



# Refugee Council of Australia

JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

## **SUBMISSION TO THE INQUIRY INTO A MODERN SLAVERY ACT**

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing over 200 organisations and around 1,000 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the inquiry into a proposed Modern Slavery Act in Australia. This submission highlights the need to address forced migration issues throughout Asia, recognising the link between refugees and victims of trafficking. It explores options for Australia to take a more protection focused role in the region, especially through leadership in the Bali Process. Finally, it endorses a Modern Slavery Act in Australia and highlights areas of particular concern for people seeking asylum and refugees in Australia in relation to issues of trafficking.

### **1. The link between trafficking, smuggling and refugees**

1.1. The issue of trafficking is closely linked to forced migration, smuggling and refugee displacement. The rapid rise in the number of people who have been compelled to flee their homes due to conflict and persecution has been accompanied by a rise in the forced recruitment of children into armed groups, sexual slavery or forced labour, and increased trade of women and girls into forced marriage.<sup>1</sup>

1.2. These forms of modern slavery and trafficking have been acknowledged by UNHCR as the kind of persecutory conduct which in their own right can result in forced displacement and give rise to refugee status.<sup>2</sup> Survivors of trafficking or slavery may also be subject to persecutory conduct in their community as a result of their experiences – by way of social exclusion, family ostracism or the threat of retribution or recapture by traffickers and criminal gangs.<sup>3</sup>

1.3. Refugees who are forced to flee may also become victims of trafficking. People smuggling may merge into trafficking when smugglers use their position of power to exploit or abuse people who are fleeing persecution or violent conflict. Smugglers may take advantage of their clients' desperation to extract additional money, forced labour or sexual services from them either before, during or after the journey.<sup>4</sup>

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<sup>1</sup> Türk, V. (2015). 'Keynote Address.' *People at Risk: Combating Human Trafficking Along Migration Routes*. United Nations High Commissioner for Refugees (UNHCR). Vienna, Austria: 6-7 July 2015. <http://www.unhcr.org/en-au/admin/dipstatements/559b868b9/organization-security-cooperation-europe-alliance-against-trafficking-persons.html?query=modern%20slavery>, 1.

<sup>2</sup> Edwards, A. (2007). 'Traffic in human beings: at the intersection of criminal justice, human rights, asylum/migration and labor', 36(1) *Denver Journal of International Law and Policy*, 36.

<sup>3</sup> Türk 2015.

<sup>4</sup> Türk 2015.

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1.4. A recent tragedy which highlights this example is the 139 graves of trafficking victims found along the Thai/Malaysia border, along with 23 trafficking camps. It is understood the victims were Bangladeshi migrants and Rohingya Burmese refugees.<sup>5</sup> Reports suggest that victims were tortured and abused. While these people may have started out as smuggled migrants and refugees, often to flee persecution in their home country, they were subsequently exploited and became victims of trafficking. As Human Rights Watch reports: “Each year, tens of thousands of Rohingya flee the dire human rights situation in Burma only to be further abused and exploited at the hands of traffickers in Thailand.”<sup>6</sup>

1.5. Human trafficking and smuggling thrives on restrictive border and asylum policies. The absence of a viable option for accessing protection often leaves refugees with no choice but to entrust their lives to smugglers, meaning that any deterrent effects of these policies are counterbalanced by a “deflection into irregularity.”<sup>7</sup> A low rate of resettlement places may therefore increase the number of irregular migrants within a host region, as well as heightening the risk that they may fall prey to traffickers.<sup>8</sup>

1.6. As prominent legal scholar James Hathaway notes, “the criminalisation of smuggling may actually increase the risk of human trafficking by driving up the cost of facilitated transborder movement and leaving the poor with no choice but to mortgage their futures in order to pay for safe passage”.<sup>9</sup> This is particularly true for refugees, who often have no other option than to resort to smugglers. Indeed, as Hathaway notes, “refugees must routinely rely upon smugglers and even traffickers in order to escape their own country because no state grants refugees legal authorization to travel for the purpose of seeking asylum.”<sup>10</sup>

1.7. As RCOA has advocated for years, safe and orderly pathways to protection are needed to combat people smuggling and trafficking.<sup>11</sup> RCOA has also underscored the need to address root causes of displacement, and to focus on building regional protection in our region. If refugees could lawfully live, work and access basic health and education services in countries within the region, this would greatly reduce the incentive to move on that gives rise to exploitation and trafficking. Australia can play a key role in developing a regional response to forced migration through the Bali Process (discussed below).

