

Australia's Continued Struggle with Asylum Seekers Who Arrive by Boat – How Consistent is the Current Policy Approach with Australia's International Human Rights and Humanitarian Obligations?

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Abstract

Australia's latest policy approach to asylum seekers who arrive by boat, *Operation Sovereign Borders*, shifts the human rights focus from Australia's own asylum seeker assessment and resettlement processes towards the human rights safeguards Australia has put in place under its offshore regime. An examination of these safeguards suggests a deterioration in Australia's commitment to meet its human rights obligations to this group of people.

I. Introduction

Operation Sovereign Borders (OSB) is Australia's current policy on asylum seekers who arrive by boat.² The stated intent of this policy is 'to combat people smuggling and to protect our borders'.³ In practice this involves refusing asylum seekers who arrive or attempt to arrive by boat, refugee status assessment or resettlement in Australia. Key elements of OSB are turning asylum seeker boats back to source and transit countries; offshore processing and resettlement; and resolving the legacy caseload of asylum seeker boat arrivals currently awaiting assessment in Australia.⁴

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²Operation Sovereign Borders officially began on 18 September 2013.

³LNP Coalition, Operation Sovereign Borders (OSB), 26 July 2013, <http://www.liberal.org.au/latest-news/2013/07/26/operation-sovereign-borders>, 2.

⁴Ibid 5, 15, 16.

The Australian Human Rights Commission (AHRC) has identified that Australia as signatory to a range of human rights instruments, owes the following key human rights obligations to asylum seekers who arrive by boat:⁵

People should not be returned to a country where their life or freedom would be threatened (principle of *'non-refoulement'*)⁶

Everyone has the right not to be subjected to arbitrary detention⁷

Children should only be detained as a measure of last resort, and for the shortest appropriate period of time⁸

In all actions concerning children, the best interests of the child should be a primary consideration⁹

Anyone who is detained has the right to challenge the legality of their detention in court¹⁰

All persons who are detained should be treated with humanity and respect for their inherent dignity¹¹

No one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment¹²

Everyone is entitled to respect for their human rights without discrimination¹³

⁵Australian Human Rights Commission, Asylum seekers, refugees and human rights: Snapshot report 2013 (Snapshot Report), https://www.humanrights.gov.au/sites/default/files/document/publication/snapshot_report_2013.pdf.

⁶Convention relating to the Status of Refugees, 189 UNTS 150 (entered force 28 July 1951), as amended by its 1967 Protocol, 19 UST 6223 (Refugee Convention), art 33; International Covenant on Civil and Political *Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered force 3 November 1976) (ICCPR) at least arts 6 and 7; *Convention on the Rights of the Child*, 1577 UNTS 3 (entered force 20 Nov 1989) (CRC) arts 6 and 37; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85, 113 (entered force 10 Dec 1984) (CAT) arts 3 and 16.

⁷ICCPR art 9(1); CRC art 37(b).

⁸CRC art 37(b).

⁹CRC art 3(1) and art 18(1).

¹⁰ICCPR art 9(4); CRC art 37(d).

¹¹ICCPR art 10; CRC art 37(c).

¹²ICCPR art 7; CAT art 2 and art 16; CRC art 37(a).

Asylum seekers should not be penalised for arriving in a country without authorisation¹⁴

Everyone is entitled to enjoy the highest attainable standard of mental and physical health¹⁵

Everyone has the right to have their family protected from arbitrary or unlawful interference¹⁶

Australia is yet to report to any United Nations committee on the extent to which the OSB approach implemented in September 2013 meets its human rights obligations. However, many elements of OSB pre-existed the policy, and the Human Rights Committee and other UN committees have found some of these pre-existing elements to engage human rights obligations including in the following areas:

Arbitrary detention of asylum seekers¹⁷

Poor conditions in Australian detention centres¹⁸

Poor treatment of child asylum seekers¹⁹

Dis-respect for the principle of non-refoulement²⁰

This paper examines each of the three key elements of OSB noted above with a view to identifying whether the policy improves or worsens Australia's compliance with its human rights obligations to asylum seekers who arrive by boat. This will be done by identifying actual and potential inconsistencies between the implementation of the policy and Australia's obligations.

¹³ICCPR art 2(1) and art 26; CRC art 2; *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3 (entered force 16 Dec 1966) (ICESCR) art 2(2).

