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Submission for UN Special Rapporteur on the Human Rights of Migrants

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Australian Lawyers for Human Rights (ALHR) was established in 1993 and is a network of legal professionals active in practising and promoting awareness of international human rights. ALHR has a national membership of over 2,600 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

In this submission, ALHR will address the following issues:

1. Onshore mandatory detention and offshore processing
2. Access to family reunification for refugees and asylum seekers
3. The situation of unaccompanied minors
4. The effects of the Legacy Caseload Act 2014 (Cth); and
5. Australia's approach to refugee resettlement

1. Mandatory detention and alternatives

ALHR opposes the mandatory detention of asylum seekers in Australia and submits that the Australian government should pursue alternatives to mandatory detention.

Australia has a system of mandatory detention whereby all 'unlawful non-citizens' are subject to mandatory detention and removal.[1] Mandatory detention applies equally to migrants — for example, whose visa has lapsed or expired — as it does to asylum seekers.

[1] See *Migration Act 1958* (Cth) ss 13, 14, 189 and 198.

The Labor Government led by the then Prime Minister Paul Keating enacted the *Migration Legislation Amendment Act 1992* (Cth) ("Amendment Act") which brought mandatory detention into effect. The rationale for the Amendment Act was to address the concerns of the Australian government over the Indochinese unauthorised boat arrivals (a consequence of the Vietnam War),[2] by stemming the flow of potential future arrivals of these "designated persons". The then Minister for Immigration, Gerry Hand in his second reading speech made clear that:

> *"The Government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community … this legislation is only intended to be an interim measure. The present proposal refers principally to a detention regime for a specific class of persons. As such, it is designed to address only the pressing requirements of the current situation."*[3]

When it was first introduced, mandatory detention had a limit of 273 days. This requirement was removed in 1994. Despite the initial intention that mandatory detention was to be a temporary measure, successive governments have entrenched mandatory detention as a key feature of the Australian migration system.

As of 30 September 2016, there were 1454 people in immigration detention facilities in Australia.[4] The average period of time for people held in detention facilities was 489 days.[5]

The detrimental impact on the physical and psychological well-being of those held in detention has been well documented. The extensive physical and mental trauma is undeniably caused or at the least exacerbated by the unduly long periods of time to process an application for a person's refugee status to be considered and determined.

Inconsistent with international law and domestic law

ALHR maintains its position that mandatory immigration detention should be abolished and that Australia's persistent failure to do so places Australia in breach of its international obligations. Australia's policy of prolonged mandatory detention is a clear breach of Article 7 and 9 (and potentially Article 26) of the ICCPR[6] as well as

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[2] Joint Standing Committee on Migration, *Immigration detention in Australia: a new beginning: criteria for release from detention,* First report of the Inquiry into immigration detention, House of Representatives, Canberra, December 2008, p 141 as cited in Phillips, J and Spinks, H 20 March 2013, *Immigration detention in Australia* at http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/Detention#_ftn27.

[3] G Hand (Minister for Immigration, Local Government and Ethnic Affairs), *Migration Amendment Bill 1992*, Second reading speech, 5 May 1992.

[4] Department of Immigration and Border Protection, Detention Statistics <https://www.border.gov.au/about/reports-publications/research-statistics/statistics/live-in-australia/immigration-detention>

[5] Ibid.

[6] ALHR Submission to the Joint Select Committee on Australia's Immigration Detention Network, August 2011.

the welfare rights under Chapter IV in the Refugee Convention and Articles 2 and 3 of the Convention Against Torture. It is also important to note that Australia has not implemented any clear and articulate system as required under Articles 4 – 8, 10 – 16 of the CAT in relation to our immigration detention system. Detention should be a measure of last resort and where it is used, must be for the shortest period possible.

The Australian High Court has held that immigration detention is authorised under the Australian Constitution as an exercise of administrative power by the excutive,[7] and that detention can extend indefinitely where there was no prospect of removal to another country.[8] More recently, in *Plaintiff S/4* the High Court has placed some constitutional limits on mandatory detention. The court held that detention is only valid for one of three purposes: removal; receiving, investigating and determining an application for a visa permitting an alien to enter and remain in Australia; or determining whether to permit a valid application for a visa.[9] The court also held that in holding persons in detention for one of these purposes, the 'purposes must be pursued and carried into effect as soon as reasonably practicable'.[10]

In light of its international obligations and the High Court's findings on the constitutional limits to detention, it is incumbent on the Australian government to ensure that detention is truly a measure of last resort and, if it is practiced, for the shortest amount of time possible.

