



Australian
Human Rights
Commission

Expert Panel on Asylum Seekers

AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION

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1 Introduction

1. The Australian Human Rights Commission welcomed the opportunity to meet with the Expert Panel on Asylum Seekers on 12 July 2012. The Commission makes this brief submission further to that discussion.
2. On 28 June 2012, the Prime Minister, the Hon Julia Gillard MP announced the appointment of the Expert Panel to provide advice and recommendations to the Australian Government on policy options to prevent asylum seekers risking their lives on dangerous boat journeys to Australia.¹ The Expert Panel has had a range of meetings with government, non-government and parliamentary stakeholders, has called for submissions and will report to government prior to commencement of the Spring 2012 sitting period of the Australian Parliament.
3. The Commission is established by the *Australian Human Rights Commission Act 1986* (Cth) and is Australia's national human rights institution.
4. Over the last decade the Commission has undertaken extensive work in the area of Australian law, policy and practice relating to asylum seekers, refugees and immigration detention. This has involved conducting national inquiries,² examining proposed legislation,³ monitoring and reporting on immigration detention,⁴ and investigating complaints from individuals subject to Australia's immigration laws and policies.⁵ More specifically, the Commission's work in this area has included engagement regarding the risk of breaches to Australia's human rights obligations posed by successive Australian Governments' planned or effected third-country arrangements for the processing of asylum seekers' claims.⁶

2 Brief observations relating to Terms of Reference

5. The Commission does not seek to address the Expert Panel's terms of reference in full, but rather makes brief observations in relation to four of the points which the Expert Panel will consider in providing its advice to government. These are:
 - how to best prevent asylum seekers risking their lives by travelling to Australia by boat
 - relevant international obligations
 - the development of an inter-related set of proposals in support of asylum seeker issues, given Australia's right to maintain its borders
 - short, medium and long term approaches to assist in the development of an effective and sustainable approach to asylum seekers.

2.1 ***How best to prevent asylum seekers risking their lives by travelling to Australia by boat***

6. The Commission recognises the serious risk to lives and safety posed by asylum seekers undertaking hazardous sea journeys and strongly supports the adoption of any measures to avert further tragic loss of lives at sea that

are consistent with the Australian Government's human rights obligations and recognised international standards. In particular, the Commission encourages the Australian Government to collaborate closely with the Indonesian Government, and other relevant parties, to ensure that its rescue at sea capabilities are robust, and that the safety of all concerned is not jeopardised by the policies or instructions governing the actions of authorities who respond to boats carrying asylum seekers, including boats that have signalled that they are in distress.

7. In the view of the Commission, the best and most sustainable means of dissuading asylum seekers from risking their lives by endeavouring to reach Australia by boat is the creation of viable alternative pathways for people who are seeking protection to achieve lasting safety for themselves and their families. The Commission appreciates that this is a complex undertaking. It will require sensitive multilateral engagement, a long-term commitment, inter-related strategies and the cultivation of a vision and framework for sustainable regional refugee protection. It will also require the Australian Government to exercise leadership by modelling the humane and effective treatment of asylum seekers in conformity with its international obligations.

2.2 *Relevant international obligations*

8. The Commission holds serious concerns regarding the stated intention of both the Australian Government and the opposition to send asylum seekers who arrive in Australia by boat to third countries for processing of their claims. There is a high risk that such arrangements will result in breaches of Australia's human rights obligations.
9. The Commission has detailed its concerns regarding proposals for third country processing arrangements, as well as past practices including the 'Pacific Solution' and use of Temporary Protection Visas, in a number of reports, submissions and public statements.⁷ The analysis and observations contained in the following submissions may be helpful to the Expert Panel in considering this aspect of its terms of reference:
 - Australian Human Rights Commission, Submission to the Senate Standing Committees on Legal and Constitutional Affairs Inquiry into Australia's agreement with Malaysia in relation to asylum seekers (September 2011), at http://www.humanrights.gov.au/legal/submissions/2011/20110914_asylum_seekers.html
 - Australian Human Rights Commission, Inquiry into Australia's agreement with Malaysia in relation to asylum seekers: Australian Human Rights Commission's response to questions on notice (29 September 2011), at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/malaysia_agreement/submissions.htm
 - Submissions on behalf of the Australian Human Rights Commission (intervening), in *Plaintiff M106/2011 v Minister for Immigration and*

Citizenship, at http://www.hcourt.gov.au/assets/cases/m70-2011/M106-2011_HRC.pdf

- Australian Human Rights Commission, Submission to the Inquiry of the Senate Legal and Constitutional Legislation Committee on the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (May 2006), at <http://www.humanrights.gov.au/legal/submissions/migration20060522.html>

