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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**MIGRATION AMENDMENT (UNAUTHORISED MARITIME ARRIVALS AND
OTHER MEASURES) BILL 2012**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration and Citizenship,
the Hon. Chris Bowen MP)

Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012

OUTLINE

The Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (the Bill) amends the *Migration Act 1958* (the Act) to implement recommendation 14 from the report by the Expert Panel on Asylum Seekers (the Expert Panel) handed to the Prime Minister and the Minister for Immigration and Citizenship on 13 August 2012, and to implement other measures to strengthen the regional processing framework.

The *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Regional Processing Act) amended the Act to give effect to recommendation 7 of the Expert Panel's report to allow offshore entry persons to be taken to designated regional processing countries for the processing of any asylum claims. The Regional Processing Act commenced on 18 August 2012.

Under the Regional Processing Act, regional processing arrangements only apply to offshore entry persons who enter Australia at excised offshore places. Regional processing arrangements do not currently apply to individuals who enter Australia at the Australian mainland because they are not classified as offshore entry persons. Consequently, under current arrangements, there is an inherent risk that individuals may seek to travel to the Australian mainland to avoid being sent to a designated regional processing country.

The Expert Panel stated that all possible measures should be implemented to avoid creating an incentive for people to take even greater risks with their lives by seeking to bypass excised offshore places to reach the Australian mainland. Further, the Expert Panel stated that such an amendment will be important to ensure that the introduction of processing outside Australia does not encourage asylum seekers to avoid these arrangements by attempting to enter at the Australian mainland. Such attempts would increase the existing dangers inherent in irregular maritime travel.

For this reason, the Expert Panel recommended (in recommendation 14) that the Act also be amended to ensure that arrival anywhere in Australia by irregular maritime means will not provide individuals with a different lawful status than those who arrive at an excised offshore place.

The Bill therefore provides that all arrivals in Australia by irregular maritime means will have the same legal status regardless of where they arrive, unless they are an excluded class or otherwise exempted. This means, all arrivals in Australia by irregular maritime means cannot make a valid application for a visa unless the Minister personally thinks it is in the public interest to do so. Those people are also subject to mandatory immigration detention, are to be taken to a designated regional processing country and cannot institute or continue certain legal proceedings.

This Bill also provides for discretionary immigration detention of Papua New Guinea (PNG) citizens who are unlawful non-citizens and are in a protected area. The Regional Processing Act amended section 189 of the Act to require mandatory immigration detention of unlawful non-citizens in an excised offshore place (except for allowed inhabitants of the Protected Zone in a protected area who are unlawful non-citizens). Prior to the commencement of the Regional Processing Act, the immigration detention of all unlawful non-citizens in an excised offshore place was discretionary.

Specifically, the Bill amends the Act to:

- repeal the defined term *offshore entry person*;
- insert a new defined term *unauthorised maritime arrival*;

- provide that a person is an *unauthorised maritime arrival* if they entered Australia by sea at an excised offshore place at any time after the excision time for that place or at any other place at any time on or after commencement, became an unlawful non-citizen because of that entry and is not an excluded maritime arrival;
- replace references in the Act to *offshore entry person* with either the word “person” or the new defined term *unauthorised maritime arrival* as grammatically appropriate;
- amend the defined term *transitory person* so that a person does not cease to be a *transitory person* if a person has been assessed to be a refugee for the purposes of the Refugees Convention as amended by the Refugees Protocol;
- provide that a person will have entered Australia by sea if: (a) the person entered the migration zone except on an aircraft that landed in the migration zone; or (b) the person entered the migration zone as a result of being found on a ship detained under section 245F and dealt with under paragraph 245F(9)(a); or (c) if the person entered the migration zone after being rescued at sea;
- provide that a person is an *excluded maritime arrival* and therefore not an unauthorised maritime arrival if the person is a New Zealand citizen who holds and produces a New Zealand passport that is in force, or is a non-citizen who holds and produces a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island, or is included in a prescribed class of persons;
- amend subsection 189(2) of the Act to provide for discretionary immigration detention for some persons who are seeking to enter the migration zone (other than at an excised offshore place);
- amend paragraph 189(3A)(a) of the Act to provide for discretionary immigration detention of PNG citizens who are unlawful non-citizens and are in a protected area;
- amend section 198AE of the Act to include an express power for the Minister to revoke or vary a determination made under section 198AE if the Minister thinks it is in the public interest to do so;
- amend section 198AH of the Act to confirm that a *transitory person* can be taken to a regional processing country whether or not the *transitory person* has been assessed to be covered by the definition of *refugee* in Article 1A of the Refugees Convention as amended by the Refugees Protocol;
- repeal sections 198C and 198D of the Act so that a *transitory person* cannot seek an assessment of their refugee status from the Refugee Review Tribunal (RRT) and the subsequent lifting of the section 46B bar on making a valid visa application where the RRT considers the *transitory person* is covered by the definition of *refugee* in Article 1A of the Refugees Convention as amended by the Refugees Protocol;
- provide that an authorisation made under section 336D of the Act that was in force immediately before commencement is taken to authorise access to identifying information relating to *unauthorised maritime arrivals* to the extent that, immediately before commencement, the authorisation authorised access to identifying information relating to *offshore entry persons*;

- provide that an authorisation made under section 336F of the Act that was in force immediately before commencement is taken to authorise disclosure of identifying information relating to *unauthorised maritime arrivals* to the extent that, immediately before commencement, the authorisation disclosure of identifying information relating to *offshore entry persons*;
- provide that any reference in the access authorisation or disclosure authorisation to an *offshore entry person* is taken, after commencement, to be a reference to an *unauthorised maritime arrival*;
- make necessary consequential amendments; and
- provide for contingent amendments to paragraph 5AA(2)(b) and subsection 5AA(4) of the Act following the commencement of the *Maritime Powers Act 2012*.

CONSULTATION

External consultations in relation to the Bill have taken place with various Commonwealth agencies including the Attorney-General's Department, the Department of the Prime Minister and Cabinet, the Australian Customs and Border Protection Service, the Department of Defence, the Department of Infrastructure and Transport and the Department of Agriculture, Fisheries and Forestry.

FINANCIAL IMPACT STATEMENT

The financial impact of these amendments is low. Any costs will be met from within existing resources of the Department of Immigration and Citizenship.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation has been consulted and assessed that a regulation impact statement is not required. The advice references are 14216 and 14264.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

A Statement of Compatibility with Human Rights has been completed in relation to the amendments in this Bill and assesses that the amendments are compatible with Australia's human rights obligations. A copy of the Statement of Compatibility with Human Rights is at [Attachment A](#).

MIGRATION AMENDMENT (UNAUTHORISED MARITIME ARRIVALS AND OTHER MEASURES) BILL 2012

NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short title

1. Clause 1 provides that the short title by which this Act may be cited is the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2012*.

