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Kaldor Centre Principles for Australian Refugee Policy



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Refugee Law

Preface

In times of crisis, those living in precarious circumstances suffer most. Conflicts, disasters and a global pandemic continue to pose extraordinary challenges for individuals and societies across the globe, with far-reaching health, economic, educational, social and personal costs.

Governments have the power to change this trajectory.

In Australia, extended lockdowns and border closures during COVID-19 meant that for the first time, many people had an insight into some of the deprivations that are hallmarks of displacement – the inability to cross borders lawfully, loss of liberty, confinement, separation from family and friends, and extreme uncertainty. But whereas for them, these measures were temporary, for many refugees and other displaced people, such limbo is permanent.

With Australia's borders reopened, we now have a particular opportunity – indeed, responsibility – to rethink and reset Australia's asylum policies, drawing on this newfound understanding. This includes reinvigorating Australia's successful resettlement program; increasing other protection pathways for refugees stuck overseas; abolishing mandatory, and potentially indefinite, detention; and providing recognised refugees with permanent protection.

At this critical juncture, we are issuing an updated version of the Kaldor Centre Principles for Australian Refugee Policy.



Image credit: IOM/ Muse Mohammed

Introduction

Since 1945, Australia has played a major role in providing protection and opportunities for refugees – both by resettling people in need from overseas, and by enabling people seeking asylum to apply for protection in Australia. Providing a welcoming, secure and respectful environment for refugees results in greater social and economic benefits for everyone and a stronger, more cohesive Australia. Yet, many of Australia's current refugee policies are out of step with community values of fairness and decency, fall short of Australia's international obligations, and are not contributing to a sustainable, humane response to refugees globally.

In March 2020, Australia closed its international border to everyone but Australian citizens and permanent residents, with very few exceptions. This all but halted Australia's refugee resettlement program and made it virtually impossible for people in need of protection to seek it here. Meanwhile, refugees and people seeking asylum living in the Australian community were denied access to pandemic support schemes that gave other residents at least some financial security if they could not work. People held in immigration detention were at heightened risk of contracting COVID-19 because physical distancing was often not possible, and they were subject to particularly severe restrictions in the name of 'public health', including periods of solitary confinement in some cases.

Australia's reopening of the border in February 2022 provides an opportunity to reflect on our responsibility to better protect refugees and others at risk of serious harm – not only those in need elsewhere, but also the refugees already in Australia stuck in limbo in indefinite detention or on temporary protection visas.

The Kaldor Centre Principles for Australian Refugee Policy are designed to serve as a stable foundation for policymaking in this area. They are grounded in evidence-based research and are informed by good practices from other countries, as well as from Australia's past.¹ They provide concrete examples of how, and why, Australia can develop a more humane, sustainable and manageable approach to protection that simultaneously benefits refugees, asylum seekers and the Australian community.

The Kaldor Centre Principles have been developed with the objectives of ensuring Australia's compliance with its obligations under international law – including those set out in the 1951 Refugee Convention, its 1967 Protocol and international human rights treaties – and respect for the inherent human dignity of everyone who is displaced and in search of protection.

By committing to the following principles, Australia could create a more sustainable and effective refugee policy and advance its aspirations for a more fair and decent society.

¹ The intention of these good practice examples is to highlight alternative approaches that Australian policymakers could consider, acknowledging, of course, that each may have limitations or context-specific factors.

1 Australia should comply with its international legal obligations

What?

Australia should comply with its international legal obligations relating to the treatment of refugees and others at risk of serious harm (such as death, torture, or cruel, inhuman or degrading treatment or punishment). These obligations apply wherever Australian officials or their representatives act, including outside Australian territory.

Australia's international legal obligations include the fundamental duty not to send any person to a place where they are at risk of persecution or other serious harm (known as the principle of *non-refoulement*),² as well as obligations not to discriminate against refugees³ or to penalise them for the manner in which they arrive.⁴ Australia is responsible for upholding these obligations on its territory (including excised places and immigration clearance) and wherever else it asserts its control. This includes places outside Australian territory – for example, when Australia intercepts boats carrying asylum seekers at sea, or exercises control over refugees held offshore.⁵ Some aspects of Australia's refugee policy have put Australia in breach of these obligations, including turning back boats at sea and detaining asylum seekers and refugees (including children) for extended periods of time.

Why?

Australia played a key role in drafting the international treaties that protect people fleeing persecution and other forms of serious harm, and it has voluntarily committed to abide by them. International law reinforces, rather than undermines, Australia's sovereignty, and it provides an important framework within which governments can manage their borders yet still cooperate on matters of common concern.

A renewed commitment by Australia to comply with its international legal obligations would improve its reputation as a good international citizen and a leader in human rights. It would also provide a stronger basis for cooperation between Australia and other countries on refugee protection issues, both within the Asia-Pacific region and globally.

² *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) (Refugee Convention) art 33(1); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR) arts 6–7; *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) (CAT) art 3(1); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (CRC) arts 6, 37; *Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty*, opened for signature 15 December 1989, 999 UNTS 414 (entered into force 11 July 1991). See UN Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 44th sess, UN doc HRI/ GEN/1/Rev.7 (10 March 1992) para 9; UN Human Rights Committee, *General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant*, 80th sess, UN doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) (*General Comment No. 31*) para 12; Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, 39th sess, UN doc CRC/GC/2005/6 (1 September 2005) para 27; Jane McAdam and Fiona Chong, *Refugee Rights and Policy Wrongs: A Frank, Up-to-Date Guide by Experts* (UNSW Press, 2019) ch 1.

³ Refugee Convention art 3; ICCPR art 26.

⁴ Refugee Convention art 31.

⁵ See ICCPR art 2(1); UN Human Rights Committee, *General Comment No. 31*, above n 2, para 10; CRC art 2(1); *Conclusions and Recommendations of the Committee against Torture concerning the Second Report of the United States of America*, UN doc CAT/C/USA/CO/2 (25 July 2006) para 15; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and Its 1967 Protocol* (26 January 2007); McAdam and Chong, above n 2, 139–41; Madeline Gleeson and Natasha Yacoub, 'Cruel, Costly and Ineffective: The Failure of Offshore Processing in Australia' (Policy Brief No. 11, Kaldor Centre for International Refugee Law, 2021) 12.

Australia has ratified a number of treaties relating to the treatment of refugees and others in need of international protection, including the Refugee Convention⁶ and its Protocol,⁷ the Convention against Torture,⁸ the International Covenant on Civil and Political Rights (ICCPR)⁹ and the Convention on the Rights of the Child.¹⁰ By ratifying these treaties, Australia has committed to upholding the principles and obligations they set out in good faith.¹¹ It is not permitted to invoke its domestic law as a justification for ignoring them.¹²

How?

Australia should incorporate its international legal obligations into domestic law. The best way to do this is by including direct reference to key refugee and human rights treaties in relevant legislation – in particular, within the *Migration Act 1958* (Cth). At a minimum, Australia should ensure that the provisions of its domestic legislation are not *inconsistent* with its international legal obligations.

Australia should also create accountability mechanisms to ensure that these obligations are fulfilled. This would make important protections for refugees enforceable at the national level and reviewable in domestic courts, giving people seeking Australia's protection the opportunity to challenge government decisions relating to their status and treatment.

As a matter of priority, Australia should abolish laws and practices that could result in people being sent to places where they risk being persecuted, tortured, killed or otherwise subjected to cruel, inhuman or degrading treatment or punishment. In particular, Australia should stop turning back boats at sea without engaging in a full consideration of the international protection claims of those on board. Australia should ensure that all those who seek its protection are able to have their claims determined fairly and with due process.

Australia should repeal those sections of the *Migration Act* that are specifically intended to exclude its international obligations from being considered under domestic law.¹³ These include section 197C, which states that Australia's *non-refoulement* obligations are 'irrelevant' to the removal of unlawful non-citizens brought temporarily to Australia; section 197D, which empowers the Home Affairs or Immigration Minister to disregard a person's refugee status for the purposes of Australian law; sections 5H–5M, which set out Australia's own interpretation of its international protection obligations; and a number of legislative 'bars' in the *Migration Act* which prevent many asylum seekers from applying for a protection visa in Australia.¹⁴ In addition, Australia should reinsert those references to the Refugee Convention that were removed from the *Migration Act*¹⁵ and ensure that the Act's provisions on complementary protection fully reflect Australia's *non-refoulement* obligations.¹⁶ Australia should also adopt a legal framework and procedure for the identification and protection of stateless persons.¹⁷

⁶ Australia ratified the Refugee Convention on 22 January 1954.

⁷ *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (1967 Protocol). Australia ratified the 1967 Protocol on 13 December 1973.

⁸ Australia ratified the CAT on 8 August 1989.

⁹ Australia ratified the ICCPR on 13 August 1980.

¹⁰ Australia ratified the CRC on 17 December 1990.

¹¹ See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (VCLT) art 26: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

¹² *Ibid* art 27: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty...'

¹³ Many of these provisions were introduced by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

¹⁴ *Migration Act* ss 46A (unauthorised maritime arrivals), 46B (transitory persons), 48A (refused a protection visa), 91E (safe third countries), 91K (holder of a temporary safe haven visa), and 91P (nationality or right to reside in third country).

¹⁵ See generally *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Act 2014* (Cth).

¹⁶ *Migration Act* ss 5, 36(2A). Some of the provisions are more limited than the international law sources on which they are based: Jane McAdam, 'Australian Complementary Protection: A Step-by-Step Approach' (2011) 33 *Sydney Law Review* 687.

