Edmund Rice Centre
Awareness. Advocacy. Action

31 March 2016

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
legcon.sen@aph.gov.au

Edmund Rice Centre submission to Senate Legal and Constitutional Affairs References Committee Inquiry into Conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea

Preamble

The Edmund Rice Centre (ERC) is a research, education, advocacy and networking body that promotes the causes of the most marginalised in society. To that end, the Centre has been involved over time in supporting and advocating for people seeking refugee status in Australia. Through its work, the centre has developed relationships with people working and living in immigration detention on Nauru and Manus Island. Our submission to this Inquiry is based on the work the ERC has done with asylum seekers and refugees with reference to Australia's legal obligations to those people under its protection.

Summary

The Edmund Rice Centre is concerned that conditions and treatment of asylum seekers and refugees in regional processing centres in Nauru and Papua New Guinea represent a breach of our international legal obligations.

We are particularly concerned that Australia's current regional processing regime is leading to a system of backdoor refoulement. Refugees are returning to their homeland because they are faced with a hopeless choice: arbitrary detention, resettlement in an unsafe country where they have minimal rights or returning to their country of origin where they risk persecution and danger.

The Edmund Rice Centre recommends that regional processing centres in the Republic of Nauru and Papua New Guinea be closed; all asylum seekers and refugees be relocated to Australia to finalise their processing and that the response of Australia to people who seek asylum in our country be amended to reflect our international legal obligations. We have also presented the Committee with an alternative plan to improve Australia's current policy settings.

Ultimately, Australia's offshore processing regime is unsustainable. It is inevitable that sometime in the future a Government will launch a Royal Commission into

Australia's treatment of refugees and asylum seekers. This will be followed by an apology from an Australian Prime Minister on the floor of Parliament.

This Inquiry provides the Senate Constitutional and Legal Affairs Committee with an opportunity to draw a line the sand, recommend an end to offshore processing and set in train the process of improving our country's treatment of refugees and asylum seekers.

Contact

Phil Glendenning
Director, Edmund Rice Centre
15 Henley Road
Homebush West NSW 2140
erc@erc.org.au
(02) 8762 4200

Date

31 March 2016

Contents of submission

Section (a) Conditions and Treatment of Asylum Seekers and Refugees in Nauru and Papua New Guinea

There have been a significant number of reports (in the press and on social media) that highlight the poor conditions and treatment of asylum seekers in regional processing centres in Nauru and PNG.

These reports are widespread and extensive. They cover all parts of life in Nauru and Manus Island, such as health, education, accommodation and safety. The Committee will receive a number of submissions containing first-hand accounts from witnesses about the conditions and treatment of asylum seekers.

The Edmund Rice Centre believes that an independent investigation, possibly a Royal Commission, is required to examine the very serious nature of these allegations.

Section (d) The extent to which the Australian-funded regional processing centres in the Republic of Nauru and Papua New Guinea are operating in compliance with Australian and international legal obligations

As a signatory to a number of international conventions, Australia has a legal obligation to ensure asylum seekers and refugees are treated in a humane and decent way. However, the Edmund Rice Centre is concerned that this is not occurring particularly in relation to arbitrary detention, refoulement and children in regional processing centres.

Arbitrary Detention

Arbitrary detention refers to –

> *"The detention of an individual, in a case in which there is no likelihood or evidence that they committed a crime against legal statute, or in which there has been no proper due process of law."*[i]

Australia has signed and ratified the following International Conventions which prohibit the use of arbitrary detention:

- *The Universal Declaration on Human Rights*[ii];
- *International Convention on Civil and Political Rights* [iii]
- *Convention on the Rights of the Child*;[iv] and
- *The Convention Relating to the Status of Refugees*.[v]

As stated in the *Memoranda of Understanding*[vi], detention on Manus and Nauru is intended as a deterrent to people who choose to come to Australia by boat. However, the *Convention Relating to the Status of Refugees* clearly enunciates that states are not to impose penalties on refugees and asylum seekers who enter a country illegally. [vii]

It is important to note that the use of arbitrary detention also contravenes Australia's obligations under domestic law (under Australian law, to be penalised for a crime you have to possess *Mens Rea* (a guilty mind)). [viii] However, many of these refugees are not aware that their entry into Australian territory is via illegal means (so they cannot

possibly be guilty of a crime) and, as previously stated, under international law refugees and asylum seekers should not be punished for their illegal entry.

