

DOCUMENTS TABLED WITH THE INSTRUMENT OF DESIGNATION
OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA [F2012L02003]

No. 115—9 October 2012

3071

Documents: Senator Collins tabled the following documents:

Migration Act—Instrument IMMI 12/115—Instrument of designation of the Independent State of Papua New Guinea as a regional processing country [F2012L02003] and explanatory statement.

The Parliamentary Secretary for School Education and Workplace Relations (Senator Collins): To move on the next day of sitting—That, for the purposes of section 198AB of the *Migration Act 1958*, the Senate approves the designation of the Independent State of Papua New Guinea as a regional processing country, by instrument made on 9 October 2012. [F2012L02003]

Documents: Senator Collins tabled the following documents:

Migration Act—Section 198AB(1)—

1. Copy of Instrument IMMI 12/115—Instrument of designation of the Independent State of Papua New Guinea as a regional processing country [F2012L02003] and explanatory statement.
4. Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Papua New Guinea, and related issues, dated 8 September 2012.
10. Statement about arrangements that are in place, or are to be put in place, in the Independent State of Papua New Guinea for the treatment of persons taken to Papua New Guinea.
13. Statement about the consultations by the Minister for Immigration and Citizenship with the Office of the United Nations High Commissioner for Refugees in relation to the designation of the Independent State of Papua New Guinea as a regional processing country, including the nature of those consultations.
14. 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, dated 9 October 2012.
24. Letter from the United Nations High Commissioner for Refugees (Mr António Guterres), dated 9 October 2012.

The Parliamentary Secretary for School Education and Workplace Relations (Senator Collins): To move on the next day of sitting—That the provisions of paragraphs (5) to (8) of standing order 111 not apply to the following bills, allowing them to be considered during this period of sittings:

Australian Charities and Not-for-profits Commission Bill 2012
Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012
Industrial Chemicals (Notification and Assessment) Amendment Bill 2012
National Portrait Gallery of Australia Bill 2012
National Portrait Gallery of Australia (Consequential and Transitional Provisions) Bill 2012.

Commonwealth of Australia

Migration Act 1958

INSTRUMENT OF DESIGNATION OF
THE INDEPENDENT STATE OF PAPUA NEW GUINEA AS A REGIONAL PROCESSING COUNTRY
UNDER SUBSECTION 198AB(1) OF THE MIGRATION ACT 1958

I, CHRIS BOWEN, Minister for Immigration and Citizenship, acting under subsection 198AB(1) of the Migration Act 1958 ("the Act"), thinking it is in the national interest to do so, DESIGNATE that the Independent State of Papua New Guinea is a regional processing country.

Dated: 9 October 2012.



CHRIS BOWEN

Minister for Immigration & Citizenship

NOTE: Subsection 198AB(1) of the Act provides that the Minister may, by legislative instrument, designate that a country is a *regional processing country*. Subsection 198AB(2) of the Act provides that the only condition for the exercise of the power under subsection (1) is that the Minister thinks that it is in the national interest to designate the country to be a regional processing country. Subsection 198AB(3) of the Act, provides that in considering the national interest for the purposes of subsection (2), the Minister: (a) must have regard to whether or not the country has given Australia any assurances to the effect that: (i) the country will not expel or return a person taken to the country under section 198AD 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 (ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of *refugee* in Article 1A of the Refugees Convention as amended by the Refugees Protocol and: (b) may have regard to any other matter, which in the opinion of the Minister, relates to the national interest.

EXPLANATORY STATEMENT

Migration Act 1958

**INSTRUMENT OF DESIGNATION OF THE INDEPENDENT STATE OF
PAPUA NEW GUINEA AS A REGIONAL PROCESSING COUNTRY UNDER
SUBSECTION 198AB(1) OF THE *MIGRATION ACT 1958***

1. This Instrument is made under subsection 198AB(1) of the *Migration Act 1958* ('the Act').
2. This Instrument operates to designate that the Independent State of Papua New Guinea is a regional processing country.
3. Subsection 198AB(1) of the Act provides that the Minister may, by legislative instrument, designate that a country is a regional processing country.
4. Subsection 198AB(2) of the Act provides that the only condition for the exercise of the power under subsection 198AB(1) is that the Minister thinks that it is in the national interest to designate the country to be a regional processing country.
5. Subsection 198AB(3) of the Act provides that in considering the national interest for the purposes of subsection 198AB(2), the Minister:
 - must have regard to whether or not the country has given Australia any assurances to the effect that:
 - the country will not expel or return a person taken to the country under section 198AD 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
 - the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of *refugee* in Article 1A of the Refugees Convention as amended by the Refugees Protocol;
 - may have regard to any other matter which, in the opinion of the Minister, relates to the national interest.
6. The notes to the Instrument refer the reader to the above provisions, which are relevant to the making of this Instrument.

7. The purpose of the Instrument is to enable the taking of offshore entry persons to the Independent State of Papua New Guinea, in accordance with subsection 198AD.

Commencement

8. Subsection 198AB(1B) of the Act provides that, despite subsection 12(1) of the *Legislative Instruments Act 2003*, this Instrument commences at the earlier of the following times:
- immediately after both Houses of the Parliament have passed a resolution approving the designation;
 - immediately after both of the following apply:
 - a copy of the designation has been laid before each House of the Parliament under section 198AC;
 - 5 sitting days of each House have passed since the copy was laid before that House without it passing a resolution disapproving the designation.