¹⁴Refugee Convention art 31.

¹⁵ICESCR art 12.

¹⁶ICCPR art 17 and art 23; CRC art 8(1).

¹⁷For example, Human Rights Committee, *F.K.A.G. et al v Australia*, Communication No. 2094/2011, UN Doc CCPR/C/108/D/2094/2011; Committee Against Torture, Concluding observations of the Committee against Torture: Australia, Fortieth session, 28 April – 16 May 2008, CAT/C/AUS/CO/1 at [11]

¹⁸For example, in Human Rights Committee, *Madafferi v Australia*, Communication No. 1011/2001, UN Doc CCPR/C/81/D/1011/2001 (2004) at [9.3].

¹⁹Committee on the Rights of the Child, Concluding observations: Australia, Sixtieth sess, CRC/C/AUS/CO/4, (15 June 2012) 80.

²⁰Human Rights Committee, Consideration of reports submitted by states parties under article 40 of the covenant, Concluding observations, Australia, UN Doc CCPR/C/AUS/CO/5, (2 April 2009) 6.

II. Turning Asylum Seeker Boats Back to Source and Transit Countries

A The Policy Approach

This element of OSB involves stopping the entry of detected Suspected Illegal Entry Vessels (SIEVs) into Australian territory via interception and transfer of passengers to an external location.²¹

The Minister recently reported 'in the first eight months of 2014, just one people smuggling venture made it to Australia'.²²

Information is scarce on the number of boats being turned around. Although, it is known that 157 asylum seekers spent most of July 2014 on a Customs boat as the Australian Government unsuccessfully sought ways to send them back to India. The group were taken to Nauru where they remain in detention.²³

In October 2014 the High Court began hearing a case brought by one of those asylum seekers (CPCF) to decide the validity of using the Maritime Powers Act to detain the asylum seekers at sea. The decision may affect the way the Government either intercepts asylum seekers at sea, or the way it holds them and where it takes them.²⁴

Perhaps pre-empting the possibility of a negative finding, a Bill introduced to parliament in September 2014 contains amendments to the *Maritime Powers Act* to 'provide additional clarity and consistency in the powers to detain and move vessels and persons'.²⁵ The High Court decision and/or the final passage of the Bill may influence the current policy of turning the boats around and result in an alternate approach.

B Australia's international human rights obligations

²¹LNP Coalition, above n 2, 7.

²²Hon Scott Morrison MP, Minister for Immigration and Border Protection, Restoring integrity and public confidence in Immigration and Border Protection, Address to the National Press Club, Canberra, Wednesday, 10 September 2014. <http://www.minister.immi.gov.au/media/sm/2014/sm217736.htm>

²³James Glenday, ABC Radio National, The World Today, 14 October 2014.

²⁴Ibid.

²⁵Hon Scott Morrison MP, Second Reading Speech, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Thursday, 25 September 2014, House of Representatives, Commonwealth of Australia.

The policy of turning asylum seeker boats back undermines the fundamental human right enshrined in the Universal Declaration on Human Rights to seek and enjoy in other countries asylum from persecution.²⁶

This policy may also be inconsistent with international obligations in relation to non-refoulement²⁷ and arbitrary detention²⁸.

Australia has broad *non-refoulement* obligations under the ICCPR, CRC and CAT to ensure protection from removal to a country where people face a real risk of significant harm. These are known as 'complementary protection' obligations. Australia also has *non-refoulement* obligations under the Refugee Convention²⁹ which prohibits expelling refugees to territories where their lives or freedom would be threatened on the basis of their race, religion, nationality, membership of a particular social group or political opinion.³⁰

This policy raises doubts about ensuring protection for asylum seekers who are turned around, from ending up in a country where they face a real risk of significant harm and/or threats to their freedom. It also raises doubts about ensuring protection from arbitrary detention at sea. A lack of available information on boat interceptions makes it difficult to determine further.

In his recent opening statement the new United Nations Commissioner for Human Rights commented:

Australia's policy of off-shore processing for asylum seekers arriving by sea, and its interception and turning back of vessels, is leading to a chain of human rights violations, including arbitrary detention and possible torture following return to home countries. It could also lead to the resettlement of migrants in countries that are not adequately equipped.³¹

²⁶Australian Human Rights Commission, *Australia's obligation to people seeking asylum who are intercepted at sea*.media statement, 4 July 2014. <https://www.humanrights.gov.au/news/stories/australia-s-obligation-people-seeking-asylum-who-are-intercepted-sea>

²⁷*Refugee Convention* art 33; ICCPR arts 6 and 7; CRC arts 6 and 37; CAT arts 3 and 16.