¹⁷ See generally Michelle Foster, Jane McAdam and Davina Wadley, 'The Prevention and Reduction of Statelessness in Australia: An Ongoing Challenge' (2017) 40(2) *Melbourne University Law Review* 456.

Examples of good practice:

- › Canada, New Zealand and the United States all include direct reference to international refugee and human rights treaties, such as the Refugee Convention and Protocol, CAT and/or ICCPR, in their domestic legislation.¹⁸ New Zealand's *Immigration Act 2009* includes all four.¹⁹
- › In New Zealand, the direct incorporation of the Refugee Convention in domestic law has enabled refugee status decision-makers to draw on a robust body of judicial decisions from other jurisdictions, as well as the views of academic experts, when making decisions regarding the scope and content of international protection.²⁰
- › The EU includes extensive references to the Refugee Convention and Protocol and other human rights instruments in its own regional treaty law, as well as in regulations and directives dealing with border surveillance, border and coast guard activities, reception, procedures and qualification for protection, among other issues.²¹
- › In Europe, the European Convention of Human Rights guarantees all individuals, including refugees and asylum seekers, access to a fair determination of their legal rights and an effective remedy when such rights are violated.²² The European Court on Human Rights has held that this right is not just 'theoretical or illusory' but must be 'practical and effective', and that it may require governments to provide legal assistance where individuals cannot obtain it themselves.²³
- › Many countries have enshrined the right to asylum in their national constitutions. In Europe alone, almost half the constitutions of EU Member States contain the right to asylum.²⁴ While this does not guarantee implementation in practice, it provides a basis for challenging attempts by governments to restrict access to protection. For example, in Ecuador, attempts by the government to reduce the time allowed to lodge an application for asylum or appeal a negative decision were struck down by the courts as infringing the right to asylum.²⁵
- › A number of countries have a formal procedure in place to determine whether an individual is stateless, including France, Georgia, Hungary, Italy, Latvia, Mexico, Moldova, the Philippines, Slovakia, Spain, Turkey and the United Kingdom.²⁶
- › In New Zealand and Canada, refugee status decision-makers are empowered to grant visas to people who may not qualify for international protection but for whom there are humanitarian or compassionate grounds for allowing them to remain.²⁷ Australian law contained a similar provision between 1980 and 1989.²⁸

¹⁸ See *Immigration Act 2009* (NZ) s 124; *Immigration and Refugee Protection Act*, SC 2001, c 27 (Canada) ss 2(1), 96, 97; *Immigration and Nationality Act*, 8 CFR §§ 208.16, 208.17 (United States).

¹⁹ *Immigration Act 2009* (NZ) s 124.

²⁰ See Doug Tennent, 'The Contribution of the New Zealand Refugee Status Appeals Authority to International Refugee Jurisprudence: A Submission to both Acknowledge the Contribution of the Authority and to Advocate for its Retention' (2007) 15 *Waikato Law Review* 160, esp 162.

²¹ See, eg, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast)* [2011] OJ L337/9 (EU Qualification Directive) recital 4, arts 2(c)–(d); *Consolidated Version of the Treaty on the Functioning of the European Union*, 2012 OJ C 326/47, art 78(1); *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast)* OJ L 180/60, recital 3, art 2(a); *Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person* OJ L 180/31, recital 3; *Regulation (EU) No. 656/2014 of the European Parliament and of the Council of 15 May 2014 Establishing Rules for the Surveillance of the External Sea Borders in the Context of Operational Cooperation Coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union* OJ L 189/93, recital 8; *Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who Are Long-Term Residents* OJ L 16/44, art 2(f); *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals* OJ L 348/98, recital 23; *Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and Amending Regulation (EU) 2016/399 of the European Parliament and of the Council and Repealing Regulation (EC) No. 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No. 2007/2004 and Council Decision 2005/267/EC* OJ L 251/1, recital 47 and art 34(1).

²² *European Convention on Human Rights*, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953) arts 6(1), 13.

²³ See *Airey v Ireland* [1979] 2 EHRR 305, esp para 24.

²⁴ The right to asylum is contained in the constitutions of Bulgaria, Czech Republic, France, Germany, Hungary, Italy, Poland, Portugal, Romania, Slovakia, Slovenia and Spain, as well as in those of the Russian Federation and Serbia. See Stephen Meili, 'The Constitutional Right to Asylum: The Wave of the Future in International Refugee Law?' (2018) 41(2) *Fordham International Law Journal* 383, 399.

²⁵ *Sentencia N. 002-14-Sin-CC*, Case No. 0056-12-IN y 0003-12-IA (14 August 2014), cited in *ibid* 393–96. See *Constitution of the Republic of Ecuador* (2008) art 41.

²⁶ See generally Gábor Gyulai, 'Statelessness Determination and the Protection Status of Stateless Persons: A Summary Guide of Good Practices and Factors to Consider When Designing National Determination and Protection Mechanisms' (European Network on Statelessness, 2013) 7.

²⁷ *Immigration Act 2009* (NZ) ss 194(5), 194(6), 195(6), 195(7); *Immigration and Refugee Protection Act*, SC 2001, c 27 (Canada) s 25.

²⁸ Former s 6A(1)(e) of the *Migration Act*. See further Jane McAdam, 'From Humanitarian Discretion to Complementary Protection: Reflections on the Emergence of Human Rights-Based Refugee Protection in Australia' (2011) 18 *Australian International Law Journal* 53. Note that section 195A of the *Migration Act* contains a general power that allows the Minister to grant a visa to a person in detention if the Minister 'thinks that it is in the public interest to do so', and irrespective of whether the person has applied for the visa. It is not framed in terms of humanitarianism or compassion per se.





Australia should provide humane, fair reception conditions

What?

Australia should ensure that people seeking asylum are afforded a humane and fair reception, regardless of their legal status or mode of arrival. Reception conditions should be sensitive to age, gender and diversity. People seeking asylum should not be detained, except where absolutely necessary for a brief initial period for registration, documentation, health and security checks. Where detention is exceptionally required, it should be non-arbitrary, justified by reference to individual circumstances, proportionate and periodically reviewable by a court. Children should never be detained on account of their immigration status.

Why?

Many of Australia's international legal obligations relating to the treatment of refugees and others in need of international protection apply even before a person has been recognised by Australian authorities as requiring international protection. The basic standards of treatment required under international refugee and human rights law provide a 'yardstick' for defining appropriate reception conditions for people who come to Australia seeking protection.²⁹

Under the Refugee Convention, the principles of *non-refoulement* and non-discrimination, as well as rights relating to personal status, access to the courts and public education, accrue to refugees from the moment they arrive in Australia or come under Australia's control.³⁰ Under international human rights law, Australia must ensure minimum standards of treatment for every person within its territory or jurisdiction, including ensuring basic standards of living,³¹ protecting against arbitrary detention and torture,³² and upholding the best interests of the child.³³ Yet, many people seeking asylum in Australia live in destitution, without secure work, adequate health care, basic financial assistance, counselling or other support.³⁴ According to a Senate Committee, policies that leave asylum seekers destitute are 'morally indefensible and an abrogation of responsibility by the Commonwealth'.³⁵

The prohibition on arbitrary detention is of particular importance to those seeking protection in Australia. As a general principle, detention of refugees and asylum seekers will be unlawful under international law unless, in each individual case, it is reasonable, necessary, proportionate and subject to periodic review.³⁶ Blanket detention policies – such as Australia's policy of mandatory detention for those arriving without a valid visa, or those whose visas are cancelled at the airport – do not satisfy these criteria and are therefore unlawful. Australia also cannot 'contract out' of its obligation *not* to detain people by sending them to other countries for processing. As discussed under Principle 7, offshore processing undermines Australia's potential role as a global and regional leader in refugee protection, hindering genuine and equitable cooperation between Australia and other countries in the Asia-Pacific region on this issue.

²⁹ See UNHCR, 'Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems' (4 September 2001) para 3.

³⁰ Ibid.

³¹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (ICESCR) art 11. Australia ratified the ICESCR on 10 December 1975.

³² ICCPR arts 7, 9, 10; CAT art 2.

³³ CRC art 3(1).

³⁴ See Refugee Council of Australia, 'How Cuts to Support for People Seeking Asylum Will Affect People, States and Local Communities' (6 July 2018) <https://www.refugeecouncil.org.au/srss-cuts-factsheet>; Refugee Council of Australia, 'Understanding Status Resolution Support Services (SRSS) Program and the Impact of the 2018 Changes' on Economic Justice Australia (8 February 2019)

<https://www.ejaustralia.org.au/wp/social-security-rights-review/understanding-status-resolution-support-services-srss-program-and-the-impact-of-the-2018-changes>; McAdam and Chong, above n 2, 112–3.

³⁵ Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into the Administration and Operation of the Migration Act 1958* (2006) para 8.62; see also McAdam and Chong, above n 2, 113.

³⁶ See 'Immigration Detention in Australia' (Factsheet, Kaldor Centre for International Refugee Law, 2021) <https://www.kaldorcentre.unsw.edu.au/publication/immigration-detention-australia>.

