



Submission to the Expert Panel on Asylum Seekers

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About the Human Rights Law Centre

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1. Introduction

1.1 Background

1. On 28 June 2012 the Prime Minister and the Minister for Immigration and Citizenship announced the establishment of an Expert Panel on Asylum Seekers to inquire into ‘the best way forward for Australia to prevent asylum seekers risking their lives on dangerous boat journeys to Australia’. The panel has been asked to consider Australia’s international obligations, among other things.
2. The Human Rights Law Centre (HRLC) is concerned that several policies proposed by the Government and the Coalition, such as proposals to transfer asylum seekers to third countries, including Malaysia and Nauru, breach Australia’s international human rights obligations.
3. The HRLC’s human-rights-based analysis of policies directed at deterring boat arrivals recognises that:
 - (a) asylum seekers do not want to make the dangerous boat journey to Australia. People get on boats as a last resort. Any attempt to eliminate the possibility of refugee protection in Australia that does not offer a better alternative forces asylum seekers to pursue more risky, life-threatening options; and
 - (b) there are 10.4 million refugees in the world.¹ The vast majority stay in their region of origin and are hosted by developing nations. However, some will try to make their way to Australia. This is not a crisis or a threat. As a wealthy, secure country with a history of good international citizenship, we have an ethical and legal obligation to treat these people humanely.
4. The HRLC considers that these two considerations should be central to the Expert Panel’s enquiry.

1.2 Scope of this submission

5. This submission examines Australia’s obligations under international law concerning:
 - (a) unauthorised arrival of asylum seekers;
 - (b) non-refoulement;
 - (c) the use, conditions, length and reviewability of detention; and

¹ UNHCR, *A Year of Crises: UNHCR Global Trends 2011*, 18 June 2012 at <http://www.unhcr.org/4fd6f87f9.html> (viewed 12 July 2012).

(d) particular rights pertaining to children.

6. This submission focuses on Australia's obligations under the human rights treaties to which it is a party. Obligations under the Convention Relating to the Status of Refugees (**Refugee Convention**)² are considered in detail in the submission made by Australian refugee law academics on 11 July 2012.

1.3 Recommendations

Recommendation 1:

To minimise the number of people who make the boat journey to Australia in a way that does not violate international human rights law, Australia should increase its humanitarian intake and provide additional resources for UNHCR to process and resettle asylum seekers in the region.

Recommendation 2:

To ensure compliance with its international law obligations, Australia should not transfer asylum seekers to third countries that have not ratified the Refugee Convention or that do not have adequate procedures in place for determining eligibility for refugee status, or where they are otherwise at risk of being subject to significant violations of their human rights.

Recommendation 3:

To ensure compliance with its international law obligations, Australia should avoid policies involving the detention of child asylum seekers or their transfer to third countries.

2. Non-refoulement

2.1 International law

7. Australia has an obligation not to return a person to a territory where they would face a serious violation of their human rights.³ Non-refoulement obligations are contained in or arise from the:

² *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) and the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

³ In this context a serious violation of rights includes a violation of the prohibition on torture or cruel, inhuman or degrading treatment or punishment, a breach of the right to life, or a flagrant denial of justice.

- (a) Refugee Convention;
 - (b) International Covenant on Civil and Political Rights (**ICCPR**);⁴
 - (c) the Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty (**Optional Protocol on the Abolition of the Death Penalty**);⁵
 - (d) the Convention on the Rights of the Child (**CRC**);⁶ and
 - (e) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**)⁷.
8. The non-refoulement obligation extends to all people under Australia's jurisdiction or control, including those outside Australian territory.⁸
9. Further, the obligation extends to both direct and indirect refoulement.⁹ For example, Australia will violate its non-refoulement obligation by returning an Afghan refugee to:
- (a) Afghanistan (direct refoulement);
 - (b) a third country where they would face a serious violation of their human rights (also direct refoulement); and
 - (c) a third country where they are at risk of subsequently being returned to Afghanistan (indirect refoulement).
- 2.2 Application to Australian law and policy
10. In order to comply with international law, the Australian Government must not transfer an asylum seeker to a third country unless it can ensure that the asylum seeker:
- (a) does not risk being exposed to a serious violation of human rights in that country; and
 - (b) does not risk being returned to another country where they would be exposed to a serious human rights violation.

⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 172 (entered into force 23 March 1976).

⁵ *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, opened for signature 15 December 1989, 29 ILM 1464 (entered into force 11 July 1991).

⁶ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 3 (entered into force 2 September 1990).

