



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

**UN Committee Against Torture
53rd Session (3-28 November 2014)**

**Australian Lawyers for Human Rights
Submission on Australia**

17 October 2014



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17 October 2014

Secretariat of the Committee Against Torture
UNOG-OHCHR
CH-1211 Geneva 10
Switzerland

Dear Committee Against Torture,

Submission concerning Australia's laws, policies and practices on asylum seekers and refugees

Australian Lawyers for Human Rights (**ALHR**) thanks the UN Committee Against Torture (**CAT**) for the opportunity to share our comments in connection with the Committee's fifth periodic review of Australia during its 53rd session from 3-28 November 2014.

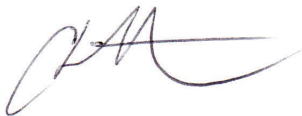
ALHR was established in 1993 and is a network of legal professionals active in practising and promoting awareness of international human rights. ALHR has a national membership of over 2,600 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

This submission solely addresses issues concerning Australia's policies, laws and practices on asylum seekers and refugees and, in particular, how Australia's current policies, laws and practices contravene its obligations under the UN Convention Against Torture (**UNCAT**). As part of ALHR's 2014 strategic plan, we identified Australia's treatment of asylum seekers and refugees as a priority area. Since Australia's last periodic review before the CAT in 2008, ALHR holds the view that the harm, and potential harm, to asylum seekers and refugees resulting from Australia's current laws, policies and practice has worsened. It is largely for this reason that ALHR has identified Australia's treatment of asylum seekers and refugees as a priority area for action. Urgent reform is needed if Australia is to fulfill its obligations under the UNCAT and other international human rights treaties.

In opting to provide a submission to the CAT focused on asylum seekers and refugees, ALHR does not intend to imply that this is the only issue of concern regarding Australia's fulfillment of its obligations under the UNCAT or that asylum seekers and refugees is necessarily the most important issue. There are several other areas in relation to which Australia is falling foul of its obligations under the UNCAT and, in this respect, ALHR endorses the 'NGO Submission to the UN Committee Against Torture' authored principally by the Human Rights Law Centre.

If you would like to discuss any aspect of this submission, please contact Claire Hammerton, ALHR Refugee Sub-Committee Coordinator, by email at: refugees@alhr.org.au.

Yours faithfully,



Claire Hammerton
Refugee Sub-Committee Coordinator
Australian Lawyers for Human Rights

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1. About this submission

As lawyers and other legal professionals with an interest and background in legal affairs, ALHR members strive towards a society where justice and fairness is upheld in law, policy and practice. The treatment of asylum seekers and refugees by the Australian Government has been identified as a priority area for ALHR and is cause for great concern amongst ALHR members, motivating members to contribute to the drafting of this submission.

This submission does not address all issues identified in the List of Issues Prior to Reporting or cover all aspects of the UNCAT. Instead it focuses solely on issues relating to Australia's policies, laws and practices regarding asylum seekers and refugees. This submission has been prepared by members based on their research and, in many cases, first hand working knowledge. ALHR would like to acknowledge the following members for their contribution to this submission: Genevieve Balgarnie, Ashleigh Bucket, Briohny Cogle, Matthew Cole, Ana L. Galvez, Patrice Galatis, Jo Kwan, Joanna Mansfield, Rebecca Minty, Benjamin Pynt and Sangeeta Sharmin.

2. Overview

In September 2014 the new United Nations High Commissioner for Human Rights, Prince Zeid Ra'ad Al-Husseini, accused Australia of a "chain of human rights violations" in relation to its offshore processing of asylum seekers, stating that its policy has led to human rights violations including "arbitrary detention and possible torture following return to home countries". He further stated that: "a tendency to promote law enforcement and security paradigms at the expense of human rights frameworks dehumanises irregular migrants, enabling a climate of violence against them and further depriving them of the full protection of the law."¹

¹ Michael Gordon, 'New UN Human Rights Chief attacks Australia over asylum seeker rights violations', *Sydney Morning Herald*, 7 September 2014 <<http://www.smh.com.au/federal-politics/political-news/new-un-human-rights-chief-attacks-australia-over-asylum-seeker-rights-violations-20140907-10dlkx.html>> (accessed 16 October 2014).

ALHR is of the view that this assessment is accurate. This submission will consider some of the most concerning aspects of Australian law, policy and practice as it relates to asylum seekers and refugees. There are a number of crosscutting features of the Australian approach to asylum seekers and refugees that will be briefly highlighted here, before specific issues are considered in detail.

First, it is important to highlight that one of the key motivations behind the Australian Government's policy on asylum seekers and refugees is the desire to deter asylum seekers from seeking protection on Australian shores². This can be seen in the Australian Government's policy of turning back boats that attempt to arrive on our shores and through the cursory and inadequate 'on water' assessments of refugee claims of asylum seekers intercepted at sea, turning back many who should have been given an opportunity to elaborate their claims.

The deterrence drive approach is also seen in the Government's policy of mandatory detention of all asylum seekers – including young children. Those asylum seekers who have arrived in Australian territory, including Australian territorial waters, after 19 July 2013 have been sent to detention facilities on remote islands – on Nauru or Manus Island in Papua New Guinea (**PNG**) – to face oppressive conditions for an indefinite period, with no certainty about where they will be resettled even if their refugee claim is accepted. The Government has openly stated that this policy of mandatory, offshore detention is necessary to deter others from coming.³ Meanwhile the detrimental impact of these policies on asylum seekers is severe and ALHR submits that Australia is violating its obligations under the UNCAT by creating conditions that amount to cruel, inhuman or degrading treatment or punishment and may amount to torture.

² See for example, Gary Cox, 'Refugees angered by Government's graphic novel campaign', *SBS*, 13 February 2014 <<http://www.sbs.com.au/news/article/2014/02/13/refugees-angered-governments-graphic-novel-campaign>> (accessed 15 October 2014); Australian Government, 'Government Response to Recommendations by Joint Select Committee on Australia's Immigration Detention Network, November 2012' <<https://www.immi.gov.au/media/publications/pdf/2012/response-recommendations-joint-select-committee-aust-immi-detention.pdf>> at 2 (accessed 15 October 2014).

³ Australian Department of Foreign Affairs and Trade, 'Regional resettlement arrangements between Australia and Papua New Guinea', 19 July 2013 <<https://www.dfat.gov.au/geo/png/regional-resettlement-arrangement-20130719.html>> at para 3 (accessed 16 October 2014).

Another concerning feature of the Australian Government's approach to asylum seekers is the lack of public information and transparency about the Government's practices. The Australian Government justifies media blackouts on any aspect of on-water operations on the basis that disclosure would only assist people smugglers.⁴ Despite this, asylum seekers on boats have still been able to communicate with family, lawyers or media via mobile phones, illustrating the inadequacy of the government's explanation. Journalists, lawyers, Members of Parliament, the Australian Human Rights Commission and some NGOs have been denied access to places of detention, especially offshore detention,⁵ with the Australian Government clearly wielding significant influence with the governments of Nauru and PNG on issues of access. The lack of oversight of places of detention, particularly in relation to offshore detention facilities, is of grave concern and has meant that many risk factors for torture and ill-treatment are left unaddressed, with at times tragic consequences including rioting, murder and death by medical negligence, as discussed in this submission.

Finally, it is concerning that the Australian Government is seeking to circumvent its human rights obligations and redefine the concept of 'regional cooperation' by entering into arrangements with other countries in the region concerning asylum seekers. PNG and Nauru both host immigration detention facilities that are funded by Australia.⁶ A formal arrangement and Memorandums of Understanding have been signed with the governments of PNG, Nauru and Cambodia respectively, with Australia recompensing these countries by providing significant amounts of aid.⁷

⁴ Australian Federated Press, 'Operation to stop boats like a war: Tony Abbott', *The Australian*, 10 January 2014 <<http://www.theaustralian.com.au/national-affairs/immigration/operation-to-stop-boats-like-a-war-tony-abbott/story-fn9hm1gu-1226798801617>> (accessed 16 October 2014).