1.8. The United Nations has also advocated for the integration of measures to combat trafficking within broader strategies for asylum seekers, refugees and displaced persons. In particular, UNHCR has pointed to the clear need for refugee status determination procedures to involve effective communication and referral mechanisms between anti-trafficking enforcement agencies and those responsible for granting permanent protection.<sup>12</sup> The United Kingdom’s *Modern Slavery Act 2015* demonstrates some good practice in incorporating these principles into federal legislation.

## **Recommendation 1**

*Australia should provide international leadership in addressing the drivers of forced displacement and protection needs in countries of asylum. In particular, the Australian Government should:*

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<sup>5</sup> Lewis, S. ‘Mass graves of suspected trafficking victims found in Malaysia.’ *The Guardian*, 25 May 2015. <https://www.theguardian.com/world/2015/may/24/mass-graves-trafficking-malaysia-perlis>.

<sup>6</sup> Human Rights Watch (2015). *Thailand: Mass Graves of Rohingya Found in Trafficking Camp*. <https://www.hrw.org/news/2015/05/01/thailand-mass-graves-rohingya-found-trafficking-camp>.

<sup>7</sup> Czaika, M. & Hobolth, M. (2016). ‘Do restrictive asylum and visa policies increase irregular migration into Europe?’, 17(3) *European Union Politics*, 345-365, 361.

<sup>8</sup> Czaika & Hobolth 2016.

<sup>9</sup> Hathaway, J. C. (2008). ‘The human rights quagmire of “human trafficking”’ 49(1) *Virginia Journal of International Law* 1-60, 5.

<sup>10</sup> Hathaway 2008, 6.

<sup>11</sup> Refugee Council of Australia (RCOA), *Improving Refugee Protection in Asia-Pacific: How Australia can make a practical difference*. <http://www.refugeecouncil.org.au/publications/improving-refugee-protection-asia-pacific/>.

<sup>12</sup> Türk 2015, 2.

- a) recognise the the crucial role of aid in addressing the reasons people move, by immediately restoring Australia's overseas aid program to its former level and aiming to increase overseas aid to at least 0.7% of Gross National Income
- b) work with diaspora communities in Australia and people living in refugee communities overseas to identify urgent protection needs in countries of origin and asylum and develop and implement strategies to respond to these needs
- c) provide additional funding to UNHCR, given the increasing numbers of displaced people worldwide and UNHCR's critical role in coordinating humanitarian responses to displacement
- d) develop a cross-portfolio approach to promoting the protection of forced migrants and working with other states to explore options to promote access to some form of legal status, alternatives to detention, work rights, education and health for refugees in countries of asylum, particularly in South East Asia, and
- e) convene a forum with NGOs, peak bodies, intergovernmental bodies and other relevant stakeholders to advance the development of an integrated response to displacement, including consideration of the roles of aid, diplomacy, capacity-building and resettlement.

## **2. Case study: Rohingya refugees in Southeast Asia**

2.1. The Rohingya people, a Muslim ethnic minority who live in Myanmar's Arakan and Rakhine states, have been called the "most persecuted minority in the world".<sup>13</sup> The Rohingya have been subject to widespread systematic persecution which has left over 120,000 internally displaced within Myanmar, and over 1 million with severely restricted rights and limited access to humanitarian aid.<sup>14</sup> Large-scale rape, torture, murder, forced population transfer, ethnic cleansing, and the denial of citizenship rights have driven more than 100,000 stateless Rohingya to flee their country of birth by sea.<sup>15</sup>

2.2. Rohingya refugees from Burma have fled multiple forms of persecution including forced labour in Burma. They are also extremely vulnerable to exploitation and slavery in the countries to which they move, in particular Thailand and Malaysia. The lack of safe, legal avenues by which they can flee Myanmar forces them to engage smugglers, who have been reported to murder or abandon passengers who cannot pay the smuggling fee.<sup>16</sup> These exorbitant fees can also be seen as a direct and deliberate form of exploitation, given they have no other means of transportation nor any avenue for recourse. People smuggling can also merge into human trafficking, when smugglers pick up people seeking asylum whose boats are pushed out to sea by government officials, and then sell them into indentured servitude on Thai farms or fishing boats.<sup>17</sup>

2.3. In Malaysia and Thailand, Rohingya are regularly denied the right to work, forcing them to engage in exploitative labour to survive. The work that they find is usually 'dangerous, dirty and difficult'. This irregular status leaves them vulnerable to wage theft, at risk of injury and without medical care, and exposed to arrest, detention or extortion by police as they travel to work.<sup>18</sup> These experiences are examples of exploitation that fit the definition of trafficking.

