RCOA’S ANALYSIS OF PROGRESS IN IMPLEMENTING THE
RECOMMENDATIONS OF THE EXPERT PANEL ON ASYLUM SEEKERS

13 February 2013

On 13 August 2013, the Australian Government’s Expert Panel on Asylum Seekers handed down its report and 22 recommendations on how to prevent asylum seekers risking their lives on dangerous boat journeys to Australia. Six months later, it is timely to consider whether and how these recommendations have been implemented and what impact has been observed to date.

As outlined in its submission to the Expert Panel, the Refugee Council of Australia (RCOA) believes that any solution to discourage asylum seekers arriving by boat in Australia should focus on improving the inadequate levels of protection faced by refugees and asylum seekers that compel them to make dangerous journeys further afield to secure protection and safety. RCOA believed that the Panel's deliberations provided an opportunity to reframe the discussion of refugee and asylum issues in a way that would reflect the complexity of the issues and focus international attention on the pressing need for much improved protection of the most vulnerable. Unfortunately, the Panel largely failed to do this. The recommended expansion of Australia’s Refugee and Humanitarian Program is providing greater protection for those able to access the additional places but many of the Panel’s other recommendations have resulted in greater uncertainty for many people seeking protection and, in the case of those subject to transfer to Nauru or Manus Island, resulted in greater misery.

RCOA sets out below the 22 recommendations made by the Panel – and endorsed in principle by the Government – and the developments related to these recommendations. While a number of policies and programs related to the recommendations are still in their infancy, in the six months following the Panel’s recommendation for offshore processing, more people seeking protection arrived by boat than in any other six-month period in Australian history.1 There were also further deaths at sea off the coast of Indonesia, so the core intention of the Panel’s work – to prevent loss of life at sea – remains unresolved. The need for further protections for asylum and refugees in our region and around the world still requires urgent attention and consideration.

RECOMMENDATION 1 – POLICY PRINCIPLES

The Panel recommends that the following principles should shape Australian policymaking on asylum seeker issues:
- The implementation of a strategic, comprehensive and integrated approach that establishes short, medium and long-term priorities for managing asylum and mixed migration flows across the region.
- The provision of incentives for asylum seekers to seek protection through a managed regional system.
- The facilitation of a regional cooperation and protection framework that is consistent in the processing of asylum claims, the provision of assistance while those claims are being assessed and the achievement of durable outcomes.
- The application of a ‘no advantage’ principle to ensure that no benefit is gained through circumventing regular migration arrangements.
- Promotion of a credible, fair and managed Australian Humanitarian Program.
- Adherence by Australia to its international obligations.

Of the policy principles recommended by the Panel, the one which has received the most attention from the Government has been the “no advantage” principle. RCOA believes that this is the most poorly-

1 Boats carrying 10,595 passengers arrived between 13 August 2012 and 11 February 2013 – see page 8.
conceived of the Panel’s policy principles and its basis is not founded in the knowledge of international protection practice and jurisprudence. The “no advantage” principle stipulates “asylum seekers [should] gain no benefit by choosing not to seek protection through established mechanisms”. According to this concept, asylum seekers subject to offshore processing who are found to be refugees will wait for resettlement for the amount of time they would have waited had they applied through “regional arrangements”. While the Government has not yet announced specific timeframes for resettlement from Nauru and Manus Island, it has proposed that regional benchmarks for resettlement through UNHCR processes will be used to determine an appropriate “waiting time” for resettlement.

RCOA has consistently expressed concern about the profound disconnection between the assumptions underlying the “no advantage” test and the realities of the protection environment in the Asia-Pacific region. The most perplexing of these assumptions is that asylum seekers who attempt to enter Australia by boat should instead have applied through “established mechanisms”, “enhanced regional arrangements” or a “managed regional system”. Again, this fails to recognise the reality that there are no orderly, consistent regional arrangements through which refugees can seek to have their status recognised or access timely durable solutions in the Asia-Pacific region. This point was eloquently made by the UN High Commissioner for Refugees, Antonio Guterres, in a letter to the Australian Government:

Finally, the “no advantage” test appears to be based on the longer term aspiration that there are, in fact, regional processing arrangements in place. We share this aspiration. However, for the moment, such regional arrangements are very much at their early conceptualization. In this regard, UNHCR would be concerned about any negative impact on recognized refugees who might be required to wait for long periods of time in remote island locations.

While the Panel’s suite of recommendations relies heavily on the development of a “managed regional system” through which asylum seekers can apply for protection, its report does not clearly articulate the form, scope or timeline for implementation of these arrangements. The “no advantage” test, as conceived by the Panel, therefore places asylum seekers in a paradoxical position: they will face indefinite exile in offshore processing facilities on the basis that they have “chosen not to seek protection through established mechanisms” which have not yet been established.

The Government’s reliance on UNHCR resettlement processes to determine the “waiting time” for resettlement out of offshore facilities is equally problematic. The assumption that applying for resettlement through UNHCR processes provides a viable alternative to dangerous boat journeys represents a dramatic misrepresentation of the accessibility and, indeed, the purpose of resettlement. UNHCR prioritises refugees for resettlement based on need, not on a queue system. Because these needs fluctuate and are constantly reassessed, it is largely meaningless (and, in effect, impossible) to determine a fixed waiting time for resettlement.

This difficulty is further heightened by the fact that access to resettlement varies dramatically across the region. Based on current trends, for example, it would take over 12,500 years for all of the registered refugees in Pakistan to be resettled through UNHCR processes, not to mention the estimated one million people who are unregistered. Furthermore, many Hazara refugees in Pakistan face serious difficulties in accessing resettlement due to the precarious security situation in Quetta. In Bangladesh, the refusal of the government to cooperate with UNHCR resettlement processes has rendered this solution effectively inaccessible to the large population of Rohingya refugees currently residing there. For Sri Lankans who are still in their country of origin and thus not refugees, resettlement is impossible. Given that many asylum seekers arriving in Australia by boat previously resided in one of these three countries, logic would suggest that the “benchmarks” for resettlement out of these countries will be taken into consideration when determining the “waiting time” for resettlement out of offshore facilities. Any benchmarking model which included these countries, however, would result in refugees remaining in Nauru or Manus Island for the rest of their lives.