Consultation

9. Consultations regarding the designation of the Independent State of Papua New Guinea as a regional processing country have been undertaken with the Office of the United Nations High Commissioner for Refugees and the Independent State of Papua New Guinea. In addition, a range of Commonwealth agencies have been consulted.
10. The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required (OBPR Reference 14312).

Not subject to disallowance

11. Under section 44 of the *Legislative Instruments Act 2003*, this Instrument is not subject to disallowance.

Statement of Compatibility with Human Rights

12. In accordance with section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, a Statement of Compatibility with Human Rights has not been completed for this Instrument. This is because that section requires a statement of compatibility to be prepared only for a legislative instrument to which section 42 of the *Legislative Instruments Act 2003*, and the effect of section 44 of that Act is that section 42 does not apply to this Instrument.

**MEMORANDUM OF UNDERSTANDING BETWEEN THE
GOVERNMENT OF THE INDEPENDENT STATE OF
PAPUA NEW GUINEA AND THE GOVERNMENT OF AUSTRALIA,
RELATING TO THE TRANSFER TO AND ASSESSMENT OF
PERSONS IN PAPUA NEW GUINEA, AND RELATED ISSUES.**

The Government of Papua New Guinea and the Government of Australia (the Participants), wishing to build on their existing strong and cordial relations, have come to the following Memorandum of Understanding (the MOU) in relation to the assessment in Papua New Guinea of certain persons, and related issues.

Preamble

Noting that:

- The Participants are State parties to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, and acknowledge the importance of inter-country cooperation to undermine the People Smuggling industry;
- The Participants share a longstanding bilateral relationship of cooperation on migration and in combating transnational crime;
- Irregular Migration is a continuing challenge for the Asia-Pacific region;
- While border control and law enforcement measures are important, practical cooperative solutions that also address humanitarian needs are required; and
- The Government of Australia appreciates the offer made by the Government of Papua New Guinea to host an Assessment Centre for Asylum Seekers in Papua New Guinea.

Recalling that:

- At the Fourth Ministerial Conference of the Bali Process on People Smuggling, Trafficking and Related Transnational Crime (the MCBP) held in Indonesia on 29-30 March 2011, Ministers agreed:
 - to a regional cooperation framework that would provide a more effective way for interested states to cooperate to reduce Irregular Migration in the region;
 - that the framework would be operationalised through arrangements entered into between interested participating states on a bilateral or sub-regional basis (noting the cooperation that might be available from relevant international organisations regarding implementation);

- that those arrangements would be consistent with the core principles at paragraph 16 and guided by the considerations set out in paragraph 19 of the MCPB Co-Chairs' Statement;
- that any arrangements should seek to undermine the People Smuggling model and create disincentives for irregular travel, including through possible transfer and readmission arrangements in appropriate circumstances; and
- that due to the large scale of irregular movement it would be appropriate to focus arrangements on a selected caseload or caseloads.

Recognising:

- the need for practical action to provide a disincentive against Irregular Migration, People Smuggling syndicates and transnational crime and intended to promote orderly migration and humanitarian solutions;
- the need to take account of the protection needs of persons who have moved irregularly who may be seeking asylum;
- the impact that an arrangement could have in providing a disincentive for Irregular Migration and creating increased protection opportunities for those in need of international protection; and
- the need to ensure, so far as is possible, that no benefit is gained through circumventing regular migration arrangements;

the Participants have reached the following common understanding regarding a transfer arrangement, whereby Australia would Transfer persons to Papua New Guinea for processing of any asylum claims that Transferees may raise.

Interpretation

"Transferee" means a person transferred to Papua New Guinea under this MOU.

"Transfer" means transfer from Australia to Papua New Guinea under this MOU.

"Costs" refers to agreed direct costs arising out of the implementation of this MOU.

"Irregular Migration" means the phenomenon of people moving without proper authorisation to a country including for the purpose of seeking asylum.

"Refugee" means a person outside their country of nationality, or in the case of a person not having a nationality, who is outside their country of habitual residence, and who is unable or unwilling to return because of a well founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group.

"Asylum Seeker" means an individual who is seeking international protection or whose claim for international protection has not yet been finally decided.

“People Smuggling” means the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a country of which the person is not a national or a permanent resident.

“Assessment Centre” means the relocation centre to be established in Papua New Guinea pursuant to this MOU and declared under section 15B of the Migration Act 1978 (Papua New Guinea).

Objectives

1. The Participants have determined that combating People Smuggling and Irregular Migration in the Asia-Pacific region is a shared objective. Transfer arrangements and the establishment of an Assessment Centre are a visible deterrent to people smugglers.
2. This MOU will enable joint cooperation, including the development of enhanced capacity in Papua New Guinea, to address these issues.
3. The Participants understand the importance of regional cooperation and have determined to continue discussions as to how the Assessment Centre might over time undertake a broader range of functions under the regional cooperation framework.