Clause 2 Commencement

2. Subclause 2(1) provides that each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.
3. Table item 1 provides that sections 1 to 3 of this Act and anything in this Act not elsewhere covered by the table will commence on the day on which this Act receives the Royal Assent.
4. Table item 2 provides that items 1 to 14 of Schedule 1 will commence on a single day to be fixed by Proclamation. It also provides that if the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.
5. Table item 3 provides that items 15 and 16 of Schedule 1 will commence on the day after this Act receives the Royal Assent.
6. Table item 4 provides that items 17 to 62 of Schedule 1 will commence at the same time as the provision(s) covered by table item 2.
7. Table item 5 provides that Schedule 2 will commence the later of:
 - immediately after the commencement of the provision(s) covered by table item 2; and
 - immediately after the commencement of section 69 of the *Maritime Powers Act 2012*.

It also provides that, the provision(s) do not commence at all if the event mentioned in paragraph (b) of table item 5 does not occur. The effect of this is that if section 69 of the *Maritime Powers Act 2012* does not commence then Schedule 2 of this Act will not commence.

8. The note in subclause 2(1) makes it clear that the table relates only to the provisions of this Act as originally enacted. The table will not be amended to deal with any later amendments of this Act.
9. Subclause 2(2) provides that any information in column 3 of the table is not part of this Act. It provides that information may be inserted in column 3, or information in it may be edited, in any published version of this Act.

Clause 3 Schedule(s)

10. This clause provides that each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned. In addition, any other item in a Schedule to this Act has effect according to its terms.

SCHEDULE 1 – Main amendments

Part 1 – Amendments

Migration Act 1958

Item 1 Subsection 4(5)

11. This item omits the words “offshore entry persons” and substitutes the words “unauthorised maritime arrivals” in subsection 4(5) of the *Migration Act 1958* (“the Act”).
12. Section 4 sets out the object of the Act. Relevantly, subsection 4(1) provides that the object of the Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.
13. Current subsection 4(5) provides that, to advance its object, the Act provides for the taking of offshore entry persons from Australia to a regional processing country.
14. New subsection 4(5) provides that, to advance its object, the Act provides for the taking of unauthorised maritime arrivals from Australia to a regional processing country.
15. This is a consequential amendment as a result of the amendments in item 3 of Schedule 1 to the Bill which repeals the term offshore entry person and item 7 of Schedule 1 to the Bill which inserts the term unauthorised maritime arrival.

Item 2 Subsection 5(1) (note at the end of the definition of *excised offshore place*)

16. This item repeals the note at the end of the definition of excised offshore place in subsection 5(1) of the Act.
17. Excised offshore place is defined in subsection 5(1) of the Act as any of the following:
 - the Territory of Christmas Island;
 - the Territory of Ashmore and Cartier Islands;
 - the Territory of Cocos (Keeling) Islands;
 - any other external Territory that is prescribed by the regulations for the purposes of this paragraph;
 - any island that forms part of a State or Territory and is prescribed for the purposes of this paragraph;
 - an Australian sea installation;
 - an Australian resources installation.
18. The current note to the definition of excised offshore place provides that the effect of this definition is to excise the listed places and installations from the migration zone for the purposes of limiting the ability of offshore entry persons to make valid visa applications.

19. This note is repealed because the amendments made by item 8 of Schedule 1 to the Bill mean that entering Australia at an excised offshore place is not the only entry to Australia whereby there will be a limit on the ability of a person to make a valid visa application.

Item 3 Subsection 5(1) (definition of *offshore entry person*)

20. This item repeals the definition of *offshore entry person* in subsection 5(1) of the Act.
21. Current subsection 5(1) of the Act defines an offshore entry person to mean a person who:
- has, at any time, entered Australia at an excised offshore place after the excision time for that offshore place; and
 - became an unlawful non-citizen because of that entry.
22. The definition of offshore entry person is repealed as the definition of unauthorised maritime arrival, which is inserted by item 8 of Schedule 1 to the Bill, maintains the effect of the definition of offshore entry person so that a person who enters Australia by sea at an excised offshore place at any time after the excision time for that place, which may be prior to the commencement of this Act, and who became an unlawful non-citizen because of that entry will continue to have the same consequences under the Act as an offshore entry person.
23. However, while an offshore entry person included all persons who entered Australia at an excised offshore place after the excision time for that place regardless of their mode of entry, subparagraph 5AA(1)(a)(i) in item 8 of Schedule 1 to the Bill does not include a person as an unauthorised maritime arrival if they had not entered Australia by sea at an excised offshore place.

Item 4 Subsection 5(1) (paragraphs (a) and (aa) of the definition of *transitory person*)

24. This item omits the words “an offshore entry person” and substitutes the words “a person” in paragraphs 5(1)(a) and 5(1)(aa) of the definition of transitory person in subsection 5(1) of the Act.
25. This is a consequential amendment as a result of the amendments in item 3 of Schedule 1 to the Bill which repeals the term offshore entry person and item 7 of Schedule 1 to the Bill which inserts the term unauthorised maritime arrival.

Item 5 Subsection 5(1) (subparagraph (c)(iii) of the definition of *transitory person*)

26. This item omits “country;” and substitutes it with “country.”.
27. This is a consequential amendment as a result of the amendment in item 6 of Schedule 1 to the Bill.

Item 6 Subsection 5(1) (definition of *transitory person*)

28. This item omits all the words after subparagraph (c)(iii) of the definition of transitory person.
29. Currently, transitory person is defined in subsection 5(1) of the Act to mean:
- an offshore entry person who was taken to another country under repealed section 198A; or

- an offshore entry person who was taken to a regional processing country under section 198AD; or
- a person who was taken to a place outside Australia under paragraph 245F(9)(b); or
- a person who, while a non-citizen and during the period from 27 August 2001 to 6 October 2001:
 - was transferred to the ship *HMAS Manoora* from the ship *Aceng* or the ship *MV Tampa*; and
 - was then taken by *HMAS Manoora* to another country; and
 - disembarked in that other country;

but does not include a person who has been assessed to be a refugee for the purposes of the Refugees Convention as amended by the Refugees Protocol.

30. Following the amendments by item 4, item 5 and item 6 of Schedule 1 to the Bill, the definition of transitory person provides:

- a person who was taken to another country under repealed section 198A; or
- a person who was taken to a regional processing country under section 198AD; or
- a person who was taken to a place outside Australia under paragraph 245F(9)(b); or
- a person who, while a non-citizen and during the period from 27 August 2001 to 6 October 2001:
 - was transferred to the ship *HMAS Manoora* from the ship *Aceng* or the ship *MV Tampa*; and
 - was then taken by *HMAS Manoora* to another country; and
 - disembarked in that other country.

31. The effect of the amendment in item 6 of Schedule 1 to the Bill is to provide that a person will continue to be transitory person if they have been assessed to be a refugee for the purposes of the Refugees Convention as amended by the Refugees Protocol.