The United Nations has also stated that people recognised as refugees require protection, especially children.[ix] Arbitrary detention does not provide this protection. For instance, there are frequent reports of assaults and sexual assaults in regional processing centres. According to Cheryl-Anne Moy, an official with the Department of Immigration and Border Protection, there were 10 reports of sexual assault involving children in immigration detention in regional processing centres between September 2013 and September 2015.[x]

The obligation to protect refugees and asylum seekers extends not only to meeting refugees and asylum seekers' basic human needs such as providing food, water, clothing and shelter.[xi] This obligation also includes protecting refugees and asylum seekers against the dangers of torture, which some people have reportedly experienced while in Australia's regional processing centres. For example in 2015 there were claims of asylum seekers being subjected to waterboarding (claims the Minister denied).[xii]

The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment stated in 2015 -

> *"By failing to provide adequate detention conditions; end the practice of detention of children; and put a stop to the escalating violence and tension at the Regional Processing Centre, [Australia] has violated the right of the asylum seekers, including children, to be free from torture or cruel, inhuman or degrading treatment."*[xiii]

In addition to Australia's failure to meet its obligations to protect refugees, the UN has also stated that the prolonged use of arbitrary detention is not a sustainable solution.[xiv] This is because regional processing centres can only hold a limited number of people and as of 31 August 2015 there were 653 people in Nauru and 936 people on Manus Island.[xv] Cleary this number of people creates cramped, unhealthy and uncomfortable living conditions on a daily basis.

The inhumane nature of these conditions is highlighted by the fact that prisoners in Australia have better access to clean clothing, drinking water, beds and nutritional food than people in regional processing centres.[xvi] The problems arising out of Australia's continued use of arbitrary detention could be curbed by:

1. A change in policies and procedures which aim to expedite the processing of refugees. The average processing time in 2014 was nine and a half months.[xvii] There needs to be at least two procedures for assessing refugees: one for those who appear to have simple claims and another one for those who have complex claims.[xviii]

2. When someone is recognised as a refugee they should be welcomed into Australia. For those whose refugee status is still under review, alternative temporary accommodation options should be available to them such as community detention (this point applies particularly to children).

3. Children should only be detained to facilitate identity and medical checks for no longer than 48 hours. Where more time is required, this would only be

permitted by judicial order and for no longer than one week (seven days), as is the practice in the UK.

4. All children should then be treated in the same way as any child in Australia. In New South Wales, for example, children should be managed in accordance with the *Children and Young Persons (Care and Protection) Act*.[xix] This act applies to all children who are legally in New South Wales, including refugee and asylum seeker children (as they cannot be penalised for their illegal entry under the *Convention Relating to the Status of Refugees)*.[xx] Furthermore under the *Children (Criminal Procedure Act)*, a court order is needed for any child to undergo procedures such as identity checks and fingerprinting. Given that refugee and asylum seeker children are legally in New South Wales, these provisions should apply to them as well.[xxi]

5. Australia should ultimately repeal domestic legislation that requires those who enter without a visa to be subject to mandatory detention, where an application for asylum is made on arrival.[xxii]

Refoulement

Refoulement is the forcible return of refugees or asylum seekers to a country where there are substantial grounds for believing that upon return their life and freedom would be threatened. Returning refugees and asylum seekers to a place where they would be in danger of being subject to torture or other cruel inhume or degrading treatment, serious human rights violations or arbitrarily deprived of life, also constitutes refoulement.[xxiii]

Australia has signed and ratified several International Conventions which prohibit the refoulement of refugees and asylum seekers, including: *The Convention Relating to the Status of Refugees*[xxiv], *The International Convention on Civil and Political Rights*[xxv], *The Convention on the Rights of the Child*[xxvi], *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[xxvii].

Australia has breached its non-refoulement obligations in several ways:

- There are reports that asylum seekers on Manus and Nauru are being told by officials that if they do not leave voluntarily, they will be forced to leave;[xxviii]
- In 2014, the then-Immigration Minister, Scott Morrison said "the Government will take the steps necessary to remove failed asylum seekers from Australia who wish to stay indefinitely at taxpayers' expense."[xxix] While this may be legal, the point is we do not know if correct decisions have been made about their status because of the secrecy involved;
- We have recently witnessed the prominent case of Baby Asha, who was at risk of being deported;[xxx]
- There have been numerous instances of forced removal of those who have not been granted refugee status in Australia, but still face a significant risk of danger and/or suffering torture if they were to be deported;[xxxi] and
- Where Australia has disallowed refugee claims and deported asylum seekers in the past, there have been reports of death, disappearance, imprisonment and torture, and of fear-filled lives spent in hiding, privation and despair.

The Edmund Rice Centre investigates what happens to asylum seekers who are

deported from Australia. For example, in a report tabled by the Centre in September 2004, forty returned asylum seekers were followed up in their new country of residence (including Afghanistan, Iraq, Iran, Sri Lanka and Palestine). Only five people felt they were safe in their new life, had identity papers and were free to work. Twenty-four were not safe, subject to poor conditions, such as no proper identity papers, imprisonment, being unable to work, living in hiding, fearing persecution, living in a war zone, or subject to threats from police. A number were in an Immigration Detention Centre or applying for refugee status in a first world country, while others were worried about safety because of past political activity, or had felt the need to bribe police to maintain safety on a tourist visa. The remaining two people had been recognised as a refugee and resettled in another first world country.[xxxii] This arguably constitutes refoulement for a number of people who were deported when Australia disallowed their refugee claims.

In May 2015, the Centre provided further evidence relating to two asylum seekers who were deported to Sri Lanka after being refused refugee status by Australia. The two cases have the following elements in common:

- Prior to their removal both individuals informed Australian officials that they were suspected by Sri Lankan authorities of having links to the LTTE;
- When they were disbelieved or their fears were trivialised, they were returned to Sri Lanka where they face interrogations (which involved torture) about:
    - The details of their escape by boat to Australia;
    - What they said to Australian officials; and
    - Which LTTE members they met or knew in Australia; and
- Both have credible evidence as to the effects of the torture they have suffered.

