UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

Submission by the United Nations High Commissioner for Refugees

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AUSTRALIA

I. BACKGROUND INFORMATION

Australia acceded to the *1951 Convention relating to the Status of Refugees* in 1954 and to its *1967 Protocol* in 1973 (hereinafter collectively referred to as the *1951 Convention*). Australia also acceded to the *1954 Convention relating to the Status of Stateless Persons* (the *1954 Convention*) and the *1961 Convention on the Reduction of Statelessness* (the *1961 Convention*) in 1973.

Australia has a developed refugee status determination (RSD) system involving avenues of review and appeal. The *1958 Migration Act* (Cth) constitutes the statutory basis for RSD and assessment of complementary protection needs in domestic law. The Department of Immigration and Border Protection is responsible for managing immigration to Australia, including the provision of asylum and resettlement.

In 2014, Australia received 8,988 protection visa applications from asylum-seekers and 2,780 protection visa applications were granted. Australia also granted 11,570 offshore visas in the 2014 calendar year to resettled refugees and persons with special humanitarian concerns.

II. ACHIEVEMENTS AND POSITIVE DEVELOPMENTS

Australia makes a significant contribution to refugee protection through its participation and membership in UNHCR's Executive Committee (ExCom), its generous financial support to UNHCR's global programmes and its longstanding Humanitarian Programme which currently provides for 13,750 refugees and others in humanitarian need to be resettled and/or settled in Australia every year.[1]

[1] 13,750 is the current total number of places provided for in the annual Australian Humanitarian Programme. The Humanitarian Programme includes visas granted to refugees who arrive spontaneously in Australia (excluding those who arrive irregularly, who are now processed offshore or granted temporary visas, both of which are considered to be outside the Humanitarian Programme); UNHCR-referred resettlement; and sponsored humanitarian resettlement. For planning purposes, the current break down by Australia is approximately 11,000 offshore places and 2,750 onshore places per annum.

Australia undertakes full responsibility for RSD processing of asylum-seekers under the *1958 Migration Act*. On 24 March 2012, the *1958 Migration Act* was amended to establish a complementary protection framework, whereby applicants for protection visas who do not meet the definition of a refugee may be entitled to a protection visa if they establish, subject to specified exceptions and exclusions,[2] that there "are substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm."[3]

UNHCR welcomes a legislative basis to protect persons who may not qualify as refugees under the *1951 Convention*, but who are nonetheless in need of international protection in accordance with Australia's *non-refoulement* obligations, specifically under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*CAT*) and the *International Covenant on Civil and Political Rights* (*ICCPR*).[4]

Although the *1958 Migration Act* codifies Australia's obligations under the *1951 Convention* as well as under the *CAT* and the *ICCPR* allowing for alternative recognition as a protected person, recent proposed legislation seeks to remove the statutory basis for the provision of complementary protection under the *Act* (see further Issue 3 below).

III. KEY PROTECTION ISSUES, CHALLENGES AND RECOMMENDATIONS

Issue 1: Transfer of asylum-seekers to offshore processing centres

Background on offshore processing

In August 2012, the Government of Australia amended the *1958 Migration Act* by introducing transfer to third countries and 'regional' processing arrangements in relation to asylum-seekers who arrived by sea to an Australian excised territory (namely, Ashmore Island, the Cartier Islands, Christmas Island or the Cocos Islands).[5] Further amendments were made to the *Act*, to expand upon these amendments, so that all asylum-seekers who arrive to Australia by sea:

a) cannot make a valid application for a visa unless the Minister exercises a personal discretion that it is in the public interest to do so;

b) are subject to mandatory immigration detention;

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[2] See ss 36(2B) and 36(2C) of the *1958 Migration Act*, available at: http://www.comlaw.gov.au/Details/C2015C00023.

[3] See s 36(2)(aa) of the *1958 Migration Act*, available at: http://www.comlaw.gov.au/Details/C2015C00023.

[4] UNHCR has previously expressed its concern that the *1958 Migration Act* does not address Australia's *non-refoulement* obligations under the *CAT*, *ICCPR* and *CRC*. See *Submission by the Office of the United Nations High Commissioner for Refugees Inquiry into the 2013 Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill*, 21 January 2014, available at: http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=country&docid=530b20594&skip=0&category=LEGAL&coi=AUS&querysi=Migration&searchin=title&sort=date.

[5] See the *2012 Migration Legislation Amendment (Regional Processing and Other Measures) Act* (Cth), available at: http://www.comlaw.gov.au/Details/C2012A00113.

c) are subject to being taken to a designated regional processing country for the processing of their claims for protection (currently Nauru and Papua New Guinea (Manus Island)); and

d) cannot institute or continue certain legal proceedings.[6]

These amendments have effectively 'excised' all of Australia for asylum-seekers arriving by sea.