Alternatives to detention

There are many alternatives to detention which ALHR submits offer more humane conditions for asylum seekers, while their claims are being processed including:

- Release without conditions (for example, once a person's identity has been assessed and the State has not shown that the person poses a threat to national security);

- Release with the provision of support services (for example, provision of a case worker, legal referral);

- Community-based release: under the Act the Minister for Immigration can grant a detainee the right to reside in the community subject to certain conditions (e.g. reporting, not working, living at the specified address). This and other community-based alternatives should be available, for assessment on a case-by-case basis, to all asylum seekers irrespective of their mode of entry into Australia;

[7] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1
[8] *Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562.
[9] *Plaintiff S4* [2014] HCA 34; (2014) 88 ALJR 847, 853 [26].
[10] Ibid 853 [28], 854 [34].

- Supervised release to an individual/family/NGO: this has, in the past, been adopted by Australia in an ad hoc fashion in circumstances concerning children in detention;

- Release on bail, bond or payment of a surety; and

- Release to a designated residence (e.g. State-sponsored accommodation centre).

ALHR is of the view that these alternatives are more in line with Australia's human rights obligations than the current system of mandatory detention and, further, that use of these alternatives would mean that Australia would be less likely to breach its obligations under the CAT and other human rights treaties.[11] These alternatives are pragmatic and allow for a legally and ethically sound balance between Australia's concerns in maintaining border integrity and to discontinue breaching its international law obligations.

2. Access to family reunification for refugees and asylum seekers

The right to family reunification is reflected in the Universal Declaration of Human Rights,[12] the International Covenant on Civil and Political Rights,[13] the Convention on the Rights of the Child[14] and the International Covenant on Economic, Social and Cultural Rights.[15]

Facilitating family reunion through resettlement typically means reuniting nuclear family members or dependent relatives of a refugee in the state where they have been granted permanent protection. Resettled family members should, in principle, obtain the same legal status and have access to the same support services as the principal family member.

Concerns with respect to Australia's approach

The main pathway for people to reunite with their family members in Australia is through the Special Humanitarian Programme (SHP). Other options are the Community Proposal Pilot and the family stream of the regular Migration Programme.

ALHR has a number of issues with Australia's current approach to family reunification, including the following:

<u>General</u>

[11] ALHR submission to committee against torture (2014) http://alhr.org.au/wp/wp-content/uploads/2014/10/ALHR-Submission-to-Committee-Against-Torture-17.10.14.pdf
[12] Article 16(3).
[13] Article 23.
[14] See Articles 9(1), 10(1) and 22(1).
[15] Article 10(1).

- There are large costs associated with family reunion, irrespective of which pathway is pursued;

- Quality migration advice is expensive (the Federal government used to cover the cost of migration advice for family reunion, but this ceased in 2013); and

- There are long delays in processing applications for family reunion. UNHCR's Executive Committee (comprising States) has called on States to ensure family reunification without delay.[16]

Special Humanitarian Programme

- The definition of family (for SHP applicants) is restrictive, which is not consistent with the approach advocated by UNHCR.[17]

    - Applications for split family reunion require the main applicant to be a member of the proposer's 'immediate family'. This means that the applicant must be the proposer's a spouse or de facto partner, dependent child, or parent (only if the proposer is their child and is under 18).[18] The definition of a dependent child requires that a child be under 18, or, if over 18, be wholly or substantially reliant on the proposers for financial, psychological or physical support. The definition places significant burden on refugee families to show 'dependency'.

- There are not enough places available under the SHP;

- There are long delays in the processing of SHP applications; and

- This is the least expensive option, but it is still very costly.

Community Proposal Pilot

- This is limited to up to 500 places per year;

[16] Office of the United Nations High Commissioner for Refugees (UNHCR), Conclusions Adopted by the Executive Committee on the International Protection of Refugees, December 2009, 1975-2009 (Conclusion No. 1-109) No. 85 (XLIX)(w) – Conclusion on International Protection 1998 (Executive Committee – 49th Session): "Exhorts States, in accordance with the relevant principles and standards, to implement measures to facilitate family reunification of refugees on their territory, especially through the consideration of all related requests in a positive and humanitarian spirit, and without undue delay." See also, No. 24 (XXXII) FAMILY REUNIFICATION 1981 (Executive Committee—32nd Session): "…it is desirable that countries of asylum … support the efforts of the High Commissioner to ensure that the reunification of separated refugee families takes place with the least possible delay."

[17] According to the UNHCR, the principle of family unity requires the following people to be reunited: married and engaged couples, legally recognised spouses (including same-sex couples), persons who have entered into customary marriage, children, dependent parents of adult refugees and other dependent members of the family unit, such as foster children. See United Nations High Commissioner for Refugees, UNHCR resettlement Handbook (2011) para 4.6.7(b).

[18] See Regulation 1.12AA.

- This number is not in addition to those provided under the government's Refugee and Humanitarian Programme, and therefore does not expand the available places; and

- This is extremely costly.

