THE UNIVERSITY OF NEW SOUTH WALES

FACULTY OF LAW

Professor Jane McAdam
BA (Hons) LLB (Hons) (Sydney) DPhil (Oxford)

Scientia Professor of Law

Australian Research Council Future Fellow

Non-Resident Senior Fellow,
Brookings Institution, Washington DC

Research Associate, Refugee Studies Centre, University of Oxford

Committee Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600
human.rights@aph.gov.au

BY EMAIL

11 January 2013

Dear Committee Secretary,

Migration Legislation (Regional Processing and Other Measures) Act 2012
and Related Bills and Instruments

Thank you very much for the opportunity to provide a written submission in lieu of oral evidence to the Committee.

In addition to the submission below, which addresses a number of the specific questions raised by the Committee, I am enclosing two further submissions which are relevant to the issues before the Committee:

- A submission by 17 Australian refugee law academics to the Expert Panel on Asylum Seekers (11 July 2012), endorsed by a number of international refugee law scholars (Professor Deborah Anker, Dr David Cantor, Professor Geoff Gilbert, Professor Guy S Goodwin-Gill, Professor Elspeth Guild, Professor Kate Jastram, Professor Hélène Lambert, Professor Audrey Macklin: http://expertpanelonasylumseekers.dpmc.gov.au/public-submissions);

- Annexed to the above, a submission of 14 Australian refugee law academics to the Senate Inquiry into the Agreement between Australia and Malaysia on the Transfer of Asylum Seekers to Malaysia (15 September 2011).

Please do not hesitate to contact me if I can be of further assistance.

Yours sincerely,

Professor Jane McAdam

Director, International Refugee & Migration Law Project
Gilbert + Tobin Centre of Public Law
Faculty of Law, University of NSW

SUBMISSION TO THE JOINT PARLIAMENTARY
COMMITTEE ON HUMAN RIGHTS

all, treatment must not be inhuman or degrading.[5] The regional processing arrangements are sub-standard when assessed against

territory, including within the territory of other sovereign States, such as Nauru and Papua New Guinea.[8]

8. Liability for breaches of international law can be both joint and several.[9] 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' of their international responsibilities. This was recently emphasized by the Grand Chamber of the European Court of Human Rights in respect of Italy's transfer of irregular migrants to Libya, where it stated that Italy could not contract out of its international obligations via a bilateral agreement with another State.[10]

9. Given Australia's involvement in the transfer, management and possible processing of the asylum seekers to be held in such places, it remains responsible for any violations of international law relating to their treatment under the Refugee Convention, general international law, and human rights law. This is a consequence of the general law on State responsibility, as well as deriving from Australia's obligations under article 2(1) of the ICCPR, which requires States parties to 'respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.'[11]

10. On the issue of State responsibility in the present context, I refer the Committee to the oral evidence presented to it by Professors Jupp, Kneebone and Triggs on 19 December 2012 and by UNHCR on 17 December 2012. I also refer the Committee to UNHCR's public statement of 31 October 2012 that 'under international law any excision of ta61( )-10.1537(S)-4.33117(-2.16554N1.22997( )-210.272)

B Specific questions raised by the Committee

(a) The objective(s) of the legislation and evidence that the measures are likely to be effective in achieving the objective(s) being sought

11. On this point, I draw the Committee's attention to the 'Conclusion' of the Refugee Law Academics' submission to the Expert Panel on Asylum Seekers (enclosed, pages 6–7).

(b) The nature and scope of Australia's obligations under the seven human rights treaties listed under the definition of human rights in the Human Rights (Parliamentary Scrutiny) Act 2011 with regard to individuals who are removed to regional processing countries

12. Refugees and asylum seekers are entitled to enjoy the full range of civil, political, economic, social, and cultural rights set out in international and regional human rights treaties and customary international law. With very few exceptions (relating to the right to vote, the right to stand for public office, and the expulsion of aliens), the international human rights instruments make no distinction between the rights of citizens and (forced) migrants. Indeed, the principle of non-discrimination mandates that States respect and ensure human rights 'without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[13] That is not to say that all differential treatment amounts to discrimination, but rather that it will only be justified if the criteria for such differentiation are 'reasonable and objective' and the overall aim is 'to achieve a purpose which is legitimate' under human rights law.[14]

13. A fundamental point to note in the context of both excision and regional processing is that Australia cannot relieve itself of its international obligations – whether by excising territory from its 'migration zone' or by sending asylum

human rights law. This automatically heightens the risk of refoulement on account of arbitrary deprivation of life or the infliction of torture, or cruel, inhuman or degrading treatment or punishment. As the European Court of Human Rights stated in 2012 in *Hirsi Jamaa v Italy* '[i]t is a matter for the State carrying out the return to ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed to his country of origin without an assessment of the risks faced.'[16]

15. Secondly, Australia may violate human rights law if it knowingly sends asylum seekers to conditions which do not meet minimum human rights guarantees. For example, the European Court of Human Rights found that Belgium violated its non-refoulement obligations by returning an asylum seeker to Greece, because it 'knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment.'[17] The conditions of detention in Greece 'were well known before the transfer of the applicant and were freely ascertainable from a wide number of sources'.[18] Australia may violate the international law prohibition on return to cruel, inhuman or degrading treatment if the living conditions for asylum seekers in Nauru/Papua New Guinea fall below a minimum standard.