Guiding Principles

4. All activities undertaken in relation to this MOU will be conducted in accordance with international law and the international obligations of the respective Participant.
5. The Government of Australia will conduct all activities in respect of this MOU in accordance with its Constitution and all relevant domestic laws.
6. The Government of Papua New Guinea will conduct all activities in respect of this MOU in accordance with its Constitution and all relevant domestic laws.
7. The Government of Australia will bear all Costs incurred under this MOU.
8. Separate to the Costs incurred for the specific operation of this MOU, the Participants (The Government of Papua New Guinea and Government of Australia) will develop a package of assistance focused on Manus Province and other bilateral cooperation, which will be in addition to the current allocation of Australian development cooperation assistance to PNG, and directed towards priorities which are consistent with the revised PNG-Australia Partnership for Development (endorsed by both Governments on 12 October 2011).

Operation of this MOU

9. Australia may Transfer and Papua New Guinea will accept Transferees from Australia under this MOU.
10. Administrative measures giving effect to this MOU will be settled between the Participants. Any further specific arrangements may be made, as jointly determined to be necessary by the Participants, on more particular aspects of this MOU for the purpose of giving effect to its objectives.

Persons to be transferred to Papua New Guinea for processing

11. Persons to be transferred to Papua New Guinea are those persons who:
 - a) have traveled irregularly by sea to Australia; or
 - b) have been intercepted at sea by the Australian authorities in the course of trying to reach Australia by irregular means; and
 - c) are required by Australian law to be transferred to Papua New Guinea.

The site

12. Papua New Guinea will host an Assessment Centre in Manus Province or elsewhere in Papua New Guinea for the purposes of this MOU.

Timing

13. The Government of Australia will make all efforts to ensure that all persons entering Papua New Guinea under this MOU will have left within as short a time as is reasonably necessary for the implementation of this MOU, bearing in mind the objectives set out in the Preamble and Clause 1.
14. Australia undertakes for the purposes of this MOU to arrange for the resettlement or transfer from Papua New Guinea of all persons entering Papua New Guinea under this MOU.

Commitments

15. The Participants will ensure that Transferees will be treated with dignity and respect and that relevant human rights standards are met.
16. Special arrangements will be developed and agreed to by the Participants for vulnerable cases including unaccompanied minors.

17. Consistent with the Participants' objective of combating People Smuggling and Irregular Migration, and noting the establishment of the Assessment Centre under this MOU, Australia will support the Government of Papua New Guinea in its management of nationals from third countries who are illegally entering Papua New Guinea. Such support could consist of the provision of appropriate technical and financial assistance, as well as advice, as jointly determined between the Participants.
18. The Government of Papua New Guinea assures the Government of Australia that it will:
- a. not expel or return a transferee 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
 - b. make an assessment, or permit an assessment to be made, of whether or not a transferee is covered by the definition of refugee in Article 1A of the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees; and
 - c. not send a transferee to another country where there is a real risk that the transferee will be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty.

Co-operation

19. The Participants may jointly decide to vary this MOU in writing.
20. Communications concerning the day-to-day operation of activities undertaken in accordance with this MOU will be between the Office of the Chief Migration Officer of Papua New Guinea and the Australian High Commission.
21. The Participants will establish a Joint Committee with responsibility for the oversight of practical arrangements required to implement this MOU including issues relating to the duration of stay of Transferees. The Joint Committee will meet regularly no less than once monthly and will be co-chaired by mutually agreed representatives of the Australian High Commission Port Moresby and the PNG Immigration and Citizenship Service. Participation in the Joint Committee will be as agreed but may include relevant non-government organizations and service providers where appropriate.
22. This MOU will come into effect on the date of signature by both Participants and will remain in effect until terminated by mutual agreement.

Settlement of Disputes

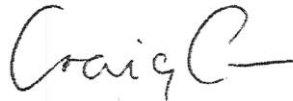
23. Any dispute arising with respect to the interpretation or implementation of this arrangement will be settled amicably through consultation between the Participants.

Signed on the 8th of September 2012.



The Hon Rimbink Pato OBE MP
Minister for Foreign Affairs
and Immigration

FOR THE GOVERNMENT OF
THE INDEPENDENT STATE OF
PAPUA NEW GUINEA



The Hon Dr Craig Emerson MP
Minister for Trade and Competitiveness

FOR THE GOVERNMENT OF
AUSTRALIA

**STATEMENT ABOUT ARRANGEMENTS THAT ARE IN PLACE, OR ARE TO BE PUT IN PLACE, IN THE
INDEPENDENT STATE OF PAPUA NEW GUINEA FOR THE TREATMENT OF PERSONS TAKEN TO
PAPUA NEW GUINEA**

1. This document sets out the arrangements that are in place or are to be put in place for the treatment of persons taken to Papua New Guinea (PNG) under s 198AD of the *Migration Act 1958 (the Act)*.

Status of transferees in PNG

2. The PNG Government has advised the Commonwealth that:
 - a. it will enable transferees to live lawfully in PNG while any claims that they may make for protection under the Refugees Convention, as amended by the Refugees Protocol, are assessed;
 - b. transferees will not be permitted to leave the processing centre until security and health assessments have been completed, and they are assessed as not presenting a risk to public health and are security cleared. Thereafter, transferees in the process of having their claims to protection assessed, or who have been determined to be a refugee, will be permitted to leave the Centre with an escort for approved activities;
 - c. transferees with appropriate skills may be invited to utilise those skills to the benefit of the local community. Details regarding this proposal are still being worked through.

Refugee status determination arrangements

3. The PNG Government has advised the Commonwealth that refugee status determinations for transferees will be made under PNG law with reference to Article 1A of the *Refugees Convention* as amended by the *Refugees Protocol*.