10. As detailed in a submission to the Inquiry into Australia's agreement with Malaysia in relation to asylum seekers, the Commission held serious concerns about the human rights implications of a number of aspects of that proposed bilateral arrangement. These included that:

- The detention of people awaiting transfer under the arrangement may have become arbitrary as the conditions of detention under which those who were held pending transfer may have been unnecessarily restrictive.⁸
- There appeared to be inadequate pre-transfer assessment processes in place under the arrangement to safeguard against breaches of fundamental human rights.⁹
- Transferring asylum seekers to Malaysia under the arrangement may have led to serious breaches of Australia's international human rights obligations, most significantly, to breaches of Australia's *non-refoulement* obligations (both direct and indirect),¹⁰ as well as those relating to non-discrimination¹¹ and family unity.¹²
- The safeguards included in the arrangement and operational guidelines were inadequate to ensure that the rights of people transferred to Malaysia with respect to liberty and humane treatment would be protected, and that they would receive appropriate services and support.¹³
- There was limited provision for independent oversight and monitoring of the arrangement.¹⁴
- The arrangement may have compromised Australia's obligation to ensure that children's best interests are a primary consideration in all actions concerning them.¹⁵

11. The Commission was particularly concerned about the fate of any unaccompanied children transferred to Malaysia under the arrangement. In its intervention in *Plaintiff M106/2011 v Minister for Immigration and Citizenship* in the High Court of Australia, the Commission argued that:

- domestic law requires an unaccompanied child's best interests to be taken into consideration in the decision as to whether to transfer the child under the arrangement
- the best interests of the child are an overriding limit on the exercise of the powers of a guardian, including those of the Minister as guardian of

unaccompanied children seeking asylum in Australia under s 6 of the *the Immigration (Guardianship of Children) Act 1946* (Cth) (IGOC Act)

- the Minister's power to remove unaccompanied children under s 198A of the *Migration Act 1958* (Cth) (Migration Act) must be read conformably with his duties as guardian under the IGOC Act
- in deciding whether to remove a child to a third country, the Minister must be guided by Australia's international obligation under the *Convention on the Rights of the Child* (CRC) to consider a child's best interests as of primary importance when making any decision regarding them.

12. The High Court decided that the Minister may not transfer an unaccompanied child to Malaysia under the Migration Act unless he gives his consent in writing under the IGOC Act for the child to be removed. The Minister's decision as to whether to grant consent is judicially reviewable.

13. In the Commission's view, even if transfer of unaccompanied children seeking asylum to a third country were lawful under Australian law, it would likely breach Australia's international human rights obligations. Owing to the particular vulnerabilities of unaccompanied children, article 20(1) of the CRC recognises that they are entitled to special protection and assistance provided by the State.

14. Unaccompanied children transferred under the arrangement may have experienced a breach of their fundamental rights, including those relating to *non-refoulement*, liberty, healthcare and education.¹⁶ Unaccompanied children transferred under the arrangement would have been sent to a country with a poor record for the treatment of asylum seekers and refugees, in the absence of clear, mandated arrangements for their guardianship, care and custody. The Commission would hold grave concerns for the fate of any unaccompanied child placed into such circumstances.

15. The Commission strongly recommends against a revival of the arrangement to transfer asylum seekers to Malaysia, in light of the High Court's judgment in *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 and Australia's binding international obligations.

16. As the Commission has previously argued, re-establishing third country processing in Nauru and Papua New Guinea may not be a humane, viable alternative to an arrangement with Malaysia. Both countries are parties to the Convention Relating to the Status of Refugees 1951 and Protocol Relating to the Status of Refugees 1967 (the Refugee Convention). However, Nauru has only been a party to the Convention as of June 2011 and has not had an opportunity to demonstrate the extent to which it can comply with the international obligations under the treaty.¹⁷ Papua New Guinea has posed numerous reservations to the Convention which specify that it does not intend to comply with many of the obligations that it contains.¹⁸ The Commission strongly recommends against a revival of former arrangements involving transfer of asylum seekers to third countries as occurred under the 'Pacific Solution'.