2.4. While some protection exists in Thailand for victims of human trafficking, officials enjoy a high level of discretion in the way they deal with people seeking asylum because of the lack of clear formal procedures for seeking asylum.<sup>19</sup> This situation is conducive to trafficking, and often leads to abuse.

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<sup>13</sup> Haraldsen, J. (2014). 'Human Trafficking as a Crime Against Humanity'. Thesis, *Faculty of Law - University of Oslo*, 1-60, 6.

<sup>14</sup> Sullivan, D. (2016). 'Still adrift: Failure to protect Rohingya in Malaysia and Thailand', *Refugees International*, 1-16, 4.

<sup>15</sup> Sullivan 2016, 4; Kingston, L. (2015) 'Protecting the world's most persecuted: the responsibility to protect and Burma's Rohingya minority', 19(8) *International Journal of Human Rights* 1163-1175, 1169.

<sup>16</sup> Kingston 2015, 1169.

<sup>17</sup> Kingston 2015, 1169.

<sup>18</sup> Sullivan 2016, 8.

<sup>19</sup> Slezak A.C., Singer T. R., Ramadurai R. (2015). 'Stateless and fleeing persecution: The situation of the Rohingya in Thailand', *Children's Legal Rights Journal*, 44-78, 51-52.

Unaccompanied children are also particularly vulnerable, whether they arrive alone, or arrive with a parent who is later detained, and are left alone thereafter.<sup>20</sup> There are reports of parents or brokers forcing children from Thailand's neighbouring countries to sell flowers, beg, or work as domestic servants.<sup>21</sup>

2.5. Addressing the exploitation of Rohingya in the region ultimately requires tackling the root causes of displacement from Myanmar, as well as providing safe and orderly pathways to protection and the basic rights for those who remain in countries of asylum such as Thailand and Malaysia. Without a safe pathway to protection, such as resettlement, Rohingya will continue to flee to neighbouring countries where they are denied basic rights and fall into exploitative situations, thereby becoming trafficking victims.

## **Recommendation 2**

*The Australian Government and other resettlement states should work with the Governments of Bangladesh, Malaysia and Thailand to develop a regional strategy for facilitating resettlement and brokering other durable solutions for Rohingya refugees, including through reinstating resettlement from Bangladesh.*

## **3. Towards a protection focused role in the Bali Process**

3.1. The Bali Process is a key opportunity for Australia to exert a positive influence in response to forced displacement in the Asia-Pacific region. Australia, as co-chair with Indonesia, is well placed to provide constructive leadership through the Bali Process, which involves more than 48 members including key states, international agencies and observer countries. Established in 2002, the Bali Process was set up to allow collaborative work on addressing the issues of people smuggling, trafficking in persons and related transnational crime.

3.2. At the most recent Ministerial Conference in March 2016, Ministers across the region, including in Australia, acknowledged the growing scale and complexity of irregular migration. They supported measures contributing to comprehensive long-term strategies addressing the crimes of people smuggling and human trafficking. They also discussed how to address migrant exploitation by expanding safe, legal and affordable migration pathways.<sup>22</sup>

3.3. The Bali Process could be used more actively as a way of addressing the reasons behind irregular migration and the protection needs of those in the region that drive some of this migration. Although a Regional Support Office (RSO) was established in 2012 with Australia's support, the Office appears to have been underused, at least until more recently. More could be done in resourcing the RSO, ensuring its independence and enlarging the scope of work to realise its potential to influence change in the region, including the development and implementation of a Regional Cooperation Framework (RCF).

3.4. More effort is also needed to include in this discussion NGOs and a broader range of civil society representatives. As the formal Bali Process meetings provide very limited opportunities for civil society engagement, it is important to create other opportunities for dialogue and to develop proposals to address protection needs. Australia as co-chair could support the involvement of credible and established civil society networks, such as the Asia Pacific Refugee Rights Network (APRRN),<sup>23</sup> in these discussions.

3.5. To increase the engagement of our neighbours, the Bali Process must recognise the interests of other countries, including in both South East Asia and South Asia. The dialogue should include the world's largest protracted refugee situation in Pakistan, and the flow of Rohingya refugees into Bangladesh and the Bay of Bengal. Greater room should be given to the perspectives and needs of host governments such as Pakistan and Bangladesh. Similarly, there is a need for greater dialogue with NGOs and the broader civil society in South Asia.

