

A PLATFORM FOR CHANGE: REFORMING AUSTRALIAN REFUGEE POLICY

April 2022

In 2017, a wide range of participants from across the Australian refugee sector and movement worked together to articulate a platform for reform of Australian refugee policy in 2018 and beyond. The contributors included people from refugee backgrounds, NGOs, community groups, academics and grassroots organisations.

While some positive progress has been made since 2017, including providing durable solutions for some of the people subject to offshore processing and an additional intake for refugees from Afghanistan, the issues identified continue to be our ongoing priorities over the next few years.

Outlined below are the five key policy areas that we must change for Australia to become a fair, egalitarian nation that will prosper into the future:

- 1) The permanent end to offshore processing**
- 2) A fair process for claiming asylum**
- 3) Reform of the immigration detention system**
- 4) A larger and more responsive Refugee and Humanitarian Program**
- 5) Australia's improved engagement in Asia**

1. The permanent end to offshore processing

The problem

Of the 3,127 people who were transferred to either Papua New Guinea (PNG) or Nauru since July 2013, 1,384 people remain in limbo as of April 2022 – 112 in Nauru, 104 in PNG and 1,168 in Australia. Most people in Australia are on temporary visas, while some remain in community or closed detention. The policy of keeping refugees and people seeking asylum on Nauru and PNG has had devastating impacts on those subject to it.

It includes:

- Deteriorating mental health, including: very high levels of depression, anxiety or post-traumatic stress disorder; alarming incidents of threatened or actual self-harm; and high risk of suicide. This has also negatively affected people's ability to live independently and make important decisions about their future, including access to durable solutions.
- Deteriorating physical health due to poor living conditions, limited access to medical facilities and doctors, and Immigration Department restrictions on transfers of people back to Australia (including the separation of families).
- Incidents of serious harm and assault inside detention centres and in the community.
- Ongoing limbo with people waiting years for a country to resettle them and many continuing to be separated from their immediate families who remain in countries of origin or destination.
- Continued harm and limbo even when people are transferred to Australia for medical treatment, with six people medically transferred still in closed detention for no reason (as at 11 April 2022), and over 1,100 people in the community with no access to a basic safety net. All are repeatedly told that they can never settle in Australia.
- The damage and human cost of this regime has been documented in a variety of reports and assessments by international and Australian organisations.¹

Costly, damaging and illegal

- The offshore processing regime costs over AUD\$1 billion per year. Since 2013, the Australian Government has spent more than \$9.65 billion on this regime.

- The PNG Supreme Court determined in April 2016 that the detention of people seeking asylum is not legal under the PNG constitution.ⁱⁱ Nevertheless, people remain without adequate options for safety and security.
- The refugee status determination processes have been marked by lengthy delays, inadequate processes and lack of judicial review in PNG. When people have been found to be in need of refugee protection, the options available to them – permanent settlement in PNG or Cambodia or temporary protection in Nauru – have offered no real hope of long-term security, safety or a viable future. The resettlement deal Australia has brokered with USA offered some hope to refugees but the number of resettlement places as part of this deal was far fewer than the number of people in need of durable solutions. Policies like extreme vetting unfavourably targeted certain nationalities and the COVID-19 pandemic significantly slowed the process.
- Nine years after the Government of New Zealand first offered to accept refugees from offshore facilities, the Australian Government finally accepted this offer in March 2022. New Zealand will resettle 450 refugees over three years. It will also work separately with UNHCR to accept some refugees from PNG who were excluded from the bilateral agreement with Australia.
- Even if all of the current applications for resettlement to the United States (remaining at around 275) and private sponsorship to Canada (around 159) are accepted and the places offered by New Zealand are taken up, more than 500 people affected by the offshore processing policy will be left with nowhere to go and no durable solution.
- Offshore processing has resulted in the death of 14 people and created life-long trauma and illnesses for many more.

At the end of 2021, Australia finalised the Regional Resettlement Agreement with PNG and handed over the “full responsibility” for more than 100 refugees and people seeking asylum who remain there to the Government of PNG.ⁱⁱⁱ Australia, however, signed a new agreement with the Government of Nauru to create an “enduring form” of offshore processing in this country, and as a result, offered a transfer to Nauru to those who remained in PNG until the end of 2021.^{iv} These new developments create added concerns about the protection of people who remain subject to offshore processing and many unanswered questions about their future. It is also a further sign of the Australian Government's shirking of responsibility.