Family Stream of the Migration Programme

- This is the most expensive option;

- Waiting periods can be very long, especially for non-contributory parent visas;

- The Department of Immigration has developed a priority list for applications; applicants in categories lower on the list will wait longer.

Unauthorised maritime arrivals

- People who arrived by boat without a visa before 13 August 2012 are given the lowest priority for processing under the SHP, the Community Proposal Pilot and the family stream of the migration programme.[19] Their applications are unlikely to ever be processed, unless they are granted citizenship (which takes at least 4 years).

- People who arrived by boat without a visa after 13 August 2012 are only entitled to apply for a Temporary Protection Visa (TPV) or a Safe Haven Enterprise Visa (SHEV). These visas do not enable them to apply for family reunion.

- As of 22 March 2014, minors who arrive in Australia by boat are also barred from proposing their family for resettlement to Australia.[20] While the Australian Government recognises that family reunification would be in the best interest of minors, it considers that it is outweighed by the need to maintain the 'integrity of Australia's migration system' by deterring minors from taking boat journeys to achieve resettlement in Australia. This is inconsistent with Australia's obligations under international human rights law:

    - International law emphasizes the need for a child to be reunited with his or her family.[21] Priority is given to the nuclear family and, in particular, unaccompanied children.[22] According to article 3(1) of the Convention on the Rights of the Child (CRC), in applications concerning children, the best interests of the child shall be a primary consideration. Under article 9(1), states are obliged to ensure that 'a

[19] See Direction 62 – order for considering and disposing of Family Stream visa applications.
[20] Department of Immigration and Border Protection (2016), 'What are the changes to Refugee and Humanitarian programme?', <https://www.border.gov.au/Lega/Lega/Form/Immi-FAQs/what-are-the-changes-to-refugee-and-humanitarian-programme>.
[21] Office of the United Nations High Commissioner for Refugees (UNHCR), Conclusions Adopted by the Executive Committee on the International Protection of Refugees, December 2009, 1975-2009 (Conclusion No. 1-109) No. 47 (XXXVIII) REFUGEE CHILDREN 1987 (Executive Committee—38th Session).
[22] United Nations High Commissioner for Refugees, UNHCR resettlement Handbook (2011) Para.6.2.1.

child is not separated from his or her parents…[unless] such separation is necessary for the best interests of the child.'[23] Pursuant to article 10(1), 'applications by a child or his or her parents to enter or leave a State party for the purpose of family reunification shall be dealt with by State Parties in a positive, humane and expeditious manner.'

- According to UNHCR, reunification of separated and unaccompanied children with their parents or guardians should be treated as a matter of urgency. Where the child has arrived first in the country of asylum, the right to family requires that the child's next of kin be allowed to join him or her in that country.[24]

- On 10 November, legislation passed through the House of Representatives (the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016). Under this legislation, persons who arrived in Australia by boat on or after 19 July 2013 and who were over 18 years old at the time they were taken to Nauru or Manus Island, would not be permitted to ever make a valid visa application to enter Australia. Some refugees on Manus Island and Nauru have family members in Australia, as do some refugees who have been resettled in other countries. They would be precluded from even visiting them on a tourist visa. This flagrantly violates their right to family reunion.

- All of these measures are discriminatory and punitive against people who arrived in Australia by boat, in violation of international refugee law and is a breach of article 31 of the Convention.[25]

3. The situation of child asylum seekers, in particular, unaccompanied minors in Australia

ALHR is deeply concerned about the lack of basic human rights afforded to children in immigration detention. It submits that the treatment of children in immigration detention in some circumstances, such as prolonged detention or detention involving violence or abuse, is likely to constitute torture in contravention of Article 2 or cruel,

[23] See also art 22(2): "…States Parties shall provide, as they consider appropriate, cooperation in any efforts … to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family."

[24] United Nations High Commissioner for Refugees, UNHCR resettlement Handbook (2011) Para 6.6.2.2.

[25] According to Article 31 of the Refugee Convention, a state is prohibited from imposing a 'penalty' on asylum seekers who come directly to its territory "illegally" (i.e. by boat) provided that they 'present themselves without delay to the authorities and show good cause for their illegal entry. The European Court of Human Rights has also found that article 14 of the ECHR prohibits the discriminatory application of rights. See in general, *Hode and Abdi v the United Kingdom* (2012) 22341/09 Eur Court HR. In this case the court found refusing family reunification on the grounds of 'status' or 'characteristics' provided by law, rather than one that is inherent to an individual, can amount to "other status" and thus be discriminatory. The court decided that refusing discrimination on the basis of the time of marriage and arrival of the respondent was discriminatory and in breach of the right to respect for family life. Article 14 ECHR is similar an equivalent of article 2 of the ICCPR. (For more information see the
section on 'Other Countries' Approaches to Family Reunification.)'

in human or degrading treatment or punishment under Article 16 of the CAT. ALHR refers to the comprehensive submission made to the CAT on this point.[26]

Denying a child their liberty must always be an exceptional measure of last resort. As at 30 September 2016, there were less than five children (aged less than 18 years) in Australia in Immigration Residential Housing, Immigration Transit Accommodation and Alternative Places of Detention and 278 living in community detention. While ALHR supports the current government's initiative in releasing children from detention, we note that has been achieved as a measure of policy, not law.