To support these regional processing arrangements, the Government of Australia entered into separate bilateral memoranda of understanding with the Governments of Nauru and Papua New Guinea which relate to the transfer of asylum-seekers who arrived in Australia by sea without valid visas to offshore processing centres in those States to have their asylum claims assessed in accordance with the receiving State's domestic laws.[7]

The Government of Australia announced on 19 July 2013 that any asylum-seeker who arrived by sea on or after 19 July 2013 without prior authorization would not be settled in Australia if found to be a refugee. As a consequence, the Government of Australia entered into the following separate bilateral arrangements, which supersede the earlier arrangements:

a) The Governments of Australia and Papua New Guinea entered into a *Regional Resettlement Agreement* (*RRA*) on 19 July 2013, agreeing among other things that Australia would transfer to Papua New Guinea asylum-seekers who have arrived by sea for processing of their asylum claims. Additionally, Papua New Guinea would settle, on a permanent basis, those asylum-seekers who are determined to be refugees. On 6 August 2013, the Governments of Australia and Papua New Guinea entered into a new *Memorandum of Understanding*,[8] which supports the *RRA*.[9]

b) The Governments of Australia and Nauru signed a new *Memorandum of Understanding* on 3 August 2013, whereby Nauru undertakes to enable individuals found to be in need of international protection to settle in Nauru, "subject to agreement between the Participants on arrangements and numbers."[10] Like the previous *Memorandum of Understanding*, Nauru commits to conducting a refugee status assessment or permitting such an assessment to be made.

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[6] The *2012 Migration Amendment (Unauthorized Maritime Arrivals and Other Measures) Bill* was passed on 16 May 2013.

[7] The *Memorandum of Understanding* between the Government of the Independent State of Papua New Guinea and the Government of Australia dated 8 September 2012 and the *Memorandum of Understanding* between the Government of Nauru and the Government of Australia signed on 30 August 2012.

[8] The *Memorandum of Understanding* between the Government of the Independent State of Papua New Guinea and the Government of Australia was firstly signed by the Government of Australia on 5 August 2013 and by the Government of Papua New Guinea on 6 August 2013.

[9] The main difference between the memoranda of understanding was that under the earlier memorandum, asylum-seekers processed in offshore processing centres were not barred from settling in Australia.

[10] See *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*, 3 August 2012, para.12, available at: http://www.dfat.gov.au/issues/people-smuggling-mou.html.

UNHCR's position on transfers

UNHCR's position is that asylum-seekers and refugees should ordinarily be processed in the territory of the State where they arrive, or which otherwise has jurisdiction over them.[11] Arrangements should be aimed at enhancing burden- and responsibility-sharing and should ideally contribute to the enhancement of the overall protection space in the transferring State, the receiving State and/or the region as a whole.[12] With these general observations in mind, UNHCR's position is that the physical transfer of asylum-seekers from Australia to Nauru or Papua New Guinea, as bilateral arrangements agreed between Contracting States to the *1951 Convention*, does not extinguish the legal responsibility of Australia, as the transferring State, for the protection of the asylum-seekers and refugees affected by the arrangements. In UNHCR's view, Australia and each of Nauru and Papua New Guinea have shared and joint responsibility to ensure that the treatment of all transferred asylum-seekers and refugees is fully compatible with their respective obligations under the *1951 Convention* and other applicable international human rights instruments.

Where transfers take place nonetheless, UNHCR considers that the transfer arrangement needs to guarantee that each asylum-seeker:

a) is individually assessed as to the appropriateness of the transfer, subject to procedural safeguards, prior to transfer. Pre-transfer assessments are particularly important for groups with specific needs, including unaccompanied and separated children (UASC). The best interests of the child must be a primary consideration.

b) is admitted to the proposed receiving State;

c) is protected against *refoulement*;

d) has access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection;

e) is treated in accordance with applicable international refugee and human rights law standards, for example: appropriate reception arrangements; access to health care, education and basic services; safeguards against arbitrary detention; identification and assistance of persons with specific needs; and

f) if recognized as being in need of international protection, is able to enjoy asylum and/or access a durable solution within a reasonable time.[13]

UNHCR undertakes periodic missions to the offshore processing centres[14] on Manus Island, Papua New Guinea and Nauru. Following missions to those offshore processing centres in October 2013,[15] UNHCR found serious shortcomings at the Nauru and Papua New Guinea

[11] UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para.1, available at: http://www.refworld.org/pdfid/51af82794.pdf.
[12] Ibid, para. 3 (iv).
[13] Ibid, para. 3 (vi).
[14] Nauru and Papua New Guinea refer to the offshore processing centres as 'regional processing centres' while Australia refers to them as 'offshore processing centres'. The latter is used for the purpose of this submission.
[15] UNHCR, *UNHCR monitoring visit to the Republic of Nauru*, 26 November 2013, available at: http://www.refworld.org/docid/5294a6534.html; UNHCR, *UNHCR monitoring visit to Manus Island, Papua New Guinea, 23 to 25 October 2013*, available at: http://unhcr.org.au/unhcr/images/2013-11-

processing centres to which asylum-seekers have been transferred and observed that the policies, operational approaches and harsh physical conditions at the centres did not comply with international standards. In particular, UNHCR considered the offshore processing centres:

a) constituted arbitrary and mandatory detention under international law;

b) did not provide a fair, efficient and expeditious system for assessing refugee claims;

c) did not provide safe and humane conditions of treatment in detention; and

d) did not provide for adequate and timely solutions for refugees.

