government has endorsed in principle each of the 22 recommendations contained in the report, and has taken steps to implement some of the recommendations. This has included, on the one hand, doubling Australia's refugee resettlement commitment from 6,000 to 12,000 places, and on the other hand, pursuing legislative amendments to allow for the transfer of asylum seekers who arrive in Australia by boat to third countries for the processing of their claims for protection.

The Expert Panel's report is underpinned by the 'no advantage' principle – the concept 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.

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 1958* (Cth) (Migration Act) and the *Immigration (Guardianship of Children) Act 1946* (Cth) (IGOC Act).

The amendments allow the Minister to make a further legislative instrument which designates a country as a 'regional processing country' to which asylum seekers who have arrived unauthorised in Australia's excised offshore territory will be sent for the processing of their claims for protection. In exercising this power to designate a country, the only condition is that the Minister thinks that the designation is in the national interest.⁷ 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*
- it will make an assessment, or permit an assessment to be made, of whether transferred asylum seekers are refugees.⁸

However, under the amended legislation the designation of a country 'need not be determined by reference to the international obligations or domestic law of that country'.⁹

The amendments provide for a form of parliamentary oversight. The Minister must provide both Houses of Parliament with copies of the following documents:

- 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.¹⁰

A failure to table these documents does not affect the validity of the designation.¹¹

A legislative instrument may only designate one country and must not provide that the designation ceases to have effect at any particular time.¹² The 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.¹³

The amendments providing for the processing of asylum seekers' claims in third countries apply to any person who arrived in Australia's excised offshore territory, without authorisation, on or after 13 August 2012.¹⁴

The legislation provides that an officer must take such a person to a 'regional processing country' as soon as 'reasonably practicable'.¹⁵ However, the Minister has discretion to determine that a person does not have to be taken to a 'regional processing country'.¹⁶

The Migration Act has also been amended such that mandatory detention of 'unlawful non-citizens' now applies in 'excised offshore places', as it does on the Australian mainland.¹⁷ While it has long been Australian government policy that asylum seekers who arrived unauthorised are detained in excised territories, such detention was previously discretionary under Australian law.

In addition to the amendments to the Migration Act, the IGOC Act has been amended to make clear that it does not affect the operation of migration law.¹⁸ The IGOC Act provides that the Minister for Immigration is the guardian of unaccompanied children who arrive in Australia.¹⁹ However, the Minister ceases to be the guardian of children who are taken from Australia to a 'regional processing country' pursuant to the Migration Act.²⁰ The effect of the amendments to the IGOC Act 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'.

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'.²¹

On 8 September 2012 the Governments of Australia and Papua New Guinea signed an MOU 'Relating to the Transfer to and Assessment of Persons in Papua New Guinea, and Related Issues'.²²

Neither MOU specifies which country has responsibility for the processing of the claims of transferred asylum seekers, nor provides details as to how the respective governments understand legal responsibilities to be apportioned between them.

Designation of Nauru as a ‘regional processing country’

On 10 September 2012 the Minister for Immigration and Citizenship, The Hon Chris Bowen MP, 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 his statement of reasons, the Minister states:

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 Refugees 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.²³

The documents tabled with the instrument of designation included a letter from the United Nations High Commissioner for Refugees, 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 High Commissioner’s letter outlines 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’.²⁴

The High Commissioner notes that arrangements to transfer asylum-seekers to another country are a ‘significant exception’ to normal practice and should only be pursued as part of a burden-sharing arrangement to more fairly distribute responsibilities, and 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.²⁵

The letter further states that ‘it is not clear from the information available to us that transfer of responsibilities for asylum seekers to Nauru is fully appropriate’.²⁶ The letter includes 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.

On 12 September 2012, the designation of Nauru as a ‘regional processing country’ came into effect, having been approved by both Houses of Parliament.