⁷ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

⁸ See, for example, Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (2007), 244-53.

⁹ UNHCR, *Advisory Opinion on the Extraterritorial Application of the Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*.

11. Whether or not these criteria are met in relation to a particular proposal will depend on the country that the asylum seekers are intended to be transferred to and the operational details of the transfer arrangement. The fact that the third country is a party to the Refugee Convention or a member of the Bali Process is not sufficient to fulfil the criteria.
12. In the HRLC's opinion, neither the 'Malaysia Solution'¹⁰ nor the proposal to send asylum seekers to Nauru complies with Australia's non-refoulement obligations.
13. The Malaysian Government's 'assurances' that refugees would not be refouled were not legally binding and were not sufficient to meet Australia's non-refoulement obligations.
14. Proposals under which Australia sends asylum seekers to Nauru and maintains control over their refugee status determination, but does not guarantee resettlement in Australia, are also problematic. When such an arrangement was previously in place as part of the Howard Government's 'Pacific Solution', 70 percent of those detained were ultimately found to be refugees and, despite their protracted detention with a view to resettlement elsewhere, a majority of those (i.e. 60 percent) were eventually resettled in Australia.¹¹
15. If such a policy was re-introduced, refugees would face either return to their country of origin (in which case Australia would have indirectly refouled) or indefinite detention on Nauru while awaiting possible resettlement elsewhere, a possibility that may never materialise (in which case Australia has directly refouled and failed to comply with international law in respect of arbitrary detention, discussed below).

3. Detention

3.1 International law

16. Article 9(1) of the ICCPR provides that "no one shall be subjected to arbitrary detention". To avoid being arbitrary, detention must be reasonable, necessary and proportionate in all the circumstances.¹²
17. The UN has criticised Australia's policy of mandatory immigration detention on several occasions. Significantly, several expert UN human rights treaty bodies have called on the Government to abolish mandatory immigration detention on the basis that it is a violation of

¹⁰ For background to this policy see: Minister for Immigration and Citizenship, *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*, 25 July 2011. At http://www.minister.immi.gov.au/media/media-releases/_pdf/20110725-arrangement-malaysia-aust.pdf (viewed 12 July 2012.)

¹¹ Chris Bowen MP, *Last Refugees Leave Nauru*, 8 February 2008 at <http://www.minister.immi.gov.au/media/media-releases/2008/ce08014.htm> (viewed on 12 July 2012).

¹² Nowak, *CCPR Commentary (2nd revised edition)* (2005), p. 224.

international human rights law.¹³ These criticisms apply whether detention facilities are in Australia or in another country but still under the jurisdiction or control of the Australian Government.

3.2 Application to Australian law and policy

18. In order to comply with Australia's international human rights obligations, any proposal that involves the detention of asylum seekers must:

- (a) codify in law that asylum seekers are detained only where strictly necessary and as a last resort;¹⁴
- (b) codify in law that no children are held in immigration detention;¹⁵
- (c) codify in law that detainees have access to regular, periodic, judicial review of their detention;¹⁶
- (d) codify in law time limitations on immigration detention;¹⁷ and
- (e) ensure that all detainees have adequate access to legal counsel, interpreters, communication facilities, education, physical and mental health services and social, cultural and religious support networks.¹⁸

4. Children's rights

4.1 International law

19. Article 3 of the CRC provides that a child's best interests must be a primary consideration in all actions concerning them. The CRC also provides that Australia must only detain a child "as a

¹³ See eg, *Concluding Observations of the Human Rights Committee: Australia*, 95th sess, UN Doc CPPR/C/AUS/CO/5 (7 May 2010) [22]; *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, 42nd sess, UN Doc E/C.12/AUS/CO/4 (12 June 2009) [25]; CERD, above n 53 [24]. See also Human Rights Council, Universal Periodic Review of Australia, Recommendations 126, 127 and 131.

¹⁴ Article 9, ICCPR; *A v Australia*, HRC, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (3 April 1997); Manfred Nowak, *CCPR Commentary (2nd revised edition)* (2005), p. 224.

¹⁵ Articles 3 and 37(b), CRC.

¹⁶ Article 9(3), ICCPR; Human Rights Committee, *General Comment No 8: Right to liberty and security of persons (Art. 9)*, 30/06/82, [2].

¹⁷ Article 9, ICCPR.

