



Submission to the Joint Standing Committee on Migration

**Ending Indefinite and Arbitrary Immigration Detention Bill 2021**

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Submitted by  
**Amnesty International Australia**

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## **About Amnesty International**

Amnesty International is the world's largest independent human rights organisation, with more than ten million supporters in over 160 countries.

Amnesty International is a worldwide movement to promote and defend all human rights enshrined in the Universal Declaration of Human Rights (UDHR) and other international human rights instruments.

Amnesty International undertakes research focused on preventing and ending abuses of these rights. Amnesty International is impartial and independent of any government, political persuasion or religious belief and does not receive funding from governments or political parties.

Since 1961 Amnesty International has campaigned on behalf of thousands of prisoners of conscience - people who are imprisoned because of their political, religious or other conscientiously held beliefs, ethnic origin, sex, colour, language or sexual orientation, gender identity or intersex status.

Amnesty International campaigns for a world where human rights can be enjoyed by everyone, no matter what situation they are in. Amnesty International has championed the human rights of refugees, people seeking asylum and migrants for decades. We campaign to make sure governments honour their shared responsibility to protect the rights of refugees, people seeking asylum and migrants. We condemn any policies and practices that undermine the rights of people on the move.

Amnesty International is a proud People Powered movement founded on the work of volunteers and activists all around the country. More than 500,000 Amnesty International supporters live in Australia.

## 1. Summary

1.1 Amnesty International Australia (AIA) welcomes the opportunity to make a submission to the Joint Standing Committee's Inquiry into the *Ending Indefinite and Arbitrary Immigration Detention Bill 2021* (the Bill).

1.2 The recommendations contained in this submission go towards ending the abuse and enhancing the protection for refugees and people seeking asylum in Australia.

1.3 AIA supports the changes to the *Migration Act 1958* proposed in the Bill as they address key issues directly and establish a human rights based approach to immigration detention practices.

1.4 The rights of refugees and people seeking asylum has been an important area of work for AIA in which extensive research, reports and submissions have been published that deal with issues of mandatory and indefinite detention, as well as the conditions of offshore detention centres, among other topics.<sup>1</sup>

1.5 AIA maintains that both mandatory and indefinite detention, wherever they occur, are a breach of Australia's international human rights obligations.

1.6 Over the past 30 years AIA has continued to monitor all forms of detention centres on mainland Australia and Christmas Island, as well as on Nauru and Papua New Guinea.

1.7 This submission will draw on AIA's expertise in international human rights law and standards as well as our Australian research.

1.8 With respect to the above, this submission will focus on:

1. International human rights frameworks;
2. The right to seek asylum;

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<sup>1</sup> See Amnesty International, Submission to the Australian Human Rights Commission National Inquiry into Children in Immigration Detention,' 2014, available at <https://humanrights.gov.au/our-work/commission-website-national-inquiry-children-immigration-detention-114>; Amnesty International, 'Submission to the Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru,' 2015 available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regional\\_processing\\_Nauru/Regional\\_processing\\_Nauru/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Submissions); Amnesty International, 'Island of Despair,' 2016, available at <https://www.amnesty.org.au/wp-content/uploads/2016/10/ISI-AND-OF-DESPAIR-FINAL.pdf>; Australian Human Rights Commission, 'Lives On Hold: Refugees and Asylum Seekers in the Legacy Caseload,' 2019 available at [https://humanrights.gov.au/sites/default/files/document/publication/ahrc\\_lives\\_on\\_hold\\_2019.pdf](https://humanrights.gov.au/sites/default/files/document/publication/ahrc_lives_on_hold_2019.pdf); Amnesty International, 'The Impact of Indefinite Detention: The Case to Change Australia's Mandatory Detention Regime,' 2005 available at <https://www.amnesty.org/es/wp-content/uploads/2021/08/asa120012005en.pdf>; Amnesty International, 'Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 2010, available at [https://www.aph.gov.au/Help/404?item=%2fsenate%2fcommittee%2flegcon\\_ctte%2fmigration\\_detentionreform\\_proc&user=extranet%5cAnonymous&site=website](https://www.aph.gov.au/Help/404?item=%2fsenate%2fcommittee%2flegcon_ctte%2fmigration_detentionreform_proc&user=extranet%5cAnonymous&site=website); Amnesty International, 'Submission to the Joint Select Committee on Australia's Immigration Detention Network,' 2011, available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Former\\_Committees/immigrationdetention/submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/immigrationdetention/submissions).

### Australia's current immigration detention System

3. The impacts of indefinite and mandatory detention;
4. The impacts of offshore detention;
5. The impacts of Alternative Places of Detention (APODs);
6. The impacts of temporary visas;

### A human rights based approach

7. Independent inspection of detention facilities;
8. Alternatives to detention;
9. Increasing the humanitarian intake;
10. Expanding Community and Private Sponsorship;
11. Assessing refugee applications within a prompt, effective and fair time period;
12. Running timely search and rescue operations;
13. Adapting foreign policy settings.

## 2. Recommendations

AIA recommends that the Bill is passed with the following considerations for further implementation:

- 1) Allow recognised refugees the right to settle in Australia, regardless of how they arrive, and ensure those seeking asylum have their claims assessed in a timely, fair and effective manner;
- 2) Make comprehensive amendments to the *Migration Act* 1958 to ensure that no person is detained in violation of their human rights and bring an end to the mandatory and indefinite detention of people waiting for their asylum claims to be assessed;
- 3) Establish a formal independent review process to assess on a case-by-case basis the necessity and proportionality of detention of all refugees and people seeking asylum who are currently detained in Australia and offshore;
- 4) End the policy of offshore processing and detention and permanently close the 'Regional Processing Centre' on Nauru;
- 5) Bring all refugees and people seeking asylum on Nauru and remaining in Papua New Guinea to Australia, and release them into the community whilst they await permanent solutions. Accept the New Zealand offer of resettlement as a matter of urgency;
- 6) Ensure APODs are used as a detention measure of last resort, and for the shortest possible amount of time;
- 7) Release all refugees and people seeking asylum who have been held in Australia's offshore detention regime who are now detained in Australia into the community whilst they await permanent solutions;
- 8) Abolish Temporary Protection Visas and Safe Haven Enterprise Visas and allow for all refugees to have permanent protection in Australia;
- 9) Ensure the effective establishment of NPMs across all Australian jurisdictions;
- 10) Ensure that people seeking asylum who arrive in Australia without adequate documentation are detained only when their detention is consistent with international human rights standards. Such legislation should be based on a general presumption against detention;
- 11) Specify in national law a statutory maximum duration for detention which should be reasonable in its length. Once this period has expired the individual concerned should automatically be released;
- 12) Ensure that people seeking asylum who are detained have regular and automatic access to courts empowered to review the necessity of detention and to order release if continued detention is found to be unreasonable or disproportionate to the objectives to be achieved;
- 13) Establish a new class of bridging visa that allows for refugees and people seeking asylum to remain in the community with rights and entitlements;
- 14) Increase Australia's overall humanitarian program to at least 30,000 places;

- 15) Further reform Australia's Community Sponsorship Program so that it adds to (rather than takes places from within) the humanitarian program;
- 16) Leverage Australia's diplomatic and humanitarian assistance efforts to support agencies and governments in the Asia-Pacific region to assess refugee applications in a fair and efficient manner and within a certain and reasonable time period;
- 17) End hazardous boat push-backs at sea and instead utilise Australia's maritime capabilities to run proper search and rescue operations;
- 18) Adapt Australia's Foreign Policy to recognise the need for a coordinated regional solution that targets the root causes of displacement;
- 19) Restore and expand Australian aid to key countries in the region affected by displacement to ensure the basic needs of refugees and people seeking asylum are met and to mitigate the need for people to make dangerous onward journeys in search of safety and security;
- 20) Increase Australia's unconditional assistance in humanitarian situations including natural disasters, so that people are able to rebuild their lives in safety and dignity.