Accommodation

4. Initially, transferees will be accommodated in a combination of refurbished buildings and newly constructed tent accommodation. The refurbished buildings comprise small rooms, each able to accommodate two people. Tent accommodation is in the form of 4.2 metre by 4.2 metre canvas tents with timber flooring, lighting and fans, and insect netting over the camp beds. Five transferees can be accommodated in each tent.
5. It is expected that there will be capacity for 150 beds by mid October 2012 with a further 350 beds to be in place by late October 2012.
6. To support the temporary accommodation, onsite amenities such as recreation, mess and catering facilities will also be constructed. Utilities and underpinning infrastructure have

also been put in place at the temporary site, including sewerage, ablutions, water and power services.

7. Once a suitable permanent site is agreed work will immediately commence to establish a facility for up to 600 clients. The permanent site will include accommodation and a full range of client and administration amenities. These facilities will be completed as quickly as possible.

Medical care

8. Medical facilities will be provided to transferees by International Health & Medical Services (IHMS). Medical practitioners and nurses will provide health care, with provision for PNG nationals to be trained in ancillary roles, including in administration.
9. Provision for a medical facility, including a series of consulting and treatment rooms, will be provided at both the temporary and permanent sites.
10. For medical emergencies which cannot be dealt with in PNG, medical evacuation arrangements to Australia will be in place. Where appropriate, the Australian government will permit transferees to travel to Australia for non-emergency medical care that cannot be provided in PNG.

Education

11. Transferees who are children or unaccompanied minors who are taken to PNG will be provided with access to education, either in local PNG schools or, if necessary or appropriate, through the direct provision of schooling by contractors engaged for that purpose.
12. A range of accredited training courses will be available to transferees. These courses will be provided by an appropriate service provider, and may be available to residents of PNG who reside near the processing centre. These courses will predominantly be designed to meet the needs of transferees, but the needs of the local community will also be considered.

Other

13. Welfare and client support programs will be provided by the Salvation Army. This stream of service provision will ensure transferees are well supported and engaged during their stay in PNG.
14. Programs and activities for transferees will also be provided by the Salvation Army. Programs and activities that will be available to transferees in PNG will include sport and recreation, education, life skills and health and wellbeing. A range of facilities will be available at both the temporary and permanent sites to support the delivery of programs and activities, including a computer room, a library/reading room, a multi faith area and classrooms. A number of local activities and excursions will also be offered such as visits to the local markets, fishing and orientation to the local area in PNG.

15. To support operation of the processing centre, Group Four Falck Global Solutions Pty Ltd have been appointed to deliver services such as security, catering, cleaning, facilities maintenance and supply logistics. Where possible, local PNG businesses will be engaged to assist with the provision of these services.
16. All service providers are expected to be actively engaged with each other and with both the Australian and PNG Governments at local and national levels.

Commonwealth of Australia

Migration Act 1958

**STATEMENT ABOUT THE CONSULTATIONS BY THE MINISTER FOR IMMIGRATION AND CITIZENSHIP
WITH THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
IN RELATION TO THE DESIGNATION OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA AS A
REGIONAL PROCESSING COUNTRY, INCLUDING THE NATURE OF THOSE CONSULTATIONS**

On 15 August 2012, representatives from my department met with the Regional Representative of the UNHCR Regional Office for Australia, New Zealand, Papua New Guinea and the Pacific to discuss implementation of the recommendations of the Expert Panel on Asylum Seekers, including discussions regarding the designation of PNG as a regional processing country.

On 21 August 2012, I met with the Regional Representative of the UNHCR Regional Office for Australia, New Zealand, Papua New Guinea and the Pacific to discuss implementation of the recommendations of the Expert Panel on Asylum Seekers, including discussions regarding the designation of PNG as a regional processing country under section 198AB of the *Migration Act 1958* (the Act).

On 2 October 2012, I wrote to the United Nations High Commissioner for Refugees (UNHCR), H.E. Mr António Guterres, in relation to the implementation of the recommendations of the Expert Panel on Asylum Seekers. The letter also sought UNHCR's views on the designation of PNG as a regional processing country under section 198AB of the Act. A response to that letter remains outstanding.

On 2 October 2012, representatives from my department held discussions with the UNHCR Assistant High Commissioner for Protection, Ms Erika Feller, regarding implementation of the recommendations of the Expert Panel on Asylum Seekers, including discussions regarding designation of PNG as a regional processing country.

**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**

THE DESIGNATION

1. I, CHRIS BOWEN MP, Minister for Immigration and Citizenship, have exercised my power under s 198AB(1) of the *Migration Act 1958* (**the Act**) to designate that the Independent State of Papua New Guinea (PNG) is a regional processing country.
2. This document sets out my reasons for thinking that it is in the national interest to designate PNG to be a regional processing country.

