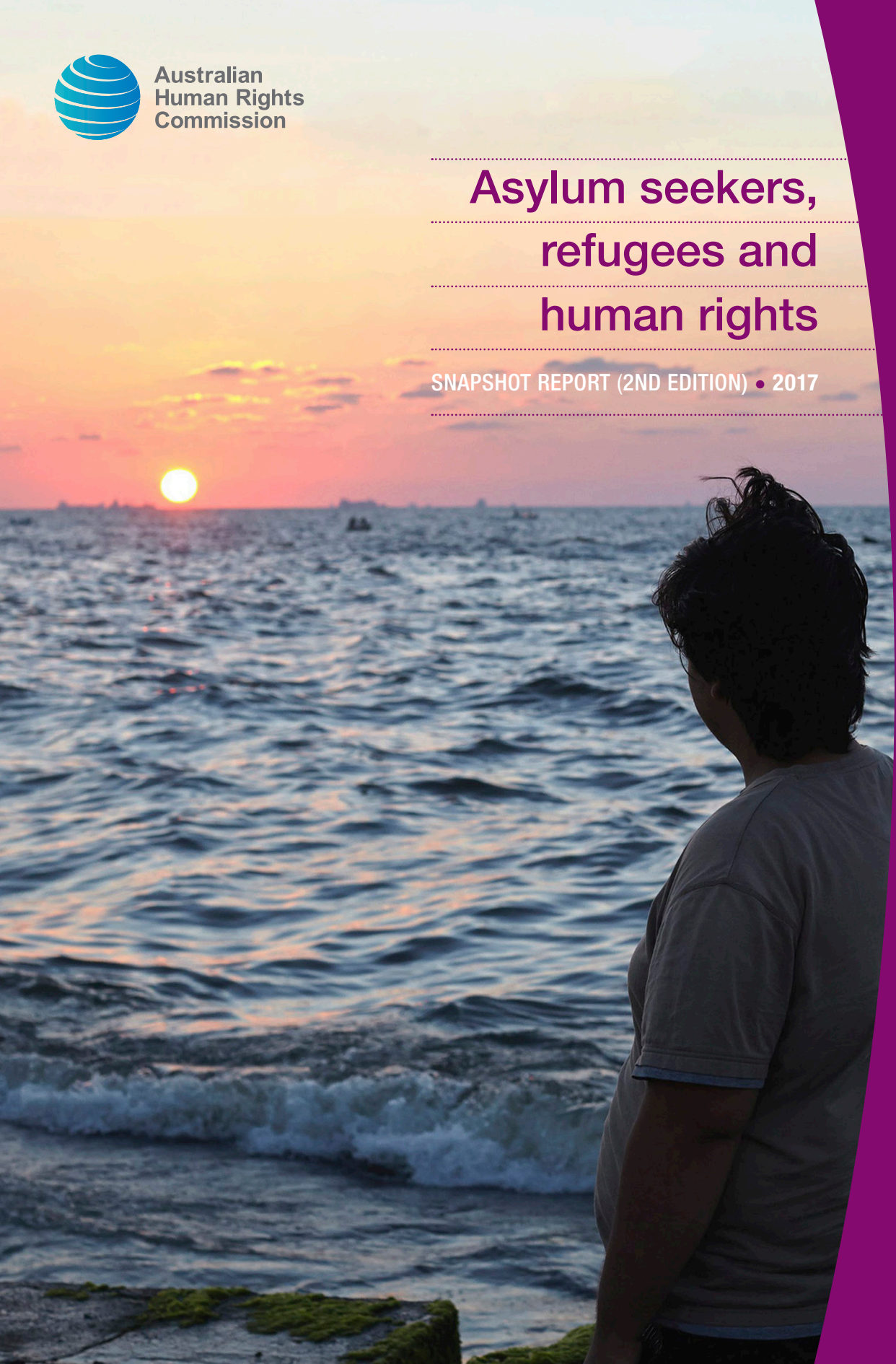
Australian Human Rights Commission

Asylum seekers, refugees and human rights

SNAPSHOT REPORT (2ND EDITION) • 2017



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Contents

President's introduction 2

Executive Summary 4

1. Background 5

1.1 Global and domestic context 5
1.2 Australia's international human rights obligations 7

2. Immigration detention and community alternatives 11

2.1 Detention facilities in Australia 11
2.2 Arbitrary detention 12
2.3 Detention of children 13
2.4 Conditions of detention 15
2.5 Detention resulting from security and character assessments 16
2.6 Impacts of detention on mental health 19
2.7 Alternatives to detention 22

3. Protection against *refoulement* 26

3.1 Screening of asylum claims 26
3.2 Refugee status determination 28

4. Third country processing 32

4.1 *Non-refoulement* 32
4.2 Arbitrary detention 34
4.3 Living conditions and safety concerns 35
4.4 Impacts of third country processing on physical and mental health 37
4.5 Resettlement arrangements 38
4.6 Independent monitoring 40

5. Discrimination based on mode of arrival 41

5.1 Temporary protection 41
5.2 Support services and entitlements 43
5.3 Family reunion 45

Appendices

Appendix 1: Summary of progress since last Snapshot Report 47
Appendix 2: Timeline of key developments since the introduction of mandatory immigration detention in Australia 51
Appendix 3: Acronyms used in this report 54

President's introduction

The Commission published its inaugural Snapshot Report on asylum seekers, refugees and human rights in October 2013. The intent of the Report was to provide parliamentarians, key commentators and the community with a clear understanding of the human rights issues that arise from Australia's refugee and asylum seeker policies. This new edition of the Snapshot Report is updated to reflect on the significant developments in law and policy over the past three years.

During that time, there have been some significant positive developments, particularly in relation to immigration detention. The overall number of people in detention has reduced; numerous detention facilities have been closed, including several in remote areas; and almost all children have been released from closed detention facilities.

Successive Australian Governments have significantly expanded the use of community alternatives to detention, which promote better health and wellbeing outcomes than closed detention.

One of the most positive developments since the publication of the first Snapshot Report has been the reinstatement of work rights for most asylum seekers living in the community.

The 2013 Snapshot Report revealed a significant gap between Australia's human rights obligations under international law and its treatment of refugees and people seeking asylum, particularly those who arrive by boat. This updated Report confirms that substantial gaps remain, and some policy changes have given rise to new human rights concerns.

The overall policy settings for people who arrive in Australia by boat remain. Australia maintains a policy of mandatory immigration detention for unlawful non-citizens, regardless of whether they pose a risk to the community. People who are detained cannot seek judicial review of whether or not their detention is arbitrary, and there is no limit on how long they can be detained. Despite repeated recommendations from the Commission, no changes have been made to the *Migration Act 1958* (Cth) to remedy these problems.

Many people continue to face indefinite detention for prolonged periods of time. People who have received adverse security assessments or who have had a visa refused or cancelled on character grounds remain at particular risk of being detained for very lengthy periods of time. For asylum seekers who are released from detention into the Australian community, maintaining an adequate standard of living remains a challenge.

Non-refoulement is one of the most basic and central principles of international humanitarian and human rights law. It seeks to ensure that people will not be returned to a situation where they would be in danger of persecution, torture or

other forms of serious harm. The principle of *non-refoulement* is so fundamental that it is considered to be a rule of customary international law, which all states are expected to respect regardless of which treaties they have ratified.

Since 2013, the Commission has become increasingly concerned about a range of policies which increase the risk of *refoulement*. The continuation of screening processes which do not provide a fair or thorough assessment of protection claims; turnbacks of boats carrying people seeking asylum; substantial changes to the refugee status determination process; and restrictions on access to free government-funded legal advice, could all lead to breaches of Australia's *non-refoulement* obligations.

Third country processing in Nauru and Papua New Guinea's Manus Island continues to raise numerous human rights concerns. Inadequate pre-transfer assessments and the variable quality of refugee status determination processes create a risk of *refoulement*; living conditions remain below international standards; there has been an increase in safety concerns, including multiple reports of physical and sexual assault; and durable solutions for people found to be refugees have proven difficult to find. The combination of these factors continues to have a deleterious impact on the physical and mental health of people subject to third country processing. There also remains a need to improve independent monitoring of third country arrangements.