UNHCR was also particularly concerned about children, families and individuals with specific needs (e.g. torture/trauma victims), and the effectiveness of pre-transfer assessments in detecting such specific needs.

As noted, UNHCR is of the view that Australia's responsibilities under applicable international instruments to which it is a party remain engaged and cannot be extinguished by the physical transfer of asylum-seekers to Nauru or Papua New Guinea. In this regard, and further to the concerns noted above, UNHCR is concerned that neither Nauru nor Papua New Guinea has codified their complementary human rights obligations, nor introduced statelessness determination procedures. UNHCR's view is that Australia's protection obligations to such individuals remain extant.

Recommendations:
UNHCR recommends that the Government of Australia:

- Ensure that all asylum-seekers and refugees who arrive in Australia are processed[16] there, without distinction as to their mode of arrival; and
- Take immediate action, along with the Governments of Nauru and Papua New Guinea, to ensure that conditions at the offshore processing centres comply with international laws and standards.

Issue 2: <u>Interceptions and 'push-backs' at sea</u>

The military-led *Operation Sovereign Borders* commenced implementing the Government's policy of intercepting and returning boats in late 2013.

Ten boats travelling towards Australia carrying a total of 441 reported passengers were intercepted by Australian authorities in 2014. Of those, seven boats with 205 total passengers were returned to Indonesia; all but one of the 79 passengers on two boats from Sri Lanka were returned to Sri Lanka following screening procedures (the passenger who was not returned was to be transferred to an offshore processing centre); and 157 people who

26%20Report%20of%20UNHCR%20Visit%20to%20Manus%20Island%20PNG%2023-25%20October%202013.pdf

[16] A recommendation was made to "[E]nsure the processing of asylum-seekers' claims in accordance with the United Nations Refugee Convention and that they are detained only when strictly necessary" during the 1st cycle UPR examination of Australia. See: Report of the Working Group of the Universal Periodic Review: Australia, A/HRC/17/8, 24 March 2011, para. 86.123 (recommended by Norway).

travelled on a boat from India which was intercepted by Australian authorities were brought to Australia after a period at sea and then transferred from the Australian mainland to an offshore processing centre on Nauru, where they remain detained.

On 5 December 2014, the *2014 Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* was passed by the Parliament of Australia, introducing the following amendments to the *2013 Maritime Powers Act* (Cth) (*2013 MPA*) that:

a) Restrict the application of the rules of natural justice to a range of powers in the *2013 MPA*, including the powers to authorize the exercise of maritime powers, the new Ministerial powers and the exercise of powers to hold and move vessels, and detain and move individuals for an indefinite period of time;

b) Ensure that the exercise of a range of powers cannot be invalidated because a court considers there has been a failure to consider, properly consider, or comply with Australia's international obligations (including its *non-refoulement* obligations), or the international obligations or domestic law of any other country; and

c) Clarify for the purposes of certain provisions under the *2013 MPA* that a vessel or a person may be taken to a place outside Australia whether or not Australia has an agreement or arrangements with any country concerning the reception of the vessel or the persons.

UNHCR has a number of concerns about these legal and policy developments, including concerns around consistency with international law, as well as the negative precedent this sets both regionally and globally.

UNHCR is of the view that a State, wherever it exercises jurisdiction, including outside its territory, is bound by its international obligations under the *1951 Convention*, in particular its *non-refoulement* obligation to not return individuals to a country, either directly or indirectly, where their life or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group or political opinion.

UNHCR considers that a statutory power which allows maritime powers to be exercised and considered valid under national law even if they are in breach of Australia's international obligations is inconsistent with Australia's commitment to implement its treaty obligations in good faith. Further, UNHCR considers that this power also creates a risk that Australia may place itself in breach of its commitments under the *1951 Convention* and international human rights instruments.

UNHCR is concerned by any policy of pushing asylum-seeker boats back at sea without a proper consideration of each individual's need for protection.

Recommendations:
UNHCR recommends that the Government of Australia:

- Cease its practice of interceptions and push-backs and implement measures that comply with international law and standards;[17] and
- Renew its efforts to strengthen regional cooperation efforts to provide viable alternatives to dangerous boat journeys.[18]

Issue 3: <u>Assessments of refugee status and complementary protection needs</u>

UNHCR has concerns in respect of a number of recent legislative developments that impact the rights of asylum-seekers, refugees and stateless persons.

Assessment of refugee status

As noted above, the *MPA* was passed on 5 December 2014 and amends, among other legislation, the *1958 Migration Act*.