32. This amendment is consistent with the ‘no advantage’ principle as outlined in recommendation 1 of the report provided by the Expert Panel so that no benefit is gained through circumventing regular migration arrangements. This amendment will allow for a transitory person, who has been assessed as a refugee but does not yet have a visa, to be transferred between a regional processing country and Australia.

Item 7 Subsection 5(1)

33. This item inserts the term *unauthorised maritime arrival* in subsection 5(1) of the Act.

34. This item provides that the term unauthorised maritime arrival has the meaning given by section 5AA of the Act.

Item 8 After section 5

35. This item inserts section 5AA into the Act.

36. Section 5AA of the Act provides the meaning of unauthorised maritime arrival.
37. Subsection 5AA(1) of the Act provides that for the purposes of this Act, a person is an *unauthorised maritime arrival* if:
- the person entered Australia by sea:
 - at an excised offshore place at any time after the excision time for that place; or
 - at any other place at any time on or after the commencement of this section; and
 - the person became an unlawful non-citizen because of that entry; and
 - the person is not an excluded maritime arrival.
38. Subparagraph 5AA(1)(a)(i) provides that a person is an unauthorised maritime arrival if the person entered Australia by sea at an excised offshore place at any time after the excision time for that place.
39. The purpose of this amendment is to maintain the effect of the definition of offshore entry person (which is being repealed) so that a person who enters Australia by sea at an excised offshore place at any time after the excision time for that place, which may be prior to the commencement of this Act, and who became an unlawful non-citizen because of that entry will continue to have the same consequences under the Act as an offshore entry person.
40. However, while an offshore entry person included all persons who entered Australia at an excised offshore place after the excision time for that place regardless of their mode of entry, subparagraph 5AA(1)(a)(i) does not include a person as an unauthorised maritime arrival if they had not entered Australia by sea at an excised offshore place.
41. Subparagraph 5AA(1)(a)(ii) provides that a person will be an unauthorised maritime arrival if the person entered Australia by sea at any other place at any time on or after the commencement of this section.
42. The purpose of this amendment is to give effect to recommendation 14 of the report provided by the Expert Panel.
43. Paragraph 5AA(1)(b) provides that a person is an unauthorised maritime arrival if the person became an unlawful non-citizen because of that entry.
44. Subsection 14(1) of the Act provides that a non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen. Subsection 13(1) of the Act provides that a non-citizen in the migration zone who holds a visa that is in effect is a lawful non-citizen.
45. Paragraph 5AA(1)(c) provides that a person is an unauthorised maritime arrival if the person is not an excluded maritime arrival.
46. Taken as a whole, the effect of this amendment is that a person who entered Australia by sea and became an unlawful non-citizen will be an unauthorised maritime arrival, unless the person is an excluded maritime arrival.

47. Subsection 5AA(2) provides that a person *entered Australia by sea* if:
- the person entered the migration zone except on an aircraft that landed in the migration zone; or
 - the person entered the migration zone as a result of being found on a ship detained under section 245F and being dealt with under paragraph 245F(9)(a); or
 - the person entered the migration zone after being rescued at sea.
48. Paragraph 5AA(2)(a) is intended to cover a person who arrived in Australia by sea and entered the migration zone, other than by an aircraft, whether on a ship or otherwise. This is intended to cover people who make their way to Australia by sea without being rescued or intercepted and who enter the migration zone.
49. A person cannot become an unauthorised maritime arrival unless they also are an unlawful non-citizen because of their entry into the migration zone. A person cannot be an unlawful non-citizen unless they are in the migration zone and do not hold a visa that is in effect.
50. The migration zone is defined in subsection 5(1) of the Act. It provides that the migration zone means the area consisting of the States, the Territories, Australian resource installations and Australian sea installations, and to avoid doubt, includes:
- land that is part of a State or Territory at mean low water; and
 - sea within the limits of both a State or a Territory and a port; and
 - piers, or similar structures, any part of which is connected to such land or to ground under such sea;
- but does not include sea within the limits of a State or Territory but not in a port.
51. A port is defined in subsection 5(1) of the Act to mean a proclaimed port.
52. A proclaimed port is defined in subsection 5(1) of the Act to mean a port appointed under section 15 of the *Customs Act 1901* or a port appointed by the Minister under subsection 5(5) of the Act.
53. Paragraph 5AA(2)(a) is intended to cover all possible situations where a person can enter Australia by sea apart from where they are being dealt with under subsection 245F(9) of the Act or are rescued at sea.
54. It is not intended to allow the complexity of the interaction of the definition of the migration zone and the variations of the geography of the Australian coastline to provide a means of argument for a person to be excluded from the operation of this definition. The way in which it is to be determined that, as a matter of law, sea is within the limits of a State or a Territory at any particular place is a matter that can involve complex analysis of the law and also the geography of that place.
55. For the sea to meet the definition of being in the migration zone, paragraph (b) of the definition of the migration zone requires that the sea be within the limits of both a State, or a Territory, and a port.

56. There are many places in the migration zone where a person will enter the migration zone while they are still on the ship. That is because the sea in which the ship is travelling is in the limits of a State or a Territory and is within the limits of a port. That is, the ship has entered the migration zone at the point prior to its arrival at the pier or similar structure.
57. In many places on the Australian coastline, it is not possible for a person to enter the migration zone while they are still on board a ship. It will not be until the person steps onto a pier or a similar structure, or steps onto land above the mean low water mark, in a State or a Territory, that they will enter the migration zone. It is intended that all such people will come within the definition of an unauthorised maritime arrival if they are an unlawful non-citizen on entering the migration zone.
58. To negate any argument that by stepping onto a pier or a similar structure, or onto land above the mean low water mark, a person has not entered Australia by sea anywhere in the migration zone, whether at an excised offshore place or not, the only way that a person will not come within that definition is to enter the migration zone on an aircraft that landed in the migration zone.
59. Paragraph 5AA(2)(b) is intended to cover a person who was found on a ship that was detained under section 245F of the Act and being dealt with under paragraph 245F(9)(a) of the Act and the person entered the migration zone as a result.
60. Paragraph 245F(9)(a) of the Act provides that if an officer detains a ship or aircraft under section 245F the officer may detain any person found on the ship or aircraft and bring the person, or cause the person to be brought, to the migration zone.
61. Subsection 245F(9A) relevantly provides that for the purposes of moving a person under subsection 245F(9), an officer may outside Australia:
 - place the person on a ship or aircraft; or
 - restrain the person on a ship or aircraft; or
 - remove the person from a ship or aircraft.
62. It is intended that the definition in paragraph 5AA(2)(b) will cover every situation in which a person is brought to the migration zone while being dealt with under paragraph 245F(9)(a), whether by a ship or an aircraft, and the person became an unlawful non-citizen because of that entry into the migration zone.
63. Paragraph 5AA(2)(c) is intended to cover where a person is rescued at sea and is brought to the migration zone and who becomes an unlawful non-citizen on arrival in the migration zone as a result of that entry. That is intended to cover every person who is rescued at sea wherever that may be and however they are brought to the migration zone as a result of that rescue whether or not they arrive in the migration zone:
 - on a ship, whether or not the ship on which they are brought entered the migration zone; or
 - on an aircraft that landed in the migration zone.

