

Policy Statement

Proposal for Australia's role in a regional cooperative approach to the flow of asylum seekers into and within the Asia-Pacific region

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Law Council
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Proposal for Australia’s role in a regional cooperative approach to the flow of asylum seekers into and within the Asia-Pacific region

1. The Law Council recognises that forced displacement affects a significant number of people worldwide, and that the number of people seeking international protection, and a safe and viable way in which to access it, continues to increase.¹
2. The Law Council considers that any regional responses to the flow of asylum seekers into and within the Asia-Pacific region must comply with the agreed standards set out in international legal instruments to which Australia is party and must take place in consultation with other countries in the region, and internationally, under the guidance of the Office of the United Nations High Commissioner for Refugees (**UNHCR**) and the International Organisation for Migration (**IOM**).
3. The Law Council therefore proposes that the Australian Government work with other countries in the Asia-Pacific region to establish a cooperative and transparent approach in response to the flow of asylum seekers into and within the region, including by:
 - (a) addressing the protection and material needs of asylum seekers and recognised refugees in the region; and
 - (b) upholding the human rights of all people within the territory and subject to the jurisdiction of countries in the region.
4. Any such approach must be consistent with Australia’s international legal obligations and developed in consultation with the UNHCR and the IOM, having regard to their mandates and expertise.

The international legal context

5. The Law Council acknowledges that the High Court of Australia has upheld the constitutional validity of Australia’s domestic statutory provisions supporting the regime for detention of asylum seekers in Nauru.² However, the High Court’s decision does not mean that Australia’s offshore detention regime is free of any legal constraints or is consistent with Australia’s international legal obligations.
6. Under Australian law, as well as international law, the Commonwealth of Australia has responsibility for the health and safety of asylum seekers transferred to other countries for offshore processing and assessment. Such processing and assessment must accord, in particular, with Australia’s obligations under the 1951 *Convention relating to the Status of Refugees* (the **Refugee Convention**) and the 1967 *Protocol relating to the Status of Refugees*.³ Australia’s responsibility for the health and safety of asylum seekers transferred to other countries derives from:

¹ See, for example: Office of the United Nations High Commissioner for Refugees, *Global Trends: Forced Displacement in 2015* (20 June 2016) (**UN Global Trends Report**).

² *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors* (2016) 327 ALR 369; [2016] HCA 1.

³ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954); *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) . The principle of *non-refoulement* appears at art 33.

- (a) the Commonwealth's common law duty of care;⁴ and
- (b) international law, namely:
 - (i) the joint and several responsibility of States for internationally wrongful acts;⁵ and
 - (ii) the extraterritorial application of refugee and human rights treaties to which Australia is party and Australia's effective control of its regional processing centres.⁶

7. For example, and as articulated in the Law Council's *Asylum Seeker Policy*,⁷ conditions of immigration detention must be humane and dignified, such that:

- (a) no asylum seeker is held in conditions of detention which amount to torture or cruel, inhuman or degrading treatment,⁸ including being held in incommunicado or lengthy solitary detention;⁹
- (b) asylum seekers should not be held with prisoners or in prison-like facilities;¹⁰

Australia's 'complementary protection' obligations in respect of *non-refoulement* also arise pursuant to its obligations under: arts 6 and 7 of the *International Covenant on Civil and Political Rights (ICCPR)*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); art 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); the *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, 1642 UNTS 414 (entered into force 11 July 1991); and art 3 of the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁴ In *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483, Bromberg J held that the Commonwealth had a duty of care to facilitate a safe and lawful abortion in respect of a refugee who had been sexually assaulted while in offshore processing (waiting resettlement) on Nauru. The duty of care arose in Australia, as it was in Australia that the decision to procure an abortion had been made.

⁵ To establish whether Australia has engaged in an internationally wrongful act (including determining that Australia has breached its international obligations), the nature of the relationship between the State and its organs or agents must be examined and acts or omissions assessed by reference to Australia's obligations at international law, including human rights treaties to which Australia is party. Australia may also be jointly or severally responsible for an internationally wrongful act committed by an offshore processing country if it can be demonstrated that it: (a) aided or assisted an offshore processing country in committing an internationally wrongful act; (b) directed and exercised control over the offshore processing country's commission of an internationally wrongful act; or (c) coerced an offshore processing country to commit an internationally wrongful act. See: James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002).

⁶ Australia's extraterritorial obligations arise under various human rights treaties to which Australia is party, such as art 2(1) of the ICCPR and art 2(1) of the CAT.