Designation of Papua New Guinea as a ‘regional processing country’

On 9 October 2012, the Minister for Immigration and Citizenship signed the legislative instrument designating Papua New Guinea as a ‘regional processing country’ under the Migration Act. In his statement of reasons for thinking that the designation was in the national interest, the Minister stated, as he did in his designation of Nauru, that ‘even if the designation of PNG 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 PNG to be a regional processing country’.²⁷

On 9 October 2012, the United Nations High Commissioner for Refugees wrote to the Minister for Immigration and Citizenship with respect to the designation of Papua New Guinea as a ‘regional processing country’. The UNHCR letter reiterates the earlier advice provided in relation to the designation of Nauru and raises the following specific concerns with regard to the designation of Papua New Guinea:

- that PNG, while having acceded to the Refugees 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 Refugees Convention
- that there remains a risk of *refoulement* despite written undertakings
- that the quality of protection currently offered in PNG remains of concern.²⁸

On 10 October 2012, the designation of Papua New Guinea as a ‘regional processing country’ came into effect, having been approved by both Houses of Parliament.

Transfer of asylum seekers to Nauru

On 13 September 2012 the first group of asylum seekers were sent from Christmas Island to Nauru. As at 4 November, there were reportedly 377 asylum seekers in Nauru,²⁹ comprising adult men from diverse countries, including Sri Lanka, Afghanistan, Iran and Iraq.

On 10 September 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.³⁰ 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; and

the Salvation Army would provide case management, community liaison, and programs and activities.

The asylum seekers are currently being accommodated in tents, pending the construction of more permanent facilities. The Commission understands that they have not been granted freedom of movement on the island.

On 10 October the *Refugees Convention Act 2012* was certified by the Parliament of the Republic of Nauru, being 'an Act to give effect to the Refugees Convention; and for other purposes'. It affirms that for the purposes of the Act a 'refugee' means a person who is a refugee under the Refugees Convention as modified by the Refugees Protocol and enshrines the principle of *non-refoulement* as articulated in the Refugees Convention.³¹ It further sets out procedures relating to the determination of refugee status, including merits and judicial review. It does not address articles of the Refugees Convention other than articles 1 and 33.

The Commission understands that as at 9 November 2012 processing of asylum seekers' claims under the Nauruan legislation had not commenced.

Bill to extend the scope of asylum seekers' liability for transfer to third countries and related matters

On 31 October 2012, the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 was introduced into the House of Representatives. This Bill is now the subject of an Inquiry by the Senate Legal and Constitutional Affairs Committee, with a reporting date of 5 February 2013.

The Bill seeks to amend the Migration Act to give effect to recommendation 14 of the report of the Expert Panel on Asylum Seekers, such that asylum seekers who reach anywhere in Australian mainland by boat, without authorisation, will have the same status under domestic law as those who arrive at an 'excised offshore place'. The effect of the amendment is that asylum seekers who arrive by boat to the Australian mainland would also be liable for transfer to a third country.

Amongst other measures, the Bill also provides an express power for the Minister to vary or revoke a determination that a person is exempt from transfer to a third country, if it is deemed to be in the public interest to do so.³² It 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.³³

What are Australia's international obligations to asylum seekers who are subject to transfer to third countries?

Australia's human rights obligations unquestionably apply in relation to asylum seekers who are subject to transfer to a third country, during the period of their detention on either Christmas Island or the mainland, prior to their transfer. They will also apply to the conduct of agencies of the Australian Government during the transfer.

It is important to note that Australia's human rights obligations also extend to acts done in the exercise of Australian jurisdiction, even if these acts occur outside Australian territory.³⁴ If Australia has 'effective control' over the people 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.³⁵

Furthermore, States cannot avoid their international law obligations by transferring asylum seekers to a third country.³⁶ Under international law, Australia will be in breach of its obligations under the ICCPR if it removes a person to another country in circumstances where there is a 'real risk' that their rights under the ICCPR will be violated.³⁷ The United Nations Human Rights Committee has said that responsibility for extra-territorial violations of human rights will arise when a country's act of removing someone from its territory is 'a link in the causal chain that would make possible violations in another jurisdiction'.³⁸ There is a responsibility on States to exercise 'due diligence' in determining whether the requisite level of risk exists, particularly in cases that may involve serious threats to physical integrity.³⁹

In relation to the CRC, the Committee on the Rights of the Child has said that:⁴⁰

in 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. The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services.