It is important to note that changes to the *Migration Act* in 2013 have given the Government significant power to exclude certain classes of asylum seekers from even applying for protection in Australia, placing them at even greater risk of being deported to danger. The amended Act has also given the minister significant discretionary power as opposed to power vested in legislation, in deciding who can apply for Protection Visas and who can be deported.[xxxiii]

The amendments made to the *Migration Act* in 2013 should be reversed as a matter of urgency to ensure compliance with Australia's international non-refoulement obligations.

Offshore processing as a form of backdoor refoulement

The Edmund Rice Centre is concerned that current offshore processing is a vehicle for refoulement.

The current offshore processing arrangements were established in 2013 on the premise of ensuring that any asylum seeker who travels to Australia by boat will not be settled in Australia. The Government's focus on deterrence and intention to use third countries to resettle refugees significantly increases the risk of refoulement.

The conditions in offshore processing centres are deliberately harsh and undesirable – they are designed with deterrence in mind. Some asylum seekers have chosen to return to their homelands (and risk danger and persecution) because the conditions in offshore processing centres are so bad. For instance, in 2014 it was reported that

asylum seekers transferred to Manus Island were returning to their countries of origin to escape "gang rapes, car jackings, sudden violent street clashes or risk of attack…high levels of HIV, tuberculosis, malaria, dengue and food and waterborne diseases."[xxxiv] Australia is failing its non-refoulement obligations by designing an offshore detention regime premised on deterrence.

The Government has also designed resettlement solutions for refugees in offshore detention that undermine our non-refoulement obligations. The Government reached an agreement with the Cambodian Government to resettle refugees from Nauru in Cambodia. The nature of this agreement, as well as its lived experience, indicate a form of *backdoor refoulement*.

Cambodia has a poor human rights record. Indeed, it is a refugee producing country. For instance, in 2013 there were 13,982 people of concern to the UNHCR originating from Cambodia.[xxxv] The country also has a very poor record when it comes to refoulement. Daniel Webb from the Human Rights Law Centre has written that, "in 2009 Cambodia forcibly sent 20 Uighur asylum seekers back to China…four were reportedly condemned to execution and the rest sentenced to more than 10 years in prison."[xxxvi] In making this agreement with Cambodia, the Australian Government was prepared to send refugees to a country where they risked being returned to their country of origin. It calls into question our compliance with our non-refoulement obligations.

The Cambodian agreement has failed. Of the five refugees on Nauru who agreed to be resettled in Cambodia, three have returned to their homeland (Iran and Myanmar), despite the dangers they face there.[xxxvii] Cambodia has now declared they will not any more accept refugees and the Australian Government is reportedly looking into resettlement arrangements with countries such as Kyrgyzstan (which also has a very poor human rights record).[xxxviii]

While the Government and other supporters of current policy settings would argue people are returning voluntarily, asylum seekers are faced with little choice when confronted by indefinite detention on Manus Island or Nauru or resettlement in countries with poor human rights records such as Cambodia. Faced with such a choice, it is little wonder people would choose to return home where, despite risking their lives, they have existing networks, such as family.

In other words, the conditions and treatment of asylum seekers in offshore processing centres has resulted in Australia breaching its international non-refoulement obligations. While Australia may not be directly deporting refugees to danger, we have facilitated a system of indirect and backdoor refoulement.

Children in detention

No child should ever be housed in immigration detention.

All children and their families should be moved to community accommodation arrangements if their refugee status is still in question. Once their refugee status is confirmed, they should be granted Permanent Protection Visas.

Children should only be detained for identity and medical checks for a maximum of 48 hours. Where more time is required, this would only be permitted by judicial order and extend for no longer than one week (7 days).

All children should then be treated in the same way as any child in Australia. For example, in New South Wales children should be managed in accordance with the Children and Young Persons (Care and Protection) Act 1998. Under this Act, children are given a control order (placed in detention) only when no lesser punishment is appropriate and as a last resort. No child under the age of 10 can be placed in detention. Given that children who are asylum seekers have committed no crime, detention should not be possible for them.

There is a fundamental principle that needs to be considered when discussing the issue of children in detention. Detention is a form of punishment. However, you cannot punish people for a choice they have not made. In the case of children, the decision to seek asylum in Australia by boat is not a choice of their making. Therefore, they should not be held accountable for the decisions of others.

It is important to note that the use of the arbitrary detention for anyone also contravenes domestic legislation. Where the person detained is a child, there are other relevant considerations. Should the child be under 10 years old, the law views them as incapable of committing a crime as they have no *Mens Rea* (guilty mind)[xxxix] and therefore cannot be subject to control orders (detention). Furthermore, between the ages of 10-14, Australian law assumes that children (in most cases) do not know the act itself was wrong.[xl] Hence, the detention of any child under the age of 14 in NSW is highly unlikely. However, as of the 30 November 2015, there were 174 children in immigration detention on Nauru, many of whom would be under fourteen[xli].