### 3. International Human Rights Framework

3.1 The Australian Government is entitled to control the entry and residence of foreign nationals on its territory. However, all Australian Government policies and practices must comply with the state's international obligations.

3.2 A number of the Australian Government's current policies regarding refugees and people seeking asylum fall short with respect to a number of fundamental human rights, including:

- 1) Non-refoulement – i.e. the ban on transfer to a real risk of serious human rights violations.<sup>2</sup>
- 2) The ban on torture and other cruel, inhuman, or degrading treatment or punishment.<sup>3</sup>
- 3) The right to security of the person – i.e. freedom from injury to the body and the mind, or bodily and mental integrity.<sup>4</sup>
- 4) The right to life.<sup>5</sup>
- 5) The right to liberty.<sup>6</sup>
- 6) The ban on arbitrary detention.<sup>7</sup>
- 7) The right to equality before the law.<sup>8</sup>

3.3 The Australian Government's current policies towards refugees and people seeking asylum have been consistently criticised by a number of United Nations (UN) Treaty Bodies, and most recently in Australia's third cycle Universal Periodic Review by the UN High Commissioner for Human Rights.<sup>9</sup>

#### **The 1951 Convention Relating to the Status of Refugees (Refugee Convention)**

3.4 The primary source of rights for refugees and people seeking asylum relevant to this submission can be found in the *Refugee Convention* 1951.<sup>10</sup> Australia voluntarily acceded to the Refugee Convention and Protocol and is therefore bound by the standards for refugee protection outlined within them.

3.5 Along with other international instruments and customary norms, the Refugee Convention defines who is and who is not a refugee, whilst also specifying a range of rights to which refugees and people seeking asylum are entitled.

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<sup>2</sup>UN General Assembly, Convention Relating to the Status of Refugees (Refugee Convention), 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <https://www.refworld.org/docid/3be01b964.html>.

<sup>3</sup>UN General Assembly, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html>.

<sup>4</sup>ICCPR, Arts. 9(1), 12(1).

<sup>5</sup>ICCPR, Art. 6(1).

<sup>6</sup>ICCPR, Art. 9(1).

<sup>7</sup>Ibid.

<sup>8</sup>ICCPR, Art. 14(1).

<sup>9</sup>United Nations Human Rights Council, 'Universal Periodic Review - Australia,' 2021 available at [https://lib.ohchr.org/HRBodies/UPR/Documents/Session37/AU/HC\\_letter\\_to\\_Australia.pdf](https://lib.ohchr.org/HRBodies/UPR/Documents/Session37/AU/HC_letter_to_Australia.pdf)

<sup>10</sup> Above, n1.



3.6 The Refugee Convention crystallises principles such as non-refoulement - that is, refugees must not be expelled or returned to places where they would face persecution based on one or more Convention grounds.

3.7 However, read in partnership with customary international law, the concept of 'constructive refoulement' is also prohibited. 'Constructive refoulement' includes any actions, including arbitrary or prolonged detention, that would compel a person seeking asylum to abandon their claim and return to places where they would face persecution based on one or more Convention grounds.

3.8 Along with non-refoulement obligations, many other rights and protections can be found within the Refugee Convention.

3.9 Most relevant to this submission is Article 31(1) of the Refugee Convention, which highlights that States are not allowed to penalise refugees and people seeking asylum who show 'good cause' for illegal entry or stay.<sup>11</sup> This includes administrative penalties such as detention.

3.10 Furthermore, the preamble of the Refugee Convention highlights that refugees and people seeking asylum should be able to enjoy the widest possible exercise of their fundamental rights.<sup>12</sup> This includes civil rights; such as access to courts, as well as economic, social and cultural rights; ranging from employment rights to social security and the right to education.<sup>13</sup>

### **International Covenant on Civil and Political Rights**

3.11 The International Covenant on Civil and Political Rights (ICCPR) recognises the right to liberty and security of a person and prohibits arbitrary detention.<sup>14</sup> Although the ICCPR has never been fully adopted into domestic legislation, Australia ratified the ICCPR in 1980 and is therefore bound by the rights and protections outlined within it.

3.12 Most relevant to this submission is the guarantee to challenge the lawfulness of detention, stating:

*"Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."<sup>15</sup>*

### **The Vienna Convention on the Law of Treaties**

3.13 The ratification of an international treaty is a voluntary act by which a state accepts to fulfil in good faith its obligations under that treaty.

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<sup>11</sup>Ibid.

<sup>12</sup>Refugee Convention, Preamble.

<sup>13</sup>Above, n1 Articles 3 - 34.

<sup>14</sup>Above, n2 Article 9.

<sup>15</sup>Above, n2 Article 9(4)

3.14 The Vienna Convention on the Law of Treaties provides that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'.<sup>16</sup>

3.15 Australia therefore has the obligation to comply with those treaties to which it is a party, as well as with customary international law, including those provisions relating to the protection of refugees, people seeking asylum, migrants and others in its territory or subject to its effective control.

3.16 As one previous UN High Commissioner for Human Rights observed:

*"Law, as any other institution, is subject to abuse. Apartheid South Africa was governed by laws that regulated oppression and led to horrific denial of dignity. The law that must guide us is that law which is capable of delivering justice and providing remedies for grievances. It is a dynamic and reliable institution that is capable of preserving the rights of all while adapting itself to the needs of a changing world. This is the role of human rights law."<sup>17</sup>*

3.17 Thus, the Vienna Convention on the Law of Treaties states that parties 'may not invoke the provisions of its internal law as a justification for its failure to perform a treaty'.<sup>18</sup>

3.18 These pieces of international law and standards form the basis of AIA's recommendations.

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<sup>16</sup>United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <https://www.refworld.org/docid/3ae6b3a10.html>.

<sup>17</sup>UN High Commissioner for Human Rights, Louise Arbour, International Commission of Jurists, Biennial Conference, Berlin, Germany, 27 August 2004.

<sup>18</sup>Above, n15 Article 27.

## 4. Australia's Current Immigration Detention System

### The Right to Seek Asylum

4.1 The right to seek asylum is premised on the human right "to seek and enjoy in other countries asylum from persecution" as found in the Universal Declaration of Human Rights.<sup>19</sup>

4.2 All people are entitled to this right, regardless of *how* or *where* they arrive in Australia. This includes people seeking asylum who arrive by boat.

4.3 This right recognises that using irregular means to enter a country when seeking international protection may be some people's only option. To use arguments of sovereignty to justify denial of a person's right to seek asylum is contrary to the object and intention of the international human rights and the refugee law framework.

4.4 According to the Australian Human Rights Commission:

*"All people who make claims for asylum in Australia should have those claims assessed on the Australian mainland through the refugee status determination and complementary protection system that applies under the Migration Act."*<sup>20</sup>

**Recommendation 1:** Allow recognised refugees the right to settle in Australia, regardless of how they arrive, and ensure those seeking asylum have their claims assessed in a timely, fair and effective manner.

### The Impacts of Indefinite & Mandatory Detention

4.5 Under Australia's mandatory detention legislation, people seeking asylum who arrive without adequate documentation are held in immigration detention pending the outcome of their asylum claim. The only way their detention can come to an end under Australian law is for the person to be granted a visa enabling them to remain lawfully in Australia, or to be removed or deported to another country.<sup>21</sup>

4.6 However, under the *Migration Act* 1958, those whose detention cannot be ended in any of these ways must continue to be detained.<sup>22</sup> Due to the lack of any independent review, a rejected person seeking asylum may be subject to indefinite detention pending removal.

4.7 Additionally, Australian law prohibits the release of detained people seeking asylum while their status is being determined, notwithstanding the relevant Minister's ability to lift the bar.<sup>23</sup>

4.8 It can take more than five years for a final determination to be made on a person seeking asylum's claim. Meanwhile, the person remains in detention until they are recognised as a refugee under the Refugee Convention and granted a visa, or are removed.<sup>24</sup>

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<sup>19</sup>UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html>.

<sup>20</sup>Australian Human Rights Commission, 'Asylum Seekers and Refugees,' accessed 2021, available at <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/asylum-seekers-and-refugees>.