⁵ See for example, Karen Barlow, 'Greens Senator Sarah Hanson-Young denied access to Curtin Detention Centre to visit asylum seekers', *ABC News*, 30 July 2014 <<http://www.abc.net.au/news/2014-07-30/sarah-hanson-young-denied-access-to-curtin-detention-centre/5635690>> (accessed 16 October 2014).

⁶ See, for example, Cathy Alexander, 'A Serco bet? Australia's immigration detention centers are up for grabs', *Crikey.com* <<http://www.crikey.com.au/2014/04/11/a-serco-bet-australias-immigration-centres-are-up-for-grabs/>> (accessed 16 October 2014).

⁷ See, for example, *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues*, 6 August 2013 <<https://www.dfat.gov.au/geo/png/joint-mou-20130806.pdf>> (accessed 16 October 2014); *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, Relating to the Resettlement of Refugees in Cambodia*, 26 September 2014

This submission will now detail specific issues of concern.

3. Turning back boats

Relevant UNCAT Articles: 3

Since September 2013, very shortly after the new Australian Government was elected, a policy has been adopted and implemented of intercepting maritime vessels carrying asylum seekers attempting to reach the Australian mainland and removing these vessels outside Australian territorial waters when the Government decides it is “safe to do so”.⁸

According to news reports, since December 2013 asylum seekers attempting to reach Australia by boat from Indonesia have been intercepted and towed back to Indonesian waters.⁹ In late June 2014, Australian authorities intercepted two boatloads of asylum seekers who had fled Sri Lanka. One group was returned directly to Sri Lankan authorities, while the second group was held on an Australian Customs vessel for four weeks before being brought to the Australian mainland and transferred to offshore detention facilities in Nauru.¹⁰ Given the compelling evidence concerning the use of torture by the Sri Lankan military,¹¹ ALHR submits that there is a risk that Australia has breached its *non-refoulement* obligations under the UNCAT with respect to the group of asylum seekers returned to Sri Lanka. Furthermore, the incident of Australia detaining

<<http://www.minister.immi.gov.au/scottmorrison/files/cambodia-australia-mou-operational-guidelines.pdf>> (accessed 16 October 2014).

⁸ The Hon Tony Abbott PM, ‘Operation Sovereign Borders’, Press Release, 25 July 2013 <<http://www.tonyabbott.com.au/LatestNews/PressReleases/tabid/86/articleType/ArticleView/articleId/9311/Operation-Sovereign-Borders.aspx>> (accessed 16 October 2014); Australian Customs and Border Protection Service, *Operation Sovereign Borders*, Press Release, 17 April 2014 <<http://www.customs.gov.au/site/operation-sovereign-borders.asp>> (accessed 16 October 2014).

⁹ Emma Griffiths, ‘Immigration Minister Scott Morrison confirms 12 asylum seeker boats turned back since start of Operation Sovereign Borders’, *ABC News*, 18 September 2014 <<http://www.abc.net.au/news/2014-09-18/immigration-minister-confirms-12-asylum-seeker-boats-turned-back/5752262>> (accessed 16 October 2014); Natalie O’Brien, ‘Australia may breach international law by forcing boats to turn back’, *Daily Life*, 11 January 2014 <<http://www.dailylife.com.au/news-and-views/news-features/australia-may-breach-international-law-by-forcing-boats-to-turn-back-20140112-30oal.html>> (accessed 16 October 2014).

¹⁰ Daniel Hurst, ‘Australia returns asylum seekers to Sri Lanka in sea transfer’, *The Guardian*, 7 July 2014 <<http://www.theguardian.com/world/2014/jul/07/australia-asylum-seekers-sri-lanka-sea-transfer>>; Paul Farrell and Nick Evershed, ‘Operation Sovereign Borders timeline: every encounter’, *The Guardian*, 2 July 2014 <<http://www.theguardian.com/news/datablog/interactive/2014/jul/01/operation-sovereign-borders-timeline>> (accessed 16 October).

¹¹ Committee Against Torture, ‘Consideration of reports submitted by States parties under article 19 of the Convention’, Forty-seventh session 31 October – 24 November 2011, 6.

Sri Lankan asylum seekers at sea arguably breached Article 16 of the UNCAT in terms of the conditions under which they were kept.¹²

It is widely recognized that States conducting interdiction and return operations will generally fulfill the 'effective control test' with respect to vessels (and persons on board vessels) intercepted and that, therefore, the international obligations of these States, including the principle of *non-refoulement*, are triggered.¹³ On this basis, ALHR submits that Australia's international obligations are triggered with respect to vessels it intercepts at sea under its policy of 'turning back boats'. This applies whether or not vessels are intercepted within Australian territorial waters. In any event, the two vessels carrying Sri Lankan asylum seekers were intercepted within Australia's contiguous zone where Australia clearly exercises a large degree of control.¹⁴

In the incidents outlined above, and in future incidents where vessels carrying asylum seekers are 'turned back' by Australia authorities, Australia is at risk of breaching its *non-refoulement* obligations under the UNCAT by virtue of turning boats back to places where passengers face a risk of torture or to places where there is a danger of indirect *refoulement*, i.e. there is a risk that the country to which the boat is 'turned back' will return the person to a country where they face a risk of torture. Australia's *non-refoulement* obligations may also be breached if individual evaluations to a requisite standard are not conducted for every person on the vessel which, in effect, means that authorities cannot accurately assess whether the person faces a risk of torture in the country to which the boat is 'turned back'. Furthermore, Australia is potentially in breach of its human rights obligations by returning asylum seekers to countries that do not offer effective legal and human rights protections – such as

¹² Jason Om, 'Lawyers for detained asylum seekers say 153 asylum seekers being held "behind locked door"', *ABC News*, 17 July 2014 <<http://www.abc.net.au/news/2014-07-16/lawyers-for-asylum-seekers-say-tamils-held-behind-closed-doors/5603140>> (accessed 16 October 2014).

¹³ Sophie Roden (2013) *Turning their Back on the Law? The Legality of the Coalition's Maritime Interdiction and Return Policy*, Paper in fulfillment of requirements for honours in law, the Australian National University Paper <https://law.anu.edu.au/sites/all/files/acmlj/turning_their_back_on_the_law_v2.pdf> (accessed 16 October).

¹⁴ ABC, 'Fact file: Why the fate of 153 asylum seekers is in the hands of the High Court', *ABC News*, 13 August 2014 <<http://www.abc.net.au/news/2014-07-14/fact-file-asylum-seekers-fate-in-high-court/5581926>> (accessed 16 October 2014).

to Indonesia, which is not a party to the Refugee Convention or the International Covenant on Civil and Political Rights.

ALHR notes that a State cannot ‘contract out’ of its *non-refoulement* obligations or transfer responsibility for its obligations to another State.¹⁵ Therefore, even if Indonesia were to agree to having boats ‘turned back’ into its territorial waters, Australia may still be in contravention of its *non-refoulement* obligations under international law including its obligations under the UNCAT.

Recommendation: the Australian Government immediately discontinue its policy of intercepting vessels carrying asylum seekers and ‘turning them back’ to locations where asylum seekers directly or indirectly risk torture and/or do not have adequate human rights and legal protections.

4. Conditions and treatment in immigration detention

Onshore detention facilities – conditions and treatment

Relevant UNCAT Articles: 2, 11 and 16

Section 189 of the *Australia Migration Act 1958 (Cth)* (**Migration Act**) provides for mandatory detention of all unlawful non-citizens in the ‘Australian Migration Zone’. As at 30 September 2014, there were 3,314 people in immigration detention facilities in Australia, including 2,394 in immigration detention on the Australian mainland and 920 in immigration detention on Christmas Island.¹⁶ 603 of these were children.¹⁷ The number of individuals in immigration detention who arrived in Australia as “illegal maritime arrivals” was

¹⁵ See Jane McAdam et al, *Submission to Inquiry into the Agreement between Australia and Malaysia on the Transfer of Asylum Seekers to Malaysia*, 15 September 2011, 7 <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/Malaysia_submission.pdf> (accessed 16 October 2014); Andrew & Renata Kaldor Centre for International Refugee Law (2014), *Factsheet – Turning back Boats*, University of New South Wales, 4 August 2014 <http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/turning_back_boats_factsheet_04.08.14.pdf> (accessed 16 October 2014).

