

UNSW Law

Kaldor Centre Principles for Australian Refugee Policy

Key Priorities



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INTRODUCTION

Australia has a proud record of welcoming refugees since 1945, giving people a new home, new hope and new opportunities. Our reward has been a strong economy, an authoritative voice in world affairs, and vibrant, globally connected communities. Recently, however, our refugee policy has changed direction; it no longer provides a sustainable, humane response that enables both refugees and Australia to prosper. This is out of step with our shared values as a ‘fair go’ nation that does the right thing by people in need.

A successful refugee policy not only manages national borders, but also protects people who need safety and demonstrates leadership in meeting the global challenge of displacement. The Kaldor Centre’s Principles for Australian Refugee Policy, distilled below, set out an independent, non-partisan framework for achieving a principled and pragmatic policy.

Supported by law, evidence-based research, and good practices from other countries as well as Australia’s own history, the Principles provide a stable foundation for responsible policy making, and make specific recommendations for meaningful, measurable actions towards a better future.



1 Australia should comply with its international legal obligations

Australia played a key role in drafting the international treaties that protect people fleeing persecution and other forms of serious harm. These agreements reinforce, rather than undermine, Australia's sovereignty, providing the framework within which governments can manage their borders yet still cooperate on matters of common concern. Revitalising our commitments in practice will deliver Australia renewed authority as a leader in human rights and provide a stronger foundation for real and effective international cooperation on refugee issues, which cannot be resolved unilaterally.

Australia must not send people to any country where they face a real chance of being persecuted or subjected to other serious harm. This fundamental obligation (known as the principle of *non-refoulement*) is enshrined in the refugee and human rights treaties accepted by Australia. It reflects the universal, and Australian, value of decency.

Australia's obligations under international law apply wherever it acts, including where it intercepts boats carrying asylum seekers at sea or exercises control over refugees held offshore in Nauru and Papua New Guinea. Australia cannot 'contract out' of its obligations by sending people to other countries.

To be effective, Australia's international legal obligations should be incorporated into domestic law, and accountability mechanisms should be put in place to ensure compliance.

Specific steps that Australia should take include:

- Repealing section 197C of the *Migration Act 1958* (Cth), which says that Australia's non-refoulement obligations are irrelevant to the removal of unlawful non-citizens
- Repealing the self-contained statutory framework in the *Migration Act* which sets out Australia's own interpretation of its protection obligations under the Refugee Convention (which was introduced by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth))
- Re-inserting references to the Refugee Convention in the *Migration Act* (which were removed by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act*)
- Removing the legislative bar that prevents certain asylum seekers from applying for a visa in Australia
- Repealing the offshore processing regime in Division 8, Subdivision B of the *Migration Act*, which is incompatible with Australia's obligations under international law
- Inserting a statelessness status determination procedure into the *Migration Act*



2 Australia should provide humane, fair reception conditions

End mandatory, indefinite detention

Australia is one of the few countries with a policy of mandatory, indefinite detention. On average, people seeking Australia's protection are detained for 500 days, and some have been detained for over five years. This is significantly out-of-step with practice elsewhere. In Europe, for instance, the average length of detention is less than 90 days, and in some countries it is even shorter. Tried and tested alternatives to detention exist, such as open reception centres, travel restrictions and reporting requirements, and are much more cost-effective.

By definition, mandatory detention is arbitrary and thus contrary to international law. Experience shows that detaining asylum seekers and refugees can have devastating effects on their mental health and hamper their ability to rebuild their lives once released. People seeking asylum should only be detained where absolutely necessary for a brief initial period for registration, documentation, health and security checks. On rare occasions when detention is required beyond this, including in cases that raise security issues, it should be justified by individual circumstances, proportionate to the reasons for detention, reviewable by a court, and subject to time limits specified by law. Children should never be detained on account of their immigration status.

Process asylum claims in Australia, not offshore

Australia's offshore processing arrangements with Nauru and Papua New Guinea are unsustainable; they exact an extraordinarily high human, financial and reputational cost and in many cases fail to provide durable solutions for those transferred. The United Nations has described Australia's offshore processing regime as 'an affront to the protection of human rights'.

Australia should end offshore processing and fulfil its international legal obligations to all people sent offshore. Those found to be refugees should be settled promptly in Australia or in another country able and willing to provide effective protection and a durable solution in accordance with international law. Those found not to require protection should be given appropriate assistance to enable them to rebuild their lives elsewhere.

The abolition of offshore processing would bring Australia into line with international good practice and human rights law. It would save Australia billions of dollars that could be spent pursuing more effective and humane refugee policies. It would also pave the way for more genuine and equitable cooperation on refugee protection between Australia and other countries in the Asia-Pacific region.



