NJP POSITION STATEMENT:
Immigration Detention

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The National Justice Project

The National Justice Project ('**NJP**') is a not-for-profit human rights legal and civil rights service. Our mission is to fight for justice, fairness and inclusivity by eradicating systemic discrimination. Together with our clients and partners, we work to create systemic change and amplify the voices of communities harmed by government inaction, harm and discrimination.

The NJP creates positive change through strategic legal action, supporting grassroots advocacy, collaborative projects, research and policy work and practice-inspired and catalytic social justice education. Our focus areas include health justice, specifically for persons with disability and First Nations communities; racial justice, challenging misconduct in policing, prisons, judicial and youth services; and seeking justice for refugees and people seeking asylum. We receive no government funding and intentionally remain independent in order to do our work. We therefore rely on grassroots community, philanthropic and business support.

Acknowledgement of First Nations Peoples' Custodianship

The National Justice Project pays its respects to First Nations Elders, past and present, and extends that respect to all First Nations Peoples across the country. We acknowledge the diversity of First Nations cultures and communities and recognise First Nations Peoples as the traditional and ongoing custodians of the lands and waters on which we work and live.

We acknowledge and celebrate the unique lore, knowledges, cultures, histories, perspectives and languages that Australia's First Nations Peoples hold. The National Justice Project recognises that throughout history the Australian health and legal systems have been used as an instrument of oppression against First Nations Peoples. The National Justice Project seeks to strengthen and promote dialogue between the Australian legal system and First Nations laws, governance structures and protocols. We are committed to achieving social justice and to bring change to systemic problems of abuse and discrimination.

National Justice Project

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EXECUTIVE SUMMARY

National Justice Project position on Immigration Detention[I]

The National Justice Project ('NJP') believes that everyone has the right to seek asylum, without distinction or discrimination. Refugees and people seeking asylum are equal in rights and dignity and must be treated with compassion. The Australian Government owes a duty of care to those fleeing violence, persecution and other injustices and has a positive duty to prevent harm from occurring to those we detain.

Australia has one of the most stringent mandatory detention regimes in the world. The protracted and indefinite nature of immigration detention is inhumane and has a significant long-term, and often irreparable, psychological and physical toll on those detained. The systemic injustices experienced by refugees and people seeking asylum detained in Australia's onshore and offshore immigration detention systems have resulted in tragic and preventable outcomes; not only for those who have made the life-threatening journey to our shores seeking safety, but also their families.

Immigration policy in Australia, particularly as it relates to refugees and people seeking asylum, has historically been, and continues to be, prejudicial, punitive and politically motivated. The discriminatory treatment of people based on their country of origin and manner of arrival in Australia is in direct violation of Australian and international laws. Rather than aiding humane and rights-based solutions, and despite its international obligations, the Australian Government continues to indefinitely detain refugees, deny asylum and turn back boats, leaving refugees and people seeking asylum facing harsh and at times fatal consequences.

National Justice Project approach to Immigration Detention

The NJP's Health Justice, Racial Justice and Just Systems programmes challenge systemic discrimination by defending and extending the rights of people from diverse minority communities who have experienced racism and discrimination in healthcare systems, immigration detention, prisons and juvenile detention, and policing.

The NJP supports clients in their pursuit of justice through legal processes including litigation, conciliation and complaints. We also pursue justice through education programmes, advocacy and collaborative projects. We contribute to public debate, awareness and make powerful submissions to public inquiries to draw the attention of decision-makers to the systemic injustices affecting disadvantaged communities and pressure governments to implement the recommendations of coronial inquests and parliamentary

[I] The NJP Position Statement on Immigration Detention is part of a series of position statements. Please also see: NJP Position Statement on Health Justice; NJP Position Statement on First Nations Overincarceration and Deaths in Custody; and NJP Position Statement on Discriminatory Policing.

inquiries through petitions and open letters.[1] We support our clients to tell their stories, helping to educate and raise awareness in the wider community and to inspire others to fight for justice.

We collaborate with stakeholders to amplify our collective impact and support students and volunteers to work with us, developing their skills and knowledge to challenge systemic discrimination. We act for a significant cohort of refugees and people seeking asylum who have been previously subjected to Australia's offshore and onshore processing regimes. We represent people who have suffered psychological and physical injuries while held in detention, seeking to hold the government accountable for their avoidable and lifelong injuries.

The NJP uses tort law in a novel way to hold the Australian Government to account for its duty of care breaches.[2] We developed the legal strategy that led to hundreds of people, including children, to be evacuated from Nauru and Papua New Guinea ('**PNG**') so that they could access urgent and lifesaving medical treatment. We examine systems in immigration detention settings to pinpoint areas of risk which cause avoidable and irreversible harm to refugees and people seeking asylum.[3] We advocate against countries seeking to emulate and support Australia's asylum policy model.[4] Our work also draws the attention of the public and the media, supporting a change in public opinion that would lead to a more just system of refugee processing in Australia.[5] We are motivated and informed by the strength and experiences of our clients and their communities and it is from this perspective that we present the NJP's Position Statement on Immigration Detention.

PRIORITIES & RECOMMENDATIONS

Overarching Recommendations

1. The Australian Government must be held accountable for breaches of its duty of care and non-refoulement obligations under domestic and international law, including redress for those who have been harmed by its policies and actions.
2. Australia's blanket mandatory and indefinite immigration detention policies are arbitrary – and thus, unlawful – and should be repealed and replaced with detention policies that are reasonable, necessary and proportionate, in line with international law. Detention should be a last resort and limited to a brief initial period for the purposes of documenting a person's entry, recording their claims and verifying their identity. People seeking asylum should be allowed to live in the community while their refugee status is being determined, unless there are reasons to consider that the individual poses a risk to the community.
3. All offshore processing and detention policies should cease with immediate effect and arrangements made to transfer and resettle persons currently being held in PNG and Nauru in Australia to live in the community.
4. The harsh, highly restrictive and prison-like conditions of immigration detention facilities are not fit for purpose and comprehensive modifications to the infrastructure and management of these facilities are urgently needed.

5. All people seeking asylum, regardless of their mode of arrival or visa status, should have access to fair and efficient refugee status and non-refoulement determination processes.
6. All maritime interdiction policies and practices should cease as they are unsafe, are unlikely to afford adequate and fair protection assessments and potentially return people to face persecution or significant harms.
7. Pathways for judicial review of immigration decisions, including right of review on grounds of natural justice (or procedural fairness) and unreasonableness, should be reinstated.
8. It is incumbent on all Federal, State and Territory governments to ensure that safe and adequate health care is made available to all without discrimination, including on the grounds of citizenship or residency status.

The domestic framework for seeking asylum

9. Temporary Protection visas ('**TPV**') and Safe Haven Enterprise visas ('**SHEV**') should be abolished.
10. All people seeking asylum in Australia who are found to be refugees or found to be owed complementary protection, including refugees currently on TPVs and SHEVs, should be issued with Permanent Protection visas, regardless of their mode of arrival, and should have their cases reviewed and processed in a timely manner.
11. All bridging visas should include access to full income support, the Medicare Benefits Scheme ('**Medicare**'), the Pharmaceutical Benefits Scheme ('**PBS**') and the National Disability Insurance Scheme ('**NDIS**') and the automatic right to work and study while their applications are being processed.
12. The Government should afford the same priority and apply the same eligibility criteria to all applications for family reunion, regardless of a person's mode of arrival in Australia or the type of visa they hold.
13. The *Migration Act 1958* (Cth) ('**Migration Act**') should be amended to increase the threshold for refusing or cancelling visas on 'character' or 'security' grounds; transfer the burden of proof requirement from refugees and people seeking asylum to the Government; introduce strict assessment protocols and ensuring that Ministerial determinations are subject to judicial review; and provide alternatives to indefinite detention that are in line with our non-refoulement and other human rights obligations, particularly those relating to arbitrary, mandatory and indefinite detention.
14. All immigration legislation, policies and procedures should be amended to remove terms such as 'unauthorised' and 'illegal' with 'irregular' when referring to people seeking asylum who arrive by air or by sea without a valid visa. This language is misleading and criminalises the asylum-seeking process.
15. All eligibility restrictions based on health and disability should be abolished.

16. The Migration Act should be amended to extend the operation of s 4AA to include persons with disabilities[II] and the ten-year residency minimum for the Disability Support Pension should be abolished, or at least substantially reduced.

The administrative review system[6]

17. Dismantle and re-stablish the Administrative Appeals Tribunal (AAT) to ensure it is structured in a way that operates in accordance with its legislated aims of providing fair, informal, unbiased and expeditious merits review.[III]
18. Significantly increase resources to the AAT Migration and Refugee Division (MRD) to address the backlog of protection visa cases.
19. Establish an independent body to make AAT appointments to strengthen the independence of the AAT appointment process and ensure that only relevantly experienced and qualified people are appointed.
20. Publish yearly statistics which set out the decision-making patterns of individual tribunal members in refugee cases.
21. Abolish the Immigration Assessment Authority (IAA) and ensure all people seeking asylum have access to merits review through the AAT.
22. Ensure access to adequate legal representation by reinstating access to the Immigration Advice and Application Assistance Scheme at all stages of the refugee status determination process, regardless of how a person arrives in Australia.

Health care for refugees and people seeking asylum

23. Health care should be delivered in a manner that is culturally appropriate and trauma-informed, with special consideration to physical and mental health needs proportionate to the harmful conditions created and exacerbated by detention.
24. All refugees and people seeking asylum have the right to receive appropriate health care without delay and at a standard equivalent to that which is enjoyed by the rest of the Australian community regardless of their citizenship and residency status – including full access to Medicare, PBS and NDIS.
25. Enhanced resourcing and supports are needed for improved access to health care services for all adults and children regardless of their residency status – including health, mental health and disability services, with a focus on community-based, holistic, compassionate and responsive health and support services.

[II] Section 4AA of the Migration Act provides that 'a minor shall only be detained as a measure of last resort'.

Australia's duty of care obligations

26. In line with Australia's international obligations, the international human rights treaties and optional protocols, to which Australia is a party, should be incorporated into Australian law through legislation to ensure obligations are enforceable, procedurally clear and both adequately funded and resourced.

27. Australia's obligations under the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('OPCAT')[IV,7,] should be expanded to include to all places where people are or may be deprived of their liberty, including all Immigration Transit Accommodations[8] and Alternative Places of Detention.[9]

28. Establish and fund a statutory framework to ensure the independent judicial investigation of the deaths of ALL refugees and people seeking asylum transferred by the Australian Government to onshore and offshore detention facilities.

THE JUSTIFICATION

Legislative, policy and service issues

Immigration policy in Australia, particularly as it relates to refugees and people seeking asylum, has historically been, and continues to be, prejudicial, punitive and politically motivated. Since its inception, Australia's legislative history has been perverted by racial, religious and cultural intolerances, each reinforced by politicians and the media through the manipulation of fear and the deliberate conflation of 'asylum seekers' and 'refugees' with 'illegals', 'terrorism' and 'national security'.