For refugees who arrived in Australia by boat or without visas and have been permitted to settle in Australia, the situation remains challenging. Those found to be refugees are now eligible for temporary protection only, and do not have access to the same support services and entitlements as refugees on permanent humanitarian visas. They also have limited or no access to family reunion opportunities, with the result that many face the prospect of indefinite and potentially permanent separation from their relatives.

Australia has a long history of providing new homes to some of the world's most persecuted and vulnerable people, having offered protection to over 800,000 refugees since Federation. We maintain a generous resettlement program, a network of highly-regarded settlement services and a reputation as one of the world's most successful multicultural societies. However, these achievements — of which Australians can be rightly proud — continue to be overshadowed by our current treatment of people seeking asylum.

Australia's international human rights obligations require that all refugees and people seeking asylum are treated humanely and with respect for their inherent dignity, regardless of their mode of arrival in Australia. I hope that this Report, through setting out many of the key facts on this issue, can assist in bringing Australian law and policy on refugees and asylum seekers into line with our international obligations.

Gillian Triggs
President
March 2017

Executive Summary

The first Snapshot Report on refugees, asylum seekers and human rights was published in October 2013. This Report focused on human rights issues arising from the policies of mandatory immigration detention and third country processing. It concluded with observations on some of the policy changes proposed by the newly elected Australian Government.

The second edition of this Report provides an update on legal and policy developments related to refugees and people seeking asylum in Australia since 2013. The Report is not intended to address all the issues facing refugees and people seeking asylum in Australia. Instead, it focuses on developments which place Australia at risk of breaching its international human rights obligations or which have responded to previously raised concerns about potential breaches.

The Report addresses four key areas of law and policy:

- ***immigration detention and community alternatives***, including the ongoing policy of mandatory indefinite detention, the detention of children, conditions of detention, indefinite detention of people who have received adverse security and character assessments, the impacts of detention on mental health and the use of community-based alternatives to detention
- ***protection against refoulement***, focusing on developments which may place people seeking asylum at higher risk of being returned to danger, including those relating to screening of asylum claims, turnbacks and the refugee status determination process
- ***third country processing of asylum claims*** in Nauru and Papua New Guinea, with the main issues of concern including *non-refoulement*, arbitrary detention, living conditions, safety concerns, resettlement arrangements, impacts on health and independent monitoring
- ***discrimination based on mode of arrival***, focusing on policies which discriminate against refugees settling in Australia on the basis that they arrived in Australia by boat and/or without valid visas.

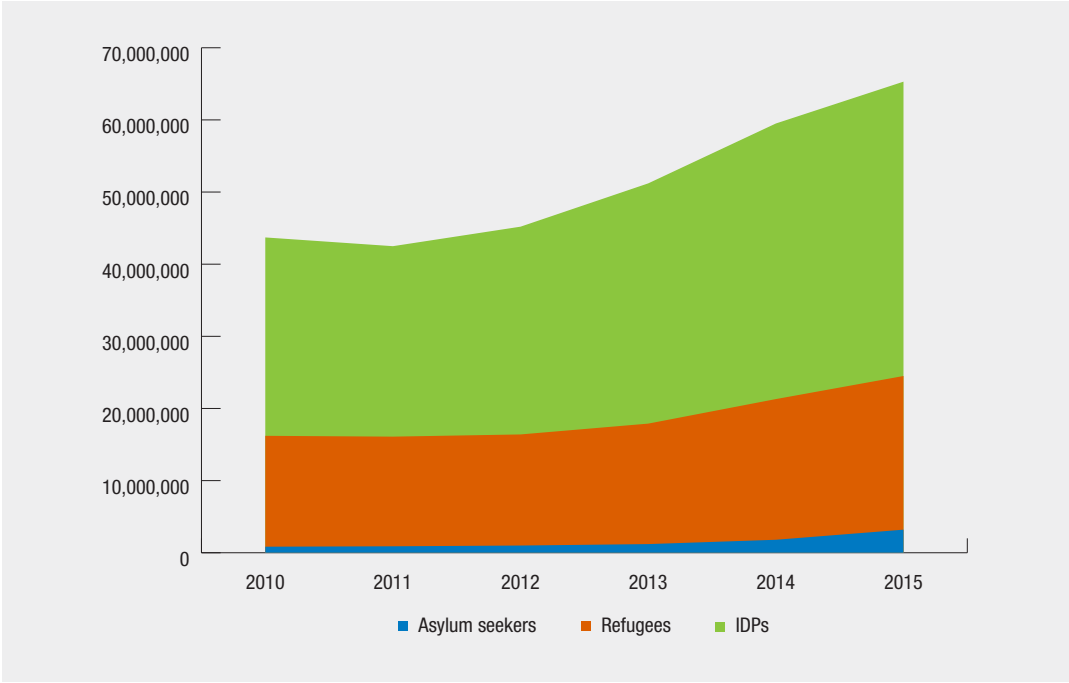
This Report draws upon the extensive work the Australian Human Rights Commission (the Commission) has undertaken in the area of Australian law, policy and practice relating to asylum seekers, refugees and immigration detention. The Commission's work has included conducting national inquiries, examining proposed legislation, monitoring and reporting on immigration detention, and investigating complaints from individuals subject to Australia's immigration laws and policies.

1. Background

1.1 Global and domestic context

Forced displacement has increased dramatically worldwide since the Commission published its first Snapshot Report. At the end of 2013, there were 51.2 million forcibly displaced people in the world. By the end of 2015, this number had risen to 65.3 million, comprising 40.8 million internally displaced people (IDPs), 21.3 million refugees and 3.2 million asylum seekers.[1] This is the highest level of displacement ever recorded by the United Nations High Commissioner for Refugees (UNHCR).[2]

Chart 1: Forcibly displaced people, 2010 to 2015[3]



Despite the enormous increase in global displacement, the number of asylum applications received by Australia has remained relatively static, and has in fact declined as a proportion of the global total.

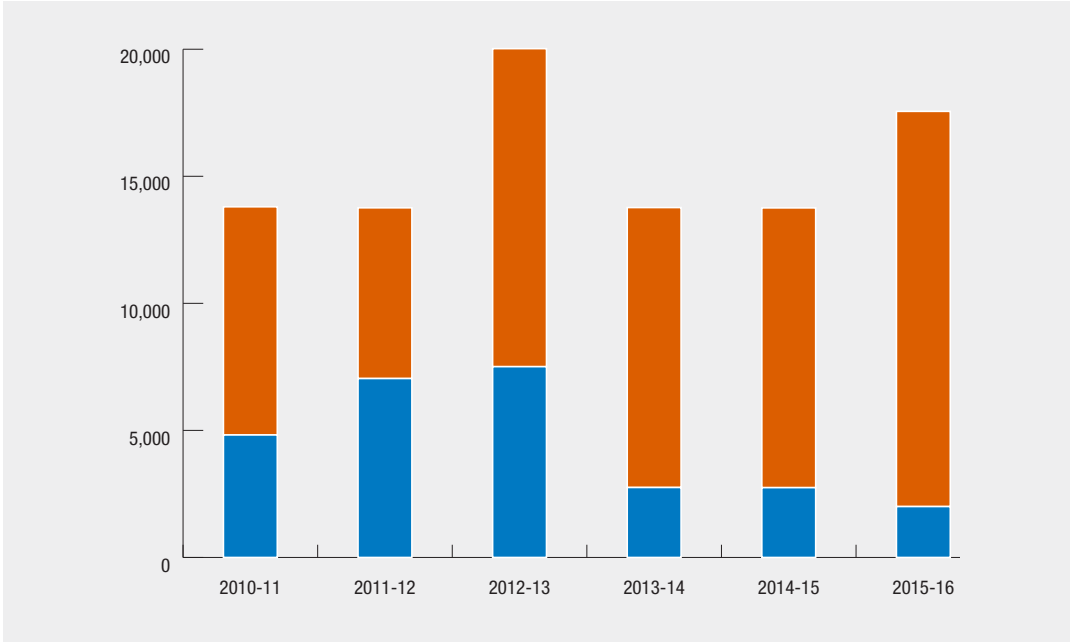
In 2013, Australia received 15,977 applications for asylum, or 1.5% of the total number of asylum applications submitted worldwide; in 2015, Australia received 16,117 applications, or just 0.5% of the global total.[4]

Over the same period, the number of people arriving in Australia by boat to seek asylum has decreased dramatically. In 2012, 20,587 people arrived in Australia by boat. In 2015, an estimated 213 people attempted to reach Australia by boat but were intercepted by Australian authorities and returned to their point of departure without being permitted to lodge asylum claims.[5]