<sup>21</sup>Migration Act 1958 (Cth).

<sup>22</sup>Ibid.

<sup>23</sup>Ibid.

<sup>24</sup>Ibid.

4.9 This delay can be due to a number of factors including the nature of the claim itself and the difficulty in obtaining relevant information. However, in some cases it is also due to the shortcomings of Australia's refugee determination system, which lacks adequate safeguards to prevent errors in decision making at first instance or in relation to subsequent applications, and provides asylum applicants with inadequate advice and representation beyond appeal to the Administrative Appeals Tribunal.

4.10 There is mounting evidence that detainees, particularly those who are kept in prolonged or indefinite detention, are at high risk of experiencing chronic depression, incidents of self-harm or attempted suicide.<sup>25</sup>

4.11 AIA considers it unacceptable that exercising the right to seek asylum in Australia from human rights abuses in other countries should be met with a system that further violates human rights, including mandatory administrative detention of a prolonged or indefinite period of time.

4.12 The ICCPR prohibits arbitrary detention and provides that a detained person must be able to take proceedings before a court that can determine the lawfulness of detention and order release where detention is unlawful.<sup>26</sup>

4.13 AIA maintains that detention should only take place in exceptional circumstances, consistent with international human rights standards.<sup>27</sup> Persons whose detention does not meet such standards should be immediately released from detention. Persons who are detained beyond a maximum period of detention which should be reasonable in its length and as specified in national law should be automatically released.

**Recommendation 2:** Ensure that no person is detained in violation of their human rights and bring an end to the mandatory and indefinite detention of people waiting for their asylum claims to be assessed.

**Recommendation 3:** Establish a formal independent review process to assess on a case-by-case basis the necessity and proportionality of detention of all refugees and people seeking asylum who are currently detained in Australia and offshore.

## The Impacts of Offshore Detention

4.14 The current policy of the Australian Government is that no person who arrives in the country by boat seeking asylum can ever settle in Australia.<sup>28</sup> Instead, anyone who arrives by boat is forcibly taken by the Government of Australia to offshore 'Regional Processing Centres'.<sup>29</sup>

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<sup>25</sup>See Amnesty International, 'Island of Despair,' 2016, available at <https://www.amnesty.org.au/wp-content/uploads/2016/10/ISLAND-OF-DESPAIR-FINAL.pdf>.

<sup>26</sup>Above, n2 Article 9.

<sup>27</sup>UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers. Geneva: UNHCR, United Nations High Commissioner for Refugees (February 1999) (UNHCR Revised Guidelines on Detention), Guideline 3.

<sup>28</sup>Above, n20.

<sup>29</sup>Ibid.

4.15 A mainstay of the Australian Government's offshore detention regime, Nauru and Australia signed a new memoranda of understanding about offshore processing on the island as recently as 2021.<sup>30</sup>

4.16 Under this agreement, Nauru is responsible for assessing people's claims for international protection and hosting the facilities required to detain them, while Australia is committed to bearing the entirety of the cost.<sup>31</sup>

4.17 As a matter of international law, a state can be held responsible for the conduct of its officials when they are outside its territory. The test for whether Australia retains primary responsibility over refugees and people seeking asylum offshore is not whether those individuals are located on Australian soil, but whether Australia exercises "effective power and control" over them.

4.18 Currently there are more than 100 refugees and people seeking asylum remaining in Nauru.<sup>32</sup>

4.19 Similar arrangements existed between the Australian and Papua New Guinea Government, however this was terminated at the end of 2021, with - according to the Australian Government - responsibility for the more than 100 refugees and people seeking asylum remaining there transferring to the Papua New Guinea Government, despite a lack of alternative resettlement options.<sup>33</sup>

4.20 The Australian Government has repeatedly claimed that this policy of offshore detention deters people-smugglers and protects people who might otherwise undertake the hazardous boat crossing to Australia.

4.21 However, since its inception, offshore processing has been designed to be punitive and has been widely promoted by a succession of Australian governments as a deterrent to refugees and people seeking asylum, rather than people-smugglers.

4.22 This deterrence-based response to those attempting to reach safety by boat, which includes boat push-backs, is both abusive and unsustainable.

4.23 It has seen more than a dozen avoidable deaths, along with serious and worsening physical and mental health impacts.<sup>34</sup>

4.24 Furthermore, it has seen the deteriorating security and safety of those continuing to be detained under this regime, with people seeking asylum being forcibly returned to their countries of origin and then becoming victims of persecution, violence, torture and death.<sup>35</sup>

4.25 Despite a lack of services for refugees and people seeking asylum detained in these conditions, the extraordinarily high financial costs of this policy continues, with the operation of the

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<sup>30</sup>Department of Foreign Affairs and Trade, 'Memorandum of Understanding between the Republic of Nauru and Australia on the Enduring Regional Processing Capability in Republic of Nauru,' 2021 available at <https://www.dfat.gov.au/geo/nauru/memorandum-understanding-between-republic-nauru-and-australia-enduring-regional-processing-capability-republic-nauru>.

<sup>31</sup>Ibid.

<sup>32</sup>Department of Home Affairs, 'Visa Statistics,' 2021 available at <https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/live/immigration-detention>.

<sup>33</sup>Legal and Constitutional Affairs Legislation Committee, 'Official Committee Hansard,' 2021, pg. 59, available at [https://parliinfo.aph.gov.au/parliInfo/download/committees/estimate/25201/toc\\_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee\\_2021\\_10\\_25\\_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/25201/0000%22](https://parliinfo.aph.gov.au/parliInfo/download/committees/estimate/25201/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2021_10_25_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/25201/0000%22)

<sup>34</sup>Monash University, 'Australian Border Deaths Database,' 2021 available at [https://www.monash.edu/\\_data/assets/pdf\\_file/0018/2523141/BOB-Research-Brief-18- border-deaths-annual-report-2020\\_Final.pdf](https://www.monash.edu/_data/assets/pdf_file/0018/2523141/BOB-Research-Brief-18- border-deaths-annual-report-2020_Final.pdf)

<sup>35</sup>Above, n25.

Nauru 'Regional Processing Centre' to cost Australian taxpayers \$220 million over the next six months alone.<sup>36</sup>

4.26 The 'Regional Processing Centre' on Nauru is kept well-hidden from international scrutiny. Most journalists are denied access and in 2015 the Australian Government passed the *Australian Border Force Act 2015*, which at the time carried a prison sentence of up to two years for any staff member who spoke out publicly about conditions in the Centre.<sup>37</sup> Although now significantly amended, the secrecy amendments still apply to information that may compromise Australia's security, defence or international relations.<sup>38</sup>

4.27 Despite this, in 2016 AIA travelled to Nauru, interviewing 58 refugees and people seeking asylum and gathering documentary, video and audio evidence about conditions on the island.<sup>39</sup> Researchers also interviewed individuals who are currently employed by, or who have previously worked for, companies or organisations under contract to the Australian Department of Immigration and Border Protection on Nauru.<sup>40</sup>

4.28 In 2019, AIA also travelled to Papua New Guinea, interviewing more than 15 refugees and people seeking asylum, gathering documentary, video and audio evidence about conditions on the island.<sup>41</sup>

4.29 Mental illness and incidents of self-harm among refugees and people seeking asylum in offshore detention are shockingly commonplace. Nearly all of the people whom AIA's researchers and campaigners have met reported mental health issues of some kind: high levels of anxiety, trouble sleeping, and mood swings were frequently mentioned. Almost all said that these problems began when they were transferred offshore.<sup>42</sup>

4.30 This is in part due to the debilitating uncertainty refugees and people seeking asylum face about their future. Although refugees and people seeking asylum on Nauru and in Papua New Guinea are no longer technically detained, they are nonetheless in a detention-like environment. In all intents and purposes Nauru and Papua New Guinea are open-air prisons that people cannot leave, even when they have been officially recognised as refugees.