Australia's mandatory detention policies have been repeatedly criticised, both domestically³⁷ and internationally.³⁸ The average length of detention of asylum seekers in Australia is nearly 700 days, although some individuals have been detained for more than 10 years.³⁹ This is vastly out of step with detention practices elsewhere – for example, in most of Europe the average length of detention is less than 90 days, and in some countries it is limited to an even shorter duration.⁴⁰ Leaving refugees for prolonged and indefinite periods with little hope for a solution has devastating impacts on people's mental and physical health and well-being.⁴¹ The UN Special Rapporteur on Torture found that Australia's detention practices violated the right of asylum seekers, including children, to be free from 'torture or cruel, inhuman or degrading treatment'.⁴² The UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the UN Committee on the Rights of the Child have jointly proclaimed that: 'Every child, at all times, has a fundamental right to liberty and freedom from immigration detention. ... Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.'⁴³

Allowing people seeking asylum to live in the community while their claims are processed, and providing them with adequate care and assistance during this period, helps to promote their self-sufficiency and prospects for long-term integration.⁴⁴ It is also a more humane approach that aligns with human rights law, and it is considerably less expensive than closed detention.⁴⁵ Research in Uganda – which has adopted a 'self-reliance' model of refugee protection, allowing refugees the right to work and freedom of movement – shows that programs encouraging self-reliance and self-sufficiency among refugees can promote economic sustainability among refugees themselves, as well as benefitting host communities.⁴⁶ For those whose claims for international protection are unsuccessful, humane and fair treatment during their stay in Australia will help to facilitate successful return and re-integration into their country of origin (or another country).⁴⁷

³⁷ See Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014); Human Rights and Equal Opportunity Commission (now Australian Human Rights Commission), *A Last Resort? Report of the National Inquiry into Children in Immigration Detention* (2004).

³⁸ *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E Méndez*, UN doc A/HRC/28/68/Add.1 (6 March 2015) (Special Rapporteur Report) paras 16–31; UN Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia*, UN doc CCPR/C/AUS/CO/6 (1 December 2017) paras 37–38.

³⁹ Global Detention Project, *Country Report: Immigration Detention in Australia: Turning Arbitrary Detention into a Global Brand* (February 2022) <https://www.globaldetentionproject.org/wp-content/uploads/2022/02/GDP-Australia-Detention-Report-2022-2.pdf>; Refugee Council of Australia, 'Statistics on People in Detention in Australia' (8 January 2022) <https://www.refugeecouncil.org.au/detention-australia-statistics/5>.

⁴⁰ See Jacques Delors Institut, *Asylum Detention in Europe: State of Play and Ways Forward* (18 May 2017) 15. Detention in France is limited to 60 days, and in Spain to 45 days.

⁴¹ Médecins Sans Frontières, *Indefinite Despair: The Tragic Mental Health Consequences of Offshore Processing on Nauru* (December 2018); Commonwealth Ombudsman, *Suicide and Self-Harm in the Immigration Detention Network* (May 2013).

⁴² *Special Rapporteur Report*, above n 38, paras 19, 31.

⁴³ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child, *Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return*, UN doc CMW/C/GC/4-CRC/C/GC/23 (16 Nov 2017) para 5.

⁴⁴ See, eg, Caroline Fleay, Lisa Hartley and Mary Anne Kenny, 'Refugees and Asylum Seekers Living in the Australian Community: The Importance of Work Rights and Employment Support' (2013) 48(4) *Australian Journal of Social Issues* 473; Eurocities, *Refugee Reception and Integration in Cities* (March 2016); Australian Human Rights Commission, *Community Arrangements for Asylum Seekers, Refugees and Stateless Persons* (2012) s 5.1; International Detention Coalition, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention* (revised edition, 2015) s 1.3.2.

⁴⁵ See McAdam and Chong, above n 2, 208.

⁴⁶ See generally Alexander Betts et al, *Refugee Economies in Uganda: What Difference Does the Self-Reliance Model Make?* (Refugee Studies Centre, University of Oxford, 2019). This report also identifies a number of weaknesses in the Ugandan model, however.

⁴⁷ Australian Human Rights Commission, above n 44, s 5.1; International Detention Coalition, above n 44, s 2.4.3.

How?

Australia should provide humane and fair reception conditions for *all* people seeking asylum, irrespective of their legal status or whether they arrive by sea or air. People should be given access to medical care, gainful employment, education and such other assistance as will enable them to live in dignity in the community pending the determination of their claims.

In order to provide humane, fair conditions for all people seeking asylum, Australia should take the following actions as a matter of priority:

a) End mandatory and indefinite detention

By its very nature, mandatory detention is arbitrary and thus contrary to international law. Detention should only be used where absolutely necessary, and for the shortest possible time, while registration, documentation, health and security checks take place. It should be subject to time limits specified by law. Sufficient safeguards must exist to ensure that detention is not arbitrary or indefinite. Individuals who are detained must be given the opportunity and necessary assistance to challenge their detention in court. In all cases, including where security issues are raised, the use of detention should comply with international legal standards. Community-based alternatives to detention should be used whenever possible. Children should never be detained on account of their immigration status.

Where detention is deemed necessary, it should only ever be in an appropriate facility with the minimum necessary level of security and with adequate access to open air, recreational and leisure activities, education programs, visitors and excursions.⁴⁸

b) Process asylum claims in Australia, not offshore

Australia should also abolish its offshore processing regime and fulfil its international legal obligations to all people who were sent offshore and are still waiting for a durable solution, whether they be in Australia or a regional processing country. Those found to be refugees should be promptly settled 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 international protection should be given appropriate assistance to enable them to return to their country of origin and rebuild their lives. All those sent offshore should be treated with dignity and given access to necessary medical and other assistance.

c) Enable dignified living conditions for all people seeking asylum

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, and other essential services.

Examples of good practice:

- › The EU Reception Directive⁴⁹ sets out minimum standards for the reception of asylum seekers to ensure ‘a dignified standard of living and comparable living conditions in all Member States’.⁵⁰ The Directive recommends specific measures to be taken by States in relation to freedom of movement, respect for family unity, education, employment and training, and provisions for people with special needs, in order to ensure that minimum reception standards are met.
- › In most South American countries, national legislation either does not provide for, or explicitly prohibits, immigration detention.⁵¹ For example, legislation in Venezuela provides that measures taken towards deportation ‘[must] not imply a deprivation or restriction of the right to personal liberty’, while Ecuador’s Constitution recognises freedom of movement for all people and prohibits any type of criminalisation of irregular migration.⁵²
- › Many European States have replaced the detention of asylum seekers with alternatives. For example, Belgium’s *Reception Act 2007* guarantees basic forms of assistance to all asylum seekers, including accommodation, food, clothing, medical care, social and psychological support, access to interpreters and legal representation, access to training, and a small monetary allowance.⁵³ A number of other pilot programs have demonstrated the benefits of housing asylum seekers in the community,⁵⁴ proving to be ‘highly effective in terms of cost and compliance’.⁵⁵

⁴⁸ For a full set of the principles relevant to immigration detention, see: UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012); Australian Human Rights Commission, *Human Rights Standards for Immigration Detention* (2013).

⁴⁹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (recast) OJ L 180/96.

⁵⁰ Ibid preambular para 11.

⁵¹ See Pablo Ceriani Cernadas, ‘Immigration Detention through the Lens of International Human Rights: Lessons from South America’ (Global Detention Project Working Paper No. 23, September 2017) 6.

⁵² *Migration and Foreigners Law* (2004) (Venezuela) art 46.5 (emphasis added); *Constitution of the Republic of Ecuador* (2008) art 40. Both cited in ibid 5–6.

⁵³ See European Migration Network and European Commission, ‘The Organisation of Reception Facilities in Belgium’ (August 2013) https://emnbelgium.be/sites/default/files/publications/be_ncp_emn_focussed_study_on_reception_version_30_august_2013.pdf; see also Asylum Information Database, ‘Criteria and Restrictions to Access Reception Conditions: Belgium’ (last updated 1 April 2021) <https://asylumineurope.org/reports/country/belgium/reception-conditions/access-and-forms-reception-conditions/criteria-and-restrictions-access-reception-conditions/#:~:text=The%20Reception%20Act%20provides%20the,deemed%20admissible%20by%20the%20CGRS>.

⁵⁴ See, eg, Eiri Ohtani, *Alternatives to Detention: Building a Culture of Cooperation Evaluation of Two-Year Engagement-Based Alternative to Immigration Detention Pilot Projects in Bulgaria, Cyprus and Poland* (European Programme for Integration and Migration, July 2020).

⁵⁵ *Evaluation of ‘Action Access’, an Alternatives to Detention Pilot* (UNHCR 2021) 8.





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

What?

Australia should provide a fair, efficient and transparent system for processing asylum claims, with decisions made by suitably qualified, independent decision-makers. All those seeking Australia's protection should receive a fair hearing, including free access to legal advice and assistance, interpreting services, and the opportunity for independent review of negative decisions. Asylum claims should never be processed at sea.

Why?

In order to fulfil its obligations under the Refugee Convention and international human rights law, Australia must have in place procedures that ensure the timely and accurate identification of refugees and others in need of international protection. While there is no single uniform procedure that must be used when processing asylum claims, the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR), which is comprised of States, has set out certain basic requirements for ensuring fairness and essential guarantees for applicants. These include ensuring respect for the principle of *non-refoulement*, providing appropriate guidance for applicants, and allowing appeals against negative decisions.⁵⁶

Failing to provide adequate asylum procedures for those seeking Australia's protection hampers the ability of decision-makers to make well-informed and well-reasoned decisions. Where applicants are not given appropriate advice and assistance with asylum procedures, they may be unable to present their claims effectively.⁵⁷ In turn, this increases the likelihood of appeals and undermines public confidence in the decision-making process.⁵⁸

Expeditious and effective decision-making promotes certainty for applicants and helps those in need of international protection to rebuild their lives and become full participants in Australian society. It also contributes to the timely return to their home country of those who are not entitled to international protection. Fundamentally, processing all asylum claims fairly and efficiently will help to ensure that Australia does not inadvertently return someone to a place where their life or freedom is at risk.