Proposed policy solution

Our vision: Australia ends offshore processing and instead processes all people onshore. Australia ends the practice of “turning back boats” and instead provides search and rescue; cooperates with governments in the region to develop safe disembarkation, reception and protection measures. Australia ends its detention and deterrence approach and instead responds to people seeking asylum in line with its responsibilities under the Refugee Convention.

This can be achieved by:

- Urgently resolving the situation of those currently held in PNG and Nauru.
- Closing all Australian-funded offshore detention, processing and transit facilities.
- Bringing all refugees and people seeking asylum to Australia while determinations are made about durable solutions.
- The ideal option would be for Australia to resolve this issue quickly by: 1) bringing all people on Nauru and PNG to safety in the Australian community; 2) ensuring all asylum applications are assessed fairly and quickly; 3) giving recognised refugees permanent visas.
- If the ideal options were not pursued immediately, then alternatives would be:
 - Immediately releasing people transferred to Australia for medical treatment from closed detention.
 - Transferring to Australia people with significant mental health concerns who cannot live independently offshore.
- Legislating to bar future Australian Governments from enacting offshore processing and detention is required once the current regime has ended.

2. A fair process for claiming asylum

The problem

A. *Inadequate legal rigour*

Since 2014, people seeking asylum who arrive by boat and do not have a valid visa are no longer entitled to access the Refugee Status Determination process. A fair process requires adequate access to legal services and independent review. Research conducted in the UK and Ireland shows legal assistance increases the confidence of asylum seekers to present their case and improves the quality of decisions.^v

B. *Forced destitution, exploitation and the threat of detention*

Many people seeking asylum are left in the community with no government-funded support for 12 or more months awaiting legal processes and thus experience a prolonged period of financial crisis. Community Services are experiencing significantly increased demand for prolonged emergency relief. The Australian Council for Social Service acknowledges that 'Emergency relief was originally designed as a stop-gap measure, to help solve short-term financial problems'.^{vi} However, the situation facing many vulnerable people seeking asylum falls outside of this traditional situation to which emergency relief was intended to respond. The management of the 'legacy caseload' and the regular policy changes to the Status Resolution Support Service (SRSS) are directly resulting in increased destitution. Recent issuing of the 'Final Departure' bridging visas is a prime example. The majority of vulnerable people affected by these decisions will also lose access to government-funded support, leaving them in the precarious situation of having to make important decisions about their future, often while struggling to meet their basic needs. Another area of concern is making people ineligible for SRSS if they send transfer money domestically or overseas.

If denied a bridging visa, people will live in fear of being re-detained, will be unable to access health care, have no income support and be unable to work. This situation has serious mental health ramifications across Australia.

C. *Temporary protection: creating fear and obstructing settlement*

Temporary Protection Visa (TPV) and Safe Haven Enterprise Visa (SHEV) holders do not have the same access to services, rights and residency or citizenship pathways as refugees who hold a Permanent Protection Visa. The key difference between people seeking asylum eligible for a Permanent Protection Visa and those eligible for a temporary visa is their method of arrival in Australia, not the legitimacy of their refugee status. TPVs have detrimental effects on the mental health of refugees. These detrimental effects are compounded by limiting the entitlements of TPV holders to access accommodation, language training, health care and other essential services.^{vii} Moreover, refugees who faced the prospect of 'rolling' TPVs are placed in a state of ongoing legal limbo.^{viii} The Australian Human Rights Commission found in 2019 that TPVs and SHEVs have "led to financial hardship, deteriorating mental health, a heightened risk of *refoulement* and poorer settlement outcomes."^{ix}

The ban on family reunion, including for family members in dangerous situations, has a profound impact. Many TPV and SHEV holders have been forced to live apart from their families, including their partners and children, for over a decade. This is especially damaging to mental health and wellbeing, and this ordeal is magnified by not knowing if or when they may ever be able to bring their families to Australia.