In addition, a basic principle of international law is that States have a responsibility to implement their treaty obligations in good faith.⁴¹ 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.

The Commission holds serious concerns about the approach taken to Australia's international obligations in the designations of Nauru and Papua New Guinea as a 'regional processing country'. As noted above, in both of his statements of reasons for thinking that the designation is in the national interest, the Minister for Immigration and Citizenship states that, while he thinks that the designation is not inconsistent with Australia's international obligations (including but not limited to Australia's obligations under the Refugees Convention) even if it is, he nevertheless thinks that it is in the national interest to proceed with the designation.⁴²

The Commission considers that a blanket statement that the 'national interest' may justify the limitation of rights goes beyond the circumstances in which 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 in a 'time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'. It is difficult to see how the arrival of asylum seekers to Australia by boat is a public emergency that threatens the life of the nation. Certainly

the Australian Government has made no suggestion to that effect, nor has there been any official proclamation to this effect. Further, Australia has not given any notification to the Secretary-General of the United Nations that it intends to derogate from its obligations under any human rights instruments.⁴³

Refugees Convention

The Refugees Convention does not itself specify procedures which should be put in place for determining refugee status, nor is there an international law obligation on Australia to provide durable solutions for asylum seekers found to be refugees. However, as noted above, Australia has a general obligation to implement the Refugees Convention in good faith.

The key objects and purposes behind the Refugees Convention are the protection of refugees seeking asylum, and the assurance of fundamental rights and freedoms for refugees, without discrimination. These purposes strongly suggest that effective measures for determining the refugee status of asylum seekers are required if Australia is to fulfil its obligations under the Convention in good faith.⁴⁴

The Commission is also concerned that a number of the features of the current arrangements concerning the transfer of asylum seekers to third countries may undermine specific provisions of the Refugees Convention, including the obligations to:

- respect the principle of *non-refoulement* (article 33); and
- ensure that asylum seekers are not penalised for unlawful arrival (article 31).

Further to these obligations, the Refugees Convention sets out a number of rights which accrue to refugees once they are lawfully present or lawfully staying in a country. It is not clear that these rights will be upheld under the third country processing arrangements currently being implemented.

International Covenant on Civil and Political Rights

As noted above, it is clear that Australia's obligations under the ICCPR and other international instruments apply while persons are detained on Christmas Island, and during their transfer to a third country.

The Commission is concerned that third country processing arrangements may lead directly to the breach of some of the rights in the ICCPR, including:

- the right to liberty and to be free from arbitrary detention (article 9(1))
- the right of people deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (article 10).

Convention on the Rights of the Child

A number of Australia's obligations under the CRC could be directly breached by the transfer of asylum seekers to a third country. Under the CRC, Australia is obliged to:

- treat the best interests of the child as a primary consideration in all actions concerning children (article 3)
- ensure that unaccompanied children are provided with special protection and assistance (article 20)
- ensure that applications for family reunification are dealt with in a positive, humane and expeditious manner (article 10)
- ensure that child asylum seekers receive appropriate protection and humanitarian assistance (article 22)
- ensure that children are detained only as a measure of last resort, and for the shortest appropriate period of time (article 37(b)).

In addition, aspects of the conditions for child asylum seekers detained in third countries may lead to breaches of their rights such as the right to education (article 28), and the right to the highest attainable standard of health and access to health care services (article 24).

What are the Commission’s key concerns about the third-country processing arrangements?