4.31 Many of the refugees and people seeking asylum interviewed by Amnesty described how they or their friends and family had been attacked and/or subjected to verbal abuse.<sup>43</sup> On Nauru, this includes physical attacks on men, children and women – including sexual assaults – as well as robbery and attempts to break into their homes.<sup>44</sup>

4.32 Refugees and people seeking asylum who were victims of crime said that the police failed to adequately investigate their complaints, a claim supported by Nauru's former Chief Justice.<sup>45</sup>

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<sup>36</sup>The Guardian, 'Nauru Offshore Regime to Cost Australian Taxpayers Nearly \$220m Over Next Six Months,' 2022 available at [https://www.theguardian.com/world/2022/jan/24/nauru-offshore-regime-to-cost-australian-taxpayers-nearly-220m-over-next-six-months?utm\\_term=61edb3a4a6fd94b801cdf9a59685ac2e&utm\\_campaign=MorningMailAUS&utm\\_source=esp&utm\\_medium=Email&CMP=orningmailau\\_email](https://www.theguardian.com/world/2022/jan/24/nauru-offshore-regime-to-cost-australian-taxpayers-nearly-220m-over-next-six-months?utm_term=61edb3a4a6fd94b801cdf9a59685ac2e&utm_campaign=MorningMailAUS&utm_source=esp&utm_medium=Email&CMP=orningmailau_email).

<sup>37</sup>Australian Border Force Act 1958 (Cth).

<sup>38</sup>Ibid.

<sup>39</sup>Above, n25.

<sup>40</sup>Ibid.

<sup>41</sup>Amnesty International, 'Game Over,' 2019, available at <https://www.amnesty.org.au/gameover/>.

<sup>42</sup>Above, n25,40.

<sup>43</sup>Ibid.

<sup>44</sup>Ibid; Amnesty International, 'Until When?,' 2018, available at <https://www.amnesty.org/en/documents/asa34/9422/2018/en/>.

<sup>45</sup>Geoffrey M. Eames AM QC, 'Submission to Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru,' 2015, available at <http://www.aph.gov.au/DocumentStore.ashx?id=1c235c65-51bc4979-93f3-320175ad7c9e&subId=352831>.

4.33 The health care available in offshore processing is also inadequate. Certain medical services, specialists, tests and procedures are not available. Individuals said they had to wait for months to see a visiting specialist or undergo a necessary test, even when, according to the doctors, their condition was serious, such as suspected cancer.<sup>46</sup>

4.34 Descriptions of medical transfers to and from Nauru and Papua New Guinea expose a system that traumatises the patient and appears to be done in a manner that is not in the best interests of patients. The medical transfer of patients depends on the discretion of the Home Affairs Minister, and medical professionals can be overruled or their advice disregarded.<sup>47</sup>

4.35 This system has resulted in the avoidable deaths of more than a dozen refugees and people seeking asylum, including that of Hamid Khazaei. The Queensland Coroner found that Mr Khazaei's death was preventable and the result of "compounding errors" in health care provided under Australia's offshore immigration detention system.<sup>48</sup>

4.36 The inescapable conclusion, made clear by the purported intent of this system, is that the abuse and anguish that constitutes the daily reality of refugees and people seeking asylum held offshore is the express intention of the Australian Government.

4.37 The conditions on Nauru and in Papua New Guinea - refugees' severe mental anguish, the intentional nature of the system, and the fact that the goal of offshore processing is to intimidate or coerce people to achieve a specific outcome - amounts to torture.

4.38 In furtherance of a policy to deter refugees and people seeking asylum, the Australian Government has made a calculation in which intolerable cruelty and the destruction of the physical and mental integrity of hundreds of children, men and women, have been chosen as a tool of government policy. In doing so the Australian Government is in breach of international human rights law and international refugee law.

4.39 The authority responsible for the systematic human rights abuses is the Australian Government. It is the Australian Government that set up the offshore processing system and the Australian Government that has forcibly transferred people seeking asylum offshore. A range of Australian Government officials and contractors – on Nauru, Papua New Guinea and in Australia – are involved with the operation of these regimes. The Australian authorities are continuously informed about what is happening.

4.40 The depravity of such a policy is further highlighted when it is revealed that while refugees and people seeking asylum have been detained in these conditions, for many approaching nine years, there have been solutions on offer.

4.41 Since 2013, the New Zealand Government has offered to resettle 150 refugees per-year from Australia's offshore detention regime, an offer that has been reaffirmed by successive Prime Ministers, most recently in 2021.<sup>49</sup> Despite this, the Australian Government has not publicly accepted this offer.

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<sup>46</sup>Above, n25.

<sup>47</sup>Migration Amendment (Repairing Medical Transfers) Bill 2019 (Cth).

<sup>48</sup>ABC, 'Asylum Seeker Hamid Khazaei's Death From Leg Infection Was Preventable, Queensland Coroner Finds,' 2018, available at <https://www.abc.net.au/news/2018-07-30/asylum-seeker-hamid-khazaei-coronial-inquest-death-preventable/10050512>.

<sup>49</sup>The Guardian, 'New Zealand Offer to Resettle Australia's Offshore Refugees Still Active As US Deal Nears End,' 2021, available at <https://www.theguardian.com/australia-news/2021/may/30/new-zealand-offer-to-resettle-australias-offshore-refugees-still-active-as-us-deal-nears-end>.

**Recommendation 4:** End the policy of offshore processing and detention and permanently close the 'Regional Processing Centre' on Nauru.

**Recommendation 5:** Bring all refugees and people seeking asylum on Nauru and remaining in Papua New Guinea to Australia, and release them into the community whilst they await permanent options. Accept the New Zealand offer of resettlement as a matter of urgency.

## The Impact of Alternative Places of Detention

4.42 Another population relevant to offshore processing on Nauru and Papua New Guinea is a group of approximately 1200 people currently in Australia. These are refugees and people seeking asylum who were previously held offshore, and who were brought to Australia for their own, or a family member's medical treatment.

4.43 The majority of these refugees and people seeking asylum are living in the community on some form of bridging visa or in community detention, awaiting permanent options of resettlement whilst contributing to the communities in which they now live.

4.44 Despite this, approximately 70 refugees and people seeking asylum remain detained in what are referred to as 'Alternative Places of Detention' (APODs) and various other detention centres around Australia.<sup>50</sup>

4.45 However, there is nothing 'alternative' to this form of detention, with many reporting that conditions within APODs are far more restrictive than that of traditional detention centres. According to the United Nations High Commissioner for Refugees 'Revised Guidelines on Detention', APODs do not fall within the parameters of 'alternatives to detention'.<sup>51</sup>

4.46 AIA has received reports of refugees and people seeking asylum remaining locked in their rooms for upwards of 23 hours a day. They have nearly no access to the outside world, yet alone the proper treatment they were brought to Australia to receive.<sup>52</sup> Many have been in these conditions for upwards of two years.

4.47 According to the Australian Human Rights Commission, APODs should only ever be used for "very short periods of time and under exceptional circumstances."<sup>53</sup>

4.48 To make matters worse, many of the refugees and people seeking asylum being held in these conditions have physical and mental health conditions that require lengthy periods of treatment, and in many cases, have deteriorated under the current detention conditions of APODs.

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<sup>50</sup>Above, n32.

<sup>51</sup>Office of the United Nations High Commissioner for Refugees, 'UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers,' 1999, available at <https://www.unhcr.org/en-au/protection/globalconsult/3bd036a74/unhcr-revised-guidelines-applicable-criteria-standards-relating-detention.html>.

<sup>52</sup>Public Interest Advocacy Centre, 'Healthcare denied: Medevac and the long wait for essential medical treatment in Australian immigration detention,' 2021 available at [https://piac.asn.au/wp-content/uploads/2021/12/PIAC\\_Medevac-Report\\_2021\\_IssueE\\_03122150-1-1.pdf](https://piac.asn.au/wp-content/uploads/2021/12/PIAC_Medevac-Report_2021_IssueE_03122150-1-1.pdf)

<sup>53</sup>Australian Human Rights Commission, 'Inspections of Australia's immigration detention facilities 2019 Report,' 2019, available at <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspections-australias-immigration-detention>.