How?

Australia should provide access to fair, efficient and transparent procedures for determining the claims of all those seeking asylum. The criteria for international protection should be set out in domestic law by reference to Australia's international legal obligations.⁵⁹ Decisions regarding applicants' protection claims should be made by suitably qualified and independent decision-makers, in accordance with procedural fairness and the rule of law.

⁵⁶ See UNHCR Executive Committee Conclusion No. 8 (XXVIII), 'Determination of Refugee Status' (1977) (UNHCR ExCom Conclusion 8); UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019) (UNHCR Handbook) para 192.

⁵⁷ As the UN Human Rights Committee has noted, access to appropriate legal and other assistance 'often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way'. UN Human Rights Committee, *General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, 90th sess, UN doc CCPR/C/GC/32 (23 August 2007) para 10.

⁵⁸ See McAdam and Chong, above n 2, 189–95.

⁵⁹ See Principle 1, above.

Access to fair and efficient asylum procedures should be provided to every person seeking asylum in Australia, irrespective of the time or mode of their arrival. In particular, Australia should abolish its use of 'fast track' procedures, which prevent some applicants from accessing legal assistance or applying for independent review of the decision on their claim.⁶⁰ It should also cease relying on 'enhanced screening' as a replacement for a full status determination procedure for some asylum seekers arriving by boat. Asylum processing or screening conducted at sea does not meet the minimum requirements for fair procedures.⁶¹ Similarly, Australia should end the use of 'entry screening' and abolish the practice of cancelling the visas of asylum seekers who raise protection claims at airports.⁶²

People seeking asylum should be given the advice and assistance necessary to fully present their claims. Australia should provide free age, gender and diversity sensitive counselling, legal advice and representation with the support of a qualified interpreter. Tailored assistance should be provided for those with special requirements, including children, victims of trauma and people with disabilities. At a minimum, the government should reinstate free legal assistance to all applicants for their initial protection visa application and merits review (as previously provided under the Immigration Advice and Application Assistance Scheme (IAAAS)).⁶³

Every person seeking asylum should have access to independent merits review and judicial review of government decisions affecting them. Cases that raise security issues should be dealt with in accordance with Australia's international legal obligations and the rule of law. In particular, individuals subject to adverse ASIO security assessments should have the opportunity to meaningfully challenge the assessment and to have it independently reviewed.

Examples of good practice:

- › Many countries provide free legal advice and representation to those seeking asylum – for example, via a dedicated legal service provider (eg Red Cross in Iceland)⁶⁴ or a duty lawyer service (eg in Sweden and Netherlands).⁶⁵ Interpreters are also provided for free in many countries. In the United States, the quality of interpretation in interviews is continuously monitored.⁶⁶
- › Canada and France have facilitated independent evaluations of their country's asylum procedures, with findings made public. In France, UNHCR was contracted to evaluate the quality of asylum interviews, research and decisions.⁶⁷ In Canada, the government commissioned an independent review of its asylum management systems which identified shortcomings in the existing system and made recommendations for improvement.⁶⁸

⁶⁰ McAdam and Chong, above n 2, 43ff.

⁶¹ UNHCR has expressed its concerns to Australia about the potential non-compliance of enhanced screening procedures with international law, and the fact that asylum procedures conducted at sea 'would rarely afford an appropriate venue for a fair procedure'. See UNHCR, 'Returns to Sri Lanka of Individuals Intercepted at Sea' (Press release, 7 July 2014) <https://www.unhcr.org/en-au/news/press/2014/7/53baa6ff6/returns-sri-lanka-individuals-intercepted-sea.html>. While UNHCR has expressed support for the use of 'fast track' procedures elsewhere (notably, in Europe), this is only if they are accompanied by sufficient procedural safeguards and due process standards, including the rights of applicants to seek legal advice, prepare their application, receive properly reasoned decisions, apply for review, and remain in the country until the final determination of their claim. See UNHCR, *Fair and Fast: UNHCR Discussion Paper on Accelerated and Simplified Procedures in the European Union* (May 2018) 12–13.

⁶² Regina Jefferies, Daniel Ghezlbash and Asher Hirsch, 'Assessing Protection Claims at Airports: Developing Procedures to Meet International Domestic Obligations' (Policy Brief No. 9, Kaldor Centre for International Refugee Law, 2020); Regina Jefferies, 'Comparative Perspectives on Airport Asylum Procedures Before and During the COVID-19 Pandemic' (Policy Brief No. 12, Kaldor Centre for International Refugee Law, 2021).

⁶³ See McAdam and Chong, above n 2, 187–8.

⁶⁴ See Directorate of Immigration, 'Rights and Services for Asylum Seekers' (undated) <https://utl.is/index.php/en/rights-and-services-for-asylum-seekers>.

⁶⁵ See Government of Canada, *Report of the Independent Review of the Immigration and Refugee Board: A Systems Management Approach to Asylum* (10 April 2018) ch 2:

'International Best Practices' <https://www.canada.ca/content/dam/ircc/migration/ircc/english/pdf/pub/irb-report-en.pdf>.

⁶⁶ Ibid.

⁶⁷ Forum Réfugiés – Cosi, 'Regular Procedure: France' on *Asylum Information Database/ECRE* (undated) https://www.asylumineurope.org/reports/country/france/asylum-procedure/procedures/regular-procedure#footnote9_4josdys.

⁶⁸ See Government of Canada, above n 65.

4

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

What?

Australia should respect the principles of family unity and the best interests of the child, in accordance with international human rights law. All those granted international protection in Australia should have the opportunity to be reunited with their families. Children should not be separated from their parents, and their health, welfare and education should be carefully safeguarded. Special provisions should be made for unaccompanied children, including the appointment of an independent guardian with the power to advocate for their best interests. Children should never be detained.

Why?

International human rights law recognises the family as ‘the natural and fundamental group unit of society’⁶⁹ and obliges States to ensure respect for family unity.⁷⁰ Summary Conclusions from UNHCR’s Global Consultations on International Protection explain that the principle of family unity ‘requires not only that States refrain from action which would result in family separations, but also that they take measures to maintain the unity of the family and reunite family members who have been separated’.⁷¹ They also urge that deciding who constitutes a ‘family’ requires ‘a flexible approach which takes account of cultural variations, and economic and emotional dependency factors’.⁷²

The Convention on the Rights of the Child sets out basic standards of treatment for all children, regardless of their immigration status. Fundamental among these obligations is the requirement that, in all actions concerning children, the best interests of the child shall be a primary consideration.⁷³ More specifically, no child should be separated from their parents against their will,⁷⁴ and States must assist in the reunification of children separated from family members.⁷⁵ Under the Convention on the Rights of the Child, Australia is obliged to afford children seeking asylum the ‘appropriate protection and humanitarian assistance’ necessary to allow them to enjoy their rights.⁷⁶ The Committee on the Rights of the Child, which oversees the implementation of the Convention, has criticised Australia’s treatment of children seeking asylum and urged Australia ‘to bring its immigration and asylum laws into full conformity with the Convention and other relevant international standards’.⁷⁷

Mutual support among family members is critical to people’s resilience, including their integration and success in new communities. Family separation creates significant psychological hardship and distress, as so many Australians experienced first-hand during COVID-19 lockdowns and travel bans. In certain circumstances, family separation could even amount to cruel, inhuman or degrading treatment, in violation of the ICCPR.⁷⁸

⁶⁹ ICCPR art 23(1); also CRC, preambular para 5.

⁷⁰ ICCPR arts 17(1), 23(1); CRC arts 8(1), 9; See also *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, Recommendation B, which reaffirms the ‘essential right’ of family unity for refugees.

⁷¹ *Summary Conclusions: Family Unity*, Expert Roundtable organized by the United Nations High Commissioner for Refugees and the Graduate Institute of International Studies, Geneva, Switzerland, 8–9 November 2001, para 5.

⁷² *Ibid* para 8.

⁷³ CRC art 3(1).

⁷⁴ Unless the best interests of the child require such separation: *ibid* art 9.

⁷⁵ *Ibid* art 22(2).

⁷⁶ *Ibid* art 22(1).

⁷⁷ See UN Committee on the Rights of the Child, *Consideration of Reports submitted by States Parties under Article 44 of the Convention. Concluding Observations: Australia*, UN doc CRC/C/AUS/CO/4 (28 August 2012) para 81.

⁷⁸ ICCPR art 7; see McAdam and Chong, above n 2, 26.

How?

All refugees should have the opportunity to be reunited with their families, irrespective of their legal status or their mode of arrival. Australia should increase the capacity of its current family reunification programs, and provide a dedicated quota for family reunification that is separate from Australia's general humanitarian resettlement program. Australia should also remove existing discriminatory restrictions on family reunification for those who come by boat or who raise a protection claim in airport immigration clearance, and allow for family reunion beyond 'immediate family members'.⁷⁹

All children seeking asylum in Australia should have access to appropriate care, assistance and education, irrespective of their legal status or the duration of their stay in Australia. Australia should incorporate the principle of the best interests of the child into domestic legislation and ensure that it is a primary consideration in all aspects of refugee policy affecting children. As a matter of priority, Australia should abolish those aspects of its refugee policy that are most harmful to children. These include offshore processing and temporary protection visas.

Offshore processing has particularly devastating effects on families and children, even after their release from detention.⁸⁰ It should be abolished, and those currently held offshore or back in Australia on a temporary basis should be provided with protection and durable solutions. This includes anyone still in Papua New Guinea who does not have access to a suitable settlement option. While there are no children currently held offshore, Australian law should be amended to guarantee that no child or family will be transferred offshore in the future.