Furthermore, the notion that the “no advantage” test provides a means of ensuring fairness to refugees

3 According to UNHCR statistics, in the five years to 31 December 2011, only 678 of the 1,702,700 officially registered refugees in Pakistan were resettled. At an annual rate of 136 refugees resettled, the resettlement of all current refugees in Pakistan would take 12,520 years.
waiting for resettlement elsewhere, or to those who do not have the opportunity to seek asylum in Australia, is highly problematic. Refugees should not be considered “advantaged” if they have access to protection and assistance. For people fleeing persecution, these are rights, not privileges. Moreover, it is illogical to argue that Australia should lower its own standards of protection for refugees in “fairness” to those who do not have access to effective protection. This approach to “levelling the playing field” does nothing to improve the situation of refugees living in dire circumstances overseas. On the contrary, it purposefully replicates difficult circumstances in an Australian context, despite Australia being largely free of the deep underlying economic, social and internal security problems experienced in many countries of asylum.

RCOA would welcome — and has repeatedly called for — a comprehensive and integrated regional approach to forced migration issues, along with the facilitation of a regional cooperation framework focused on ensuring the adequate protection of people who clearly need it. The other policy principles of a credible, fair and managed Humanitarian Program and Australia’s adherence to its international obligations are also both laudable and necessary components of a well-considered approach to refugee protection needs. Australia has enhanced its Humanitarian Program with the announcement of the increase to 20,000 places (see recommendation 2). However, the Government’s application of the “no advantage” concept and its re-establishment of processing and detention arrangements in Nauru and Papua New Guinea have raised serious questions about its adherence to its international obligations.

**RECOMMENDATION 2 – INCREASE IN HUMANITARIAN PROGRAM**

The Panel recommends that Australia’s Humanitarian Program be increased and refocused:
- The Humanitarian Program be immediately increased to 20,000 places per annum.
- Of the 20,000 places recommended for the Humanitarian Program, a minimum of 12,000 places should be allocated for the refugee component which would double the current allocation.
- Subject to prevailing economic circumstances, the impact of the Program increase (recommended above) and progress in achieving more effective regional cooperation arrangements, consideration be given to increasing the number of places in the Humanitarian Program to around 27,000 within five years.
- The Humanitarian Program be more focused on asylum seeker flows moving from source countries into South-East Asia.

On 23 August 2012, the Government announced that it would increase the 2012-13 Refugee and Humanitarian Program to 20,000 places, with 12,000 places allocated to the refugee resettlement component of the program and the remaining 8,000 places split between the onshore protection program and the Special Humanitarian Program (SHP). Whereas Australia’s resettlement program was previously divided relatively evenly between the Middle East, Asia and Africa regions, the program targets for the 2012-13 Refugee and Humanitarian Program announced on 26 October 2012 indicate that program will have a stronger focus on the Middle East and Asia over the coming year. Of the 12,000 places available under the Refugee component of the program, around 34% (up to 4,150 places) have been allocated to the Asia region and around 47% (up to 5,800 places) to the Middle East and South West Asia, with just under 17% (up to 2,000 places) allocated to Africa. The remaining 200 places have been allocated to UNHCR-referred caseloads outside these target groups.

RCOA welcomes the increase to the Humanitarian Program, noting that this is the largest increase in the program in 30 years. We encourage the Government to consider the additional increases in the Refugee and Humanitarian Program recommended by the Panel. There is a need, however, to balance resettlement needs in different regions. The targeted resettlement from Asia and the Middle East associated with efforts to improve regional cooperation must be balanced with pressing resettlement needs from the Africa region.

On 15 December 2012, the Government announced that it would allocate up to 500 places (within the expanded program of 20,000 places per year) for a community refugee sponsorship pilot program to commence in early 2013. The then Minister for Immigration and Citizenship, Chris Bowen, said

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sponsoring organisations would be “subject to a two-stage visa application charge between $20,000 and $30,000, depending on family composition, as well as airfares and medical screening costs. They would also be required to provide humanitarian settlement support for up to 12 months.” While welcoming the commencement of the pilot, RCOA expressed grave misgivings about the scale of the visa application charge, noting that this would exclude many organisations interested in participating in this program.7

RECOMMENDATION 3 – REGIONAL CAPACITY-BUILDING

The Panel recommends that in support of the further development of a regional cooperation framework on protection and asylum systems, the Australian Government expand its relevant capacity-building initiatives in the region and significantly increase the allocation of resources for this purpose.

In its report, the Expert Panel noted the current level of expenditure on international engagement and capacity-building activities related to people smuggling and border control was approximately $70 million. It recommended that this allocation be doubled and focused on programs “in support of building the regional framework for improved protections, registration, processing, integration, resettlement, returns and other priorities.” It is unclear whether the Panel envisaged the additional $70 million to be allocated on an ongoing annual basis, or whether these additional funds will provided over a number of years.8

On 23 August 2012, the Government announced that it would allocate a “down payment” of $10 million in additional funding for regional capacity building projects, tacitly suggesting that funding would be further increased over time. Priorities for the distribution of the initial $10 million allocation will include supporting the work of United Nations High Commissioner for Refugees (UNHCR) and projects in Malaysia and Indonesia, with a focus on “improving protection outcomes, improving the options for registration [and] improving the management of asylum seekers throughout our region.”9 This allocation is being managed by the Department of Immigration and Citizenship as part of its Displaced Persons Program. Applications for this funding round closed on 8 February 2013.