¹⁶ Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary*, September 2014 <<https://www.immi.gov.au/About/Documents/immigration-detention-statistics-for-30-september-2014.pdf>> (accessed 16 October 2014).

¹⁷ *Ibid.*

2,779, representing approximately 84% of the immigration detention population.¹⁸

The United Nations has long recognised that the conditions inside Australia's immigration detention facilities are similar to the conditions inside prisons.¹⁹ *Figure 1* provided in the Appendix shows a photograph of Curtin Immigration Detention Centre in Australia's Northern Territory. These facilities are used to accommodate children alongside adults, including the accommodation of women and girls alongside single men, exposing detainees to the risk of physical and sexual abuse and exacerbating their fear of assault in detention.²⁰

Asylum seekers are detained for an average of 413 days in immigration detention²¹ and are subject to various measures designed to prevent them obtaining permanent protection visas, including a proposed test of "national interest".²²

ALHR is concerned with the following practices of the Australian Government in relation to asylum seekers held in onshore detention facilities:

- Denying asylum seekers in immigration detention access to legal assistance;
- Preventing asylum seekers from challenging their detention in court;
- Not providing access to adequate mental health services despite reports indicating that:
 - o Prevalence of post-traumatic stress disorder for asylum seekers in

¹⁸ Ibid.

¹⁹ Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention: Visit to Australia (24 October 2002) UN Doc. E/CN.4/2003/8/Add.2, 14.

²⁰ AHRC 'National Inquiry into Children in Immigration Detention' Section 8.5.1 *Fear of Assault in Detention* See <<https://www.humanrights.gov.au/publications/last-resort-national-inquiry-children-immigration-detention/8-safety-children>>

²¹ Ibid, 10.

²² Michael Gordon, 'Scott Morrison looks to circumvent High Court ruling on permanent protection visas', *The Sydney Morning Herald*, 3 July 2014 <www.smh.com.au/federal-politics/political-news/scott-morrison-looks-to-national-interest-test-to-circumvent-high-court-ruling-on-permanent-protection-visas-20140703-3bbbz.html> (accessed 16 October 2014).

immigration detention ranges from 32% and 100%;²³

- o There were 4,313 incidents of actual, threatened and attempted serious self-harm recorded in immigration detention facilities in Australia between January 2011 and February 2013;²⁴ and that
- o “Estimates place suicidal behavior by men and women in Australian Immigration Detention to be 41 and 26 times higher than the national averages respectively”.²⁵
- Detaining children, including unaccompanied minors, in detention and not providing them with sufficient health and educational services (discussed further in section 5 of this submission);
- Detaining people with physical and intellectual disabilities without access to adequate services.

In relation to the UNCAT in particular, ALHR submits that Australia is potentially in breach of its obligations under Articles 2, 11 and 16 of the UNCAT by subjecting asylum seekers in onshore immigration detention facilities to the following treatment and conditions:

- Overcrowding of detention facilities;²⁶
- Confined accommodation;²⁷
- Placing restrictions over everyday behaviours such as when and what detainees can eat;²⁸
- Severe physical conditions, including extreme temperatures in remote

²³ Mental Health Council of Australia, 'Fact Sheet: Mental Health Care for Refugees and Asylum Seekers in Immigration Detention Centres', 2011
<http://dassan.weebly.com/uploads/8/2/7/1/8271022/refugees_and_asylum_seekers_in_detention.pdf> (accessed 16 October 2014).

²⁴ Commonwealth Ombudsman (2013), *Suicide and Self-harm in the Immigration Detention Network*, 150 <<http://www.ombudsman.gov.au/reports/investigation/2013>> (accessed 16 October 2014).

²⁵ Op Cit, n 7.

²⁶ Australian Human Rights Commission. *Immigration Detention on Christmas Island: Observations from Visits to Immigration Detention Facilities on Christmas Island* (2012) page 23 <https://www.humanrights.gov.au/sites/default/files/document/publication/idc2012_christmas_island.pdf

²⁷ Ibid, page 15; See also Australian Human Rights Commission *Summary of observations from visit to immigration detention facilities at Villawood* (2011) page 16 at <<https://www.humanrights.gov.au/publications/2011-immigration-detention-villawood>>; n 24 at page 4.

²⁸ See submission of the Victorian Foundation for the Survivors of Torture to the National Inquiry into Children in Immigration Detention, (2014) at <<http://www.humanrights.gov.au/publications/commission-website-national-inquiry-children-immigration-detention-193>>;

centres such as Christmas Island and Curtin Detention Centre;²⁹

- Deprivation of freedom and rights to ordinary privileges;³⁰
- Routine monotony with little meaningful activity;³¹
- Lack of privacy, including regular invasions of privacy such as head counts several times during the night³² and constant CCTV surveillance, including in bathrooms;³³
- Anonymity – the degree to which detainees are required to identify themselves by their number rather than by their name at meal times and during checks at night;³⁴
- Limited recreational facilities;³⁵
- Reports of mental distress;³⁶
- “Unnecessarily cruel” separation of family;³⁷
- Lack of autonomy: e.g. limits on the capacity of parents to make decisions regarding their children;³⁸
- Inability to control exposure to riots³⁹, hunger strikes⁴⁰, self-harming behavior;⁴¹
- Limited school hours for children and adolescents;⁴²

²⁹ Ibid

³⁰ Ibid

³¹ Report for AHRC Dr Sarah Mares (May 2014) Visit to Christmas Island Immigration Detention Facilities March 1-8th 2014 at page 3 at < <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/national-inquiry-children-immigration-detention-2014/expert>>

³² Ibid; Report to Australian Human Rights Commission on visit to Inverbrackie APOD, Dr Jon Jureidini (12 May 2014). Page 1 at < <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/national-inquiry-children-immigration-detention-2014/expert>>

³³ Above n 26, p. 15.

³⁴ Above n 31, pp. 2-3,8,10.

³⁵ Above n 31, p. 23.

³⁶ Above n 31, p. 10.

³⁷ Above n 31, p. 12.

³⁸ AHRC Inquiry into children in immigration detention: Dr Kowalenko Visit to SIRH at Villawood, Sydney (30 March 14) Page 3 at < <https://www.humanrights.gov.au/sites/default/files/Expert%20Report%20-%20Dr%20Kowalenko%20-%20SIRH%20June%202014.pdf>>

³⁹ G Jones, ‘Christmas Island riot fear, says Triggs’, The Daily Telegraph, 12 October 2012.

⁴⁰ P Taylor, ‘Lips stitched, dozens on hunger strike on Christmas Island’, The Australian, January 16 2014 at < <http://www.theaustralian.com.au/news/nation/lips-stitched-dozens-on-hunger-strike-on-christmas-island/story-e6frg6nf-1226802748546>>

⁴¹ Evidence of Dr Ai-Lene Chan (31 July 2014) National Inquiry into Children in Immigration Detention 2014 at < <https://www.humanrights.gov.au/sites/default/files/Dr%20Chan.pdf>>

⁴² Above n 31, pp. 6-7.

- Communication regarding health and protective issues is compromised by unavailability of external interpreters.⁴³

Recommendation: Abolish the statutory scheme of mandatory detention of asylum seekers by repealing section 189 of the Migration Act as it relates to mandatory detention.

Recommendation: Ensure provision of adequate accommodation, health and other support services including legal assistance to asylum seekers as required to satisfy Australia's obligations under the UNCAT and other international human rights treaties.

Offshore detention facilities – Australia's obligations

Relevant UNCAT Articles: 3

Under recent amendments to the Migration Act⁴⁴ passed in May 2013, asylum seekers who arrive by boat to mainland Australia or an “excised offshore place”, are deemed “unauthorised maritime arrivals” and are sent to a third country, currently either Nauru or Manus Island in PNG, for processing and resettlement. In designating these countries, in accordance with the Migration Act the Minister needs only think it is in the national interest to send asylum seekers to those countries.⁴⁵ The Migration Act does not require the Minister to consider Australia's *non-refoulement* obligations when sending asylum seekers to third countries.