With respect to children detained in both offshore processing centres and onshore detention centres, ALHR's main areas of concern, from the available research and evidence, can be summarized as follows:

- Length of detention: on average, the length of time that children spend in onshore immigration detention is 231 days.[27]

- Access to education: in 2000, immigration detention standards (IDS) were established to provide a framework for the minimum standards for the treatment of detained children. These standards require that the contracted service provider, Serco, ensure that child detainees have access to age and skill appropriate educational services.[28] Despite the establishment of these standards, children in closed detention facilities have had limited or no access to education.

- Recreation: children have inadequate opportunities or facilities for play and recreation in offshore detention facilities and there is a distinct lack of sufficient outdoor recreation space.[29]

- Health: prolonged detention of children has severely negative impacts on their health and development. On 6 October 2014, the Medical Journal of Australia reported that over 80 precent of paediatricians surveyed believe that the mandatory detention of asylum seeker children amounts to "child abuse", confirming the assessment made recently by the Australian Medical Association.[30] Evidence of the children's significant mental and physical decline is confirmed by Department of Immigration reports of 128 incidents of self-harm by children over a fifteen-month period from January 2013 to March 2014.[31]

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[26] ALHR submission to CAT http://alhr.org.au/wp/wp-content/uploads/2014/10/ALHR-Submission-to-Committee-Against-Torture-17.10.14.pdf.
[27] Australian Human Rights Commission, National Inquiry into Children in Immigration Detention 2014. Online at < https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/national-inquiry- children-immigration-detention-2014>.
[28] Australian Parliament House, Committee Report into Immigration Detention, Appendix H: Immigration Detention Standards, 9.4.1, 160 < www.aphref.aph.gov.au-house-committee-jfadt-idcvisits- idcapph%20(1).pdf >
[29] Australian Human Rights Commission, (2012) 'Immigration detention on Christmas Island - Observations from visit to Immigration detention facilities on Christmas Island'.
[30] Elizabeth Corbett et al, 'Australia's treatment of refugee and asylum seeker children: the views of Australian paediatricians', Med J Aust 2014, 201 (7): 393T398 at 393.
[31] http://www.smh.com.au/comment/human-rights-commission-keeping-asylum-seeker-children-in-detention-doesnt-stop-people-smugglers--so-why-do-it-20141007-10rcz3.html.

- Sexual abuse: allegations of sexual abuse of children detained in Nauru have been made to the National Inquiry. There are reports of teenage girls being detained in the same quarters as boys at a ration of 1:66.[32]

Detaining children as a first resort is a breach of international law, including Article 37(b) of the Convention on the Rights of the Child, and a breach of children's legal rights. This is so in Australia, despite s 4AA of the Migration Act requiring that 'a minor shall only be detained as a measure of last resort'. The government must be held accountable to the law, and it must pursue effective and less harmful ways of managing a child's irregular entry into Australia. This can be achieved through some of the alternatives to detention referred to above.

Unaccompanied minors

Under the *Immigration (Guardianship of Children) Act 1946* (Cth), the Minister for Immigration and Border Protection is appointed the guardian of 'non-citizen' unaccompanied minors.[33] The Minister has the same 'rights, powers, duties, obligations and liabilities as a natural guardian of the child'.[34] ALHR is of the view that the Minister for Immigration and Border Protection should not be the guardian of unaccompanied minors: the Minister has a conflict of interest in his role as a visa decision-maker and as the person responsible for administering the detention regime. It is concerning that neither the Minister, nor those to whom powers are delegated, are required to be equipped with specialist knowledge or experience in relation to children.[35] This conflict of interest has been raised in numerous reports, including the the Human Rights Commission's report: Forgotten Children.

ALHR believes that it is necessary for an independent legal guardian to be appointed for all unaccompanied refugee and asylum seeker children in Australia and in offshore processing centres. We refer you to the *Guardian for Unaccompanied Minors Bill 2014 (Cth),* as this framework provides a good starting point. The Bill seeks to introduce an Office of the Guardian for Unaccompanied Non-citizen Children which would be responsible for overseeing the provision of legal and other assistance, including education, language, health and accommodation. The Office would have a number or functions, including:

- acting as legal guardian for unaccompanied children;

- promoting the needs and rights of unaccompanied children and advocating for their best interests

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[32] http://www.abc.net.au/news/2010-11-22/whyaustralianeedsanationalcommissionerforchildren/41352.
[33] *Immigration (Guardianship of Children) Act 1946* (Cth) s 6(1).
[34] Ibid.
[35] Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014), 167.