RCOA believes that capacity-building initiatives could play a key role in ensuring that people seeking protection in the Asia-Pacific region are able to access credible refugee status determination procedures and have the support necessary to ensure a decent standard of living while they are awaiting processing of their claims or a durable solution. We welcome the initial increase of funding and will continue to seek further details on the prospects for further increases in the future and the likelihood of the increased funding being maintained over time.

RECOMMENDATION 4 – BILATERAL COOPERATION WITH INDONESIA

The Panel recommends that bilateral cooperation on asylum seeker issues with Indonesia be advanced as a matter of urgency, particularly in relation to:
- The allocation of an increased number of Humanitarian Program resettlement places for Indonesia.
- Enhanced cooperation on joint surveillance and response patrols, law enforcement and search and rescue coordination.
- Changes to Australian law in relation to Indonesian minors and others crewing unlawful boat voyages from Indonesia to Australia.

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7 RCOA’s statement is at http://refugeecouncil.org.au/n/mr/121215_Sponsor.pdf


9 In the body of its report, Expert Panel recommended that the current level of expenditure on capacity-building initiatives ($70 million annually) be doubled, without specifying whether this should be an ongoing annual increase or whether the additional funds should be allocated immediately or progressively over a number of years. However, Attachment 11 of the report states that funding of “up to $70 million over the forward estimates” be allocated to capacity-building initiatives. See Houston, Aristotle & L’Estrange 2012, pp. 44 & 144.

The Government has taken several steps towards enhancing bilateral cooperation with Indonesia. On 23 August 2012, when announcing the increase to Australia’s Refugee and Humanitarian Program, the Government indicated that 400 places within the expanded program would be immediately allocated to refugees residing in Indonesia, “for people who are considering whether to make that journey [to Australia by boat] or not”.\(^{11}\) It was also indicated that Indonesia would be considered a priority country for funding under the additional $10 million allocation for capacity-building projects in the region. On 26 October, when outlining the program targets for the 2012-13 Refugee and Humanitarian Program, it was announced that around 600 places would be allocated to Afghan, Iraqi and Iranian refugees in Indonesia.\(^{12}\)

Also on 23 August, the Government announced that then Attorney-General Nicola Roxon would be issuing a directive to the Director of Public Prosecutions stipulating that first-time offenders and “low-culpability crew” of people smuggling boats should not be charged with offences that carry a mandatory sentence.\(^{13}\)

The Panel also recommended that the Government pursue further bilateral cooperation with Indonesia in the areas of maritime cooperation, people smuggling, human trafficking and engagement with ASEAN, and work with Indonesia to develop a practical agenda of initiatives to be pursued under the auspices of the Regional Cooperation Framework established under the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime and in liaison with the newly established Regional Support Office.\(^{14}\) While bilateral discussions with Indonesia are understood to be ongoing, it is unclear whether the Government has begun to pursue these additional areas of cooperation. In particular, it is unclear whether the Government has begun to develop the proposed “practical agenda of initiatives” with Indonesia or what activities are envisaged to form part of this agenda. RCOA will continue to seek information on the Government’s priorities and progress in the area of enhanced bilateral cooperation with Indonesia.

**RECOMMENDATION 5 – COOPERATION WITH MALAYSIA ON ASYLUM ISSUES**

*The Panel recommends that Australia continue to develop its vitally important cooperation with Malaysia on asylum issues, including the management of a substantial number of refugees to be taken annually from Malaysia.*

On 26 October, when outlining the program targets for the 2012-13 Refugee and Humanitarian Program, it was announced that around 1,350 places would be allocated to Burmese, Afghan, Iranian and other refugee populations in Malaysia.\(^{15}\) Malaysia has also been nominated as a priority country for funding under the additional $10 million allocation for capacity-building projects in the region.

Other than its recommendation for substantial resettlement of out Malaysia and the strengthening of the “swap” arrangement (discussed in further detail below), the Panel provided very little detail in its report on the possible trajectories for future bilateral cooperation with Malaysia. The Government has similarly provided little detail on how it intends to pursue future engagement with Malaysia beyond these two initiatives. RCOA will continue to seek information on the Government’s priorities and progress in this area, also encouraging the Government to explore how it can work with the Malaysian Government to address refugee protection concerns in South-East Asia.

**RECOMMENDATION 6 – ENGAGEMENT WITH SOURCE COUNTRIES**

*The Panel recommends a more effective whole-of-government strategy be developed for engaging with source countries for asylum seekers to Australia, with a focus on a significant increase in resettlement places provided by Australia to the Middle East and Asia regions.*

\(^{11}\) Minister Bowen, quoted in Houston report on asylum seekers: Joint Press Conference with Prime Minister Julia Gillard.


\(^{14}\) Houston, Aristotle & L'Estrange 2012, p. 43.

\(^{15}\) Priority regions announced for refugee intake boost.
As outlined under Recommendation 2, the Refugee and Humanitarian Program will have a stronger focus on the Middle East and Asia over the coming year. Excluding the measures outlined above in relation to Indonesia and Malaysia, the Government has not yet articulated a clear whole-of-government strategy for engagement with source countries for asylum seekers in Australia, beyond the allocation of additional resettlement places. While the Government continues to work with countries in the region on a range of issues relating to irregular and forced migration through the Bali Process, it has yet to provide specific details on whether or how its work through the Bali Process will facilitate the implementation of this recommendation. RCOA will continue to seek information on the specific strategies that will be pursued by the Government to enhance protection space for refugees and asylum seekers across the region.

**RECOMMENDATION 7 – LEGISLATION TO ALLOW TRANSFERS OF ASYLUM SEEKERS TO OTHER COUNTRIES**

The Panel recommends that legislation to support the transfer of people to regional processing arrangements be introduced into the Australian Parliament as a matter of urgency. This legislation should require that any future designation of a country as an appropriate place for processing be achieved through a further legislative instrument that would provide the opportunity for the Australian Parliament to allow or disallow the instrument.