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<sup>20</sup> Slezak et. al. (2015), 51.

<sup>21</sup> US State Department (2012). *Trafficking in Persons*, <http://www.state.gov/j/tip/rls/tiprpt/2012/>, 338.

<sup>22</sup> The Bali Process (2017). *About the Bali Process*. <http://www.baliprocess.net/>.

<sup>23</sup> Asia Pacific Refugee Rights Network (APRRN) (2017). *APRRN's Vision for Regional Protection*. [Http://aprrn.info](http://aprrn.info)

3.6. However, Australia can only play an effective role in furthering regional if its own policies protect refugees. As participants in our consultations have repeatedly noted, Australia cannot credibly advocate for change while maintaining policies that harm people seeking asylum and refugees.

### **Recommendation 3**

*ROCA recommends that AUstralia, in its capacity as co-chair of the Bali Process, revive efforts to operationalise the Regional Cooperation Framework agreed to by Bali Process members in March 2011, including advocating for greater involvement of civil society networks in the development of a regional response to forced displacement.*

## **4. Support for an Australian Modern Slavery Act**

4.1. There is a strong case for an Australian Modern Slavery Act, mirroring that of the UK, based on Australia's commitments under the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* (Palermo Protocol). Under the protocol, states parties are obliged to establish legislation to criminalise trafficking in persons, as well as to provide support and protection to victims of trafficking.<sup>24</sup>

4.2. The United Kingdom's 2015 Act supports these commitments by clarifying criminal offences relating to slavery and trafficking and increasing their relevant penalties. The Act also provides a statutory defence for victims of slavery or trafficking who face criminal proceedings as a result of their exploitation. This is particularly relevant in the Australian context, given that many of the people who are prosecuted as people smugglers have been deceptively recruited to work on ships as crew members, and may themselves be victims of trafficking.<sup>25</sup>

4.3. The availability of a statutory defence helps to protect victims of trafficking, many of whom may also be refugees, from further harm and trauma after their exploitation has ended.<sup>26</sup> However, UK advocates consider that it is too hard for victims to provide the evidence needed to establish the defence. Traumatized victims are unlikely to have access to evidence that they were compelled to act in the way they did during their exploitation.<sup>27</sup>

4.4. The UK Act also created the office of an independent Anti-slavery Commissioner. The Commissioner has provided detailed advice regarding the particular risks of exploitation and trafficking faced by unaccompanied child refugees and other vulnerable groups. The Commissioner's recommendations have been consistent with a broader protection-based agenda for people seeking asylum and refugees, including faster family reunification and increased efforts to prevent human trafficking at its source.<sup>28</sup> As a result, the UK's response to the refugee and migration crisis now includes counter-trafficking protections, aligning with the recommendations of the UNHCR.<sup>29</sup>

4.5. Companies operating in the UK are also required by the Act to report every year on the measures they have taken to ensure that their supply chains are slavery-free. There are, however, limitations to this provision. Companies can comply by reporting simply that they have taken no steps to address modern slavery. A more comprehensive and enforceable Australian instrument would support the Joint Standing

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<sup>24</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Palermo Protocol)*, 15 November 2000. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>, arts 5-6.

<sup>25</sup> Ezeilo, J. N. (2012). *Report of the Special Rapporteur on trafficking in persons, especially women and children: Mission to Australia*. United Nations Human Rights Council. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/135/48/PDF/G1213548.pdf?OpenElement>, 6.

<sup>26</sup> Refugee Children's Consortium (RCC) (2015). *Modern Slavery Bill Report Stage Briefing – House of Lords: Clause 45: A strengthened statutory defence, 23<sup>rd</sup> and 25<sup>th</sup> February 2015*. Anti-Slavery.org. <http://www.antislavery.org/wp-content/uploads/2017/02/atmg-statutory-defence-briefing.pdf>, 1.

<sup>27</sup> RCC 2015, 2.

<sup>28</sup> Hyland, K. (2017). *Statement on protecting unaccompanied child refugees against modern slavery and other forms of exploitation*. Office of the Independent Anti-Slavery Commissioner. <http://www.antislaverycommissioner.co.uk/media/1127/iasc-statement-on-protecting-unaccompanied-child-refugees-against-modern-slavery.pdf>, 6.

<sup>29</sup> Hyland 2017, 5.