In Australia, the prejudice and bias that people of colour and people from culturally and linguistically diverse backgrounds seeking asylum suffer stems from the deep-rooted discriminatory and xenophobic attitudes and ideologies that have pervaded immigration policy dating back to the Federation of our nation. Particularly where asylum policy is concerned, the wilful ignorance that pervades Australian politics, the media and even the community provides further credence to misconceptions and assumptions about refugees and people seeking asylum as 'queue jumpers', 'criminals', 'illegals' and 'terrorists' who refuse to 'assimilate' and do not 'contribute' to society. The actions of States function to legitimise in the public opinion harmful attitudes and behaviours that would otherwise be considered unacceptable on moral or ethical grounds. The result is at best a sense of antipathy and at worst varying degrees of fear and hostility toward refugees and people seeking asylum that by design feed back into the political and media discourse to simultaneously justify and deny asylum policies that inherently discriminate based on race.

The dehumanisation of refugees and people seeking asylum and the lack of a humanitarian and compassionate response on behalf of the Australian Government, the media and the general public does not reflect a country that is committed to promoting and protecting human rights. The notion that opening our borders to refugees, regardless of when and how they arrive, will somehow diminish our own prosperity

[IV] Australia ratified the OPCAT on 21 December 2017.

and sovereignty is a fallacy that not only denies safe harbour to those fleeing persecution, but also denies the Australian community the opportunities and strengths that come with embracing diversity, tolerance and humanity.[10]

The early history of asylum and refugee policy in Australia

All people seeking asylum, regardless of their country of origin, mode of arrival or visa status, should have access to fair and efficient refugee status and non-refoulement determination processes. However, people seeking asylum in Australia routinely face discrimination based on these factors.

The legitimisation of Australia's discriminatory immigration policy dates back to Federation. The *Immigration Restriction Act 1901* (Cth) was the first piece of legislation to pass after Federation and the cornerstone of the White Australia Policy – a policy that endured until the last official traces of it were dismantled with the passing of the *Racial Discrimination Act 1975* (Cth). Since then, racism and discrimination has continued to pervade Australia's immigration policy – applied increasingly through harsher restrictions for people arriving by sea, the arbitrary application of so-called 'character' and 'security' tests and unfettered Ministerial discretion. Today, the lack of procedural transparency and accountability for granting and revoking a person's refugee status is so routinely exacerbated by the flagrant misuse of 'God-like'[11] Ministerial powers in the decision-making process that 'discretion' has become a euphemism for 'discrimination'.

Even during WWII, the racialisation of 'security' was openly exploited by the Australian Government to justify its highly restrictive intake of Jewish refugees – a policy starkly incongruous with the Government's public condemnation of Nazi atrocities. In an attempt to justify its position, Australia's delegate to the July 1938 Evian Conference in France, Colonel Thomas White explained: 'It will no doubt be appreciated also that, as we have no real racial problem, we are not desirous of importing one by encouraging any scheme of large-scale foreign migration'.[12] In the final months of the war, Australia's first Department of Immigration was formed.[13] At this time, Australia's approach to affording people protection was framed by its economic and geo-political interests, and migration was viewed as a way to combat both the labour shortages created by the war and the growing power of the Cold War-era Soviet Union.

This period also marked the start of what would become an enduring strategy, by both sides of government, to implement legislative amendments to migration law in response to Federal and High Court rulings against the government. After WWII, the Australian Government had sought to forcibly remove the roughly 800 remaining non-European wartime refugees who were evacuated from nearby countries during the war and given sanctuary in Australia, including Annie O'Keefe and her family.[14] In response to a High Court ruling against the Government in *O'Keefe v Calwell*,[V,15] the *War-time Refugees Removal Act 1949* (Cth) was introduced by the Chifley Labor Government. The Act empowered the minister to forcibly deport any persons who had been allowed to enter as a result of the war and had not since left.[16]

[V] In its decision, the High Court ruled that the Department of Immigration did not have the power to deport Annie O'Keefe under the *Aliens Deportation Act 1948* (Cth) as she had not been declared a 'prohibited immigrant' – in accordance with the definition provided at section 3 of the *Immigration Act 1901-1940* (Cth) – when she arrived in Australia.

In 1954, Australia formally expanded its protection obligations to refugees when it became a party to the United Nations ('**UN**') *Convention relating to the Status of Refugees* ('**Refugee Convention**').[17] Although officially dismantling its White Australia Policy between the late 1960s and early 1970s, Australia has continued to shape its asylum and immigration policy through a series of ad hoc and racialised legislative responses to international humanitarian crises.[18]

Australia's non-refoulement obligations

The principle of non-refoulement (derived from the French 'refouler' which means to drive back or to repel) constitutes an essential component of international asylum and refugee protections. The essence of the principle is that a State may not oblige a person to return to a territory where they may be exposed to persecution.

Part of Australia's non-refoulement obligations are derived from the Refugee Convention.[19] Under the Convention, States are prohibited from 'expelling or returning a refugee in any manner whatsoever to the frontiers of territories where [their] life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion', regardless of where they come from or when or how they arrive.[20] There are two key exceptions to the principle of non-refoulement as contained in the Convention. These include where a person who would otherwise qualify as a refugee may not claim protection because they are found to be a threat to national security or the community[21] or where they have been convicted of a particularly serious crime and constitute a danger to society.[22]

In addition to its obligations under the Refugee Convention, Australia's non-refoulement obligations are also derived from three key international conventions to which Australia is a party. These include the *International Covenant on Civil and Political Rights* ('**ICCPR**')[23] and its Second Optional Protocol,[24] the *Convention Against Torture* ('**CAT**'),[25] and the *Convention on the Rights of the Child* ('**CRC**').[26] Australia's non-refoulement obligations apply under these treaties where there are substantial grounds for believing that there is a real risk that a person returned to their country of origin will suffer significant harm – such as arbitrary deprivation of life, the death penalty, torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment.[27]

The domestic framework for seeking asylum

The Australian Government considers asylum claims under the *Migration Act 1958* (Cth)[28] ('**Migration Act**') and the *Migration Regulations 1994*.[29] However, Australia does not protect the right to seek asylum in either legislation or policy. Despite clear obligations under international and Australian law, successive governments have taken explicit steps to weaken the implementation of critical human rights obligations and degrade the rights of refugees and people seeking asylum.

Australia's Humanitarian Program

Australia's Refugee and Humanitarian Program is comprised of two components. The 'offshore' programme offers resettlement pathways for people who make a successful claim for asylum prior to arriving in

Australia and who are found to be refugees[VI] or who are found to be in humanitarian need because they are subject to substantial discrimination amounting to a gross violation of their human rights in their country of origin.[VII,30] The 'onshore' programme offers protection pathways for people who make a successful claim for asylum on or after arriving in Australia and who are found to be refugees or engage Australia's complementary protection.[31]

Refugee status determination

Prior to being afforded protection, people seeking asylum are required to be assessed to determine their status as a refugee. In Australia, refugee status determination ('**RSD**') is the process by which a person seeking asylum may be recognised by the government as a refugee in order to receive the protections and entitlements afforded to refugee status.[32]

Significantly, only people who arrive by air with a valid visa and who pass through immigration clearance at the airport are entitled to access the 'regular' RSD process. Whereas people who arrive by sea, or people who arrive by air and are refused immigration clearance at the airport, are no longer entitled to access the regular RSD process.[33] Instead, they are prohibited from applying for a protection visa, unless the Minister exercises a personal, non-compellable discretion to allow them to do so (this is known as 'lifting the bar'). Once the Minister lifts the bar, these persons are subject to a 'fast track' RSD process.[34] The fast track RSD process was implemented through changes to the Migration Act via the *Migration and Maritime Powers Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) ('**Legacy Caseload Act**'). The fast track process applies to people who arrived in Australia without a valid visa between 13 August 2012 and 1 January 2014 and who were not taken to Nauru or PNG for offshore processing.[35] It also applies to people who are reapplying for a Temporary Protection Visa ('**TPV**')[VIII,36] or Safe Haven Enterprise Visa ('**SHEV**'),[IX,37] and other people designated as 'fast track applicants', including a small number of people seeking asylum by sea who have, through legislation, been included in the fast-tracking process and babies born to people

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[VI] The refugee category applies to people who have been recognised as refugees by the United Nations High Commissioner for Refugees (UNHCR).

[VII] Special Humanitarian Program (SHP) category applies to people who are found to be in humanitarian need.

[VIII] TPVs (subclass 785) are one of two visas available to people seeking asylum who arrived in Australia without a valid visa. To be eligible for a TPV a person, or a member of their family, must meet Australia's protection obligations and meet all other visa requirements, such as health, character, identity and security checks. TPV holders have restricted entitlements to work, study, and access government services such as Centrelink. However, they have no right to family reunification. To remain in Australia beyond the three-year TPV period, a person must apply for a subsequent TPV or SHEV before their current visa expires.

[IX] SHEVs (subclass 790) are similar to TPVs but are issued for a period of five years. As with TPV holders, SHEV holders have no right to family reunification. Those applying for a SHEV must be found to be in need of complementary protection and must intend to work and/or study in a designated regional or rural area and must not receive income support for more than 18 months during the five-year period. In addition, SHEV holders who have met the requirements of the visa for the full five-year period may be eligible to apply for standard onshore migration visas that may give rise to permanent residency, however they remain excluded from applying for a PPV. While SHEVs may provide a pathway to permanent residency for some refugees, most will be unable to satisfy the eligibility requirements for permanent visas.

in the 'Legacy Caseload'.[38] Importantly, the fast track RSD process affords limited merits review and appeal rights.

The RSD process is also used to determine whether a person is entitled to 'complementary protection'. Complementary protection refers to the legal mechanism for providing protection to a person if they do not fall within the definition of a refugee, but their circumstances nonetheless trigger Australia's non-refoulement obligations under the Refugee Convention, the ICCPR, the CAT and the CRC, to which Australia is a party. Complementary protection is considered additional, or complementary, to the protection given by Australia to refugees.

Section 36 of the Migration Act sets out grounds for complementary protection. Complementary protection was introduced by the Gillard Labor Government through the *Migration Amendment (Complementary Protection) Act 2011* (Cth).[39] The Act gave effect to Australia's non-refoulement obligations under international human rights law. Since its commencement on 24 March 2012, complimentary protection has enabled people seeking asylum to claim protection in Australia if they do not meet the refugee definition criteria but may face torture or serious human rights violations if they were returned to their country of origin. The process for assessing grounds for complementary protection is integrated into the refugee status determination process. In 2013 and 2015, the Australian Government proposed a series of amendments that would have abolished, or significantly changed, the system of complementary protection. However, such amendments have to date been unsuccessful.[X,40]

Protection visas

Once a person has been determined to be a refugee or in need of complementary protection, protection visas can offer protection to that person.[41]

Section 36 of the Migration Act sets out the grounds for granting a protection visa. Prior to 16 December 2014, section 36(2)(a) of the Migration Act gave effect to Australia's non-refoulement obligations by directly linking the Refugee Convention to the Migration Act. The Legacy Caseload Act amended section 36(2)(a) of the Migration Act to remove reference to the Refugee Convention[42] – instead referring to protection obligations in respect of a person because they are a 'refugee'.[XI,XII] Although the replacement definition is similar in meaning, the Refugee Convention effectively ceased to form part of Australian law.

