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Submission on Australia's Humanitarian Program 2013-14 - and beyond

Dear Secretary

Thank you for providing the Refugee Advice and Casework Service (Aust) Inc. (RACS) with the opportunity to make a submission on Australia's Humanitarian Program 2013-14 and beyond.

1. About RACS

RACS, the oldest Community Legal Centre specialising in providing advice to asylum seekers, was originally established in NSW in 1987 to provide a legal service to meet the specific needs of asylum seekers.

A not-for-profit incorporated association, RACS relies primarily on income through the Immigration Advice and Application Assistance Scheme (IAAAS) administered by the Department of Immigration and Citizenship (DIAC), donations from the community, an extensive volunteer network and a Management Committee.

RACS' principal aims may be summarised as follows:

- to provide a free, dedicated legal service for individuals seeking asylum in Australia;
- to provide referral for counselling and assistance on related welfare issues such as accommodation, social security, employment, psychological support, language training and education;

- to provide a high standard of community education about refugee law, policy and procedure;
- to provide training sessions, workshops and seminars on refugee law, policy and procedure to legal and welfare agencies and individuals involved in advising and assisting refugees;
- to establish a resource base of current information and documentation necessary to support claims, for use by RACS, community organisations and lawyers assisting refugee claimants;
- to participate in the development of refugee policy in Australia as it relates to the rights of those seeking asylum in this country; and
- to initiate and promote reform in the area of refugee law, policy and procedures.

More broadly, RACS aims to raise awareness about the issues asylum seekers face and to advocate for a refugee status determination process which both protects and promotes the rights of all asylum seekers that arrive in Australia, regardless of mode or time of arrival; and in accordance with Australia's international legal obligations. It is in this spirit that RACS makes this submission.

2. Summary of RACS' submissions

- RACS welcomes the Government's post-budget announcement of increasing the total number of places for the Humanitarian Program for the 2012-2013 financial year from 13,750 to 20,000. RACS recommends that the 20,000 places be a *minimum* benchmark for coming years, to be increased to 27,000 within five years subject to appropriate conditions.
- RACS notes the 500 places allocated for the pilot scheme for community sponsored humanitarian visas, but recommends that these 500 places be *additional* to the 20,000 places under the Humanitarian Program, rather than comprising part of it.
- RACS welcomes the Government's commitment not to disturb the number of offshore refugee places (originally at 6,000, and now at 12,000) allocated for refugee entrants, despite the fact that the Onshore Protection and offshore humanitarian places under the Special Humanitarian Program (SHP) continue to be combined. RACS recommends that the Government remove the numerical link between visas granted under the Onshore Protection component and those granted under the SHP.
- RACS welcomes the Government's post-budget announcement of increasing the family stream visa quota by 4,000 places specifically reserved for Humanitarian visa-holding sponsors. RACS recommends that these places be continue to be specifically earmarked for humanitarian sponsors in upcoming years.

- Given the particular needs of humanitarian applicants and sponsors, RACS recommends that DIAC implement a special taskforce with specific training to handle those family visa applications specifically reserved for humanitarian visa holding sponsors.
- RACS continues to oppose the regional processing regime as it arbitrarily discriminates against certain asylum seekers for their irregular mode of entry into Australia. Asylum seekers arriving in Australia are Australia's legal responsibility. RACS recommends that the Government cease regional processing.

3. Recent positive developments

RACS wishes to note that there have been a number of positive developments in relation to Australia's Humanitarian migration program announced in recent months and looking forward.