Section (e) (iii) The extent to which contracts associated with the operation of regional processing centres are delivering services which meet Australian standards

Recommendations relating to this term of reference:

The services provided in the regional processing centres particularly relating to materials supplied, housing and health care do not meet Australian Standards. Detainees should be transferred to Australia immediately.

Adequate housing

In the Memoranda of Understanding governing the processing on Nauru[xlii] and Manus Island[xliii] both state in point 17 that "The Participants will treat Transferees with dignity and respect and in accordance with relevant human rights standards." To that end, the standard of housing offered should be reviewed with reference to what any Australian citizen might reasonably expect in accordance with Article 25 of the United Nations Declaration of Human Rights and Article 21 of the United Nations on the Rights of the Refugee. The detainees live in tents with limited access to cooling, safe drinking water, sanitation, energy for cooking, lighting, food storage and refuse disposal.

The United Nations has defined 'adequate housing' as:

> *"Adequate housing must provide more than four walls and a roof. A number of conditions must be met before particular forms of shelter can be considered to constitute "adequate housing."*
>
> *These elements are just as fundamental as the basic supply and availability of housing. For housing to be adequate, it must, at a minimum, meet the following criteria:*
>
> - *Security of tenure: housing is not adequate if its occupants do not have a degree of tenure security which guarantees legal protection against forced evictions, harassment and other threats.*
> - *Availability of services, materials, facilities and infrastructure: housing is not adequate if its occupants do not have safe drinking water, adequate sanitation, energy for cooking, heating, lighting, food storage or refuse disposal.*
> - *Affordability: housing is not adequate if its cost threatens or compromises the occupants' enjoyment of other human rights.*
> - *Habitability: housing is not adequate if it does not guarantee physical safety or provide adequate space, as well as protection against the cold, damp, heat, rain, wind, other threats to health and structural hazards.*
> - *Accessibility: housing is not adequate if the specific needs of disadvantaged and marginalized groups are not taken into account.*
> - *Location: housing is not adequate if it is cut off from employment opportunities, health-care services, schools, childcare centres and other social facilities, or if located in polluted or dangerous areas.*
> - *Cultural adequacy: housing is not adequate if it does not respect and take into account the expression of cultural identity"*[xliv]

Detainees on Nauru and Manus live in tents. These dwellings fail the above definition of adequate housing particularly with reference to availability of services, materials, facilities and infrastructure, habitability, accessibility and location. They do not meet Australian Standards for long-term accommodation.

Adequate health care

The people within the regional processing centres are entitled to adequate health care as stated in the *Convention Relating to the Status of Refugees* Article 23 and 24.

The health care available is not adequate as detainees are regularly sent to Australia for treatment. Women are transferred to have a baby, hence maternal care is not adequate in the short or long term.

Any minimal health care provided in the camps would need to meet the standards set by the Australian Commission on Safety and Quality in Healthcare. Where it may be proposed that detainees are to remain in Nauru or Papua New Guinea forever, this would only be possible if the local healthcare met Australian Standards so that Australia meets its obligations under the United Nations Convention on the Rights of the Refugee Article 21 and 24.

Australian Standards – commercial products

Official Australian Standards with regards to the construction of any consumer product are available online and relevant to every aspect of the regional processing centres as:

> *"Standards are published documents setting out specifications and procedures designed to ensure products, services and systems are safe, reliable and consistently perform the way they were intended to. They establish a common language which defines quality and safety criteria."*[xlv]

Australian Standards, some of which are mandatory as they are embedded in legislation and codes of practice, cover every aspect of the building and supply of goods and materials, and in some cases services, in Australia. While it is not possible to verify without visiting the processing centres to check, the limited photographs that have emerged from the camps would indicate that these standards are not being met. For example, there is a mandatory Australian Standard (AS) with regards to all plumbing products (taps and water pipes) where products must be manufactured and installed according to AS3500. Without access to the sites, it is not possible to check but all plumbing products at the sites should be manufactured and installed in accordance with this standard. This goes to the secrecy that the Government has practiced and the lack of transparent independent monitoring.

Any washing machines supplied would need to meet AS 2040. Any cots supplied would need to meet mandatory AS/NZS 2172. The Australian Building Codes Board (ABCB) has codes of practice and standards to cover every aspect of the built environment. This combined with the local building certification system ensures that any buildings constructed within Australia are of an adequate standard. Given that detainees are living in tents, it is unlikely that their built environment meets Australian Standards for permanent homes.

Section (f) Any other related matter

Our solution

It is important that the Committee also considers alternatives to our current offshore processing arrangements. The Edmund Rice Centre proposes a six-point alternative:

- Ending Operation Sovereign Borders and Offshore Detention;
- Reform our onshore program;
- Increase and improve the efficiency of our humanitarian intake;
- Build a genuine regional cooperation framework;
- Increase transparency; and
- Improve public debate and discourse.