Temporary protection, which results in families being separated for prolonged, and potentially indefinite, periods of time, also has especially detrimental effects on the mental health of refugee and asylum seeker children.⁸¹ Temporary protection visas should be abolished and replaced with more durable solutions which allow families to rebuild their lives together, in a safe and stable environment (see Principle 7 below). The *Migration Act* should be amended to guarantee that children are never detained on account of their immigration status.⁸²

In order to safeguard the rights and interests of unaccompanied asylum seeker and refugee children, Australia should appoint an independent guardian with the power to advocate for unaccompanied refugee and asylum seeker children in relation to all decisions that affect their lives. The current guardian, the Minister, has a clear conflict of interest in this role.⁸³

⁷⁹ See Refugee Council of Australia, 'We Can and Should Do More: Australia's Humanitarian Program 2018–19' (May 2018) 35–6. An 'immediate family member' refers to a spouse or de facto partner (including same-sex partner), a dependent child or stepchild, and a parent or step-parent (if the applicant is under 18): Department of Home Affairs, 'Reunite Your Split Family' <https://immi.homeaffairs.gov.au/what-we-do/refugee-and-humanitarian-program/about-the-program/resettle-in-australia>.

⁸⁰ McAdam and Chong, above n 2, ch 5.

⁸¹ Ibid 24–5; Human Rights and Equal Opportunity Commission, above n 37, esp ch 16. See further Kaldor Centre for International Refugee Law, *Temporary* <https://temporary.kaldorcentre.net>.

⁸² *Migration Act* s 4AA.

⁸³ See *Immigration (Guardianship of Children) Act 1946* (Cth); see also Committee on the Rights of the Child, *Consideration of Reports submitted by States Parties under Article 44 of the Convention. Concluding Observations: Australia*, UN doc CRC/C/AUS/CO/4 (28 August 2012) paras 80(c) and 81(c).

Examples of good practice:

- › In the Netherlands, all unaccompanied children are placed under the guardianship of an independent agency which arranges housing and care, usually within foster families.⁸⁴ There are special interview rooms with toys for children under 12, and immigration officials are specially trained to interview children in an age-appropriate manner.⁸⁵
- › The EU Qualification Directive provides that Member States may extend provisions on family unity beyond immediate family members 'to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of international protection at that time.'⁸⁶ The Court of Justice of the European Union has held that dependency in this context must be understood in terms of legal, financial, emotional or material support between family members.⁸⁷
- › Sweden has established a Children's Ombudsman – a government agency formed to represent children's rights and to monitor Sweden's implementation of the Convention on the Rights of the Child.⁸⁸

⁸⁴ Nidos Foundation, 'Guardianship' (undated) <https://www.nidos.nl/en/home/voogdij-en-gezinsvoogdij/guardianship>. The Nidos Foundation is a non-government organisation, funded by the Ministry of Justice, but with an independent board.

⁸⁵ Government of the Netherlands, 'Unaccompanied minor aliens (AMV)' (undated) <https://www.government.nl/topics/asylum-policy/unaccompanied-minor-foreign-nationals-umfns>.

⁸⁶ EU Qualification Directive art 23(5).

⁸⁷ See Communication from the Commission to the European Parliament and the Council on Guidance for Application of Directive 2003/86/EC on the right to family reunification, COM(2014) 210 final (3 April 2014) 6–7 (discussion and relevant cases).

⁸⁸ 'About the Ombudsman for Children in Sweden' on *Barnombudsmannen* (2 March 2022) <https://www.barnombudsmannen.se/english>.





Australia should create additional safe, lawful pathways to protection

What?

Australia should create additional safe, lawful pathways to protection, including by increasing the resettlement of refugees as an agreed percentage of Australia's annual migration intake; creating special humanitarian intakes for people fleeing particular crises; expanding programs for those particularly at risk or otherwise in danger of being left behind (including women and girls at risk); enhancing the opportunities for refugees to access skilled or student visas; and increasing opportunities for community and private sponsorship of refugees (in addition to government-allocated places).

Why?

People fleeing persecution, conflict and human rights abuses often face unimaginable dangers on their journeys to find safety and protection. Many refugees who make dangerous boat journeys or employ the assistance of smugglers understand the risks. But with no alternative pathway to safety, they may have no other option.

Safe, lawful pathways to protection provide opportunities for refugees to seek safety using regular means and routes of travel and without putting their lives at risk.⁸⁹ They include refugee resettlement, as well as other complementary pathways to protection, such as community and private sponsorship,⁹⁰ family reunification programs, special humanitarian intakes,⁹¹ targeted work and study programs,⁹² and in-country processing or other 'protected entry' schemes.⁹³ For many refugees, such pathways may provide the only means of finding a durable solution and an opportunity to rebuild their lives.

Safe, lawful pathways to protection not only save lives, but are also a critical form of international solidarity and responsibility-sharing among States, because they can relieve the pressure on 'front line' States during large-scale humanitarian emergencies. Indeed, the 'urgent need for more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees'⁹⁴ was the driving force behind the 2016 New York Declaration and the 2018 Global Compact on Refugees, both of which Australia supported. Under the Refugee Compact, Australia pledged to 'ease pressures on host countries' and 'expand access to third country solutions' for refugees.⁹⁵

Most people want to move safely and lawfully.⁹⁶ Most governments want to know who has entered their territory and why. Creating safe and lawful pathways to protection is therefore in everyone's interests. And Australia has done it before. Between 1948 and 1953, Australia resettled more than 160,000 refugees, predominantly from Eastern Europe.⁹⁷ During this period, refugees represented around half of all newcomers who settled in Australia (compared to less than 10 per cent now).⁹⁸ By working together, the Australian community and government could again reduce the risks faced by refugees and enhance access to protection and durable solutions.

⁸⁹ See generally Australian Human Rights Commission, *Pathways to Protection: A Human Rights-Based Response to the Flight of Asylum Seekers by Sea* (2016).

⁹⁰ See 'Complementary Refugee Pathways: Private and Community Refugee Sponsorship' (Factsheet, Kaldor Centre for International Refugee Law, 2020) <https://www.kaldorcentre.unsw.edu.au/publication/alternative-refugee-pathways-private-and-community-led-refugee-sponsorship>.

⁹¹ Tamara Wood and Claire Higgins, 'Special Humanitarian Intakes: Enhancing Protection through Targeted Refugee Resettlement' (Policy Brief No. 7, Kaldor Centre for International Refugee Law, 2018).

⁹² 'Complementary Refugee Pathways: Labour Mobility Schemes' (Factsheet, Kaldor Centre for International Refugee Law, 2020) <https://www.kaldorcentre.unsw.edu.au/publication/complementary-refugee-pathways-labour-mobility-schemes>; 'Complementary Refugee Pathways: Education Pathways' (Factsheet, Kaldor Centre for International Refugee Law, 2020) <https://www.kaldorcentre.unsw.edu.au/publication/complementary-refugee-pathways-education-pathways>.

⁹³ See 'Protected Entry Procedures' (Research Brief, Kaldor Centre for International Refugee Law, 2021) https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Research%20Brief_Protected%20Entry_March2021.pdf; 'Complementary Refugee Pathways: Protected Entry Schemes' (Factsheet, Kaldor Centre for International Refugee Law, 2021) <https://www.kaldorcentre.unsw.edu.au/publication/in-country-processing-and-other-protected-entry-procedures>.

⁹⁴ *Report of the United Nations High Commissioner for Refugees: Part II: Global Compact on Refugees*, UN doc A/73/12 (part II) (2018) (Refugee Compact) para 1. See also *New York Declaration for Refugees and Migrants*, GA Res 71/1, UN GAOR 71st sess, 3rd plen mtg, UN doc A/RES/71/1 (19 September 2016) para 68.

⁹⁵ Refugee Compact, Objectives (i) and (iii).

⁹⁶ McAdam and Chong, above n 2, 68.

⁹⁷ See Klaus Neumann, *Refuge Australia: Australia's Humanitarian Record* (UNSW Press, 2004) 34; Jane McAdam, 'Editorial: Australia and Asylum Seekers' (2013) 25 *International Journal of Refugee Law* 435, 436.

⁹⁸ Refugee Council of Australia, 'How Many Refugees Have Come to Australia?' (9 October 2021) www.refugeecouncil.org.au/australian-immigration-humanitarian-intake/2.

How?

Australia should expand its existing humanitarian program to increase the overall number of people resettled to Australia each year, and to address the specific resettlement needs of particular individuals and groups. This is particularly urgent given the dramatic reduction in resettlement places provided by Australia in 2019–21 on account of COVID-19.⁹⁹ Australia's general resettlement quota should be increased as a percentage of the country's annual migration intake.¹⁰⁰ This number should be subject to annual review to ensure that it reflects the scale of global displacement and the needs identified by UNHCR. Australia's resettlement program should prioritise those with the greatest protection needs and maintain sufficient flexibility to respond to changing priorities. Restrictions on resettlement based on someone's date, mode or place of arrival should be removed, including for refugees registered with UNHCR in Indonesia.

In addition to its general resettlement program, Australia should maintain a dedicated quota for urgent or emergency resettlement cases. It should also have places set aside for special humanitarian intakes, which can be used as and when required to respond to large-scale humanitarian crises. This helps to promote international solidarity and responsibility-sharing, as well as protection and durable solutions for those with the greatest protection needs.¹⁰¹ By offering a special humanitarian intake for refugees fleeing Afghanistan or Ukraine, for example, Australia could help to relieve the pressure on front-line States that are hosting many thousands of refugees.

