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to table in Parliament an annual report detailing the arrangements in place for assessing refugee claims by asylum seekers processed offshore and information about their the accommodation, health care and education. There is no such requirement in the 2012 Bill, which adds to the concerns expressed below about the lack of transparency and public scrutiny.

The 2006 Bill was eventually withdrawn when it became clear that it would be defeated in the Senate, with a number of Federal Senators threatening to vote against it or abstain. The Senate Committee that reported on the Bill also recommended that 'the Bill should not proceed' in light of the evidence presented to it (Recommendation 1).

Given that the present Bill raises identical concerns, my submission below reiterates many of the same concerns I presented in my submissions on the 2006 Bill.

Yours sincerely,

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A INTRODUCTION

1. While Australia has a sovereign right to determine who enters its territory, this right is not absolute. It is limited by certain obligations which Australia has voluntarily accepted under international treaty law, as well as under customary international law. These mandate that Australia must not return refugees (either directly or by virtue of deflection or interception policies) to territories in which they face—or risk removal to—persecution on account of race, religion, nationality, political opinion or membership of a political social group; arbitrary deprivation of life; torture; or cruel, inhuman or degrading treatment or punishment.¹ Refugee law places limits on the otherwise unfettered exercise of

5. As a matter of State responsibility, liability for breaches of international law can be both joint and several. Any State that aids or assists, directs or controls, or coerces another State to commit an internationally wrongful act is also responsible if it knows the circumstances of the wrongful act, and the act would be wrongful if that State committed it itself. Furthermore, an internationally wrongful act is attributable to a State if it is committed by a legislative, judicial or executive organ of government, or a person or entity which, although not a government organ, has nonetheless been delegated certain aspects of governmental authority (even if that person or entity exceeds the actual authority they have been given or goes against instructions). In other words, States cannot 'contract out' their international responsibilities.
6. Given Australia's involvement in the transfer and possible processing of the asylum seekers to be held in such places, Australia will remain responsible for any violations of international law relating to their treatment, under the Refugee Convention and its Protocol, general international law, and human rights law.

(b) Asylum

7. Under international law, individuals have a right to seek and enjoy asylum from persecution. Every State has the sovereign right to grant asylum to refugees within its territory; the corresponding duty is respect for that asylum by all other States. Asylum is a peaceful, humanitarian and non-political act. Australia has a fundamental legal duty not to return people to persecution and other forms of significant harm. This duty is based on a long-standing principle of international treaty law and custom, entrenched in domestic law, and cannot simply be abandoned for political reasons.

(c) Good faith

8. A basic principle of international law is that States have a responsibility to implement their treaty obligations in good faith. 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. A lack of good faith is distinct from (although may also encompass) a violation of an express term of a treaty. The duty requires parties to a treaty 'not only to observe the letter of the law, but also to abstain from acts which would inevitably

⁴ Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) ('Protocol').

⁵ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 arts 26, 31; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) para 3. See GS Goodwin-Gill 'State Responsibility and the "Good Faith" Obligation in International Law' in M Fitzmaurice and D Sarooshi (eds), *Essays of State Responsibility before International Judicial Institutions* (Hart Publishing Oxford 2004) esp 85–88; arguments presented by U

affect their ability to perform the treaty.⁶ Thus, a State lacks good faith 'when it seeks to avoid or to "divert" the obligation which it has accepted, or to do indirectly what it is not permitted to do directly.'⁷ The test for good faith is an objective one; it looks to the practical effect of State action, not its intent or motivations.⁸

9. In the context of the right to seek asylum, measures which have the effect of blocking access to procedures on territory may not only breach express obligations under international human rights and refugee law, but may also constitute a breach of the principle of good faith. Although States do not have a duty to facilitate travel to their territories by asylum seekers, the options available to States wishing to frustrate the movement of asylum seekers are limited by specific rules of international law and by States' obligations to fulfil their international commitments in good faith. Even though immigration control per se may be a legitimate exercise of State sovereignty, it must nevertheless be pursued within the boundaries of international law.