17. It has been the longstanding view of the Commission that all people who make claims for asylum in Australia should have those claims assessed on the mainland through the refugee status determination system that applies under the Migration Act and that the greatest possible use should be made of community arrangements for asylum seekers while their claims are being assessed. The Commission holds this view because such approaches ensure better compliance with Australia's international obligations. They are also more humane; may be cheaper; have been shown to yield high rates of compliance with immigration processes; and enable a readier transition into the Australian community for those who are found to be owed protection and a greater preparedness to return amongst those who are not.¹⁹

18. The Commission strongly welcomes the Government's recent expansion of the use of community arrangements for asylum seekers and refugees, rather than closed immigration detention, and return to a single statutory system for processing asylum seekers' claims (now including complementary protection provisions). The Commission looks forward to the consolidation of these initiatives and hopes that their benefits may resonate beyond the domestic setting.²⁰

2.3 *The development of an inter-related set of proposals in support of asylum seeker issues, given Australia's right to maintain its borders*

19. The Commission recognises the need for appropriate regional and international cooperation on issues relating to asylum seekers, refugees and the complex challenges associated with forced and mixed migration. The Commission also appreciates that associated initiatives must recognise the legitimate sovereign interests of Australian and other countries relating to security and border management, while safeguarding human rights and upholding Australia's international obligations.

20. As stated in our submission to the Inquiry into Australia's agreement with Malaysia in relation to asylum seekers, in the Commission's view, a sustainable regional protection framework based on international human rights standards should involve:

- addressing the root causes of flight
- encouraging greater understanding of protection issues across the region
- Australia modelling best practice in relation to asylum seekers and refugees in its domestic arrangements
- an expansion of Australia's offshore resettlement commitment.

21. The benefits of such a framework could include:

- enhanced understanding of, respect for and compliance with international human rights standards across the region

- enhanced safety and wellbeing of refugees and asylum seekers across the region, mitigating the likelihood of dangerous onward movement
 - more equitable distribution of the benefits and burdens associated with refugee protection and asylum seeker assistance across the region
 - facilitation of collaborative efforts to address primary causes of forced displacement and create opportunities for safe voluntary return.
22. The Commission recognises that potential exists to leverage strengthened protection for asylum seekers, refugees and other displaced persons through the Regional Cooperation Framework, endorsed in March 2011 through the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, which is co-chaired by Australia and Indonesia.²¹
23. While focussed upon border control and law enforcement initiatives, the non-binding Regional Cooperation Framework notably includes important principles and considerations aimed at protecting vulnerable people. It also recognises the need to tackle complex push factors, harmonise standards for the processing and treatment of asylum seekers, and achieve safe and lasting solutions for those both found and not found to be in need of international protection.²²
24. While the Regional Cooperation Framework affords significant opportunities to strengthen the respect, protection and promotion of the human rights of refugees, asylum seekers and other displaced persons across our region, its text also accommodates arrangements that may jeopardise the human rights and safety of these populations. The arrangement between the Australian and Malaysian Governments, which was announced as the first initiative to be developed under the auspices of the Regional Cooperation Framework,²³ was a case in point.
25. In keeping with Australia's international obligations, the respect for the human rights of asylum seekers, refugees and other affected persons, including those suspected of engagement in people smuggling activities, must be central to any bilateral or multilateral activities entered into by the Australian Government under the auspices of the Regional Cooperation Framework, or otherwise.
26. The Regional Cooperation Framework is an important prospective platform for strengthened regional refugee protection. Its newly established Regional Support Office, co-managed by Australia and Indonesia in consultation with the United Nations High Commissioner for Refugees and the International Organisation for Migration, may provide momentum for the development and coordination of research and strategic initiatives to strengthen the human rights protections afforded to displaced persons within the region.²⁴
27. As noted earlier, the Commission believes that the Australian Government should exercise leadership by modelling and promoting to its regional counterparts practices which are aligned with the international obligations Australia has agreed to respect. This might include initiatives to encourage and assist other governments to develop domestic infrastructure and standards related to the fair and timely processing of asylum seekers' claims

and the greatest possible use of community-based arrangements as opposed to closed immigration detention. It may also include initiatives to encourage more widespread accession to the Refugee Convention and other human rights instruments across the region.

28. The Australian Government should ensure that its regional engagement in no way contributes to undermining human rights. For instance, the Australian Government should not fund border control practices which obstruct the right to seek asylum.
29. Finally, the Commission welcomes recent indications that Australia may increase its resettlement commitment. Such a measure would build on Australia's established reputation as a world leader in this area, and would demonstrate a genuine commitment to responsibility sharing. Australia may also be in a position to encourage other resettlement countries to allocate a greater number of places to refugees in need of resettlement in the Asia-Pacific region.
30. Any increased regional resettlement commitment by Australia cannot be regarded as a substitute for meeting our protection obligations to asylum seekers. Nor should it diminish Australia's existing commitment to refugee resettlement from other regions of the world. Furthermore, increased resettlement from within the region would need to be introduced strategically. For instance, if there are viable prospects for resettlement to occur directly from a number of different countries in the region, this may assist in tackling drivers for onward movement.