- involving unaccompanied children in decision-making about their situation; and

- monitoring policies and practices relating to service provision for unaccompanied children and advocating for the provision of suitable accommodation, care, education, language support and health care for unaccompanied non-citizen children, both during and after the time that their refugee status is being considered.

4. The effects of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014

ALHR is extremely concerned about the effects of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). The Act amended the *Migration Act 1958* (Cth) to remove all references to the Refugee Convention, and instead, replaced it with a new, independent and self-contained statutory framework which sets out Australia's own interpretation of its protection obligations under the Refugee Convention.[36] ALHR is concerned the new statutory framework is fundamentally at odds with principles of international law and does not amount to a good faith interpretation of the refugee convention.[37]

For example, the Act inserts s 197C which provides that where a non-citizen is detained and subject to removal, it is irrelevant whether Australia owes *non-refoulement* obligations to that person. This is a clear repudiation of a fundamental tenet of the Refugee Convention. Further, the 'self-contained' definition of a refugee is also at odds with well-established principles of international refugee law. Some specific examples include:

- Providing that a person does not have a well-founded fear of persecution unless that fear 'extends to all parts of the receiving country'.[38] This is at odds with the international understanding of the internal protection alternative principle.[39]

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[36] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth).

[37] Article 31 of the Vienna Convention on the Law of Treaties provides that treaties must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

[38] *Migration Act 1958* (Cth) s 5J(1)(c).

[39] The test in s 5J does not require any consideration of whether it is reasonable for a person to relocate to a place where they could be safe. The concept of reasonableness has been adopted in Europe, the UK and Canada. For example, in the UK the Courts have interpreted reasonableness as amounting to a consideration of whether it is 'unduly harsh' to expect an applicant to relocate. This is consistent with UNHCR's Guidelines. See,

- Stipulating that protection may be provided in another country by non-State actors who do not have any international obligations towards refugees.

ALHR is also concerned with other aspects of the Act, including:

- The introduction of 'fast-track' processing for the 'legacy caseload' cohort which involves quick decision-making and a 'limited form of merits review'.[40] These fast-track procedures favour expedient decision-making in a manner that risks *refoulement*.

- Reintroduces temporary protection visas and a safe haven enterprise visa. ALHR opposes the provision of temporary protection visas on the basis that this discriminates against those who arrive by boat and does not provide a durable solution for refugees.

- Providing the Minister with the power to detain people on the seas and to transfer them to any country (or a vessel of another country) that the Minister chooses without proper oversight. Such powers are inconsistent with international refugee law and heighten the risk of *refoulement*.

ALHR strongly urges the Special Rapporteur to recommend that the Australian Government review the operation and effect of the Legacy Caseload Act.

5. Australia's approach to refugee resettlement

ALHR is extremely concerned about the **lack of access to durable solutions** for the refugees held on Nauru and Manus Island. As at 31 October 2016, the Department of Immigration reported that there were 872 people in the Manus Island RPC[41] and 390 in the Nauru RPC. This totals 1262. However, there are several hundred asylum seekers receiving medical treatment in Australia, and this number does not include refugees living in the community in Nauru.

- Of the 1015 RSD decisions on Manus Island, 510 were positive and 505 were negative as at 31 October 2016. **675 refugees have been given a positive**

UNHCR, *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees.*

[40] The new fast-track procedures apply to those who entered Australia as an unauthorised maritime arrival on or after 13 August 2012 but before 1 January 2014, and who has been invited by the Minister to apply for a temporary visa or a safe haven visa. These 'fast track' applicants do not have access to the Migration and Refugee Division of Administrative Appeals Tribunal. Instead their merits review claims are heard by the Immigration Appeals Authority, which is tasked with undertaking review that is 'review that is efficient, quick, free of bias'. The IAA is generally to undertake review 'on the papers' and cannot accept new information from an application unless there are 'exceptional circumstances'. See *Migration Act 1958* (Cth) pt 7AA.

[41] This number will be fluid as refugees and those whose applications are yet to be determined are permitted to depart the RPC.

final determination. 147 asylum seekers have been given a negative final determination.

- Of the 1195 RSD decisions in Nauru, **941 refugees have been given a positive final determination**. 254 asylum seekers have been given a negative final determination.