10. In its Advisory Opinion on Reservations to the Genocide Convention the International Court of Justice stated that in the area of human rights law, of which refugee law is an integral part, treaties have 'a purely humanitarian and civilizing purpose.' In such treaties,

the contracting States do not have interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in ... convention[s] of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.

11. While there is no provision that expressly mandates States to process asylum seekers within their borders, a combination of provisions in the Refugee Convention (no penalties for illegal entry, non-discrimination, non-refoulement, access to courts and the status which contracting States owe to refugees) reinforce the object and purpose of the Refugee Convention as assuring to refugees 'the widest possible exercise of fundamental rights and freedoms'.¹⁰ States are responsible for refugees within their territory, as well as those whom they subject to enforcement action beyond their territorial jurisdiction. This responsibility entails ensuring that refugees are not returned in any manner to territories in which they face—or risk return to—persecution, arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment, and if sent

concerns as Australia's (self-created) problem.¹⁴ UNHCR's reluctance to involve itself in the regional processing regime is a sign of repudiation of Australian unilateralism in this area of law.

by which flight must occur given that States do not generally provide visas for individuals seeking to flee persecution. The regional processing regime risks contributing to the significant problem of refugee ‘warehousing’, the practice by which refugees are kept ‘in protracted situations of restricted mobility, enforced idleness, and dependency—their lives on indefinite hold—in violation of their basic rights under the 1951 UN Refugee Convention.’¹⁷ This typically occurs in poor African and Asian countries which host millions of refugees but lack the economic and environmental capacity to support them within the local community. Australia’s decision to contribute to this global problem illustrates contempt for the protection regime and highlights a lack of good faith in implementing its international obligations.

(e) Effective protection

20. Although the transfer of asylum seekers to a third country may be permissible under international refugee law, this will only be the case where appropriate ‘effective protection’ safeguards are met.¹⁸ Any transfer agreement must at least ensure that the asylum seeker will be able to: enjoy effective protection against refoulement; have access to a fair and effective asylum procedure; and be treated in accordance with international refugee and human rights law and standards.
21. In considering the issue of ‘effective protection’ in the context of transfer to safe third countries, safe countries of asylum and safe countries of origin, the Lisbon Expert Roundtable defined its criteria as including ‘respect for fundamental human rights ... in accordance with applicable international standards, including ... no real risk that the person would be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’¹⁹ Furthermore, protection is only ‘effective if the asylum seeker does not fear persecution in the host State, is not at risk of being sent to another State in which effective protection would not be forthcoming, has access to means of subsistence sufficient to maintain an adequate standard of living, and has his or her fundamental human rights respected in accordance with international standards. The State must comply with international refugee and human rights law in practice (not just in theory),²⁰ grant access to fair and efficient determination procedures which include protection grounds that would be recognized in the State in which asylum was originally sought, take into account any special

¹⁷ M Smith ‘Warehousing Refugees: A Denial of Rights, A Waste of Humanity’ in US Committee for Refugees World Refugee Survey 2008; see also G Chen ‘A Global Campaign to End Refugee Warehousing’ in US Committee for Refugees World Refugee Survey 2004.

¹⁸ Executive Committee Conclusion No 85 (1998), Executive Committee Conclusion No 87 (1999). Conclusion No 85 provides that the host country must treat the asylum seeker in accordance with accepted international standards, ensure protection against refoulement and provide the asylum seeker with the possibility to seek and enjoy asylum.

¹⁹ Lisbon Expert Roundtable ‘Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers’ (9–10 December 2002) para 15(b).