UNHCR has a number of concerns in respect of the recent amendments, including that the *Act*:

a) Codifies Australia's interpretation of the refugee definition (while removing specific references to the *1951 Convention*) and narrows the personal scope of the refugee definition as established in Article 1(A)(2) of the *1951 Convention* by: i) disregarding consideration of the 'reasonableness' of the proposed area of internal flight or relocation; ii) concluding that a person does not have a well-founded fear of persecution if 'adequate and effective protection measures' are provided by a source other than the relevant State; iii) concluding that a person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour relating to certain characteristics; and iv) disregarding the special protection regime established by Article 1(D) of the *1951 Convention* and thereby requiring "Palestinian refugees" to establish their need for international refugee protection by reference to Article 1(A)(2);

b) Reintroduces temporary protection visas that require refugees recognized under the *1951 Convention* to re-establish their continuing need for international refugee protection and afford only limited Convention rights for reasons of their irregular arrival to Australia; and

[17] Several recommendations were made to Australia during its 1st cycle UPR examination requesting Australia to comply with its obligation of *non-refoulement*. See: Report of the Working Group of the Universal Periodic Review: Australia, A/HRC/17/8, 24 March 2011, para.86.122, 86.124, 86.125 (respectively recommended by Slovenia (2) and Ghana (last)).
[18] A recommendation was made to "[C]ontinue to work and coordinate with countries in the region to strengthen the regional framework to deal with irregular migration and human trafficking in a comprehensive and sustainable manner, bearing in mind international human rights and humanitarian principles" during the 1st cycle UPR examination of Australia. See: Report of the Working Group of the Universal Periodic Review: Australia, A/HRC/17/8, 24 March 2011, para. 86.134 (recommended by Thailand).

c) Introduces new 'fast track' procedures that do not incorporate appropriate procedural safeguards, including the opportunity to be heard in person.

UNHCR made submissions on the original draft *MPA* prior to it being presented to the Senate for passage. Before passing the *MPA,* the Senate made some amendments.

Complementary protection

UNHCR defines 'complementary' forms of protection as referring to legal mechanisms for protecting and according a status to a person in need of international protection who does not fulfill the refugee definition contained in the *1951 Convention*.

UNHCR considers such mechanisms to be a positive and pragmatic response to certain international protection needs not covered by the *1951 Convention*, but emphasizes the need to ensure that this form of international protection complements, and does not undermine, a person's entitlement to refugee status under the *1951 Convention*.

UNHCR is of the view that it is desirable for refugee status assessment procedures to have a legislative basis that includes an assessment of a person's complementary protection needs if the person concerned does not meet the definition of a refugee. Further, UNHCR considers that a State's codification of its complementary protection obligations provides a clearer and more predictable framework within which assessments of certain international protection needs not covered by the *1951 Convention* can be made.

Australia is a party to the *ICCPR*, the *CAT* and the *CRC*, which contain *non-refoulement* obligations and give rise to grounds for complementary protection. As mentioned above, Australia codified its complementary protection obligations by amending the *1958 Migration Act* on 24 March 2012. However, on 5 December 2013, the Government introduced the *2013 Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill* (*2013 Regaining Control Bill*) into Parliament to amend the *1958 Migration Act* by removing the criteria for grant of a protection visa on "complementary protection" grounds, and other related provisions.

The *2013 Regaining Control Bill* proposes to amend the *1958 Migration Act* by removing the complementary protection framework from the *Act*, so that Australia's *non-refoulement* obligations are only considered through an administrative process, which was the procedure in place prior to 24 March 2012. If passed, this *2013 Bill* will remove the legislative basis for complementary protection which provides a clear and predictable framework for a person who may not meet the definition of a refugee, but may be in need of complementary protection

Further, the *2014 Migration Amendment (Protection and Other Measures) Bill* (*2014 POM Bill*), is also currently before the Parliament of Australia and proposes to amend the *1958 Migration Act* by, *inter alia*, defining the risk threshold for assessing Australia's protection obligations under the *ICCPR*[19] and the *CAT*[20] by inserting a new Section 6(A).[21] The

[19] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations,Treaty Series, vol. 999, p. 171.
[20] UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or*

proposed standard of proof is that the Minister can only be satisfied that Australia has protection obligations under the *CAT* and *ICCPR* if the Minister considers that it is 'more likely than not' that the non-citizen will suffer significant harm if removed from Australia to a receiving country. The *Explanatory Memorandum of the Bill* states that this new test would require that there would be greater than a 50 per cent chance that an applicant would suffer significant harm in the country of origin;[22] this would represent a threshold similar to the civil law standard of proof of 'on the balance of probabilities.'

In relation to refugee status claims, the standard of proof applied by many States parties to the *1951 Convention*,[23] and also by UNHCR, is whether the applicant's fear of persecution should be considered well-founded if he or she "can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable" or, in other words, there is a "reasonable possibility" of persecution upon return.[24] There is no requirement to prove well-foundedness conclusively beyond doubt, or even that persecution is 'more probable than not.'[25]

In view of the absolute prohibition on torture or cruel, inhuman and degrading treatment and punishment, and on the arbitrary deprivation of life, and the very serious repercussions if an applicant is returned to such serious human rights violations, as well as the similarity of difficulties facing applicants in obtaining evidence and recounting their experiences to refugees, UNHCR is of the view that there is no basis for adopting a stricter approach to assessing the risk of harm in cases of complementary protection than there is for refugee protection, and that the standard of proof 'more likely than not' is inappropriate.