The size of Australia's Refugee and Humanitarian Program has also fluctuated over this period. The program was temporarily increased to 20,000 places in 2012–13 before being reduced back to its former level of 13,750 places in 2013–14 but with a higher proportion of places allocated to resettlement.[6] In addition to the existing annual intake, a further 12,000 resettlement places have been allocated for Syrian and Iraqi refugees from 2015 onwards.[7]

In the 2015–16 financial year, a total of 17,555 visas were granted under the Refugee and Humanitarian Program. This included 15,552 visas under the resettlement component (of which 3,790 were granted as part of the additional intake for Syrian and Iraqi refugees) and 2,003 visas under the onshore protection component.[8] The program will progressively increase to 18,750 places by 2018–19.[9]

Chart 2: Australia's Refugee and Humanitarian Program, 2010–11 to 2015–16[10]



Since 2013, there have been a number of significant developments in Australia's policies towards people seeking asylum, particularly in relation to those who arrive by boat. These include:

- the release of almost all children from immigration detention
- a significant reduction in the overall number of people in immigration detention and the resulting closure of numerous detention facilities
- the reinstatement of work rights for asylum seekers living in the community on Bridging Visas
- the reintroduction of boat turnbacks through Operation Sovereign Borders
- major changes to the refugee status determination process, including the introduction of a new statutory framework for assessing asylum claims and a 'fast track' merits review process
- the development of resettlement arrangements with Cambodia and, more recently, the United States, for refugees subject to third country processing
- the reintroduction of Temporary Protection Visas as well as a new temporary visa for refugees, the Safe Haven Enterprise Visa
- the introduction of further restrictions on access to family reunion opportunities for refugees who arrive in Australia without valid visas.

These policies all have significant human rights implications. While some bring Australia's policies into closer alignment with international human rights law, others could potentially place Australia in breach of its international obligations.

1.2 Australia's international human rights obligations

There are nine core international human rights instruments, of which seven have been ratified by Australia.[11] These are:

- the *International Convention on the Elimination of All Forms of Racial Discrimination*
- the *International Covenant on Civil and Political Rights* (ICCPR)
- the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- the *Convention on the Elimination of All Forms of Discrimination against Women*
- the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)
- the *Convention on the Rights of the Child* (CRC)
- the *Convention on the Rights of Persons with Disabilities* (CRPD).

Several of these treaties — particularly the ICCPR, ICESCR, CAT and CRC — enshrine obligations which are relevant to refugees, people seeking asylum and people in immigration detention. Australia also has a range of specific obligations towards refugees under the *Convention relating to the Status of Refugees* (the Refugee Convention). These obligations are summarised below.

Treaty obligations relevant to refugees and people seeking asylum[12]

Obligation	Relevant treaties
Everyone has the right to ***enjoy human rights without discrimination of any kind***. No one should be subjected to ***discrimination*** on any ground (including, in the case of children, ***discrimination or punishment on the basis of the status and activities of their parents***). Refugees who enter or are present in a country without authorisation ***should not be penalised***.	ICCPR articles 2(1) and 26, ICESCR article 2(2), CRC article 2(1), Refugee Convention article 31(1)
In all actions concerning children, the ***best interests of the child*** shall be a primary consideration.	CRC article 3(1)
Everyone has the right to ***life*** and ***security of person***. The ***survival and development*** of the child should be ensured to the maximum extent possible. Children should be protected from ***all forms of physical and mental violence, including sexual abuse***.	ICCPR articles 6(1) and 9(1), CRC articles 6(2), 19(1) and 34, CRPD article 10
No one should be subjected to ***cruel, inhuman or degrading treatment or punishment***. No one should be returned to another country if they would be ***in danger of being persecuted or subjected to torture or cruel, inhuman or degrading treatment***. The ***recovery and social reintegration*** of a child victim of torture or cruel, inhuman or degrading treatment or punishment should be promoted.	ICCPR article 7, CRC articles 37(a) and 39, CAT article 3(1), CRPD article 15(1), Refugee Convention article 33(1)
No one should be subjected to ***arbitrary detention***, and children should only be detained as a ***last resort*** and for the ***shortest appropriate period*** of time. Anyone who is arrested has the right to be informed of the ***reasons for their arrest and the charges against them***. Anyone who is detained has the right to ***challenge the legality of their detention in court***.	ICCPR articles 9(1), 9(2) and 9(4), CRC articles 37(b) and 37(d), CRPD article 14(b)
People in detention should be treated with ***humanity and respect*** for the inherent dignity of the human person. Children in detention should be treated in a manner which ***takes into account the needs of people their age***.	ICCPR article 10(1), CRC article 37(c)
Everyone has the right to ***work***. Refugees should be treated ***at least as favourably as non-citizens in the same circumstances***[13] with regards to employment.	ICESCR article 6(1), Refugee Convention articles 17, 18 and 19

Obligation	Relevant treaties
Everyone has the right to an ***adequate standard of living***, including adequate food, clothing and housing. Children have a right to a standard of living adequate for their physical, mental, spiritual, moral and social development. Refugees should be treated ***at least as favourably as non-citizens in the same circumstances*** with regards to housing, and in the ***same manner as citizens*** with regards to public relief and social security.	ICESCR article 11(1), CRC article 27(1), CRPD article 28(1), Refugee Convention articles 21, 23 and 24
Everyone has the right to enjoy the ***highest attainable standard of health***.	ICESCR article 12(1), CRC article 24(1), CRPD article 25
Everyone has the right to ***education***. Primary education must be compulsory and available free to all. Refugees should be treated ***in the same manner as citizens*** with regards to primary education and ***at least as favourably as non-citizens in the same circumstances*** with regards to secondary and tertiary education.	ICESCR article 13, CRC article 28, CRPD article 24(1), Refugee Convention article 22
The family is entitled to ***protection and assistance*** as the natural and fundamental group unit of society. No one should be subjected to ***arbitrary or unlawful interference with their family***. Applications by a child or their parents for family reunification should be dealt with in a ***positive, humane and expeditious manner***.	ICCPR articles 17(1) and 23(1), ICESCR article 10(1), CRC articles 10(1) and 16(1)
The ***assimilation and naturalisation*** of refugees should be facilitated as far as possible. A child who is seeking or has refugee status should receive ***appropriate protection and humanitarian assistance***. All necessary measures should be taken to ensure the ***safety of people with disabilities in situations of risk***, including humanitarian emergencies.	Refugee Convention article 34, CRC article 22(1), CRPD article 11

Since the publication of the Commission's first Snapshot Report, there has been growing international concern about potential breaches of these obligations resulting from Australia's policies towards people seeking asylum, particularly those who arrive by boat.

UNHCR has issued numerous reports, submissions and statements highlighting potential breaches of Australia's international obligations resulting from third country processing, boat turnbacks, changes to Australia's migration legislation and the resettlement arrangement with Cambodia.[14]

In September 2014, United Nations High Commissioner for Human Rights Zeid Ra'ad Al Hussein raised concerns about Australia's asylum seeker policies in a speech to the United Nations Human Rights Council, stating that turnbacks and third country processing were 'leading to a chain of human rights violations, including arbitrary detention and possible torture following return to home countries'.[15]

In December 2014, the United Nations Committee against Torture released the findings of its most recent periodic review of Australia's compliance with CAT. The Committee expressed concern about Australia's policy of third country processing, citing harsh conditions, prolonged detention and uncertainty about the future, and recommended that all people seeking asylum be 'afforded the same standards of protection against violations of [CAT] regardless of their mode and/or date of arrival'.[16]

Similar concerns have been noted by the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez, who found in March 2015 that Australia had violated CAT through its treatment of people subject to third country processing in Papua New Guinea.[17]

In November 2015, Australia underwent its second Universal Periodic Review by the Human Rights Council. The Review revealed widespread concern about Australia's treatment of refugees and people seeking asylum, with more than 50 states making recommendations on this issue. Mandatory indefinite detention, the detention of children, third country processing and turnbacks were each singled out by several different states as being of particular concern.[18]