Australia should develop additional safe and lawful pathways for refugees and others in need of international protection, including through 'protected entry procedures' and community and private sponsorship. While Australia's current Community Support Program is a first step in this regard, and underwent some modest improvements in late 2021, it requires significant revision to make it a genuinely complementary pathway to protection in Australia.¹⁰² In particular, places in the Community Support Program should be *additional* to those in the Humanitarian Program (not taken from them). Eligibility should be based on individuals' protection needs, not their potential for integration and/or economic participation. Australia should also expand options for 'in-country processing' by giving people at risk the opportunity to apply for protection *before* they flee their home countries. This could include, for example, the expansion of Australia's existing In-country Special Humanitarian visa (subclass 201), which is currently used only rarely.¹⁰³ Finally, Australia should consider ways to improve refugees' access to visas for skilled migration, study, family reunion and so on by relaxing certain documentary requirements and waiving or reducing fees.

⁹⁹ See further Adele Garnier, 'The Ongoing Impacts of the COVID-19 Pandemic on Refugee Resettlement' on *Asylum Insight* (December 2021) <https://www.asyluminsight.com/garnier>; UNHCR, 'Resettlement Data Finder (RDF)' <https://rsq.unhcr.org>.

¹⁰⁰ The Expert Panel on Asylum Seekers suggested that the number should increase to at least 27,000 refugees per annum: Australian Government, *Report of the Expert Panel on Asylum Seekers* (2012) 14 (Recommendation 2).

¹⁰¹ See Wood and Higgins, above n 91.

¹⁰² See Refugee Council of Australia, 'The Community Support Program' (22 February 2021) <https://www.refugeecouncil.org.au/community-support-program>; Statement by the Hon. Josh Frydenburg MP and Senator the Hon. Simon Birmingham, *Mid-Year Economic and Fiscal Outlook 2021–22*, Appendix A: Policy Decisions taken since the 2021–22 Budget (Commonwealth of Australia, 17 December 2021), 258, <https://budget.gov.au/2021-22/content/myefo/download/myefo-2021-22.pdf>.

¹⁰³ See 'Complementary Refugee Pathways: Protected Entry Schemes', above n 93.

Examples of good practice:

- › Between 2015 and 2017, Australia implemented a special humanitarian intake of 12,000 refugees fleeing conflict in Syria and Iraq. This number was additional to the annual quota of refugees resettled under Australia's general resettlement program. While there is room for improvement in relation to similar future intakes, the Syria–Iraq special intake provides a sound basis for planning for, and responding to other humanitarian crises, such as those in Afghanistan (2021) and Ukraine (2022).
- › Canada has a highly successful private sponsorship program for resettlement of refugees, which to date has provided durable solutions for more than 368,000 refugees.¹⁰⁴ Canada's program has not only significantly expanded refugee resettlement in Canada, but has also broken down cultural barriers and enhanced social inclusion more generally.¹⁰⁵ Several other countries – including Argentina, Ireland, New Zealand, Spain and the United Kingdom – have launched or are piloting community sponsorship programs, many of which are based on the Canadian model.¹⁰⁶ In Germany, an estimated 10 per cent of the population provided voluntary, financial or in-kind support to refugees in 2015 when refugee arrivals increased significantly.¹⁰⁷
- › Following the end of the Second World War, several countries – including Australia, Belgium, Canada and the Netherlands – implemented post-war refugee placement programs, simultaneously providing work opportunities for refugees and addressing labour shortages within each country.¹⁰⁸
- › Between 1979 and 1997, Australia ran a Community Refugee Resettlement Scheme (CRRS) which supported the settlement and integration of more than 30,000 refugees. Refugees were settled directly into communities and supported by voluntary agencies, community groups, businesses and individuals. Under the CRRS, the government provided funding for refugees' airfares and other transportation, while the community supported refugees with housing support, English language tuition and assistance in getting employment.¹⁰⁹
- › Italy has supported a coalition of faith-based organisations to implement 'humanitarian corridors' for people fleeing Syria and Eritrea, allowing safe passage from neighbouring countries for 3,600 refugees since 2016.¹¹⁰ The program has also been established in France, Belgium, Andorra and San Marino.¹¹¹
- › In the 1980s, the Australian government used in-country processing to resettle several hundred refugees from Latin America.¹¹²

¹⁰⁴ Ian Van Haren, 'Canada's Private Sponsorship Model Represents a Complementary Pathway for Refugee Resettlement' on *Migration Information Source* (Migration Policy Institute, 9 July 2021) <https://www.migrationpolicy.org/article/canada-private-sponsorship-model-refugee-resettlement>

¹⁰⁵ McAdam and Chong, above n 2, 69–70.

¹⁰⁶ See: Nikolas Feith Tan, 'Community Sponsorship in Europe: Taking Stock, Policy Transfer, and What the Future Might Hold' (2021) 3 *Frontiers in Human Dynamics* <https://doi.org/10.3389/fhumd.2021.564084>; 'Private Sponsorship' on *Asylum Insight: Facts and Analysis* (3 May 2018)) <https://www.asyluminsight.com/private-sponsorship#.XOXwtS17GqA%22https://www.asyluminsight.com/private-sponsorship#.XOXwtS17GqA>; 'Spanish Government and UNHCR to Carry Out Community Sponsorship Pilot Project for Refugees' (26 November 2018) <https://ec.europa.eu/migrant-integration/news/spanish-government-and-unhcr-to-carry-out-community-sponsorship-pilot-project-for-refugees>.

¹⁰⁷ See Susan Fratzke, 'Engaging Communities in Refugee Protection: The Potential of Private Sponsorship in Europe' (Migration Policy Institute Policy Brief, September 2017) 3.

¹⁰⁸ See 'Labour Mobility for Refugees: Past and Present Examples' (7 September 2012) (Paper prepared for UNHCR/International Labour Organization 'Labour Mobility for Refugees Workshop', Geneva, 11–12 September 2012) <https://www.unhcr.org/56fa39b76.pdf>.

¹⁰⁹ See Khanh Hoang, 'Lessons from History: The Community Refugee Settlement Scheme' on *Community Refugee Sponsorship Australia* (27 April 2018) <https://refugeesponsorship.org.au/lessons-from-history-the-community-refugee-settlement-scheme>.

¹¹⁰ Sant'Egidio, '48 Refugees from Greece Safely Arrived in Italy This Morning Thanks to Humanitarian Corridors' (28 January 2022) <https://www.santegidio.org/pagelD/30284/langID/en/itemID/46297/48-refugees-from-greece-safely-arrived-in-italy-this-morning-thanks-to-humanitarian-corridors.html>

¹¹¹ 'Protected Entry Procedures', above n 93.

¹¹² Claire Higgins, 'Australia's Little-Known In-Country Programme in Latin America' (2014) 33(1) *Refugee Survey Quarterly* 8, 16.



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Australia should provide global and regional leadership on refugee protection

What?

Australia should engage and cooperate with other countries at the international and regional levels to secure protection and find durable solutions for refugees and those seeking asylum, and to promote the better management of international migration in all its aspects. Australia should commit to ongoing participation in relevant dialogue and policy processes, as well as ad hoc arrangements to address specific refugee situations. Australia should also ensure coherence between its diplomatic, aid and refugee programs in order to promote human rights and the rule of law in countries of origin and asylum, address the root causes of displacement, and support durable solutions. Australia should ensure that its own refugee policies do not seek to deflect responsibility for protection on to neighbouring States or increase the risk of harm for people on the move.

Why?

The COVID-19 pandemic has underscored that international cooperation is essential in tackling shared challenges. As the UN High Commissioner for Human Rights and the UN High Commissioner for Refugees jointly stated: 'If ever we needed reminding that we live in an interconnected world, the novel coronavirus has brought that home'.¹¹³ Refugees and people seeking asylum are often among those most harshly affected in times of crisis.

The challenges of refugee protection are international in nature and require international cooperation in response.¹¹⁴ Securing protection and solutions for refugees requires engagement and cooperation with other countries, the UN and other international organisations to protect people seeking asylum in accordance with international law. Under the Refugee Convention, Australia is obliged to cooperate with UNHCR in the exercise of its functions,¹¹⁵ which include providing international protection and seeking permanent solutions for refugees.¹¹⁶

Further, under international human rights law, Australia has committed to respect, protect and fulfil fundamental human rights. As a Member State of the United Nations, Australia has pledged to take 'joint and separate' action¹¹⁷ to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all'.¹¹⁸ These commitments require not only that Australia uphold its obligations within its own territory and jurisdiction, but also that it cooperate with and assist other States to promote and protect human rights more generally.¹¹⁹

With 86 per cent of the world's refugees hosted in developing regions and 76 per cent of all refugees trapped in situations of protracted displacement,¹²⁰ the international community has recognised the 'urgent need for more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees'.¹²¹ Under the Global Compact on Refugees, Australia has committed to responding to these needs, including via contributions of financial, material and technical assistance, and by providing resettlement places and complementary pathways for admission for those in need of international protection.¹²²

¹¹³ Michelle Bachelet and Filippo Grandi, 'The Coronavirus Outbreak is a Test of Our Systems, Values and Humanity' (12 March 2020) <https://www.unhcr.org/en-au/news/latest/2020/3/5e69eea54/coronavirus-outbreak-test-systems-values-humanity.html>.

¹¹⁴ See Refugee Convention preambular para 4: considering that 'a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation'.

¹¹⁵ Ibid art 35.