The differential treatment of asylum seekers based on their mode of arrival

The Commission has long argued against a two-tiered approach to processing asylum seekers’ claims for protection. In the past, the Commission was highly critical of the different approach taken to asylum seekers who arrived at offshore excised places, usually by boat, and those who arrived on the Australian mainland, typically by air. In October 2011, the Commission welcomed the return to a single system of processing claims for asylum under the provisions of the Migration Act.⁴⁵

The third country processing arrangements again establish differential treatment of asylum seekers depending on their place and means of arrival. As noted above, the Commission is concerned that the current arrangements will likely lead to breaches of Australia’s international obligations.

In particular, article 31 of the Refugees Convention prohibits States Parties from penalising asylum seekers on account of their unlawful entry when they are coming directly from a territory where their life or freedom was threatened.⁴⁶ It has been held that any treatment of such persons that is ‘less favourable than that accorded to others’ and is ‘imposed on account of illegal entry’ is a penalty within the meaning of article 31 ‘unless objectively justifiable on administrative grounds’.⁴⁷ Australia’s differential treatment of asylum seekers based on their place and method of arrival arguably breaches this obligation, as well as the right to equality and non-discrimination before the law in article 26 of the ICCPR.⁴⁸

In addition, the CRC affirms the right of child asylum seekers and refugees to receive appropriate protection and assistance.⁴⁹ Article 2 of the CRC requires States Parties to ensure that all children enjoy their right to protection ‘without discrimination of any kind’.⁵⁰

The detention of asylum seekers who are liable for transfer to a third country

Following the recent amendments, the Migration Act now requires the detention of people who arrive unauthorised and are in excised offshore places. Asylum seekers awaiting transfer to a third country are currently held in closed immigration detention facilities either on Christmas Island or on the mainland. The Commission considers that restrictive detention of people awaiting transfer to a third country may be arbitrary, in breach of Australia's obligations under article 9 of the ICCPR and article 37(b) of the CRC.⁵¹ 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.

The Commission understands that families with children and unaccompanied minors are being detained in the Lilac and Aqua compounds of the North-West Point Immigration Detention Centre, these compounds having been declared 'Alternative Places of Detention'. In the Commission's view, the classification of these compounds as Alternative Places of Detention is misleading and inappropriate. Both compounds look and feel like immigration detention centres, and in practice they have been operated as such whenever they have been used since 2010. The Commission believes that the detention of families and unaccompanied minors in these environments undermines the Australian Government's statement that children and their family members will not be detained in immigration detention centres.

The Commission is also concerned that many of the people who are liable for transfer to a third country, including children, may face prolonged periods of detention in closed facilities. There are more people liable for third-country transfer than there are current or projected places available in Nauru and Papua New Guinea. It is likely that many of those currently in detention will ultimately have their protection claims processed in Australia. However, they may face lengthy periods in detention prior to the processing of their claims. The fact that detention is prolonged may contribute to a finding that it is arbitrary.

Pre- and post-transfer risk and vulnerability assessment procedures

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 third country.

On 13 October 2012 the Department of Immigration and Citizenship posted pre-transfer assessment guidelines to its website,⁵² along with guidelines for the exercise of Ministerial discretion under s198AE of the Migration Act to exempt a person or persons from transfer to a designated 'regional processing country'.⁵³

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 Refugees Convention, ICCPR, CAT and CRC. 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 processing country. Counter to internationally established processes for the assessment of claims for protection, they indicate that ‘assurances given by the RPC’ 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 does it give any guidance as to the circumstances in which advice should be sought from an suitably experienced officer.⁵⁴

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 or mental 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 are referred to him for consideration 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).⁵⁵

The Minister has also asked that cases are referred to him for consideration 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.⁵⁶

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 third country; if people have a particular vulnerability that cannot be adequately managed in a third country; or if transfer would lead to separation from immediate family. Where pre-transfer risk assessments indicate that it is not appropriate for people to be transferred to a third country, those people should have their claims for protection processed in Australia, expeditiously.