Ending Operation Sovereign Borders and offshore processing

Offshore processing of asylum claims should be abolished and detention centres in Nauru and Manus Island should be closed. Asylum seekers who are currently in offshore detention centres should be returned to Australia for processing in community arrangements. People who have been found to be refugees and are still detained on Manus Island and Nauru should be returned to Australia and granted Permanent Protection Visas.

Operation Sovereign Borders includes measures which significantly increase the risk of refoulement. These measures include rapid screening, boat turn backs, detainment at sea and the removal of review rights. Operation Sovereign Borders means that in some instances, no assessment or determination of a person's claim is made at all. The Government has even inserted a provision in the Migration Act that that Australia's non-refoulement obligations are irrelevant for the purposes of removing what it terms "unlawful non-citizens." In light of this, it is difficult to see how the Government can still claim to be meeting its non-refoulement obligations when it returns people before any proper assessment is made.

The reinstatement of a robust refugee determination system is an urgent priority.

Resources currently deployed as part of Operation Sovereign Borders should be diverted towards implementing a search and rescue response, investing in a regional cooperation framework and improving our onshore system. This includes increased funding for the UNHCR and the Bali Process' Regional Support Office and our humanitarian assistance program.

Summary

As a matter of urgency, the following recommendations should be implemented:

- End offshore processing of asylum claims and return all asylum seekers to Australia for processing;
- End Operation Sovereign Borders and abolish relevant legislation, including the practice of boat turn backs, detainment of people at sea and rapid processing; and

- The savings generated from ending these policies should be invested towards implementing a search and rescue response and the establishment of a regional cooperation framework, such as increased funding for the UNHCR and Bali Process Regional Support Office.

Reform our onshore system

A risk-based, fair and efficient approach to onshore processing should be developed. Mandatory detention in its current format should be phased out and replaced with a risk-based approach with publicly available criteria for who should be detained, length of detainment and conditions.

Minimum conditions should be codified and based on our human rights obligations and international best practice. An independent statutory authority with responsibility for the guardianship of unaccompanied child asylum seekers should be established.

There should be time limits for how long someone can be kept in a detention centre for health, security and identity checks – 14 days (2 weeks) for adults and 48 hours (2 days) for children. Continued detainment in centres past time limits should only be subject to judicial order and in the case of children, this should only be for a maximum period of 7 days. It is also important to keep families together as part of this process – parents and caregivers should be released with their children.

People should then be transferred to community accommodation arrangements. These arrangements should be designed to help asylum seekers live safely in the community, with access to essential services and work rights. An urgent independent review is needed to assess whether the rights, support and assistance available to asylum seekers in the community is sufficient.

There needs to be greater integration between Departments, such as Immigration and Border Protection, Foreign Affairs and Trade and Social Services, to help refugees and asylum seekers live socially and well connected lives in Australia.

We also need to give greater certainty to refugees and asylum seekers. The current Government removed the '90 day rule' for processing refugee claims. Yet, some people who are found to be genuine refugees remain in indefinite detention. They should immediately be released and granted Permanent Protection Visas. To remove uncertainty for refugees, Temporary Protection Visas (TPVs) should also be abolished.

Summary

As a matter of urgency, the following recommendations should be implemented:

- Onshore mandatory detention in its current format should be phased out and replaced with a risk-based approach;
- Minimum conditions in onshore facilities should be codified and based on international best practice and our legal obligations;
- There should be time limits for how long someone can be kept in detention;
- Community-based accommodation arrangements should be expanded and a review into the current rights, support and assistance available to asylum seekers in the community is needed;
- An independent authority should be established with responsibility for the

guardianship of unaccompanied children;
- Greater integration between Government Departments is needed to help asylum seekers live better connected lives in Australia;
- Reinstate the 90 day rule for processing refugee claims and deliver the adequate funding to make this happen;
- Temporary Protection Visas should be abolished; and
- Any refugee who is still detained should be immediately released.

Increase our humanitarian intake

The current intake of 13,750 is simply inadequate and it should be expanded to at least 30,000 people each year. We should cease the practice of linking our offshore and onshore program – Australia is the only signatory to the Refugee Convention to link the programs. The Government should also improve our offshore Special Humanitarian Program (SHP) to be more responsive to internal displacement. For instance, a component of our SHP could be strategically focused on easing internal displacement pressures in targeted countries. The Department of Foreign Affairs and Trade and Department of Immigration and Border Protection should work collaboratively to ensure this strategic focus is responsive and targeted in the right places.

There should also be a focus on expediting family reunion by ensuring that when a referral from the UNHCR is provided for resettlement of a family, all members are identified (whether they are in other country, in-country or missing) and that places are allocated for these family members.

Summary

As a matter of urgency, the following recommendations should be implemented:

- Increase the humanitarian program to at least 30,000 people each year;
- De-link the onshore and offshore programs;
- Strategically focus a component of our SHP on internal displacement in targeted countries; and
- Focus on expediting family reunion.

Lead efforts to establish a genuine regional framework

Australia should play a leadership role in the establishment of a genuine regional cooperation framework through the Bali Process. The programs developed in response to the Indo-Chinese refugee crisis in the 1970s and 1980s – the Orderly Departure Program and Comprehensive Plan of Action – provide a good model. The programs offered humane solutions to stopping the flow of boat arrivals in the aftermath of the Vietnam War: asylum seekers did not have to get on a boat because there were safe places near their homeland where their refugee claims could be processed and where an orderly resettlement process could take place.