ALHR submits that Australia's legal obligations towards asylum seekers are not extinguished by transferring them to a third country.⁴⁶ Australia still

⁴³ Above n 24, pp. 14, 29; Report to Australian Human Rights Commission on Visit to Inverbrackie APOD, South Australia, Dr Packer (12 May 2014). Page 2 at < <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/national-inquiry-children-immigration-detention-2014/expert>>

⁴⁴ Section 198AD.

⁴⁵ *Migration Act 1958* (Cth), s 198AB(2).

⁴⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136.

owes human rights obligations to these asylum seekers due to the ‘effective control’ it has over the asylum seekers and over the immigration detention facilities in which the asylum seekers are held in third countries. This ‘effective control’ can be demonstrated in several ways including that: Australia funds the immigration detention facilities in PNG and Nauru; contracts for services provided at these facilities are entered into with the Australian Government and often involve Australian service providers; and Australian Government officials play a key role in assessing refugee claims made in PNG and Nauru.⁴⁷

The Migration Act provides that the Minister must have regard to assurances provided by third countries that persons will not be taken to a (further) country where their life or freedom would be threatened on account of one of the Refugee Convention grounds.⁴⁸ ALHR is of the view that Ministerial discretion is an inadequate safeguard against *non-refoulement* and against mistreatment of asylum seekers and refugees transferred by third countries.

Offshore detention facilities – conditions and treatment

As at 31 July 2014, there were 1,127 asylum seekers detained on Manus Island, and 1,146 asylum seekers detained in Nauru.⁴⁹ ALHR is strongly opposed to the practice of offshore detention for many reasons, including:

- The lack of accountability and transparency regarding the management and conduct of detention staff at these facilities;
- The detrimental effect upon the mental wellbeing of asylum seekers resulting from indefinite detention and uncertainty regarding resettlement;
- The poor standard of living conditions in these facilities – including overcrowding, inadequate sanitation and poor ventilation;

⁴⁷ ABC, ‘Is Australia responsible for asylum seekers detained on Manus Island’, *Fact check*, ABC News <<http://www.abc.net.au/news/2014-02-27/who-is-responsible-for-asylum-seekers-detained-on-manus/5275598>> (accessed 16 October 2014).

⁴⁸ *Migration Act 1958* (Cth), s 198AB(3).

⁴⁹ Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary*, 31 July 2014 <www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-july2014.pdf> (accessed 16 October 2014).

- Insufficient health services;
- Reported incidents of use of force and violence by detention staff;
- Lack of access to legal services for asylum seekers and lack of procedural fairness in relation to seeking legal redress;
- Lack of educational and recreational opportunities for children;
- Reports of actual and threatened self harm (including attempted suicide and hunger strikes).

In November 2013, the United Nations High Commissioner for Refugees (**UNHCR**) described Australia's offshore detention facilities as, amongst other things: "unsatisfactory", "cramped" "oppressive" and "harsh".⁵⁰ The harsh conditions, indefinite detention and violation of international law have earned Manus Island the reputation as "Australia's Guantanamo Bay".⁵¹ *Figure 2* in the Appendix shows a photograph of immigration detention facilities in Nauru, which are funded by the Australian Government. *Figure 3* shows a cartoon depicting life in an offshore processing facility as prepared by the Australian Government to dissuade people from seeking asylum in Australia.

On 17 February 2014, it was reported that Mr Reza Berati, an Iranian asylum seeker detained on Manus Island, was bludgeoned to death with a rock by local security staff during a riot which involved PNG police firing live rounds of ammunition, as well as PNG nationals, security staff, and Australian ex-pats, beating detainees using fists and improvised weapons.⁵² The PNG police have only recently arrested two men for Mr Berati's murder six months after the incident and are still searching for others.⁵³ This is despite the fact that the

⁵⁰ United Nations High Commissioner for Human Rights, 'UNHCR Monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013', 26 November 2013 <<http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Manus%20Island%20PNG%2023-25%20October%202013.pdf>> (accessed 16 September 2014).

⁵¹ Conor Duffy, 'UN Condemns Australia's Guantanamo Bay', *ABC Television*, 25 February 2014 <<http://www.abc.net.au/7.30/content/2014/s3952255.htm>> (accessed 16 September).

⁵² See Robert Cornall, *Report to the Secretary, Department of Immigration and Border Protection: Review into the Events of 16-18 February 2014 at the Manus Regional Processing Centre*, 23 May 2014, <https://www.immi.gov.au/about/dept-info/_files/review-robert-cornall.pdf> (accessed 16 September).

⁵³ 'Police charge two over Reza Berati murder', *Sky News*, August 20, 2014 <<http://www.skynews.com.au/news/top-stories/2014/08/20/png-police-charge-two-over-reza-berati-murder.html>> (accessed 10 October 2014).

incident occurred in front of a number of eyewitnesses and the identities of the alleged perpetrators are apparently well known by detainees and staff on Manus Island.⁵⁴

In September 2014, a second asylum seeker, 24-year-old Hamid Kehazaei, died after contracting septicaemia from a cut to his foot at the Manus Island facility.⁵⁵ The significant delays in providing him with appropriate medical treatment arguably constitute medical negligence and a failure of duty of care by the Australian Government.

In 2014, Dr Peter Young, former Director of the International Health and Mental Services (**IHMS**), a service provider contracted by the Australian Government to provide health services at offshore immigration detention facilities, provided evidence to the Australian Human Rights Commission's *National Inquiry into Children in Immigration Detention* (**National Inquiry**) that the Government had requested that IHMS remove figures from a report highlighting the pervasiveness of mental health distress in child detainees⁵⁶.

Dr John-Paul Sanggaran, who worked as a medical practitioner at detention facilities on Christmas Island, also provided evidence to the National Inquiry detailing instances of medications, hearing aids, and prosthetic limbs being removed from detainees and destroyed before the detainees were transferred to an offshore detention facility.⁵⁷

Ms Kirsty Jane Diallo, a child protection support worker at the immigration detention centre on Nauru, gave evidence to the National Inquiry that detainees live in tents at the bottom of a quarry, that there is no privacy, that it is extremely hot with temperatures reaching 40 Degrees Celsius in the tents, and that white rocks covering the ground attracted heat, so there is also significant glare from the white rocks – “for staff you always had to wear

⁵⁴ Based on communications between ALHR member and asylum seekers detained on Manus Island.

⁵⁵ Oliver Laughland, 'Asylum Seeker Declared Brain Dead After Leaving Manus Island', *The Guardian Australia*, 3 September 2014 <www.theguardian.com/world/2014/sep/03/asylum-seeker-declared-brain-dead-medical-evacuation-manus-island> (accessed 16 October 2014).

⁵⁶ Evidence given by Dr Peter Young, Australian Human Rights Commission, National Inquiry into Children in Immigration Detention 2014 (Public Hearing, Sydney, 31 July 2014).

⁵⁷ Evidence given by Dr John-Paul Sanggaran Australian Human Rights Commission, National Inquiry into Children in Immigration Detention 2014 (Public Hearing, Sydney, 31 July 2014).

sunglasses because the glare would hurt your eyes ... often children and families didn't have sunglasses, they also didn't have hats, but we [the staff] would wear hats".⁵⁸

The Australian Government's policy of offshore processing is designed to deter people from exercising their right to seek asylum from persecution.⁵⁹ This motivation may well satisfy the purposive element in the definition of torture, and, combined with the severe physical and mental pain and suffering that asylum seekers experience due to the conditions and uncertainty of their detention, there is a strong case to argue that the Australian Government is engaging in torture in violation of Article 1 of the UNCAT or, at least, cruel, inhuman or degrading treatment or punishment under Article 16.