2.4 Short, medium and long term approaches to assist in the development of an effective and sustainable approach to asylum seekers

31. In the view of the Commission, in order to be effective and sustainable, any approach to asylum seekers adopted and promoted by the Australian Government must be aligned with accepted international human rights standards.
32. The Commission is mindful that the realisation of significantly strengthened protection for asylum seekers, refugees and other displaced persons within our region will take time and considerable effort. The cultivation of a long-term vision for refugee protection, domestically and regionally, will be important.
33. The Commission believes that there are strong existing foundations for achieving this long-term agenda, and that there are various short- to medium-term measures that can be introduced towards that end. These include:
 - ensuring that measures taken to respond to the arrival of boats carrying asylum seekers are consistent with Australia's human rights obligations
 - the piloting, development and promotion of initiatives designed to strengthen the protection of refugees and asylum seekers in the region through the Regional Cooperation Framework's Regional Support Office

- an increased and strategically targeted refugee resettlement commitment.
34. The Commission urges the Australian Government to ensure that any short term measures adopted in response to the arrival of asylum seekers to Australia by boat both align with our international human rights obligations and genuinely assist in the development of an effective and sustainable approach to asylum seekers.
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¹ The Expert Panel is led by Air Chief Marshall Angus Houston AC AFC (retired), and also comprises Mr Paris Aristotle AM, Director of the Victorian Foundation for the Survivors of Torture ('Foundation House') and Professor Michael L'Estrange AO, Director of the National Security College. The Terms of Reference for the Expert Panel are provided at <http://expertpanelonasylumseekers.dpmc.gov.au/terms> (viewed 11 July 2012). The appointment of the Expert Panel followed the drowning of a known 94 asylum seekers en route to Australia in two incidents within a week, and intense debate surrounding the *Migration Legislation Amendment (The Bali Process) Bill 2012*, which was narrowly defeated in the Senate.

² See Human Rights and Equal Opportunity Commission, *A last resort?* (National Inquiry into Children in Immigration Detention) (2004), at http://www.humanrights.gov.au/human_rights/children_detention_report/report/index.htm (viewed 16 July 2012); Human Rights and Equal Opportunity Commission, *Those who've come across the seas: Detention of unauthorised arrivals* (1998), at http://www.humanrights.gov.au/human_rights/immigration/seas.html (viewed 16 July 2012). See also Australian Human Rights Commission, *An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children* (July 2012), publication forthcoming.

³ The Commission's submissions on matters pertaining to asylum seekers are available at <http://humanrights.gov.au/legal/submissions/indexsubject.html#refugees> (viewed 16 July 2012).

⁴ Over the past two years, the Commission visited seven immigration detention facilities and produced five detailed public reports. For further information see http://www.humanrights.gov.au/human_rights/immigration/detention_rights.html#9_3 (viewed 26 June 2012).

⁵ Reports are available at http://humanrights.gov.au/legal/HREOCA_reports/index.html (viewed 16 July 2012).

⁶ Further to the four documents referenced in the body of the text of this submission at sub-section 2.2, see, for example: 'Commission warns against revisiting aspects of "Pacific Solution"' (Media Release, 22 August 2011), at http://humanrights.gov.au/about/media/media_releases/2011/75_11.html; 'Sending asylum seekers to Malaysia is not the answer to addressing people smuggling' (Media Release, 25 July 2011), at http://humanrights.gov.au/about/media/media_releases/2011/61_11.html; 'More detail needed on new asylum seeker policy' (Media Release, 6 July 2010), at http://humanrights.gov.au/about/media/media_releases/2010/71_10.html; 'HREOC welcomes end of Pacific Solution' (Media Release, 5 February 2008), at http://humanrights.gov.au/about/media/media_releases/2008/12_08.html; 'Australia's treatment of refugees still has a long way to go' (Media Release, 17 June 2007), at http://humanrights.gov.au/about/media/media_releases/2007/41_07.html; ' "Pacific Solution" still poses human rights risks' (Media Release, 19 September 2006), at http://humanrights.gov.au/about/media/media_releases/2006/75_06.htm (all viewed 23 August 2011); *A last resort?*, note 2, sections 6.4.4, 6.6.4, 6.7.8, 6.7.9, 7.8.1, 7.8.2, 7.8.3, 16.2.2, 17.4.9; and J von Doussa, 'Human rights and offshore processing' (2007) 9 UTS Law Review 41.

⁷ See Note 6.