This recommendation was the first to be implemented by the Government. The *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* commenced on 18 August 2012, just five days after the release of the Expert Panel’s report. Key features of the legislation include the following:

- **Removal of existing safeguards:** Previously, the *Migration Act* set out a series of minimum conditions which had to be met if a country was to be designated for offshore processing. For example, the country had to be legally bound by domestic or international law to provide access for asylum seekers to effective refugee status determination procedures. It was these provisions which led the High Court to rule against the Government’s proposed “swap” arrangement with Malaysia. The new legislation removed these safeguards.

- **Changes to criteria for making a designation:** The new legislation included a series of provisions outlining processes for and issues to be considered when designating a country for offshore processing. With the removal of the safeguards outlined above, the only conditions which must now be met if the Minister is to make a designation is that he or she believes it is in the national interest to do so, and has considered whether the designated country has provided assurances (which need not be legally binding) that it will adhere to the principle of non-refoulement and allow access to refugee status determination procedures. The legislation also requires the Minister to provide documents to Parliament detailing, among other things, assurances provided by the designated regional processing country and arrangements for the treatment of people subject to transfer. However, it specifically states the content of these documents, or the failure to provide them, does not affect the validity of the designation.

- **Introduction of provisions on parliamentary scrutiny:** The legislation introduced a new requirement that designations of offshore processing countries must be made through a disallowable legislative instrument. The intention of this provision was to enable the Australian Parliament to scrutinise proposed designations and either allow or disallow particular countries to be designated for offshore processing.

- **Absence of sunset clause:** The new legislation did not include a sunset clause or other form of review mechanism for designations of offshore processing countries. In practice, this means that designations will remain in place indefinitely, regardless of whether conditions in designated countries change or whether the initial assurances provided by those countries are fulfilled.

- **Obstruction of natural justice:** The legislation introduced provisions stipulating that the rules of natural justice do not apply to the Minister’s decision to designate a country for offshore processing, effectively removing such decisions from independent judicial review.
A legislative change was also made to the Immigration (Guardianship of Children) (IGOC) Act 1946 to remove the Minister for Immigration’s guardian responsibilities for any unaccompanied minor transferred to a regional processing country.

The Parliamentary Joint Committee on Human Rights is currently reviewing the Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 along with other related legislation and instruments. RCOA provided verbal evidence to the Committee at a public hearing on 17 December 2012, in which we outlined a number of our key concerns relating to this package of legislation.

RECOMMENDATION 8 – ESTABLISHMENT OF PROCESSING ARRANGEMENTS IN NAURU

The Panel recommends that a capacity be established in Nauru as soon as practical to process the claims of IMAs transferred from Australia in ways consistent with Australian and Nauruan responsibilities under international law.

While the transfer of asylum seekers who arrived in Australia by boat to Nauru occurred a month after the release of the Panel’s report, the processing of asylum claims is yet to begin, due to the fact that Nauru has only recently passed legislation to enable it to establish a Refugee Status Determination (RSD) procedure. While Nauru has established the initial legal framework for RSD, it does not have the local experience to provide advice and support to asylum seekers to make their applications for protection. In fact, the Australian Government has recently released a request for tender for protection claims assistance services to people transferred to a “Regional Processing Country”. As Nauru (and Papua New Guinea) does not have the expertise or experience in this area, it is expected that the organisations vying for the contract to provide legal and migration advice will be predominantly Australian. The Australian Department of Immigration and Citizenship will determine the successful tenderers and, as with all aspects of the offshore processing arrangements, Australia will cover the costs. The uncertainty created by this delay in the commencement of the RSD process for the men held on Nauru is just one of many disturbing aspects of this policy.

In its report, the Panel said that the establishment of processing facilities in Nauru was viewed as a “circuit breaker” to the stem the current flow of boat arrivals to Australia and diminish the prospect of further loss of life at sea. The total number of asylum seekers who have arrived in Australia by boat in the six months since the report is greater than for any previous six-month period in Australian history – and, in fact, higher than any previous annual total. Between 13 August 2012 and 11 February 2013, 10,595 asylum seekers reached Australian territory by boat.17 Six months after the Panel report, there is no reason to believe that the transfer of asylum seekers to Nauru and PNG is having the impact the Panel envisaged.

The Panel also noted that the involvement of UNHCR and IOM in registrations, processing and resettlement and/or returns in Nauru and other regional processing centres would be highly desirable and should be actively pursued as a matter of urgency. Neither organisation has been involved in these processes to date. UNHCR has made several public statements and reports criticising the conditions and arrangements on Nauru and has refused to play a central role in the assessment of protection claims, as UNHCR sees Australia as responsible for the care and protection of the people that have entered its territory. In its monitoring mission report released on 14 December 2012, UNHCR found that “the accommodation conditions for asylum seekers on Nauru were harsh, that a fully functioning legal framework was absent and that there was inadequate capacity to assess refugee claims”.18 UNHCR also noted that the “current lack of clear and effective processing arrangements for asylum-seekers might be inconsistent with the purpose of the transfers: namely, to undertake refugee processing in a

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17 DIAC Secretary Martin Bowles told a Senate Legal and Constitutional Affairs Committee Additional Estimates hearing on 11 February 2013 that Australia had received 12,684 boat arrivals between 1 July 2012 and 10 February 2013. A boat carrying 53 passengers arrived on 11 February 2013. Media releases from the Minister for Home Affairs report the arrival of 2942 boat passengers between 1 July and 12 August 2012 (see http://www.ministerhomeaffairs.gov.au/MediaReleases/Pages/MediaReleases2012.aspx?Third=2012) The total of 10,595 arrivals for the period 13 August 2012 to 11 February 2013, despite being just six months, is greater than for any 12-month period prior to the current financial year (the previous annual record number of passengers being 8,092 in 2011-12).
18 See http://www.unhcr.org/50cb0f759.html
fair, humane, expeditious and timely way”. IOM has also allegedly declined to be involved in the administration of the facilities in Nauru and Manus Island.\(^\text{19}\)