Enable dignified living conditions for all people seeking asylum

Many people seeking asylum in Australia live in destitution, without secure work, adequate health care, basic financial assistance, counselling or other support. Australia should allow all those seeking asylum the opportunity to work so that they can contribute to their own well-being and to the Australian community. Australia should provide adequate support and a social security safety net to those unable to find employment. At a minimum, Australia should ensure that people seeking asylum have access to basic health care, housing support, financial assistance, counselling, language training and other essential services.

Specific steps that Australia should take include:

- Abolishing mandatory, indefinite detention in section 189 of the *Migration Act* and replacing it with an individual assessment consistent with due process and international human rights law
- Enabling an individual to have a decision to detain them judicially reviewed, on a periodic basis
- Amending section 4AA of the *Migration Act* to provide that children must never be detained
- Abolishing offshore processing, including by repealing sections 198AA–AJ of the *Migration Act* and associated regulations
- Finding durable solutions for those who remain offshore, including by bringing them to Australia and accepting New Zealand's resettlement offer
- Ensuring access to work rights, basic health care and income support for all people seeking asylum, regardless of how or when they arrived



3 Australia should provide a fair, efficient and transparent system for processing asylum claims

Ensuring fair, efficient and transparent asylum procedures benefits the Australian community and people seeking asylum. Without proper procedures in place, Australia cannot accurately identify the people to whom it owes protection. Expedious, effective decision-making promotes certainty for applicants and allows those whose claims are accepted to rebuild their lives and become full participants in Australian society. It contributes to the timely return of those not entitled to international protection, and it promotes public confidence in the system.

People seeking Australia's protection, regardless of how or when they arrived, should have access to asylum procedures that accord with international standards. They should have the opportunity to present their claim fully and to have it assessed by a suitably qualified, impartial and accountable decision-maker. While there is no single uniform procedure required to ensure the fair, efficient and transparent processing of asylum claims, the 'fast track' procedures currently used for some applicants do not meet minimum standards or procedural safeguards, and discriminate against certain refugees.

Appropriate support for people seeking asylum enables them to present their claims effectively, decreasing the likelihood of appeals and increasing efficiency. People seeking asylum in Australia should be provided with age, gender and diversity-sensitive counselling, government-funded legal advice and representation based on need, and tailored assistance for those with special requirements. Those whose claims for protection are unsuccessful should have prompt access to review by an independent tribunal and the courts.

Where security issues arise, they should be dealt with in accordance with Australia's international legal obligations, due process and the rule of law.

Specific steps that Australia should take include:

- Repealing the 'fast track' assessment process and abolishing the Immigration Assessment Authority
- Re-instating access to free legal assistance for people seeking asylum
- Ensuring that all asylum seekers have access to full merits review of asylum decisions
- Creating a formal, independent and merits-based appointment procedure for members of the Administrative Appeals Tribunal

4 Australia should respect the principles of family unity and the best interests of the child

Respect for family unity and the best interests of the child are fundamental principles of international human rights law and central to core Australian values. Yet, Australia's current asylum policies result in the separation of many families, potentially indefinitely.

Australia must ensure that its policies do not cause family separation, and that separated families are reunited. In particular, children should not be separated from their parents, and their health, welfare and education should be carefully safeguarded. The best interests of the child must be a primary consideration in all decisions affecting them.

Australia should not send asylum-seeker children and their families offshore. Families should be kept together in Australia and provided with the necessary support to enable their well-being while their claims are assessed, including help to integrate and succeed. Children who arrive in Australia without a parent or guardian should be given special assistance, including through the appointment of an independent guardian with the power to advocate for their best interests.

Australia's well-established family reunification program should be expanded, with a quota separate from the general refugee resettlement intake. Restrictions on applications for family reunification should be removed to give all those entitled to Australia's protection the opportunity to be reunited with their families.

Specific steps that Australia should take include:

- Restoring family reunion rights for all refugees, regardless of their mode of arrival
- Repealing section 91WB of the *Migration Act*, which denies protection to a refugee's family members if they apply after the refugee has already been granted a protection visa
- Expanding the family reunification program beyond the general refugee resettlement intake
- Appointing an independent guardian for children who arrive without a parent or guardian to avoid any conflict of interest for the Minister, who is currently appointed as the guardian

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Australia should create additional safe, lawful pathways to protection

People fleeing persecution, conflict and human rights abuses often face unimaginable dangers on their journeys to find safety and protection, including endemic risks of sexual violence faced by women and girls. Many refugees who make dangerous boat journeys or seek the assistance of smugglers understand the risks, but with no alternative pathway to safety, they may have no other option.

Most people want to move safely and lawfully. Most governments want to know who has entered their territory and why. Creating safe, lawful pathways to protection – opportunities for refugees to seek safety without putting their lives at risk – is therefore in everyone's interests.

Australia should increase its resettlement quota to better reflect the scale of global displacement and the needs identified by UNHCR. Its resettlement program should prioritise people with the greatest protection needs and maintain sufficient flexibility to respond to changing priorities, including a dedicated quota for urgent or emergency cases. Restrictions on resettlement based on someone's date, mode or place of arrival should be removed.