Recommendations:
UNHCR recommends that the Government of Australia:

- Retain a legislative basis for assessing complementary protection; and
- Refrain from adopting the proposed standard of proof in respect of Australia's *non-refoulement* protection obligations under the *ICCPR* and the *CAT*.

Issue 4: Relocation to Cambodia from Nauru

As noted above, the Australian Government's policy is that asylum-seekers who arrived to Australia by sea on or after 19 July 2013 will not be permitted to settle in Australia.

Punishment : resolution / adopted by the General Assembly, 10 December 1984, United Nations, Treaty Series, vol.1465 UNTS p. 112.

[21] See the *2014 Migration Amendment (Protection and Other Measures) Bill*, Explanatory Memorandum, page 1.

[22] 2013-2014, The Parliament of the Commonwealth of Australia, House of Representatives, *2014 Migration Amendment (Protection and other Measures) Bill*, Explanatory Memorandum, 18.

[23] See the Annex to the UNHCR, *Note on the Burden and Standard of Proof in Refugee Claims*, 16 December 1998.

[24] UNHCR, *Note on the Burden and Standard of Proof in Refugee Claims*, 16 December 1998, para.8, available at: http://www.refworld.org/docid/3ae6b3338.html. UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011 (reissued), para.42, available at: http://www.refworld.org/docid/4f33c8d92.html.

[25] UNHCR, *Note on the Burden and Standard of Proof in Refugee Claims*, 16 December 1998, para.17.

In respect of those recognized as refugees in Nauru, the formal arrangements do not require Nauru to offer a durable solution in Nauru. As a consequence, the Government of Australia has taken steps to obtain long-term settlement opportunities elsewhere for refugees recognized in Nauru.

The Governments of the Kingdom of Cambodia (Cambodia) and Australia announced a bilateral *Memorandum of Understanding* signed on 26 September 2014 (*MOU*),[26] formalizing an agreement between those States to provide settlement and integration support in Cambodia for a number of refugees.

The *MOU* between Cambodia and Australia will provide for settlement of refugees in Cambodia on a voluntary basis and in conformity with the *1951 Convention*. The number and timing of any relocation and settlement will be determined by Cambodia. Any settlement and integration support will be funded by Australia.

It has been reported that Cambodia has agreed to receive only five refugees to be relocated from Nauru.[27] To date, no refugees have consented to relocation from Nauru to Cambodia.

In light of the apparently limited capacity of the relocation arrangement agreed by Australia and Cambodia, and in light of significant development, governance and rights concerns relevant to current and potential future refugee hosting by Cambodia,[28] there is currently considerable uncertainty about the prospects for effective durable solutions for refugees and stateless persons to result from the *MOU*.

Recommendations:
UNHCR recommends that the Government of Australia:

- Reconsider its policy of not allowing settlement in Australia for refugees who arrived by sea;
- Ensure that, if refugees are recognized in Nauru and Australia proceeds with relocating those individuals on a voluntary basis to Cambodia:

    (i) Post-processing conditions, including any settlement services, are clearly articulated in a policy and operational framework by the Australian and Cambodian Governments to ensure that all refugees enjoy the rights to which they are entitled under the *1951 Convention;* as well as other applicable international laws and standards;

    (ii) Prior to any relocation, an individualized assessment as to the individual refugee's specific needs is undertaken to ensure that appropriate support and assistance is available in the receiving State, including any special support

[26] See *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, relating to the Settlement of Refugees in Cambodia* http://www.minister.immi.gov.au/scottmorrison/files/cambodia-australia-mou-operational-guidelines.pdf.
[27] ABC News 'Cambodia refugee deal: Protests outside Australian embassy in Phnom Penh as Scott Morrison signs agreement', 27 September 2014 http://www.abc.net.au/news/2014-09-26/immigration-minister-to-sign-cambodia-refugee-deal/5770468.
[28] Human Rights Watch 'Australia: Reconsider Nauru refugee transfers to Cambodia', 20 November 2014 http://www.hrw.org/news/2014/11/20/australia-reconsider-nauru-refugee-transfers-cambodia.

required for individuals with specific needs, including children, women, elderly, persons with disabilities and survivors of torture or trauma;

(iii) The refusal to accept an offer for relocation to a third country does not, of itself, raise questions about the individual's refugee status and is not a ground for cessation or cancellation of status. There may be a number of legitimate reasons which have led the refugee to refuse such an offer; and

(iv) The legality and/or appropriateness of any relocation of a recognized refugee is assessed on a case-by-case basis, in the light of the particular modalities, legal provisions, and sustainability.

Issue 5: Protection of stateless persons

Australia is a State party to the *1954 Convention,* which has the object and purpose of ensuring minimum standards of treatment for stateless persons in respect to a number of fundamental rights. These include, but are not limited to, the right to education, employment, housing and public relief. The *1954 Convention* also guarantees stateless persons a right to identity and travel documents and to administrative assistance and requires State parties as far as possible to facilitate the assimilation and naturalization of stateless persons.