- As per Recommendation 2 of the Report of the Expert Panel on Asylum Seekers August 2012 ('The Expert Panel Report')¹, the Australian Government has increased the Humanitarian Program overall to 20,000 places in 2013-14 from 13,750 in 2012-13, including 12,000 places for the refugee component. The UNHCR Assistant High Commissioner Erica Feller has commended Australia's generosity in this regard², and RACS acknowledges that Australia is one of the top 15 refugee-receiving countries globally, sharing 3% of asylum applications in 2011-12.³ Consistent with Recommendation 2 of the Report of the Expert Panel, RACS is hopeful that the Humanitarian Program be extended to 27,000 places within five years, if conditions are appropriate. RACS also hopes that the Australian Government will continue to offer resettlement to many of the worlds most vulnerable refugees, giving *full consideration* to all of UNHCR's global priority situations, particularly those in protracted situations, in addition to Australia's regional geo-political interests. In terms of regional cooperation and capacity building, RACS notes with alarm that decreasing Australia's overseas aid budget to accommodate for onshore asylum seekers⁴ is certainly not conducive to this end.
- The *Migration Regulations 1994* were amended on 14 December 2012 to offer Refugee visas to locally-engaged Afghan employees and their direct family members at risk of individual harm due to their employment in support of Australia's mission in Afghanistan.

¹ Report of the Expert Panel on Asylum Seekers, 13 August 2012.

² UNHCR's Executive Committee (ExCom) Key Developments 2012, UNHCR Regional Representation, Canberra, 14 November 2012.

³ *Asylum Trends Australia*, 2011-12 Annual Publication, the Department of Immigration and Citizenship.

⁴ Australia to cut aid to fund asylum seeker costs, ABC News, 17 December 2012, <http://www.abc.net.au/news/2012-12-17/australia-to-cut-aid-to-fund-asylum-seeker-costs/4432606>.

RACS welcomes this initiative and hopes that it will be used strategically to effectively identify the most vulnerable individuals in this cohort.

- The Private Sponsorship Pilot, which will allow 500 places to be allocated for individuals or families sponsored by community groups in Australia has the potential, as noted by the DIAC, to 'harness community goodwill and empower community groups to support Australia's humanitarian intake'⁵ as well as providing a supportive resettlement environment for new arrivals. However, RACS shares the concerns of the Refugee Council of Australia ('RCA'), that the very high visas application fees of between \$20-30,000 per application will be prohibitively expensive for many community organisations⁶, and may reduce their incentive to be involved in the pilot. Critically, RACS is also disappointed that the 500 places will form *part of* the overall Humanitarian Program of 20,000 places, rather than being *additional* to it. As RCA CEO Paul Power notes:

When the Australian government first announced it would develop a pilot private sponsorship program in May, community organisations were interested in the idea that private or community sponsorship could allow an expansion of the Refugee and Humanitarian Program by enabling more refugees to be resettled for the same level of government expenditure...Now that refugees resettled through the pilot will be included within the capped Refugee and Humanitarian Program, the incentive to achieving increased resettlement through marshalling private sponsorship is now gone⁷.

Since visa costs, airfares, medical screening costs, and settlement support for up to 12 months will all be covered by the sponsoring community organisation, and not by the Australian government – RACS recommends that the 500 places allocated for the pilot project sit *outside* the humanitarian program allocated places of 20,000 per annum. RACS believes that this would increase the incentive for community organisations to get involved out of goodwill, and reduce the perception that the pilot is a cost-cutting measure for the government.

⁵ *Australia's Humanitarian Program 2013-14 and beyond*, Information Paper, December 2012, Department of Immigration and Citizenship.

⁶ See *Pilot Sponsorship Program Welcome but needs further work*, 15 December 2012, Refugee Council of Australia.

⁷ *Pilot Sponsorship Program Welcome but needs further work*, 15 December 2012, Refugee Council of Australia.

4. The numerical link between Onshore Protection and the Special Humanitarian Program (SHP)

Projected for 2013-14 are 12,000 places for Refugee visas, and 8000 places for Onshore Protection and the SHP⁸ combined. In 2011-12, of the 13,759 visa grants in Australia's Humanitarian Program overall, only 714 people (10 per cent) were able to reunite with their families under the SHP.⁹ This was due mostly to Onshore Protection visa grants to IMAs (totalling 4766, compared with 2272 for non IMAs), squeezing the allocated places for the SHP.¹⁰ There is currently a huge backlog of applications under the SHP, with many applications taking years to process.

There is ample evidence that long term separation of families can have negative psychological and social consequences, and affect the ability of those granted protection visas to successfully integrate in to Australian society.¹¹ As well as having strong familial or community connections to Australia, many SHP applicants comprise some of the most vulnerable individuals in the world who are living outside their home countries, and subject to human rights violations within their home countries.