Furthermore, the events on Manus Island in PNG indicate that locally engaged security contractors, and the local community outside the perimeter fence of the detention facilities, have a strong aversion to the presence of the asylum seekers and that in the riots that led to the death of Reza Berati there may have been a deliberate targeting of asylum seekers. This supports an argument that Australia's transfer of asylum seekers to Manus Island could contravene Australia's *non-refoulement* obligations under Article 3 of the UNCAT.⁶⁰ There is also lack of certainty as to where those asylum seekers detained on Manus Island who are found to be genuine refugees will be resettled to.⁶¹

In September 2014, the Australian Government signed a Memorandum of Understanding with the Government of Cambodia to accept refugees from offshore facilities in both PNG and Nauru.⁶² ALHR submits that Cambodia is not a country adequately equipped to deal with an influx of asylum seekers and

⁵⁸ Evidence given by Kirsty Jane Diallo, Australian Human Rights Commission, National Inquiry into Children in Immigration Detention 2014 (Public Hearing, Sydney, 31 July 2014).

⁵⁹ Op cit, n2.

⁶⁰ Article 3, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

⁶¹ Latest reports indicate the Papua New Guinea government is undertaking an assessment of this in order for Cabinet to make an informed decision. 'A third of Manus Island asylum seekers assessed as refugees', The Australian (online), 14 May 2014. Online at: < <http://www.theaustralian.com.au/national-affairs/immigration/a-third-of-manus-island-asylum-seekers-assessed-as-refugees/story-fn9hm1gu-1226916440478>> (accessed 16 October 2014).

⁶² Samantha Hawley, 'Cambodia refugee deal: Protests outside Australian embassy in Phnom Penh as Scott Morrison signs agreement', 27 September 2014, < <http://www.abc.net.au/news/2014-09-26/immigration-minister-to-sign-cambodia-refugee-deal/5770468>> (accessed 16 October).

refugees and that this arrangement will serve to further jeopardise the mental and physical wellbeing of this already vulnerable group of people.

Recommendation: The Australian Government end its policy of offshore processing and set a timetable for closing the Manus Island and Nauru offshore detention facilities and processing the claims of all asylum seekers detained there.

Recommendation: The Australian Government not send asylum seekers to Cambodia where there are inadequate safeguards and legal protections in place and Cambodia is ill-equipped to handle an influx of asylum seekers and/or refugees.

5. Children in detention

Relevant UNCAT Articles: 1, 2 and 16

As at August 2014, there were 647 children detained in closed detention facilities in Australia – 500 on the mainland and 147 on Christmas Island, including 28 children with disabilities.⁶³ A further 222 children were detained on Nauru.⁶⁴

ALHR is deeply concerned about the lack of basic human rights afforded to children in immigration detention. It submits that the treatment of children in immigration detention in some circumstances, such as prolonged detention or detention involving violence or abuse, is likely to constitute torture in contravention of Article 2 or cruel, inhuman or degrading treatment or punishment under Article 16 of the UNCAT.

⁶³ Gillian Triggs, 'Human Rights Commission: keeping children in immigration detention doesn't deter people smugglers, so why do it?', *Sydney Morning Herald*, 8 October 2014. Online at <<http://www.smh.com.au/comment/human-rights-commission-keeping-asylum-seeker-children-in-detention-doesnt-stop-people-smugglers--so-why-do-it-20141007-10rcz3.html>> (accessed 16 October 2014).

⁶⁴ *Ibid.*

ALHR's main areas of concern regarding children can be summarised as follows:

- Length of detention: On average, the length of time that children spend in onshore immigration detention is 231 days.⁶⁵
- Access to education: In 2000, Immigration Detention Standards (**IDS**) were established to provide a framework for the minimum standards for the treatment of detained children. These standards require that the contracted service provider, Serco, ensure that child detainees have access to age and skill appropriate education services.⁶⁶ Despite the establishment of these standards, children in closed detention facilities have had limited or no access to education. For example, children on Christmas Island have had virtually no access to school (until the Government funded Catholic Education to provide a program in June 2014)⁶⁷. There are reports that hundreds of children from five to 17 years of age have been denied any access to school for at least seven months.⁶⁸ In other places it is reported that some children have access to only one hour of informal English classes taught by unqualified volunteers, with insufficient equipment and resources in inadequate facilities.⁶⁹
- Recreation: Children have inadequate opportunities or facilities for play and recreation in offshore detention facilities and there is a distinct lack of sufficient outdoor recreation space.⁷⁰ No legally enforceable minimum

⁶⁵ Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention 2014*. Online at < <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/national-inquiry-children-immigration-detention-2014>> (accessed 16 October 2014).

⁶⁶ Australian Parliament House, *Committee Report into Immigration Detention, Appendix H: Immigration Detention Standards*, 9.4.1, 160 < [www.aphref.aph.gov.au/house-committee-jfact-idcvisits-idcaph%20\(1\).pdf](http://www.aphref.aph.gov.au/house-committee-jfact-idcvisits-idcaph%20(1).pdf)> (accessed 15 September 2010).

⁶⁷ The Hon. Scott Morrison MP, 'Delivering education to children on Christmas Island', Media Release, 13 June 2014. Online at: <<http://www.minister.immi.gov.au/media/sm/2014/sm215367.htm>> (accessed 16 October).

⁶⁸ Pamela Curr, 'Why Australia needs a Commissioner for Children', *ABC The Drum*, 22 November 2010 <<http://www.abc.net.au/news/2010-11-22/whyaustralianeedsanationalcommissionerforchildren/41352>> (accessed 16 October 2014).

⁶⁹ M Stern, 'The Educational Rights of Asylum Seeking Children: Observing Failure' *Public Space: The Journal of Law and Social Justice*, 3.

⁷⁰ Australian Human Rights Commission, (2012) 'Immigration detention on Christmas Island - Observations from visit to Immigration detention facilities on Christmas Island' <<https://www.humanrights.gov.au/publications/immigration-detention-christmas-island-observations-visit-immigration-detention>> (accessed 16 October 2014).

standards for the conditions of children in immigration detention have been codified in Australia.⁷¹

- Health: Prolonged detention of children has severely negative impacts on their health and development. On 6 October 2014, the Medical Journal of Australia reported that over 80 per cent of paediatricians surveyed believe that the mandatory detention of asylum seeker children amounts to "child abuse", confirming the assessment made recently by the Australian Medical Association.⁷² As Chairperson of the Australian Human Rights Commission, Gillian Triggs, reported in a recent op-ed, "One paediatrician, after visiting Christmas Island, concluded, "almost all the children are sick". Evidence of the children's significant mental and physical decline is confirmed by Department of Immigration reports of 128 incidents of self-harm by children over a fifteen-month period from January 2013 to March 2014"⁷³.
- Sexual abuse: Allegations of sexual abuse of children detained in Nauru have been made to the National Inquiry. There are reports of teenage girls being detained in the same quarters as boys at a ratio of 1:66.⁷⁴

ALHR is also concerned about the conflict of interest that exists in relation to the Minister for Immigration and unaccompanied minors. Under the *Immigration (Guardianship of Children) Act 1946* (Cth), the Minister is the guardian of unaccompanied minors and as such has a duty of care to those children.⁷⁵ Given the Australian Government's explicit hard line policies and practices on asylum seekers, the Minister clearly has a conflict of interest with respect to protecting the rights and interests of the children in whose best interests he is charged to act. ALHR submits that the Minister for Immigration is not the appropriate person to be the guardian of unaccompanied minors and cannot adequately protect them from torture or other human rights abuses.

⁷¹ Op Cit, n 5.

⁷² Elizabeth Corbett et al, 'Australia's treatment of refugee and asylum seeker children: the views of Australian paediatricians', *Med J Aust* 2014, 201 (7): 393-398 at 393.

⁷³ Op Cit, n 63.

⁷⁴ Op Cit n 68.

⁷⁵ *Immigration (Guardianship Of Children) Act 1946* (Cth), s 6.

It is noted that there have been some recent attempts by the Australian Government to address some of the above issues but, in ALHR's view, these attempts fail to sufficiently address any of these issues. For example, the Minister recently announced that 150 children under 10 years of age, who arrived before July 19, 2013, are to be released before Christmas 2014.⁷⁶ Although this is welcome news, it does not apply to children over the age of 10 and the reality is that hundreds of children, including many who are under the age of 10, will remain in detention due to arriving after this date. In addition, it was announced on 3 October 2014 that an internal departmental inquiry is to be held into allegations of sexual abuse in detention facilities in Nauru⁷⁷. It is unclear yet whether this inquiry will be sufficiently thorough, independent, transparent or effective.