As a State party, Australia is obliged to respect the rights of stateless persons guaranteed under the *1954 Convention*, including stateless asylum-seekers and their children. In 2011, at the *Ministerial Intergovernmental Event on Refugees and Stateless Persons* held in Geneva to commemorate the anniversary of the adoption of the *1951 Convention* and the *1961 Convention*, the Government of Australia pledged to "better identify stateless persons and assess their claims" and to "continue to work with UNHCR, civil society and interested parties to progress this pledge."[29] However Australia has not yet established in its national law a statelessness status determination procedure to identify non-refugee stateless migrants.[30] We would like to highlight that in November 2014, UNHCR launched its Global Campaign to End Statelessness by 2024. Action Six of the *Global Action Plan to End Statelessness 2014 – 2024* involves granting protection status to stateless migrants and facilitating their naturalization, including by establishing statelessness determination procedures.[31]

The transfer of stateless asylum-seekers and their stateless children to Nauru or Papua New Guinea is likely to breach Australia's obligations under the *1954 Convention* because no appropriate protection is available for them in either Nauru or Papua New Guinea,

[29] UNHCR, *Ministerial Intergovernmental Event on Refugees and Stateless Persons - Pledges 2011*, October 2012, pages 49-50, available at: http://www.refworld.org/docid/50aca6112.html.

[30] "Whilst the *1954 Convention* establishes the international legal definition of "stateless person" and the standards of treatment to which such individuals are entitled, it does not prescribe any mechanism to identify stateless persons as such. Yet, it is implicit in the *1954 Convention* that States must identify stateless persons within their jurisdictions so as to provide them appropriate treatment in order to comply with their Convention commitments…recognition of statelessness plays an important role in enhancing respect for the human rights of stateless persons, particularly through access to a secure legal status and enjoyment of rights afforded to stateless persons under the *1954 Convention*." See UNHCR *Handbook on Protection of Stateless Persons*, 30 June 2014, available at: http://www.refworld.org/docid/53b676aa4.html.

[31] UNHCR, *Global Action Plan to End Statelessness*, 4 November 2014, available at: http://www.refworld.org/docid/545b47d64.html.

particularly if they are subsequently found not to be refugees.[32] As noted above, UNHCR is of the view that Australia's responsibilities under applicable international instruments to which it is a party remain engaged and cannot be extinguished by the physical transfer of asylum-seekers to Nauru or Papua New Guinea. Australia's obligations to asylum-seekers who are also stateless and their stateless children under the *1954 Convention* therefore remain extant following transfer and any subsequent relocation.

Recommendations:
UNHCR recommends that the Government of Australia:

- Implement a statelessness status determination procedure to ensure compliance with its obligations under the *1954 Convention relating to the Status of Stateless Persons*; and
- Immediately cease to transfer asylum-seekers or their children who may be stateless to Nauru and Papua New Guinea as this may breach Australia's obligations under the *1954 Convention relating to the Status of Stateless Persons Convention*.

Issue 6: <u>Prevention of statelessness</u>

UNHCR welcomes the fact that Australia is a State Party to the *1961Convention*, the *ICCPR* and the *CRC*, which have the object and purpose, amongst other things, of preventing childhood statelessness and realizing the child's right to a nationality.[33] The *2007 Citizenship Act* (Cth) provides the domestic legal framework in this regard. In 2011, on the 50th Anniversary of the adoption of the *1961 Convention*, Australia made a pledge stating that it "is committed to minimizing the incidence of statelessness and to ensuring that stateless persons are treated no less favourably than people with an identified nationality."[34]

The 2007 *Citizenship Act* provides that a child born in Australia who is otherwise stateless is entitled to apply and be granted Australian citizenship on a non-discretionary basis if the child is "not entitled to acquire the nationality/citizenship of another country."[35] However, it would not be consistent with Australia's international legal obligations to refuse to grant citizenship to a stateless child born in Australia on the basis that the child could apply to another State for a discretionary grant of nationality/citizenship or not to take into account the special situation of refugee children.[36]

UNHCR also notes that Australia does not provide statistics on the number of stateless persons on Australian territory and that no comprehensive mapping of statelessness in Australia has been undertaken.

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[32] See UNHCR, *Handbook on Protection of Stateless Persons*, 30 June 2014, available at: http://www.refworld.org/docid/53b676aa4.html, paras. 153-157.
[33] See Art.1 to 4 of the *1961 Convention*; Art.7 *CRC* and Art. 24 *ICCPR*.
[34] UN High Commissioner for Refugees (UNHCR), *Ministerial Intergovernmental Event on Refugees and Stateless Persons - Pledges 2011*, October 2012, p.49, available at: http://www.refworld.org/docid/50aca6112.html.
[35] See *Australian 2007Citizenship Act*, available at: http://www.comlaw.gov.au/Details/C2010C00720.
[36] UN High Commissioner for Refugees (UNHCR), *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, HCR/GS/12/04, paras. 16-21 and 24-28, available at: http://www.refworld.org/docid/50d460c72.html.