64. Subsection 5AA(3) of the Act provides that a person is an *excluded maritime arrival* if the person:
- is a New Zealand citizen who holds and produces a New Zealand passport that is in force; or
 - is a non-citizen who holds and produces a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island; or
 - is included in a prescribed class of persons.
65. Paragraphs 5AA(3)(a) and 5AA(3)(b) exclude certain New Zealand citizens and permanent residents of Norfolk Island from being unauthorised maritime arrivals. These are existing cohorts of non-citizens who are currently not required to hold a visa to travel to Australia under section 42 of the Act and who apply for specific visas in immigration clearance.
66. Paragraph 5AA(3)(c) inserts a regulation making power to prescribe further classes of persons as excluded maritime arrivals in the *Migration Regulations 1994*. The purpose of this amendment is to provide the Minister with the flexibility to allow the Governor-General, acting on the advice of the Federal Executive Council, to prescribe further classes of persons to be excluded without an Act amendment.
67. Subsection 5AA(4) provides the definition of *aircraft* and *ship* for the purposes of section 5AA of the Act.

Item 9 Subparagraphs 5A(3)(j)(ii) and (iii)

68. This item omits the words “offshore entry person” and substitutes the words “unauthorised maritime arrival” in subparagraphs 5A(3)(j)(ii) and 5A(3)(j)(iii) relating to the meaning of personal identifier in the Act.
69. This is a consequential amendment as a result of the amendments in item 3 of Schedule 1 to the Bill which repeals the term offshore entry person and item 7 of Schedule 1 to the Bill which inserts the term unauthorised maritime arrival.

Items 10 - 14 Section 46A

70. Items 10, 11, 13 and 14 omits the words “offshore entry person” (wherever occurring) and substitutes the words “unauthorised maritime arrival” in section 46A (heading), subsections 46A(1) and 46A(2), paragraphs 46A(5)(a) and 46A(5)(b), and subsection 46A(7) of Subdivision AA of Division 3 of Part 2 of the Act.
71. Item 12 omits the words “the person” and substitutes the words “the unauthorised maritime arrival” in subsection 46A(2) of Subdivision AA of Division 3 of Part 2 of the Act.
72. Section 46A of the Act deals with visa applications by offshore entry persons.
73. Subsection 46A(1) of the Act provides that an application for a visa is not a valid application if it is made by an offshore entry person who:
- is in Australia; and
 - is an unlawful non-citizen.

74. Subsection 46A(2) of the Act provides that if the Minister thinks it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection 46A(1) does not apply to an application by the person for a visa of a class specified in the determination.
75. These items amend references to offshore entry person which is repealed by item 3 of Schedule 1 to the Bill to reflect term unauthorised maritime arrival which is inserted by item 7 of Schedule 1 to the Bill.
76. The effect of these amendments is that persons who are unauthorised maritime arrivals (as defined in section 5AA inserted by item 8 of Schedule 1 to the Bill) will be prevented from being able to make a valid application for a visa in Australia if they are in Australia and they are unlawful non-citizens. However, if the Minister thinks it is in the public interest to do so, the Minister may, by written notice given to the unauthorised maritime arrival, determine that the prohibition on making an application does not apply to an application by the unauthorised maritime arrival for a visa of a class specified in the determination.

Item 15 Subsection 189(2)

77. This item omits the words “must detain” and substitutes the words “may detain” in subsection 189(2) of Subdivision A of Division 7 of Part 2 of the Act.
78. Subsection 189(2) of the Act currently provides that if an officer reasonably suspects that a person in Australia but outside the migration zone is seeking to enter the migration zone (other than an excised offshore place) and would, if in the migration zone, be an unlawful non-citizen, the officer must detain the person.
79. Subsection 189(4) of the Act provides that if an officer reasonably suspects that a person in Australia but outside the migration zone is seeking to enter an excised offshore place and would, if in the migration zone, be an unlawful non-citizen, the officer may detain the person.
80. This amendment makes the immigration detention arrangements of certain persons seeking to enter the migration zone (other than at an excised offshore place) discretionary if they would, if in the migration zone, be unlawful non-citizens. In effect, the amendment will provide consistency in the immigration detention arrangements so that where an officer reasonably suspects that a person in Australia but outside the migration zone:
- is seeking to enter the migration zone (other than at an excised offshore place); and
 - would, if in the migration zone, be an unlawful non-citizen;
- the officer may detain the person.

Item 16 Paragraph 189(3A)(a)

81. This item repeals and substitutes paragraph 189(3A)(a) in Subdivision A of Division 7 of Part 2 of the Act.
82. Subsection 189(3A) of the Act provides that if an officer knows or reasonably suspects that a person in a protected area:
- is an allowed inhabitant of the Protected Zone; and
 - is an unlawful non-citizen;

the officer may detain the person.

83. The protected area is defined in subsection 5(1) of the Act and means an area that is part of the migration zone, and in, or in an area in the vicinity of, the Protected Zone. The Protected Zone is defined in subsection 5(1) of the Act and means the zone established under Article 10 of the Torres Strait Treaty, being the area bounded by the line described in Annex 9 to that treaty. The areas defined as a protected area are parts of the migration zone and are excised offshore places.
84. Subsection 189(3A) was inserted by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (the Regional Processing Act), as a consequence of the change in immigration detention arrangements for unlawful non-citizens in an excised offshore place from discretionary to mandatory immigration detention except in very limited circumstances. Prior to this, officers were given the discretion to detain unlawful non-citizens in an excised offshore place. Under subsection 189(3A), only allowed inhabitants of the Protected Zone in a protected area, who are unlawful non-citizens are subject to discretionary immigration detention.
85. The consequence is that citizens of Papua New Guinea (PNG) who are not allowed inhabitants of the Protected Zone in a protected area, who are unlawful non-citizens, are liable for mandatory immigration detention.
86. Due to the complex and unique operational environment and history of the Torres Strait, and for practical and operational reasons, this amendment extends the discretionary immigration detention power so that it applies to all PNG citizens, who are unlawful non-citizens in a protected area.

Items 17 - 30 Sections 198, 198AA, 198AD and 198AE

87. Items 17 to 30 omit references to “offshore entry person”, “offshore entry persons”, “the person” and “the person’s” (wherever occurring) and substitutes each of those references with “unauthorised maritime arrival”, “unauthorised maritime arrivals” and “unauthorised maritime arrival’s” as grammatically appropriate in sections 198, 198AA, 198AD and 198AE in Subdivision B of Division 8 of Part 2 of the Act.
88. These are consequential amendments as a result of the amendments in item 3 of Schedule 1 to the Bill which repeals the term offshore entry person and item 7 of Schedule 1 to the Bill which inserts the term unauthorised maritime arrival.