¹¹⁶ Statute of the Office of the United Nations High Commissioner for Refugees, GA Res 428(V) UN GAOR, 5th sess, 325th plen mtg, Supp No. 20 (14 December 1950) Annex, para 1 (UNHCR Statute).

¹¹⁷ Charter of the United Nations art 56.

¹¹⁸ Ibid art 55.

¹¹⁹ See, eg, Committee on Economic, Social and Cultural Rights, General Comment 3: The Nature of States Parties' Obligations (Art 2, Para 1, of the Covenant), 5th sess, UN doc E/1991/23 (14 December 1990) para 14.

¹²⁰ UNHCR, Global Trends: Forced Displacement in 2020 (2021) 2, 20 <https://www.unhcr.org/60b638e37.pdf>.

¹²¹ Refugee Compact, para 1.

¹²² Ibid para 18.

By adopting a coherent, human rights-centred approach across its diplomatic, aid and refugee policies, Australia can support the expansion of the protection space in countries of origin and asylum. Measures such as the provision of development and humanitarian assistance and the strategic use of resettlement can promote respect for refugees' rights in countries of asylum and enhance opportunities for refugees and host communities,¹²³ which may in turn reduce the need for people to take dangerous journeys to other countries in search of safety.

Australia should also contribute to international efforts to address the root causes of displacement, including persecution, conflict, statelessness, human rights violations, and the impacts of disasters and climate change. The multi-layered causes of displacement mean there is no simple way to address root causes and prevent displacement. While displacement may be the result of a specific trigger or cause – that is, a precipitating event (or events) that prompt a person to decide to flee – it is often the result of underlying and longer-term drivers – that is, the social, political and environmental conditions that produce the triggering event and decision to leave.¹²⁴ Nevertheless, over the long term, promoting respect for human rights and the rule of law, contributing to aid and development, and working to reduce conflict and the negative effects of climate change, could help to ease the conditions that force people to leave their countries of origin in search of safety and to contribute to conditions for the safe, dignified and sustainable return of those not in need of international protection.¹²⁵

It is in Australia's interests to promote refugee protection and regional cooperation, particularly in the Asia-Pacific. By working cooperatively with our neighbours in the region and demonstrating leadership through modelling 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.

However, Australia's authority to promote protection and cooperation both regionally and globally depends upon it being able to demonstrate respect for human rights within its own territory and abroad. Australia's credibility and moral authority to promote constructive and protection-sensitive responses to displacement in the Asia-Pacific region has been fundamentally undermined by several of its current policies, particularly offshore processing and turning back boats, which may be perceived as an attempt by Australia to evade its international legal commitments and shift responsibility for refugee protection on to other States. Adopting a principled approach to Australia's refugee policies, as outlined here, will foster cooperation and lay the foundations for a more effective and sustainable response to displacement in our region.

¹²³ Executive Committee of the High Commissioner's Programme, 'The Strategic Use of Resettlement: A Discussion Paper Prepared by the Working Group on Resettlement' (3 June 2003) <https://www.refworld.org/docid/41597a824.html>; UNHCR, 'UNHCR Position Paper on the Strategic Use of Resettlement' (4 June 2010) <https://www.unhcr.org/en-au/protection/resettlement/4fbcf739/unhcr-position-paper-strategic-use-resettlement.html>; High Commissioner's Forum, 'Multilateral Framework of Understandings on Resettlement', FORUM/2004/6 (16 September 2004) <http://www.unhcr.org/refworld/docid/41597d0a4.html>.

¹²⁴ See 'Understanding the Root Causes of Displacement: Towards a Comprehensive Approach to Prevention and Solutions' (Norwegian Refugee Council and the Internal Displacement Monitoring Centre Briefing Paper, 8 December 2015).

¹²⁵ See generally Axel Dreher, Andreas Fuchs and Sarah Langlotz, 'The Effects of Foreign Aid on Refugee Flows' (Global Labor Organization Discussion Paper No. 195, 2018).

¹²⁶ 'A government's budget is the most important economic policy and planning document, and is an essential means by which to assess government's efforts for the realization of human rights': 'Foreword' by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights and Warren Krafchik, Executive Director International Budget Partnership Office of the High Commissioner for Human Rights, in Office of the High Commissioner for Human Rights, *Realizing Human Rights through Government Budgets* (New York and Geneva, 2017) 7.

How?

Fundamentally, Australia must work with other States and the international community as a whole to ensure a global, cooperative approach to promoting peace, human rights and solutions to situations of displacement.

Australia should actively contribute to international frameworks and mechanisms for promoting and ensuring respect for human rights, including through diplomatic efforts, the provision of funding¹²⁶ and by setting a positive example of cooperation and engagement on human rights issues. Australia should take action to address the numerous concerns and recommendations expressed by UN human rights bodies regarding its own human rights record.¹²⁷

Australia should also provide humanitarian assistance, development, and technical and financial support in countries of origin and first asylum, to help people access effective protection without the need to undertake lengthy and often dangerous journeys. Australia should reverse the significant (and repeated) cuts that have been made to its foreign aid budget in recent years.¹²⁸ As a proportion of Australia's Gross National Income, Australia's aid program should be increased 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.¹²⁹

Australia should actively support regional cooperation in the Asia-Pacific to provide protection to people who are displaced (or who are at risk of being displaced) and to promote international and regional agreements oriented to protection, solutions and standards of treatment consistent with international refugee law and international human rights law. This includes an on-going commitment by Australia to support UNHCR through funding, the provision of resettlement places and the promotion of protection. It also includes engagement by Australia with other countries in the region to promote the ratification of the Refugee Convention and Protocol and international human rights treaties; to encourage States in the region to provide opportunities for local integration or refugee resettlement; and to support capacity-building in countries of origin and first asylum aimed at improving protection for people who are displaced.

Australia should draw on its experience and expertise to support other countries to develop their own refugee laws and policies. Australia could encourage and support new resettlement states in the region through technical or financial assistance – for example, via the IOM–UNHCR Emerging Resettlement Countries Joint Support Mechanism.¹³⁰ It could also provide financial assistance to countries developing their own asylum and refugee systems.¹³¹

Any regional cooperation agreements that Australia enters into with other countries in the Asia-Pacific region should be founded on a genuine commitment to responsibility-sharing (rather than responsibility-shifting). They should aim to increase the overall available protection space in the region, be subject to effective oversight and quality assurance mechanisms, and in all cases be consistent with Australia's international legal obligations.¹³²

¹²⁷ See Office of the High Commissioner for Human Rights, 'Summary by Country: Australia' on *Universal Human Rights Index* <https://uhri.ohchr.org>.

¹²⁸ See Lowy Institute, 'Australian Foreign Aid' (undated) <https://www.lowyinstitute.org/issues/australian-foreign-aid>; DevPolicy Australian Aid Tracker, 'Trends' (undated) <http://devpolicy.org/aidtracker/trends>.

¹²⁹ *Global Indicator Framework for the Sustainable Development Goals and Targets of the 2030 Agenda for Sustainable Development*, GA Res 71/313 (Annex), UN GAOR, 71st sess, 90th plen mtg, Supp No. 49, UN doc A/RES/71/313 (6 July 2017) Goal 17, Indicator 17.2.

¹³⁰ See Khalid Koser, 'A Global Compact on Refugees: The Role of Australia' on *Lowy Institute* (28 August 2017) <https://www.lowyinstitute.org/publications/global-compact-refugees-role-australia>.

¹³¹ *Ibid.*

¹³² See Kaldor Centre for International Refugee Law, *Where to from Here? Report from the Expert Roundtable on Regional Cooperation and Refugee Protection in the Asia-Pacific* (12–13 September 2016); McAdam and Chong, above n 2, 178–81.



Image credit: UNHCR/ Lukas Hueller

Examples of good practice:

- › The Comprehensive Plan of Action for Indochinese refugees in the 1970s and 1980s entailed cooperation between States of first asylum, resettlement States (including Australia) and UNHCR to provide immediate protection and long-term solutions for refugees fleeing conflict in South-East Asia.¹³³
- › In Africa and Latin America, regional agreements relating to refugees, as well as broader migration-related agreements and policies, reinforce the importance of the Refugee Convention and Protocol and call on States that have not done so to ratify these instruments and to apply their provisions.¹³⁴
- › In the Americas, the Regional Conference on Migration (RCM) promotes cooperation and coordination between Member States to protect both the human rights of those who move *and* the national interests of States.¹³⁵ For example, in 2016, the RCM adopted a guide to effective practices on addressing the needs of people displaced across borders in the context of disasters.¹³⁶
- › Sweden concluded a multi-year funding agreement with UNHCR for 2018–21, 94 per cent of which was unearmarked funds, providing both predictability and consistency for UNHCR's work.¹³⁷
- › The vast majority of States have adopted *both* the Global Compact on Refugees and the Global Compact for Safe, Orderly and Regular Migration, demonstrating their commitment to cooperate in the better management of all aspects of people movement across borders.
- › Canada, together with UNHCR and the Open Society Foundations, launched an initiative aimed at increasing private sponsorship for refugees around the world.¹³⁸
- › Denmark, Luxembourg, Norway, Sweden and the United Kingdom all meet or exceed the target of 0.7 per cent of Gross National Income for overseas aid.¹³⁹ Luxembourg, Sweden and Norway spend around one per cent.¹⁴⁰
- › The Nansen Initiative's *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, endorsed by 109 governments in 2015, provides an example of a holistic approach to displacement that includes recommended actions for how countries can both *protect* people displaced in the context of disasters, and *prevent* displacement from occurring in the first place – for example, through disaster risk reduction activities and by facilitating voluntary migration for those at risk of displacement.¹⁴¹

¹³³ See, eg, Sten Bronée, 'The History of the Comprehensive Plan of Action' (1993) 5(4) *International Journal of Refugee Law* 534; Kate Jastram, 'Regional Refugee Protection in Comparative Perspective: Lessons Learned from the Asia-Pacific, the Americas, Africa, and Europe' (Policy Brief No. 2, Kaldor Centre for International Refugee Law, 2015) 8.