⁷ Law Council of Australia, *Asylum Seeker Policy*, (6 September 2014), available at:

http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker_Policy_web.pdf.

⁸ Art 7 of the ICCPR; art 16 of the CAT; Principle 6 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA res 43/ 173 (1998) (**UN Detention Principles**) and Principle 7 of the Law Council's *Policy Statement: Rule of Law Principles*, (March 2011), available at: <https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>.

⁹ Human Rights Committee, *General Comment 20: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment)*, 44th sess, HRI/GEN/1/Rev.9 (Vol. I) (10 March 1992); Office of the High Commissioner for Human Rights, United Nations Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, A/HRC/16/47(2010); Office of the High Commissioner for Human Rights, United Nations Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, E/CN.4/2005/6 (2005). See also: Law Council of Australia, submission to National Consultation on Human Rights, *A Charter: Protecting the rights of all Australians*, 6 May 2009

¹⁰ Art 10.2(a) of the ICCPR; Principle 8 of the UN Detention Principles; Guideline 8 of the Office of the United Nations High Commissioner for Refugees, 'Detention Guidelines: guidelines on the Applicable criteria and

- (c) asylum seekers should be detained in a manner appropriate to their status, including segregation of men from women and children from adults unless part of a family unit;¹¹
 - (d) detained asylum seekers should have appropriate access to key services such as education and health services, including appropriate mental health services;¹² and
 - (e) risks of suicide and self-harm by detained asylum seekers must be identified and removed or minimised.¹³
8. The Law Council considers that the UNHCR is an authoritative source of legal interpretation of the Refugee Convention, and supports a regional approach that accords with the UNHCR's May 2013 *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers* (the **Guidance Note**) and the key principles therein which can be summarised as follows:
- (a) There is no obligation on asylum-seekers to seek asylum at the first effective opportunity, yet at the same time there is no unfettered right to choose one's country of asylum.
 - (b) A State is bound by relevant international and regional refugee and human rights law obligations if it has *de jure* and/or effective *de facto* control over a territory or over persons.
 - (c) States involved in bilateral or multilateral transfer arrangements should be party to the Refugee Convention and/ or its 1967 Protocol, or otherwise party to relevant refugee and human rights instruments.
 - (d) Arrangements should be aimed at enhancing burden-and-responsibility-sharing and international/regional cooperation, and not be burden-shifting. Arrangements should ideally contribute to the enhancement of the overall protection space in the transferring State, the receiving State and/or the region as a whole.
 - (e) An arrangement between States for the transfer of asylum seekers is best governed by a legally binding instrument, and challengeable and enforceable in a court of law by the affected asylum seekers.
 - (f) The transfer arrangement needs to guarantee that each asylum seeker:
 - (i) will be individually assessed as to the appropriateness of the transfer, subject to procedural safeguards, prior to transfer. The best interests of the child must be a primary consideration;
 - (ii) will be admitted to the proposed receiving State;
 - (iii) will be protected against *refoulement*;

standards relating to the detention of asylum-seekers and alternatives to detention' (2012) (**UNHCR Guidelines**).

¹¹ Guideline 8, UNHCR Guidelines, see discussion for example in Law Council of Australia, submission to Joint Select Committee on Australia's Immigration Detention Network, *Inquiry into Australia's Immigration Detention Network*, 17 August 2011 (**LCA Immigration Detention Submission**).

¹² *Ibid.*

¹³ Guideline 8 of the UNHCR Guidelines. See also LCA Immigration Detention Submission.

- (iv) will have access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection;
 - (v) will be treated in accordance with accepted international standards (for example, appropriate reception arrangements, access to health, education and basic services, safeguards against arbitrary detention, persons with specific needs are identified and assisted);
 - (vi) if recognised as being in need of international protection, will be able to enjoy asylum and/ or access to a durable solution.¹⁴
- (g) Where these guarantees cannot be met, the UNHCR considers transfer would not be appropriate.
 - (h) The transferring State bears the obligation to ensure that conditions in the receiving State meet these requirements prior to entering into any arrangement. The transferring State must conduct regular monitoring and/or review to ensure the receiving State continues to meet international standards.
9. The Law Council also notes the political declaration adopted at the high-level meeting to address the question of large movements of refugees and migrants, held at United Nations Headquarters in New York on 19 September 2016 (the New York Declaration for Refugees and Migrants, hereafter the **Declaration**):
- (a) reaffirmed the purposes and principles of the Charter of United Nations;
 - (b) also reaffirmed the Universal Declaration of Human Rights; and
 - (c) recalled the core international human rights treaties;
 - (d) reaffirmed and committed to fully protecting the human rights of all refugees and migrants, regardless of status, recognising that all are rights holders;
 - (e) reaffirmed the principle of non-refoulement in line with which individuals must not be returned at borders; and
 - (f) expressed the determination to address unsafe movements of refugees and migrants without prejudice to the right to seek asylum.
10. In particular, the Declaration confirmed that the response of States to addressing the question of large movements of refugees and migrants will demonstrate full respect for international law and international human rights law, and, where applicable, international refugee law and international humanitarian law.¹⁵
11. The Declaration also recognised that large movements of refugees and migrants are global phenomena that call for global approaches and global solutions¹⁶ and