As RACS advanced in our previous submissions on Australia's Humanitarian Program for 2012-13, we strongly urge the Australian government to remove the numerical link between visas granted under the Onshore Protection component and those granted under the SHP. Notably, the Expert Panel recommends that '...the linkage between the offshore and onshore components of the Humanitarian Program be reviewed within two years'.¹² As the number of boat arrivals cannot be accurately predicted, planning under the SHP remains very difficult if the two groups remain linked. RACS suggests that the groups be separated to allow for the backlog of SHP visa applications to be processed in a timely manner, unaffected by the fluctuating and unpredictable numbers of onshore protection applicants.

⁸ Australia's Humanitarian Program 2013-14 and beyond, Information Paper, December 2012. The Department of Immigration and Citizenship.

⁹ Australia's Humanitarian Program 2013-14 and beyond, Information Paper, December 2012. The Department of Immigration and Citizenship.

¹⁰ Australia's Humanitarian Program 2013-14 and beyond, Information Paper, December 2012. The Department of Immigration and Citizenship.

¹¹ McDonald, B. & Gifford, S.M. (2009) 'Refugee resettlement, family separation and Australia's humanitarian programme'. *New Issues in Refugee Research*, Research Paper No. 178. Geneva: United Nations High Commissioner for Refugees.

¹² Report of the Expert Panel on Asylum Seekers, 13 August 2012.

5. Family reunion opportunities for Irregular Maritime Arrivals (IMAs)

RACS is particularly alarmed about a number of punitive and discriminatory consequences of the so called 'no advantage' principle endorsed by the Expert Panel. Changes to the *Migration Regulations* made in September 2012 mean that IMAs who arrive in Australia after 13 August 2012, including unaccompanied minors, are unable to sponsor family members to join them in Australia under the Humanitarian Program, and must apply through the family migration stream as does any other migrant. The same changes also removed family reunion concessions for IMAs arriving before 13 August 2012, with those applications now being given the lowest processing priority (with the exception of those under 18), and also having to meet compelling reasons criteria.

RACS believes that the policy of limiting family reunion opportunities for irregular maritime arrivals operates unfairly towards irregular migrants by essentially punishing them, as well as their immediate family members - simply due to the proposer's mode of arrival to Australia. While we note that family reunion through the family stream of visas is theoretically available to humanitarian applicants, RACS is of the opinion that the needs of humanitarian applicants and their sponsors are in most cases *qualitatively different* from many migrants who have come to Australia under the family migration stream. The critical distinction is that humanitarian migrants are usually a result of forced movement from unstable, dangerous or conflict-ridden environments, while family migrants choose to migrate to Australia voluntarily. Secondly, family-stream migrants will often be in a stronger position financially than humanitarian migrants. Thirdly, given the insecure and unpredictable situations from which many humanitarian migrants are coming, particularly those living illegally in countries of asylum - the documentation and eligibility requirements of many of the family stream visas are simply unachievable. Afghan refugees living in Pakistan are a particularly large and relevant cohort to note in this regard.

RACS is particularly concerned about the effect of these changes on unaccompanied minors. The stringent application criteria for many family stream visas make it impossible for minors to be a sponsor for their parents, meaning that unaccompanied minors granted protection visas are unable to reunite with their parents.

RACS is pleased that an additional 4000 places in the family migration stream have been created specifically for humanitarian applicants¹³. However, the expensive application fees and the very long waiting periods for some family visas make this option unfeasible for many humanitarian applicants living in perilous situations in their countries of asylum. In regard these places within the family migration stream, which were created 'to accommodate the resulting increase in demand for visas in

¹³ Australia's Humanitarian Program 2013-14 and beyond, Information Paper, December 2012. The Department of Immigration and Citizenship.

the family migration stream¹⁴, as a result of limiting family reunion opportunities for IMAs, RACS endorses the recommendation of the RCA that:

...RCA recommends DIAC consider resourcing offshore and Australian DIAC processing offices to appropriately identify and assess applications from humanitarian entrant proposers separately from applications from non-humanitarian proposers to ensure the additional 4000 places are quarantined for the family members of humanitarian entrants only.¹⁵

RACS therefore recommends that family visa applications from humanitarian applicants be *specifically earmarked and prioritised* within the family migration stream in 2013-14 and looking ahead. RACS urges the DIAC to keep the important qualitative distinction in mind when assessing and prioritising family migration applications from humanitarian applicants. To address this, RACS recommends that the DIAC implement a special taskforce with specific training to handle those family visa applications specifically reserved for the Humanitarian visa holding sponsors. This is necessary given unique evidentiary difficulties faced by Humanitarian sponsors and applicants in obtaining documents; as well as other difficulties such as providing assurances of support; or meeting policy requirements such as the sponsor being "settled" in Australia for a certain period.

The policy objective behind these changes is to deter future IMAs from making hazardous boat journeys to Australia, and to in turn encourage migration to Australia through proper legal channels. However, we believe that this policy objective is unlikely to be met for two reasons. Firstly, as mentioned above, formal migration channels are simply not available to many asylum seekers seeking protection in Australia, particularly unaccompanied children. Secondly, the deterrence objective may not in fact be achieved, as such changes alone are unlikely to provide a strong disincentive for desperate migrants to travel by boat to Australia. If the policy objective is not met, the measure itself may be unacceptable under international human rights law in the sense that it operates in a discriminatory manner by penalising certain asylum seekers for their mode of entry, as well as being disproportionate and poorly adapted to the public objective of discouraging irregular migration to Australia.

RACS is critical of the statement of human rights compatibility of the changes to family reunion opportunities for IMAs, as required by the *Human Rights (Parliamentary Scrutiny) Act 2011*, which states that the amendments are necessary, reasonable and proportionate to the legitimate aim of preventing IMAs from making the dangerous journey to Australia by boat. RACS is also critical of the interpretation of Article 3 of the *Convention on the Rights of the Child* (CRC) put forward in the Legislative Instrument, declaring that, in regard to the requirement that the best interests of the child

¹⁴ Government implements Expert Panel's Family Reunion Recommendation, Minister for Immigration and Citizenship Media Release, 22 September 2012, at <http://www.minister.immi.gov.au/media/cb/2012/cb190059.htm>.

¹⁵ Response to Planning for the 2013-14 Migration Program, Refugee Council of Australia, December 2012.

be treated as the primary consideration in all actions concerning children – that *other considerations* may also be primary considerations, that 'Australia's migration system and protecting the national interest, are also primary considerations' and that these considerations 'outweigh' the interests of the child in seeking family reunification.¹⁶ RACS believes that this is an incorrect interpretation of Australia's international obligations towards children under the CRC.

In regard to children, consistent with recommendation 19 of the Select Committee on Australia's Immigration Detention Network final report of March 2012, RACS urges the Parliament to immediately appoint an independent guardian for unaccompanied asylum seekers, noting the current serious conflict between the Minister for Immigration's responsibility as guardian under the *Immigration (Guardianship of Children) (IGOC) Act 1946* and the Minister's roles under the *Migration Act* including the detention and removal of children to regional processing countries.

6. Offshore Processing

In the view of RACS, another arbitrary and discriminatory manifestation of the 'no advantage' principle is the mandatory transfer of irregular maritime arrivals from Australia to regional processing countries. RACS believes that regional processing operates unfairly towards irregular migrants, placing them at a significant disadvantage by essentially punishing them for their mode of arrival to Australia. According to Article 31(1) of the *Refugees Convention*, refugees shall not be penalised solely be reason of their unlawful entry to a country. This clause has been interpreted by the UNHCR as not being limited to refugees coming directly from territories where their life is threatened, but also including those who have been unable to obtain effective protection in transit countries.¹⁷ This is significant since the majority of countries in the Asia Pacific region from which IMAs travel to Australia, such as Indonesia and Malaysia - are not parties to the *Refugee Convention* and offer very poor protection environments and with no durable solutions such as local integration.