16. Thirdly, as noted in paragraphs 7–10 above, States retain responsibility over persons within their territory or jurisdiction, which includes situations where one State uses another as its agent.[19] Liability for breaches of international law can be both joint and several. This means that human rights violations in regional processing countries (including refoulement) will remain attributable to Australia,

discrimination, the right to religious freedom, the right to elementary education, and access to the courts.

19. As a human rights treaty itself, the Refugee Convention must be read in conjunction with other human rights instruments. Refugee law is not intended to restrict human rights law tiier

guarantee of fairness and integrity for decisions which a person's life may be in the balance.[20]

24. However, the regional processing model does not reflect this. In determining which countries Australia will engage for regional processing, the only criterion that the Immigration Minister need consider is whether he or she thinks it is in the 'national interest' to designate a country as a 'regional processing country' (proposed new section 198AB(2) of the Migration Act 1958 (Cth)). Proposed new section 198AB(3) provides that in considering the 'national interest', the Minister must have regard to whether the country has given Australia any assurances that it:

- 'will not expel or return a person … to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion'; and
- will enable an assessment to be made of whether or not a person taken to the designated country under that section is a refugee in accordance with article 1A of the Refugee Convention.

25. These two elements reflect only the non-refoulement obligation arising under refugee law. There is no requirement for the Minister to seek assurances that the designated country will respect human rights-based non-refoulement obligations, such as refraining from returning a person to a place where he or she faces a real

28.

Judicial oversight of detention is a fundamental guarantee of freedom and liberty from arbitrariness.[27] However, Australian law does not permit the courts to review decisions to detain unlawful non-citizens, or to order their release on the grounds that continued detention is arbitrary.[28]

38. In order for detention to be consistent with international human rights law – that is, not arbitrary – it must be necessary in the individual case (rather than the result of a mandatory, blanket policy); subject to periodic review by the judiciary or another authority, with the power to release detainees if detention cannot be objectively justified; be reasonably proportionate to the reason for the restriction (eg national security); and be for the shortest time possible.

39. The adverse effects of children being in kept in immigration detention centres, in some cases for up to five years, have been well-documented. In 2004 the Australian Human Rights Commission released a comprehensive report examining Australia's compliance with the CRC, finding that the system of mandatory detention breached children's human rights. The report detailed

who had arrived lawfully and permitted them to reside in the community pending the determination of their protection claim. Many asylum seekers on BVEs faced poverty and homelessness and were entirely dependent on community services for their basic subsistence.[38] The new two-tier system raises concerns about discrimination (discussed further in paragraphs 51–54) and other substantive human rights, including the right to work under article 6 of the ICESCR.

46. The UN Committee on Economic, Social and Cultural R

49. Following *Limbuela*, the House of Lords in *Adam* said that treatment is inhuman or degrading 'if, to a seriously detrimental extent, it denies the most basic needs of any human being'.[45] While the court noted that there is no general public duty to house the homeless or provide for the destitute, it said that the State would have such a duty if an asylum seeker 'with no means and no alternative sources of support, unable to support himself, is, by the deli

56. The overall impact of regional processing does not reflect a good faith interpretation of the Refugee Convention. Even though the Refugee Convention does not contain a provision expressly requiring states to process asylum seekers within their borders,

> the right to seek asylum, when read in conjunction with the right to freedom of movement and the totality of rights protected by the Universal Declaration and ICCPR, implies an obligation on States to respect the individual's right to leave his or her country in search of protection. Thus, States that impose barriers on individuals seeking to leave their own country, or that seek to deflect or obstruct access to asylum procedures, may breach this obligation and, more generally, demonstrate a lack of good faith in implementing their treaty obligations.[53]

57. Thus, States do not have an unfettered sovereign right to frustrate the movement of asylum seekers. Any measures of immigration control must be exercised proportionately and within the confines of international law. This applies not only to refugees within a State's own territory, but also those subject to enforcement action outside its territorial jurisdiction. It requires States to ensure 'that refugees are not returned in any manner to territories in which they face – or risk return to – persecution, torture, or other cruel, inhuman or degrading treatment or punishment; and, if sent elsewhere, have access to protection and durable solutions'.[54]

58. Australia's attempt to contract out its obligations to Nauru and Papua New Guinea undermines the multilateral nature of the Refugee Convention regime and frustrates its object and purpose.[55] As UNHCR has observed:

> The 1951 Convention, together with the 1967 Protocol, is framed to apply without geographic restrictions or discrimination. Its efficacy depends on it being global in scope and adherence, and if inter se agreements were permitted, the treaty regime as a whole would be rendered meaningless.[56]

59. Bilateral agreements such as those between Australia and 'regional processing countries' may undermine respect for international obligations 'for which a common and coherent international practice is required'. Such disparities have the effect of distorting the burden-sharing rationale underlying the 1951 Convention, by shifting the responsibilit.121 Tm7792(t)-2.16558(h)-t85(e)955