A regional framework should include:

- The removal of barriers to refugee determination processes in countries such as Indonesia, Malaysia and Thailand;
- Establishing protected spaces for international agencies such as the UNHCR

to process claims and for NGOs to provide services to refugees and asylum seekers;
- Cooperation between host countries, the UNHCR and resettlement states to provide durable solutions to refugees, whether that is resettlement, integration in a host country or assisted voluntary repatriation;
- Consistent asylum processes across the region based on the Refugee Convention – these processes would include legislation for refugee status determination and independent review rights;
- Improving conditions for refugees and asylum seekers in host and transit countries, such as legal permission to stay, work rights and access to basic services; and
- Increased funding for the UNHCR from countries of resettlement, such as Australia.[xlvi]

Australia's domestic policy settings will need to change if we are to successfully develop a regional cooperation framework. The challenge Australia faces when it comes to irregular migration is minute compared to other countries in our region. We cannot expect their cooperation if we continue to neglect our responsibilities through policies such as boat turn backs and offshore processing.[xlvii] The only viable way of achieving a regional framework is by ending Operation Sovereign Borders and offshore detention, reforming our onshore program and increasing our humanitarian intake.

Summary

- Australia needs to play a leadership role in the establishment of a regional cooperation framework. However, we need to recognise that our current policy settings are a barrier to this; and
- A regional framework would include removing barriers to refugee determination across the region, establishing protection spaces, developing durable solutions (safe return, integration in host countries or resettlement), consistent processes across the region and improved conditions for asylum seekers in host countries.

Increased transparency

The current system lacks transparency and is far too secretive. Workers, teachers, doctors and psychologists working in detention centres are unable to come forward with concerns, fearing criminal prosecution. The secrecy provisions of the Border Force should be abolished and there needs to be greater judicial oversight over the operations of our immigration processes. For instance, decisions to detain asylum seekers for longer than 2 days (for children) or 14 days (for adults) should only occur subject to judicial order. The conditions in detention centres should be based on codified minimum standards.

For too long serious allegations have been ignored or downplayed. A Royal Commission, with broad terms of reference, is needed to investigate our treatment of asylum seekers and refugees. Reports of abuse, bribery of people smugglers, the issuing of false passports are three examples of the serious allegations that have been made and which should be independently investigated.

Summary

- Abolish the Border Force Act and other related legislation;
- Implement judicial oversight over the immigration regime; and
- A Royal Commission should be established to investigate the serious allegations that have been made about the practices of our immigration regime. A Royal Commission should not delay the abolition of Operation Sovereign Borders and offshore processing or reform of our onshore program.

Improve public debate and discourse

Debate and discourse on the issue of asylum seekers and refugees is heavily focused on national security, implying that our sovereignty is under threat from asylum seeker arrivals. In December 2015, the UNHCR expressed concern –

> *"That asylum-seekers and refugees may be victimised as a result of public prejudice and unduly restrictive legislative or administrative measures, and that carefully built refugee protection standards may be eroded. Current anxieties about international terrorism risk fuelling the perception of those seeking to reach safety as a threat to security. This can lead to heightened levels of fear and xenophobia manifesting themselves in hostile attitudes towards, and even physical attacks against, asylum-seekers and refugees. Such fears and anxieties can reinforce a growing trend toward the erection of barriers to keep out perceived dangers."*[xlviii]

Unfortunately, this observation is especially relevant to Australia. For instance, references to the Refugee Convention have been removed from the Migration Act and asylum seekers are portrayed as a threat to national sovereignty. The Sunday Telegraph recently reported that "terrorists exploiting the Syrian refugee crisis [were attempting] to smuggle fighters" to Australia.[xlix]

We are concerned that, as we approach a Federal Election, politicians will be increasingly tempted to play into voter's fears and anxieties on these issues. In an address to the Lowy Institute, Prime Minister Turnbull linked recent terror attacks in Belgium to the Syrian refugee crisis. The Belgian Ambassador to Australia Jean-Luc Bodson refuted these claims, saying –

> *"It's dangerous because it's precisely what ISIS wants – that we would make a confusion between terrorism and migrants and between terrorism and Islam…My view is that the terrorists who committed the latest attacks and in Paris and in Belgium are European raised and born. Maybe from foreign origins, but they are Europeans. So it has nothing to do with the refugee crisis."*[l]

Rather than appeal to the lowest common denominator, our politicians have to take the lead in improving public debate and discourse. It has been done before. In the late 1970s, Malcolm Fraser and Bill Hayden combined to deliver a humane policy towards boat arrivals following the Vietnam War. The Government acted in accordance with Australia's international obligations under the Refugee Convention and worked to establish a regional cooperation framework. The Orderly Departure Program and later, the Comprehensive Action Plan were established to provide

refugees with durable solutions.

The programs offered humane solutions to stopping the flow of boat arrivals: asylum seekers did not have to get on a boat because there were safe places near their homeland where their refugee claims could be processed and where an orderly resettlement process could take place.

