



Refugee Council
of Australia

SUBMISSION TO THE ATTORNEY-GENERAL'S DEPARTMENT ON RECOMMENDATIONS MADE UNDER THE UNIVERSAL PERIODIC REVIEW OF AUSTRALIA

The Refugee Council of Australia (RCOA) is the national umbrella body for organisations involved in supporting and representing refugees and asylum seekers, with a membership of more than 150 organisations and 550 individuals. RCOA promotes the adoption of flexible, humane and constructive policies by government and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members and refugee community leaders and this submission is informed by their views.

RCOA welcomes the opportunity to comment on the recommendations made to the Australian Government under the Universal Periodic Review (UPR) of Australia. RCOA believes that the recommendations stemming from the UPR offer critical guidance for addressing human rights issues in Australia. Many of these recommendations, if adopted, would immeasurably improve human rights protections for asylum seekers and refugees in Australia.

RCOA wishes to note that this submission encompasses only those recommendations which have specific implications for asylum seekers, refugees and humanitarian entrants. As such, omission of recommendations from this submission should not be taken as implying that RCOA advocates the rejection of these recommendations.

1. Incorporating international human rights obligations into domestic law

As noted in RCOA's submission to the UPR, refugees and asylum seekers who experience human rights violations in Australia face barriers when seeking formal recognition of and recompense for their experiences. The barriers stem not only from their restricted access to review mechanisms, but also from the absence of an overarching human rights framework in Australia. Australia has yet to introduce comprehensive human rights legislation which specifically encodes minimum human rights standards in domestic law and, as such, lacks the formal legal foundation required to launch a successful claim for rights recognition.

Many of the recommendations made under the UPR called on Australia to incorporate its obligations under international human rights law into domestic legislation. Adopting these recommendations would greatly assist in breaking down the barriers faced by refugees and asylum seekers in seeking recognition of their human rights.

In incorporating Australia's international obligations into domestic law, RCOA advises the Australian Government to consider including not only those obligations stemming from the core human rights conventions to which Australia is party, but also those from other international treaties which have significant human rights implications. Such instruments would include, for example, the 1951 Convention Relating to the Status of Refugees (the Refugee Convention), the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on

the Reduction of Statelessness. The incorporation of these instruments into domestic law is crucial to safeguarding the rights of persons whose needs are not specifically addressed in the core human rights conventions.

Recommendation 1:

RCOA recommends that:

- a) *recommendations 86.17, 86.18, 86.19, 86.20, 86.21, 86.22, 86.121, 86.122 and 86.125 be accepted.*
- b) *in implementing the above recommendations, the Australian Government incorporate provisions from both the core human rights conventions to which Australia is party and other international treaties which have significant human rights implications.*

2. Upholding international obligations

In determining which recommendations should be a matter of priority for Government, RCOA urges the Government to consider expediting the implementation of recommendations relating to areas of law and policy which are currently in serious breach of Australia's obligations under international human rights law. Specifically, recommendations relating to the following areas should be accepted and implemented as soon as possible:

- Indefinite mandatory detention (violation of Article 9.1 of the International Convention on Civil and Political Rights on the prohibition of arbitrary detention, Article 16 of the Convention Against Torture on the prohibition of cruel, inhuman or degrading treatment or punishment and Article 31 of the Convention Relating to the Status of Refugees on the treatment of refugees unlawfully in the country of refuge);
- Conditions in immigration detention (violation of Article 12.1 of the International Convention on Economic, Social and Cultural Rights on the right to physical and mental health and Article 10.1 of the International Convention on Civil and Political Rights on the treatment of persons deprived of their liberty);
- Detention of children and unaccompanied minors (violation of Article 37 of the Convention on the Rights of the Child on the prohibition of cruel, inhuman or degrading treatment or punishment and the detention of children); and
- Excised offshore places and offshore processing (violation of Article 2.1 of the International Convention on Civil and Political Rights and Article 2.2 the International Convention on Economic, Social and Cultural Rights on the prohibition of discrimination and Article 31 of the Convention Relating to the Status of Refugees on the treatment of refugees unlawfully in the country of refuge).