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 the third country. The Commission has also requested a copy of any post-transfer vulnerability assessment tools and awaits provision of these documents.

The detention of asylum seekers in third countries

The Commission is concerned that the human rights of people transferred to third countries may be breached, especially if they are subject to detention in those countries.

The Commission is aware that the Australian Government has said that asylum seekers will not be detained on Nauru. However, despite this assurance, it appears that as of mid-November, 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.

Furthermore, the Commission considers that, even if asylum seekers have freedom of movement around Nauru, the conditions under which people transferred to third countries are held could be characterised as deprivation of liberty amounting to detention.

The Human Rights Committee has observed that ‘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.⁵⁷ 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.⁵⁸

The Commission considers that the circumstances in which people are held on Nauru 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; if they have no control over their accommodation; or if they are subject to supervision and monitoring by security guards.

If asylum seekers transferred to third countries spend long periods of time held in circumstances which can be characterised as detention, this will likely lead to breaches of article 9(1) of the ICCPR and, where children are involved, article 37(b) of the CRC.

Refugee status determination processes on Nauru

As noted above, Australia is prohibited under article 33(1) of the Refugees Convention from expelling or returning refugees 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. Australia has further and broader *non-refoulement* obligations under the ICCPR, CRC and CAT,⁵⁹ 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.⁶⁰

The transfer of asylum seekers to a third country creates a situation in which Australia’s *non-refoulement* obligations apply to any potential removal of the

transferred persons from that third country. In other words, Australia is placing itself in a position in which it relies on third countries to comply with the *non-refoulement* obligations that are in fact owed to asylum seekers by Australia.

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 Refugees Convention.⁶¹

However, the Commission notes that the office of the UNCHR 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'.⁶²

While the *Refugees 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 relating to the determination of asylum seekers' claims remain unclear.⁶³ For instance, it is not known when the assessment of asylum seekers' claims will commence, nor the extent of legal assistance that will be provided to them, nor whether the process will include a complementary protection assessment or an adequate approach to determining whether a person is stateless.

In the absence of this information, the Commission shares the concerns of the UNHCR that the processing of refugee claims may contain inadequate safeguards, leading to a risk that refugees will be returned to a situation where their life or freedom may be threatened.

The potential for family separation

The ICCPR and CRC both provide that everyone has the right to freedom from interference with their family.⁶⁴ In addition, article 10(1) of the CRC specifically states 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 ... in a positive, humane and expeditious manner'.

If asylum seekers who are transferred to a third country already have family members in Australia, they may face potentially indefinite separation from those family members, and Australia could be in breach of its obligation to protect the right to freedom from interference with family.

In addition, if the application of the 'no advantage' principle to children, including unaccompanied children, may lead to long periods of time before they are able to make applications for family reunification, this may result in breaches of the obligations contained in article 10(1) of the CRC.

The situation of unaccompanied children

The recent amendments to the Migration Act place beyond doubt the Minister for Immigration and Citizenship's authority to transfer unaccompanied children to third countries for processing of their claims for protection. This is despite the fact that prior to such transfer, he is their legal guardian and obliged under international law to treat their best interests as a primary consideration in all decisions concerning them.

The Commission considers that despite the fact that the transfer of unaccompanied children seeking asylum to a third country is lawful under Australian law, it is likely to breach Australia's international human rights obligations. Owing to the particular vulnerabilities of unaccompanied children, the CRC recognises that they are entitled to special protection and assistance from the State.⁶⁵ Additionally, as noted above, the CRC requires a child's best interests to be a primary consideration in any decision involving them.⁶⁶ For a range of reasons, it is difficult to see how, in the vast majority of cases, transferring unaccompanied children to a third country for processing of their claims for asylum could be in their best interests.