²⁰ In particular, the third State must be a signatory to the 1951 Convention and/or 1967 Protocol and comply with those instruments, or at least demonstrate that it has developed a practice akin to what those instruments require: *Ibid*, para 15(e).

vulnerabilities of the individual, and maintain the privacy interests of the individual and his or her family.²¹

22. In a letter to the Immigration Minister about the regional processing arrangements, the UN High Commissioner for Refugees, António Guterres, stated that protection safeguards should include:

- x respect for the principle of non-refoulement
- x the right to asylum (involving fair adjudication of claims);
- x respect for the principle of family unity and best interests of the child;
- x the right to reside lawfully in the territory until a durable solution is found;
- x humane reception conditions, including protection against arbitrary detention;
- x 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;
- x special procedures for vulnerable individuals with clear pre-transfer assessments by qualified staff (including best interests determinations for children, especially unaccompanied and separated children) and support for victims of torture/trauma or suffering from disabilities (including aged/disabled); and,
- x durable solutions for refugees within a reasonable period.²²

23. While the legal framework in a particular State is very important in determining whether or not it is 'safe', even more significant is what it does in practice. It is essential that asylum seekers are treated in accordance with accepted international standards.²³ Mere ratification of human rights and refugee instruments does not equate to compliance with their standards, and an absence of ratification raises particular concerns about what level of protection might realistically be expected.

24. Nauru acceded to the Refugee Convention in 2011 but has only recently sought to establish national refugee status determination procedures. As such, there is no expertise within that country for determining the... s, the UNHCR (94J 0 -1.1

instruments, including non-refoulement obligations based on the right to life and the right to be free from torture or cruel, inhuman or degrading treatment or punishment.

25. Although Papua New Guinea is a party to the ICCPR, ICESCR, CERD,²⁶ the CRC²⁷ and CEDAW,²⁸ it has a significant reservation to the Refugee Convention. This provides that Papua New Guinea does not accept the obligations set out in articles 17(1) (work rights), 21 (housing), 22(1) (education),²⁶ 26 (freedom of movement), 31 (non-penalization for illegal entry or presence), 32 (expulsion) and 34 (facilitating assimilation and naturalization). This means that there is a significant curtailment of the rights of refugees and asylum seekers in Papua New Guinea. Again, this means that asylum seekers transferred there are receiving different treatment than asylum seekers processed in Australia (or even on Nauru), which may amount to discriminatory treatment. As the UN High Commissioner for Refugees wrote to the Immigration Minister in October 2012, 'PNG does not have the legal safeguards nor the competence or capacity to shoulder alone the responsibility of protecting and processing asylum-seekers transferred by Australia.'²⁹

27. Finally, in this context, it should be recalled that the practice of transferring asylum seekers to other States for processing has typically been limited to refugees who have passed through other countries on their way to the State in which asylum is ultimately claimed. The new policy targets individuals for whom Australia may be the first country in which asylum could be claimed—in other words, they have come directly to Australia. It is clear that the policy shuts down Australia as an asylum country for persons fleeing by boat, which contravenes the very foundation of the international protection regime.

C SPECIFIC CONCERNS

- (a) *Non-refoulement* (Art 33 Refugee Convention; Art 3 CAT; Arts 6 and 7 ICCPR)

28. The principle of non-refoulement is the cornerstone of international refugee law. States have a duty under the Refugee Convention, CAT and the ICCPR³² as well as under customary international law, not to return individuals (either directly or by virtue of deflection or interception policies) to territories where their lives or freedom are threatened by virtue of their race, religion, nationality, political opinion or membership of a particular social group, or where they are at risk of being subjected to arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment. This obligation also prohibits States from sending refugees to their territories from which they risk removal to such harm (often described as *chapeau refoulement*).
29. Although Nauru is now a party to the Refugee Convention, its implementing legislation has no practical force as yet and Nauru lacks the resources to put in place its own refugee status determination system. Despite any bilateral agreements with Australia, Nauru's status as a sovereign State means that it could force the expulsion of asylum seekers and refugees should it so choose. This would, in turn, place Australia in breach of its non-refoulement obligations, since a State that sends refugees to a country which in turn expels that person to persecution or other forms of serious harm will be liable under international law for refoulement. This principle applies regardless of whether it occurs 'beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc.'³³

- (b) Penalties (Art 31 Refugee Convention)

30. Article 31(1) of the Refugee Convention provides that States must not impose penalties on refugees for illegal entry or presence, provided that they have come directly from a territory where their life or freedom was threatened, present themselves without delay to the authorities, and show good cause for their illegal entry or presence. Having a well-founded fear of persecution is generally

³² Refugee Convention, art 33; CAT, art 3; ICCPR, art 7.