²⁸ICCPR art 9(1); CRC art 37(b).

²⁹Refugee Convention, art 31(a).

³⁰Australian Human Rights Commission, *Examination of the Migration (Regional Processing) package of legislation*, submitted to Parliamentary Joint Committee on Human Rights, 31 January 2013, [84-95].

³¹United Nations Human Rights Office of the High Commissioner, Opening Statement by Zeid Ra'ad Al Hussein United Nations High Commissioner for Human Rights at the Human Rights Council 27th Session, Geneva, 8 September 2014, 5.

These results of turning back the boats back and offshore processing are examined further below.

III. Offshore Processing and Resettlement

A The Policy

This element of *Operation Sovereign Borders* (OSB) involves establishing 'genuine and rigorous' third country offshore processing on Nauru and Manus Island (PNG) for all asylum seekers who arrive(d) by boat after 19 July 2013, and resettlement to a third country.³²

Part of the justification for this approach is:

If (refugee resettlement) remains simply the responsibility of first world nations then not only will the number of places remain limited but the programme itself will become a pull factor for people smuggling.³³

Offshore processing was re-introduced in 2012 for asylum seekers who arrive in Australia by boat at an 'excised offshore place'³⁴ and extended in May 2013 to apply to asylum seekers who arrive by boat anywhere in Australia.³⁵ Also in 2013, Nauru and Papua New Guinea (PNG) were designated as 'regional processing countries', and later a Regional Resettlement Arrangement (RRA) with the Government of PNG and a new MOU with Nauru were signed.³⁶ In September 2014, the Government signed a voluntary resettlement agreement with Cambodia.³⁷

The Minister for Immigration and Border Protection (the Minister) reported in September 2014 that 'more than 1000 people transferred to Nauru have commenced their claims assessment and 206 people found to be refugees have been resettled on Nauru'.

³²LNP Coalition, above n 2, 5 and 7.

³³Hon. Scott Morrison, above n 21.

³⁴*Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth).

³⁵Australian Human Rights Commission, *Asylum seekers and refugees guide*, <https://www.humanrights.gov.au/asylum-seekers-and-refugees-guide>, [at 10 October 2014].

³⁶Australian Human Rights Commission, *Transfer of Asylum Seekers to Third Countries*, 1 January 2014, <https://www.humanrights.gov.au/transfer-asylum-seekers-third-countries>.

³⁷Hon Scott Morrison MP, *Reintroducing TPVs*, press conference, 26 September 2014. <http://www.minister.immi.gov.au/media/sm/2014/sm218131.htm>

There are also more than 1000 people who have been transferred to Manus Island for assessment.

Very few if any assessments of their refugee status have been completed³⁸ and the Minister recently reported the PNG resettlement programme has now been before the PNG Cabinet for several months.³⁹

B Australia's international human rights obligations

International law does not prohibit offshore processing and once transferred to offshore processing destinations, asylum seekers' claims for protection are processed under the laws of that country. However, Australia may remain liable for the international human rights consequences of its action of transferring them, so is responsible to ensure that adequate human rights safeguards are in place in those countries.⁴⁰

There are serious human rights concerns in relation to the processing regimes on both Manus Island and Nauru, suggesting inadequate human rights safeguards have been put in place by Australia. This is hardly surprising given Australia's own poor human rights record on the processing of asylum seekers. These same and other concerns are reflected when the processing of asylum seeker claims in both Nauru and Manus Island are examined against Australia's human rights obligations below.⁴¹

1. Obligation not to Treat Asylum Seekers Differently Based on their mode of Arrival⁴²

The Refugee Convention prohibits penalising asylum seekers for unauthorized arrival in a country. The policy of 'regional processing' for asylum seekers who arrive by boat may be construed as penalizing those against other arrivals, on the basis of the worse conditions in Regional Processing Centres (RPCs) and resettlement outcomes generally (discussed below).⁴³

³⁸As at October 2013 no Refugee Status Determinations had been completed on Manus Island since transfer of asylum seekers from Australia commenced in November 2012, UNHCR Monitoring Visit to Manus Island 23-25 October 2013.