The impact of temporary protection on children was also documented Australian Human Rights Commission in 2004 and again in 2019, who found that the uncertainty created by TPVs detrimentally affected the mental health of children and their ability to fully participate in educational opportunities in Australia.^x TPVs also had the effect of separating children from their parents and family for long, and potentially indefinite, periods of time.

In addition to the human costs, the temporary protection regime is administratively inefficient. It requires the full reassessment of an individual's protection claim from scratch at the expiration of the TPV.^{xi} As at December 2021, over 5,000 people are awaiting a decision on a subsequent TPV or SHEV application, with no timeframe given for when they will receive a decision. There are also

2,600 people still waiting for a decision on their initial TPV application, under the so-called “fast track” system which began in 2014 and received its final applications in 2017. As the policy applies to people who arrived in Australia by boat between 2009 and 2013, their wait for an initial visa for three or five years is now close to or more than 10 years.

Proposed policy solution

Our vision: People seeking asylum in Australia are treated humanely and have access to a fair protection application process no matter how or when they arrived in Australia.

This can be achieved by:

- Repealing the fast track system and restoring a single statutory Refugee Status Determination (RSD) process with full access to independent review by the Administrative Appeals Tribunal (AAT): independent review for those whose claims for protection are rejected is a central part of any open, fair and honest dispute process. After the restoration of a single RSD system, there must be reassessment of those whose claims were refused in the fast track process.
- Providing a rigorous independent, merit-based appointment and re-appointment process for Members of the AAT (Migration and Refugee Division) and a minimum term of five years to avoid political influence and interference.
- Reinstating reference to the Refugee Convention in the Migration Act and repealing the provision (section 197C) that obligates the removal of a person from Australia irrespective of Australia’s international protection obligations (*non-refoulement* obligations, section 197C).
- Repealing temporary protection and restoring permanent protection and family reunion: permanent protection and family reunion provide the necessary degree of security people need to heal, settle and rebuild their lives.
- Restoring government funding for appropriate legal assistance and advice for people seeking asylum: reinstatement of government funding towards legal assistance for all people seeking asylum will assist the timeliness and quality of the application and review process.
- Ensuring access to financial assistance, basic health care and work rights for all people seeking asylum. This support needs to be made available to all people – no matter their mode of arrival or stage in the determination process – assessed as being in financial hardship and at risk of destitution.
- Granting people seeking asylum access to mental health support available to resettled refugees and others in the community and the right to send remittances without fear of losing support.

3. Reform of the immigration detention system

The problem

- Detention for people with no visa status is by law mandatory, or in effect the ‘first resort’ rather than the ‘last resort’. A person’s vulnerabilities or personal circumstances do not exempt them from detention. Children, pregnant women, elderly, survivors of torture and trauma and people with disability can be (and are) detained.
- The system is deteriorating, with cruelty and humiliation being used as tactics for control.
- There is no time limit on detention, resulting in prolonged and indefinite detention. The average length of detention is at all-time high, with average length of time in immigration detention 689 days as at 31 December 2021. In comparison, the average length of detention in Canada in the first quarter of the fiscal year of 2021-22 (latest available) was 24.5 days.^{xii}
- There is no legislation that regulates the conditions of detention or its review, unlike in prisons.
- Release from detention is almost entirely at the discretion of the Minister and the Department of Home Affairs, with no transparency over most matters.
- Detention is only reviewed administratively and by some oversight bodies who can only make recommendations, and cannot be reviewed substantively by the courts.
- The detention environment has been increasingly securitised. Mechanical restraints are routinely used, people in detention have reduced freedom of movement within a facility and there are reports of inappropriate use of force. Detention visitors have faced significant challenges in accessing detention facilities even before the start of COVID-19 pandemic.

- Laws requiring visas to be cancelled automatically, and empowering wide discretionary decisions resulting in detention, have significantly increased the population of those in detention, result in double and discriminatory punishment, and are not subject to independent or court review.

Proposed policy solution

Our vision: People seeking asylum in Australia are treated fairly and humanely with their human rights upheld. Mandatory, indefinite immigration detention ends and people seeking safety are free to live in the Australian community while their claims are transparently processed. A well-designed, risk-based triage process is implemented.