Committee's recommendation in 2013 that federal laws should be passed to reduce the incidence of trafficking, slavery and forced labour in the supply chains of companies operating in Australia.<sup>30</sup>

#### **Recommendation 4**

*The Parliament of Australia should enact an Australian Modern Slavery Act based on the successful provisions of the UK Modern Slavery Act. In particular, RCOA supports:*

- a) *the creation of a statutory defence for victims of trafficking or forced labour in criminal proceedings, subject to a burden of proof that is reasonable in all the circumstances*
- b) *the establishment of the office of an independent Anti-Slavery Commissioner, and*
- c) *a statutory requirement that companies operating in Australia must take steps to address the risk or incidence of forced labour in their supply chains, and regularly report on those steps.*

### **5. Reforming the Australia visa system to provide greater support for victims of trafficking and slavery**

5.1. Australia is obliged under the Palermo Protocol to consider humanitarian and compassionate factors when determining the visa and residence status of trafficking victims.<sup>31</sup> In practice, however, the eligibility of victims for visas has instead mainly depended on a victim's cooperation with relevant criminal investigations.<sup>32</sup> Their access to even temporary legal residence depends on the discretion of police and prosecutors, and factors such as whether the perpetrators are located in Australia.

5.2. Victims who help with the prosecution of their traffickers may legitimately fear retribution when they return to their country of origin. Such victims would also be refugees,<sup>33</sup> and in such cases Australia must be ready to protect them to meet its international commitment to the principle of non-refoulement.

5.3. The Joint Standing Committee's 2013 report, *Trading Lives: Modern Day Human Trafficking*, received numerous submissions detailing how victims are unable to access welfare support or services available to permanent residents.<sup>34</sup> Victims of trafficking in Australia have very limited options to apply for a visa. An application for ministerial discretion on humanitarian grounds is personal and not subject to review, while other routes depend on victims passing character tests.<sup>35</sup> Such tests may be particularly difficult to pass for those who have engaged in illegal conduct as the result of forced labour or exploitation.

5.4. Australia's mandatory detention regime must also be reformed to comply with international human rights law. The UN Trafficking Principles and Guidelines require that trafficked persons "shall not be detained, charged or prosecuted for their illegal entry into or residence in countries of transit or destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons."<sup>36</sup>

#### **Recommendation 5**

*Victims of trafficking who fear persecution or harm if returned to their country of origin should be given information, support and legal advice in order to apply for protection in Australia. This should be facilitated by a National Referral Mechanism similar to that contained within the UK's Modern Slavery Act, which obliges authorities to record and report encounters with potential victims of trafficking and*

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<sup>30</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade (2013). *Trading Lives: Modern Day Human Trafficking: Inquiry of the Human Rights Sub-Committee*. Parliament of the Commonwealth of Australia. [http://www.aphref.aph.gov.au-house-committee-ifact-slavery\\_people\\_trafficking-report-full](http://www.aphref.aph.gov.au-house-committee-ifact-slavery_people_trafficking-report-full), 92.

<sup>31</sup> *Palermo Protocol*, art 7.

<sup>32</sup> Teshome, A. (2011). 'Australia's response to human trafficking', 30(2) *University of Tasmania Law Review* 73.

<sup>33</sup> 'Trading Lives: Modern Day Human Trafficking,' 62.

<sup>34</sup> 'Trading Lives: Modern Day Human Trafficking,' 60.

<sup>35</sup> McSherry, B & Kneebone, S. (2008). 'Trafficking in women and forced migration: Moving victims across the border of crime into the domain of human rights', 12(1) *International Journal of Human Rights* 76.

<sup>36</sup> UN Trafficking Principles and Guidelines, Principle 7.

*allows a 45-day reflection period for case assessment during which the alleged victim is not liable to immigration enforcement action.*

**Recommendation 6**

*Australia should reform its immigration detention regime substantially to comply with international human rights law, including the UN Trafficking Principles and Guidelines. This should include:*

- a) Abolishing mandatory detention and instead using detention as a last resort and only when strictly necessary*
- b) Imposing a maximum time limit of 30 days of detention without judicial review, and a maximum of six months overall*
- c) Establishing a system of judicial review of immigration detention longer than 30 days, with subsequent regular reviews*
- d) Codify clear criteria for lawful detention and minimum standards of treatment for people in detention, in line with UNHCR's Detention Guidelines; and*
- e) Prohibit the detention of children in closed immigration detention facilities.*