¹⁴ Namely, voluntary repatriation, resettlement or local integration, As the UNHCR has noted, '[c]omprehensive durable solutions have legal, economic, cultural, political, and civil dimensions that need to be addressed so that a refugee, internally displaced person, or stateless person is able to enjoy the same rights as a national. See: UNHCR Global Trends Report, 23.

¹⁵ *New York Declaration for Refugees and Migrants*, UN GAOR, 71st sess, UN Doc A/71/L.1* (13 September 2016), at [5].

¹⁶ *Ibid*, at [7].

confirmed a determination to address the root causes of large movements of refugees and migrants.¹⁷

12. The Declaration identified various commitments, including:
- (a) implementing border control procedures in conformity with applicable obligations under international law, including international human rights law and international refugee law;¹⁸
 - (b) continuing to protect the human rights and fundamental freedoms of all persons in transit and after arrival;¹⁹
 - (c) ensuring that responses to large movements of refugees and migrants mainstream a gender perspective, promote gender equality and the empowerment of all women and girls, and fully respect and protect the human rights of women and girls;²⁰
 - (d) detaining children only as a measure of last resort, in the least restrictive setting, for the shortest possible period of time, under conditions that respect their human rights and in a manner that takes into account, as a primary consideration, the best interest of the child;²¹ and
 - (e) a comprehensive refugee response to be developed and initiated by the UNHCR in close coordination with relevant States, including host countries, and involving other relevant UN entities, for each situation involving large movements of refugees.²²
13. Attached to the Declaration is a comprehensive refugee response framework, addressing reception and admission, support for host countries and communities, and durable solutions.²³

Australia's role in a cooperative regional approach

14. The Law Council considers that Australia must contribute adequate funds to a regional approach that is based on durable solutions to the flow of asylum seekers into and within the region, rather than their long-term or indefinite detention. Under international law, there is a general principle that asylum seekers should not be detained, and a presumption against detention.²⁴ Detention should take place only

¹⁷ Ibid, at [12].

¹⁸ Ibid, at [24].

¹⁹ Ibid, at [26].

²⁰ Ibid, at [31].

²¹ Ibid, at [33].

²² Ibid, [69].

²³ Ibid, Annex 1, [2]. The Law Council notes that although the 'large-scale refugee movements' referred to in the Declaration are not defined, such movements are generally those that overwhelm normal asylum procedures. The Law Council therefore considers that if it is accepted that the principles in the framework apply in mass-influx situations, they therefore also apply to smaller-scale arrivals.

²⁴ See art 31 of the Refugee Convention, which provides:

1. *The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*

2. *The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.*

after a full consideration of all possible alternatives, and having regard to whether it is reasonable to do so and proportionate to the objectives to be achieved.²⁵ The permissible exceptions must be prescribed by law, and the circumstances in which the detention of asylum seekers may be resorted to, if necessary, include to verify identity, and conduct health and security checks.²⁶ If detained, asylum seekers should be entitled to minimum procedural safeguards including the right to free legal assistance and periodic review by a court of the necessity for the continuation of their detention.²⁷

15. Australia must work collaboratively with other countries in the region as equal partners, and encourage them to work closely with the UNHCR in the development of a cooperative regional approach. Australia must not be prescriptive about which countries should host, process and provide durable solutions to those in need of protection.
16. Australia should encourage other countries in the region to accede to or ratify the Refugee Convention and relevant international human rights instruments where they have not already done so. This will not only offer protection to asylum seekers and refugees, but also ensure better protection of the human rights of all persons living in those countries. An effective regional approach cannot be attained without meaningful commitment to and implementation of these instruments. At a minimum, Australia's involvement in any regional approach should accord with the Refugee Convention and other relevant international instruments to which Australia is party.
17. Rule of law principles and human rights obligations must be observed in the processing of protection claims for people seeking asylum and the provision of durable solutions to those in need of protection. Applicants for international protection should be provided with access to free legal advice and interpreter services, and should be afforded merits and judicial review of adverse decisions in accordance with principles of procedural fairness. The Law Council considers that any regional processing arrangement should use as a common standard for processing protection claims that set out in the Refugee Convention in order to ensure transparency, consistency and compliance with relevant human rights obligations.
18. Whilst awaiting the determination of their protection application, asylum seekers and refugees should be permitted to access work, health and education services, commence processes for family reunion and receive identity and travel documents, especially if it is anticipated that the determination of the claim will be a lengthy process.
19. These services should also be available to asylum seekers upon settlement and refugees upon resettlement. Recognised refugees should be afforded all the rights to which they are entitled under the Refugee Convention.