Obtaining refugee status provides the avenue for the issuing of a protection visa. Section 35A of the Migration Act establishes the classes of visas known as protection visas. People who have been found to be refugees or have been granted protection through the Special Humanitarian Program may be issued

[X] Including the Migration Amendment (Complementary Protection and Other Measures) Bill 2015 and the Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013.

[XI] The term 'refugee' is defined at s 5H of the Migration Act, with related definitions and qualifications provided at ss 5(1) and 5J-5LA.

[XII] These amendments commenced on 18 April 2015 and apply to protection visa applications made on or after 16 December 2014.

with Permanent Protection Visas ('**PPV**').[XIII,43] People who have arrived in Australia without valid visas are issued with one of a number of temporary visas. Temporary visas were first introduced by the Howard Coalition Government in October 1999. They were abolished by the Rudd Labor Government in August 2008 via the *Migration Amendment Regulations 2008 (no. 5)* (Cth) before being reintroduced by the Abbott Coalition Government in December 2014 via the Legacy Caseload Act. Following the reintroduction of temporary visas, people who arrive by sea without a valid visa are no longer eligible for a PPV. Instead, they are only eligible for three-year TPV or five-year SHEV.[44]

This change to asylum seeking processes affects approximately 30,500 people who travelled to Australia by sea prior to 1 January 2014 and were allowed to remain in Australia while their claims for protection were being processed but did not have their claims finalised by January 2014.[45] Significantly, permanent residency through temporary protection pathways is near impossible. For example, of the more than 13,000 refugees granted a SHEV since 2014, only one refugee has been granted a PPV through the SHEV pathway.[46]

Bridging visas are temporary visas that allow for substantive visa applicants, including people seeking asylum to remain lawfully in Australia and live in the community while their applications are being processed and finally determined.[XIV] People who arrive by sea cannot apply for a bridging visa. However, since November 2011, the Minister has a personal and non-compellable public interest power, under section 195A of the Migration Act, to grant Bridging visas to people who arrive in Australia by sea without a valid visa and who meet certain eligibility requirements.[47]

Temporary protection arrangements for refugees are not explicitly prohibited under the Refugee Convention or international human rights law. However, the United Nations High Commissioner for Refugees ('**UNHCR**') recommends that such arrangements be limited to situations where individual status determination is either not appropriate or practical (such as large-scale influxes resulting from international humanitarian crises) and should not be used if the stay becomes prolonged or to discourage people from seeking asylum.[48] The UNHCR also emphasises that 'refugees should not be subjected to constant review

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[XIII] PPVs holders are allowed to live, work and study in Australia permanently, access government services such as Medicare and Centrelink services, sponsor eligible family members for permanent residence through the offshore Humanitarian Program, travel to and from Australia for five years, if eligible become an Australian citizen, and if eligible attend English language classes for free.

[XIV] There are two main types of bridging visas which are generally granted to people seeking asylum (if eligible): 1) A person seeking asylum is generally eligible for a Bridging Visa A (BVA) where they have arrived by air on a valid visa, have applied for and are awaiting the outcome of a substantive visa application (or judicial review of a decision relating to the outcome of a substantive visa application) and meet the character requirements set out at section 501 of the Migration Act. Depending on the specific visa conditions attached to the BVA, a person seeking asylum may be able to work and access Medicare (if eligible); 2) A person seeking asylum will generally be granted a Bridging Visa E (BVE) where they are in immigration detention awaiting the outcome of their protection visa applications (Subclass 051) or have previously been in immigration detention in Australia and, following approval from the Department of Home Affairs, are currently residing in the community (Subclass 050). The BVE (Subclass 050) does not grant travel rights or work rights (unless an applicant can demonstrate 'financial hardship').

of their refugee status',[49] and any review of their status should be triggered by 'fundamental'[50] and 'durable'[51] changes in their country of origin, rather than occurring periodically.

Temporary protection has a significant detrimental effect on people's mental health and well-being, at times with catastrophic consequences, including self-harm and suicide.[52] The discriminatory treatment of people based on the manner of their arrival in Australia is punitive, inhumane, and degrading, and in direct violation of various international laws and obligations.[53]

Obstructing access to asylum

Despite Australia's clear non-refoulement obligations under international and Australian law, successive governments have taken 'explicit steps to weaken the application of the obligation of non-refoulement, in part by framing full and effective implementation of the obligation as being at odds with state sovereignty'.[54]

The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014[55] ('**Legacy Caseload Bill**'), was introduced in 2014 by the then Immigration Minister, Scott Morrison. The Bill includes a key change[XV] intended to reverse a 'series of High Court decisions which have found that the Migration Act as a whole is designed to address Australia's non-refoulement obligations'.[56] The High Court decisions referred to include two key rulings on offshore processing: *Plaintiff M61/2010E v Commonwealth of Australia* 2010 relating to procedural rights for people seeking asylum held on Christmas Island;[57] and *Plaintiff M70/2011 v Minister for Immigration and Citizenship* 2011 relating to the 'Malaysian Solution'.[58]

The newly inserted section 197C[XVI] provides that Australia's non-refoulement obligations are irrelevant to the power to remove 'unlawful non-citizens' in various circumstances under section 198 of the Migration Act. Section 198a of the Migration Act provides that a non-citizen who is in immigration detention and who has exhausted their visa options must be removed from Australia 'as soon as practicable'. In response, the UNHCR commented:

> *A State party to the Refugee Convention, wherever it exercises jurisdiction, including outside its territory, is bound by its international obligations under the Refugee Convention, in particular the non-refoulement obligation to not return individuals to a country, either directly or indirectly, where their life or freedom would be at risk.*[59]

The Legacy Caseload Bill Explanatory Memorandum also establishes the definition for so-called 'Unauthorised Air Arrivals' ('**UAA**'). UAA status is applied where an individual arrives at an Australian airport with a valid visa and during airport screening discloses that they intend to seek protection.[60] The disclosure invalidates a person's existing visa and consequently precludes their eligibility for a PPV.[61] This process

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[XV] Contained in Schedule 5 and which clarifies Australia's international law obligations.

[XVI] Section 197C of the Migration Act provides that: - 'Australia' s non-refoulement obligations irrelevant to removal of unlawful non-citizens under section 198 (1) For the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen; (2) An officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen'.

effectively criminalises the asylum-seeking process, despite the fact that not only is the right to seek asylum protected under Article 31 of the Refugee Convention, but there is no offence under Australian law that criminalises the act of arriving in Australia, or the seeking of asylum, without a valid visa.

The Australian Border Force's ('**ABF**') highly secretive and militarised operational structure has also received intense criticisms[62] since its inception in 2015.[63] In 2019, the ABF was criticised for its discriminatory targeting of Saudi Arabian women at airports to stop them from seeking asylum in Australia.[64] It is reported that as part of their investigations, ABF officers required Saudi women to provide evidence that their travel has been sanctioned by their 'male guardian'.[65]

In recent years, the Federal Government, and in particular the Abbott and Morrison Coalition Governments, has introduced a series of hard-line legislative amendments to immigration and asylum policy. The increasing frequency with which these legislative changes are being introduced, for the purpose of overturning at appeal cases where the Federal Court has decided against the Government, is arguably nothing more than a flagrant attempt by the Government to circumvent its human rights obligations under international and Australian law.

Refusing and revoking visas on character and security grounds

In 2014, then Immigration Minister, Scott Morrison the Migration Amendment (Character and General Visa Cancellation) Bill 2014 ('**Character Bill**')[66] which include changes to section 501 of the Migration Act and strengthened the Minister's capacity to refuse or cancel a visa on 'character' grounds. The amendments also introduce mandatory visa cancellation in cases where a person who is not an Australian citizen receives a carceral sentence of 12 months or more, or a child sexual offence conviction.[67]

Case study: *AJL20 v Commonwealth*

The Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 was tabled in response to Federal Court case *AJL20 v Commonwealth*.[68] AJL20 is a Syrian refugee who arrived in Australia as a child. In 2014, AJL20 was detained by the Federal Government after the Minister cancelled his visa on 'character' grounds under section 501 of the Migration Act owing to previous criminal convictions he received as a teenager, despite his age and that his convictions attracted no penalty or imprisonment. The Federal Government argued that AJL20's detention was lawful under section 116 of the Migration Act, which provides that the Minister may cancel a visa where 'its holder has not complied with a condition of the visa'[69] or where 'a prescribed ground for cancelling a visa applies to the holder',[70] including the Minister being satisfied that the holder has been convicted of, or merely charged with, an offence in Australia or overseas.[71]

When AJL20's visa was cancelled, he became an 'unlawful non-citizen' and was therefore subject to mandatory detention under section 189 of the Migration Act. As he could not be returned to Syria without Australia breaching its non-refoulement obligations, his indefinite detention was declared 'lawful'.[XVII] The Federal Court decided against the government and ruled that immigration detention must be 'for a

[XVII] Further, the Federal Government argued that owing to the Minister's discretionary powers under sections 501(3) and 501(5) of the Migration Act, relating to the 'Refusal or cancellation of visa on character grounds', such decisions were exempt from administrative review.

purpose' – to assess a person's protection visa application or to facilitate their removal from Australia. As neither purpose could be applied in this case, the Federal Court ruled his detention unlawful and ordered his release.[72]

Shortly before appealing the Federal Courts ruling to the High Court of Australia,[73] the Federal Government introduced the Clarifying International Obligations for Removal Bill 2021, targeting refugees in immigration detention who cannot return to their home countries because they risk facing persecution or serious harm. The Bill was passed with retrospective effect on 13 May 2021 – less than two months after it was tabled[XVIII,74] – and cemented the legal basis for the arbitrary and indefinite detention of refugees whose visas have been cancelled on 'character' or 'security grounds'. Once the bill had passed the Senate, the Government appealed the Federal Court decision in *AJL20 v Commonwealth* to the High Court who decided in favour of the Government ruling that under the new legislation AJL20's indefinite detention was now lawful.

At the time, the government was criticised for its conspicuously strategic timing and bypassing of public consultation processes. Concerns were also raised in relation to the process of making 'character 'and 'security' determinations at the discretion of the Minister whose powers are generally non-reviewable and non-compellable and are not subject to procedural fairness.[75] While the government has claimed that the legislation is intended to ensure Australia does not breach its non-refoulement obligations under international law, in practice it gives the Minister carte blanche to overturn a person's refugee status without providing a mechanism to prevent their indefinite detention, in breach of international law.[76]

The Migration Amendment (Strengthening the Character Test) Bill 2021,[77] currently before the Senate, introduces unreasonably low thresholds to refuse or cancel visas on 'character' or 'security' grounds. These include Ministerially determined crimes of 'association' and criminal convictions punishable by two years irrespective of whether the sentence is imposed.[78] The original bill was debated and rejected twice previously, in 2019 and 2021. Should the latest bill pass, read together with the *Clarifying International Obligations for Removal Act 2021* (Cth),[79] these two pieces of legislation would have unprecedented consequences. For instance, after the Legacy Caseload and Character Bills passed in 2014, the number of visas cancelled under section 501 of the Migration Act increased dramatically – from 76 cancellations in 2013-14 to 983 cancellations in 2015-16. The Government has reportedly used these powers to expel 4,000 people from Australia since the 2019 Federal election.[80]

The administrative review system

Following initial assessment and determination by the Minister, options for review of refugee status decisions depends on how a person arrived in Australia. People who arrive by air can have the merits of their claim for protection assessed at a new hearing before the Administrative Appeals Tribunal ('**AAT**').[XIX,81] Whereas people who arrived by sea can access a limited form of review before the Immigration Assessment

[XVIII] The 25th of March was the last sitting day of the March 2021 session of Parliament with both houses reconvening on 4 May 2021 – leaving the Bill tabled for a total of 6 days.