4.49 The Home Affairs Minister has the ability to grant residence determination to refugees and people seeking asylum who are being held in these conditions, which would allow people to live in the community while legally remaining in immigration detention.<sup>54</sup> The Minister can also grant a Bridging Visa (recently this option has been preferred, however while the Bridging Visa includes work rights it does not include any welfare support).

4.50 Over the last year, more than 100 refugees and people seeking asylum have been released into the community. However, no reasoning has ever been given as to why some have been released, whilst others remain detained, reinforcing the arbitrary nature of the detention for those who remain. Many with mental health issues already at breaking point.

**Recommendation 6:** Ensure APODs are used as a detention measure of last resort, and for the shortest possible amount of time.

**Recommendation 7:** Release all refugees and people seeking asylum who have been held in Australia's offshore detention regime who are now detained in Australia into the community whilst they await permanent solutions.

### The Impact of Temporary Visas

4.51 AIA has consistently denounced the policy of granting temporary protection to refugees seeking asylum in Australia.<sup>55</sup>

4.52 It is AIA's position that the Australian Government's use of temporary visas is a further measure to deter those seeking asylum in Australia.

4.53 There are two types of temporary visas for refugees who arrived without valid visas: Temporary Protection Visas (TPVs) and Safe Haven Enterprise Visas (SHEVs).

4.54 A TPV allows refugees to stay in Australia for a maximum of three years, after that their protection claims need to be reassessed. The new temporary visa policy differs from the previous one as TPV holders are allowed to apply for another temporary visa only - they will never be eligible for permanent residency. The logic underlying this policy is unnecessarily punitive since most refugees with temporary status are unlikely ever to be able to go home. They would then have to reapply for temporary protection for their whole life. The cost to taxpayers of re-processing an individual every three years is both wasteful and unnecessary.

4.55 The Safe Haven Enterprise Visa (SHEV) is another form of temporary visa, which is issued for a period of five years. Contrary to TPVs, it allows people to apply for a permanent migration visa. To apply for a permanent migration visa, SHEV holders have to commit to study or work in "a designated regional or rural area" without accessing income support for a minimum period of three-and-a-half-years. Even then, they must meet all the conditions for the permanent migration visa (for example a skilled or family visa), because they cannot apply for a permanent protection

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<sup>54</sup>Above, n20.

<sup>55</sup>See Amnesty International "Submission to the Select Committee on Temporary Migration's Inquiry Into Impacts of Temporary Migration," 2020, available at [https://www.amnesty.org.au/wp-content/uploads/2020/07/20200730\\_Submission\\_Temporary-Migration.pdf](https://www.amnesty.org.au/wp-content/uploads/2020/07/20200730_Submission_Temporary-Migration.pdf).

visa. SHEVs theoretically offer a pathway to permanent residency, however most are unable to satisfy the very strict eligibility criteria.

“I have been living a temporary life now for the past 10 years, and it has taken away my hopes and dreams. People like me came to Australia to seek safety and to be able to rescue our family and loved ones. Instead we have been tortured mentally and psychologically. We don't even have our basic human rights that every human being deserves, like simply living with your family in a safe place that you can call home. We don't have access to a formal education and we're unable to buy a house. The system has failed to protect us and our loved ones. Instead it tortured us.”

**Zaki Haidari, refugee and TPV holder**

4.56 For TPV and SHEV holders, any departure from Australia without permission from the government (only granted in compelling circumstances) will result in a cancellation of their visa. This restriction of the freedom of movement imposed through government policy contravenes Australia's obligations under the ICCPR.<sup>56</sup>

4.57 TPV and SHEV holders cannot sponsor their family members to join them and will never be able to reunite with their loved ones. Yet the principle of family unity is fundamental in international law and repeated UNHCR Executive Committee Conclusions have emphasised the importance of maintaining family unity.<sup>57</sup>

4.58 Temporary protection condemns people to being second class citizens for the rest of their lives. They will not have access to the same services and support as others, with the Australian social security system discriminating between temporary and permanent residence in a number of respects.

4.59 Although TPV and SHEV holders are granted work rights in Australia, it has been shown that employers are more reluctant to engage them in permanent, meaningful employment. For example, the three-years expiry period for TPV holders has often limited refugees to finding short-term and potentially unstable employment.

4.60 TPV and SHEV holders have access to Medicare and get some social support payments through Centrelink payments. However, they are not eligible for the full range of settlement support services available to other humanitarian entrants. For example, the only income support they can receive is known as the “Special Benefit”. It is a stopgap benefit for the most vulnerable and is not designed to support people in the long-term. They are not eligible for other benefits such as the Newstart Allowance, Youth Allowance or Austudy.

4.61 People on TPVs and SHEVs are not eligible for Federal programs designed to assist students with financing tertiary study. If they want to do further or university study, they will lose their Special

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<sup>56</sup>ICCPR, Art. 12.

<sup>57</sup>UNHCR, 'Annual Tripartite Consultations on Resettlement: Family Reunification in the Context of Resettlement and Integration,' 2001, available at <https://www.unhcr.org/3b30baa04.pdf>.

Benefit allowances if they take a course of more than 12 months. Without government support, people are forced to pay international student rates to attend TAFE and university. The costs of these fees can be in the thousands of dollars effectively preventing them from furthering their education.

4.62 Furthermore, the current visa system involves months-long delays of processing applications. People face the constant threat of being left without regular visa status, which means they would be without rights and entitlements.

4.63 AIA has found that far from offering the protection refugees require, temporary protection rules create prolonged uncertainty, separation, frustration, fear and mental ill-health. On recognising an individual's refugee status, Australia must provide a long-term durable solution for their protection and that of their family. The mere temporary nature of the visa prevents refugees from fully integrating into the country. The temporary visa policy ultimately deprives refugees from what they need the most, a sense of safety. They are prisoners of endless procedures in which every step contains the risk of being rejected and forced to leave the country after years of contributing to Australian society.

**Recommendation 8:** Abolish Temporary Protection Visas and Safe Haven Enterprise Visas and allow for all refugees to have permanent protection in Australia.

## 5. A Human Rights Based Approach

5.1 AIA recommends a human rights-based approach and alternative solutions to the current bipartisan immigration and border protection policies (particularly towards those arriving by boat) which successive Australian Governments have applied to those seeking to enter Australia to escape conflict, poverty and natural disasters in their countries of origin.<sup>58</sup>

5.2 There is a need to protect the rights of people who migrate without discrimination, as well as addressing the root causes of conflict, climate change, natural disasters and persecution.

5.3 Australia needs to discard its deterrence-focused strategy and instead adopt a human rights based approach and work to more effectively engage the region on issues relating to protection, in order to mitigate the risks of people making dangerous onward journeys by sea and have a rights respecting framework to receive and process those who are forced to do so.

### Independent Inspection of Detention Facilities

5.4 Four years ago the Australian Government made a commitment under the Optional Protocol to the Convention Against Torture (OPCAT) to implement an independent inspection system for all places of detention.<sup>59</sup>

5.5 The implementation of these monitoring systems, known as 'National Preventive Mechanisms' (NPM) would have ensured independent oversight across Australia's detention network.

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<sup>58</sup>Amnesty International, 'A Better Plan,' 2018, available at <https://www.amnesty.org.au/wp-content/uploads/2018/05/Amnesty-A-Better-Plan-refugees.pdf>.

<sup>59</sup>Department of Foreign Affairs and Trade, 'Improving oversight and conditions in detention,' 2017 available at <https://www.dfat.gov.au/news/news/Pages/improving-oversight-and-conditions-in-detention>.

5.6 AIA notes with great concern that more than 13 years on from Australia signing OPCAT, Australia's two most populous States, New South Wales and Victoria have failed to introduce their own NPM Models.

5.7 Despite the responsibility of NPM implementation falling to State and Territory Government's, Australia's immigration detention system is managed at a Federal level, and it is the Federal Government that must ensure Australia meets its international treaty obligations.