See also art 26:

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

²⁵ UNHCR Detention Guidelines, Guideline 4.2 and 4.3.

²⁶ Ibid, Guideline 4.1.

²⁷ Ibid, Guideline 7.

20. In the event that persons are found not to be in need of protection, returns should be undertaken in a human manner and in full respect for the individual's human rights and dignity, without resorting to excessive force.²⁸
21. In cooperation with regional partners, as well as the UNHCR and IOM, the Law Council considers that any regional approach should as a minimum:
- (a) establish a coordinated, region-wide processing system that complies with the UNHCR's Guidance Note;
 - (b) provide temporary²⁹, as well as permanent³⁰ solutions for refugees and people who are not found to be refugees but who otherwise qualify for protection. Asylum seekers who are settled and refugees who are resettled should be afforded their rights under the Refugee Convention and other applicable international human rights instruments; and
 - (c) increase Australia's refugee resettlement intake so that it is proportionate to the number of global and regional asylum seekers and Australia's relative ability and resource capacity to resettle them.³¹
22. Further, the Law Council considers that an appropriate starting point for a cooperative and transparent regional approach to the flow of asylum seekers into and within the Asia-Pacific region could build upon:
- (a) the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime which was first established in 2002 (**Bali Process**). This could involve the establishment of a Working Group which would recognise the need to provide for permanent protection and local stay arrangements for asylum seekers and refugees in the region; that asylum seekers and refugees may be victims of people smuggling and must not be criminally punished as a result of being smuggled; and that their rights under refugee and human rights law must not be prejudiced.³² Any such working group should work with organisations that can offer operational responses to humanitarian crises in the region to enable an immediate response to such crises; and

²⁸ UNHCR, Background Paper No.1: Legal and practical aspects of the return of persons not in need of international protection, May 2001, available at: <http://www.unhcr.org/4d948b2c9.pdf>.

²⁹ For example, local integration options, long-term temporary residence and other such initiatives that can lead to voluntary return.

³⁰ That is, resettlement.

³¹ Office of the United Nations High Commissioner for Refugees, *UNHCR Projected Global Resettlement Needs 2017* (13-15 June 2016), 38: the total projected resettlement needs for the Asia region in 2017, identified by UNHCR offices, is 153,358 persons. In its submission to the Expert Panel on Asylum Seekers, in respect of Australia's refugee intake, UNHCR stated:

Resettlement of refugees from South east Asia countries must be very carefully managed as it can never be the primary durable solution for more than a small percentage of the total numbers of refugees in the region. The degree of access to resettlement is contingent upon a number of factors such as: a) the size of the resettlement quota allocated to each country including the composition of any such quota; b) the ratio between allocated resettlement places to the size of refugee population; c) the timeframe for resettlement to take place; and, d) concerns about the impact of resettlement on onward movements to and from the country of asylum, and responses to such concerns, including the risk that over-weighted resettlement programs might be a 'pull factor' into the region – a risk that a number of states are keenly anxious to avoid.

See: Office of the United Nations High Commissioner for Refugees, Submission to the Expert Panel on Asylum Seekers, (27 July 2012), 8, available at: <http://unhcr.org.au/wp-content/uploads/2015/05/2012-07-27-UNHCR-Submission-to-the-Expert-Panel-on-Asylum.pdf>.

³² *Protocol against the Smuggling of Migrants by Land, Sea and Air*, opened for signature 15 November 2000, 2241 UNTS 507 (entry into force 28 January 2004), arts 5 and 19 respectively.

- (b) the Track II Dialogue on Forced Migration in the Asia Pacific (**the Dialogue**), first convened by the Centre for Policy Development in 2015 to bring together individuals from government, non-government organisations, policy and academic institutions and international organisation, and which aims to build relationships and explore new policy responses to foreign migration.