Item 31 After subsection 198AE(1)

89. This item inserts new subsection 198AE(1A) after subsection 198AE(1) in Subdivision B of Division 8 of Part 2 of the Act.
90. Subsection 198AE(1) provides that if the Minister thinks that it is in the public interest to do so, the Minister may, in writing, determine that section 198AD does not apply to an offshore entry person. Section 198AD applies to an offshore entry person who is detained under section 189.
91. New subsection 198AE(1A) clarifies that the Minister may, in writing, vary or revoke a determination made under subsection (1) if the Minister thinks it is in the public interest to do so. While this power is already presumed to exist, a new subsection has been added to make this intention expressly clear.

92. Consistent with the making of a determination under subsection 198AE(1), the effect of this amendment is that the Minister may only vary an existing determination, or revoke the determination, if the Minister thinks it is in the public interest to do so.

Item 32 Subsection 198AE(2)

93. This item inserts “or (1A)” after “subsection (1)” in subsection 198AE(2) of Subdivision B of Division 8 of Part 2 of the Act.
94. Subsection 198AE(2) provides that the power under subsection 198AE(1) to make a determination may only be exercised by the Minister personally.
95. Consistent with the making of a determination under subsection 198AE(1), the effect of this amendment is that the power under new subsection 198AE(1A) to vary or revoke a determination may only be exercise by the Minister personally.

Item 33 At the end of subsection 198AE(3)

96. This item adds “or (1A)” at the end of subsection 198AE(3) in Subdivision B of Division 8 of Part 2 of the Act.
97. Subsection 198AE(3) provides that the rules of natural justice do not apply to an exercise of power under subsection 198AE(1).
98. Consistent with the making of a determination under subsection 198AE(1), the effect of this amendment is that the rules of natural justice do not apply to an exercise of power under new subsection 198AE(1A) to vary or revoke a determination.

Items 34 - 36 Subsection 198AE(4)

99. Items 34 to 36 amend subsection 198AE(4) of Subdivision B of Division 8 of Part 2 of the Act to ensure subsection 198AE(4) applies to a variation or a revocation of a determination made under new subsection 198AE(1A).
100. Item 34 inserts “or varies or revokes a determination under subsection (1A)” after “subsection (1)” in subsection 198AE(4) of Subdivision B of Division 8 of Part 2 of the Act.
101. Item 35 inserts “, the determination as varied or the instrument of revocation” after the word “determination” in paragraph 198AE(4)(a) of Subdivision B of Division 8 of Part 2 of the Act.
102. Item 36 inserts “, variation or revocation” after the word “determination” in paragraph 198AE(4)(b) of Subdivision B of Division 8 of Part 2 of the Act.
103. Subsection 198AE(4) provides that if the Minister makes a determination under subsection 198AE(1), the Minister must cause to be laid before each House of the Parliament a statement that:
- sets out the determination; and
 - sets out the reasons for the determination, referring in particular to the Minister’s reasons for thinking that the Minister’s actions are in the public interest.

104. Consistent with the making of a determination under subsection 198AE(1), the effect of these amendments are that if the Minister varies or revokes a determination, the same tabling requirements for making a determination apply to a variation or a revocation of a determination.

Item 37 Paragraphs 198AE(5)(a) and (b)

105. This item omits the words “offshore entry person” and substitutes the words “unauthorised maritime arrival” in paragraphs 198AE(5)(a) and 198AE(5)(b) of Subdivision B of Division 8 of Part 2 of the Act.
106. This is a consequential amendment as a result of the amendments in item 3 of Schedule 1 to the Bill which repeals the term offshore entry person and item 7 of Schedule 1 to the Bill which inserts the term unauthorised maritime arrival.

Item 38 Paragraphs 198AE(6)(a) and (b)

107. This item inserts “,varied or revoked” after the word “made” in paragraphs 198AE(6)(a) and 198AE(6)(b).
108. This is a consequential amendment as a result of the amendment in item 31 of Schedule 1 to the Bill which inserts the power for the Minister to vary or revoke a determination.

Item 39 Subsection 198AE(7)

109. This item inserts “or (1A)” after “subsection (1)” in subsection 198AE(7) of Subdivision B of Division 8 of Part 2 of the Act.
110. Subsection 198AE(7) provides that the Minister does not have a duty to consider whether to exercise the power under subsection 198AE(1) in respect of any offshore entry person, whether the Minister is requested to do so by the offshore entry person or by any other person, or in any other circumstances.
111. Consistent with the making of a determination under subsection 198AE(1), the effect of this amendment is that the Minister does not have a duty to consider whether to exercise the power under new subsection 198AE(1A), whether or not the Minister is requested to do so.

Item 40 Subsection 198AE(7)

112. This item omits the words “offshore entry person” (wherever occurring) and substitutes the words “unauthorised maritime arrival” in subsection 198AE(7) of Subdivision B of Division 8 of Part 2 of the Act.
113. This is a consequential amendment as a result of the amendments in item 3 of Schedule 1 to the Bill which repeals the term offshore entry person and item 7 of Schedule 1 to the Bill which inserts the term unauthorised maritime arrival.

Item 41 Subsection 198AE(8)

114. This item omits “A determination under subsection (1)” and substitutes “An instrument under subsection (1) or (1A)” in subsection 198AE(8) of Subdivision B of Division 8 of Part 2 of the Act.

115. Subsection 198AE(8) provides that a determination under subsection 198AE(1) is not a legislative instrument.
116. This amendment makes it clear that an instrument under subsection 198AE(1A) is not a legislative instrument. This provision is declaratory and is not intended as an exemption to the *Legislative Instruments Act 2003* but is included to assist readers in the interpretation of this provision.

Item 42 Sections 198AF and 198AG

117. This item omits references to “offshore entry person” (wherever occurring) and substitutes those references with “unauthorised maritime arrival” in sections 198AF and 198AG in Subdivision B of Division 8 of Part 2 of the Act.
118. These are consequential amendments as a result of the amendments in item 3 of Schedule 1 to the Bill which repeals the term offshore entry person and item 7 of Schedule 1 to the Bill which inserts the term unauthorised maritime arrival.

Item 43 Section 198AH

119. This item inserts “(1)” before “Section 198AD” in section 198AH of Subdivision B of Division 8 of Part 2 to the Act.
120. This amendment restructures section 198AH by creating a new subsection 198AH(1) for the current contents of section 198AH.
121. This is a consequential amendment as a result of item 47 of Schedule 1 to the Bill which inserts new subsection (2) at the end of section 198AH.