5.8 To achieve this, AIA recommends that any NPM model designed to monitor immigration detention facilities meet the following criteria:

1) *Independence;*

- a) The functional and operational independence of the NPM and its members must be guaranteed.<sup>60</sup> This means that the NPM should be formed in such a way that it does not constitute any part of the government, parliament, judiciary or prison system.
- b) The appointment procedure for the members of the NPM should be through an open, transparent and inclusive process which involves a wide range of stakeholders, including civil society. It should set out a period of office that should be sufficient to foster the independent functioning of the NPM.<sup>61</sup>
- c) The state should not appoint to the NPM members who hold positions that could raise questions of conflict of interest.<sup>62</sup>
- d) Members of the NPM must be guaranteed privileges and immunities that are necessary for them to function independently.<sup>63</sup>
- e) The NPM should enjoy complete financial and operational autonomy and avoid actual and perceived conflicts of interest when carrying out its functions.<sup>64</sup>
- f) The NPM should have its own premises. Where the NPM performs other functions in addition to those under the OPCAT, its NPM functions should be located within a separate unit or department, with its own staff and budget.<sup>65</sup>
- g) The NPM should be able to draft its own rules and procedures.

2) *Adequate funding, free from political restrictions;*

- a) The NPM must have the necessary resources, including adequate funding to function effectively.<sup>66</sup>
- b) The founding instrument should provide for long-term funding and ensure that funding can not be restricted for spurious reasons e.g. as a punishment for criticism.
- c) The NPM should have financial control over its own staff, including to hire, dismiss and pay its own staff.<sup>67</sup>

3) *Independent, capable, gender-balanced and representative members*

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<sup>60</sup>UN General Assembly, Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT), 9 January 2003, A/RES/57/199, article 18(1), available at: <https://www.refworld.org/docid/3de6490b9.html>.

<sup>61</sup>Paris Principles: composition and guarantees of independence (Paris Principles), principle 3 and Subcommittee on the Prevention Against Torture (SPT) Guidelines on NPMs at para. 9 and 16.

<sup>62</sup>SPT Guidelines on NPMs at paras.18.

<sup>63</sup>OPCAT article 35 & SPT Guidelines on NPMs at para.26.

<sup>64</sup>SPT Guidelines on NPMs at paras. 12 and 30.

<sup>65</sup>Paris Principles, principle 2 and SPT Guidelines on NPMs at para.32.

<sup>66</sup>OPCAT article 18(3) and SPT Guidelines on NPMs at para.11.

<sup>67</sup>Paris Principles, principle 2.

- a) The experts of the NPM must have the required capabilities and professional knowledge to function effectively, ensuring gender balance and adequate representation of ethnic and minority groups.<sup>68</sup>
  - b) The appointment procedure detailed in the founding instrument should take into account the specific expertise and experience required for visiting places of detention to prevent torture and other ill-treatment. Relevant experts would include lawyers, doctors including forensic specialists, psychologists, penitentiary management experts, and human rights experts.<sup>69</sup>
  - c) The members and staff of the NPM should regularly review their working methods and undertake training in order to enhance their ability to execute their functions effectively.<sup>70</sup>
- 4) *Widest possible application of the definition of “places of detention” and “detainees”*
- a) The founding instrument of the NPM must guarantee it access to any place under the state party's jurisdiction (i.e where it exercises effective control) where people are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence. The NPM must function throughout a state party, including all parts of a federal state without limitations or exceptions.<sup>71</sup>
  - b) The definition of “places of detention” should include any places where people are or may be deprived of their liberty by any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.<sup>72</sup>
  - c) This includes police stations, military and other security forces' stations and detention centres, all pre-trial detention centres, remand prisons, prisons for sentenced persons (civilian and military), places outside prisons where prisoners are employed, hospitals or clinics where prisoners are treated, rehabilitation and similar centres for juveniles, immigration centres, transit areas at international ports, transit vehicles, centres for detained people seeking asylum, refugees or internally displaced persons, psychiatric institutions, and other places of administrative detention where people are not permitted to leave at will, and places believed to be unofficial or secret places of detention.
- 5) *Full, immediate, unhindered access to all places of detention and detainees*
- a) The NPM must be allowed to conduct regular visits, announced and unannounced, to all places of detention, their installations and facilities.<sup>73</sup>
  - b) The NPM must be able to choose the places it wants to visit and set the frequency of its regular visits without interference.<sup>74</sup>
  - c) If there are several NPMs they must collectively monitor all places of detention.

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<sup>68</sup>OPCAT article 18(2) and SPT Guidelines on NPMs at para. 17 and 20.

<sup>69</sup>SPT Guidelines on NPMs at paras. 17 and 20.

<sup>70</sup>SPT Guidelines on NPMs at paras. 31.

<sup>71</sup>OPCAT article 4(1) and 29 and SPT Guidelines on NPMs at para. 24 and 33.

<sup>72</sup>OPCAT article 4(1) and (2).

<sup>73</sup>OPCAT articles 4 and 20(c) and SPT Guidelines on NPMs at para. 24 and 25.

<sup>74</sup>OPCAT article 20(e) and SPT Guidelines on NPMs at para.25.

- d) The NPM should be able to initiate contact with directors of places of detention and the executive, in particular where urgent action is required.

6) *Unrestricted access to all relevant information*

- a) The NPM must have access to all information relating to the number of places of detention and their location.<sup>75</sup>
- b) The NPM must have access to all information relating to the number of persons deprived of liberty.<sup>76</sup>
- c) The NPM must have access to all information about the treatment of persons deprived of their liberty and conditions of detention.<sup>77</sup>
- d) The NPM must be able to choose the persons it wants to interview and to conduct private interviews.<sup>78</sup>

7) *Unrestricted, safe access to the NPM*

- a) Guarantees must be put in place to ensure that no person or organisation is subject to any form of sanction, reprisal, or other harm for communicating any information, whether true or false, to the NPM.<sup>79</sup>
- b) Procedures must be put in place to ensure that confidential information collected by the NPM is not published without the express consent of the person concerned.<sup>80</sup>
- c) A procedure should be put in place to ensure that information regarding the NPM and on ways to contact it, is readily available to the public and all persons deprived of their liberty.

8) *Direct, unhindered, untapped communications with the Subcommittee*

- a) The NPM must be able to communicate and meet with the Subcommittee without interference.<sup>81</sup>
- b) If there are several NPMs there should be a clear and coherent process for coordinating and communicating with each other and the SPT.

9) *NPMs recommendations and follow-up to be taken seriously*

- a) The NPM must be allowed to make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment. It should also be granted the power to submit proposals and observations concerning existing or draft legislation.<sup>82</sup>
- b) The NPM should be able to independently make public the findings and recommendations from its visits without interference. The NPM should be able to

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<sup>75</sup>OPCAT article 20(a).

<sup>76</sup>OPCAT article 20(a).

<sup>77</sup>OPCAT article 20(b).

<sup>78</sup>OPCAT articles 20(d) and (e).

<sup>79</sup>OPCAT article 21(1) and SPT Guidelines on NPMs at paras. 14 and 27.

<sup>80</sup>OPCAT article 21(2).

<sup>81</sup>OPCAT articles 12(c) and 20(f).

<sup>82</sup>OPCAT article 19(b) and (c) and SPT Guidelines 35 and 36.