The United Nations Special Rapporteur on the human rights of migrants, François Crépeau, undertook an official mission to Australia during November 2016. In his end-of-mission statement, the Rapporteur noted that Australia's migration policies 'present many positive examples' but also expressed concern that some of these policies 'have increasingly eroded the human rights of migrants in contravention of its international human rights and humanitarian obligations'. Some of the specific concerns highlighted in the statement related to *non-refoulement*, discrimination based on mode of arrival, immigration detention, third country processing, guardianship of unaccompanied children, family reunion, visa refusals and cancellations, access to justice and citizenship.[19]

2. Immigration detention and community alternatives

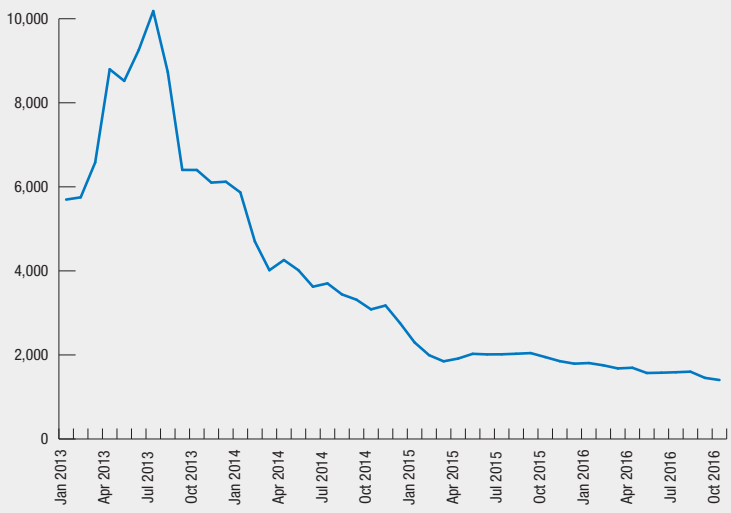
2.1 Detention facilities in Australia

The majority of unlawful non-citizens are detained in closed immigration detention facilities. At the time of publication, there were nine secure immigration detention facilities operating in Australia, comprising:

- five high security Immigration Detention Centres (IDCs) in Villawood, Maribyrnong, Perth, Yongah Hill and North West Point on Christmas Island. These facilities are used for adults deemed to be 'medium to high risk'. As a matter of policy, children are not held in these facilities
- three Immigration Transit Accommodation (ITA) facilities in Adelaide, Brisbane and Melbourne. These are lower security facilities which have less intrusive security measures than IDCs
- one Immigration Residential Housing (IRH) facility in Perth. This lower security facility provides residential-style accommodation.[20]

Since the publication of the Commission's first Snapshot Report, the number of people in closed immigration detention has reduced dramatically. As at 31 December 2016, there were 1,364 people in closed detention facilities in Australia.[21] As can be seen in Chart 3, this is the lowest number of people in detention in almost four years.

Chart 3: Number of people in closed detention in Australia, January 2013 to December 2016[22]



As a result of this reduction, the Australian Government has closed ten mainland detention facilities (the Curtin, Northern and Scherger IDCs; the Bladin, Darwin Airport Lodge, Inverbrackie, Leonora, Pontville and Wickham Point Alternative Places of Detention (APODs); and Port August IRH) and has plans to close a further three (the Maribyrnong IDC, the Blaxland facility within the Villawood IDC and Perth IRH).[23] In addition, the Sydney IRH is no longer operating as a closed detention facility.[24] Detention on Christmas Island is being gradually phased out: the Aqua and Lilac APODs have been closed, the Construction and Phosphate APODs have been put into contingency and the North West Point IDC is also due to be put into contingency from 1 January 2018.[25]

The Commission welcomes the reduction in the number of people held in immigration detention and the closure of numerous detention facilities, particularly those in remote areas and on Christmas Island.

2.2 Arbitrary detention

Australia has obligations under article 9(1) of the ICCPR and article 14(b) of the CRPD not to subject anyone to arbitrary detention. Australia also has an obligation under article 9(4) of the ICCPR to uphold the right of people who are detained to challenge the legality of their detention in court.

According to the United Nations Human Rights Committee, 'arbitrary detention' includes detention which, although lawful under domestic law, is unjust or disproportionate. Therefore, in order for the detention of a person not to be arbitrary, it must be a reasonable and necessary measure in all the circumstances.[26]

Under the *Migration Act 1958* (Cth) (the Migration Act), immigration detention is mandatory for all unlawful non-citizens, regardless of circumstances. Once detained, unlawful non-citizens must remain in detention until they are either granted a visa or removed from Australia.[27]

The detention of an unlawful non-citizen is not based on an individual assessment of the need for detention. All unlawful non-citizens are automatically detained, regardless of whether they pose any identifiable risk to the community. People who are detained cannot seek judicial review of whether or not their detention is arbitrary. Under the Migration Act there is no time limit on how long a person can be detained.

These aspects of Australia's immigration detention regime can result in people being detained for prolonged periods of time, including in circumstances where there is no valid justification for their detention under international law. The United Nations Human Rights Committee has repeatedly found Australia to be in breach of its international obligations under the ICCPR as a result of these factors.[28]

The Commission has previously recommended that, instead of the Migration Act requiring the mandatory immigration detention of broad groups of people, a person should only be detained if it is shown to be necessary in their individual case. Time limits on detention and access to regular judicial oversight of detention would further assist in ensuring that detention does not become arbitrary.

2.3 Detention of children

*Australia has an obligation under article 3(1) of the CRC to ensure that in all actions concerning children, the **best interests of the child** shall be a primary consideration.*

*Australia has an obligation under article 37(b) of the CRC not to subject any child to **arbitrary detention** and to ensure that children are detained only as a measure of **last resort** and for the **shortest appropriate period of time**. Australia also has an obligation under article 37(d) of the CRC to uphold the right of children who are detained to **challenge the legality of their detention in court**.*

There is emerging jurisprudence through the United Nations system that the obligations under Art 37(b) of the CRC apply specifically in the context of juvenile detention facilities, and that the relevant standard for immigration detention is one of 'no detention'.

*For example, the Committee on the Rights of the Child has affirmed that 'the detention of a child because of their or their parent's migration status constitutes a **child rights violation** and **always contravenes the principle of the best interests of the child**'. It has called on states to 'expeditiously and completely **cease the detention of children** on the basis of their immigration status'.*[29]

The Migration Act affirms that as a general principle, children shall only be detained as a measure of last resort.[30] In practice, the provisions of the Migration Act relating to mandatory detention apply equally to adults and children. The Commission has previously raised concerns about the mandatory detention of children, the number of children in immigration detention and the prolonged periods for which some children have been detained.[31]

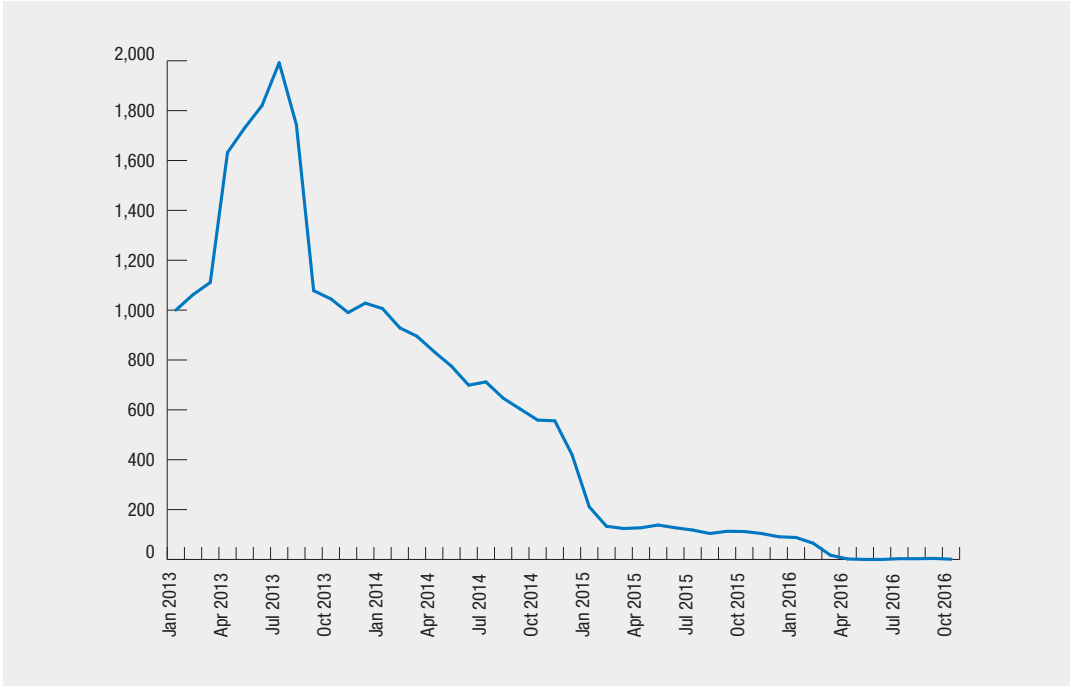
In 2014, the Commission conducted a National Inquiry into Children in Immigration Detention (the National Inquiry). The inquiry found that Australia's detention law, policy and practice do not address the particular vulnerabilities of asylum seeker children, nor do they afford them special assistance and protection. The policy of mandatory detention does not consider the individual circumstances of children or address the best interests of the child as a primary consideration.[32]