Item 44 Paragraph 198AH(a)

122. This item omits the words “offshore entry person” and substitutes “unauthorised maritime arrival” in paragraph 198AH(a) of Subdivision B of Division 8 of Part 2 of the Act.
123. This is a consequential amendment as a result of the amendments in item 3 of Schedule 1 to the Bill which repeals the term offshore entry person and item 7 of Schedule 1 to the Bill which inserts the term unauthorised maritime arrival.

Item 45 Paragraph 198AH(c)

124. This item omits “achieved); and” and substitutes “achieved).” in paragraph 198AH(c) in Subdivision B of Division 8 of Part 2 of the Act.
125. This is a consequential amendment as a result of the repeal of paragraphs 198AH(d) and 198AH(e) made by item 46 of Schedule 1 to the Bill.

Item 46 Paragraphs 198AH(d) and (e)

126. This item repeals paragraphs 198AH(d) and 198AH(e).
127. This is a consequential amendment as a result of the repeal of sections 198C and 198D made by item 48 of Schedule 1 to the Bill.

Item 47 At the end of section 198AH

128. This item adds new subsection 198AH(2) at the end of section 198AH in Subdivision B of Division 8 of Part 2 to the Act.
129. New subsection 198AH(2) provides that subsection 198AH(1) applies whether or not the transitory person has been assessed to be covered by the definition of *refugee* in Article 1A of the Refugees Convention as amended by the Refugees Protocol.
130. This amendment is consistent with the ‘no advantage’ principle as outlined in recommendation 1 of the report provided by the Expert Panel so that no benefit is gained through circumventing regular migration arrangements.
131. The effect of this amendment is that it will allow for a transitory person, who has been assessed as a refugee, to be transferred between a regional processing country and Australia. Those transitory persons brought back to Australia would be unlawful non-citizens.

Item 48 Sections 198C and 198D

132. This item repeals sections 198C and 198D of Subdivision C of Division 8 of Part 2 of the Act.
133. Section 198C provides that certain transitory persons are entitled to an assessment of refugee status if the transitory person is brought to Australia under section 198B and remains in Australia for a continuous period of 6 months. The person may make a request to the Refugee Review Tribunal (RRT) for an assessment of refugee status. However, an assessment by the RRT cannot commence, or continue, when a certificate by the Secretary is in force under section 198D.
134. Section 198D provides if the Secretary is satisfied that a transitory person has engaged in uncooperative conduct, either before or after the person was brought to Australia, then the Secretary may issue a certificate to that effect to the Tribunal.
135. The effect of this amendment is that transitory persons brought to the Australia under section 198B will not be entitled to request an assessment of refugee status if they remain in Australia for a continuous period of 6 months.
136. This amendment is consistent with the ‘no advantage’ principle as outlined in recommendation 1 of the report provided by the Expert Panel so that no benefit is gained through circumventing regular migration arrangements. Otherwise, a transitory person from a regional processing country who remains in Australia for a continuous period of 6 months could access merits review and judicial review processes and remain in Australia for a longer period of time. This would create an advantage for such persons in having the ability to access these processes, and, depending on the result, make an application for a visa.

Item 49 Subparagraphs 336F(3)(a)(ii) and (iii) and (4)(a)(ii) and (iii)

137. This item omits the words “offshore entry person” and substitutes the words “unauthorised maritime arrival” in subparagraphs 336F(3)(a)(ii) and 336F(3)(a)(iii), and subparagraphs 336F(4)(a)(ii) and 336F(4)(a)(iii), in Division 3 of Part 4A of the Act.
138. This is a consequential amendment as a result of the amendments in item 3 of Schedule 1 to the Bill which repeals the term offshore entry person and item 7 of Schedule 1 to the Bill which inserts the term unauthorised maritime arrival.

Item 50 Paragraphs 336F(5)(c) to (cc)

139. This item omits the words “offshore entry person” and substitutes the words “unauthorised maritime arrival” in paragraphs 336F(5)(c) to 336F(5)(cc) in Division 3 of Part 4A of the Act.
140. This is a consequential amendment as a result of the amendments in item 3 of Schedule 1 to the Bill which repeals the term offshore entry person and item 7 of Schedule 1 to the Bill which inserts the term unauthorised maritime arrival.

Item 51 Section 494AA (heading)

141. This item repeals the heading of section 494AA in Part 9 of the Act and substitutes a new heading – 494AA Bar on certain legal proceedings relating to unauthorised maritime arrivals.
142. Section 494AA provides for a bar on certain legal proceedings relating to offshore entry persons. Subsection 494AA(1) relevantly provides that the following proceedings against the Commonwealth may not be instituted or continued in any court:
- proceedings relating to an offshore entry by an offshore entry person;
 - proceedings relating to the status of an offshore entry person as an unlawful non-citizen during any part of the ineligibility period;
 - proceedings relating to the lawfulness of the detention of an offshore entry person during the ineligibility period, being a detention based on the status of the person as an unlawful non-citizen;
 - proceedings relating to the exercise of powers under repealed section 198A;
 - proceedings relating to the performance or exercise of a function, duty or power under Subdivision B of Division 8 of Part 2 of the Act in relation to an offshore entry person.

143. This is a consequential amendment as a result of the amendments in item 3 of Schedule 1 to the Bill which repeals the term offshore entry person and item 7 of Schedule 1 to the Bill which inserts the term unauthorised maritime arrival.

Item 52 Paragraph 494AA(1)(a)

144. This item omits the words “offshore entry by an offshore entry person” and substitutes the words “unauthorised entry by an unauthorised maritime arrival” in paragraph 494AA(1)(a) of Part 9 of the Act.
145. This is a consequential amendment as a result of the amendments in item 3 of Schedule 1 to the Bill which repeals the term offshore entry person, item 7 of Schedule 1 to the Bill which inserts the term unauthorised maritime arrival and item 58 of Schedule 1 to the Bill which inserts a definition of *unauthorised entry*.

Items 53 - 55 Paragraphs 494AA(1)(b), (c) and (e)

146. Items 53 to 55 omit references to “offshore entry person” and “the person” and substitute each of those references with “unauthorised maritime arrival” or “the unauthorised maritime arrival” as grammatically appropriate in paragraphs 494AA(1)(b), 494AA(1)(c) and 494AA(1)(e) of Part 9 of the Act.

147. These are consequential amendments as a result of the amendments in item 3 of Schedule 1 to the Bill which repeals the term offshore entry person and item 7 of Schedule 1 to the Bill which inserts the term unauthorised maritime arrival.

Item 56 Subsection 494AA(4) (definition of *ineligibility period*)

148. This item omits the word “offshore” and substitutes the word “unauthorised” in the definition of *ineligibility period* in subsection 494AA(4) of Part 9 of the Act.

149. This is a consequential amendment as a result of the amendments in items 57 and 58 of Schedule 1 to the Bill.

Item 57 Subsection 494AA(4) (definition of *offshore entry*)

150. This item repeals the definition *offshore entry* in subsection 494AA(4) of Part 9 of the Act.

151. This item is a consequential amendment as a result of the amendments in item 3 of Schedule 1 to the Bill which repeals the term offshore entry person and item 7 of Schedule 1 to the Bill which inserts the term unauthorised maritime arrival.