THE LEGISLATIVE FRAMEWORK

3. The power conferred on me by s 198AB(1) to designate that a country is a regional processing country is contained in Part 2 Division 8 Subdivision B of the Act. That Subdivision was introduced into the Act by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (**the Amendment Act**). Section 198AA states that the Subdivision was enacted because Parliament considers that:
 - (a) people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed; and
 - (b) offshore entry persons, including offshore entry persons in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended by the Refugees Protocol, should be able to be taken to any country designated to be a regional processing country;

- (c) it is a matter for the Minister and Parliament to decide which countries should be designated as regional processing countries; and
 - (d) the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country.
- 4. Subsection 198AB(2) provides that the only condition for the exercise of the power conferred on me by s 198AB(1) is that I think it is in the national interest to designate the country to be a regional processing country.
- 5. Subsection 198AB(3) provides that, in considering the national interest for the purposes of s 198AB(2), I must have regard to whether or not the country has given Australia any assurances to the effect that:
 - (i) the country will not expel or return a person taken to the country under section 198AD 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
 - (ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of refugee in Article 1A of the Refugees Convention as amended by the Refugees Protocol;

and I may have regard to any other matter which in my opinion relates to the national interest.
- 6. Subsection 198AB(4) provides that the assurances referred to in s 198AB(3) need not be legally binding.
- 7. Section 198AD of the Act has the effect that, subject to ss 198AE, 198AF and 198AG, an officer must, as soon as reasonably practicable, take an offshore entry person who is detained under s 189 from Australia to a regional processing country. Section 198AE confers on me a personal non-compellable power to determine in writing that s 198AD does not apply to an offshore entry person, if I think that it is in the public interest to do so. Section 198AF provides that s 198AD does not apply to an offshore entry person if there is no regional processing country. And s 198AG provides that s 198AD does not apply to an offshore entry person if the regional processing country, or each

regional processing country (if there is more than one such country), has advised an officer in writing that the country will not accept the offshore entry person.

BACKGROUND

8. On 28 June 2012, the Prime Minister appointed an independent expert panel (**the panel**) to provide advice and recommendations to the Government on policy options available to prevent asylum seekers risking their lives on dangerous boat journeys to Australia. The panel consisted of Air Chief Marshal Angus Houston AC AFC (Retired), Mr Paris Aristotle AM, Director of the Victorian Foundation for Survivors of Torture Inc and Professor Michael L'Estrange AO, Director, National Security College.
9. The panel consulted widely on asylum issues with political leaders, other members of the Parliament, agencies and departments of Government, non-government organisations, academics and other experts as well as those in the wider community. The panel also held discussions with representatives of some refugee communities in Australia and refugees who travelled to Australia through irregular means. The panel received more than 550 written submissions.
10. The panel released its report on 13 August 2012. The panel recommended, among other things, that "a capacity be established in PNG as soon as possible to process the claims of IMAs [irregular maritime arrivals] transferred from Australia in ways consistent with the responsibilities of Australia and PNG under international law".
11. Following the report of the panel, the Government introduced the *Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012*. That Bill passed both Houses of Parliament with the support of both the Government and the Opposition.

SUBMISSION

12. To facilitate my consideration of whether I think that it is in the national interest to designate PNG to be a regional processing country, a submission was provided to me by my Department, which included the following attachments:
- (1) *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea (PNG) and the Government of Australia, relating to the transfer to and assessment of persons in Papua New Guinea, and related matters*, which was signed on 8 September 2012 (**the MOU**) (**Attachment A**)
 - (2) a statement about arrangements that are in place, and are to be put in place, in PNG for the treatment of persons taken there under s 198AD of the Act (**the statement of arrangements**) (**Attachment B**)

MY REASONS

13. I think that it is in the national interest to designate PNG to be a regional processing country (notwithstanding that I have previously designated Nauru to be a regional processing country), because:
- (1) PNG has given Australia the assurances referred to in s 198AB(3)(a)(i) and (ii) of the Act and other assurances;
 - (2) I consider designating PNG to be a regional processing country will discourage irregular and dangerous maritime voyages and thereby reduce the risk of the loss of life at sea;
 - (3) I consider designating PNG to be a regional processing country will promote the maintenance of a fair and orderly Refugee and Humanitarian Program that retains the confidence of the Australian people;

- (4) I consider designating PNG to be a regional processing country will promote regional co-operation in relation to irregular migration and address people smuggling and its undesirable consequences;
 - (5) I consider the arrangements that are already in place in PNG, and that are proposed to be put in place in PNG, to be satisfactory.
14. It is my opinion that, in addition to the assurances to which I must have regard pursuant to s 198AB(3), each of the other matters referred to in the preceding paragraph relates to the national interest.

Assurances by PNG

15. As stated above, s 198AB(3) provides that, in considering the national interest for the purposes of s 198AB(2), I must have regard to whether or not the country has given Australia any assurances to the effect set out in paragraph 5 above.
16. PNG has given those assurances. They are contained in clause 18 of the MOU. I consider that the "Transferees" who are referred to in clause 18 of the MOU are people who will be taken to PNG pursuant to s 198AD of the Act.
17. In relation to the assurance referred to in paragraph 5(ii) above, the PNG Government has advised the Commonwealth that refugee status determinations for transferees will be made under PNG law with reference to Article 1A of the *Refugees Convention* as amended by the *Refugees Protocol*.
18. PNG has given an additional assurance in clause 18 of the MOU that it will not send a transferee to another country where there is a real risk that the transferee will be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty.
19. Whether or not the assurances referred to above are legally binding, I expect that PNG will act in accordance with them and that, as a consequence, offshore entry persons who are transferred to PNG will not be at risk of being sent to another country where they have a well founded fear of persecution,

and will have any claims that they may make to be refugees within Article 1A of the Refugee Convention assessed. That was part of my thinking as to why it is in the national interest to designate PNG to be a regional processing country.