In addition, Australia should provide other safe, lawful pathways to protection. This includes special humanitarian intakes for people fleeing particular crises; programs for people particularly at risk or otherwise in danger of being left behind (including women and girls at risk); and community and private sponsorship of refugees.

Specific steps that Australia should take include:

- Increasing the resettlement quota and reviewing it annually, with an eye to increasing its contribution in line with needs identified by UNHCR
- Removing resettlement restrictions on refugees in Indonesia
- Enhancing community and private sponsorship of refugees, additional to the number of government resettlement places
- Setting aside a quota for special humanitarian intakes
- Expanding options for 'in-country processing' by giving people at risk the opportunity to apply for protection *before* they flee their home countries (for example, by expanding the In-country Special Humanitarian Visa (subclass 201))
- Facilitating refugees' access to visas for skilled migration, study, family reunion and so on by relaxing certain documentary requirements and waiving or reducing fees

6 Australia should provide global and regional leadership on refugee protection

The challenges of refugee protection are global in nature and require international cooperation. In 2018, Australia committed to 'more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees' through the Global Compact on Refugees. Australia can demonstrate its commitment to this goal by actively promoting protection and solutions for refugees, including through the expanded and strategic use of resettlement, humanitarian and development assistance, and diplomatic efforts within the Asia-Pacific region and globally.

To exercise effective leadership, Australia must show its own commitment to refugee protection by bringing its policies into line with its international obligations and the spirit of responsibility-sharing. It should also commit its on-going support to working with other governments and the United Nations, through both funding and action, to secure protection and durable solutions for refugees both within and beyond the region. This would enhance Australia's credibility on refugee issues in global and regional fora, laying a stronger foundation for future cooperative action.

It is in Australia's interests to promote refugee protection and regional cooperation in the Asia-Pacific, in particular. By working cooperatively with our neighbours and demonstrating leadership through good practices, Australia could more effectively address the root causes of displacement, enhance protection in countries of first asylum, encourage responsibility-sharing among States, and increase the availability of durable solutions for refugees in the region.

At the first annual Global Refugee Forum in late 2019, Australia will be called upon to provide concrete pledges towards the objectives of the Global Compact on Refugees. By increasing its own financial and other contributions, addressing its own human rights record, and actively working with its partners and neighbours, Australia could again play a leading role in advancing refugee protection worldwide.

Specific steps that Australia should take include:

- Increasing funding to UNHCR
- Engaging in good faith to promote protection-sensitive cooperation mechanisms in the Asia-Pacific region, which take age, gender and diversity into account
- Increasing its aid program as a proportion of Australia's Gross National Income from its current level (of around 0.2 per cent) to 0.7 per cent, in line with commitments under the UN Sustainable Development Goals

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Australia should invest in refugees for long-term success

Investing in refugees as members of our community, and enabling them to strengthen their education, skills and resilience, allows them to contribute to their own well-being as well as that of their families and their communities. Australia's history shows that welcoming refugees is not only possible, but also a source of great rewards for our nation. Providing the conditions for refugees to rebuild their lives in safety and dignity benefits everyone. A welcoming, secure and respectful environment for refugees results in greater economic and cultural richness for the community and a stronger, more socially cohesive Australia.

Time-limited protection visas are at odds with this. Australia should abolish temporary protection visas, which hinder refugees' ability to move forward with their lives because their status must be re-assessed every few years. Temporary protection visas also deny refugees the chance to become full members of the Australian community with the full responsibilities of citizenship.

Australia should invest in refugees' settlement, integration and inclusion, including by providing them with medical care, English language tuition, and such other social support as will enable them to live with dignity in the community. Access to work and study from the moment of arrival, and during the determination of protection claims, would promote long-term integration for those who are found to be refugees or otherwise in need of protection. For those whose claims are unsuccessful, it would help facilitate their successful return and re-integration in their country of origin (or elsewhere).

Specific steps that Australia should take include:

- Increasing funding to settlement services
- Abolishing temporary forms of protection (including Temporary Protection Visas, Safe Haven Enterprise Visas and Temporary (Humanitarian Concern) Visas) and instead provide refugees with permanent protection

A successful refugee policy not only manages national borders but also protects people who need safety. The approach we set out is both principled and pragmatic. By adopting it, Australia could once again show global leadership in addressing the challenge of displacement.

**Professor Jane McAdam, Director,
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The Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney is the world's leading research centre dedicated to the study of international refugee law. Founded in October 2013, the Centre undertakes rigorous research on the most pressing displacement issues in Australia, the Asia-Pacific region and around the world, and contributes to public policy by promoting legal, sustainable and humane solutions to forced migration. Through outstanding research and engagement, the Centre has become recognised as an intellectual powerhouse with global impact.

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