Additionally, the Commission has concerns regarding the arrangements for the care and custody of children transferred under the arrangement. As noted above, the Minister ceases to be the guardian of children who are taken from Australia to a regional processing country pursuant to the Migration Act. It is unclear what arrangements have been made for the guardianship of any unaccompanied children transferred to a third country.

Conditions on Nauru

People forcibly removed to third countries, particularly if they can be characterised as being in detention, face the possibility of breaches of other human rights.

People deprived of their liberty must be treated with humanity and with respect for the dignity of the human person. The Commission is concerned that aspects of the conditions in third countries, specifically the existing conditions in Nauru, may lead to breaches of this right. Detaining asylum seekers in a camp that is not yet completed, where they must live in tents 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.

In addition, the conditions of detention may lead to breaches of other rights, such as rights to an adequate level of health care and to appropriate recreation and education, especially in the case of children.

Duration of stay in a third country

The Commission holds serious concerns about the length of time that asylum seekers and refugees could potentially have to stay in a third country to which they have been sent for the processing of their claims for protection.

The Australian Government has stated that it will implement the principle of 'no advantage' set out in the report of the Expert Panel on Asylum Seekers – namely, the idea that asylum seekers who come to Australia by boat will gain no benefit through

doing so rather than waiting elsewhere to have their claims assessed and a durable solution provided if they are found to be refugees.⁶⁷ The UNHCR has expressed serious concern about the basis of such a principle, explaining that there is no ‘average’ time for resettlement.⁶⁸

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 in third countries, which might amount to arbitrary detention.

The impact that long-term detention had on the physical and mental health of asylum seekers who were detained in Nauru and Papua New Guinea when these facilities were last used is well documented.⁶⁹ The Commission is extremely concerned that the long-term detention of asylum seekers in third countries could once again detrimentally affect their physical and mental health.

¹ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150, (entered into force 22 April 1954) and *Protocol Relating to the Status of Refugees*, 606 UNTS 267 (entered into force 4 October 1967). Both at <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> (viewed 26 September 2012).

² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), at <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 26 September 2012).

³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), at <http://www2.ohchr.org/english/law/crc.htm> (viewed 26 September 2012).

⁴ *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), at <http://www2.ohchr.org/english/law/cat.htm> (viewed 26 September 2012).

⁵ Australian Government, *Expert Panel on Asylum Seekers*, <http://expertpanelonasylumseekers.dpmc.gov.au/> (viewed 11 October 2012)

⁶ 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://expertpanelonasylumseekers.dpmc.gov.au/report> (viewed 12 October 2012).

⁷ *Migration Act 1958* (Cth) (Migration Act), s 198AB(2).

⁸ Migration Act, s 198AB(3).

⁹ Migration Act, s 198AA.

¹⁰ Migration Act, s 198AC(2).

¹¹ Migration Act, s 198AC(5).

¹² Migration Act, s 198AB(1A).

¹³ Migration Act, s 198AB(1B).

¹⁴ Amendment Act, Schedule 1, item 36.

¹⁵ 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’.

¹⁶ Migration Act, s 198AE.

¹⁷ Migration Act, s 189(3).

¹⁸ *Immigration (Guardianship of Children) Act 1946* (Cth) (IGOC Act) s 8(2).

¹⁹ IGOC Act, s 6(1).

²⁰ IGOC Act, ss 6(1) and (2)(b).

²¹ 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 12 September 2012)

²² 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 10 September 2012)

²³ The Hon Chris Bowen, 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, paras 35 and 36. At <http://www.minister.immi.gov.au/media/cb/2012/cb189739.htm> (viewed 27 September 2012).

²⁴ A Guterrres, United Nations High Commissioner for Refugees, Correspondence to The Hon. Chris Bowen MP, Minister for Immigration and Citizenship of Australia, 5 September 2012. 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 12 September 2012)

²⁵ Above.

²⁶ Above.

²⁷ The Hon Chris Bowen, 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, pars 35 and 36. At <http://www.minister.immi.gov.au/media/cb/2012/cb190599.htm> (viewed 12 October 2012).