Several of the other recommendations set out by the Panel have yet to be implemented in relation to Nauru. Of particular note is the Panel’s expectation that asylum seekers on Nauru would be subject to treatment consistent with human rights standards, including freedom from arbitrary detention. The model of an open reception centre from which asylum seekers and registered refugees can freely move is not yet a reality. Asylum seekers are held in temporary accommodation (tents), with the first permanent structure for 88 people finished only in early February 2013. Hunger strikes and incidents of self-harm occur regularly at the detention centre on Nauru and, while the Australian Government claims that medical facilities are comparable to that of treatments available to people detained on the Australian mainland, there is evidence that the facilities are inadequate, with a support worker choosing to return to Australia early in order to get treatment for a broken ankle.\(^\text{20}\) Following its visit to the Nauru facility in December 2012, UNHCR expressed concern that asylum seekers on Nauru are currently being held under conditions that are tantamount to detention and recommended “as a matter of urgency that asylum-seekers are provided with adequate conditions of accommodation in line with international standards and are granted freedom of movement”.\(^\text{21}\)

The Panel recommended that a representative group comprised of government and civil society members from both Australia and Nauru monitor the care arrangements on the island centre. On 22 November 2012, the then Minister for Immigration and Citizenship, Chris Bowen, announced that, as an interim step to the establishment of this monitoring committee, a joint advisory committee would be chaired by Nauruan and Australian officials and include Paris Aristotle, Professor Nicholas Procter, Associate Professor Mary Anne Kenny and Dr Maryanne Loughry (all of whom are members of the Australian Government’s Ministerial Advisory Committee on Asylum Seekers and Detention). To date, there has been no public discussion of the deliberations or activities of this committee. The only monitoring that has occurred and been discussed publicly has been the result of independent organisations visiting Nauru at their own cost and reporting their findings.

RECOMMENDATION 9 – ESTABLISHMENT OF PROCESSING ARRANGEMENTS IN PAPUA NEW GUINEA (PNG)

The Panel recommends that a capacity be established in PNG as soon as possible to process the claims of IMAs transferred from Australia in ways consistent with the responsibilities of Australia and PNG under international law.

The failings of Nauru are mirrored on Manus Island, PNG. While Nauru has, to date, received only adult male asylum seekers (at the behest of the Nauruan Government due to the conditions at the detention centre being unfit for women or children), Manus Island has received men, women, and children, including family groups. Over three dozen children are currently held on Manus Island with their families, enduring sweltering hot days inside dongas, similar to shipping containers that are used as dormitories for all detainees. The conditions for children and their families are dire, with temperatures inside the containers often reaching 40 degrees Celsius. Fungal infections, skin rashes and irritations and a high risk of contracting malaria are all medical issues of concern to detainees on Manus Island.

The same issues of a lack of RSD procedures, lack of appropriate accommodation and lack of independent monitoring are present on Manus Island. Like on Nauru, the lack of a legal framework for determining protection claims also undermines the stated purpose of transferring people to Manus Island: in order to have their protection claims assessed.

UNHCR also released a report on 4 February 2013 warning of “significant inadequacies in the transfer,


\(^{20}\) See Kim Edwards’s account of her four weeks in Nauru as a support worker, including her assessment that her time on Nauru was “worse than three months in a war zone in Afghanistan”, http://www.sunshinecoastdaily.com.au/news/kim-witnesses-mans-inhumanity-to-man/1749607/.

treatment and processing of asylum seekers” on Manus Island.\textsuperscript{22} UNHCR found that the “current policy and practice of detaining all asylum-seekers on a mandatory and indefinite basis, without an individual assessment or possibility for review, amounts to arbitrary detention”. This breaches both the obligations of Australia and PNG under international human rights law as well as the intentions of the Panel for an open reception-style centre for asylum seekers and refugees.

RCOA has been contacted by people held on Manus Island and on Nauru, and these asylum seekers are disturbed not only by the conditions in which they live but also by the uncertainty that they face. They do not know when their protection claims will be assessed nor if they will have any durable solution made available to them. This combination of anxiety and uncertainty coupled with the physical harshness of the conditions on Manus Island is setting up the conditions for major health issues and mental and emotional deterioration.

**RECOMMENDATION 10 – AUSTRALIA’S ARRANGEMENT WITH MALAYSIA**

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The Panel recommends that the 2011 Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement (Malaysia Agreement) be built on further, rather than being discarded or neglected, and that this be achieved through high-level bilateral engagement focused on strengthening safeguards and accountability as a positive basis for the Australian Parliament’s reconsideration of new legislation that would be necessary.
\end{quote}

The Government remains committed to implementing its 2011 arrangement with Malaysia to transfer asylum seekers from Australia. Since the release of the Panel’s report and the passing of the new offshore processing legislation, however, it has not attempted to designate Malaysia as an offshore processing country. While it is understood that the Government is engaged in ongoing discussions with Malaysia, it remains unclear whether or how the Government will seek to amend the arrangement in line with the Panel’s recommendations. Comments made in October 2012 by the then Minister for Immigration and Citizenship, Chris Bowen, suggest that the Government is not actively pursuing the issue with Malaysia at this stage. Mr Bowen stated that, since the continued opposition of the Coalition and the Greens to the arrangement would preclude the designation of Malaysia as an offshore processing country, any negotiations with Malaysia on strengthening the arrangement would remain “hypothetical”.\textsuperscript{23} Secretary of the Department of Immigration and Citizenship, Martin Bowles, has since confirmed that the original arrangement with Malaysia has not been amended and it is likely to remain unchanged until there is “a prospect that we could move [the arrangement] forward in the Australian context”.\textsuperscript{24}

**RECOMMENDATION 11 – RESTRICTING ACCESS TO THE SPECIAL HUMANITARIAN PROGRAM (SHP)**

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The Panel recommends that the current backlog in the SHP be addressed as a means of reducing the demand for family reunion through irregular and dangerous maritime voyages to Australia, and that this be achieved through removing family reunion concessions for proposers who arrive through irregular maritime voyages - with these proposers to instead seek reunion through the family stream of the Migration Program.
\end{quote}

The Government has made regulatory changes in order to implement recommendations 11 and 12. RCOA members and former refugees have raised concerns about the increasing difficulties faced by refugee families separated by conflict, displacement and resettlement. The further restriction of the already-limited pathways to family reunion will bring more stress, anxiety and worry to many vulnerable people trying to settle in Australia. These family reunion and SHP policy changes have effectively meant the closing off of some of the limited pathways that did exist for refugees to reunite with family members. This may mean that thousands of refugees are indefinitely separated from their immediate families.