- submit reports to and, where appropriate, address in person directors of places of detention, legislative bodies, the Executive and other political institutions.
- c) The NPM should actively seek to follow-up on the implementation of any recommendations which the Subcommittee has made in relation to the country in question, liaising with the Subcommittee when doing so.<sup>83</sup>
  - d) The relevant authorities must examine the recommendations of the NPM and to discuss their implementation with the members of the NPM in a follow-up process.<sup>84</sup>
  - e) The relevant authority must publish and disseminate the annual reports of the NPM. It should also ensure that it is presented to, and discussed in the national legislative assembly, or Parliament or other political institutions. The Annual Reports of the NPM should also be transmitted to the SPT which will arrange for their publication on its website.<sup>85</sup>

5.9 Whilst the proper implementation of OPCAT and NPMs will ensure independent oversight across Australia's detention network, in the words of Mehdi Ali, a refugee currently detained at the Park Hotel APOD:

*"The issue is not about the quality of life in detention. The issue is detaining people without any explanation or reason. The issue is detention itself."<sup>86</sup>*

**Recommendation 9:** Ensure the effective establishment of NPMs across all Australian jurisdictions.

### Alternatives to Detention

5.10 The United Nations High Commissioner for Refugees 'Revised Guidelines on Detention' calls upon states to consider alternatives to the detention of people seeking asylum until their status is determined.<sup>87</sup> In accordance with these guidelines, the issuing of bridging visas may be considered to be an alternative to detention.<sup>88</sup>

5.11 As highlighted previously, the Australian Government has made a number of recent policy changes - namely the issuing of bridging visas - that have to some extent softened the harsh nature of its detention system.

5.12 Although welcomed, AIA has expressed concern with respect to these visas, as their issuing is often arbitrary, whilst also in practice restricting refugees and people seeking asylum's basic rights.

5.13 More recently, refugees and people seeking asylum who have been released into the community in this way are being granted Bridging Visa E (BVE).

5.14 A BVE allows someone who is 'unlawful' to stay in Australia lawfully while their immigration matter is finalised. In most cases, this reflects the limbo many refugees and people seeking asylum find themselves in; unable to return to their country of origin, unable to permanently resettle in Australia due to their mode of arrival, and yet with no other permanent solution.

<sup>83</sup>SPT Guidelines on NPMs at para. 38.

<sup>84</sup>OPCAT article 22 and SPT Guidelines on NPMs at paras. 13.

<sup>85</sup>OPCAT article 23 and SPT Guidelines on NPMs at paras. 29.

<sup>86</sup>Mehdi Ali [@MehdiAli98]. 2022 January 20, available at <https://twitter.com/MehdiAli98/status/1484121838502682629?s=20>

<sup>87</sup>Above, n26.

<sup>88</sup>Above, n26.

5.15 While in most cases a BVE holder will be granted working rights, this trade off means BVE holders are not eligible to receive Centrelink and are ineligible for the Status Resolution Support Services (SRSS) program.<sup>89</sup>

5.16 The reality of this means that refugees and people seeking asylum who have been detained for close to a decade in conditions that amount to torture - are released with the expectation to find employment and accommodation with almost no support from the Australian Government.

5.17 This crisis is exacerbated by issues such as language barriers, and lack of appropriate training and support. This means that many refugees and people seeking asylum with work rights often face the prospect of significant financial hardship.

“I am on a temporary bridging visa which means this visa has lots of restrictions. I can not study and I can not get qualifications which means I can't even think about my passion for the job I desire. All I want to do is make and sell my own wine, but because of my visa I'm not allowed to. For me it's like Iran! I left Iran to come to Australia for safety and now I live under the same restrictions! There is also no access to any financial support and it is extremely difficult to gain employment on a temporary visa and they ask for a resume. How do I explain to potential employers that I have been imprisoned for nearly 8 years? And they expect me to find somewhere to live with no tenant history or references. And there is also the trauma to deal with! I am free but still chained. Many people have been living in the community with these conditions for years and years. We all need permanent visas to live decent lives, to contribute.”

**Farhad Bandesh**, *refugee formally detained in Papua New Guinea and at the Mantra Hotel APOD.*

“I was released from the Park Hotel prison to a kind of freedom, but only with limited rights. It's like running out from an invisible coffin to the middle of nowhere. Everyone has the human rights to study and get a qualification. Why is the Australian Government separating us from others? I still deal with the trauma after 8 years of being in detention for no crime, but I don't give up! I believe one day I will get my rights back.”

**Mostafa Azimitabar**, *refugee formally detained in Papua New Guinea and at the Mantra and Park Hotel APOD.*

5.18 Refugees and people seeking asylum who are granted bridging visas should be afforded basic rights and entitlements, including the right to employment, education, social security and access to health care.

5.19 Furthermore, the issuing of bridging visas should be made by an independent Court empowered to review the necessity of detention and order release if continued detention is found to be unreasonable or disproportionate to the objectives to be achieved. This review process should follow the standards set out by international refugee law.

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<sup>89</sup>Australian Human Rights Commission, 'Lives On Hold: Refugees and Asylum Seekers in the Legacy Caseload,' 2019 available at [https://humanrights.gov.au/sites/default/files/document/publication/ahrc\\_lives\\_on\\_hold\\_2019.pdf](https://humanrights.gov.au/sites/default/files/document/publication/ahrc_lives_on_hold_2019.pdf).



5.20 Persons whose asylum claims are yet to be finally determined should be provided immediately with bridging visas with basic rights and entitlements unless the review process establishes that it is necessary and proportionate to the objective to be achieved to detain them.

5.21 AIA maintains that recourse to more restrictive forms of detention should only take place in those circumstances where detention may exceptionally be resorted to as specified by the UNHCR, and detention should in all cases be in compliance with international human rights law and standards.

5.22 Persons whose applications for protection have been finally rejected on the basis of fair and satisfactory procedures should be granted a bridging visa with basic rights and entitlements pending their removal unless the review process establishes that it is necessary and proportionate to detain them.

5.23 Such a visa should automatically translate into a residency permit if there is no real likelihood or prospect of removal from Australia within a reasonable period of time.

**Recommendation 10:** Ensure that people seeking asylum who arrive in Australia without adequate documentation are detained only when their detention is consistent with international human rights standards. Such legislation should be based on a general presumption against detention.

**Recommendation 11:** Specify in national law a statutory maximum duration for detention which should be reasonable in its length. Once this period has expired the individual concerned should automatically be released.

**Recommendation 12:** Ensure that people seeking asylum who are detained have regular and automatic access to courts empowered to review the necessity of detention and to order release if continued detention is found to be unreasonable or disproportionate to the objectives to be achieved.

**Recommendation 13:** Establish a new class of bridging visa that allows for people seeking asylum to remain in the community with rights and entitlements as outlined above.

### **Increasing the Humanitarian Intake**

5.24 The number of arrivals through Australia's humanitarian program is currently at its lowest in 45 years, with only 5947 visas issued out of a reduced annual program of 13,750 places.<sup>90</sup> This is in stark contrast to countries like the United States, which have committed to increasing their humanitarian intake to 125,000 by the end of 2022.<sup>91</sup>

<sup>90</sup> Department of Home Affairs, 'Australia's Humanitarian Program 2021–22,' 2021, available at <https://www.homeaffairs.gov.au/research-and-stats/files/australia-offshore-humanitarian-program-2020-21.pdf>.

<sup>91</sup> Ibid.

**Recommendation 14:** Increase Australia’s overall humanitarian program to *at least* 30,000 places.

### **Expanding Options for Private and Community Sponsorship**

5.25 AIA has consistently called for a fair and accessible Community Sponsorship Program to enable broader participation from families, groups and businesses.<sup>92</sup>

5.26 Whilst AIA welcomes changes announced to Australia’s Community Sponsorship Program towards the end of 2021, AIA remains concerned that places under the renewed model contribute to Australia’s already dismal humanitarian intake.

5.27 A fair Community Sponsorship Program must be above and beyond any existing humanitarian visa quotas. Ensuring community sponsorship places are additional to Australia’s existing humanitarian intake will mean that the government is not merely passing the buck by shifting their responsibility onto the community.

**Recommendation 15:** Further reform Australia’s Community Sponsorship Program so that it adds to (rather than takes places from within) the humanitarian program.

### **Assessing Refugee Applications Within a Prompt, Effective and Fair Time Period**

5.28 Australia can reduce the incidence of dangerous journeys by making sure refugee claims can be processed in an efficient, fair and timely way in countries across Asia-Pacific. Australia should leverage diplomatic and humanitarian efforts to encourage countries across the region to process refugee applications within a defined time period.