³⁹Above n 21.

⁴⁰Australian Human Rights above n 4, 19.

⁴¹These concerns appeared in Australian Human Rights Commission, above n 35; and Australian Human Rights Commission, above n 4, 19.

⁴²ICCPR art 26; Refugee Convention art 31.

⁴³Australian Human Rights Commission, above n 29, [104-110].

To discharge its obligation to respect people's human rights without discrimination under the ICCPR,⁴⁴ Australia needs to establish a 'reasonable' basis for subjecting *only* asylum seekers who arrive by boat to the 'regional processing' regime.⁴⁵ Australia's rationale for the differential treatment of boat arrivals is 'to combat people smuggling and to protect our borders'.⁴⁶ It is doubtful this is a 'reasonable basis'.

2. Australia's Non-Refoulement Obligations⁴⁷

To meet both its complementary protection obligations and its non-refoulement obligations under the Refugees Convention,⁴⁸ Australia would need safeguards in place to ensure transferred asylum seekers will not be at risk of serious harm upon resettlement in a third country and their freedom will not be at risk.⁴⁹

Australia's current method of safe guarding its compliance with its complementary protection obligations in relation to its offshore processing is via non-compellable Ministerial discretion to exempt offshore transfers, including where 'issues arise in relation to obligations under CAT or ICCPR'.⁵⁰ It is unlikely such discretionary powers provide adequate human rights safeguards to prevent removal to a country where people face significant harm.

Available evidence from the RPCs suggests people do indeed face significant harm. This includes humiliating treatment, lack of humane detention conditions, profound uncertainty about timing for processing of claims and pressure to return home.⁵¹ Perhaps because of this, the Human Rights Committee has asked Australia:

Please (also) explain how the transferring of asylum seekers to third countries for the processing of their claims is consistent with the State party's obligations under the (ICCPR), most significantly non-refoulement obligations.⁵²

⁴⁴ICCPR art 26(1).

⁴⁵Australian Human Rights Commission, above n 29, [106].

⁴⁶LNP Coalition, above n 2, 2.

⁴⁷under ICCPR, CAT, CRC and the Refugee Convention.

⁴⁸Art 31(a)

⁴⁹Australian Human Rights Commission, above n 29, [84-95].

⁵⁰*Migration Act 1958* (Cth), s198E.

⁵¹Amnesty International Australia, *This is Still Breaking People, Update On Human Rights Violations At Australia's Asylum Seeker Processing Centre On Manus Island, Papua New Guinea*, May 2014, 8-9.

⁵²Human Rights Committee, *List of issues to be considered for Australia's 6th Report*, 106thsess, CCPR/C/AUS/Q/6 (9November2012).

3. Obligation not to subject asylum seekers to arbitrary detention⁵³

Available evidence suggesting that detention at the RPCs is arbitrary includes that:

1. both the Nauru and Manus Island processing centres are closed detention centres;⁵⁴ and
2. there is profound uncertainty about timing for processing of claims at the RPCs. In PNG not a single refugee assessment was made in the first 18 months since the centre opened.⁵⁵

The lack of safeguards to prevent against this arbitrary detention is of little surprise given a large number of UN bodies have recommended Australia abolish its own onshore arbitrary detention regime,⁵⁶ and that Australia has repeatedly defended its position in its domestic courts and to the UN.⁵⁷

In October 2013 the UNHCR observed that the RPCs at both Manus Island and Naru constituted arbitrary and mandatory detention under international law.⁵⁸

4. Obligation to ensure detained persons are treated with humanity and respect⁵⁹ and not subjected to cruel, inhuman or degrading treatment⁶⁰

The AHRC is concerned that asylum seekers transferred to RPCs are being exposed to conditions which might breach these obligations.⁶¹ There is significant evidence of the poor conditions at both RPCs.

⁵³ICCPR art 9(1); CRC art 37(b).

⁵⁴Australian Human Rights Commission, above n 4, 20.

⁵⁵Amnesty International Australia, above n 50, 22.

⁵⁶eg Human Rights Committee 2009, the Committee Against Torture 2008 and the Committee on the Rights of the Child 2012 in their concluding observations on Australia's reports.