²⁸ A Guterrres, United Nations High Commissioner for Refugees, Correspondence to The Hon. Chris 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

²⁹ 'Asylum seekers on Nauru choose to return home', *Australian Network News*, 4 November 2012, at <http://www.abc.net.au/news/2012-11-04/an-nauru-asylum-seekers-returning-home/4352166> (viewed 9 November 2012).

³⁰ 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 9 November 2012).

³¹ *Refugees Convention Act 2012* (Republic of Nauru), ss 3-4.

³² Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, item 31.

³³ Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, item 6.

³⁴ *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).

³⁵ See the decisions of the European Court of Human Rights in *Banković v Belgium and others* (dec.) [GC] no. 52207/99, [2001] ECHR 890 and *Al-Skeini v United Kingdom* [GC] no. 55721/07, [2011] ECHR 1093.

³⁶ G Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd ed., 2007), pp 408-411. See also UNHCR, 'UNHCR Statement: Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012', 31 October 2012, at http://unhcr.org.au/unhcr/index.php?option=com_content&view=category&layout=blog&id=35&Itemid=63 (viewed 12 November 2012).

³⁷ See the following decisions of the Human Rights Committee: *GT v Australia*, Communication No. 706/1996, UN Doc CCPR/C/61/D/706/1996 (2007), [8.1]; *ARJ v Australia*, Communication No. 692/1996, UN Doc CCPR/C/60/D/692/1996 (1997); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Kindler v Canada*, Communication No. 470/1991, UN Doc CCPR/C/48/D/470/1991 (1993), [13.1]-[13.2]; *Ng v Canada*, Communication No. 469/1991, UN Doc CCPR/C/49/D/469/1991 (1993), [14.1]-[14.2]; *Cox v Canada*, Communication No. 539/1993, UN Doc CCPR/C/52/D/539/1993 (1994), [16.1]-[16.2]; *Judge v Canada*, Communication No. 829/1998, UN Doc CCPR/C/78/D/829/1998 (2003), [10.2]-[10.7]; *Nakrash and Qifen v Sweden*, Communication No. 1540/2007, UN Doc CCPR/C/94/D/1540/2007 (2008), [7.3]; *Bauetdinov v Uzbekistan*, Communication No. 1205/2003, CCPR/C/92/D/1205/2003 (2008), [6.3]; *Aumeeruddy-Cziffra v Mauritius*, Communication No. 35/1978, UN Doc CCPR/C/12/D/35/1978 (1990), [9.1]. See also Human Rights Committee, *General Comment 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), [12]; and, under similar provisions in the *European Convention on Human Rights*, see *Hirsi Jamaa and Others v Italy* (European Court of Human Rights, Grand Chamber, Application no. 27765/99, 23 February 2012) [114]ff.

³⁸ *Munaf v Romania*, Communication No. 1539/2006, UN Doc CCPR/C/96/D/1539/2006 (2009), [14.2]; *Judge v Canada*, Communication No. 829/1998, UN Doc CCPR/C/78/D/829/1998 (2003), [10.6].

³⁹ *Ahani v Canada*, Communication No. 1051/2002, UN Doc CCPR/C/80/D/1051/2002 (2004), [10.7]. See also, in the context of the *European Convention on Human Rights*, *Hirsi Jamaa and Others v Italy* (European Court of Human Rights, Grand Chamber, Application no. 27765/99, 23 February 2012) [117], [133] and [156]-[157] ('In order to ascertain whether or not there was a risk of ill-treatment, the Court must examine the foreseeable consequences of the removal of an applicant to the receiving

country in the light of the general situation there as well as his or her personal circumstances'. Also, in the context of return to Libya of persons seeking asylum in Italy: 'the Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees'.

⁴⁰ United Nations 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), [27].

⁴¹ Vienna Convention on the Law of Treaties, adopted 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 26 and 31.