First and foremost, ALHR emphasises that pursuant to the 1951 *Refugee Convention*, these **refugees have the right to protection in Australia**. The most humane, logical and lawful solution would be for the Australian Government to cease searching for third country resettlement options and to immediately bring all recognised refugees to Australia. Resettlement is intended as a means to relocate refugees from one country to another that has greater capacity to meet their protection needs. As explained by UNHCR**, resettlement 'has a vital role for refugees whose life, liberty, safety, health or other human rights are at risk in the country where they sought refuge**.[42]' Australia is a traditional resettlement country itself and does not fit within this description. It should not be calling on other countries to resettle refugees within its responsibility, particularly those countries with less capacity to protect and support refugees.

ALHR is particularly concerned that **refugees on Nauru and Manus Island are being pressured by the Australian Government to return to their countries of origin**, which could put their lives and safety at risk, in violation of the principle of *non-refoulement.* In 2013, UNHCR found that the environment on Nauru was a 'return-oriented environment.'[43]

Nauru

At present, refugees on Nauru only have access to two resettlement options.

On 26 September 2014, **Australia and Cambodia signed an agreement so that refugees on Nauru could be settled in Cambodia**.[44] Despite widespread condemnation of the agreement as a violation of Australia's international human rights obligations,[45] Australia and Cambodia signed a further Memorandum of Understanding in March 2015 in order to "strengthen co-operation on irregular migration, people smuggling and trafficking".[46]

The resettlement arrangement with Cambodia has been an extreme waste of money: it has cost the government $55 million for the transfer of five refugees. Only two of

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[42] UNHCR, Frequently Asked Questions About Resettlement < http://www.unhcr.org/hk/wp-content/uploads/sites/13/2016/04/FAQ-about-Resettlement.pdf>

[43] UNHCR, 'UNHCR Monitoring Visit to the Republic of Nauru 7 to 9 October 2013', 26 November 2013, p 1 <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf > (accessed 31 August 2015).

[44] http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Cambodia-agreement.pd

[45] Refugee Council of Australia, 'Australia condemned as nations focus on global refugee crisis', 4 October 2014 < http://www.refugeecouncil.org.au/n/mr/141004_ExComAus.pdf> (accessed 3 September 2015).

[46] Minister for Immigration and Border Protection, 'Joint media release - The Hon Peter Dutton MP, Minister for Immigration and Border Protection and His Excellency Sar Kheng, Deputy Prime Minister and Minister of the Interior, Cambodia', 26 March 2015 <http://www.minister.border.gov.au/peterdutton/2015/Pages/australia-and-cambodia-sign-new-immigration-agreement.aspx> (accessed 3 September 2015).

these refugees remained for any length of time, and the Cambodian government has admitted that its government 'does not have the social programs to support them'".[47] Only one remains, though in October 2016, two additional refugees expressed interest in resettling in Cambodia.[48]

Cambodia is a developing country where basic rights are not protected. It is poorly suited to accept and support refugees. According to the Australian director of Human Rights Watch, Elaine Pearson, Cambodia is 'far from a tropical democratic paradise. The reality is that Cambodia is a struggling economy with ineffective and corrupt law enforcement where its own citizens face corruption, repression and violence on a daily basis.'[49] A spokesperson for the Cambodian Government, Siphan Phay, has described the agreement with Australia as 'a failure', adding that Cambodia 'doesn't have social services like ultra-modern governments' to support refugees, and that 'we don't have that much money to support them'.[50]

Apart from returning to their countries of origin or resettling in Cambodia, **the only other option presently available to refugees on Nauru is to temporarily resettle in the Nauruan community**. Yet despite being party to the Refugee Convention, refugees in Nauru do not have access to their basic rights. A recent Amnesty report, *Island of Despair*, describes, among other things, persistent intimidation and attacks against refugees in the community including robberies, attempted home invasions, violent attacks including against children, and sexual assaults; consistent failure of police to investigate or hold perpetrators accountable for these crimes; arbitrary arrests and intimidation of refugees in the community; and children being denied the right to safely access education services.

Further, the option to resettle in Nauru is temporary: refugees have been allowed to settle for a maximum of five years.[51] Back 2001, when the first offshore processing arrangement was negotiated, Nauru 'agreed to act as a processing centre for asylum seekers provided that any refugees be resettled in Australia or other countries'. [52] Though the current arrangement is subject to a different memorandum of understanding, Scott Morrison confirmed in April 2014 that '[t]he agreement was never there for permanent resettlement in Nauru but there will be a lengthy period of temporary resettlement in Nauru.'[53]

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[47] https://theconversation.com/same-old-rhetoric-cannot-justify-banning-refugees-from-australia-67923

[48] Three Nauru refugees volunteer to be resettled in Cambodia, 15 October 2016, https://www.theguardian.com/australia-news/2016/oct/15/three-nauru-refugees-volunteer-to-be-resettled-in-cambodia.