Discouragement of irregular and dangerous maritime voyages

20. I think that it is in the national interest to take action that is directed to discouraging irregular and dangerous maritime voyages to Australia and thereby to reducing the risk of loss of life at sea. In my view, s 198AA(a) of the Act supports that conclusion.
21. I think that designating PNG to be a regional processing country may act as a circuit breaker in relation to the recent surge in the number of irregular and dangerous maritime voyages to Australia. The surge in arrivals is indicated by the following figures my Department has provided to me:
 - (1) From 2002 to 2008 there were fewer than 10 boats a year. The total number of passengers was fewer than 200 each year.
 - (2) In 2009, there were 60 boats carrying 2,726 passengers.
 - (3) In 2010, there were 134 boats carrying 6,555 passengers.
 - (4) In 2011, there were 69 boats carrying 4,565 passengers.
 - (5) In the year to 2012 to 2 October (inclusive), there have been 173 boats carrying 11,233 passengers. The number of offshore entry persons who arrived in Australia in the first seven months of 2012 (7,120 – made up of 6,943 passengers and 177 crew) exceeded the number who arrived in total in each of 2011 and 2010. The number of passengers who arrived in September 2012 (2,293) constituted the largest ever monthly number and was the largest ever number for the sixth month in a row, since 2008.
22. A substantial number of lives have been lost at sea as a result of the activities of people smugglers. As reported by the Expert Panel, since 2001, it is

estimated that 1064 passengers have died (or gone missing, presumed dead). Of these, 704 deaths have occurred since October 2009. The figures above include the tragedy on 30 August 2012, during which an estimated 100 people lost their lives following the sinking of a vessel some 42 nautical miles off the Indonesian coast.

23. I think that the cost of irregular maritime voyages, in terms of the loss of human life and in respect of the substantial financial and resourcing costs to the Commonwealth in dealing with such arrivals (estimated to be in excess of \$5 billion over the forward estimates period), means that it is in the national interest to attempt to reduce the number of such voyages, and to do so urgently.
24. I think that, as people who are considering travelling to Australia on irregular maritime voyages become aware that their protection claims may be assessed in either Nauru or PNG, they may be discouraged from risking their lives by so doing, because it will change the equation between risk and reward for prospective IMAs.

I also think that designating PNG to be a regional processing country will make it more difficult for people smugglers to sell the opportunity to resettle in Australia.

Maintenance of a fair and orderly Refugee and Humanitarian Program

25. I think that it is in the national interest to take action that will promote the maintenance of a fair and orderly Refugee and Humanitarian Program that retains the confidence of the Australian people.
26. Many of the people who arrive in Australia as IMAs are refugees within the meaning of Article 1A of the Refugees Convention. But many persons who need protection under that Convention are also located outside Australia. While the Australian Government has recently increased the number of visas available under its Refugee and Humanitarian Program each year, that number remains limited. The policy of successive governments has been that grants of visas to both offshore and onshore refugees, including those who have arrived as IMAs as a result of the activities of people smugglers, are required to be

within this limit. As a result, for each visa granted to an onshore claimant in a given year, there is one less visa available to be granted to an offshore claimant in that year. In 2011–2012, for the first time more visas were granted to onshore claimants than to offshore claimants, shifting the balance of the program from its traditional offshore focus.

27. The designation of PNG as a regional processing country will have the effect that officers will be obliged to take offshore entry persons who are detained under s 189 of the Act from Australia to either PNG or Nauru as soon as reasonably practicable (unless I exercise my personal non-compellable power under s 198AE). For that reason, I consider that the designation of PNG to be a regional processing country is likely to reduce the level of irregular maritime arrivals to Australia and have the effect that a greater proportion of visas will be given to offshore claimants than is presently the case. I think that this would result in a fairer and more orderly Refugee and Humanitarian Program, and one which is more likely to retain the confidence of the Australian people. This is because I think that the allocation of protection visas to refugees under Australia's Refugee and Humanitarian Program should not be determined by whether or not the refugee has undertaken an irregular and dangerous maritime voyage to Australia.

Promotion of regional co-operation

28. I think that it is in the national interest to take action that will promote regional co-operation in relation to addressing people smuggling and its undesirable consequences.
29. Irregular migration is a continuing challenge for the Asia-Pacific region. At the Fourth Ministerial Conference of the Bali Process on People Smuggling, Trafficking and Related Transnational Crime held in Indonesia on 29-30 March 2011, Ministers agreed to a regional cooperation framework that would provide a more effective way for interested states to cooperate to reduce irregular migration in the region. That framework was to be given effect through arrangements entered into on a bilateral or sub-regional basis.

30. I think that the designation of PNG as a regional processing country will encourage the development of further regionally integrated arrangements to address the humanitarian and other problems caused by people smuggling, by providing a practical demonstration of regional co-operation to address irregular migration.

Arrangements

31. I think that the arrangements that are in place and are to be put in place, in PNG for the treatment of persons taken to PNG – being the arrangements described in the statement of arrangements – are satisfactory.
32. I am aware that:
- (1) some aspects of the arrangements that it is proposed would operate in PNG if I designate PNG to be a regional processing country are still the subject of negotiation between the Commonwealth and PNG;
 - (2) work is still continuing to establish the accommodation and other facilities that will be available to Transferees taken to PNG.

These facts do not alter my view as to the national interest.