Restricting the already-limited opportunities for family reunion for those who have sought and been found to be owed Australia’s protection undermines the protection of refugees more broadly and fails to

\textsuperscript{22} See \url{http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=284&catid=35&Itemid=63} \\
\textsuperscript{24} P. 20
recognise the link between the irregular movement of people and broader protection needs. Former refugees and, indeed, many people who arrived in Australia by boat have told RCOA that asylum seekers do not get on boats and seek protection only to save themselves. Most do so as part of a family survival strategy which may include sending a single family member – usually the strongest male – on a perilous, long and costly journey. Subsequently denying family reunion effectively denies the right of the most vulnerable to find safety (i.e. those women and children who are left behind with no or limited access to protection).

RCOA is also concerned about the unfairness of a retrospective policy change that will see split family applications of adult boat arrivals reassessed under all the SHP criteria. Given that these refugees have already travelled to Australia – that is, the removal of concessions is not designed to deter this group from undertaking dangerous sea voyages in the future – it is difficult to view this measure as anything other than punitive.

At the same time, some people fear that reassessments will not only further prolong separation and be onerous administratively but will also effectively remove the eligibility for immediate families to reunite because of the discretionary nature of the “compelling reasons” criteria and the Minister’s clear statement that these cases would be given “lowest priority”. The reassessment has the potential to include a review of the extent of the applicant’s connection to Australia and the person’s settlement prospects. As many of the proposers are only recent arrivals and may not yet have established themselves in the community, applications may be refused on these grounds.

**RECOMMENDATION 12 – RESTRICTING FUTURE ACCESS TO THE SHP**

The Panel recommends that in the future those who arrive in Australia through irregular maritime means should not be eligible to sponsor family under the SHP but should seek to do so within the family stream of the Migration Program.

Restricting the access of refugees to family reunion through the SHP and thereby forcing them to seek reunification through the General Migration Program is unjust and unfair. While the Government has allocated 4,000 additional places in the Family Stream, RCOA is concerned about the overwhelming number of barriers that face former refugees who seek (and have sought) to reunite with their immediate family through the Family Migration Program pathway. Many former refugees have already pursued family reunion via this pathway, and their feedback on the challenges that they face include:

- **Significant costs**: Cost is a major barrier due to the lack of financial capacity of many refugee and humanitarian entrants, particularly those that are more recently arrived and who had an SHP application in the backlog (i.e. who had been in the country less than five years). For example, the costs involved in an average family stream visa include: application fees (including recent changes that will see an increase in Partner visa fees and additional fees for each dependent child associated with a Partner application), migration agent fees, the costs of obtaining documentation and airfares. For refugees, many of whom have large families, the estimated costs range in the tens of thousands. RCOA spoke to one Hazara refugee who estimated the costs of reuniting with his wife and child at $24,000.

- **Access to affordable and appropriate migration advice**: Accessing the necessary migration advice and assistance to navigate complex visa application processes, particularly for those who may have limited English and/or education, is another significant barrier to humanitarian entrants successfully reuniting through the family stream of the Migration Program. Low-cost or free migration agents are in short supply in most parts of the country where refugee communities are settling, and many prioritise providing assistance for SHP applications only.

- **Onerous and unachievable documentation requirements**: The documentation requirements for many of the family stream visa sub-classes are another major barrier to humanitarian family reunion. The refugee experience is typified by persecution, armed conflict, a breakdown of civic and bureaucratic structures and flight, all of which commonly result in people arriving in Australia with little or no documentation. Many refugees come from countries where civil and administrative systems are corrupt, weak or non-existent, and documents that people in Australia take for granted – such as marriage, birth and death certificates – might not exist or cannot be sought through any official channel. RCOA is aware of particular visa documentation requirements that are virtually impossible to meet. For example, obtaining police certificates
from any country in which an applicant has spent a total of 12 months or more in the last 10 years since turning 16 years of age is impossible for many people who have lived in countries of asylum where they have no legal status (e.g. Malaysia, Bangladesh) or who come from countries of origin that they have fled because of state-based persecution (e.g. Eritrea, Burma). Were a person able to seek this documentation, it is unlikely this would be through official channels and would require paying bribes and/or travelling back to places of extreme danger (e.g. Afghanistan). In such cases, applications may be rejected on the basis of fraudulent documentation.

- **Difficult visa requirements**: The difficulties in meeting visa requirements can result in refugee families either being rejected outright or having to make the impossible decision to leave one family member out of an application. This is particularly the case for parents seeking to reunite with dependent children who are over 18. The visa requirements stipulate that adult dependent children must be “validly enrolled, and actively participating, in a full-time post-secondary course of study leading to a professional, trade or vocational qualification”, not be in full-time employment and be financially dependent on a parent. In countries of asylum, however, these requirements may be impossible to meet. If the child is a Hazara female in Pakistan without legal status, for example, they would not have the right to education and have very limited formal options because of the security situation; or a young adult male may be the only breadwinner and be forced to work to support the family in the absence of the family head.

- **Uncertainty in waiting periods**: In some Family Stream categories, there are long waiting periods (e.g. the Parent visa has a 15-20 year wait). For unaccompanied humanitarian minors who are alone in Australia and wish to reunite with their parents, the expectation that they would have to wait two decades (and support themselves during this time while their family is in a dire situation) is troubling.