Item 58 Subsection 494AA(4)

152. This item inserts a new definition *unauthorised entry* in subsection 494AA(4) of Part 9 of the Act.

153. *Unauthorised entry* means an entry into Australia that occurs:

- at an excised offshore place after the excision time for that place; or
- at any other place on or after the commencement of section 5AA.

154. This is a consequential amendment as a result of the amendments in item 3 of Schedule 1 to the Bill which repeals the term offshore entry person and item 7 of Schedule 1 to the Bill which inserts the term unauthorised maritime arrival.

Part 2 – Application and saving provisions

Item 59 Definitions

155. This item provides definitions for Part 2 of Schedule 1 to the Bill. It provides that in Part 2:

- *commencement* means the commencement of item 59; and
- *Migration Act* means the *Migration Act 1958*.

Item 60 Application provision—subparagraph 5AA(1)(a)(i) of the Migration Act

156. Subitem 60(1) provides that this item applies to an unauthorised maritime arrival, who entered Australia by sea, as mentioned in subparagraph 5AA(1)(a)(i) of the Act, as inserted by this Schedule.

157. Subitem 60(2) makes provision for the amendments made by items 18 to 47 of this Schedule, which relate to regional processing in Subdivision B of Division 8 of Part 2 of the Act, to

apply in relation to the unauthorised maritime arrival, only if he or she entered Australia by sea as mentioned in subparagraph 5AA(1)(a)(i) of the Act, on or after 13 August 2012.

158. Subparagraph 5AA(1)(a)(i) provides that a person is an unauthorised maritime arrival if the person entered Australia by sea at an excised offshore place at any time after the excision time for that place.
159. The purpose of this item is to ensure that the provisions relating to regional processing in Subdivision B of Division 8 of Part 2 of the Act as amended by this Act apply to persons who entered Australia by sea at an excised offshore place on or after 13 August 2012.

Item 61 Application provision—subsection 198AE(1A) of the Migration Act

160. This item provides that subsection 198AE(1A) of the Act, as inserted by this Schedule, applies in relation to a determination under subsection 198AE(1) of the Act that is made before or after commencement.
161. The purpose of this item is to make clear that subsection 198AE(1A) of the Act, which enables the Minister to vary or revoke a determination made under subsection 198AE(1) of the Act if the Minister thinks it is in the public interest to do so, applies to any determination made under subsection 198AE(1), whether that determination was made before or after the commencement of this Act.

Item 62 Saving provision

162. The item is consequential to the amendments made by items 9, 49 and 50 of this Schedule. Those items substitute references to offshore entry person in subparagraphs 5A(3)(j)(ii) and 5A(3)(j)(iii), subparagraphs 336F(3)(a)(ii) and 336F(3)(a)(iii), subparagraphs 336F(4)(a)(ii) and 336F(4)(a)(iii), and paragraphs 336F(5)(c) to 336F(5)(cc) with references to unauthorised maritime arrival.
163. Item 62 applies to an instrument of authorisation made under section 336D (access authorisation) or section 336F (disclosure authorisation) that was in force immediately before commencement. It also provides that such an instrument is taken, after commencement, to authorise access to, and disclosure of, identifying information relating to unauthorised maritime arrivals to the extent that, immediately before commencement, the authorisation authorised access to, or disclosure of, identifying information in relation to offshore entry persons.
164. This item also provides that any reference in the access authorisation or disclosure authorisation to an offshore entry person is taken, after commencement, to be a reference to an unauthorised maritime arrival.
165. The purpose of this amendment is to ensure that such instruments of authorisation will continue to have effect as intended, on and after commencement of the Act.

SCHEDULE 2 – Contingent Amendments

Migration Act 1958

166. This Schedule contains consequential amendments to the Act that will come into effect on the later of immediately after the commencement of the provisions covered by table item 2 of clause 2 to this Act and the commencement of section 69 of the *Maritime Powers Act 2012* (Maritime Powers Act).

Item 1 Paragraph 5AA(2)(b)

167. This item inserts “(as in force before the commencement of section 69 of the *Maritime Powers Act 2012*)” after “section 245F” in paragraph 5AA(2)(b) of the Act.

168. This amendment puts beyond doubt that a person entered Australia by sea as a result of section 245F of the Act as in force immediately prior to commencement of section 69 of the Maritime Powers Act.

Item 2 Paragraph 5AA(2)(b)

169. This item inserts “(as in force before that commencement)” after “paragraph 245F(9)(a)” in paragraph 5AA(2)(b) of the Act.

170. This amendment puts beyond doubt that a person entered Australia by sea as a result of being dealt with under paragraph 245F(9)(a) of the Act as in force immediately prior to the commencement of section 69 of the Maritime Powers Act.

Item 3 After paragraph 5AA(2)(b)

171. This item inserts new paragraph 5AA(2)(ba) after paragraph 5AA(2)(b) of the Act.

172. New paragraph 5AA(2)(ba) provides for when a person will have entered Australia by sea for the purposes of the definition of “unauthorised maritime arrival” in section 5AA of the Act – that is, the person entered the migration zone as a result of being on a vessel detained under section 69 of the *Maritime Powers Act 2012* and being dealt with under paragraph 72(4)(a) of that Act.

173. This is a consequential amendment as a result of the commencement of the Maritime Powers Act. The effect of this amendment is that a person who entered the migration zone as a result of being on a vessel detained under section 69 of the *Maritime Powers Act 2012* and being dealt with under paragraph 72(4)(a) of that Act, will be a person who entered Australia by sea.

174. The purpose of this amendment is to maintain the policy intention of paragraph 5AA(2)(b) of the Act after the commencement of the Maritime Powers Act.

Item 4 Subsection 5AA(4) (at the end of the definition of *ship*)

175. This item adds “(as in force before the commencement of section 69 of the *Maritime Powers Act 2012*)” at the end of the definition of *ship* in subsection 5AA(4) of the Act.

176. This is a consequential amendment as a result of the commencement of the Maritime Powers Act.

Item 5 Subsection 5AA(4)

177. This item inserts a new definition of *vessel* in subsection 5AA(4) of the Act, which provides that *vessel* has the same meaning as the *Maritime Powers Act 2012*.
178. This is a consequential amendment as a result of the commencement of the Maritime Powers Act.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

The Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (the Bill) amends the *Migration Act 1958* (the Act) to implement recommendation 14 from the report provided by the Expert Panel on Asylum Seekers (the Expert Panel) and to implement other measures to strengthen the regional processing framework.

Recommendation 14 recommended that the Act be amended so that arrival anywhere in Australia by irregular maritime means will not provide individuals with a different lawful status than those who arrive at an excised offshore place. The purpose of this recommendation was to ensure that the introduction of processing outside Australia did not encourage asylum seekers to avoid these arrangements by attempting to unlawfully enter at the Australian mainland and consequently expose them to danger.