⁵⁷eg. Commonwealth of Australia, *Common Core Document— incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights*, June 2006.

⁵⁸The UN Refugee Agency, *UNHCR monitoring visit to Manus Island, Papua New Guinea*, 23 to 25 October 2013, 1; and The UN Refugee Agency, *UNHCR monitoring visit to the Republic of Nauru*, 7 to 9 October 2013, 1.

⁵⁹ICCPR art 10; CRC art 37(c).

⁶⁰ICCPR art 7; CAT arts 2 and 16; CRC art 37(a).

⁶¹Australian Human Rights Commission, above n 29, [149-161].

For example, the following has been observed at Manus Island:

...overcrowding delivered meals in take-away packs for self-distribution and ...sole responsibility for cleaning the ablution blocks. a security guard is responsible for supervising vulnerable individuals with serious mental health needs... many lack shoes and/or only have one shirt...⁶²

There is also evidence of risks to mental (and physical) health posed by the long-term detention at the RPCs.⁶³

In October 2013 the UNHCR observed that the Regional Processing Centres (RPCs) at both Manus Island and Nauru do not provide safe and humane conditions of treatment in detention. UNHCR was also very concerned about the physical and mental health of the asylum seekers at both RPCs.⁶⁴

5. Obligations to children in detention.⁶⁵

Hundreds of children asylum seekers who arrive(d) by boat are being transferred to RPCs with their families. Unaccompanied minors have also been transferred due to unsatisfactory age determination processes on Christmas Island.⁶⁶ In October 2013 the UNHCR observed the presence of at least two unaccompanied children at the Manus Island RPC and had received reports of others.⁶⁷

A National AHRC Inquiry into Children in Immigration Detention is currently underway. It is expected this will provide much needed further information on the extent and experience of children in detention in Australia's RPCs.

Australia has a number of human rights obligations to protect children affected by the regional processing arrangements. Australia's compliance is particularly questionable in the following three areas.⁶⁸

⁶²Amnesty International Australia, above n 50, 4-7.

⁶³Australian Human Rights Commission, above n 29, [149-161].

⁶⁴The UN Refugee Agency, above n 58 (both), 1-2 (both).

⁶⁵CRC arts 2, 3, 8, 18, 20, 22 and 37 3(1) and 18(1).

⁶⁶Amnesty International Australia, above n 50, 9.

⁶⁷The UN Refugee Agency, above n 58, (Manus Island) 3.

⁶⁸Derived from Australian Human Rights Commission, above n 29, [84-95]. Also Megan Mitchell, Children's Commissioner, Young people seeking asylum – protecting their rights in Australia, *Practitioners Workshop, 'Improving Services for Unaccompanied Minors & Young People Seeking Asylum'*, Wednesday 4 December 2013, 3.

i Obligation to detain children only as a measure of last resort, and for the shortest appropriate period of time.⁶⁹

The mandatory and extended detention of all asylum seekers transferred to Nauru and Manus Island, including children, suggests this obligation has been engaged.

ii Obligation to treat the best interests of the child as a primary consideration in all decision-making concerning children⁷⁰

In October 2013 the UNHCR observed that the harsh environment at the RPC in Nauru is particularly inappropriate for the care of child asylum-seekers and was of the view that no child should be transferred from Australia to Nauru,⁷¹ suggesting this obligation has been engaged.

iii Obligation to provide unaccompanied minors with special protection and assistance⁷²

Under Australian legislation the Minister ceases to be the guardian of unaccompanied minors who are transferred to a 'regional processing country'.⁷³ On Manus Island it is not clear who is the lawful guardian of unaccompanied children.⁷⁴ In Nauru, the Minister for Justice is the guardian for unaccompanied minors.⁷⁵

6. Obligation to protect families from arbitrary or unlawful interference⁷⁶

If asylum seekers who are transferred to a 'regional processing country' already have family members in Australia, they face indefinite separation from those family members, suggesting this obligation may be engaged.⁷⁷

⁶⁹CRC art 37(b).

⁷⁰CRC art 3(1).

⁷¹The UN Refugee Agency, above n 58, (Nauru) 1-2.

⁷²CRC arts 20 and 22.

⁷³*Immigration (Guardianship of Children) Act 1946* (Cth), ss 6(1) and (2)(b).

⁷⁴Amnesty International Australia, above n 50, 9.