Recommendation: The Australian Government immediately release all children and their families from immigration detention facilities and end the practice of detaining children in immigration detention for any period longer than is absolutely necessary which, in ALHR's view, is no longer than 14 days.

Recommendation: The Australian Government transfer the responsibility for guardianship of unaccompanied minors from the Minister for Immigration to an impartial and competent third party with appropriate powers, resources and expertise to ensure the protection of children.

6. Mandatory detention and alternatives to detention

Relevant UNCAT Articles: 1, 2 and 16

⁷⁶ Sarah Whyte, Ben Doherty, 'Scott Morrison to release 150 detainee children into the community', *The Sydney Morning Herald*, 20 August 2014 <<http://www.smh.com.au/federal-politics/political-news/scott-morrison-to-release-150-detainee-children-into-community-20140819-3dys4.html>> (accessed 16 October 2014).

⁷⁷ The Hon. Scott Morrison, MP, 'Independent inquiry into 'Nauru Allegations'', Press Release. 3 October 2014. Online at: <<http://www.minister.immi.gov.au/media/sm/2014/sm218327.htm>> (accessed 16 October 2014).

As part of Australia's review before the CAT in 2008, the CAT recommended that:

- Australia consider abolishing its policy of mandatory detention;
- Detention be used as a measure of last resort only;
- A reasonable time limit for detention be set; and
- Non-custodial measures and alternatives to detention be made available to persons in immigration detention.⁷⁸

Australia has not adopted any of these recommendations and, in fact, mandatory detention of "unauthorized maritime arrivals" remains the policy of the Australian Government. As outlined above in section 4, at 31 July 2014, there were 1,127 asylum seekers detained on Manus Island and 1,146 asylum seekers detained in Nauru.⁷⁹ In addition, at 30 September 2014, there were 3,314 people detained in onshore immigration detention facilities. As noted above, asylum seekers are detained for an average of 413 days.⁸⁰

There are many alternatives to detention which ALHR submits offer more humane conditions for asylum seekers, while their claims are being processed, than the current detention system. These alternatives include:

- Release without conditions (for example, once a person's identity has been assessed and the State has not shown that the person poses a threat to national security);
- Release with the provision of support services (for example, provision of a case worker, legal referral);
- Community-based release: under the Migration Act the Minister for Immigration can grant a detainee the right to reside in the community subject to certain conditions (e.g. reporting, not working, living at the specified address). This and other community-based alternatives should

⁷⁸ Committee Against Torture, Fortieth session 28 April – 16 May 2008, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/AUS/CO/3, 22 May 2008, para 11.

⁷⁹ Department of Immigration and Border Protection, Immigration Detention and Community Statistics Summary 31 July 2014 (31 July 2014) Commonwealth of Australia <www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-july2014.pdf> (accessed 16 October 2014).

⁸⁰ Op Cit n 19, page 10.

be available, for assessment on a case-by-case basis, to all asylum seekers irrespective of their mode of entry into Australia;

- Supervised release to an individual/family/NGO: this has, in the past, been adopted by Australia in an ad hoc fashion in circumstances concerning children in detention;
- Release on bail, bond or payment of a surety; and
- Release to a designated residence (e.g. State-sponsored accommodation centre).

ALHR is of the view that these alternatives are more in line with Australia's human rights obligations than the current system of mandatory detention and, further, that use of these alternatives would mean that Australia would be less likely to breach its obligations under the UNCAT and other human rights treaties.

Recommendation: To end the policy of mandatory detention and establish a formal framework of alternatives to detention which is available to persons currently held in immigration detention facilities and to other persons who seek asylum in Australia in future.

7. Lack of independent oversight of detention facilities

Relevant UNCAT Articles: 1, 2 and 16

Australia lacks a comprehensive system of oversight of detention, and in particular preventive detention monitoring. This is most obvious in the area of detention of asylum seekers. The Australian Human Rights Commission and the Commonwealth Ombudsman have, in some circumstances, been permitted to visit places of immigration detention but neither has a comprehensive legal mandate nor the resources to conduct in-depth, regular preventive visits from a human rights framework.

Further, there is no comprehensive independent oversight of Australia's offshore detention facilities in PNG and Nauru. In relation to these offshore detention facilities, Australia has sought to circumvent its human rights obligations by arguing that these facilities are outside its control and are the responsibility of the PNG and Nauru Governments.⁸¹ However, even if the fact that Australia is exercising effective control over detainees on Nauru and PNG is put to one side, given the level of influence that Australia exercises vis-à-vis these countries it should show leadership, insist on oversight, and work collaboratively with Nauru and PNG to establish proper independent oversight of asylum detention centres. Nauru is, in fact, a State Party to the OPCAT but has not yet taken any action to establish a National Preventive Mechanism (NPM) as required under the protocol.

The Australian Government signed the OPCAT in 2009 and committed to ratification "as a priority" during its Universal Periodic Review before the UN Human Rights Council in 2011.⁸² In 2012, the bipartisan Federal Parliamentary Joint Standing Committee on Treaties recommended ratification, subject to a declaration under Article 24 delaying the obligation to establish a NPM for three years.⁸³ There had been some progress up until 2013, with three State/Territory jurisdictions releasing draft bills that would enable ratification to occur.⁸⁴ However, the Australian Federal Government has indicated it will not ratify until all jurisdictions pass similar laws. There has been no indication from the Federal Government over the past year that OPCAT ratification is a priority, and without concerted Federal Government efforts to see uniform laws enacted in every jurisdiction, ratification of the OPCAT seems a remote prospect.

⁸¹ For example, a spokesperson for Immigration and Border Protection Minister Scott Morrison told ABC Fact Check: 'As the individuals and the centre are located in PNG territory, it has primary responsibility'. 'Is Australia responsible for asylum seekers detained on Manus Island', Op Cit n 29.

⁸² UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Australia, 24 March 2011 UN Doc. A/HRC/17/10 at 31.

⁸³ Joint Standing Committee on Treaties, Parliament of Australia, Review into Treaties tabled on 7 and 28 February 2012 (2012) ch 6.

⁸⁴ *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2013* (Tas); *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) (National Uniform Legislation) Bill 2013* (NT); *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2013* (ACT).

Recommendation: The Australian Government prioritise the measures necessary to enable ratification of the OPCAT at the earliest opportunity.

8. Processing and assessment of asylum claims

Relevant CAT Articles: 2, 3 and 16

Procedural fairness

Procedural fairness is a necessary precondition for the protection of fundamental human rights and is of vital importance in the context of asylum applications given what is at stake. The Australian Human Rights Commission considers that measures designed to limit procedural fairness and the operation of natural justice in the assessment of asylum claims potentially prevent the review of administrative decisions, resulting in breaches of fundamental human rights.⁸⁵

A recent Australian court decision illustrates the current procedural flaws with assessment of asylum claims. In March 2013, the Full Court of the Federal Court restrained the Minister for Immigration from removing an asylum seeker to Afghanistan until his claims for protection had been assessed according to law. The Federal Court held that the International Treaties Obligations Assessment was affected by jurisdictional error as the wrong legal test was applied and procedural fairness was denied.⁸⁶ Although the Federal Court decision was a positive outcome for the claim of this particular asylum seeker, it serves to highlight the inadequacies of the current system of assessment of refugee claims which, due to procedural flaws and lack of procedural fairness, may put Australia at risk of breaching its *non-refoulement* obligations under the UNCAT.

⁸⁵ Australian Human Rights Commission (2011), *Inquiry into the Migration Amendment (Detention Reform and Procedural Fairness) Bill 2011* <<https://www.humanrights.gov.au/inquiry-migration-amendment-detention-reform-and-procedural-fairness-bill-2011#s8>> (accessed 16 October 2014).