¹³⁴ *Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974) preambular paras 9, 10; art VIII; OAU Assemblies of Heads of State and Government, Resolutions 26 and 104; African Union, *Revised Migration Policy Framework for Africa and Plan of Action (2018–2030)* (2018) s 6.1, para ii; *Cartagena Declaration on Refugees*, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (22 November 1984) paras II(a), III(2), (8).

¹³⁵ 'Regional Conference on Migration: Fostering and Strengthening Regional Dialogue and Cooperation' (undated) <http://www.crmsv.org/en>.

¹³⁶ Nansen Initiative on Disaster-Induced Cross-Border Displacement, *A Guide to Effective Practices for RCM Member Countries: Protection for Persons Moving across Borders in the Context of Disasters* (November 2016). See also Walter Kälin and David Cantor, 'The RCM Guide: A Novel Protection Tool for Cross-Border Disaster-Induced Displacement in the Americas' (2017) 56 *Forced Migration Review* 58.

¹³⁷ UNHCR, 'Sweden Signs Record High USD 400 Million Funding Agreement with UNHCR' (11 July 2018); UNHCR, *Report on Use of Flexible Funding in 2020* (UNHCR, 2021) <https://reporting.unhcr.org/sites/default/files/Flexible%20Funding%20Report%202020.pdf>.

¹³⁸ 'Summary Overview Document: Leaders' Summit on Refugees' (10 November 2016) https://refugeesmigrants.un.org/sites/default/files/public_summary_document_refugee_summit_final_11-11-2016.pdf.

¹³⁹ See Overseas Development Institute, 'Principled Aid Index' (2020) <https://odi.org/en/insights/multimedia/principled-aid-index-2020>.

¹⁴⁰ Ibid.

¹⁴¹ Nansen Initiative on Disaster-Induced Cross-Border Displacement, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change* (December 2015).



Australia should invest in refugees for long-term success

What?

Australia should prepare for long-term success by investing in refugees as community members, leaders and ambassadors for Australia, and enabling them to strengthen their education, skills and resilience to contribute to their communities, whether in Australia, their country of origin (if return becomes possible), or any other country in which they may one day live. This includes a commitment to creating conditions that enable all people granted protection to enrich society through their human, economic and social capabilities.

Why?

Refugee protection is not only about providing short-term protection from imminent harm. Refugees are entitled to the respect and fulfilment of their rights and the opportunity to rebuild and advance their lives. Under the Refugee Convention, Australia has committed to facilitating the 'assimilation and naturalization' of refugees as far as possible – meaning that Australia should provide the foundations and conditions by which refugees 'may be more readily integrated in the economic, social and cultural life of [their] country of refuge'.¹⁴² Research shows that, given the right opportunities, refugees are remarkably successful at integrating into Australia – joining communities, making friends, contributing to their communities and, for many, learning a new language.¹⁴³

Allowing refugees to find safety and rebuild their lives in Australia benefits Australian communities, too. Refugees make important social, economic and cultural contributions to the communities that receive them, including by fostering understanding and social inclusion.¹⁴⁴ 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 to facilitate their successful return and re-integration in their country of origin (or elsewhere).¹⁴⁵

How?

Australia should invest in the settlement, integration and inclusion of all refugees, providing them with the opportunity to lead dignified lives, realise their aspirations, and, if they wish, to become citizens of their new country. They should have access to medical care, English language tuition, and such other social support as will enable them to live with dignity in the community. They should also be enabled to contribute to the well-being of themselves, their families and the Australian community through gainful employment. This requires a commitment to education, training, skills transfer and recognition of qualifications for refugees, and the promotion of business partnerships to facilitate employment opportunities for refugees. Special consideration should be given to finding ways to match the economic and demographic needs of Australia's states and territories with the skills and desires of refugees.

¹⁴² Atle Grahl-Madsen, *Commentary on the Refugee Convention, 1951, Articles 2–11, 13–37* (United Nations High Commissioner for Refugees Division of International Protection, 1997) Comment (3) on art 34.

¹⁴³ See Jock Collins and Carol Reid, 'Refugees are Integrating Just Fine in Regional Australia' on *The Conversation* (13 August 2018) <https://theconversation.com/refugees-are-integrating-just-fine-in-regional-australia-101188>.

¹⁴⁴ See UNHCR, *Resettlement Handbook* (2011) 4.

¹⁴⁵ Adel Abdel Ghafar and Firas Masri, 'The Lost Generation: Children in Conflict Zones' on *Brookings* (29 May 2016) <https://www.brookings.edu/opinions/the-lost-generation-children-in-conflict-zones>; Eurocities, *Cities' Actions for the Education of Refugees and Asylum Seekers* (January 2017) http://nws.eurocities.eu/MediaShell/media/Education%20report_Final%20Version.pdf; Lisa Doyle and Gill O'Toole, *A Lot to Learn: Refugees, Asylum Seekers and Post-16 Learning* (Refugee Council (UK), January 2013) https://refugeecouncil.org.uk/wp-content/uploads/2019/03/A_lot_to_learn-Jan_13.pdf.

The long-term success of Australia's refugee policies also depends, to a significant degree, on the fulfilment of these Principles for Australian Refugee Policy as a whole. People who come to Australia seeking protection bring with them their own skills, talents and capabilities. Many of the current shortcomings in Australian refugee policy – including detention, offshore processing, temporary protection visas and limited access to family reunification programs – undermine the ability of refugees to rebuild their lives, realise their potential and become valuable, contributing members of Australian society. A more principled approach to refugee policy, including the specific recommendations provided in this document, could address misconceptions about refugees and help to enhance social inclusion.¹⁴⁶

Examples of good practice:

- › Australia has a strong record of delivering effective and responsive settlement services to refugees arriving as part of Australia's Refugee and Humanitarian Program.¹⁴⁷ With an increase in funding and flexibility, such support could be extended to all those seeking Australia's protection, including those who arrive by boat.
- › Canada's private sponsorship program for refugees has been 'transformative' for both refugees and Canadian communities, by breaking down barriers, promoting inclusion and fostering long-lasting relationships.¹⁴⁸
- › Bolivia's Immigration Law, adopted in 2013, provides extensive rights for all non-nationals, irrespective of their reason for movement, including rights to family reunion, education and health, and the possibility of obtaining permanent residency or citizenship after three years.¹⁴⁹ In an address to the UN General Assembly, the Bolivian President called for 'universal citizenship' and stated that no one who crosses an international border is 'illegal'.¹⁵⁰
- › The German government, with the support of private donors, has implemented the DAFI (Albert Einstein German Academic Refugee Initiative) programme, providing scholarships to refugees to study in their country of asylum. To date, the programme has supported the tertiary studies of more than 18,500 refugees.¹⁵¹
- › In Canada, World Education Services has trialled alternative methods of verifying education and professional qualifications for refugees lacking comprehensive personal documents. This involves matching refugees' partial documentation with independent research and experience with international educational institutions.¹⁵² The initial trial received encouraging responses from educational institutions. For refugees themselves, the process 'gave many of them hope, dignity, and a basis upon which to reclaim their identity and plan for their futures'.¹⁵³
- › Canada's private sponsorship program for refugees has been 'transformative' for both refugees and Canadian communities, by breaking down barriers, promoting inclusion and fostering long-lasting relationships.¹⁵⁴

¹⁴⁶ See McAdam and Chong, above n 2, 69–70.

¹⁴⁷ See Settlement Council of Australia, 'Review into Integration, Employment and Settlement Outcomes for Refugees and Humanitarian Entrants' (22 January 2019).

¹⁴⁸ McAdam and Chong, above n 2, 69–70. See generally Jennifer Hyndman and Shauna Jimenez, 'The State of Private Refugee Sponsorship in Canada: Trends, Issues, and Impacts' (Refugee Research Network and York University Centre for Refugee Studies Centre Policy Brief, 2016).

¹⁴⁹ See Luisa Feline Freier and Diego Acosta Arcarazo, 'Beyond Smoke and Mirrors? Discursive Gaps in the Liberalisation of South American Immigration Laws' in David James Cantor, Luisa Feline Freier and Jean-Pierre Gaudi (eds), *A Liberal Tide? Immigration and Asylum Law and Policy in Latin America* (ILAS, 2015) 47–8.

¹⁵⁰ See 'Bolivia's Morales, at UN, Says Natural Resources, Basic Necessities Must Be Viewed as Human Rights' on *UN News* (20 September 2017) <https://news.un.org/en/story/2017/09/565532-bolivias-morales-un-says-natural-resources-basic-necessities-must-be-viewed>.

¹⁵¹ UNHCR, 'DAFI Tertiary Scholarship Programme' (undated) <https://www.unhcr.org/en-au/dafi-scholarships.html>.

¹⁵² See World Education Services, *A Way Forward for Refugees: Findings from the WES Pilot Project* (2018); World Education Services, 'About the WES Gateway Program' (undated) <https://www.wes.org/ca/about-the-wes-gateway-program>.

¹⁵³ World Education Services 2018, *ibid* 21.

¹⁵⁴ McAdam and Chong, above n 2, 69–70. See generally Hyndman and Jimenez, above n 148.

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 lawful, 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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