This was met with bipartisan support - the Minister for Immigration, Ian Macphee, and the Shadow Minister, Mick Young, travelled the country together, speaking at public meetings and visiting churches and community organisations to promote a spirit of welcome to asylum-seeking Indo-Chinese boat arrivals.

In 2011, former Immigration Department Secretary John Menadue proposed the establishment of an "independent and professional commission…to facilitate informed public debate."[li]

This is a sensible proposal to oversee a national effort to improve public debate and discourse on this issue. Representatives from Government and non-Government organisations should also be actively involved in the establishment of such authorities.

Summary

- Australia's political leaders should work to improve public debate and discourse on issues of race, immigration, refugees and asylum seekers;
- An independent national body should be established to oversee this work; and
- Reinstate the UN Refugee Convention in the Migration Act.

Endnotes

i Peter Butt, Butterworths Concise Australian Legal Dictionary (Lexis Nexis Butterworths, 3rd ed, 2004).

ii *Universal Declaration on Human Rights* , GA RES 217 A (III), UN GAOR, 3rd sess, 183rd pletn mtg, UN Doc A/810(10 December 1948) art 3 & 9.

iii International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9 & 10.

iv Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3 & 37.

v Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 31 (1).

vi *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues* , 2013.

vii *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 31 (1).

viii *Greene v The Queen* [1997] HCA 50;Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 31 (1)

ix United Nations High Commissioner for Refugees, Refugee Protection and Mixed Migration : The Ten Point Plan in action (2011) < http://www.unhcr.org/4742a30b4.html>.

x Emma Griffiths, 'Recent child sex abuse reports in detention centers 'concerning': Immigration Department , ABC News (online) ,25 May 2015 <http://www.abc.net.au/news/2015-05-25/child-sex-abuse-reports-concerning-immigration-head-says/6494756>.

xi *Universal Declaration on Human Rights* , GA RES 217 A (III), UN GAOR, 3rd sess, 183rd pletn mtg, UN Doc A/810(10 December 1948), Article 25 ; International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) , article 11.

xii ABC News, 'Claims asylum seekers at Nauru were water-boarded are 'unsubstantiated': Peter Dutton' , ABC News (online) , August 14 2015 < http://www.abc.net.au/news/2015-08-14/guard-tells-parliamentary-inquiry-asylum-seekers-tortured-nauru/6699162 >.

xiii Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Addendum: Observations on communications transmitted to Governments and replies received, UN doc A/HRC/28/68/Add.1 (2015), para 19. At http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Pages/ListReports.aspx (viewed 14 May 2015).

xiv United Nations High Commissioner for Refugees, Refugee Protection and Mixed Migration : The Ten Point Plan in action (2011) < http://www.unhcr.org/4742a30b4.html>.

xv Australian Government Department of Immigration and Boarder Security, Operation Sovereign Boarders Monthly Update (2015) < http://newsroom.border.gov.au/releases/operation-sovereign-borders-monthly-update-august>.

xvi Standard Guidelines for Corrections in Australia 2012 (Cth) r 2.7, 2.10, 2.12,2.14.

xvii Parliament of Australia, Refugee Resettlement to Australia : What are the facts ? (2015) < <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs%20/rp/rp1415/RefugeeResettlement#_Toc410727178>.

xviii United Nations High Commissioner for Refugees, Refugee Protection and Mixed Migration: The Ten Point Plan in action (2011) < http://www.unhcr.org/4742a30b4.html>.

xix *Children and Young Persons (Care and Protection) Act 1998* (Nsw) ; *Convention Relating to the Status of Refugees,* opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 31 (1).

xx Judicial Commission of New South Wales,*Local Court Bench Book-Children's Court(2016)< http://www.judcom.nsw.gov.au/publications/benchbks/local/toc_childrens_court.html>; Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 31 (1).

xxi *Children (Criminal Proceedings) Act 1987* (Nsw); dicial Commission of New South Wales,*Local Court Bench Book-Children's Court(2016)< http://www.judcom.nsw.gov.au/publications/benchbks/local/toc_childrens_court.html>.*

xxii Tim O'Connor, ' Australia out of step with the world as more than 60 nations criticize our refugee policy-Recommendations', November 11 2015 < http://www.refugeecouncil.org.au/wp-content/uploads/2015/11/111115-UPR-recs-on-refugees-and-asylum-seekers.pdf>.

xxiii Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 33 ; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) article 3; UNCHR.,Advisory opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the1951 Convention Relating to the Status of Refugees and its 1967 Protocol (2007)< http://www.unhcr.org/4d9486929.pdf>.

xxiv *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 33.

xxv *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 3, 6 & 37.

xxvi *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3 & 37.

xxvii *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) article 3.

xxviii Australian Refugee Rights Alliance , Tackling Refoulement the Human Face of Australia's Refugee Policy (2006) <https://www.refugeecouncil.org.au/wp-content/uploads/2015/11/2006_ARRA_Refoulement.pdf>.