¹⁸ Article 10, ICCPR; Human Rights Committee, *General Comment No 21: Humane Treatment of Persons Deprived of Liberty*, 10/04/1992.

measure of last resort and for the shortest appropriate time”¹⁹ and imposes strict limitations and conditions on the detention of minors.²⁰

4.2 Application to Australian law and policy

20. Child asylum seekers are particularly vulnerable members of an inherently vulnerable class, a status reflected in the special protections afforded to them under international law.
21. The Australian Human Rights Commission has detailed the serious risk of mental and developmental harm facing children in immigration detention.²¹ In the HRLC’s view, no policy exposing child asylum seekers to the risk of ongoing detention is capable of complying with Australia’s international law obligations.
22. Further, in order to comply with international law, the Australian Government must not transfer a child asylum seeker to a third country unless such decision is made after the comprehensive consideration of, and is compatible with, that child’s best interests. In the HRLC’s view, in the majority of cases, the forced transfer of a child asylum seeker to a third country will run counter to their best interests and, consequently, be in violation of international law.
23. This will be particularly so where the policy provides for transfers:
 - (a) in the absence of clear and enforceable arrangements for their guardianship and care;
 - (b) to a country to which the child has no ties; and
 - (c) to a country that is not a signatory to the Refugee Convention and with a poor record for the treatment of asylum seekers.²²
24. The HRLC therefore urges that Australia avoid any policy involving the detention or international transfer of child asylum seekers.

¹⁹ Article 37(b) of the CRC.

²⁰ UNICEF, *Protecting and realizing children’s rights*, 2 June 2011 at http://www.unicef.org/crc/index_protecting.html (viewed 20 January 2012).

²¹ Australian Human Rights Commission, *Immigration detention and Villawood: Summary of observations from visit to immigration detention facilities at Villawood*, 2011 at http://www.hreoc.gov.au/human_rights/immigration/idc2011_villawood.pdf (viewed 12 July 2012).

²² In respect of Malaysia, see Australian Human Rights Commission, ‘Inquiry into Australia’s agreement with Malaysia in relation to asylum seekers: Australian Human Rights Commission Submission to the Senate Standing Committees on Legal and Constitutional Affairs, 14 September 2011.

5. The ‘good faith’ obligation

5.1 International law

25. In addition to the rights set out above, Australia has several obligations under the Refugee Convention and international human rights treaties that may be relevant to policies directed at deterring asylum seekers from arriving in Australia by boat, depending on the content and operational details of those policies. For example, Australia must not:
- (a) impose penalties on refugees on account of their illegal entry or unauthorised presence in a contracting State (article 31 of the Refugee Convention);
 - (b) frustrate attempts by asylum seekers to leave any country, including their own (article 12(2) of the ICCPR); and
 - (c) discriminate against asylum seekers on the basis of their nationality (article 1 of CERD and article 26 of the ICCPR).²³
26. Australia is required under the Vienna Convention on the Law of Treaties to perform these obligations in good faith.²⁴ A State lacks good faith when it “seeks to avoid or divert the obligation which it has accepted, or to do indirectly what it is not permitted to do directly.”²⁵

5.2 Application to Australian law and policy

27. Attempts to deter and prevent asylum seekers from travelling to Australia by boat that do not also provide an alternative safe, expedient and durable protection pathway will violate Australia’s obligation to implement the Refugee Convention and various international human rights treaties in good faith.
28. For example, it may be a violation of the good faith obligation to intercept a boat carrying asylum seekers – whether directly or indirectly through cooperation with a third country such as Sri Lanka – and to then redirect it to a country that has not ratified the Refugee Convention or that does not have adequate procedures and protections under domestic law to ensure the non-refoulement of refugees.

²³ For various reasons it is more likely that asylum seekers originating from particular countries will arrive in Australia by boat and without valid visas (these reasons include delays in processing by regional UNHCR offices, geographic proximity coupled with low levels of ratification of the Refugee Convention within the region and large numbers of refugees in Indonesia awaiting relocation. Consequently, policies that disadvantage ‘unlawful’ arrivals have a discriminatory impact, not only against non-citizens, but also between non-citizens.

²⁴ *Vienna Convention on the Law of Treaties, 1969*, article 26.

²⁵ UNHCR’s submissions in *R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre* [2004] UKHL 55, [2005] 2 AC 1, available as UNHCR, “Written Case” (2005) 17 *International Journal of Refugee Law* 427, para 32.

29. Conversely, providing greater support to UNHCR-facilitated resettlement so as to dissuade asylum seekers from travelling to Australia by boat through promoting a safe alternative means of seeking protection would be consistent with Australia's obligations under the Refugee Convention.