[XIX] The AAT is an independent statutory body that conducts independent merits review of administrative decisions made under Commonwealth laws, including refugee cases. The AAT was established by the *Administrative Appeals Tribunal Act 1975* (Cth) and commenced operations on 1 July 1976.

Authority ('**IAA**').[XX,82] For people whose claims fail at the IAA or AAT, judicial review may be sought at the Federal Circuit Court, but only on very narrow grounds involving a jurisdictional error on the part of the decision-maker.[83]

An Inquiry into the performance and integrity of Australia's administrative review system (2021)[84] has identified several systemic issues impacting the review of refugee cases at both the AAT and the IAA. The legislated objective of the AAT is to provide a mechanism of review that demonstrates fairness, efficiency, adaptability and integrity.[85] However, in 2020-21, the AAT reported a backlog of 32,064 refugee cases, with just 5,558 cases decided in the 12-month reporting period.[86] Significant under-resourcing of the AAT has been identified as a contributing factor to the backlog. In addition, the lack of expertise of some AAT members, in part due to the politicisation of appointments to the AAT and the lack of legal qualifications of some appointees,[87] has also been identified as a major governance issue with significant consequences on review times and discrepancies in decision making.[88] For example, in its submission, the Refugee Council of Australia ('**RCOA**') found that: 'At the current rate, it would take over two years to process these initial permanent protection claims. As such, a person applying for a permanent protection visa may have to wait seven years for an outcome on their protection visa application'.[89] It is therefore unsurprising that one of the key recommendations made by the Committee in the Interim Report (2022) is to 'disassemble the current [AAT] and re-establish a new, federal administrative review system' that aligns with the AAT's legislated objectives.[90]

The IAA[91] has also received criticisms for its lack of procedural fairness, inefficiencies and limitations on interviewing applicants and introducing new evidence as part of the IAA process.[XXI,92] The RCOA has raised serious concerns regarding the IAA, arguing that it is 'designed to favour expediency over procedural fairness',[93] in contrast to the legislated objectives of the AAT.[94] The RCOA found that the IAA refused asylum claims in 91-94 per cent of cases.[95] They also found that 37 per cent of appeals succeeded in the Federal Courts, indicating a significant number of jurisdictional errors.[96] The UNHCR emphasises that the 'swiftness with which the IAA can finalise cases has come at a cost; for key procedural safeguards are absent from the review process'.[97]

There is a distinct absence of procedural fairness under the current refugee status determination processes. Given that a person's release from detention can rely on the outcome of the refugee status determination procedures, these shortcomings are extremely concerning.

[XX] The IAA is a specialised division of the AAT and deals with 'fast-track' migration decisions made by a specific group of people seeking asylum who arrived in Australia by sea between 13 August 2012 and 1 January 2014 and were not taken to a regional processing country. The role of the IAA is to conduct reviews of reviewable decisions made by the Minister to refuse to grant a protection visa to a fast-track applicant.

[XXI] The Interim Report from the inquiry into the performance and integrity of Australia's administrative review system does not provide recommendations concerning the IAA.

Arbitrary and indefinite detention

Australia has one of the most stringent mandatory detention regimes in the world. This regime requires the detention of people in Australia who are non-citizens and do not hold a valid visa[XXII,98] unless they are granted a Bridging visa, which provides temporary lawful status in Australia while they arrange either to leave the country or apply for an alternative visa.[99]

An unacceptable number of refugees and people seeking asylum continue to languish in Australia's onshore detention regime as a direct result of its harsh immigration and asylum policies. According to the Department of Home Affairs,[100] as at 30 September 2021:

- There were 1,459 refugees and people seeking asylum being held in onshore closed immigration detention facilities (of these 278 arrived by sea) – with an additional 562 people in community detention;[101]
- Of the 1,459 people held in closed detention, 510 people (or 35 per cent) have spent more than two years in closed detention.[102] In 2012, that figure was just 3 per cent;[103]
- The average number of days people spent in closed detention was 689 days, the highest average ever recorded.[104] In 2012, that figure was less than 100 days;[105]
- Of the 562 people in community detention, 474 people (or 84 per cent) have spent more than two years in community detention[106] and 176 are children (or 31 per cent);[107] and
- A further 1,636 children are in the community on bridging visas.[108]

Of the 1,459 refugees and people seeking asylum currently in immigration detention in Australia, more than 70 have been transferred to Australia from Nauru or PNG for medical treatment. Many of whom spent long periods detained in hotel rooms with heavily restricted freedom of movement, and limited access to fresh food, sunlight, fresh air and exercise.[109] As at April 2022, the majority of refugees transferred to Australia from offshore have been released on Bridging visas.[110]

Mandatory detention

Under sections 189 and 196 of the Migration Act, anyone who is not an Australian citizen and does not have a valid visa must be detained[111] until they are granted a visa or leave the country.[112] This policy of mandatory detention disproportionately impacts the following categories of refugees and people seeking asylum who are not eligible for a Bridging visa:

- Non-refugees who cannot be returned to their countries of origin;
- Refugees who have had their visas refused or cancelled on character grounds; and
- Persons with adverse security assessments.[113]

Australia has a long history of using mandatory and indefinite detention as a punitive tool to deter people from seeking protection and to criminalise the asylum-seeking process. These tactics are not only

[XXII] Once detained, people remain in detention until they are either granted a visa or they are forcibly removed from Australia under sections 198 or 199 of the Migration Act or deported under sections 196(1)(b) and 200.

misguided and ineffective, but they are also in direct violation of international human rights law. This mandatory system of detention arguably breaches the right to freedom from arbitrary detention. However, mandatory immigration detention has been found to be lawful by the High Court, regardless of whether conditions are unjustifiably punitive and inhumane.[114]

The policy of mandatory detention was first introduced in 1992. Prior to 1992, while Australian law *allowed* for the detention of certain persons arriving in Australia without a valid visa, it did not *require* it. Events precipitating this shift in policy included the 1989 arrival of 27 people from Cambodia, Vietnam and Southern China[115] – the first group of refugees and people seeking asylum to arrive by sea in eight years. Later that same year, the *Migration Legislation Amendment Act 1989* (Cth) was enacted,[116] introducing harmful and long-lasting reforms to Australia's asylum policies. The Act introduced 'administrative detention' for people arriving in Australia without a valid visa while their refugee status was being determined. Following its enactment, the number of people in immigration detention increased from five people in 1985 to 478 people in 1992. Of these, 421 people had arrived by sea, including 306 people from Cambodia.[117] The discriminatory application of administrative detention based on a person's mode of arrival and country of origin was evident in the disproportionate length of detention applied for these groups. For instance, in 1989, the average length of stay in immigration detention was 15.5 days, compared with the average detention for Cambodian refugees at 523 days.[118]

In April 1992, approximately 37 Cambodia nationals who had sought asylum and who had their refugee claims rejected by the Keating Labor Government, sought a declaration in the Federal Court challenging these decisions and requesting their release. The Federal Court decision was set aside after Council for the Government conceded legal errors had been made in their refugee status determinations.[119] However, prior to the hearing scheduled for 7 May 1992, the *Migration Amendment Act (No 4) 1992* (Cth) was pushed through Parliament, clarifying the lawful detention of 'boat people' arriving in Australia between 19 November 1989 and 1 November 1993, pending the outcome of their refugee status claims.[120] The resulting litigation culminated in *Chu Keong Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs*,[121] a High Court decision affirming the constitutional validity of administrative detention under the Migration Act.[122]

The *Migration Reform Act 1992* (Cth), which came into force on 1 September 1994, broadened mandatory detention to apply to all 'unlawful non-citizens' – who either arrived without a valid visa or were in Australia on an expired or cancelled visa – until they were either granted a visa or removed from Australia.[123] This policy was highly criticised at the time by the then Human Rights and Equal Opportunities Commission ('**HREOC**').[XXIII,124] The amending Act also introduced a system of bridging visas to allow certain 'unlawful non-citizens' (that is, those who arrived with authorisation but who overstayed their visa) to be released from immigration detention and remain in the community pending the outcome of their claims.[125] Significantly, people who arrived without authorisation (such as by sea) were not eligible for bridging visas and as a result were placed in detention for the entire duration of the processing of their claims. Notably, the 273-day

[XXIII] The HREOC is now known as the Australian Human Rights Commission

time limit imposed in the earlier legislation[126] was ultimately removed when the amending Act came into force in 1994.[XXIV,127]

Subsequently, two notable grounds for appeal that were previously available when challenging immigration decisions were also removed: The right of review on grounds of natural justice (or procedural fairness) and the right of review on grounds of unreasonableness. In addition, the insertion of Part 4B into the Migration Act effectively limits the review of decisions by the Federal Court of Australia. As Former High Court Justice Michael Kirby explains: 'Its purpose is to take migration decisions out of the ordinary course of the *Judiciary Act* and the *Administrative Decisions (Judicial Review) Act* (Cth) and to place them within the *Migration Act* – in a little category all of their own'.[128]

The HREOC also criticised the sweeping powers conferred on the Minister and the erosion of the power of the courts to review and make determinations on migration decisions, including on the lawfulness of detention. In its Report (1998), the HREOC noted the amendments to the Migration Act contravened international law, stating that:

> *Australian law does not permit the individual circumstances of detention of non-citizens to be taken into consideration by courts. Neither does it permit the reasonableness and appropriateness of detaining an individual to be determined by the courts. Therefore, Australia is in breach of ICCPR article 9.4 and [CRC] article 37(d).*[129]

In its response, the Government rejected the HREOC's recommendation that the lawfulness of detention should be subject to judicial review and that sections 183, 196(3) and 72(3) of the Migration Act be repealed.[130] Since then, Australia's asylum system has continued to operate in a shroud of secrecy, in a system designed to render the administrative and discretionary decisions made by the Minister without justification beyond the scope of judicial oversight.

Case Study: *Al-Kateb v Godwin*

Mr Ahmed Al-Kateb was born in Kuwait of Palestinian parents. In 2000, Mr Al-Kateb arrived in Australia by sea without a valid visa in search of asylum and was placed in immigration detention. After his claim for asylum was denied, his legal appeals exhausted and his request to be returned to Kuwait was denied by the Kuwait Government (after refusing Mr Al-Kateb citizenship or permanent residence in Kuwait), he was effectively 'stateless' and faced indefinite detention in Australia. Mr Al-Kateb's application to the Federal Court that his continued detention was unlawful was denied. At appeal, the High Court in *Al-Kateb v Godwin*[131] denied Mr Al-Kateb's application and upheld the Federal Court decision that mandatory and indefinite detention is within the scope of the Migration Act.[132]

In 2008, the then Immigration Minister, Chris Evans commented that the powers given to the Minister under the Migration Act to make decisions about individual cases was unlike any other piece of legislation,

[XXIV] Prior to the *Migration Reform Act 1992* (Cth), the *Migration Amendment Act 1992* (Cth) imposed a 273-day limit on immigration detention. However, sections 54Q(3)(c)–(f) allowed the 273-day 'clock' to be 'stopped' and were worded in such a way as to make it extraordinarily difficult to determine whether a person's 273-day period of detention had expired or not. This limitation was ultimately removed via the *Migration Reform Act 1992* (Cth) when the Act came into force on 1 September 1994

'not just because of concern about playing God, but also because of the lack of transparency and accountability for those decisions and the lack in some cases of any appeal rights against those decisions'.[133] Since then, the Government has continued to further empower individual ministers while, at the same time, eroding the power of the courts, leaving the Government free to act with impunity for the harms they inflict and the lives they destroy.