The number of children in detention reached a peak of 1,992 in July 2013.[33] Since then, there has been a gradual decline in the number of children in closed detention facilities. In April 2016, the Minister for Immigration and Border Protection (the Minister) announced that no children were being held in closed immigration detention facilities in Australia.[34] As at 31 December 2016, there were just two children in immigration detention in Australia.[35]

In March 2015, the Department appointed an independent Child Protection Panel to 'to provide independent advice on child protection in immigration detention and regional processing centres'.[36] The Panel's terms of reference required it to 'ensure that a comprehensive and contemporary framework for the Department relating to the protection of children is in place'.[37]

In March 2016, the Department endorsed a new Child Safeguarding Framework which incorporated findings and advice from the Panel.[38] In a report of its findings released in May 2016, the Panel affirmed that the Framework fulfilled the requirements of its terms of reference and noted that the Framework is in the process of being implemented.[39]

Chart 4: Number of children in closed detention in Australia, January 2013 to December 2016[40]



The Commission warmly welcomes the release of children from detention in Australia and the development of the Child Safeguarding Framework.

Our concern for the future is to prevent a recurrence of the previous situation. As it currently stands, the Migration Act requires the indefinite detention of children on the same basis as adults. Unless the law is changed, there is a risk that children could again be detained indefinitely for prolonged periods at some point in the future.

Unaccompanied children in the detention environment also face distinct risks. The 2014 National Inquiry identified causal links between detention, mental health deterioration and self-harm in unaccompanied children, and found that detention is not a place in which these children can recover from past trauma and develop the resiliencies they will need for adult life.[41]

There remains a need to enhance protection for this vulnerable group of children, particularly in relation to guardianship. The Minister for Immigration and Border Protection is the legal guardian of unaccompanied children seeking asylum in Australia. The Commission has long argued that this role conflicts with the Minister's responsibilities for administering the immigration detention system and making decisions about visas, removals and transfers to Regional Processing Centres. Given these multiple roles, it is difficult for the Minister (or their delegate) to ensure that the best interests of the child are a primary consideration when making decisions concerning unaccompanied children.

2.4 Conditions of detention

Australia has obligations under article 10(1) of the ICCPR and article 37(c) of the CRC to treat people in detention with ***humanity and respect*** *for the inherent dignity of the human person. Children in detention should be treated in a manner which* ***takes into account the needs of people their age****.*

Australia has obligations under article 11(1) of the ICESCR, article 27(1) of the CRC and article 28(1) of the CRPD to uphold the right to an ***adequate standard of living****, and to ensure that children have a standard of living adequate for their physical, mental, spiritual, moral and social development.*

During visits to immigration detention facilities, the Commission has identified shortcomings in conditions of detention.[42] In some cases, the Commission has found that certain facilities are not appropriate places in which to hold people, especially for prolonged periods of time.[43]

Conditions of detention can have particularly significant implications for the wellbeing and development of children. For example, during visits to the Christmas Island detention facilities conducted as part of the 2014 National Inquiry, the Commission documented concerns about harsh and cramped living conditions (which had created a particular risk of physical illnesses among children), the lack of safe spaces for babies to learn to crawl or walk and lack of access to education (including preschool education).[44]

Since the National Inquiry, all children have been removed from the Christmas Island detention facilities and the four Christmas Island APODs have either been closed or put into contingency. Several other remote detention facilities have also been closed. The Commission welcomes these developments.

There are no minimum standards for conditions of detention codified in Australian law. Introducing these standards would help to ensure greater consistency in conditions across the detention network, prevent breaches of Australia's international obligations and facilitate access to appropriate remedies if breaches do occur. The Commission's publication *Human rights standards for immigration detention*, which sets out benchmarks for the humane treatment of people held in immigration detention, could provide the basis for these minimum standards.[45]

On 9 February 2017, the Australian Government announced its intention to ratify the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). OPCAT provides for ongoing independent monitoring of places of detention, to ensure adherence to minimum standards in conditions and treatment.

This significant development will likely result in more systematic consideration of the adequacy and appropriateness of conditions of detention in the coming years.

While the precise detail of how OPCAT will be implemented is still being developed, the Commission understands that the Australian Government rightly sees immigration detention centres as being within the scope of OPCAT. However, the Commission expresses concern that the Australian Government appears not to take this view in respect of immigration detention facilities in third countries, most notably those in Nauru and Manus Island, Papua New Guinea.

2.5 Detention resulting from security and character assessments

Australia has obligations under article 7 of the ICCPR, article 37(a) of the CRC and article 15(1) of the CRPD not to subject anyone to ***cruel, inhuman or degrading treatment or punishment****.*

Australia has obligations under articles 9(2) and 9(4) of the ICCPR ensure that people who are arrested are ***informed of the reasons for their arrest and the charges against them****, and to uphold the right of people who are detained to* ***challenge the legality of their detention in court****.*

(a) Refugees with adverse security assessments

When the Commission published its first Snapshot Report, there were 57 people (including five children) facing indefinite detention because they or a member of their immediate family had received an adverse security assessment from the Australian Security Intelligence Organisation (ASIO).

Refugees with adverse security assessments cannot be returned to their country of origin as they have been found to have a well-founded fear of persecution. Australian Government policy requires that they remain in immigration detention facilities unless a third country agrees to resettle them. Efforts to secure third country resettlement have not been successful. As a result, these individuals can be detained for as long as they remain in Australia, despite not having been charged with or convicted of any crime.

In October 2012, the then Australian Government appointed an Independent Reviewer of Adverse Security Assessments. The role of the reviewer is to examine the material used by ASIO to make the security assessment, as well as other relevant material (including material submitted by the person affected), and provide recommendations as to whether the assessment is an appropriate outcome. Periodic assessments of adverse security assessments are to take place every 12 months. A new reviewer was appointed in September 2015.

Since 2012, 52 people have been released from detention following a recommendation from the Independent Reviewer or following internal reviews by ASIO.[46] The Commission welcomes these releases.

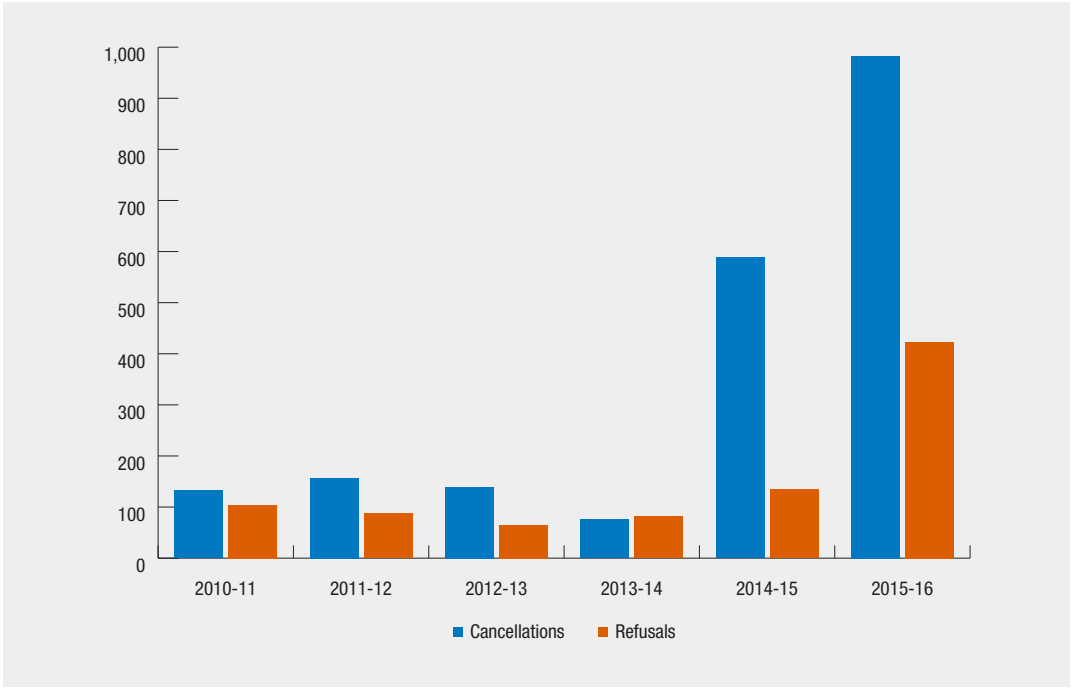
At 29 August 2016, there were four refugees in immigration detention facilities in Australia who had been refused a visa as a result of receiving an adverse security assessment.[47] These individuals, who are currently detained at the Villawood IDC and the Melbourne ITA, have been held in closed detention for between four and six-and-a-half years.[48]