This policy is discriminatory as it places asylum seekers who have arrived in Australia by boat at a significant and excessive disadvantage relative to those who arrive by plane. Furthermore, this differential treatment is completely unwarranted based on statistics. Most protection visa applications lodged onshore are by international students, accounting for 47% of total applications in 2011-12. In comparison, 71.1% of IMAs were found to be owed protection obligations by Australia

¹⁶ Explanatory Statement, Select Legislative Instrument 2012 No. 230, Issued by the Minister for Immigration and Citizenship, *Migration Act 1958, Migration Amendment Regulation 2012 (No. 5)*.

¹⁷ Summary Conclusions: Article 31 of the 1951 Convention, *Expert Roundtable organized by the United Nations High Commissioner for Refugees and the Graduate Institute of International Studies*, Geneva, Switzerland, 8–9 November 2001, at <http://www.unhcr.org/419c783f4.pdf>.

at first instance in 2011-12, compared with only 25.3% non-IMAs.¹⁸ Similarly, on review, the overturn rate for IMAs was 82.4%, compared with a 44% grant rate for IMAs.¹⁹ Given the undeniable fact that most asylum seekers who arrive in Australia by boat are eventually found to be genuine refugees, RACS is of the view that this extremely differential treatment is arbitrary, discriminatory, and ultimately unnecessary.

RACS believes that asylum seekers arriving in Australia are Australia's legal responsibility regardless of how, where, and when they arrive. Although legal responsibility for asylum seekers transferred to another state may be shared between Australia and that other state RACS is of the view that regional processing arrangements do not relieve Australia of its obligations under the Convention. RACS is opposed to the Australian Government's 'outsourcing' of its own Convention obligations to smaller developing nations in return for aid, and notes that these arrangements are not in the spirit of genuine burden sharing envisaged by the *Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime* (the Bali Process). Of all countries in the region, Australia is best placed to promote genuine regional efforts to protect refugees, given its stable political and economic climate, its aid and development capacity, and its long experience in refugee protection.

RACS is of the view that the 'no advantage' policy erroneously conflates Australia's protection obligations under the Convention (which are obligatory, and engaged when an asylum seeker arrives in Australia's jurisdiction), with resettlement to Australia (which is discretionary). Comparing those awaiting resettlement in the Asia-Pacific region with those transferred to regional processing countries from Australia is a flawed comparison. Of those recognised as refugees in Asia, some may be resettled within months, while some wait up to 20 years. There are no averages and no consistency, as resettlement is based on the need and vulnerability of individual refugees, and on the fluctuating quotas of resettlement states. The UNHCR notes in this regard that:

'...the no advantage test endorsed by your Government contemplates a time frame that is assessed against and consistent with the period of time a refugee might face had s/he been assessed by UNHCR within the regional processing arrangement'. The practical implications of this 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 should use.²⁰

¹⁸ *Asylum Trends Australia*, 2011-12 Annual Publication, the Department of Immigration and Citizenship.

¹⁹ *Asylum Trends Australia*, 2011-12 Annual Publication, the Department of Immigration and Citizenship.

²⁰ Letters from Antonio Guterres to the Hon Chris Bowen dated 5 September and 9 October 2012, the United Nations High Commissioner for Refugees.

RACS recommends that offshore processing cease immediately. RACS is of the view that all IMAs arriving in Australia should be processed in the Australian community after security and health checks. Community based processing is more efficient, more humane and far more cost effective than both offshore processing and processing in remote detention centres within Australia.

In regard to Nauru and Manus Island, the UNHCR has expressed its concerns in letters from the High Commissioner dated 5 September and 9 October 2012.²¹ RACS shares all of these concerns. RACS believes that, consistently with the High Court's reasoning in *Plaintiff M70 /2011 and M106/2011 v MIAC & Commonwealth*²², and *despite* subsequent changes to the Migration Act²³ - certain human rights safeguards must be present in the receiving countries in order for Australia to legally transfer asylum seekers to those countries consistently with its international obligations.