Community detention

Community detention (also known as 'residence determinations') was introduced by the Howard Coalition Government in 2005[134] and is generally granted when circumstances warrant a person's release from closed detention due to physical or mental health concerns which require additional support.

A residence determination allows a person who has been granted a Bridging visa to transition out of closed detention and live in the community, at a specified location determined by the Minister, while their protection visa application is being processed. Residence determinations are made at the discretion of the Minister, under section 197AB of the Migration Act, and usually come with additional reporting or other conditions, such as curfews, travel restrictions, regular reporting, or electronic monitoring. Importantly, determinations are subject to Ministerial override and the number of people in community detention has decreased significantly in recent years.[135]

With the passing of the *Migration and Maritime Powers Legislation Amendment Act 2014* (Cth), limited work rights may be granted where financial hardship can be demonstrated.[136] However, people in community detention are automatically denied the right to work and exemptions are subject to Ministerial approval and lengthy delays. People in community detention have access to basic accommodation and limited access to government benefits, including medical support through Medicare.[137] Children have access to public schooling, while adults are required to pay for their own education.[138] Levels of support and financial assistance are determined by the Minister under the Status Resolution Support Services ('SRSS') programme.[139] However these are often insufficient to ensure adequate standard of living[140] and less than five per cent of the total number of people seeking asylum in the Australian community are receiving assistance through the SRSS programme.[141]

The arbitrary and indefinite detention of people seeking asylum and refugees based solely on their mode of arrival and visa status is harmful, expensive and ineffective as a deterrent to unauthorised migration. Despite this fact, the Australian Government continues to criminalise and punish people fleeing persecution, violence and other injustices instead of offering humane and rights-based alternatives to detention.

Maritime interdictions and the militarisation of asylum policy in Australia

In 2013, the Abbott Coalition Government established 'Operation Sovereign Borders' ('OSB'), a military-led policy aiming to stop the arrival of refugees by sea by intercepting boats in Australian and international waters and either redirecting boats to transit countries or forcibly transporting people to offshore detention facilities on Manus Island and Nauru.[142]

According to Monash University's Australian Border Deaths Database, one year after offshore processing was reintroduced in 2012, the total number of deaths in Australian and international waters continued at annual rates comparable to those seen in 2009-2011.[143] Since the introduction of OSB in 2014, no deaths at sea have been reported. However, the lack of reported deaths is arguably attributable to restrictions on the public reporting of military activities rather than the actual success of OSB in deterring people from making the perilous and deadly journey toward our shores in search of asylum.[144]

Pushbacks, when carried out violently or effectively result in dire circumstances, may amount to torture or ill-treatment, and may be in violation of the right to life – a policy even the Fraser Coalition Government deemed inhumane, reputationally damaging and unlikely to provide a lasting solution.[145] In a report to the UN Human Rights Council (2021), the UN's Special Rapporteur on the Human Rights of Migrants, Felipe González Morales, noted the paucity of detail available on Australia's actions at sea, further stating that: 'The loss of life at international borders has been a tragic consequence of States increasingly relying on militarization, extraterritorial border control and deterrence to attempt to control migration'.[146]

A central feature of forcible interception is the use of so-called 'enhanced screening' processes. These screening processes are conducted summarily at sea, prompting criticism from the UNHCR and international law experts that such processes are unlikely to afford adequate and fair protection assessments.[147] For example, Dastyari and Ghezelbash (2020) examined the significant and damaging impact enhanced screening has had on success rates of asylum claims since OSB commenced and found that:

> *In the year between 27 October 2012 and 30 October 2013, of the 3,063 Sri Lankan asylum seekers screened onshore, 1,475 were screened in. This represents a success rate of approximately 48 per cent. Since the commencement of [OSB] in September 2013, around 204 Sri Lankans from 12 boats have been subject to enhanced screening at sea. Of these, only two people were screened as having protection claims that would warrant further assessment. That represents a success rate of less than 1 per cent. This percentage is even lower when considering the approximately 115 Vietnamese asylum seekers from four boats, subject to enhanced screening at sea, given that not a single one of those individuals appears to have been screened in.*[148]

The UN Human Rights Committee, responsible for monitoring State implementation of the ICCPR, has raised serious concerns regarding Australia's OSB policy. The Committee has found that:

a) Australia's domestic legal framework governing extradition, transfer or removal of non-citizens, including refugees and people seeking asylum, does not provide full protection against non-refoulement;
b) Persons intercepted at sea are subject to rapid 'on-water' assessments are unable to have their protection needs assessed properly without legal representation or appropriate mechanisms to legally challenge decisions; and
c) All people seeking asylum, regardless of their mode of arrival, should have access to fair and efficient refugee status determination procedures and non-refoulement determinations. The policy of turning back people without adequate assessment of their protection claims, breaches Australia's non-refoulement obligation in articles 6 and 7 if the ICCPR.[149]

Given the lack of transparency in Australia's militarised maritime operations, it's impossible to determine with any certainty whether all people turned back at sea were given the opportunity to have their claim for asylum heard and assessed in a meaningful way and in line with the UNHCR's guidelines on refugee status determinations[150] and detention.[151]

Offshore processing

The demonising of maritime arrivals in the political discourse

Australia has a long history of politicising the spontaneous arrivals of refugees, particularly those arriving by sea. However, the Howard Coalition Government's military response to the 'Tampa Affair' is arguably the single most important moment in the history of Australia's response to refugee arrivals. On 26 August 2001, the MV Tampa, a Norwegian freight ship rescued 433 refugees from a leaking fishing vessel 140 kilometres off Christmas Island. The predominantly-Hazara refugees were fleeing Afghanistan in fear of persecution from the resurgent Taliban. Following a three-day stand-off with an Australian Government who not only refused the ship's entry into Australia's territorial waters, but threatened to prosecute the ship's Captain, Arne Rinnan on people smuggling offences, the ship crossed the Australian maritime boundary. Once crossed, the ship was incepted by 45 Special Air Service troops who boarded the ship and prevented it from sailing any closer to Christmas Island. The lack of compassion and humanity demonstrated by the Australian Government in response to this incident marked the beginning of a disturbing and growing trend in Australian politics aimed solely at dehumanising and vilifying refugees and people seeking asylum.

The September 11 attacks in the United States just a few days later, and the 'children overboard' scandal one month later (on 7 October), marked the beginning of a suite of draconian laws and policies known as the 'Pacific Solution' – the effects of which endure to the present day.[152] Included in these, were amendments to the Migration Act which excised certain territories, including Christmas Island, from Australia's migration zone and allowed for the detention of people seeking asylum in offshore immigration processing facilities in PNG and Nauru.[153] Of the 433 people rescued from the Tampa, New Zealand ultimately accepted 208 refugees, while the remaining 225 people were transferred to Nauru and left languishing for years while their claims were being processed by the Australian Government.[154]

At risk of losing re-election, the Howard Government campaigned heavily on dehumanising and demonising refugees and people seeking asylum, and in particular those arriving by sea as 'queue jumpers', 'criminals' and a 'threat to national security'.

One year later, the Australian Security Intelligence Organisation (ASIO) reported that of the 5,639 security assessments completed for people seeking asylum who arrived in Australia by sea between 1 July 2000 and 30 June 2002, not a single security related concern had been raised.[155] Regardless, the Howard Government's fear mongering campaign had achieved the desired result and in the years following their re-election, the politicisation of refugees and people seeking asylum as an election campaign strategy continued to feature prominently on both sides of politics.

Australia's offshore processing regime

Australia has used variations of offshore processing detention since 2001. Offshore processing is designed to be punitive and has been widely promoted by successive governments as a deterrent to unauthorised arrivals and as a demonstration of strict border security.

Offshore detention was ostensibly introduced to stop people from travelling to Australia by boat in search of asylum, to save lives at sea and to collapse the business model of people smugglers. However, in practice, offshore processing has failed to achieve any of these objectives as it ignores the reasons people seek protection in the first place.

In 2008, the Rudd Labor Government dismantled the 'Pacific Solution', closing the detention centres on Nauru and Manus Island and abolishing Temporary Protection Visas. However, in July 2010, the Gillard Labor Government announced that it would resume offshore processing in reaction to an increase in the number of people arriving by sea.[156] Following this announcement, the Government moved to establish regional agreements with Timor-Leste and Malaysia in 2010 and 2011, for the transfer and resettlement of refugees via third countries in a move not dissimilar to the Pacific Solution. Both agreements later collapsed, with East Timor pulling out of negotiations[157] and the High Court's ruling in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*[158] determining that the 'Malaysia solution' contravened the Migration Act.[159] Australia's offshore processing regime resumed on 18 August 2012, following the commencement of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth).

Despite being responsible for reintroducing offshore processing, just one month after transfers to Nauru commenced in 2012, the Labor Government publicly conceded that 'Nauru by itself is not an effective deterrent'.[160] Former Coalition Prime Minister Malcolm Fraser, who oversaw Australia's response to the Indo-Chinese refugee crisis, made similar observations in 2013, when he called for a Royal Commission into Australia's offshore processing policies. Fraser aptly noted: 'If they are genuine refugees, there is no deterrent that we can create which is going to be severe enough, cruel enough, nasty enough to stop them fleeing the terror in their own lands'.[161]

Australia's policy of demonising and punishing refugees and people seeking asylum has failed to offer durable solutions for many who have endured living in a state of limbo for years. As at 31 August 2021, of the 4,183 people who arrived by sea without a valid visa (after 13 August 2012) and who were transferred to a regional processing centre in either Nauru or PNG less than half are now in Australia (2,,054), with 1,177 of these persons being transferred to Australia for a 'temporary purpose'.[XXV,162] Under sections 351 and 417 of the Migration Act, the Minister has the power to grant permanent protection to refugees who have been transferred to Australia for temporary purposes. Despite this authority, the Australian Government continues to arbitrarily detain this cohort of refugees in closed and community detention where they are subjected to highly restrictive conditions, including the denial of rights to employment, health care and education.[163]

[XXV] Of the remaining, 228 were in a regional processing country (with 121 in PNG and 107 in Nauru); 989 were resettled in a third country; 922 were returned or removed to their country of origin; and 19 are deceased.