The indefinite detention of these individuals has reportedly had a profoundly negative impact on their wellbeing. In August 2013, the United Nations Human Rights Committee found that the indefinite detention of a group of refugees with adverse assessments was inflicting serious psychological harm upon them, amounting to cruel, inhuman or degrading treatment.[49] The Committee reiterated these findings in April 2016 in relation to another group of refugees with adverse assessments.[50]

(b) Changes to the character test

Under section 501 of the Migration Act, the Minister or their delegate can refuse or cancel a visa on the basis that the person does not pass the 'character test'.[51] The *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth), which came into effect in December 2014, significantly broadened the scope of section 501. Since then, there has been a significant increase in visa refusals and cancellations on character grounds. During the 2015–16 financial year, 423 people had their visa applications refused and 983 people had their visas cancelled on this basis.[52]

Chart 5: Visa refusals and cancellations on character grounds, 2010–11 to 2015–16[53]



Consequently, the number of people in detention due to visa cancellation has also increased. When the Commission published its first Snapshot Report in October 2013, there were 115 people in detention as a result of visa cancellation. As at December 2016, 591 people were in detention for this reason, the majority of whom (451) had their visas cancelled under section 501.[54]

People who have visas refused or cancelled on character grounds have limited access to independent review. If the decision to refuse or cancel a visa was made by a delegate of the Minister, the person affected can appeal to the Administrative Appeals Tribunal (AAT). If the decision was made by the Minister personally, the person cannot appeal to the Tribunal. The Minister also has the power to set aside decisions made by delegates and the Tribunal in relation to character matters.[55]

Many of the people affected by visa refusal or cancellation on character grounds are detained pending removal to their country of origin. For those who are at risk of persecution or other forms of serious harm in their country of origin, removal is not an option. The Commission is concerned that people in this situation could face prolonged indefinite detention with little prospect of release, in much the same manner as refugees with adverse security assessments.

Between 1 January 2013 and 30 June 2016, 106 humanitarian visa holders had their visas cancelled on character grounds. Over the same period, 27 people had a Protection Visa application refused on character grounds.[56]

The Commission considers that alternatives to indefinite detention in closed facilities should be contemplated wherever possible. Where security or character concerns exist, conditions could be applied to mitigate any identified risks (such as a requirement to reside at a specified location, curfews, travel restrictions, regular reporting and, possibly, electronic monitoring).

2.6 Impacts of detention on mental health

Australia has obligations under article 12(1) of the ICESCR, article 24(1) of the CRC and article 25 of the CRPD to uphold the right to the ***highest attainable standard of health****.*

Australia has obligations under articles 6(2) and 19(1) of the CRC to ensure to the maximum extent possible the ***survival and development of the child*** *and to protect children from all forms of* ***physical and mental violence****.*

Australia has obligations under article 7 of the ICCPR, article 37(a) of the CRC and article 15(1) of the CRPD not to subject anyone to ***cruel, inhuman or degrading treatment or punishment****.*

Numerous studies have documented high rates of mental health problems amongst people in immigration detention in Australia, ranging from depression, anxiety and sleep disorders to post-traumatic stress disorder, suicidal ideation and self-harm.[57] Between 1 January 2013 and 25 August 2016, there were 1,730 recorded incidents of self-harm in immigration detention.[58]

Research has also found that bringing together groups of people in the same situation, experiencing frustration, distress and/or mental illness, can result in a 'contagion' effect. 'Dysfunctional thinking' can be magnified; behaviours such as self-harm and rioting are reinforced as responses to problems; and witnessing others self-harm can increase the risk of self-harming behaviour in imitation.[59]

The impact of mental illness on people in detention can impair cognitive function, memory and concentration. This can have a negative impact on their ability to present a coherent, consistent, fact-based claim for asylum,[60] with the result that they could be mistakenly denied refugee status even if they meet the definition of a 'refugee' under international law.

Detention can have particularly detrimental impacts on the wellbeing of children. Between 1 January 2013 and 25 August 2016, there were 203 recorded incidents of self-harm in immigration detention involving children.[61]

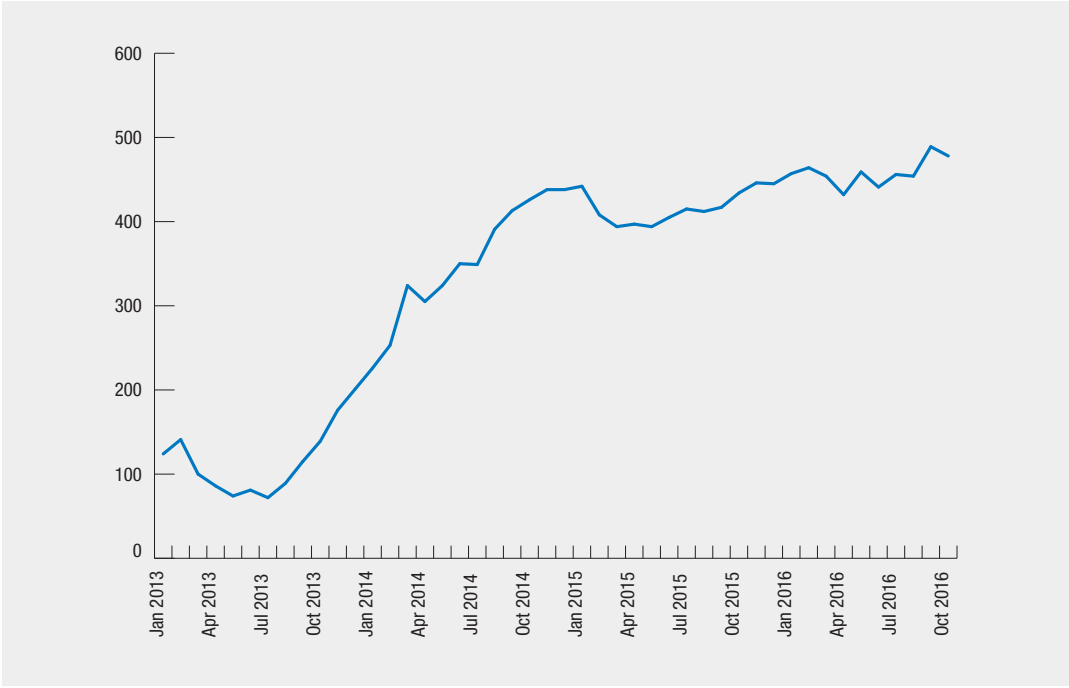
The Commission's 2014 National Inquiry found that prolonged detention was having a profoundly negative impact on the mental and emotional health and development of children. The deprivation of liberty and the exposure to high numbers of mentally unwell adults were found to cause emotional and developmental disorders amongst children.[62]

Health assessments conducted during the first half of 2014 revealed that 34% of children in detention in Australia and on Christmas Island had mental health disorders that would be comparable in seriousness to children referred to hospital-based child mental health out-patient services for psychiatric treatment. Less than two per cent of children in the Australian population have mental health disorders at this level.[63]