⁷⁵Australian Human Rights Commission, above n 4, 23.

⁷⁶ICCPR art 17 and art 23; CRC art 8(1).

⁷⁷Australian Human Rights Commission, above n 29, [177-182].

Offshore processing can be seen to engage or potentially engage a range of human rights obligations. Offshore resettlement also risks engaging Australia's obligations particularly its non-refoulement obligations in cases where there are significant risks to safety.

To date, offshore resettlement countries for all asylum seekers who arrive by boat include Nauru, Manus Island and Cambodia though resettlement has only really begun at Nauru. Resettlement in third countries is not prohibited at international law. However, Australia's policy of forced resettlement of people seeking asylum (by boat) has attracted the concern of the UNHCR because of the extent to which it departs from international norms; increases the burden on developing countries to host refugees;⁷⁸ and raises formidable challenges and protection concerns for the resettlement process.⁷⁹

IV. Resolving the Legacy Caseload

A. The Policy

In introducing a recent Bill,⁸⁰ the Minister explained 'legacy caseload' to mean those asylum seekers who arrived in Australia by boat before 19 July 2013 as well as any who arrived after that time but before 31 December 2013 and have not yet been transferred to a RPC.

Key policy strategies for 'resolving the legacy caseload' are the reintroduction of Temporary Protection Visas (TPVs) and changes to visa assessment processes.⁸¹ Two Bills are currently before Parliament to give effect to these policy strategies: the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*;⁸² and the *Migration Amendment (Protection and Other Measures) Bill 2014*.⁸³

⁷⁸The UN Refugee Agency, *UNHCR statement on Australia-Cambodia agreement on refugee relocation*, press releases, 26 September 2014.

http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=513:unhcr-statement-on-australia-cambodia-agreement-on-refugee-relocation&catid=35:news-a-media&Itemid=63

⁷⁹The UN Refugee Agency, above n 58, (Manus Island) 3.

⁸⁰*Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Cth)

⁸¹LNP Coalition, above n 2, 16.

⁸²Introduced to House of Representatives 25 September 2014.

⁸³Introduced to Senate 25 September 2014.

1. Temporary Protection Visas

The policy on TPVs denies refugees access to permanent residency and to family reunions, and revisits people's refugee status when conditions in their home country change. The policy on TPVs also aims to deny a product for people smugglers to sell.⁸⁴

The *Resolving the Asylum Legacy Caseload Bill* re-introduces TPVs and creates the new Safe Haven Enterprise Visa (SHEV), involving working in regional areas for 3.5 years (out of 5) to gain eligibility for other onshore visas other than a permanent protection visa.⁸⁵

2. Changes to Visa Assessment Processes

The *Protection and Other Measures Bill 2014*⁸⁶ makes significant changes to the way asylum seekers are assessed, including to: increase asylum seeker responsibilities to substantiate protection claims; direct the Refugee Review Tribunal (RRT) to draw an unfavourable inference about the credibility of new claims or evidence raised at the review stage; and create grounds to refuse a protection visa when an applicant fails to establish their identity.⁸⁷

The *Resolving the Asylum Legacy Caseload Bill*⁸⁸ introduces a fast-track assessment process for asylum seekers (arriving from 13 August 2012). The fast-track process will replace access to the RRT with a new Immigration Assessment Authority (IAA),⁸⁹ which will conduct a review 'on the papers', with no general duty to accept or request new information.⁹⁰

⁸⁴LNP Coalition, above n 2, 5.

⁸⁵Hon Scott Morrison MP, above n 24.

⁸⁶*Migration Amendment (Protection and Other Measures) Bill 2014* (Cth).

⁸⁷Hon Scott Morrison MP, Second Reading Speech, Migration Amendment (Protection And Other Measures) Bill 2014 (Cth), Introduced to Senate, 25 September 2014.

⁸⁸Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

⁸⁹Hon Scott Morrison, above n 24.

⁹⁰*Ibid.*

The Bill also proposes to give the Minister power to place a 'cap' on the number of protection visas issued in any year, which would overturn the High Court decision *Plaintiff S297/2013 v MIBP*.⁹¹

B. Australia's international human rights obligations

1. Temporary Protection Visas

Temporary protection for refugees is not prohibited under the Refugee Convention. However, UNHCR describes it as a group based protection mechanism in contexts of mass displacement, where an individualized assessment is not possible, and notes that an approach that is punitive or deterrent in nature or prolongs uncertainty would be of concern.⁹² Australia's approach prolongs uncertainty and aims to deter 'people smugglers' and in doing so deters asylum seekers.