5.29 When people know they’ll be assessed in a fair, efficient, orderly and timely way, which then provides security, they are less likely to make dangerous onward journeys.

**Recommendation 16:** Leverage Australia’s diplomatic and humanitarian assistance efforts to support agencies and governments in the Asia-Pacific region to assess refugee applications in a fair and efficient manner and within a certain and reasonable time period.

### **Running Timely Search and Rescue Operations**

5.30 Australia must not turn its back on the security and safety of those lost at sea.

5.31 While countries in the region have been slow to operationalise commitments made in the Bali Declaration, as part of its review of the Andaman Sea crisis Bali Process members recognised their own deficiencies by establishing a non-binding Task Force on Planning and Preparedness. Its

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<sup>92</sup>See Amnesty International, ‘Review of Australia’s Community Sponsorship Program,’ 2020, available at <https://www.amnesty.org.au/wp-content/uploads/2020/11/Amnesty-submission-Community-Support-Program-review-Oct-2020.pdf>.

role was to develop protocols to ‘harmonise detection, search and rescue, disembarkation and shelter practices.’<sup>93</sup>

5.32 Yet despite these ambitions, we’ve seen some of the worst practices from regional governments in recent years in response to Rohingya refugees smuggled and trafficked by boat from Cox’s Bazar in Bangladesh in 2020.

5.33 Once again, boats carrying hundreds of men, women and children were not just left stranded at sea, but worse, they were deliberately pushed back to sea, with governments in the region refusing to rescue them.

5.34 To avoid such a catastrophe occurring again, the Australian Government must help lead discussions around developing protocols concerning disembarkation, registration and reception conditions for those rescued.

5.35 Importantly, if people are rescued they must be allowed to safely disembark at the nearest safe port, wherever that might be, including in Australia.

**Recommendation 17:** End hazardous boat push-backs at sea and instead utilise Australia’s maritime capabilities to run proper search and rescue operations.

### **Adapting Foreign Policy Settings**

5.36 There is a great deal of scope for adapting Australia’s foreign policy settings to recognise the need for a coordinated regional solution, including boosting Australia’s aid program to help neighbouring countries support refugees better and by providing humanitarian assistance when needed.

5.37 While Australia has already engaged in a number of important regional initiatives, what is needed is greater coordination of both existing and additional initiatives that combine aid, diplomatic efforts and humanitarian assistance in a more holistic approach.

5.38 Australia’s aid program needs to be more closely linked to a strategy that improves the circumstances currently facing refugees in the region.

5.39 When people are legally recognised with rights to residence, have access to adequate housing, can access education, fair work and health services and live in safety and dignity, they will not be forced to make dangerous journeys to Australia.

5.40 Unfortunately, rather than a holistic policy that links aid to initiatives targeting displacement, it would appear that where aid allocations are provided to countries in the region there is very little focus on targeting displacement.

5.41 As noted by the Australian Human Rights Commission, with the exception of initiatives in Myanmar that target the root causes of displacement, “Australian aid programs for the Asia-Pacific

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<sup>93</sup>See The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, ‘Second meeting for the Task Force on Planning and Preparedness’ (Co-Chairs’ Statement, Bali, Indonesia, 18 – 19 May 2017), [https://www.baliprocess.net/UserFiles/baliprocess/File/TTX%20Co%20chairs%20statement%20May%202017%20\(2\).pdf](https://www.baliprocess.net/UserFiles/baliprocess/File/TTX%20Co%20chairs%20statement%20May%202017%20(2).pdf)

region appear to lack a specific strategy for responding to the needs of forcibly displaced people, addressing the root causes of displacement and preventing further displacement.”<sup>94</sup>

5.42 Australia’s current policy framework ignores the fact that one of the key causes of people continuing to attempt to travel to Australia is the lack of safety for refugees and people seeking asylum in the Asia-Pacific region. As noted by UNSW’s Kaldor Centre for International Refugee Law:

*“Despite being the location of a large and enduring portion of the world’s displaced population, many countries in the Asia-Pacific region are not parties to the Refugee Convention or Protocol, and do not have the legal frameworks and/or technical and financial capacity to provide protection to refugees. Typically, these countries do not draw a distinction between refugees and illegal immigrants. Consequently, people seeking protection in these countries commonly find themselves in a ‘state of limbo’ – unable to work legally, unable to access education for their children, and liable to arrest and punishment for breach of immigration laws.”*<sup>95</sup>

**Recommendation 18:** Adapt Australia’s Foreign Policy to recognise the need for a coordinated regional solution that targets the root causes of displacement.

**Recommendation 19:** Restore and expand Australian aid to key countries in the region affected by displacement to ensure the basic needs of refugees and asylum seekers are met and to mitigate the need for people to make dangerous onward journeys in search of safety and security.

**Recommendation 20:** Increase Australia’s unconditional assistance in humanitarian situations including natural disasters, so that people are able to rebuild their lives in safety and dignity.

## 6. Conclusion

The Australian Government’s current policy towards refugees and people seeking asylum has caused untold psychological and physical damage to refugees and people seeking asylum. It has undermined Australia’s diplomatic relations with regional neighbours and its reputation as a country that respects international law; and it has come at a financial cost of more than ten billion dollars.

There is now widespread awareness of the need for change in Australia’s immigration detention system. There is an obvious need to find a better balance between Australia’s border security and the humane treatment of refugees and people seeking asylum.

The policy of mandatory and indefinite detention without an independent process for review stands in stark contrast to the principles of justice. The Bill’s amendments to the *Migration Act* 1958 in this respect should be passed in full.

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<sup>94</sup>Australian Human Rights Commission, ‘Pathways to Protection: A human rights-based response to the flight of asylum seekers by sea,’ 2016, available at [http://www.humanrights.gov.au/sites/default/files/20160913\\_Pathways\\_to\\_Protection.pdf](http://www.humanrights.gov.au/sites/default/files/20160913_Pathways_to_Protection.pdf).

<sup>95</sup>UNSW Kaldor Centre for International Refugee Law, ‘Regional Cooperation,’ 2013, available at <https://www.kaldorcentre.unsw.edu.au/publication/regional-cooperation>.

Furthermore, the continuing operation of the 'Regional Processing Centre' on Nauru, as well as refugees left stranded in Papua New Guinea is a national shame that has led to the avoidable deaths of more than a dozen refugees and people seeking asylum. Within a system designed purely to deter, the treatment of refugees and people seeking asylum under these conditions amounts to torture. As a matter of urgency, the Australian Government must close the remaining centre on Nauru and bring all remaining refugees and people seeking asylum in Nauru and Papua New Guinea to Australia whilst they await permanent solutions.

The continuation of this system onshore under the guise of APODs must also cease, and refugees and people seeking asylum from the offshore cohort must be released into the community immediately under a new visa subclass that allows the enjoyment of basic rights such as employment, education, healthcare and social security. All refugees currently on TPV and SHEV visas should be given permanent protection and the temporary protection visa subclass should be abolished.

To ensure a human rights based approach to refugees and people seeking asylum, the Australian Government must guarantee the effective implementation of Australia's OPCAT obligations, expressly the fulfillment of State and Territory NPMs. This must be paired with an overall shift in strategic mindset, one that recognises the reasons refugees and people seeking asylum make dangerous onward sea-journeys to Australia. This approach must include an increase to Australia's humanitarian intake to at least 30,000 places, as well as a further reformation of the Community Sponsorship Program to include additionality. At its core, this shift must prioritise the human rights of refugees and people seeking asylum.

It is AIA's hope that the Parliament will use this inquiry as an opportunity to make positive changes to restore Australia's reputation and ensure refugees and people seeking asylum are treated with dignity and respect and in accordance with international human rights law.

Thank you for the opportunity to participate in this inquiry. Should you require further information, or to organise a meeting, please contact Ry Atkinson at [ry.atkinson@amnesty.org.au](mailto:ry.atkinson@amnesty.org.au) or on 0423 270 124.

Yours sincerely,



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