Recommendation 2:

RCOA recommends that recommendations relating areas of law and policy which are currently in serious breach of Australia's obligations under international human rights law be accepted and implemented as a matter of priority.

The issues of mandatory detention and excised offshore places are discussed in further detail below.

3. Mandatory detention

Several of the recommendations relating to migration, asylum and refugee issues made under the UPR focused on Australia's policy of mandatory detention. Specifically, the UPR recommended that: the provisions of the *Migration Act* relating to mandatory detention should be repealed; Australia's immigration detention policies should be reviewed to ensure that asylum seekers and migrants are detained only in exceptional cases and for the shortest time

reasonably necessary; detention should be limited to a maximum of six months; conditions in detention should be reviewed (particularly in relation to access to legal counsel and health care); children should not be held in immigration detention; and alternatives to the detention of irregular migrants and asylum seekers should be considered. These recommendations reflect the advice put forward in RCOA's submission to the UPR and we recommend that they be adopted in full as a matter of urgency.

RCOA wishes to acknowledge that many of the principles articulated in the UPR recommendations on mandatory detention are already reflected in the Australian Government's seven key immigration values. However, RCOA is concerned that these key principles still do not inform practice. Contrary to the key immigration values, detention continues to be used as a measure of first rather than last resort; the length of detention remains indefinite; and conditions in immigration detention facilities continue to have an extremely detrimental impact on the health and wellbeing of asylum seekers, including children. Clearly, the mere articulation of the policy principles has not been sufficient to ensure their implementation in practice. Encoding these principles in law would ensure that the human rights issues arising from immigration detention could be addressed more effectively.

Recommendation 3:

RCOA recommends that:

- a) *recommendations 86.123, 86.126, 86.127, 86.128, 86.129, 86.130, 86.131 and 86.132 be accepted.*
- b) *the above recommendations be codified in law to ensure their effective implementation.*

4. Excised offshore places

In its submission to the UPR, RCOA noted that the retention of excised offshore places continues to result in breaches of Australia's obligations through depriving asylum seekers of the full protection of Australian law. Several recommendations made under the UPR also highlighted the need to ensure that all asylum seekers are processed in accordance with the principles of the Refugee Convention and Australian law. RCOA urges the Government to implement these recommendations by repealing the provisions of the *Migration Act* relating to excised offshore places and ensuring that all irregular migrants have equal access to and protection under Australian law for fair and reviewable determinations of their migration applications, including applications for refugee status determination and protection.

Recommendation 4:

RCOA recommends that:

- a) *recommendations 86.122, 86.123 and 86.133 be accepted.*
- b) *in implementing the above recommendations, the Australian Government repeal the provisions of the Migration Act relating to excised offshore places and ensure that all irregular migrants have equal access to and protection under Australian law.*

5. A sustainable regional protection framework

RCOA welcomes recommendation 86.134 relating to the strengthening of regional frameworks to address irregular migration and human trafficking. However, RCOA urges the Australian Government, in implementing this recommendation, to broaden the scope of such frameworks so as to also encompass refugee protection issues.

RCOA believes that there is a pressing need to develop a sustainable regional protection framework in the Asia-Pacific. Conditions in major countries of origin are characterised by

protracted conflicts, ongoing insecurity and widespread violations of human rights. In most cases, there are limited prospects for significant improvement in these conditions in the near future. In many countries of asylum, the average standard of protection available to asylum seekers and refugees falls well below international benchmarks and is characterised by limited recognition of refugee status; inadequate standards of reception, status determination and protection; widespread use of detention; extremely difficult living conditions, including lack of access to livelihoods; and lack of access to timely durable solutions. These conditions frequently drive refugees and asylum seekers to engage in secondary movement in the hope of finding genuine safety and protection.

RCOA's 2011-12 intake submission contains further information and recommendations on developing a sustainable regional protection framework in the Asia-Pacific. These recommendations are included in Appendix 2 of this submission.