An additional concern in relation to Australia's approach to temporary protection is that the SHEV attempts to turn human rights treaty obligations into a discretionary skilled migration program.⁹³

2. Changes to Visa Assessment Processes

The proposed changes significantly alter the way refugee status assessments are conducted in Australia. Together they could remove current procedural human rights safeguards, leading to the engagement of Australia's non-refoulement obligations.⁹⁴ Those changes that propose particular individual human rights challenges include:

⁹¹[2014] HCA 24.

⁹²The UN Refugee Agency, UNHCR statement: Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 26 September 2014.

⁹³Andrew & Renata Kaldor Centre for International Refugee Law, Legislative brief, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 2 October 2014,

3.http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/legislative_brief_migration_amendment_resolving_the_asylum_legacy_caseload_final.pdf

⁹⁴Australian Human Rights Commission, above n 4, 25.

i Asylum seeker responsibility to present their claims

The Bill specifies the Minister has no obligation to assist in the specification or establishment of a claim. UNHCR's Handbook⁹⁵ states that 'while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner'.⁹⁶ The Bill does not comply with this guideline.

ii Refusal on grounds of failure to establish identity

The Refugee Convention⁹⁷ acknowledges that persons may be forced to enter and stay in a territory without the requisite authorization including with fraudulent documents.⁹⁸ Lack of such acknowledgement in the assessment process could put Australia at risk of engaging its non-refoulement obligations.

iii Immigration Assessment Authority (IAA)

The restrictive processes to be employed by the proposed IAA (to replace the RRT) are likely to result in fewer successful reviews. In 2011–12 the RRT overturned 82.4 per cent of primary decisions to refuse protection visas for asylum seekers who arrived by boat.⁹⁹ A poorer result would risk engaging Australia's non-refoulement obligations.

iv Cap on protection visas

This creates real risks of arbitrary and prolonged detention, as those whose applications are 'suspended' are liable to detention until the 'cap' is lifted.¹⁰⁰

⁹⁵The UN Refugee Agency, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, [196].

⁹⁶Office of the United Nations High Commissioner for Refugees, submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014, 12 August 2014, 4.

⁹⁷Arts 27 and 31(1)

⁹⁸Office of the United Nations High Commissioner for Refugees, above n 95, 9.

⁹⁹Australian Human Rights Commission, above n 4, 25.

¹⁰⁰Andrew & Renata Kaldor Centre for International Refugee Law, above n 92, 6.

V. Conclusion

If the OSB policies examined in this paper are implemented the overall effect would be that:

- a) Asylum seekers who attempt to arrive in Australia by boat will not make it to Australia, and some will be sent to RPCs. Those assessed as refugees will not be resettled in Australia.
- b) Asylum seekers already transferred to RPCs and those who will be sent will be detained for long periods in very poor conditions awaiting assessment of their claims. They are unlikely to have any certainty about how, when and/or if their claims will be assessed. They are at risk of being offered resettlement options which seriously risk their safety.
- c) Asylum seekers already arrived in Australia by boat prior to 19 July 2013 will be assessed more rapidly and with fewer procedural protections, and will be offered only temporary protection if granted refugee status. Fewer of these people will be assessed as refugees than would have been previously. The number of people in Australian detention centres will continue to diminish and the detention centres will continue to close.

With this shift in outcomes for people seeking asylum in Australia under OSB, human rights concerns shift from Australia's own asylum seeker assessment and resettlement processes towards the lack of human rights safeguards Australia has put in place under its offshore regime. In addition, new human rights concerns arise in relation to Australia's current attempt to deal with the remnant population of asylum seekers who arrived by boat before 19 July 2013 and are still detained in Australia.

While broad parameters of the OSB are not unlawful at international law (offshore processing, temporary protection, third country resettlement), both the way OSB is being implemented and its results engage a range of human rights obligations and indicate a general deterioration in Australia's commitment to meeting its human rights obligations to asylum seekers who arrive by boat. Further, the overall effect of OSB is that Australia shifts its commitments to asylum seekers, with the associated burdens, to developing countries.