This can be achieved by a comprehensive review of immigration detention legislation, including:

- Repealing the mandatory detention provisions in the Migration Act.
- Stipulating in law maximum time limits on immigration detention.
- Codifying in law the prohibition of the detention of children.^{xiii}
- Regulating the criteria for immigration detention.^{xiv}
- Including in law the independent and judicial review of detention, to take place immediately when a person is detained and at regular intervals afterwards.
- Including in regulations and law the public scrutiny by independent monitoring bodies.
- Ensuring that all people have access to merits and judicial review of adverse security assessments.

4. A larger and more responsive Refugee and Humanitarian Program

The problem

- There is enormous global need for resettlement, with UNHCR identifying 1.47 million of the world's 26.4 million in most urgent need of resettlement. In 2020, just 34,383 refugees were resettled.
- Despite the overwhelming need, the Australian Government cut its annual Refugee and Humanitarian Program in 2020 by 5,000 places to a capped program of just 13,750 places.
- In 2020-21, the Government filled its Migration Program of 160,000 places despite the COVID pandemic but issued just 5,947 refugee and humanitarian visas – the small annual refugee program in 45 years.
- More than half of the Refugee and Humanitarian Program is taken up effectively by applications for family reunion by people in Australia, and demand greatly exceeds supply.
- De facto or announced exclusions of particular cohorts, including refugees stuck in Indonesia.
- Perception of certain groups being favoured because of perceived superior “integration potential” and hostility towards certain religions and ethnic groups.
- Although Australia’s approach to community sponsorship is set to improve in 2022, community-sponsored refugees are still counted within the existing program cap and more could be done to fully harness the willingness of Australians to contribute to the resettlement of refugees.

Proposed policy solution

Our vision: Australia’s Refugee and Humanitarian Program increases significantly in size in recognition that we should and can do more to contribute to durable solutions for the world’s refugees. Australia uses its refugee resettlement program strategically and holistically, linking it to aid and diplomatic efforts, which support solutions for refugees who cannot get access to resettlement. As part of its commitment to an enhanced response, Australia expands alternative migration pathways for refugees, increases access to family reunion, and provides opportunities for community involvement in the refugee resettlement process that expands Australia’s resettlement capacity.

This can be achieved by:

- The Humanitarian Program increasing in size in response to growing global need, and being strategically used as a lever to improve protection for those who are not resettled, especially in our region.

- Restoring the Humanitarian Program immediately to 20,000 places per year and increasing the size of the Program to between 27,000 and 30,000 places annually within three years.
- Priorities for resettlement places being guided by priorities identified by UNHCR and removing the exclusions of particular groups, including the exclusion of refugees who arrived in Indonesia after 2014.
- Promoting family reunion of refugees through the inclusion of a separate stream of humanitarian family reunion in the Migration Program.
- Fully harnessing public support for refugee resettlement by scaling up the Community Refugee Integration and Settlement Pilot (CRISP) and Community Support Program (CSP) program with the goal of creating within three years 10,000 additional annual places for refugees to resettle with the support of Australian communities.
- Establishing an Emergency Response contingency quota to provide additional capacity to respond to urgent protection needs (such as the current crises in Afghanistan, Ethiopia, Myanmar, and Syria/Iraq), as has been seen in previous years with the Syrian Intake of 12,000 additional places and the recently announced Afghanistan intake of 16,500 places over four years.
- Undertaking a comprehensive review of the Special Humanitarian Program to ensure goals are clearly articulated, access is fair, and processes are timely and efficient.
- Establishing a pilot program to resettle and protect refugee children at risk.
- Developing alternative pathways for refugees through our Migration Program, building on efforts such as the skilled refugee labour pilot developed by Talent Beyond Boundaries.
- Developing a whole-of-government approach that promotes peace and reconciliation in countries of origin, improves protection in countries of asylum (most critically, the right to live and work legally and access to basic education and health services), and enhances cooperation among resettlement states and between countries in the region.
- Reduce incentives for irregular movement by family members and promote the mental health of refugees in Australia through facilitating family reunion by:
 - Developing a separate Humanitarian Family Reunion program.
 - Alternatively, by improving access to the family stream of the Migration Program through concessions and waivers, and improved access to migration advice.
 - Removing restrictions on family reunion on those who come by boat.