Recommendation 5:

RCOA recommends that:

- a) recommendation 86.134 be accepted.*
- b) in implementing the above recommendation, the Australian Government broaden the scope of regional frameworks to encompass refugee protection issues by adopting the recommendations made in RCOA's submission on the 2011-12 Refugee and Humanitarian Program, regarding the development of an Asia-Pacific regional protection framework.*

Appendix 1: Recommendations made under the UPR relating to refugees and asylum seekers

86.17. Bring its legislation and practices into line with international obligations (Sweden);

86.18. Take the necessary measures to fully incorporate into Australian legislation its international obligations in the field of human rights (France);

86.19. Incorporate its international obligations under human rights instruments into domestic law (Jordan);

86.20. Continue its efforts in strengthening the mechanisms for the effective incorporation of international human rights obligations and standards into its domestic legislation (Argentina);

86.21. Strengthen its human rights framework by establishing a comprehensive legislative scheme for all human rights (Timor-Leste);

86.22. Consider a comprehensive Human Rights Act as recommended by the National Human Rights Consultative Committee (Canada); Incorporate its international human rights obligations into domestic law by elaborating a comprehensive, judicially enforceable Human Rights Act to ensure legislative protection of human rights (Ukraine); Fully incorporate its international human rights obligations in domestic law through the adoption of a comprehensive justiciable law on human rights (Russian Federation); Implement a federal human rights act to maximize all Australian's legal human rights protection in accordance with Australia's international obligations (Norway);

86.121. Safeguard the rights of refugees and asylum seekers (Sweden);

86.122. Honour all obligations under Articles 31 and 33 of the Convention relating to the Status of Refugees and ensure that the rights of all refugees and asylum-seekers are respected, providing them access to Australian refugee law (Slovenia);

86.123. Ensure the processing of asylum seekers' claims in accordance with the UN Refugee Convention and that they are detained only when strictly necessary (Norway);

86.124. Cease the practice of *refoulement* of refugees and asylum-seekers, which puts at risk their lives and their families' lives (Slovenia);

86.125. Ensure in its domestic law that the principle of *non-refoulement* is respected when proceeding with the return of asylum-seekers to countries (Ghana);

86.126. Repeal the provisions of the Migration Act 1958 relating to the mandatory detention (Pakistan); Revise the Migration Law of 1958 so that federal initiatives do not penalise foreign migrants in an irregular situation (Guatemala);

86.127. Review its mandatory detention regime of asylum seekers, limiting detention to the shortest time reasonably necessary (Ghana);

86.128. Address the issue of children in immigration detention in a comprehensive manner (Philippines);

86.129. Ensure that no children are held in detention on the basis of their migratory status and that special protection and assistance is provided to unaccompanied children (Brazil);

86.130. Take efficient measures to improve the harsh conditions of custody centres in particular for minorities, migrants and asylum seekers (Islamic Republic of Iran);

86.131. Consider alternatives to the detention of irregular migrants and asylum seekers, limit the length of detentions, ensure access to legal and health assistance and uphold its obligations under the Vienna Convention on Consular Relations (Brazil);

86.132. Do not detain migrants other than in exceptional cases and limit this detention to six months and bring detention conditions into line with international standards in the field of human rights (Switzerland);

86.133. Ensure all irregular migrants have equal access to and protection under Australian law (Timor-Leste);

86.134. Continue to work and coordinate with countries in the region to strengthen the regional framework to deal with irregular migration and human trafficking in a comprehensive and sustainable manner, bearing in mind international human rights and humanitarian principles (Thailand);

Appendix 2: Strategies for the promotion of a regional protection framework

Taking into consideration the nature of protection needs in the Asia-Pacific, feedback from consultation participants and NGOs working in the region and key lessons learned from previous examples of regional cooperation on refugee protection, RCOA recommends that the Australian Government not pursue plans for a single Regional Processing Centre in Timor-Leste but focus on promoting the development of an Asia-Pacific regional refugee protection framework through the following strategies:

A. Focus on protection principles

- i) Seek the agreement of governments in the Asia-Pacific region to work together collectively to provide to all asylum seekers:
 - a) Timely access to sound refugee status determination;
 - b) Effective protection (including freedom from detention and respect of human rights) throughout the time taken to determine status and to provide a durable solution;
 - c) Timely durable solutions and/or a safe return to the country of origin.
- ii) Work towards the development of a regional agreement to guarantee non-refoulement.