Recommendations:
UNHCR recommends that the Government of Australia:

- Ensure that the provisions of the *2007 Citizenship Act* are applied consistently with all its relevant international legal obligations; and
- Undertake a mapping study to establish the number and profile of stateless people in Australia and to consider whether the provisions of its nationality laws which aim to prevent and reduce statelessness are being applied consistently with its international legal obligations.

Human Rights Liaison Unit
Division of International Protection
UNHCR
March 2015

Excerpts of Concluding Observations from UN Treaty Bodies and Recommendations of Special Procedure mandate holders

AUSTRALIA

We would like to bring your attention to the following excerpts from UN Treaty Monitoring Bodies' Concluding Observations and Recommendations and from UN Special Procedures mandate holders' reports relating to issues of interest and persons of concern to UNHCR with regards to Australia.

I. Treaty Bodies

Committee on the Rights of the Child
Concluding observations (2012) CRC/C/AUS/CO/4

Best Interests of the Child
31. The Committee is concerned that the principle of the best interests of the child is not widely known, appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings and in policies, programmes and projects relevant to and with an impact on children. In this context, the Committee is particularly concerned at the inadequate understanding and application of the principle of the best interests of the child in asylum-seeking, refugee and/or immigration detention situations.

32. The Committee urges the State party to strengthen its efforts to ensure that the principle of the best interests of the child is widely known and appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings and all policies, programmes and projects relevant to and with an impact on children. In this regard, the State party is encouraged to develop procedures and criteria to provide guidance for determining the best interests of the child in every area, and to disseminate them to public and private social welfare institutions, courts of law, administrative authorities and legislative bodies. The legal reasoning of all judicial and administrative judgments and decisions should also be based on this principle, specifying the criteria used in the individual assessment of the best interests of the child. In implementing this recommendation, the Committee stresses the need for the State party to pay particular attention to ensuring that its policies and procedures for children in asylum seeking, refugee and/or immigration detention give due primacy to the principle of the best interests of the child.

Birth registration
35. The Committee is concerned about the difficulties faced by Aboriginal persons in relation to birth registration. In particular, the Committee is concerned that obstacles to birth registration arising from poor literacy levels, the lack of understanding of the requirements and advantages of a birth registration as well as inadequacies in the support provided by authorities have not been resolved. The Committee further notes with concern that a birth certificate is subject to administrative costs, posing an additional hindrance for persons in economically disadvantaged situations.

36. The Committee urges the State party to review its birth registration process in detail to ensure that all children born in Australia are registered at birth, and that no child is disadvantaged due to procedural barriers to registration, including by raising awareness among the Aboriginal population on the importance of birth registration and providing special support to facilitate birth registration for illiterate persons. It further urges the State party to issue birth certificates upon the birth of a child and for free.

Preservation of identity

37. The Committee is concerned at the large numbers of Aboriginal and Torres Strait Islander children being separated from their homes and communities and placed into care that, inter alia, does not adequately facilitate the preservation of their cultural and linguistic identity. The Committee further notes that a child's citizenship can be revoked where a parent renounces or loses citizenship in the State party.

38. **The Committee recommends that the State party review its progress in the implementation of the recommendations of its *Bringing Them Home Report,* including as recommended by the United Nations Human Rights Committee and the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People to ensure full respect for the rights of Aboriginal and Torres Strait Islander children to their identity, name, culture, language and family relationships. With reference to article 8 of the Convention, the Committee further recommends that the State party undertake measures to ensure that no child be deprived of citizenship on any ground regardless of the status of his/her parents.**

Children with disabilities

56. The Committee appreciates the State party's assessment of its disability support system with its Productivity Commission in July2011. However, taking note of the findings of the Commission, the Committee shares the concerns that the current disability support system is "under-funded, unfair, fragmented and inefficient, and gives people with a disability little choice and no certainty of access to appropriate supports, with children with disabilities frequently failing to receive crucial and timely early intervention services, support for life transitions, and adequate support for the prevention of family or carer crisis and breakdown." Furthermore, while noting the State party's five-year implementation of its Disability Standards for Education 2005, the Committee remains concerned that a significant disparity remains between educational attainments for children with disabilities compared to children without disabilities. Further elaborating on its concerns on the non-therapeutic sterilization stated earlier in this report, the Committee is seriously concerned that the absence of legislation prohibiting such sterilisation is discriminatory and in contravention of article 23(c) of the Convention on the Rights of Persons with Disabilities. Furthermore, the Committee is concerned that the State party's legislation allows for disability to be the basis for rejecting an immigration request.

57. In the light of its general comment No. 9 (2006) on the rights of children with disabilities, the Committee urges the State party to:

(g) Ensure that all of the State party's legislation, including its migration and asylum legislation, does not discriminate against children with disabilities and is in full compliance with its legal obligations under article 23 of the Convention on the Rights of Persons with Disabilities.