Third country resettlement

Australia has expended considerable diplomatic capital trying to resolve what is effectively a domestic political issue. As at 31 May 2022, 1,056 refugees have been resettled in a third country. Of these, 1,006 people who initially sought asylum in Australia have been resettled in the United States. As at 31 August 2021, another 230 people have received provisional approval for resettlement in the United States.[164] Their resettlement is the result of a 2016 bilateral agreement between Australia and the United States offering a solution for refugees sent offshore.[165] Part of this original agreement included trading Australia's current asylum and refugee population for those from the Americas.[166] Such arrangements effectively create an selection process that is determined by a person's race rather than their refugee status – a violation of both international and Australian law.

As at 31 May 2022, 105 people remain in PNG.[167] As at 31 January 2022, a further 1,175 transitory persons remain in Australia for a temporary purpose[168] (of which 877 were returned to Australia as part of the pre-19 July 2013 cohort).[169] In Senate estimates from October 2021, the Australian Government confirmed that it would no longer provide funding for those remaining in PNG after 1 January 2022 and had not sought any commitments in relation to pathways to permanent residency or citizenship for those it has left behind.[170, XXVI,171]

As at 31 May 2022, 112 people remain offshore on Nauru.[172] On 24 March 2022, Australia finally announced that it would honour its previous agreement with New Zealand to resettle 150 refugees annually over three years.[XXVII,173] Although the Nauruan Government has offered those left behind a 20-year visa,[174] this still leaves many refugees in a precarious and insecure visa situation for decades to come.

Australia has failed to secure permanent resettlement for many refugees subjected to Australia's draconian offshore processing arrangements. Following the end of the agreement with the United States and the delayed execution of its agreement with New Zealand, many are left languishing in Australia, PNG and Nauru with no clear pathway towards permanent resettlement in any country.[175] Paul Power, chief executive of the Refugee Council of Australia has dismissed the arrangements as a political distraction, stating that even once all the available placements in the Unites States and New Zealand are filled, there are still more than 500 people in Australia or offshore detention left behind in limbo without a resettlement solution.[176]

The human toll of Australia's onshore and offshore immigration detention regime

The protracted and indefinite nature of immigration detention is inhumane and has a significant long-term psychological and physical toll on those detained. Many people seeking asylum have fled traumatic experiences only to have their trauma exacerbated by prolonged, indefinite detention in Australia's

[XXVI] The UNHCR in a separate agreement with New Zealand has agreed to resettle an indeterminate number of eligible refugees remaining in PNG, with eligibility limited to those who were transferred by Australia under the offshore processing arrangement on or after 19 July 2013 and who are not currently awaiting an outcome on a resettlement pathway with another country such as the United States or Canada.

[XXVII] The arrangement applies to eligible refugees subject to Australia's offshore transfer policy, and who are currently located on Nauru or in Australia and are not awaiting the outcome of a resettlement pathway with another country.

onshore and offshore detention centres. The systemic injustices experienced by refugees and people seeking asylum detained in Australia's onshore and offshore immigration detention systems have resulted in tragic and preventable outcomes; not only for those who have made the treacherous life-threatening journey to our shores seeking safety, but also their families.

Access to adequate and appropriate health care in immigration detention

The Australian Government has a long history of neglecting the health and welfare of refugees and people seeking asylum.[177]

The profoundly harmful effects of onshore and offshore immigration detention on people's physical and mental health have been consistently and extensively documented.[178] Despite these risks, the Australian Government continues to deny refugees and people seeking asylum, in both onshore and offshore settings, access to health care and other vital services at a standard proportionate to their needs. The systematic neglect of persons living with disability, for example, is particularly pronounced in Australia's immigration detention system and has led to numerous abuses of human rights, occasioning significant physical and psychological harms including death.

Many detainees experience trauma prior to arriving in Australia. Upon arrival, they are subsequently exposed to long-term indefinite detention in sub-standard and confined conditions, with inadequate access to fresh food, clean water and social and health services, exposure to sexual, physical and psychological abuse and the onerous and lengthy process of establishing refugee claims.[179] These conditions can contribute to poorer health outcomes in general, exacerbate existing health conditions and trigger certain psychosocial disabilities, particularly in children who are likely to experience ongoing symptoms of post-traumatic stress disorder ('PTSD') well into adulthood.[180] In 2016, UNHCR medical experts found that among refugees forcibly transferred to PNG and Nauru the cumulative rates of depression, anxiety and PTSD were at over 80 per cent in both locations - the highest rate recorded in the medical literature to date.[181]

In March 2019, following the successful 'kids off Nauru' campaign,[182] the passing of the Medevac Bill[183] allowed for the temporary transfer of patients in offshore detention to Australia for urgent medical or psychiatric assessment or treatment under section 198C of the Migration Act.[184] Temporary transfers could be granted with a recommendation from two doctors to the Federal Health Minister who was required to provide respond within 72 hours.[185] Following its repeal in December 2019,[186] refugees and people seeking asylum were left to languish in offshore detention facilities and once again rely on sections of the Migration Act and the discretion of the Minister for urgent medical assessment and treatment.[187]

Where people have been placed in immigration detention, their options to access medical treatment are severely curtailed. Where detention is offshore, the risks are even greater. People held in immigration detention have not been accused of any crime, but they continue to be treated as criminals and put in circumstances where it is impossible for them to protect their and their families own physical and mental health and wellbeing. In these situations, it is incumbent on governments to ensure that safe and adequate health care is made available. However, all too often and in the face of expert evidence of urgent need, the Australian Government has refused to provide the recommended treatment, resulting in children and adults suffering serious immediate and long-term harms and, at times, death.

Conditions in Australia's onshore immigration detention facilities

People in immigration detention are interminably subjected to the inhumanity and arbitrariness of Australia's detention system – both in individual cases, and at a systemic level in the policies, practices and underlying culture of immigration detention facilities. Key concerns include a lack of access to adequate health care and legal representation, the use of restraints, limits on contact with family and other support networks, lack of access to meaningful activities, frequent transfers between detention facilities (with no or limited prior warning or notice), lack of access to adequate and nutritious food, frequent and improper body searches, and unreasonable and disproportionate restrictions on and confiscation of personal items (such as fresh fruit, speakers and hooded clothing).[188]

People in detention undergo a risk assessment process and are assigned a risk rating. Risk ratings are the primary factor considered by the ABF when determining an individual's placement as well as the level of restrictions to which they are subjected. In many cases, the outcome is not communicated to the individual being detained.[189]

The Australian Human Rights Commission has concluded that current risk management practices 'can limit the enjoyment of human rights, in a manner that is not necessary, reasonable and proportionate'.[190] It has expressed concern about a number of issues related to risk management, including: inaccurate risk assessments; a lack of sufficient nuance in the risk rating system; routine use of restraints during escort; the impacts of 'controlled movement' policies; the highly restrictive and prison-like conditions of high security compounds; and blanket restrictions on excursions, personal items and external visits.[191]

Inaccurate assessments are particularly harmful for people with pre-existing trauma linked to past detention. People with pre-existing trauma may be triggered and have their mental health conditions exacerbated by transfers to highly secure, isolated and prison-like facilities or compounds. These compounds frequently co-locate people seeking asylum, refugees and other non-citizens detained for non-criminal reasons (or for minor criminal infractions), together with non-citizens with serious criminal histories, including violent criminal offence convictions.[192]

Australia's duty of care obligations for people in offshore immigration detention

Australia's duty of care obligations, under both international law and Australian law, do not cease with the physical transfer of people seeking asylum outside of Australian territory. Despite this fact, the Australia Government has argued, and continues to argue, that it does not exercise effective control over people taken to PNG and Nauru for processing and detention.

The UN Human Rights Committee, however, has contested this argument, finding that 'the significant levels of control and influence exercised by the State party over the operation of the offshore regional processing centres, including over their establishment, funding and service provided therein, amount to such effective control'.[193] Similar concerns have also been raised by various bodies of the UN regarding Australia's transfer agreements with PNG and Nauru since 2012.[194]

Case study: 'Manus Island riots'

The Manus Island riots demonstrates the risks associated with inadequate planning and funding prior to the relocation of people seeking asylum to offshore immigration detention centres. More than 70 refugees and people seeking asylum were injured during two days of unrest and rioting in February 2014.

The detention centre had been built to house 500 people. In the six months leading up to these events, tensions began escalating as the number of detainees increased tenfold, from 130 in July 2013 to 1,340 in February 2014, due to delays in processing claims.

Dozens of detainees were injured during the riots. One detainee, Reza Barati, a 24-year-old Iranian was brutally murdered by two detention centre workers contracted by the Australian Government. A Senate Inquiry found the escalating tensions and violence were 'eminently foreseeable' and that the Australian Government's delay in processing refugee applications was to blame.[195]

Two years after the Manus Island riots, in April 2016, PNG's Supreme Court ruled that the detention of refugees and people seeking asylum at the Manus Island detention centre was unconstitutional.[196] The centre was subsequently closed, and detainees, despite receiving threats of violence from the local community, were forced against their will into the community.[197] In June 2017, the Australian government and its contractors settled a class action, *Kamasaee v Commonwealth of Australia & Ors*[198] paying out 70 million dollars in compensation, plus 20 million in legal fees, to detainees for false imprisonment in dangerous and damaging conditions at the Manus Island detention centre.[199] At the time, this was the largest human rights settlement in Australian legal history.[200] In addition to compensation claims, offshore processing is inordinately expensive and costs the Australian Government more than one billion dollars each year.[201]

There are inherent risks involved with relying on foreign sovereign States to resolve domestic obligations. By outsourcing its international obligations, Australia has demonstrated that as a nation, we are incapable of ensuring that basic Australian standards are complied with.

Conditions in offshore detention

Medical experts working with UNHCR on Nauru and Manus Island found the rates of mental illness to be among the highest recorded in any surveyed population.[202] *Médecins Sans Frontières* ('MSF') similarly reported that suffering on Nauru was some of the worst it had ever encountered, including in victims of torture.[203] According to MSF's report, one-third of their refugee and asylum seeker patients had attempted suicide, while 12 patients were diagnosed with the rare psychiatric condition of 'resignation syndrome', a 'rare psychiatric condition where patients enter a comatose state and require medical care to keep them alive'.[204] The UN Special Rapporteur on the Human Rights of Migrants observed in 2017 that mental health issues were 'rife' in Nauru, where 'many refugees and asylum seekers [we]re on a constant diet of sleeping tablets and antidepressants'.[205] As the UN High Commissioner for Refugees, Filippo Grandi, observed: 'there is a fundamental contradiction in saving people at sea, only to mistreat and neglect them on land'.[206]

These problems have been apparent for many years. The Nauru Files – 2,116 leaked incident reports from offshore detention in Nauru between May 2013 and October 2015 – document the harm involved with processing people offshore. The following statistics have been extracted from the incident reports:

- 1,086 incidents with 51.3% involving children;
- 7 reports of sexual assault of children;
- 59 reports of assault on children;
- 30 incidents of self-harm involving children;
- 159 reports of threatened self-harm involving children;
- 335 reports of threatened self-harm; and
- 185 reports of abusive/aggressive behaviour.[207]

Had incidents of this nature arisen in Australia, the Australian legal and support system would ensure that perpetrators were investigated and where appropriate prosecuted, and survivors of abuse would be offered appropriate support. While Australia sought to assist Nauru in terms of capacity building for police and by providing contractors to offer support, ultimately Australia was unable to ensure that basic Australian standards were complied with. This has had ramifications for Australia's ability to comply with its own international obligations, as recognised by the Committee on the Elimination of Discrimination against Women.[208]

The Australian government and contractors have paid substantial out-of-court settlements to injured detainees,[209] workers and service providers as a result of events occurring in offshore detention. For example, Wilson Security who were contracted by the Australian government to manage and operate security in offshore detention, reached an out-of-court settlement for a matter involving a young female who alleged she was raped by a Wilson Security employee.[210] While it is vital that reparations be paid to individuals harmed by the Government, they are often, if not always, settled with confidentiality deeds attached. Consequently, these cases do not evolve through the establishment of legal precedents and the true nature of Australia's failures, and the human-costs are not fully understood.