B. Promote greater understanding of refugee protection needs

- i) Create a new position of Australian Ambassador for Refugee Protection, to assist the Government in high-level advocacy on refugee protection issues within the Asia-Pacific region and internationally.
- ii) Support the development of a parallel NGO process to the Bali Process, to foster the engagement of NGOs across the region in refugee protection issues.
- iii) Lobby UNHCR to coordinate more detailed research on forced displacement in the Asia-Pacific region, to gain a fuller understanding of refugee protection needs. This should include research on the numbers and circumstances of unrecognised refugees in Asia (particularly people from Burma in Thailand, India and Bangladesh), with a view to exploring strategies for regularising their status.
- iv) Lobby for the creation of a UN Special Rapporteur on Refugee Protection, to promote robust international examination of refugee needs independent of all government and UNHCR processes.

C. Model best practice in asylum procedures

Review Australia's approach to immigration detention with a view to reforming Australia's asylum seeker reception and detention arrangements to model the protection-centred practices Australia would like to see replicated in the region. The current Australian policy of indefinite mandatory detention is a particular concern, given the role that arbitrary detention plays in the fears which foster onward movement from South-East Asia.

D. Respond to protection issues in refugee-producing countries

- i) Involve the Department of Foreign Affairs and Trade in taking up protection issues within refugee-producing countries through every multilateral and bilateral means possible, proposing international action to support states unable to protect their populations and putting international pressure on those unwilling to do so.
- ii) Develop a strategy for the role of Australian aid in improving situations in refugee-producing countries, including through development initiatives, peace building, anti-corruption programs, support of human rights frameworks, strategies to resolve statelessness and efforts to improve security for vulnerable people.

E. Encourage and support change in countries of asylum

- i) Encourage states to work towards policies which ensure refugees and asylum seekers have:
 - a) Fair and prompt access to asylum processes;
 - b) Legal status and freedom from detention;
 - c) The right to work;
 - d) Access to education;
 - e) Access to health care.
- ii) Lobby for each country in the region to develop domestic asylum legislation in line with the principles of the Refugee Convention.
- iii) Seek opportunities to promote training for government and NGO officials on refugee protection issues, particularly in countries where national expertise is more limited.
- iv) Develop a strategy for the role of Australian aid in improving situations in countries of asylum, focusing on education of refugees and asylum seekers, health and livelihood programs, support for highly impoverished non-refugee populations, capacity building of government officials on refugee protection issues, supporting the role of local NGOs and ensuring adequate funding for UNHCR's work.
- v) Fund the development of a deployment scheme to involve Australians in supporting the provision of legal aid to asylum seekers, refugee status determination and involvement in resettlement programs.

F. Focus on statelessness

- i) Lobby for the development of strategies to resolve statelessness in the Asia-Pacific region, through the Bali Process, in discussions with ASEAN bodies and in bilateral discussions with governments across Asia.
- ii) Work with governments of the Asia-Pacific region to put forward specific proposals to resolve statelessness in the lead-up to the ministerial meeting to be hosted by UNHCR in Geneva on 7-8 December 2011.
- iii) Explore forming an international working group to address the displacement of Rohingya, examining issues inside Burma, treatment of Rohingya asylum seekers and refugees in various parts of Asia and possible remedies.

G. Enhance resettlement

See recommendations 1 to 10.

H. Develop strategies for sustainable and monitored return

- i) Seek agreements with states receiving returnees that all returnees will be protected from detention, harassment, torture and discrimination on return, with future returns suspended if this agreement is breached.
- ii) Work with UNHCR and human rights organisations to provide comprehensive independent monitoring of returnees.
- iii) Provide a safeguard for returnees from Australia, guaranteeing immediate resettlement through the In Country Special Humanitarian Program if they are subject to detention, harassment, torture or discrimination.

For the full RCOA submission on the 2011-12 Refugee and Humanitarian Program, see www.refugeecouncil.org.au/resources/consultations.html