⁸⁶ Australian Human Rights Commission, *Minister for Immigration and Citizenship v SZQRB [2013] FCAFC 33*, <https://www.humanrights.gov.au/publications/minister-immigration-and-citizenship-v-szqrb-2013-fcafc-33> (accessed 16 October 2014).

Adverse security assessments

For asylum seekers to receive a protection visa from the Australian Government, they must not be deemed by the Australian Security Intelligence Organisation (**ASIO**) to be either a direct or indirect risk to security⁸⁷. This is broader than the security exclusion grounds under Article 33(2) of the Refugee Convention and therefore, through this legislation, individuals who should be otherwise protected under the Refugee Convention (including by virtue of having a fear of torture) may be excluded from protection in Australia.

Individuals found to be in need of protection, either as a refugee or through the complementary protection scheme, but who are given adverse security assessments by ASIO, are not repatriated by Australia as it is recognized that this would breach its *non-refoulement* obligations.⁸⁸ However, these individuals are not granted protection visas by Australia. Instead, they are forced to remain in immigration detention unless and until a third country agrees to resettle them (which is generally unlikely). As a result, these individuals face indefinite detention. This is despite the Australian Government's assertion in its State Party Report to the CAT that indefinite detention is unacceptable.⁸⁹ The Australian Human Rights Commission reported that, as at May 2013, there were 56 refugees, including some with children, in immigration detention facilities in Australia who had been denied a protection visa as a result of receiving an adverse security assessment by ASIO.⁹⁰ In ALHR's view indefinite immigration detention constitutes cruel, inhuman or degrading treatment or punishment contrary to Article 16 of the UNCAT. Combined with the poor conditions and treatment of asylum seekers as outlined in section 4 above, indefinite detention may even amount to a form of torture in contravention of Article 2 of the UNCAT.

⁸⁷ Section 36(1B) of the *Migration Act 1958* (Cth).

⁸⁸ Ben Saul, 'Dark Justice: Australia's Indefinite Detention Of Refugees On Security Grounds Under International Human Rights Law', 13 *Melbourne Journal of International Law* 2013, 1-47, at 3 <<http://www.law.unimelb.edu.au/files/dmfile/03Saul1.pdf>> (accessed 16 October 2014).

⁸⁹ Committee Against Torture, Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedures – Fourth and fifth periodic reports of States parties due in 2012: Australia, UN Doc CAT/C/AUS/4-5 (9 January 2014), para 248.

⁹⁰ Australian Human Rights Commission, *Tell Me About: Refugees with Adverse Security Assessments*, <https://www.humanrights.gov.au/sites/default/files/document/publication/tell-me-about-refugees-adverse-security.pdf> (accessed 10 October 2014).

Asylum seekers and refugees who receive adverse security assessments are detained not on the basis of a crime but on the basis of an assessment that they pose a direct or indirect risk to security. They are not given reasons for the decision (making the decision virtually impossible to challenge). Adverse ASIO security assessments issued in respect of protection visa applicants are largely non-reviewable and made through a process lacking procedural safeguards. The legislation expressly excludes review by a tribunal. The only possible review is through an Independent Reviewer of Adverse Security Assessments but this is a non-legislative, non-binding process, operating solely as a matter of policy.⁹¹

In addition to the CAT previously raising concerns about indefinite detention of asylum seekers,⁹² the UN Human Rights Committee has similarly found indefinite detention to be a form of cruel, inhuman and degrading treatment.⁹³ ALHR notes that, in August 2013, the UN Human Rights Committee examined the case of 46 recognised refugees held in detention in Australia on security grounds and found that the indefinite detention of these refugees amounted to cruel, inhuman and degrading treatment.⁹⁴

Recommendation: The Migration Act be amended so that national security grounds on which Australia may refuse a protection visa to an asylum seeker are confined to the exclusion grounds under the Refugee Convention.

⁹¹ See generally, Ben Saul (2012), Op Cit n 88.

⁹² UN Committee Against Torture (CAT), concluding observations of the Committee against Torture: Australia, 22 May 2008, CAT/C/AUS/CO/3, para 11, UN Doc CAT/C/USA/CO/2, 25 July 2006).

⁹³ Human Rights Committee, *C v Australia*, para 8.4, Communication No. 900/1999, 28 October 2002, <http://www1.umn.edu/humanrts/undocs/900-1999.html>.

⁹⁴ Human Rights Committee, *F.K.A.G. et al. c Australia*, Communication No. 2094/2011, 30 August 2013, http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/AUS/CCPR_C_108_D_2094_2011_2072_0_E.pdf; UN Human Rights Committee, *MMM and others v Australia*, Communication No 2136/2012 (30 August 2013), UN Doc CCPR/C/108/D/2136/2012, http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/AUS/CCPR_C_108_D_2136_2012_2072_1_E.pdf.

Recommendation: Applicants for protection visas be afforded adequate mechanisms for review of ASIO security assessments, including being provided with sufficient information to enable them to understand the basis of the determination.

Recommendation: Legislative provisions be introduced for regular consideration of whether the deemed security threat posed by an asylum seeker can be addressed in manner less harmful and restrictive than detention.

Enhanced screening

Since October 2012 an “enhanced screening process” has been applied to all “unauthorised maritime arrivals” from Sri Lanka to identify whether they are raising claims that engage Australia’s *non-refoulement* obligations.⁹⁵ Under this enhanced screening process an individual is interviewed by two officers from the Department of Immigration and Border Protection (**DIBP**). If DIBP considers that a person raises claims that potentially engage Australia’s protection obligations, they are “screened in” and may make a claim for a protection visa. However, if the DIBP considers at a screening interview that a person does not raise claims that potentially engage Australia’s protection obligations, they are “screened out”. Once “screened out”, a person is not able to make a claim for a protection visa and is removed from Australia.⁹⁶

ALHR is concerned that enhanced screening may result in people being returned to serious harm, in breach of Australia’s *non-refoulement* obligations under the UNCAT. Moreover, several elements of the enhanced screening process make it an inadequate mechanism for determining whether Australia’s protection obligations may be engaged. The screening interview is understood to be very brief and therefore there is a high chance that it will fail to identify relevant claims.⁹⁷ As of May 2013, the Department of Immigration and

⁹⁵ Op Cit, n 89.

⁹⁶ Ibid.

⁹⁷ Ibid.

Citizenship had conducted 2,596 screening interviews and returned 965 people from Australia to Sri Lanka as a consequence.⁹⁸ ALHR holds the view that this is not an adequate Refugee Status Determination process and risks excluding those with legitimate claims for protection. ALHR is also concerned that unaccompanied minors who arrive by boat from Sri Lanka are subject to the enhanced screening process and may not have adequate support. For example, unaccompanied minors are not informed of their right to seek asylum and have no access to independent legal advice unless they specifically request it.⁹⁹

Where protection claims are raised, all asylum seekers should be “screened in” and should have their claims fully assessed under the refugee status determination and complementary protection system that applies under the Migration Act, with access to legal or migration advice and assistance, independent merits review and judicial review.

Recommendation: That Australia discontinue the process of “enhanced screening” of asylum seekers. Where protection claims are raised, all asylum seekers should be “screened in” by default and should have their claims fully assessed under the refugee status determination and complementary protection system that applies under the Migration Act with access to legal advice and assistance and independent merits review and judicial review.

Fast track assessment and removal

The Australian Government has stated that it intends to introduce a new “Fast Track Assessment and Removal” process.¹⁰⁰ This will be based on the United Kingdom’s “Detained Fast Track” (DFT) system and will involve “four key steps”: Triaging the Caseload; Rapid Assessment; Rapid Review; and Rapid Removal. One of the most significant problems with the DFT is that its tight

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ The Hon. Tony Abbott MP, “Tony Abbott - Clearing Labor's 30,000 Illegal Arrivals Backlog” Media Release, 16 August 2013, <<http://www.liberal.org.au/latest-news/2013/08/16/tony-abbott-clearing-labors-30000-illegal-arrivals-backlog>> (accessed 16 October).

timeframes leave insufficient time for asylum seekers and their legal representatives to prepare a claim for a protection visa, and insufficient time for decision-makers to make accurate decisions. This creates potential for denial of procedural fairness and increased risk of a State breaching its *non-refoulement* obligations if an incorrect or inappropriate decision is made. ALHR submits that the process of determining whether someone has a well-founded fear of persecution is a complex and extremely important procedure, which should not be taken lightly. It should not be driven by pressure to meet time limits and targets. Although this can cause delays while claims are being finalized, with appropriately implemented policies around alternatives to detention (outlined above in section 6), the impact on asylum seekers can be minimized.