Specifically, in regard to Nauru, RACS is concerned that:

- Nauru lacks a robust domestic legal framework or expertise in refugee protection so its ability to fulfil its Convention obligations is questionable, including the risk of *refoulement*;
- As noted by human rights groups such as Amnesty International²⁴, conditions and facilities in Nauru are very poor, and recent hunger strikes are a serious concern;
- It may be many years until recognised refugees in Nauru are resettled to Australia or elsewhere, raising serious concerns about detainees' mental health. Local integration is not possible in Nauru, and is unlikely to ever be so.

In regard to Manus Island, RACS is concerned that:

- Like Nauru, PNG has limited expertise in refugee protection, so its ability to fulfil its Convention obligations is questionable, including the risk of *refoulement*;
- Like Nauru, recognised refugees may spend years languishing in poor conditions in Manus Island before being resettled, and local integration is not possible;
- PNG lacks many human rights protections in its law, and also has a very poor human rights record in practice. RACS notes that diplomatic assurances from PNG, such as those referred to in the *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*, are grossly inadequate safeguards for individuals transferred to PNG by Australia;

²¹ Letters from Antonio Guterres to the Hon Chris Bowen dated 5 September and 9 October 2012, the United Nations High Commissioner for Refugees.

²² [2011] HCA 1.

²³ Changes to s 198AB make the public interest the only relevant criteria for the Minister to designate a country as suitable for the transfer of offshore entry persons.

²⁴ Nauru Camp a human rights catastrophe with no end in sight, Amnesty International, 23 November 2012. <http://www.amnesty.org.au/news/comments/30533/>.

- Manus Island has a high risk of malaria²⁵, making it an unsuitable location for children and other vulnerable asylum seekers.

RACS is also opposed to the recently announced so called 'no advantage' onshore processing model comprising bridging visas and no work rights, where those recognised as refugees in Australia will not be granted protection visas immediately, but will live in the community 'until such time that they would have been resettled in Australia after being processed in our region'²⁶. RACS is concerned that recognised refugees in the Australian community will be subjected to indefinite legal limbo with no permanent status. The serious mental health issues associated with this indeterminate state have been seen all too often in relation to those awaiting finalisation of their cases while in immigration detention centres. As well the obvious negative economic impact for Australia, recognised refugees living for prolonged periods in Australian communities without work rights or permanent status will likely lead to social isolation and frustration, and delay of integration into Australian society.

As outlined above, the conflation of Australia's obligatory protection obligations with discretionary permanent resettlement to Australia is logically flawed, and operates in a discriminatory manner towards irregular humanitarian migrants. RACS emphasises that all asylum seekers arriving in Australia are Australia's legal responsibility, and ought to be processed in the same manner.

RACS is of the view that the most effective and humane way of reducing irregular migration to Australia begins with longer term strategies to reduce the "push factors" underlying forced migration, such as conflict, political oppression and poverty. By building and maintaining a robust aid program to promote human rights and development in both refugee-producing and transit countries; and by building solid diplomatic relationships with countries in the region including engaging in effective capacity building and training on refugee protection, Australia can reduce the incentive of migrants to begin dangerous journeys to Australia.

We thank you for this opportunity to provide our submissions relating to Australia's Humanitarian Program for 2013-14. Please do not hesitate to contact RACS on (02) 9114 1600 if you require any further information with any aspect of this submission.

Yours sincerely,

²⁵ Eoin Blackwell, 'Malaria on Manus Island "endemic": report', The Sydney Morning Herald, 18 August 2011, <http://news.smh.com.au/breaking-news-world/malaria-on-manus-endemic-report-20110818-1izo0.html>; Global Human Rights Clinic, Urgent Appeal regarding the Commonwealth Government of Australia's proposed offshore processing of asylum seekers in Manus Island, 25 September 2012, paragraph 1.2, http://www.humanitarianresearchpartners.org/uploads/9/9/1/0/9910899/manus_island_urgent_appeal_public.pdf, citing World Health Organisation, *World Malaria Report 2011*, WHO: Geneva, 2012, page 152.

²⁶ No Advantage Onshore for Boats, Minister for Immigration and Citizenship Media Release, 21 November 2012, at <http://www.minister.immi.gov.au/media/cb/2012/cb191883.htm>.

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC

Per:

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