5. Australia's improved engagement in Asia

The problem

- Most countries in the Asia Pacific region are not signatories to the Refugee Convention but several (Indonesia, Malaysia, Thailand, Bangladesh, India, Pakistan and Iran) host large numbers of refugees.
- Pressing needs in the region include multiple crises that emerged or worsened in 2021:
 - The fall of Afghanistan to the Taliban has created an emergency crisis for refugees in the region, with millions fleeing the country and millions more living as refugees in neighbouring countries, without basic rights.
 - Both the persecution of the Rohingya, which is rapidly coming close to genocide, without any durable solutions in prospect, and the military junta's coup in Myanmar in 2021 has increased the forced movement of refugees across the region.
- Refugees in the region face many challenges, including most critically:
 - They are often not able to live or work legally, resulting in constant fear of deportation, destitution, illegal employment, and exploitation. In Indonesia, this destitution has driven refugees to present themselves to detention in order to survive.
 - They are often unable to access basic services, including health services and education.

- Calls by Australia for regional cooperation by Asia in relation to refugees often fail to recognise:
 - The far greater numbers of irregular migrant workers in those countries, which pose a greater challenge for those countries, and the comparatively small number received by Australia.
 - The fear of those countries that greater protection will act as a driver for further irregular migration and a shifting of the moral burden.
 - The lack of Australia's credibility in the region when it comes to refugee protection.
 - The complexity of regional politics and the region's attitudes to Australia.

Proposed policy solution

Our vision: Australia recognises that the interests of people and governments in the Asia-Pacific region are best served if nations work together to find the best answers available for people displaced by conflict and persecution, using its diplomacy, aid and refugee resettlement program to address the causes of displacement and increase access to durable solutions.

This can be achieved by:

The Australian Government must shift its focus from promoting deterrence and detention for people on the move in Asia, bringing the aid and diplomacy activities of the Department of Foreign Affairs and Trade and the refugee resettlement program of the Department of Home Affairs together into a coherent strategy to support:

- The early identification of causes of displacement in the Asia-Pacific region.
- Rebuilding after conflict and supporting the process of voluntary and safe repatriation of refugees when that becomes possible, viable and appropriate.
- Efforts to encourage host nations in the region to address the needs of refugees within their borders, particularly the need for safety, freedom from detention, legal status, the right to work and access to education and health programs.
- Continuing engagement in refugee resettlement from the region, working with other resettlement states (particularly New Zealand, Canada, USA, UK and EU member states) to focus on the protection of the most vulnerable and those with fewest options for durable solutions, while also using engagement in resettlement strategically to push for improved protection of refugees in host nations.
- Greater engagement with civil society across the region, encouraging governments to work with NGOs, refugee community networks, business and local leaders to work together on better answers for refugees, returnees and host communities.

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<https://www.theguardian.com/australia-news/2016/apr/26/papua-new-guinea-court-rules-detention-asylum-seekers-manus-unconstitutional>

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^{vii} Refugee Council of Australia (2013), "Temporary Protection Visas", http://www.refugeecouncil.org.au/r/pb/PB1324_TPVs.pdf; UNSW Kaldor Centre for International Refugee Law (2017),

"Temporary Protection Visas and Safe Haven Enterprise Visas", http://www.kaldorcentre.unsw.edu.au/publication/temporary-protection-visas#footnote8_206utp0

^{viii} Leach, M (2013), "Back to the Future on Temporary Protection Visas", *The Conversation*, <https://theconversation.com/back-to-the-future-on-temporary-protection-visas-17316>

^{ix} Australian Human Rights Commission, 2019, *Lives on hold: Refugees and asylum seekers in the 'Legacy caseload'*, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-on-hold-refugees-and-asylum-seekers-legacy>

^x Human Rights and Equal Opportunity Commission (2004), "A Last Resort? National Inquiry into Children in Immigration Detention",

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^{xi} See *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53, <http://www.austlii.edu.au/cqi-bin/viewdoc/au/cases/cth/HCA/2006/53.html>

^{xii} <https://www.cbsa-asfc.gc.ca/security-securite/detent/qstat-2021-2022-eng.html>

^{xiii} Australian Human Rights Commission (2014), *The Forgotten Children*, https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf

^{xiv} Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru (2017),

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