- **Lack of settlement support**: For humanitarian entrants who are successful in making an application to reunite with family members through the general Migration Program, there is little or no settlement support available. It is unreasonable to expect that newly-arrived family members will settle well in Australia without the specialised and targeted support vital to assisting others from the same background.

### RECOMMENDATION 13 – COORDINATION WITH OTHER RESETTLEMENT STATES

The Panel recommends that Australia promote more actively coordinated strategies among traditional and emerging resettlement countries to create more opportunities for resettlement as a part of new regional cooperation arrangements.

The Government has not yet articulated its strategy for working with resettlement countries to create more opportunities for resettlement out of the region. It continues to liaise with new and emerging resettlement countries through the Annual Tripartite Consultations on Resettlement and Working Group on Resettlement, as well as through the Bali Process (which has several resettlement countries as member states). Australia’s involvement in these forums, however, predates the release of the Expert Panel’s report, and it is unclear if or how the Government intends to pursue implementation of this recommendation through these avenues.

On 9 February 2013, the Prime Ministers of Australia and New Zealand jointly announced that New Zealand would annually resettle 150 refugees who had arrived in Australia by boat to seek asylum. These 150 places will be deducted from New Zealand’s existing resettlement quota of 750. Prime Minister Julia Gillard indicated that the 150 refugees to be resettled could be drawn from both those who have been sent to Nauru and Manus Island, as well as those who are currently residing in Australia.

While it was claimed that the resettlement arrangement forms part of “a regional approach to irregular migration”, little detail was provided as to how this arrangement fits within a broader regional protection

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agenda. Prime Minister John Key asserted that the arrangement was a means for New Zealand to demonstrate that it is as “a good regional partner”, in recognition of Australia’s role in intelligence sharing and disruption of potential boat movements to New Zealand. He also flagged that he was “not ruling out the potential” for New Zealand to send asylum seekers to an offshore processing centre in the event of a “massive arrival”. No information was provided, however, to suggest that the arrangement will contribute to better protection outcomes or create more opportunities for resettlement throughout the region more broadly.

RCOA is concerned that the resettlement arrangement with New Zealand, while touted as a means of improving regional cooperation, in fact does nothing to enhance protection standards and resettlement opportunities across the region. If anything, the arrangement is likely to reduce opportunities for resettlement, as it diverts resettlement places which could otherwise have been allocated to refugees in countries of first asylum in the region. Given that there are many countries in the Asia-Pacific region which host far larger populations of refugees and asylum seekers than Australia, and which have far less capacity to provide effective protection, the diversion of resettlement places to Australia serves to reinforce the inequitable distribution of responsibility for refugee protection amongst countries in the region. It also reduces the number of resettlement places available for referral by UNHCR, which has identified 781,299 refugees in need of resettlement but expects to have a maximum of 85,000 places available in 2013.

RCOA will continue to seek information on the Government’s intentions and progress in relation to cooperation with resettlement states, cautioning against the approach taken in its arrangement with New Zealand and encouraging a more constructive approach which enhances access to resettlement for people seeking protection in the region.

**RECOMMENDATION 14 – EXTENDING THE EXCISION POLICY TO ALL OF AUSTRALIA**

The Panel recommends that the Migration Act 1958 be amended so that arrival anywhere on Australia by irregular maritime means will not provide individuals with a different lawful status than those who arrive in an excised offshore place.

On 31 October 2012, the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 was introduced to the Australian Parliament. The Bill seeks to apply the same rules which apply in excised offshore territories to all of Australia, to ensure that all asylum seekers arriving by boat will have the same legal status regardless of where they first arrive in Australia. Currently, asylum seekers arriving by boat are only at risk of being processed offshore if they first arrive in Australia at an excised offshore place, such as Christmas Island. The Panel argued that this could create an incentive for asylum seekers to attempt longer, riskier voyages to the Australian mainland so as to avoid being processed offshore.

In November, the Bill was passed by the House of Representatives. The Senate referred the Bill to its Standing Committee on Legal and Constitutional Affairs for inquiry and report. RCOA made a written submission to the inquiry in December 2012 and provided verbal evidence at a public hearing in January 2013, in both cases recommending that the Bill not be passed.

**RECOMMENDATION 15 – REVIEW OF AUSTRALIA’S REFUGEE STATUS DETERMINATION (RSD) PROCESS**

The Panel recommends that a thorough review of refugee status determination (RSD) would be timely and useful.

The Government has not yet outlined a strategy for the review of the RSD process. RCOA supports a timely, quality-assured, reviewable RSD process, with quality advice available for all applicants.
However, not only does it appear that no work has begun on the review of the RSD system, asylum seekers who arrived after 13 August 2012 have, as yet, had no access to a RSD process. Such an extended delay is inconsistent with Australia’s commitment to a high-quality RSD procedure.

**RECOMMENDATION 16 – STRATEGY FOR REMOVALS AND RETURNS**

The Panel recommends that a more effective whole-of-government strategy be developed to negotiate better outcomes on removals and returns on failed asylum seekers.

Over the past six months, in response to an increase in boat arrivals from Sri Lanka, the Government has intensified involuntary returns of Sri Lankans who were allegedly found not to engage Australia’s protection obligations. Since 13 August 2012, 736 Sri Lankans have been removed involuntarily while 170 returned voluntarily, including 48 from Nauru. The Government has asserted that those returned involuntarily had travelled to Australia for economic reasons, which allowed them to be “screened out” of Australia’s asylum process and rapidly returned to Sri Lanka without having undergone a full refugee status assessment. The Government has also involuntarily repatriated two failed Afghan asylum seekers since August under a Memorandum of Understanding signed in January 2011.

RCOA recognises that the return of asylum seekers found not to be refugees is generally accepted by states and international organisations as being essential to the credibility and integrity of refugee determination systems. Provided that asylum seekers are able to access a fair, efficient, timely process of refugee determination, those who are not successful in establishing an entitlement to protection must expect to be removed.