Deaths in offshore detention

Since the reintroduction of offshore processing in 2012, eighteen people have died offshore (or in Australia, following medical evacuation). Of these, at least six are reported to have died by suicide, at least one was murdered, and at least two died after access to appropriate medical treatment was delayed or denied by the Australia Government.[211] In at least one case, an Australia Coroner found that the death was 'preventable', and that the deceased would have survived had he been promptly evacuated to Australia for medical treatment.[212]

Case studies: Deaths in offshore detention

Omid Masoumali was a 23-year-old Iranian refugee who self-immolated while being detained in Nauru. It took 30 hours for him to be medically evacuated to Australia, where he ultimately died. The coronial inquest into Mr Masoumali's death heard that he would have had a higher chance of survival if he were treated at a major Australian hospital in a 'timely fashion'.[213] The tragic death of Mr Masoumali did not occur in isolation. It occurred in a context of widely known cases of health care failure, neglect and/or delayed interventions such as medical evacuation to Australian hospitals.

Similarly, Hamid Khazaei, a 24-year-old Iranian refugee held on Manus Island, died from septicaemia caused by an infected lesion on his leg. An inquest into his death found that Mr Khazaei's death was 'preventable' and that the he would have survived had he been promptly evacuated to Australia for treatment.[214] It found that Mr Khazaei's death resulted from 'a series of clinical errors, compounded by failures in communication that led to poor handovers and significant delays in his retrieval from Manus Island'.[215] Evidence given at the Inquest has confirmed that the government's political manoeuvring can be fatal.

The Australian Government consistently delays necessary medical treatment, often until it is too late. These cases demonstrate the inherent risk in creating systems that rely on contractors, foreign medical systems, bureaucratic decision making and political considerations responding to foreseeable health emergencies. Relying on a separate sovereign country for a solution to a domestic policy issue involves inherent and significant risk with a human toll.

Human Rights Framework

Australia's obligations under international law

The right to seek asylum

The right to seek asylum is a well-founded principle enshrined in international law.

The right to seek asylum is specifically protected under article 14(1) of the *Universal Declaration of Human Rights* ('UDHR'),[216] which affirms that 'everyone has the right to seek and to enjoy in other countries asylum from persecution'[XXVIII,217] and the Refugee Convention which affirms the right of asylum without distinction or discrimination on account of a person's race, religion, country of origin,[218] or mode of arrival.[219]

The rights to liberty and freedom from arbitrary detention

Under international law, detention is only lawful if it is reasonable, necessary and proportionate in all the circumstances, and can be periodically reviewed.

The ICCPR sets out the general prohibition on arbitrary arrest and detention in article 9(1)[220] and provides additional safeguards to ensure people deprived of their liberty are treated with humanity and dignity in article 10.[221]

The Human Rights Committee makes it clear that the term 'arbitrary' in article 9(1) of the ICCPR is not only to be equated with detention which is 'against the law' but is to be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.[222]

Restrictions on State conduct in relation to arbitrary detention are of particular importance when considered alongside children's rights. Arbitrary detention breaches article 37(b) of the CRC which provides

[XXVIII] The UDHR was adopted by the United Nations (UN) General Assembly in 1948, with Australia voting in favour

that 'no child shall be deprived of his or her liberty unlawfully or arbitrarily' and where applied detention must be lawful and 'used only as a measure of last resort and for the shortest appropriate period of time'.[223]

There has been extensive international commentary and reporting on arbitrary detention, including the Working Group on Arbitrary Detention which expands the concept by asserting that:

> *The prohibition of arbitrary detention is absolute, meaning that it is a non-derogable norm of customary international law, or jus cogens. Arbitrary detention can never be justified, including for any reason related to national emergency, maintaining public security or the large movements of immigrants or asylum seekers. This extends both to the territorial jurisdiction and effective control of a State.*[224]

Mandatory and indefinite detention

Mandatory detention falls within the definition of arbitrary as individuals are detained on an automatic and indiscriminate basis, without any individual assessment of whether detention is necessary or proportionate.

Article 31 of the Refugee Convention imposes an obligation on States not to penalise refugees and people seeking asylum for 'illegal entry or presence'. Mandatory detention may constitute a penalty for irregular entry on the basis that detention is not justified in the circumstances of each individual detained and is directed at refugees and people seeking asylum who arrive without a visa.

Immigration detention of an indefinite nature is expressly denounced within commentary from human rights bodies. The UN Human Rights Committee in their report on article 9 of the ICCPR provides that: 'State parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases'.[225] A report of the Working Group on Arbitrary Detention also provides specific guarantees concerning length of detention, stating that: 'A maximum period should be set by law and the custody may in no case be unlimited or of excessive length'.[226]

These limits on State conduct are further reinforced by François Crépeau, in his Report of the Special Rapporteur on the human rights of migrants:

> *Ensuring that the law sets a limit on the maximum length of detention pending deportation and that under no circumstance is detention indefinite. There should be automatic, regular and judicial review of detention in each individual case. Administrative detention should end when a deportation order cannot be executed.*[227]

The Committee against Torture has repeatedly raised concerns regarding the mandatory and protracted periods of detention for irregular arrivals, including children, until they are either granted a temporary visa or removed from Australia. It has also raised concerns regarding Australia's practice of indefinitely detaining stateless persons whose asylum claims have not been accepted and refugees with an adverse security or character assessment in contravention of articles 2, 11 and 16 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT').[228]

Offshore Processing

Offshore processing of refugee claims violates the principle of non-penalisation for irregular arrival. Article 31(1) of the Refugee Convention provides that 'Contracting States shall not impose penalties, on account of their irregular entry or unauthorised presence'.[229] Further, the Special Rapporteur on the human rights of migrants has affirmed that 'irregular migration should not be criminalized and migrants, especially children, should not be detained in penitentiaries or facilities for criminal detention'.[230]

Article 3(1) of the CRC affords safeguards to children in offshore detention and provides that States must ensure the child's best interest is a primary consideration 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'.[231]

The Committee against Torture has repeatedly raised concerns regarding Australia's policy of transferring and detaining people in third country detention centres despite the harsh conditions prevalent in those centres, including mandatory detention, overcrowding, inadequate health care, and allegations of sexual abuse and mistreatment. The Committee against Torture has also raised concerns regarding the Australian Government's refusal to take responsibility for events taking place in PNG and Nauru and has reaffirmed that under articles 2, 3 and 16 of the CAT 'all persons who are under the effective control of the State party, because inter alia they were transferred by the State party to centres run with its financial aid and with the involvement of private contractors of its choice, enjoy the same protection from torture and ill-treatment under the [CAT]'.[232]

Interdictions at sea

While articles 31(1) and 33(1) of the Refugee Convention intrinsically relate to the principle of non-penalisation and non-refoulement on account of a person's mode of arrival, the practice of interdictions at sea and the turning back of boats remains highly contested, specifically whether article 33 of the Refugee Convention applies outside a State's territory.[233]

The Human Rights Committee has found that Australia's interdiction policies and practices are unlikely to afford people seeking asylum full protection against non-refoulement.[234] All people seeking asylum, regardless of their mode of arrival, should have access to fair and efficient refugee status determination procedures and non-refoulement determinations. Despite these protections, Australia's maritime operations fail to provide people seeking asylum adequate screening provisions, access to legal representation or appropriate mechanisms to legally challenge decisions and may constitute a violation of Australia's *non-refoulement* obligations found in articles 6 and 7 if the ICCPR and article 33(1) of the Refugee Convention and article 3 of the CAT.[235]

The Committee against Torture has also raised concerns regarding Australia's policies and practices in relation to irregular arrivals, in particular the intercepting and turning back of boats, without due consideration of its obligations under article 3 of the CAT. The Committee has argued that the legislation effectively reduces a number of existing statutory standards against refoulement. In particular, the Legacy Caseload Bill 2014, which, inter alia, establishes that 'an officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 [of the Migration Act 1958] arises irrespective of

whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen', in violation of articles 2 and 3 of the CAT.[236]

The right to freedom from torture, cruel, inhuman and degrading treatment

Conditions of detention must be humane and dignified and no person seeking asylum should be subjected to torture, cruel, inhuman and degrading treatment.

The UDHR positions freedom from torture as a primary human right, owed to all, including refugees and people seeking asylum. Article 5 of the UDHR states that: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'

Article 7 of the ICCPR affirms that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.[237] This right is further protected in the OPCAT[238] whereby State parties agree to meet international standards which aim to prevent cruel, inhuman and degrading treatment or punishment within closed environments.[239] The OPCAT also requires that State parties establish a system of regular visits, to be undertaken by independent international and national bodies, to all places of detention.[240]

Article 16(1) of the CAT places a burden on States to prevent torture within their jurisdictions whereby 'each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.[241]

Principle 1 of the UN General Assembly's *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* positions the prohibition of torture in the circumstances of detention by which 'all persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person'.[242]

Children have a specific express right to freedom from torture contained in article 37(a) of the CRC which makes it clear that State parties are responsible for ensuring that 'No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment'.[243]

The right to the highest attainable standard of physical and mental health, and the responsibility of governments to ensure access to adequate and appropriate medical care for their people, is also enshrined in international law. Article 12(1) of the ICESCR provides the most comprehensive article on the right to health in international human rights law, which recognises 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.[244] The Committee on Economic, Social and Cultural Rights ('CESCR Committee') has also made it clear that: 'the right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, [and] the prohibition against torture'.[245]

Article 25(1) of the UDHR also affirms that "[e]veryone has the right to a standard of living adequate for the health and well-being of [themselves and their] family, including food, clothing, housing and medical

care… and disability".[246] This right is absolute and does not invoke limitations on the basis of a person's legal status.[XXIX]

Other international guidelines and principles

The *UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status*[247] and *Detention Guidelines*[248] address the legal standards and norms applicable to the assessment of asylum claims and the use of detention to ensure that State concerns regarding irregular arrivals do not serve to undermine the fundamental principles upon which the regime of international protection is based.