Assessments conducted by consultant paediatricians during a visit by the Commission to the Wickham Point detention facility in October 2015 revealed further evidence of the negative impacts of detention on the mental health of children. All of the children under eight years who were assessed for developmental risk were found to be in the two highest risk categories — higher than any published results anywhere in the world for the screening tool used. Eight were assessed as reaching more than twice the threshold for the highest level of developmental risk. Almost all of the children aged eight years and over who were assessed for risk of post-traumatic stress disorder were found to be in the 'clinical' range. In an assessment of personal hopefulness, almost all children and adolescents assessed received the highest possible scores for hopelessness and despair.[64]

The negative impacts of detention tend to worsen as detention becomes more prolonged.[65] This is of particular concern given that the average length of detention has increased significantly in recent years. As at 31 December 2016, 603 people had been detained in closed facilities for more than a year, and 331 had been detained for more than two years.[66]

Chart 6: Average number of days in closed detention, January 2013 to December 2016[67]



The mental health impacts of detention can continue to affect people seeking asylum after they have been released into the community.[68] Studies have found a strong association between past detention, especially detention for longer than six months, and ongoing poor mental health in people living in the community.[69] There are particular concerns about the long-lasting impact of detention on the mental health of children. Evidence gathered during the National Inquiry indicated that while children show noticeable improvements in social and emotional wellbeing once released from detention, significant numbers of children experience negative and ongoing emotional impacts after prolonged detention.[70]

The United Nations Human Rights Committee has found Australia to be in breach of its obligations not to subject anyone to cruel, inhuman or degrading treatment for continuing to detain people in the knowledge that it was contributing to mental illness.[71]

The Commission wishes to acknowledge the efforts of successive Australian Governments to strengthen the mental health services and response across the immigration detention network. As it is the detention environment itself which causes mental health concerns,[72] it is the removal of people from immigration detention facilities which, in many cases, will prevent the deterioration of their mental health.

2.7 Alternatives to detention

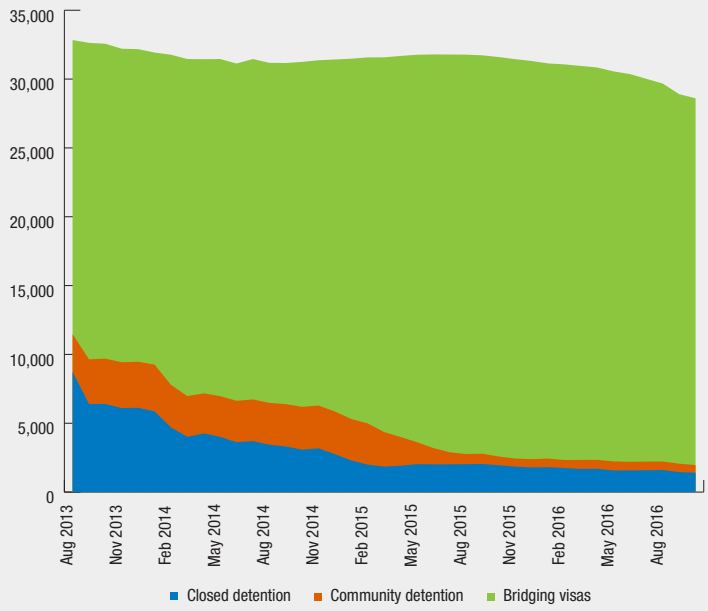
*Australia has an obligation under article 6(1) of the ICESCR to uphold the right to **work**. Australia also has an obligation under articles 17, 18 and 19 of the Refugee Convention to treat refugees **at least as favourably as non-citizens in the same circumstances** with regards to employment.*

*Australia has obligations under article 11(1) of the ICESCR, article 27(1) of the CRC and article 28(1) of the CRPD to uphold the right to an **adequate standard of living**, and to ensure that children have a standard of living adequate for their physical, mental, spiritual, moral and social development. Australia also has obligations under articles 21, 23 and 24 of the Refugee Convention to treat refugees **at least as favourably as non-citizens in the same circumstances** with regards to housing, and in the **same manner as citizens** with regards to public relief and social security.*

*Australia has obligations under article 12(1) of the ICESCR, article 24(1) of the CRC and article 25 of the CRPD to uphold the right to the **highest attainable standard of health**.*

Since community alternatives to detention were introduced in 2005, successive Australian Governments have increasingly moved refugees and people seeking asylum from closed immigration detention into alternative community arrangements, such as community detention and release onto Bridging Visas. The Commission welcomes the Government's ongoing commitment to using alternatives to detention for these groups, especially children. At the time of writing, alternatives to detention were in use for the vast majority of people seeking asylum in Australia.

Chart 7: Number of people in closed detention and alternatives to detention, August 2013 to December 2016[73]



Alternatives to detention are currently delivered under the Status Resolution Support Services (SRSS) Program. There are six bands within the SRSS program that offer varying levels of assistance and support, with all but Band 1 relating to provision of alternatives to detention. As at 25 August 2016, 24,204 people were receiving support under the SRSS Program.[74]

Table 1: Services provided under the SRSS program and number of people receiving services as at 25 August 2016[75]

Service band	Eligible group	Services provided
Band 1 (unaccompanied children in detention) *1 person*	Unaccompanied children held in closed detention facilities	• Carer support • Independent observer services • Transit support
Band 2 (community detention) *65 people*	Unaccompanied children in community detention	• Provided group accommodation with a full time carer • Coverage of rent, food and other household item costs • Small weekly allowance for personal items
Band 3 (community detention) *550 people*	Families and adults with significant vulnerabilities in community detention	• Provided accommodation • Small fortnightly allowance to cover basic living costs
Band 4 (transitional support) *47 people*	People released from detention through the grant of a visa	• Short term transitional support • Referrals to community support services including Medicare and Centrelink • Assistance to find accommodation
Band 5 (community assistance support) *809 people*	Lawful non-citizens with complex barriers to resolving their immigration status	• Casework support to address health and wellbeing, vulnerabilities and other identified barriers
Band 6 (asylum seeker assistance scheme) *22,732 people*	People seeking asylum who are experiencing financial hardship	• Casework assistance • Income support paid at 89% of equivalent Centrelink rates

Community alternatives to detention promote better health and wellbeing outcomes than closed detention, provided that fundamental rights are respected and basic needs are met.[76] One of the most positive developments in this regard since the publication of the Commission's first Snapshot Report has been the reinstatement of work rights for most asylum seekers living in the community. As at 25 August 2016, 27,005 asylum seekers who arrived in Australia by boat were living in the community on Bridging Visas with work rights.[77]

The Commission warmly welcomes the reinstatement of work rights. There remain concerns about the services currently delivered through the SRSS program (particularly under Band 6) and whether they are sufficient to ensure an adequate standard of living. Studies by the Australian Red Cross and UNHCR have found that asylum seekers living in the community face destitution, social isolation and challenges in securing adequate housing and employment.[78] Limited access to English language tuition and other key services (such as employment support services) also hamper their ability to establish themselves in the community.[79]

These conditions are of particular concern in light of the prolonged delays in the processing of asylum claims since 2012. As at the beginning of 2017, of the 30,814 asylum seekers currently in Australia who previously arrived by boat and are undergoing refugee status determination, just 6,610 have received a final decision. Around 40 per cent (12,583 people) have not yet lodged a visa application.[80]

Both the Australian Red Cross and UNHCR identified uncertainty relating to the processing of claims as a key factor contributing to poor mental health outcomes.[81] Researchers at the University of Melbourne have described a clinical syndrome specifically related to the prolonged process of seeking asylum, termed 'protracted asylum seeker syndrome'.[82] Additionally, at least seven people seeking asylum have committed suicide while living in the community since the beginning of 2014.[83]

3. Protection against *refoulement*

Australia has obligations under article 7 of the ICCPR, article 37(a) of the CRC and article 15(1) of the CRPD not to subject anyone to ***cruel, inhuman or degrading treatment or punishment****.*

Australia has obligations under article 3(1) of the CAT and article 33(1) of the Refugee Convention ***not to return a person*** *to another country if they would be* ***in danger of being persecuted or subjected to torture or cruel, inhuman or degrading treatment****.*

The principle of *non-refoulement* requires Australia to provide people seeking asylum with effective access to fair and efficient asylum procedures.[84] Since 2013, several policy and legislative changes have been introduced which have limited access to asylum procedures by people who arrive by boat. The changes have also undermined the rigorousness of Australia's refugee status determination process. The Commission is concerned that these measures may place people seeking asylum in Australia at higher risk of being returned to danger.