xxix Northern Territory News, ' Rejects to be Deported' , Northern Territory News (online) , January 30 2014 <http://www.news.com.au/national/rejects-to-be-deported-government-warns-failed-asylum-seekers-go-home-or-well-force-you/story-fncynjr2-1226813403554>.

xxx ABC News, ' Baby Asha : Protesters vow to put bodies on the line to prevent baby's offshore removal' , ABC News (online) ,21 February 2016 <http://www.abc.net.au/news/2016-02-21/protesters-vow-to-block-cars-if-baby-asha-is-deported/7187278>.

xxxi UNCHR.,Advisory opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the1951 Convention Relating to the Status of Refugees and its 1967 Protocol (2007)< http://www.unhcr.org/4d9486929.pdf>.

xxxii Edmund Rice Centre (ERC) for Justice and Community Education, "Deported to Danger – A Study of Australia's Treatment of Forty Rejected Asylum Seekers" September 2004 http://www.erc.org.au/index.php?module=pagemaster&PAGE_user_op=view_page&PAGE_id=80&MMN_position=83:79 (Accessed 29 March 2016)

xxxiii Migration Act 1958 (Cth) ; *Migration Amendment Bill 2013* (Cth); Human Rights Law Centre,' The Right to Protection and the Obligation of Non Refoulement' September 2009 < http://www.hrlrc.org.au/files/Complementary-Protection-Bill-HRLRC-Submission.pdf> ; Parliament of Australia, Migration Amendment(Regaining Control over Australia's Protection Obligations) (2013) <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2014/244/b05>.

xxxiv Paul Toohey, 'Manus Island asylum seekers voluntarily returning home because of PNG violence,' 8 March 2014, < http://www.news.com.au/national/manus-island-asylum-seekers-voluntarily-returning-home-because-of-png-violence/story-fncynjr2-1226848264933>

xxxv Asylum Seeker Resource Centre, 'Cambodia Agreement,' <http://www.asrc.org.au/resources/fact-sheet/cambodia-agreement/>

xxxvi Daniel Webb, 'Cambodia deal is not about burden sharing, its destructive burden shifting,' <http://hrlc.org.au/cambodia-deal-is-not-about-burden-sharing-its-destructive-burden-shifting/>

xxxvii Lindsay Murdoch, 'Remaining two refugees in Cambodia rue leaving Nauru,' Sydney Morning Herald, 13 March 2016 <http://www.smh.com.au/world/remaining-two-refugees-in-cambodia-rue-leaving-nauru-20160311-gnh7mo.html >

xxxviii The Guardian, 'Kyrgyzstan reported as option to resettle refugees from Nauru and Manus,' The Guarduan Australia, 31 October 2015 <http://www.theguardian.com/australia-news/2015/oct/31/kyrgyzstan-reported-as-option-to-resettle-refugees-from-nauru-and-manus>

xxxix Crimes Act 1914 (Cth) s4M , 4N ; Criminal Code Act 1995 (Cth) s7.1 , 7.2 ;
Children (Criminal Proceedings) Act 1987 (NSW) s3, s5 ;
xl R v LMW [1999] NSWSC 1128

xli Department of Immigration and Boarder Protection, Immigration Detention and Community Statistics Summary (2015) < http://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-30-nov-2015.pdf> ; Ibid 44 ; Ibid 45,

xlii Department of Foreign Affairs and Trade (DFAT), "Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues" 3 August 2013 http://dfat.gov.au/geo/nauru/pages/memorandum-of-understanding-between-the-republic-of-nauru-and-the-commonwealth-of-australia-relating-to-the-transfer-to-and.aspx Accessed 21/2/2016

xliii DFAT, "Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues" 6 August 2013 http://dfat.gov.au/geo/papua-new-guinea/pages/memorandum-of-understanding-between-the-government-of-the-independent-state-of-papua-new-guinea-and-the-government-of-austr.aspx Accessed 21/3/2016

xliv United Nations High Commissioner for Human Rights (UNHCHR), "The Right to Adequate Housing Fact Sheet 21", 2012 http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf Accessed 21/3/2016

xlv Standards Australia, "What is a standard?" 2016 http://www.standards.org.au/standardsdevelopment/what_is_a_standard/Pages/default.aspx Accessed 21/3/2016

xlvi Paul Power, 'Ten Incremental steps to transform refugee protection in the Asia-Pacific Region,' September 2013

xlvii UNHCR, 'Regional Cooperative Approach to address refugees, asylum seekers and irregular movement,' 2010

xlviii UNHCR, 'Addressing Security Concerns without undermining Refugee Protection,' December 2015

xlix Samantha Maiden, 'IS refugee risk: Australian officials taking time processing applications,' The Sunday Telegraph, 20 March 2016

l Francis Keany and Anna Henderson, 'Malcolm Turnbull linking refugee crisis to bombings 'dangerous', Belgian ambassador says,' ABC Online, 24 March 2016, <http://www.abc.net.au/news/2016-03-24/turnbull-comments-of-refugee-crisis-dangerous-says-ambassador/7272916>

li John Menadue, Arja Keski-Nummi and Kate Gauthier, 'A new Approach. Breaking the Stalemate on Refugees and Asylum Seekers,' Centre for Policy Development, August 2011