Asylum-seeking and refugee children

79. The Committee notes the State party's efforts to move children and vulnerable families in immigration detention facilities to alternative forms of detention, including community-based detention arrangements and immigration transit accommodation. However, the Committee is deeply concerned about:
(a) The State party's Migration Act stipulating the mandatory detention of children who are asylum-seeking, refugees or in an irregular migration situation, without time limits and judicial review;
(b) The best interests of the child not being the primary consideration in asylum and refugee determinations and when considered, not consistently undertaken by professionals with adequate training on best interests determination;
(c) The high risk of conflict of interest where the legal guardianship of unaccompanied minors is vested with the Minister of Immigration who is also responsible for immigration detention and determinations of refugee and visa applications; and
(d) Notwithstanding the August 2011 decision of its High Court (Plaintiff M70/2011 v. Minister for Immigration and Citizenship), which held that the State party's attempted "refugee swap" with Malaysia was in violation of international law and its own domestic law to provide access for asylum seekers to effective procedures for assessing their need for protection; provide protection for asylum seekers pending determination of their refugee status; and provide protection for persons given refugee status pending their voluntary return to their country of origin or their resettlement in another country, the State party continues to pursue its policy of so-called "offshore processing" of asylum and refugee claims.

80. The Committee urges the State party to bring its immigration and asylum laws into full conformity with the Convention and other relevant international standards. In doing so, the State party is urged to take into account the Committee's general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin. Furthermore, the Committee reiterates its previous recommendations (CRC/C/15/Add.268, para 64). In addition to that, the Committee urges the State party to:
(a) Reconsider its policy of detaining children who are asylum-seeking, refugees and/or irregular migrants; and, ensure that if immigration detention is imposed, it is subject to time limits and judicial review;
(b) Ensure that its migration and asylum legislation and procedures have the best interests of the child as the primary consideration in all immigration and asylum processes; and ensure that determinations of the best interests are consistently conducted by professionals who have been adequately trained in best interests determination procedures;
(c) Expeditiously establish an independent guardianship/support institution for unaccompanied immigrant children; and
(d) Adhere to its High Court ruling in Plaintiff M70/2011 v. Minister for Immigration and Citizenship, and, inter alia, ensure adequate legal protections for asylum seekers and conclusively abandon its attempted policy of so-called "offshore processing" of asylum claims and "refugee swaps"; and evaluate reports of hardship suffered by children returned to Afghanistan without a best interests determination.
Furthermore, the Committee recommends that the State party consider implementing the United Nations High Commission for Refugees Guidelines on International

Protection No.8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and ratifying the 1967 Protocol relating to the Status of Refugees.

II. Special Procedures

SR on trafficking in persons (17-30 November 2011)
A/HRC/20/18/Add.1

81. **Identification:**
(a) Support further collaborative research, with independent research institutions and civil society organizations in particular, to strengthen the collection of reliable, relevant data and to ascertain alternative methods for timely and accurate identification of victims;
(b) Ensure that in all cases of mandatory detention, including those involving persons arriving by boat, and in all cases of migrant smuggling, adequate safeguards are put in place to ensure that victims of trafficking are promptly identified and protected;
(c) Improve procedures and practices for the identification of victims of trafficking, including through ongoing training within front-line law enforcement agencies, especially the Department of Immigration and Citizenship, the Australian Federal Police and state/territory police, and the Office of the Fair Work Ombudsman.

82. **Support for victims of trafficking:**
(a) Consider extending the reflection and recovery period to 90 days for all persons identified or provisionally identified as having been trafficked; delink government support for victims from participation in criminal justice processes;
(b) Reconsider visa titles to avoid stigmatization and to ensure confidentiality and respect for the privacy and dignity of victims of trafficking;
(c) Improve support services for victims of trafficking and persons vulnerable to trafficking-related exploitation;
(d) Reduce the length of time for the processing of permanent residence visas for trafficked persons;
(e) Provide support services for dependents and relatives of victims of trafficking who migrate to Australia;
(f) Increase funding assistance for service providers and civil society organizations to provide support services, especially housing, for victims of trafficking, including those who do not immediately wish their matter to come before the authorities;
(g) Establish, at the federal level, a comprehensive compensation scheme for victims of trafficking;
(h) Strengthen criminal justice capacity to identify and confiscate assets and proceeds of trafficking-related crimes, and develop mechanisms and procedures to enable assets and proceeds to be used for continuing support to victims of trafficking.

85. **Prevention:**
(a) Take steps to raise community awareness of all forms of trafficking in persons, including trafficking for labour exploitation; particularly, targeting migrant communities, with information translated into their languages, including information about the rights of migrant workers and avenues for protection and redress;

(c) Increase options for safe and legal migration by expanding initiatives such as the Pacific Seasonal Workers Pilot Scheme; carefully monitor migration programmes such as those administered via the 457 visa and the Pacific Worker Seasonal Workers Pilot Scheme to ensure they do not become vehicles for trafficking and related exploitation;
(d) Monitor and evaluate prevention programmes to ensure they are effective and do not stigmatize or stereotype victims and their communities or infringe on the rights of any person, including potential migrants or visitors to Australia.

86. **The Special Rapporteur recommends that the State:**
(a) Consider ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and International Labour Organization Convention No. 189 (2011) concerning Decent Work for Domestic Workers;