The *United Nations 2030 Agenda for Sustainable Development* includes 17 Sustainable Development Goals ('**SDG**') for the realisation of human rights for all, including economic, social and environmental rights.[249] These include specific rights to equitable health care (SDG 3),[XXX] education (SDG 4)[XXXI] and employment (SDG 8)[XXXII] as well as an overarching agenda that recognises the importance of international co-operation to ensure 'safe, orderly and regular migration involving full respect for human rights and the humane treatment of migrants regardless of migration status, of refugees and of displaced persons'.[250]

Obligations under Australian law

Australia has agreed to be bound by a series of international human rights treaties, optional protocols and reporting and communications obligations,[251] which set out in clear terms Australia's international human rights obligations. Under international law, Australia is bound to comply with their provisions and to implement them domestically.[XXXIII, 252] However, they do not form part of Australia's domestic law unless the treaties have been specifically incorporated into Australian law through legislation.[253]

Australia is a party to all the aforementioned treaties.[XXXIV] Several of these rights have made it into domestic law at the Federal level, including the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Australian Human Rights Commission Act 1986* (Cth), the *Disability Discrimination Act 1992* (Cth), the *Age Discrimination Act 2004* (Cth), and at state and territory levels, including the *Human Rights Act*

[XXIX] For more information on the right to health, please see the National Justice Project Position Statement on Health Justice.

[XXX] SDG 3 aims to 'Ensure healthy lives and promote well-being for all at all ages'.

[XXXI] SDG 4 aims to 'Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all'.

[XXXII] SDG 8 aims to 'Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all'.

[XXXIII] Section 51(xxix) of the Australian Constitution, the 'external affairs' power, gives the Commonwealth Parliament the power to enact legislation that implements the terms of those international agreements to which Australia is a party.

[XXXIV] In addition to the aforementioned treaties, Australia is also a party to the *Convention on the Elimination of All Forms of Discrimination against Women* and the *Convention on the Rights of Persons with Disabilities*.

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2004 (ACT), *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2019* (Qld). The principles can also be found in common law.

Significantly, Australian does not have a Bill of Rights in our Constitution. In the absence of Constitutional protections, the safeguards against human right violations provided in domestic legislation remain susceptible to override by the legislature and the courts continue to be denied power to deprive legal validity to legislation that contravene their terms.

While Constitutional, international and administrative law has achieved limited success in creating legal and social justice outcomes, tort law remains one of the few courses of action for those impacted by human rights violations to obtain effective remedy and to hold the Government accountable for the torture and trauma they are inflicting by way of their polies and practices.

International treaties to which Australia is not a party

It is also worth noting that Australia has failed to ratify four of 18 international human rights treaties[254], all four of which are key instruments relating to the rights of refugees and people seeking asylum. These are:

- The *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* which allows individuals or groups of people to complain to the UN when their rights under the ICESCR are violated;[255]
- The *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* which recognises the right of appeal to an international mechanism specific to children when national mechanisms fail to address violations effectively;[256]
- The *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* which has implications for the rights to liberty and freedom from arbitrary detention and labour laws;[257] and
- The *International Convention for the Protection of all Persons from Enforced Disappearance* which prohibits States from expelling, returning, surrendering or extraditing a person to another 'where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance'.[258]

CONCLUDING COMMENTS

The use of indefinite detention and offshore processing as a punitive tool, to deter people from seeking protection and to criminalise the asylum-seeking process, is in direct violation of Australian and international laws. Further, the Australian Government is not fulfilling its common law duty of care to people in immigration detention, many of whom have already experienced high levels of trauma prior to arriving in Australia. The cruel treatment and punishment of refugees and people seeking asylum by the Government causes irreversible psychological and physical harm. Despite these facts, successive governments have repeatedly failed to end indefinite immigration detention and offshore processing.

At the National Justice Project, we continue to fight for justice alongside our clients who have been subjected to and harmed by Australia's draconian immigration and asylum policies. We continue to work

tirelessly to hold Governments to account and represent families who have been subjected to inhumane conditions in Australia's offshore and onshore processing regimes.

Australia has a long and continuing history of failing to meet its duty of care obligations towards refugees and people seeking asylum and this lack of accountability and reform is at the heart of the problem. Continued advocacy is needed to ensure genuine and lasting political commitment to implement the priorities and recommendations made in this Position Statement calling for a humanitarian and compassionate response to the asylum-seeking process.

ADDITIONAL RESOURCES

- Igniting Change interview - George Newhouse with Kon Karapanagiotidis (ASRC) (2022).
- Submission to the United Kingdom Parliamentary Committee scrutinising the Nationality and Borders Bill (2021).
- Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability Submission on laws, policies and practice affecting migrants, refugees and citizens from culturally and linguistically diverse backgrounds (2021).
- Law Hack 2021: Disability Justice Final Report (2021).
- Law Hack 2021: Disability Justice Kick-Off Event (2021).
- Law Hack 2021: Disability Justice Pitch Event (2021).
- Submission to the Australian Law Reform Commission: Judicial Impartiality Inquiry (2021).
- Health Inquiry into Health Outcomes and Access to Health and Hospital Services in rural, regional, and remote New South Wales (2021).
- Submission to NSW Select Committee's Inquiry into the Coronial Jurisdiction in New South Wales (2021).
- Submission to the NSW Law Reform Commission - Open Justice Review (2021).
- Submission to the Queensland Parliament Community Support and Services Committee - Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 (2021).
- Submission to the Australian Human Rights Commission National Anti-Racism Framework (2022).*

* Publication pending.

ENDNOTES

[1] For further information about the NJP's work in this area, please see: 'Over 300 organisations, businesses and community groups call on all parliamentarians to respond to the crisis in Afghanistan' *National Justice Project* (Web Page, 24 August 2021) <https://justice.org.au/over-300-organisations-businesses-and-community-groups-call-on-all-parliamentarians-to-respond-to-the-crisis-in-afghanistan/>.

[2] See, for example: *Plaintiff S99/2016 v Minister for Immigration and Border Protection* (2016) FCA 483*; FRX17 as Litigation Representative for FRM17 v Minister for Immigration and Border Protection* (2018) FCA 63*; AYX18 v Minister for Home Affairs* (2018) FCA 283*; BAF18 as Litigation Representative for BAG18 v Minister for Home Affairs* (2018) FCA 1060*; DJA18 as litigation representative for DIZ18 v Minister for Home Affairs* (2018) FCA 1050*; DWE18 as litigation representative for DWD18 v Minister for Home Affairs* (2018) FCA 1121*; FLH18 v Minister for Home Affairs* (2018) FCAFC 188.

[3] For further information about the NJP's work in this area, please see: Case File: Medevac of DWD18 from Nauru to secure urgent medical care; Case File: Securing Urgent Medical Care for DCQ18; Case File: Evacuating EWR18 from Nauru to receive urgent medical care; Case File: Securing Medical Evacuation for FRX17**;** Case Summary: Banning Mobile Phones in Immigration Detention Centres.

[4] For further information about the NJP's work in this area, please see: National Justice Project urges UK lawmakers to resist offshore processing of refugees.

[5] For further information about the NJP's work in this area, please see: After eight years of anguish, new podcast scrutinises offshore detention regime; Inhumane conditions on Christmas Island provoke unrest: George Newhouse; BREAKING: #DuttonDefeated in High Court by Refugees; Advocates Secure Senate Support for Phone Life-Line in Detention; The NJP releases investigative journal: 'Refugees, Asylum Seekers, and COVID-19'; Peter Dutton narrowly avoids potential arrest and prison time via 11th hour decision on protection visa; Judge Says Peter Dutton Could Go To Jail If He Defies Orders in Immigration Case; A looming threat: Covid-19 in immigration detention; The National Justice Project's Refugee and Asylum Seeker work featured in legal journal "Court of Conscience"; Peter Dutton Wastes Tax Payer Money on Spiteful Appeal to High Court; George Newhouse speaks on Manus asylum seekers treated at local hospital despite million dollar health contract; Inquest begins into Shocking Death of Asylum Seeker; ABF Targets Saudi Women Seeking Asylum; All Kids Off Nauru; NJP Launches Class Actions for Detainees on Manus Is & Nauru; These Two Podcasts about the work of the NJP are worth listening to; Human Rights groups call for kids to be removed from Nauru; The National Justice Project team brief Thomas Albrecht from the UNHCR on #kidsoffNauru; George Newhouse discusses Kids off Nauru on ABC News 24; Our CEO speaks out at the Kids off Nauru rally in Sydney; Blocked transfer of a critically ill woman from Nauru is 'extremely concerning'; President Waqa's comments highlight need to get #KidsOffNauru; Why Australia has a duty of care to asylum seekers on Manus and Nauru; 'Crisis point': New York Times reports on children's mental health on Nauru; NJP Court Action ensures that a Sick Child is brought to Australia for Medical Care; NJP Legal Team Secures Medical Transfer for another sick child on Nauru; Asylum Seekers to keep Mobile Phones in Detention thanks to the National Justice Project; Our Principal Solicitor discusses Australia's Duty of Care to Asylum Seekers on Manus and Nauru; Federal Court rules asylum seekers can keep mobile phones in detention; The National Justice Project Calls for a Royal Commission after another refugee death; The National Justice Project is assisting detainees to secure their urgent medical needs; Medical Care Abysmal on Nauru.

[6] See: Asher Hirsch, Daniel Ghezelbash, Keyvan Dorostkar and Shannon Walsh, *Refugee Council of Australia submission to the Legal and Constitutional Affairs References Committee on the performance and integrity of Australia's administrative review system* (online, 7 May 2022) <https://www.refugeecouncil.org.au/performance-and-integrity-of-the-aat/>.

[7] For further information, please see: The Australia OPCAT Network, *Submission to The Subcommittee on Prevention of Torture and other Cruel, Inhumane or Degrading Treatment or Punishment and The United Nations Working Group on Arbitrary Detention* (January 2020)

<https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Implementation_of_OPCAT_in_Australia.pdf>.

[8] Australian Border Force, *Immigration Detention in Australia* (Web Page, no date) <https://www.abf.gov.au/about-us/what-we-do/border-protection/immigration-detention/detention-facilities>.

[9] 'Australia's detention policies', *Refugee Council of Australia*, (Web Page, 20 May 2020) <https://www.refugeecouncil.org.au/detention-policies/>.

[10] For example, please see: Ariane Rummery, 'Tampa Boys rescued by Norwegian freighter become New Zealand citizens', *UNHCR The UN Refugee Agency* (Web Page, 8 April 2005) <https://www.unhcr.org/en-au/news/latest/2005/4/42565b6d4/tampa-boys-rescued-norwegian-freighter-become-new-zealand-citizens.html>; Annika Flensburg, 'From refugee to pioneering surgeon: Munjed Al Muderis', *Amnesty International Australia* (Web Page, no date) <https://www.amnesty.org.au/from-refugee-to-pioneering-surgeon-munjed-al-muderis/>; 'Refugee Stories', *Refugee Council of Australia* (Web Page) <https://www.refugeecouncil.org.au/stories/>; 'Stories', *Asylum Seeker Resource Centre* (Web Page) <https://asrc.org.au/stories/>.

[11] Mark Metherell, 'I should not play God: Evans', *The Sydney Morning Herald* (online, 20 February 2008) <https://www.smh.com.au/national/i-should-not-play-god-evans-20080220-gds1tt.html>.

[12] Paul R Bartrop, The Evian Conference of 1938 and the Jewish Refugee (Palgrave Macmillan 2018) 72.

[13] Australian Government Department of Home Affairs, *About Us* (Web Page, 1 July 2019) <https://www.homeaffairs.gov.au/about-us/who-we-are/our-history>.

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