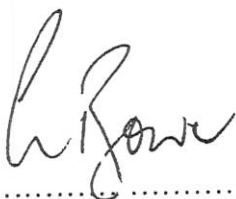
International obligations

33. If PNG is designated as a regional processing country it will follow, as is noted in s 198AA(b), that offshore entry persons, including offshore entry persons in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended by the Refugees Protocol, may be taken to PNG.
34. The content of Australia's international obligations is contestable. In particular, there is a range of views held by lawyers, academics, non-government organisations and others as to the content of Australia's international obligations with respect to persons transferred to another country, some of which differ from the Department's position.

35. 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 PNG as a regional processing country, notwithstanding that this will create a duty under s 198AD to take offshore entry persons to PNG in some circumstances (subject to s 198AD(5) and to the exercise of my personal non-compellable power in s 198AE).
36. However, 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.
37. In considering whether I think it is in the national interest to designate PNG to be a regional processing country, in addition to the matters outlined above I have chosen not to have regard to the international obligations or domestic law of PNG.

Concluded opinion

38. In light of the matters identified above, I think that it is in the national interest to designate PNG to be a regional processing country.



.....
Chris Bowen MP

Minister for Immigration and Citizenship

09 October 2012



Case postale 2500
1211 Genève 2
Suisse

9 October 2012

Sir,

I have the honour to thank you for your recent letter of September 2012, seeking UNHCR's views on the proposed designation of Papua New Guinea as a 'regional processing country,' pursuant to section 198AB of the Migration Act 1958. You have also asked for consideration of what role UNHCR might play in Australia's proposed processing arrangements in that country.

UNHCR's views are based on the information available to us at this time and I recognize that many of the important practical aspects of the arrangements, which are under active discussion between the Governments of Australia and Papua New Guinea, have yet to be finalized. For that reason, UNHCR's observations are necessarily general and subject to review as the operational arrangements become clearer.

First, as a general principle, I wish to recall UNHCR's earlier advice of 5 September 2012, in relation to a comparable designation of the Republic of Nauru, that asylum-seekers arriving at the frontier of a Convention State fall within the responsibility of that State. This responsibility includes, ordinarily, their access to a fair and effective process to determine their need for protection under the Refugee Convention and related human rights instruments.

This general practice is elaborated in more detail in the policy paper, to which you specifically refer in your letter, concerning maritime interception and the processing of international protection claims. Importantly, the paper also notes that *"claims for international protection made by intercepted persons are, in principle, to be processed in procedures within the territory of the intercepting State."*

As a significant exception to this normal practice, arrangements to transfer asylum-seekers to another country should normally only be pursued "as part of a burden-sharing arrangement to more fairly distribute responsibilities and enhance available protection space," and when the appropriate protection safeguards are in place in the countries involved.

Indeed, it has long been UNHCR's view that cooperative approaches in the region, which build and complement effective national asylum procedures and promote responsibility-sharing, can help asylum-seekers and refugees find viable protection options other than through dangerous and exploitative boat journeys. We believe that measures which enhance the quality of protection and improve the availability of solutions for refugees in South-East Asia will serve to expand the 'asylum space' for refugees in those places and reduce the need for onward movements by sea towards Australia, with all the dangers this entails.

The Hon. Chris Bowen MP
Minister for Immigration and Citizenship of Australia



When it comes to protection safeguards, any arrangements should include the following:

- respect for the principle of *non-refoulement*;
- the right to asylum (involving a fair adjudication of claims);
- respect for the principles of family unity and 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 with clear pre-transfer assessments by qualified staff (including best interest determinations for children, especially unaccompanied and separated children) and support for victims of torture/ trauma or suffering from disabilities (including aged/disabled); and,
- durable solutions for refugees within a reasonable period.

Against the above background, it is not clear from the information available to us that the transfer of asylum-seekers to Papua New Guinea, including the crucial element of legal responsibility, is fully appropriate. While UNHCR welcomes steps taken by the Government of Papua New Guinea to improve the overall quality of refugee protection, a number of very significant challenges still need to be overcome before it could be concluded, with any confidence, that a full transfer of legal responsibility from Australia to Papua Guinea could take place in practice and that this would be appropriate.

It is UNHCR's assessment that, in the current protection environment, there are several crucial challenges. First of all, with regard to commitments under international law, Papua New Guinea has acceded to the 1951 Refugee Convention in 1986 but retains seven significant reservations that affect a range of social, economic and political rights to which refugees would ordinarily be entitled under the Convention. While UNHCR welcomes pledges made by the Government of Papua New Guinea to withdraw these reservations, they remain extant at the time of writing. Papua New Guinea is party to the Convention on the Rights of the Child (30 September 1990), the Convention on the Elimination of Discrimination against Women (12 January 1995), the Convention on the Elimination of Racial Discrimination (30 March 1995), the International Covenant on Civil and Political Rights (21 July 2008) and the International Covenant on Economic Social and Cultural Rights (21 July 2008), but is not party to the UN Convention against Torture or either of the two Statelessness Conventions. Each of these Conventions is relevant to the protection of refugees and stateless people in Papua New Guinea.

Second, in considering Papua New Guinea's legal framework at the domestic level, there is, at present, no effective national legal or regulatory framework to address refugee issues. Importantly, there are currently no laws or procedures in place in the country for the determination of refugee status under the Refugee Convention.