⁴² See notes 24 and 28.

⁴³ See, for example, the process described in article 4(3) of the ICCPR.

⁴⁴ G Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd ed, Oxford University Press, 2007) pp 456-458, 530.

⁴⁵ Australian Human Rights Commission, 'Processing asylum seekers on the mainland is welcomed', (Media Release, 14 October 2011). At http://www.humanrights.gov.au/about/media/media_releases/2011/92_11.html (viewed 27 September 2012).

⁴⁶ 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.' :*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 27 September 2012).

⁴⁷ Decision of the [UK] Social Security Commissioner in Case no. CIS 4439/98, 25 November 1999, [16].

⁴⁸ See further J von Doussa, 'Human Rights and Offshore Processing' (2007) 9 *UTS Law Review* 41, pp 45, 48-49; J McAdam and T Garcia, *Submission on Refugees and Asylum Seekers to the National Human Rights Consultation* (2009), pp 33-39.

⁴⁹ *Convention on the Rights of the Child*, (1989), art 22.

⁵⁰ *Convention on the Rights of the Child*, (1989), art 2. See further Human Rights and Equal Opportunity Commission, *A last resort? The National Inquiry into Children in Immigration Detention* (2004), pp 272-274. At

http://www.hreoc.gov.au/human_rights/children_detention_report/report/index.htm (viewed 27 September 2012).

⁵¹ The prohibition on arbitrary detention includes detention which, while it may be lawful, is unjust or unreasonable. The United Nations Human Rights Committee has stated that to avoid being arbitrary, detention must be a proportionate means to achieve a legitimate aim. In determining whether detention is proportionate to a particular aim, consideration must be had to the availability of alternative means for achieving that end which are less restrictive of a person's rights. See Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997) [9.2].

⁵² 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 14 October 2012).

⁵³ 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 14 October 2012).

⁵⁴ 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), p 8.

⁵⁵ 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), p 5.

⁵⁶ 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), p 6.

⁵⁷ Human Rights Committee, *General Comment No 8: Right to liberty and security of persons (Art. 9)* (1982), [1].

⁵⁸ See, in the context of the *European Convention on Human Rights*, *Amuur v France* (1992) 22 EHRH 533, [42].

⁵⁹ *International Covenant on Civil and Political Rights*, 1966, arts 6 and 7; *Convention on the Rights of the Child*, 1989, arts 6 and 37; *Convention Against Torture*, 1984, art 3.

⁶⁰ In relation to the operation of the ICCPR in this regard, see the decisions of the Human Rights Committee referred to in footnote 37 above. In relation to the operation of the CRC in this regard, see United Nations 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).

⁶¹ 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.

⁶² Mr António Guterres, United Nations High Commissioner for Refugees, Correspondence to The Hon. Chris Bowen MP, Minister for Immigration and Citizenship of Australia, 5 September 2012.

⁶³ The Hon. Chris 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 27 September 2012).

⁶⁴ *International Covenant on Civil and Political Rights*, 1966, arts 17(1) and 23(1), *Convention on the Rights of the Child*, 1989, art 8(1).

⁶⁵ *Convention on the Rights of the Child*, 1989, art 20(1).

⁶⁶ *Convention on the Rights of the Child*, 1989, art 3(1).

⁶⁷ Report of the Expert Panel on Asylum Seekers (August 2012), p14, recommendation 1. See also, for example, The Hon. Chris 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 27 September 2012).

⁶⁸ Mr António Guterres, United Nations High Commissioner for Refugees, Correspondence to The Hon. Chris Bowen MP, Minister for Immigration and Citizenship of Australia, 5 September 2012.

⁶⁹ See Australian Human Rights Commission, Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into Australia's agreement with Malaysia in relation to asylum seekers (14 September 2001), para 76. At http://www.hreoc.gov.au/legal/submissions/2011/20110914_asylum_seekers.html#fnB72 (viewed 27 September 2012).