³³ E Lauterpacht and D Bethlehem 'The Scope and Content of the Principle of Non-Refoulement Opinion' in E Feller, V Türk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge, 2003) para 67.

children and their families, and delays ~~able~~ solutions for recognized refugees. Furthermore, the Minister has stated ~~at the~~ ⁴⁰ that asylum seekers who arrive post-13 August 2012 and are processed in Australia ~~will~~ remain on bridging visas even after they are regarded ~~through~~ the process as refugees.⁴⁰ Together, these measures may be regarded as a 'penalty ~~for~~ ⁴¹ lawful arrival, which is in flagrant violation of the terms of the Refugee Convention ~~with~~ ⁴² which Australia has freely accepted.

(c) Non-discrimination (Art 3 Refugee Convention; Art 2 ICCPR)

34. The proposed legislation will implement different processes and standards of treatment which discriminate between ~~asylum~~ seekers who arrive by plane and by boat. Such people are unable to ~~make~~ ⁴¹ a valid visa application 'unless the Minister personally thinks it is in the public interest to do so', and are 'subject to mandatory immigration detention, ~~to~~ be taken to a designated regional processing country and cannot institute or continue certain legal proceedings' (Explanatory Memorandum, 1).
35. Article 3 of the Refugee Convention ~~prohibits~~ ⁴¹ countries from discriminating between refugees or asylum seekers on the basis ~~of~~ ⁴¹ race, religion or country of origin. It is buttressed by anti-discrimination provisions in international human rights law, such as article 2 of the ICCPR and ICESCR.
36. According to the Minister, the ~~Bill~~ ⁴¹ provides a way of ensuring that ~~all~~ ⁴¹ boat arrivals get equal treatment—at the ~~lowest~~ ⁴¹ level: 'just as ~~people~~ ⁴¹ who are on Nauru and Manus Island do not receive ~~work~~ ⁴¹ rights, people on bridging visas in Australia will also not have the right to work.' However, even if the Bill seeks to treat all boat arrivals ~~equally~~, it creates an ~~unacceptable~~ ⁴¹ distinction between two groups of asylum seekers on the basis ~~of~~ ⁴¹ mode (and time) of arrival: asylum seekers who come by boat versus those who ~~arrive~~ ⁴¹ by plane. Furthermore, it is arguably discrimination on the grounds ~~of~~ ⁴¹ race as well, since asylum seekers who arrive by boat typically come from ~~a different set of countries~~ ⁴¹ than those who arrive by plane.
37. Presumably, the distinction is made ~~on the~~ ⁴¹ basis that the first group come without a valid visa, whereas ~~the latter~~ ⁴¹ arrive with documentation. Yet, as noted above, article 31 of the Refugee Convention ~~prohibits~~ ⁴¹ States from penalizing asylum seekers for arriving without ~~travel~~ ⁴¹ documents, and ~~hence~~ ⁴¹ this is an unlawful justification. International law permits distinctions between aliens who are in materially different circumstances, ~~but~~ ⁴¹ prohibits unequal treatment of those similarly placed. In general, ~~differential~~ ⁴¹ treatment between non-citizens is allowed where the distinction pursues a legitimate aim, has an objective justification, and there ~~is~~ ⁴¹ reasonable proportionality between the means used and the aims sought to be realized.⁴² While Australia may seek to invoke

⁴⁰ Interview with Immigration Minister Chris Bowen, 7.30(ABC, 21 November 2012)

<http://www.abc.net.au/7.30/content/2012/s3638131.htm>

⁴¹ Ibid.

⁴² GS Goodwin-Gill, International Law and the Movement of Persons between States (London Press, Oxford, 1978) 78; Human Rights Committee, 'General Comment No 18: Non-Discrimination' (1989) para 13; ECOSOC Commission on Human Rights, 'Prevention of Discrimination: The Rights of Non-

immigration control or 'saving lives at sea' as a 'legitimate aim' in this context, it would be difficult to establish that the means by which that aim is sought to be realized is