Third, there are a number of gaps in Papua New Guinea's capacity to implement international obligations. There are currently no immigration officers with the experience, skill or expertise to undertake refugee status determination under the Refugee Convention. Since 2008, in the absence of any national capacity in this regard, UNHCR has been obliged to exercise its mandate to determine asylum-seekers' need for protection and to find solutions through resettlement. We recognize that efforts are presently being made to identify and train a small cadre of officers in asylum and refugee issues. Over time, capacity will improve but, depending on the scale and complexity of the task of processing cases and protecting refugees under the bilateral arrangements, it will likely remain insufficient for an important period of time.



Fourth, the risk of *refoulement* persists in spite of written undertakings. Papua New Guinea has land and sea borders that are extensive, porous and often unregulated. The level of training and understanding by border officials (who are usually not immigration officers) of asylum and of Papua New Guinea's protection responsibilities is, at best, limited. In the past six years a number of attempted expulsions, particularly on the northern border with Indonesia, have been brought to the attention of UNHCR and the Office managed to prevent them.

Finally, the quality of protection for asylum-seekers and refugees remains of concern. At present, Papua New Guinea does not provide any resources for the care, maintenance, support or protection of non-Melanesian asylum-seekers and refugees. Regularization of legal status for both Melanesian and non-Melanesian refugees is extremely limited, and there are very limited opportunities for sustainable local integration for refugees from outside the region. UNHCR (in cooperation with the International Organization for Migration) provides basic care and maintenance for these populations and is obliged to find resettlement for the majority of non-Melanesian refugees. The level of human insecurity and extremely high cost of living in Port Moresby (where most of the populations reside) make life very difficult for asylum-seekers and refugees and render local integration almost impossible.

From the language of the Memorandum of Understanding, which was attached to your letter, it seems that the common intention is that "all persons entering Papua New Guinea ... will depart within as short a time as is reasonably necessary," that "transferees will be treated with dignity and respect and that relevant human rights standards are met," and that there will be "oversight of practical arrangements required to implement this MOU."

These are welcome acknowledgements, which go some way to addressing the issue of protection safeguards as identified above. They would indicate that both Australia and Papua New Guinea have shared and joint legal responsibility for the protection of refugees identified for processing.

However, from the information available to UNHCR at this time, it is not clear how this responsibility will be apportioned between the two contracting States. This is important because all operational and ancillary details will be predicated necessarily on how the question of legal responsibility is framed.

In UNHCR's view, it would be prudent for the legal responsibilities of both the transferring and receiving States to be very clearly and unambiguously set out in the formal arrangements, and that oversight mechanisms exist to ensure their full implementation in practice.

This said, we also note the indications received from your officials to the effect that Australia does not see itself as having any legal responsibilities after transfer to Papua New Guinea. In light of these various considerations, and barring receipt of information to the contrary, it is difficult to see how Papua New Guinea alone might meet the conditions set out in UNHCR's paper on maritime interception and the processing of international protection claims.

For the reasons set out above, it is UNHCR's assessment that Papua New Guinea 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. At best, we would see the transfers as a shared and joint legal responsibility under the Refugee Convention and other applicable human rights instruments.

As with the situation in Nauru, we also anticipate particular challenges in finding timely solutions for refugees. We do not underestimate the challenges involved in caring for people transferred to Manus Island and in conducting refugee status determination, nor the difficulty of preserving the psychosocial and physical health of those remaining on Manus Island for any prolonged period.



In this regard, the "no-advantage" test endorsed by your Government contemplates a time frame that is assessed against and consistent with the period a refugee might face had s/he been assessed "by UNHCR within the regional processing arrangement." The practical implications are not fully clear to us. The time it takes for resettlement referrals by UNHCR in South-East Asia or elsewhere may not be a suitable comparator for the period that a Convention State, whose protection obligations are engaged, would need. Moreover it will be difficult to identify such a period with any accuracy, given there is no "average" time for resettlement. UNHCR seeks to resettle on the basis of need and specific categories of vulnerability, not on the basis of a "time-spent" formulation. Finally, the "no advantage" test appears to be based on the longer term aspiration that there are, in fact, regional processing arrangements in place. We share this aspiration. However, for the moment, such regional arrangements are very much at their early conceptualization. In this regard, UNHCR would be concerned about any negative impact on recognized refugees who might be required to wait for long periods of time in remote island locations.

In response to your request for consideration of what role UNHCR might play in the proposed arrangements, I am conscious that a number of important questions still need to be clarified which would inform the degree to which my Office might be involved.

Our continuing view is that the arrangements being contemplated are essentially between two Convention States and that UNHCR would not have any operational or active role to play in their implementation.

However, as we have already indicated in relation to Nauru, UNHCR has a statutory role under Article 35 of the 1951 Refugee Convention which requires the Office to supervise implementation of the Refugee Convention by States parties. This role is adaptive to the context of particular situations. When the structural, operational and procedural details are clarified, we would be pleased to discuss how, in the specific context of the current arrangements, this can be most usefully employed.

Finally, allow me to reiterate my appreciation for the opportunity to provide this advice in relation to the possible designation of Papua New Guinea under section 198AB of the Migration Act 1958. My Office remains at your disposal to discuss any of these matters in greater detail. I look forward to continuation of our ongoing positive and very fruitful cooperation on refugee protection, both in the region and globally.

Please accept, Sir, the assurances of my highest consideration.

cc to my nearest personal rep

António Guterres