[49] The Guardian, 'Australia prepares to send first refugees from Nauru to Cambodia within days,' 15 April 2015, https://www.theguardian.com/australia-news/2015/apr/15/australia-prepares-to-send-first-refugees-from-nauru-to-cambodia-within-days.

[50] Sydney Morning Herald, 'Australia's Cambodia refugee resettlement plan 'a failure'', 3 April 2016, http://www.smh.com.au/world/australias-cambodia-refugee-resettlement-plan-a-failure-20160403-gnx3jv.html.

[51] Peter Alford, 'Cambodia your only option, Peter Dutton warns Nauru refugees', The Australian, 23 April 2015, <http://www.theaustralian.com.au/national-affairs/immigration/cambodia-your-only-option-peter-dutton-warns-nauru-refugees/story-fn9hm1gu-1227316045376> (accessed 3 September 2015).

[52] Mathew, Penelope (2002) 'Australian Refugee Protection in the Wake of Tampa', *The American Journal of International Law*, Vol 96, No 3 pp 661-676 http://www.jstor.org/stable/pdf/3062169.pdf

[53] ABC News, 'Refugees will be able to temporarily resettle in Nauru, Immigration Minister Scott Morrison says,' 11 April 2014, http://www.abc.net.au/news/2014-04-10/nauru-asylum-seekers-scott-morrison/5382350?pfmredir=sm.

Other options raised by the Government for the resettlement of refugees from Nauru and/or Manus Island have included the Philippines, Kyrgystan and Malaysia, but no concrete resettlement offers have been made.

Manus Island

On 26 April 2016, the Papua New Guinea (PNG) Supreme Court ruled that the detention of Australia's asylum seekers was illegal.[54] The men housed in the Manus Island RPC were theoretically released from detention, but were still living in the detention centre and their movements limited due to safety concerns.[55] Both the PNG and Australian Governments agreed the Manus Island Regional Processing Centre (RPC) would be closed although a timeline has not been given.[56]

Apart from returning to their countries of origin – which risks amounting to *refoulement* in contravention of international law – the only option given to refugees on Manus Island to date has been resettlement in Papua New Guinea (PNG). The Minister for Immigration and Border Protection has recently reiterated that there is no third country option for asylum seekers and refugees on Manus Island.[57] The PNG Government itself has requested the Australian Government assist with resettling 560 refugees who remain on Manus Island and say they will not be safe if forced to settle in PNG. [58]

PNG is not a viable option for resettlement of asylum seekers and refugees. Recent reports of those who have attempted to resettle in PNG have described discrimination, poor standards of living, and enduring violence.[59] Specifically, refugees in the town of Lae have been held up at gun point by street criminals and at one point, refugees reported criminals attempting to enter their sleeping compound.[60] The DFAT website itself advises visitors to exercise a 'high degree of caution' due to high levels of serious crime, including high instances of sexual assault where foreigners have been targeted.[61]

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[54] *Namah v Pato* [2016] PGSC 13 (26 April 2016); ABC News, 'PNG's Supreme Court rules detention of asylum seekers on Manus Island illegal', 27 April 2016, http://www.abc.net.au/news/2016-04-26/png-court-rules-asylum-seeker-detention-manus-island-illegal/7360078

[55] ABC News, 'PNG's Supreme Court rules detention of asylum seekers on Manus Island illegal', 27 April 2016, http://www.abc.net.au/news/2016-04-26/png-court-rules-asylum-seeker-detention-manus-island-illegal/7360078

[56] Sydney Morning Herald, 'Manus detention centre: PNG announces Australia has agreed to close centre', 17 August 2016, http://www.smh.com.au/federal-politics/political-news/peter-dutton-and-peter-oneill-confirm-pngs-manus-detention-centre-will-close-20160817-gquue5.html

[57] ABC News, 'Manus Island, Nauru Refugees to be banned from entering Australia, Malcolm Turnbull says', 30 October 2016, http://www.abc.net.au/news/2016-10-30/manus-nauru-refugees-asylum-seekers-to-be-banned-turnbull-says/7978228

[58] The Guardian, 'Papua New Guinea asks Australia for help resettling refugees from Manus Island', 4 October 2016, https://www.theguardian.com/australia-news/2016/oct/04/papua-new-guinea-asks-australia-for-help-resettling-refugees-from-manus-island

[59] The Guardian, 'Resettling refugees in Papua New Guinea: a tragic theatre of the absurd', 20 May 2016, https://www.theguardian.com/commentisfree/2016/may/20/resettling-refugees-in-papua-new-guinea-a-tragic-theatre-of-the-absurd

[60] The Guardian, 'Resettling refugees in Papua New Guinea: a tragic theatre of the absurd', 20 May 2016, https://www.theguardian.com/commentisfree/2016/may/20/resettling-refugees-in-papua-new-guinea-a-tragic-theatre-of-the-absurd

[61] DFAT, 'Papua New Guinea', accessed 30 October 2016, http://smartraveller.gov.au/Countries/pacific/pages/papua_new_guinea.aspx

In addition to these conditions, the men who had found work in Lae were earning around $1.50AUD an hour in labouring jobs which is not sustainable. Some may argue that local Papua New Guineans make do with this wage; but refugees are not surrounded by a family network or support to rely on.