⁸ Asylum seekers who were awaiting transfer to Malaysia, prior to collapse of the arrangement, were held in closed detention facilities on Christmas Island. Restrictive detention of people waiting transfer may be arbitrary in breach of Australia's obligations under article 9 of the *International Covenant on Civil and Political Rights* (ICCPR) and article 37(b) of the *Convention on the Rights of the Child* (CRC). Australian Human Rights Commission, Submission to the Senate Standing Committees on Legal and Constitutional Affairs Inquiry into Australia's agreement with Malaysia in relation to asylum seekers

(September 2011), see section 5 at

http://www.humanrights.gov.au/legal/submissions/2011/20110914_asylum_seekers.html

⁹ Above, section 7.

¹⁰ Australia is prohibited under article 33(1) of the Refugee Convention from expelling or returning refugees to territories where their lives or freedom would be threatened on the basis of their race, religion, nationality, membership of a particular social group or political opinion. Australia has further and broader *non-refoulement* obligations under articles 6 and 7 of the ICCPR, articles 6 and 37 of the CRC and article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), which prevent the removal of anyone from Australia to a country where they are in danger of death, torture or other mistreatment including arbitrary detention. Above, section 6.1.

¹¹ Article 31 of the Refugee Convention prohibits state parties from penalising asylum seekers on account of their unlawful entry. Further, Australia is bound to respect the right of everyone to equality and non-discrimination under article 26 of the ICCPR. And article 22 of the CRC affirms the right of child asylum seekers and refugees to receive appropriate protection and assistance. The principle of non-discrimination in article 2 of the CRC means that all children seeking asylum are entitled to the same level of assistance and protection of their rights, regardless of how or where they arrive. Above, section 6.3.

¹² Articles 17(1) and 23(1) of the ICCPR and article 8(1) of the CRC provide that everyone has the right to freedom from interference with their family. Article 10(1) of the CRC specifically states that ‘applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with ... in a positive, humane and expeditious manner’. Above, section 6.2.

¹³ Above, section 8.

¹⁴ Above, section 9.

¹⁵ Article 3(1) of the CRC provides that a child’s best interests must be a primary consideration in all actions concerning them. Above, section 10.

¹⁶ Above, section 10.2.

¹⁷ UNHCR, ‘Nauru: 2012 Regional Operations Profile – East Asia and the Pacific’, at <http://www.unhcr.org/pages/49e4889e6.html>.

¹⁸ UNHCR, Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights’ Compilation Report - Universal Periodic Review: Papua New Guinea (November 2010), at www.unhcr.org/refworld/pdfid/4ccfe3cf2.pdf.

¹⁹ See United Nations High Commissioner for Refugees, *Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, Executive Summary and p 60, at <http://www.unhcr.org/refworld/docid/4dc935fd2.html> (viewed 6 July 2012); International Detention Coalition and La Trobe Refugee Research Centre, *There are Alternatives: A handbook for preventing unnecessary immigration detention* (2011), box 12, sections 3.2, 4.3.3 and 5.1, and endnotes 51-54, at <http://idcoalition.org/cap/handbook/> (viewed 6 July 2012).

²⁰ For example, as observed in the Co-Chairs’ Summary Statement, *UNHCR-Immigration Detention Coalition Expert Roundtable on Alternatives to Detention*, Canberra, 9-10 June 2011, para 18: “[P]ositive developments in Australia’s reception of asylum seekers and refugees could have positive dividends expanding the protection space throughout the South-east Asia region, particularly within the broader Regional Cooperation Framework... Conversely, Australia’s current mandatory detention policy settings make it more difficult to encourage other states in the region to adopt alternatives to detention. At

http://unhcr.org.au/unhcr/index.php?option=com_content&view=category&layout=blog&id=37&Itemid=61.

²¹ See Co-Chair’s Statement, *Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking In Persons and Related Transnational Crime*, Bali, Indonesia, 29-30 March 2011, at <http://www.baliprocess.net/index.asp?pageID=2145895810>; and see ‘About the Bali Process’, at <http://www.baliprocess.net/index.asp?pageID=2145831400>.

²² See Co-Chair’s Statement, above, paragraphs 7-9, 16 and 19.

²³ Prime Minister and Minister for Immigration, ‘The Regional Cooperation Framework’ (Media Release, 7 May 2011), at <http://www.pm.gov.au/press-office/regional-cooperation-framework>.

²⁴ Bali Process Steering Group, ‘Note on the Operationalisation of a Regional Cooperation Framework in the Asia-Pacific Region’, *Fifth Meeting of Bali Process Ad Hoc Group Senior Officials*, Sydney, Australia, (12 October 2011), at

<http://www.baliprocess.net/files/111012%20Steering%20Group%20Note%20on%20RCF%20%20FINAL.docx>.