Complementary protection

Complementary protection, through which people at risk of harm outside the Refugee Convention are eligible for a protection visas, ‘complements’ protection under the Refugee Convention. ALHR supports Australia’s statutory complementary protection scheme, which was introduced in March 2012.¹⁰¹ This is an important mechanism for Australia to ensure that people who do not meet the definition of ‘refugee’ in the Refugee Convention, but who nonetheless face serious human rights abuses, including torture, if returned to their country of origin or residence, can be granted protection.

ALHR is, however, disappointed that the Australian Government, through the *Migration Amendment (Regaining Control over Australia’s Protection Obligations) Bill 2013*, has proposed reverting to Ministerial discretion as a basis for the grant of a complementary protection visa. This is problematic because ‘the ministerial intervention process is non-compellable, non-delegable and non-reviewable’.¹⁰² Repealing the complementary protection provisions risks

¹⁰¹ Department of Immigration and Border Protection (2014), *Factsheet 61a – Complimentary Protection*. Online at: <<https://www.google.com.au/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8>> (accessed 16 October).

¹⁰² See Andrew & Renata Kaldor Center for International Refugee Law, *Submission to the Senate Legal and Constitutional Affairs Committee Migration Amendment (Regaining Control over Australia’s Protection Obligations) Bill 2013*, University of New South Wales, 6 December 2016

violating Australia's *non-refoulement* obligations under international human rights law, including Article 3 of the UNCAT.¹⁰³ If passed, this legislation would mean that Australia's State Party Report comments on complementary protection (paragraphs 112-155) are invalid and the Committee's concerns raised in paragraph 15 of its List of Issues remains.

A further bill, the *Migration Amendment (Protection and Other Measures) Bill 2014* is currently before the Australian Senate. The reforms proposed under this Bill would significantly increase the risk of Australia returning asylum seekers to harm and breaching international *non-refoulement* obligations, including under Article 3 of the UNCAT. The Bill seeks to increase the risk threshold asylum seekers have to meet before being eligible for an Australian complementary protection visa.¹⁰⁴ It is to come into effect only if the *Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013* does not pass. Currently, a person is eligible for complementary protection from Australia if there is a "real chance" they will face significant harm on their return.¹⁰⁵ The proposed reforms would increase the risk threshold an asylum seeker is required to meet to "more likely than not", that is, a probability of greater than 50 per cent.¹⁰⁶ ALHR submits that this threshold is unreasonably high and potentially puts Australia at risk of breaching its *non-refoulement* obligations.

In addition, the 2014 Bill seeks to deny protection visas to asylum seekers who have refused or failed to establish their identity, nationality or citizenship or provided 'bogus' identity documents.¹⁰⁷ The Bill also imposes a strict legal burden of proof on asylum seekers to demonstrate that they require Australia's protection.¹⁰⁸ These amendments, if passed, will create considerable difficulties

<http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/submission_to_senate_inquiry_into_cp_0.pdf> (accessed 16 October 2014).

¹⁰³ Proposed legislation currently before the Australian Parliament also seeks to render the consideration of *non-refoulement* "irrelevant" to the removal of unlawful non-citizens: See proposed s197C Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014.

¹⁰⁴ Scott Morrison MP, *Migration Amendment (Protection and Other Measures) Bill 2014*, Second Reading Speech, House of Representatives Hansard, 25 June 2014, 9.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

for people in need of protection, and therefore increase the risk that Australia returns a person in need of protection to harm, in breach of its *non-refoulement* obligations under the UNCAT and other international human rights treaties.

Recommendation: That the existing complementary protection statutory regime be maintained, including the current threshold for complementary protection of a “real risk” of harm.

9. Conclusion

In summary, ALHR recommends that the Australian Government:

1. Immediately discontinue its policy of intercepting vessels carrying asylum seekers and ‘turning them back’ to locations where asylum seekers directly or indirectly risk torture and/or do not have adequate human rights and legal protections.
2. Abolish the statutory scheme of mandatory detention of asylum seekers by repealing section 189 of the Migration Act as it relates to mandatory detention.
3. Ensure provision of adequate accommodation, health, educational and other support services including legal assistance to asylum seekers as required to satisfy Australia’s obligations under the UNCAT and other international human rights treaties.
4. End the policy of offshore processing and set a timetable for closing the Manus Island and Nauru offshore detention facilities and processing the claims of all asylum seekers detained there.
5. Not send asylum seekers to Cambodia where there are inadequate safeguards and legal protections in place and given that Cambodia is ill equipped to handle an influx of asylum seekers and/or refugees.

6. Immediately release all children and their families from immigration detention facilities and end the practice of detaining children in immigration detention for any period longer than absolutely necessary which, in ALHR's view, is no longer than 14 days.
7. Transfer the responsibility for guardianship of unaccompanied minors away from the Minister for Immigration to an impartial and competent third party with appropriate powers, resources and expertise to ensure the protection of children.
8. Establish a formal framework of alternatives to detention which is available to persons currently held in immigration detention facilities and to other persons who seek asylum in Australia in future.
9. Prioritize the measures necessary to enable ratification of the OPCAT at the earliest opportunity.
10. Amend the Migration Act so that national security grounds on which Australia may refuse a protection visa to an asylum seeker are confined to the exclusion grounds under the Refugee Convention.
11. Ensure that applicants for protection visas under the Refugee Convention are afforded adequate mechanisms for review of ASIO security assessments, including being provided with sufficient information to enable them to understand the basis of the determination.
12. Introduce legislative provisions for regular consideration of whether the deemed security threat posed by an asylum seeker can be addressed in a manner less harmful and restrictive than detention.
13. Discontinue the process of "enhanced screening" of asylum seekers. Where protection claims are raised, all asylum seekers should be "screened in" by default and should have their claims

fully assessed under the refugee status determination and complementary protection system that applies under the Migration Act with access to legal advice and assistance and independent merits review and judicial review.

14. Maintain the existing complementary protection statutory regime, including the current threshold for complementary protection of a “real risk” of harm.

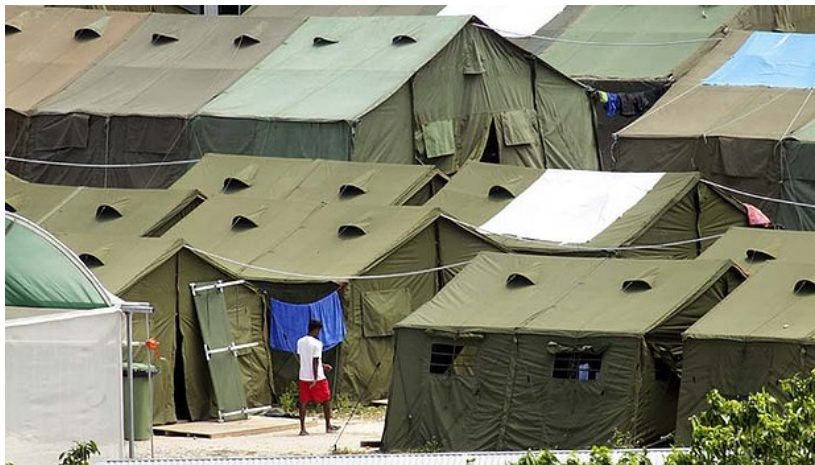
Appendix

Figure 1 – Curtin Immigration Detention Centre



(Photo courtesy of Australian Human Rights Commission)

Figure 2 – Nauru Offshore Processing Centre



(Photo courtesy of Sydney Morning Herald)

Figure 3 – A cartoon depicting life in an offshore processing facility as prepared by the Australian Government to dissuade people from seeking asylum in Australia



Graphic courtesy Department of Customs and Border Protection, February 2014.