In early October 2016, PNG's Foreign Affairs Minister told the ABC that only 24 refugee men have been resettled in PNG.[62] ALHR would reiterate that for the above reasons, Papua New Guinea is not a viable resettlement option for refugees.

ALHR's recommendations with respect to resettlement

1.1. ALHR makes the following recommendations to the Australian Government:

(1) Bring all recognised refugees on Nauru and Manus Island to Australia immediately and grant them with permanent protection visas.

(2) If (1) is not complied with, immediately accept New Zealand's offer to resettle up to 150 refugees as soon as possible.[63] This offer was first made in 2013; Australia has therefore already lost the opportunity for up to 300 people to have been resettled.

(3) For the remaining refugees, the Australian Government must find safe third countries that will accept them for resettlement. These countries should already have resettlement experience. At a minimum, these countries must:

a. Be parties to the 1951 *Refugee Convention*;

b. Have a legal and policy framework in place to provide resettled refugees with a secure legal status on arrival and access to fundamental civil, political, economic, social and cultural rights, including the prospect of acquiring citizenship. This includes access to health and education, work rights, freedom of movement and family reunion; and

c. Have an institutional framework to support resettlement, including a decision-making structure, division of responsibilities, and resource allocation, as well as information-sharing and training of key partners including levels of government, non-governmental organizations, and other service providers; and

d. Have a reception and integration programme to deliver essential services including reception, orientation, housing, financial assistance, medical care, language classes, employment preparation, and education, and to support community engagement. Given the traumatic conditions these refugees have endured in Nauru and PNG, as well as in their countries of origin and in transit, this must include access to appropriate psychological support; and

e. Not be countries that might return the refugees to their countries of origin. This would violate Australia's *non-refoulement* obligations

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[62] The Guardian, 'Papua New Guinea asks Australians for help resettling refugees from Manus Island,' 4 October 2016, https://www.theguardian.com/australia-news/2016/oct/04/papua-new-guinea-asks-australia-for-help-resettling-refugees-from-manus-island.

[63] Note that the offshore processing centres in Nauru and Manus Island must be closed as soon as possible, and certainly before the next financial year. Therefore, given that New Zealand's offer is to resettle up to 150 refugees per financial year, it is likely that a maximum of 150 people will have access to this solution.

under international law, as well as those of the returning country; and

f. Not include Nauru or PNG. As emphasised above, these are not suitable resettlement countries.

(4) If Australia pursues third country resettlement pursuant to point (3), ALHR urges the government to open this option up to those refugees that have already accepted to resettle in PNG or Cambodia, as these countries do not meet appropriate standards for resettlement.

(5) It is possible that some recognised refugees on Nauru and/or Manus Island will not be accepted by the resettlement countries identified by Australia. Solutions must be found for these people: no one can be left behind. These individuals must be brought to Australia or resettled in another country that meets the requirements set out in point (3).

(6) Those refugees on Nauru and Manus Island with family members in Australia must be brought to Australia, pursuant to their right to family reunion.[64]

a. It has been suggested that the Australian Government will seek to reunite families in a third country. This has a number of problems. Refugees in Australia also have the right to family reunion. The Government cannot impose a condition that in order to enjoy this right, they must leave the country. Further, the Government cannot require third resettlement countries that agree to take refugees from Nauru and Manus Island to also accept their family members who are already recognised refugees receiving protection in Australia.

b. The number of refugees that would be settled in Australia pursuant to family reunion is small. It would go unnoticed. Yet it would be consistent with the strong family values that most Australians hold.

(7) Once resettlement solutions have been found for all refugees on Nauru and Manus Island (and humane, lawful solutions have been found for those asylum seekers whose claims were rejected at the first instance and this was reaffirmed on review) the offshore processing centres must be closed. Australia must end its agreements with Nauru and PNG and re-instigate processing of asylum seekers on the Australian mainland.

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[64] According to the Universal Declaration on Human Rights, Article 16(3) and the International Covenant on Civil and Political Rights, Article 23, 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' According to the International Covenant on Economic, Social and Cultural Rights, Article 10(1), '[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.'

Should you have any queries about the above material, or require additional information, please contact Khanh Hoang or Rebecca Dowd, Co-Chairs of ALHR's Refugee Rights Subcommittee at refugees@alhr.org.au.