RCOA is concerned, however, about the lack of transparency in recent decision-making on involuntary returns to Sri Lanka. Very little detail has been provided by the Government regarding the processes for determining whether or not a person engages Australia’s protection obligations; opportunities provided to these individuals to raise any relevant claims for protection; independent monitoring or scrutiny of decisions regarding involuntary repatriation; assurances provided by authorities in countries of origin regarding the safety of and support provided to the individuals returned; and mechanisms for monitoring the circumstances of the individuals returned, to ensure that they are not subject to persecution or harassment. The absence of an inbuilt referral process to ensure that those subject to involuntary return can access quality independent legal advice, and the ongoing reports of serious human rights violations in Afghanistan and Sri Lanka (including, in the latter case, mistreatment of repatriated asylum seekers), further magnify our concerns.

RCOA on two occasions wrote to the then Minister for Immigration and Citizenship, Chris Bowen, to express our concerns and request further information about the processes involved in involuntary returns. On the second occasion, following an incident reported to RCOA in which a group of Sri Lankan detainees were involuntary returned despite their expressing fears which warranted further investigation, RCOA called for the immediate suspension of involuntary returns. The Minister did not respond to either letter and involuntary returns have continued.

**RECOMMENDATION 17 – DISRUPTION STRATEGIES**

The Panel recommends that disruption strategies be continued as part of any comprehensive approach to the challenges posed by people smuggling and that relevant Australian agencies be resourced with appropriate funding on a continuing basis for this purpose.

RCOA is not aware of any publicly available information about how the Government is specifically

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implementing this recommendation; however, it is clear that disruption strategies are continuing.

**RECOMMENDATION 18 – ANTI-SMUGGLING OPERATIONS**

The Panel recommends that law enforcement agencies in Australia continue their activities in countering involvement of Australian residents who are engaged in funding or facilitating people smuggling operations.

As with disruption activities, there is little public information on the details related to implementing this recommendation. There have, however, been several arrests made in Australia and in Indonesia (including one of an Australian resident) and people smuggling charges laid related to the movement of asylum seekers from Indonesia to Australia.

**RECOMMENDATION 19 – TURNING BACK BOATS**

The Panel notes that the conditions necessary for effective, lawful and safe turnback of irregular vessels carrying asylum seekers to Australia are not currently met, but that this situation could change in the future, in particular if appropriate regional and bilateral arrangements are in place.

As there has been no progress in addressing the concerns raised by the Panel about conditions not being in place for effective, lawful and safe turnback of boats (and it is highly unlikely that such conditions could be met), this recommendation has not been implemented. However, on 4 February 2013, the Federal Opposition announced that, if elected, it would seek to turn back boats from Sri Lanka. The Shadow Minister for Immigration and Citizenship, Scott Morrison, did not outline details about how this would be achieved or what consideration would be given to the safety and protection needs of those on board the affected vessels.

**RECOMMENDATION 20 – SEARCH AND RESCUE ACTIVITIES**

The Panel recommends that Australia continue to work with regional countries in a focused way to develop joint operational guidelines for managing Search and Rescue (SAR) activities in the region and to address the need for any further regional and national codification of arrangements across SAR jurisdictions.

Public information on the implementation of this recommendation is not available but there is evidence of continuing cooperation with Indonesia from reports on particular rescue operations. The need for search and rescue activities to be given greater priority has been highlighted by tragedies in recent months in which lives have been lost and harrowing accounts from survivors of spending days at sea waiting for rescue.

**RECOMMENDATION 21 – THE LINK BETWEEN AUSTRALIA’S ONSHORE AND OFFSHORE PROGRAMS**

The Panel recommends that, in the context of a review of the efficacy of the recommendations put forward in this Report, the linkage between the onshore and offshore components of the Humanitarian Program be reviewed within two years.

The link between the onshore and offshore component of Australia’s Refugee and Humanitarian Program – whereby Protection Visa grants are deducted from the allocation for the SHP – has long been an issue of concern for RCOA and its members. Not only has this policy had the effect of reducing opportunities for family reunion, it also hinders planning of the resettlement program, risks creating antagonism between refugee communities and confuses Australia’s legal obligations under the Refugee Convention with its voluntary commitment to resettlement.

In RCOA’s community consultations in October and November 2012, there was (as in previous years) strong opposition to the linking of the two components, particularly in light of the continued high demand for the already-overwhelmed SHP and the prospect of even greater numbers of refugees settling in Australia who will face the prospect of protracted or indefinite separation from their loved ones.

ones. In our submission on the 2013-14 Refugee and Humanitarian Program, RCOA again recommended that the link be immediately broken, as we have done since the introduction of policy in 1996. Should this not occur, RCOA recommended that the implementation of the Panel’s recommendation on reviewing the linking policy should be expedited to set a timeframe for the end of the linkage.

To date, the Australian Government has not indicated if or when it intends to initiate the review of the linking policy. RCOA will continue to advocate for the implementation of this recommendation.

**RECOMMENDATION 22 – CONDUCTING FURTHER RESEARCH**

The Panel recommends that the incompleteness of the current evidence base on asylum issues be addressed through a well-managed and adequately funded research program engaging government and non-government expertise.

The Panel envisaged that this proposed research program would focus on “the drivers and determinants of irregular migration, including why people decide to leave their home countries, how they travel between source, transit and destination countries, and the irregular and regular migration pathways used by asylum seekers”. RCOA welcomed this recommendation as a necessary measure to ensure that policies adopted to enhance regional cooperation are based on sound evidence and rigorous research.

The Government has indicated that it is spending $3 million over two years on research on the drivers and determinants of irregular maritime migration. A research advisory group has been formed to advise the Government and the Department on the establishment of a research program. More details on the form and scope of the program or further mechanisms to engage relevant stakeholders are yet to be provided.

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35 Houston, Aristotle & L'Estrange 2012, p. 46.