By way of background, on 18 August 2012 the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Regional Processing Act) commenced. It amended the Act to give effect to recommendation 7 of the Expert Panel's report (which permitted an offshore entry person to be taken to a regional processing country). However, the Regional Processing Act does not apply to a person who unlawfully enters Australia directly at the Australian mainland.

The Bill will expand the scope of persons that will fall within the provisions introduced by the Regional Processing Act to provide that all arrivals in Australia by irregular maritime means will have the same legal status regardless of where they arrive, unless they are an excluded class or otherwise exempted. This means that all arrivals in Australia by irregular maritime means cannot make a valid application for a visa unless the Minister personally thinks it is in the public interest to do so. Further, those people are to be taken to a regional processing country and cannot institute or continue certain legal proceedings.

The Bill also makes amendments to ensure that a person who is not eligible to apply for a visa in Australia continues to be unable to apply for a visa if assessed to be a refugee under regional processing arrangements. In particular, the defined term *transitory person* is amended so that a person does not cease to be a transitory person if they have been assessed to be a refugee.

This Bill will also provide for discretionary immigration detention of Papua New Guinea (PNG) citizens who are unlawful non-citizens and are in a protected area. The Regional Processing Act amended section 189 of the Act to require mandatory immigration detention of unlawful non-citizens in an excised offshore place (except for allowed inhabitants of the Protected Zone in a protected area who are unlawful non-citizens). Prior to the commencement of the

Regional Processing Act, the immigration detention of all unlawful non-citizens in an excised offshore place was discretionary.

Human rights implications

Right to freedom of movement

The Bill provides that the measures in the Bill are relevant to Article 12 (1) and Article 12(4) of the International Covenant on Civil and Political Rights 1966 (ICCPR). Article 12(1) provides that:

‘Everyone lawfully in the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence’. (emphasis added)

Further, Article 12(4) of the ICCPR provides that:

‘No one shall be arbitrarily deprived of the right to enter his own country’. (emphasis added)

As outlined above, the definition of ‘unauthorised maritime arrival’ envisages that certain persons who have entered Australia by sea will become an unlawful non-citizens, that is, persons who did not have a lawful right to travel to, enter into, or remain, in Australia.

In accordance with Article 12(1), an unauthorised maritime arrival will not, upon entering Australian territory, be in Australia lawfully, so Article 12(1) is not engaged. Similarly, in an assessment under Article 12(4), an unauthorised maritime arrival has neither the right to enter into Australia (as it cannot be considered his or her own country as properly understood at international law).

Expulsion of Aliens

The Bill is relevant to Article 13 of the ICCPR. Article 13 provides:

‘An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority’. (emphasis added)

For the same reasoning as the assessment of Article 12(1) above, in order to engage Article 13, a person must be lawfully in the territory. Whereas an unauthorised maritime arrival may arrive on Australian territory, they will not, by virtue of the operation of the Bill, be in Australian territory *lawfully*. For that reason, Article 13 will not be engaged for that cohort and will be liable to be expelled from Australian territory, provided that this does not breach other human rights obligations (outlined below).

Right not to be arbitrarily detained

The Bill introduces amendments to provide for discretionary detention for some persons who are seeking to enter the migration zone (other than at an excised offshore place). The Bill also amends paragraph 189(3A)(a) of the Act to provide for discretionary immigration detention of PNG citizens who are unlawful non-citizens and are in a protected area.

Article 9(1) of the ICCPR provides:

‘Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law’.

The purpose of amending ‘must detain’ to ‘may detain’ in subsection 189(2) of the Act is for the purpose of introducing discretion and flexibility to the assessment of whether persons that are not the subject of the Bill are liable to be detained (for example, persons who are not claiming asylum but have nonetheless entered Australian territory unlawfully), where detention may not be appropriate. The purpose of this is to reduce the incidence of detention to certain cohorts, and where detention is necessary, provide a clear, lawful and reasonable basis for it. This amendment does not engage Article 9(1) of the ICCPR.

The introduction of paragraph 189(3A)(a) reflects the current treaty-based arrangements between Papua New Guinea (PNG) and Australia under the *Torres Strait Treaty* (the Treaty)). The Treaty facilitates the ‘traditional activities’ of ‘traditional inhabitants’ (as defined in the Treaty). Paragraph 189((3A)(a) extends the discretion to detain all PNG citizens who are unlawful non-citizens in a protected area (not just those who are allowed inhabitants of the Protected Zone who are unlawful non-citizens) to ensure that the discretion to detain exists in the widest possible sense.

The purpose of this amendment is to provide for the discretion (‘may’ rather than ‘must’) to detain unlawful PNG citizens who are in a protected area but who are not allowed inhabitants of the Protected Zone. Due to long standing cultural connections and way of life of the communities in and adjacent to the Protected Zone, such PNG citizens may be in a protected area to seek medical treatment, shelter or to undertake non-traditional activities such as shopping or family events, before departing for their home villages. In general, these PNG citizens do not seek to enter and remain in Australia for other than a short period of time. This amendment will provide officers with a discretion in circumstances where it may not be appropriate to detain that person. Where detention is necessary, this provides a clear, lawful and reasonable basis for it. The introduction of paragraph 189(3A)(a) does not engage Article 9(1) of the ICCPR.

Australia’s non-refoulement obligations

Apart from Australia’s *non-refoulement* (non-return) obligations under the Refugees Convention (which is not one of the treaties specified in the definition of ‘human rights’ in the *Human Rights (Parliamentary Scrutiny) Act 2011*), Australia also has an obligation to not send a person to a country where they are at a real risk of the death penalty, arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment (Articles 6 and 7 of the ICCPR, Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)) or to a country which would send the person to another country where they would face such a risk.

However, the Bill does not contain or amend any existing provisions which relate to removal that already exist with the Act (as amended by the Regional Processing Act). To that extent, the provisions in the Bill only contemplate increasing the scheme to those people who arrive directly at the Australian mainland. They do not affect the substantive current operation of the Act in relation to removal or regional processing arrangements nor impact on the protections against *non-refoulement* which already exist in legislation, policies and procedures.

Rights relating to families and children

Australia also has an obligation to treat the best interests of the child as a primary consideration in all actions concerning children (Article 3 of the Convention on the Rights of the Child (CROC)). In addition, Australia must not unlawfully or arbitrarily interfere with the family (Articles 17 and 23 of the ICCPR). However, for the reasons provided above, provisions relating to removal already exist within the Act and this Bill does not propose to make any amendments to the regional processing scheme or the legislative, policy and procedural protections which already exist.

Conclusion

The Bill is compatible with human rights because it does not engage any obligations under relevant human rights treaties.

The Hon. Chris Bowen MP, Minister for Immigration and Citizenship