3.1 Screening of asylum claims

(a) Enhanced screening process

Between August and October 2012 there was a significant increase in the number of people arriving in Australia by boat from Sri Lanka. In response, the then Australian Government implemented an 'enhanced screening' process that was applied to all people arriving by boat from Sri Lanka.

Under the enhanced screening process, a person was interviewed by two officers from the Department. If the Department determined that the person raised claims which may have engaged Australia's *non-refoulement* obligations, they were 'screened in' to the refugee status determination and complementary protection system that applied under the Migration Act. If the Department determined that the person did not raise claims which engaged Australia's *non-refoulement* obligations, they were 'screened out' of the protection assessment process and removed from Australia.

Between October 2012 and September 2013, the Department conducted 3,313 enhanced screening interviews and involuntarily removed 1,118 people as a consequence. This included 70 children, one of whom was unaccompanied.[85]

While enhanced screening was in operation, the Commission raised concerns that this process did not constitute a fair asylum procedure and risked excluding those with legitimate needs for protection.[86] Key concerns included the following:

- People subjected to the enhanced screening process were not informed of their right to seek asylum
- Screening interviews could be brief and not sufficiently detailed or probing to ensure that all relevant protection claims were raised
- The process could be used not simply for screening but also for substantive assessment of protection claims without the normal safeguards

- People subjected to the screening process were not informed of their right to seek legal advice and were only provided with reasonable facilities to contact a legal adviser if they made a specific request
- People who were 'screened out' were not given a written record of the reasons for the decision, nor did they have access to independent review of such decisions
- The process was applied to vulnerable groups (including unaccompanied children) who may not have received adequate support through the process.

In September 2013, a new form of screening was incorporated into Operation Sovereign Borders, involving the screening of asylum claims at sea.

(b) Operation Sovereign Borders and screening at sea

Operation Sovereign Borders is a military-led border security operation which aims to counter people smuggling, including through preventing the entry to Australia of boats carrying asylum seekers. Beginning in December 2013, boats have been intercepted and returned to their point of departure 'where it is safe to do so'. Since Operation Sovereign Borders commenced, 29 boats carrying 740 people have been intercepted and returned.[87]

In the case of people arriving from Indonesia, turnback operations have involved forcibly transferring asylum seekers onto 'unsinkable' lifeboats which are then set adrift outside Indonesian waters. People arriving directly from Sri Lanka and Vietnam have been repatriated in cooperation with the governments of these countries after undergoing a screening process at sea.

Boat turnbacks and screening at sea raise many of the same concerns as the enhanced screening process, particularly in regard to the conduct of screening interviews, the assessment of protection claims in the absence of normal safeguards and lack of access to legal advice. In addition, the circumstances under which screening takes place during turnback operations — at sea, via teleconference and while the person is effectively being detained on board an Australian vessel — are not conducive to a fair or thorough assessment of protection claims.

Since Operation Sovereign Borders was introduced, the Australian Government has maintained a policy of refraining from public comment in relation to 'on-water matters'. As a result, it is difficult to assess whether turnbacks are being conducted in accordance with Australia's international human rights obligations, including whether adequate safeguards are in place to prevent *refoulement* and guarantee safety of life at sea.

(c) Broadening of maritime powers

The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (the Legacy Caseload Act), which passed in December 2014, introduced a range of new powers allowing the Minister and officers to detain people at sea and take them to another country, regardless of whether Australia has an agreement or arrangement with that country to do so.[88] The new powers also allow for people to be taken to other destinations, including another vessel or a place 'just outside' a country.[89]

These powers may be exercised without consideration of Australia's international obligations or the domestic law of any other country, and even if their exercise would be inconsistent with Australia's international obligations.[90] As such, people who arrive by boat to seek asylum may now be lawfully taken to other countries without any consideration of their protection claims, even if doing so would breach Australia's *non-refoulement* obligations. They could also be taken to countries where they have no legal status or access to protection, and are at risk of return to situations of persecution.

The exercise of these powers is not subject to review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or bound by the rules of natural justice.[91] Only the narrower, constitutionally-protected form of judicial review is available. Furthermore, as certain determinations made under these powers are not legislative instruments,[92] they are not subject to Parliamentary scrutiny.

3.2 Refugee status determination

(a) Changes to criteria for refugee status

The Legacy Caseload Act introduced a new statutory refugee status determination framework for all people seeking asylum in Australia. The Act removed most references to the Refugee Convention from the Migration Act and replaced them with the Australian Government's interpretation of its protection obligations.[93] As a result of these changes, a person seeking asylum in Australia will no longer be eligible for refugee status if:

- their fear of persecution does not extend to 'all areas' of their country of origin[94]
- 'effective protection measures' are available in the country of origin from either the government of that country, or a non-state party or organisation (including an international organisation) that controls the country or a substantial part of the country[95]
- they could take 'reasonable steps' to modify their behaviour so as to avoid persecution (although there are significant exceptions to this requirement).[96]

There is a risk that these amendments could result in some people being denied refugee status even if they have a well-founded fear of persecution. For example, the amendment requiring that a person's fear of persecution extend to all areas of their country is based on an expectation that they could relocate to other parts of the country to avoid persecution — regardless of whether the person could reasonably relocate there in light of their individual circumstances.

The Act also altered the definition of 'particular social group' (one of the five eligibility categories under the Refugee Convention), stipulating that a person belonging to a particular social group must have (or be perceived to have) a characteristic that is shared by each member of that group, which is either: innate or immutable; so fundamental to a person's identity or conscience that they should not be forced to renounce it; or something that distinguishes the group from society.[97]

There is a risk that this definition could exclude people at risk of persecution due to factors such as their profession or social status (such as private entrepreneurs in a socialist country or wealthy landowners targeted by guerrilla groups). If these factors are not considered to be fundamental to the person's identity or significant enough to distinguish them from society, they could be denied protection even if they are at risk of harm.

The *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (the Protection and Other Measures Act), passed in March 2015, also made a number of significant changes to the refugee status determination process. It introduced provisions stipulating that it is the responsibility of a person seeking asylum to specify all particulars of their claim and provide sufficient evidence to establish that claim, and the Minister is under no obligation to assist asylum seekers to specify and establish their claim.[98] These changes in effect increase the burden of proof on people seeking asylum, many of whom already face significant challenges in lodging protection claims (as discussed below).

The Protection and Other Measures Act also introduced provisions requiring the Minister to refuse the grant of a Protection Visa if a person provides 'bogus documents' or destroys their documents without a reasonable explanation; and requiring the then Refugee Review Tribunal (now the Migration and Refugee Division of the AAT) to draw unfavourable inferences about the credibility of claims that are presented for the first time at the review stage without a reasonable explanation.[99] As the Protection and Other Measures Act did not define the term 'reasonable explanation', there is a risk that some people with genuine claims may be refused a visa or denied refugee status on the basis of these provisions even if they are innocent of any wrongdoing. It is unclear, for example, whether a person who presents new information to the Tribunal simply because they were not initially aware that it was relevant would be considered to have a 'reasonable explanation'.

(b) 'Fast track' merits review process

The Legacy Caseload Act also introduced a 'fast track' merits review process for asylum seekers who arrived in Australia by boat between 13 August 2012 and 1 January 2014. Under this process, people who are determined not to be refugees by the Department will no longer have their claims reviewed by the AAT, but instead may be referred to the Immigration Assessment Authority (IAA).

The IAA is an independent body established specifically for the purpose of reviewing the claims of asylum seekers subject to the fast track process. Unlike the AAT, the IAA must generally review decisions 'on the papers' — that is, on the basis of the information used by the Department to reach its findings.[100] The IAA can obtain other information beyond that used by the Department; other than in exceptional circumstances, however, the IAA will not interview the person seeking asylum nor consider any new information from them.[101]

The introduction of the fast track review process heightens the risk that people seeking asylum will not receive a fair or thorough assessment of their claims. As asylum seekers will not be permitted to provide new information to the IAA other than in exceptional circumstances, they will need to provide all information relevant to their claims during the first stage of visa processing. This is likely to be very challenging for many people seeking asylum, who may have suffered significant trauma, lack understanding of Australian migration law or have limited English language or literacy skills.

In addition, some people seeking asylum are not eligible for any form of merits review under the fast track process. This includes people who, in the opinion of the Minister, have previously had their protection claims rejected in Australia, by another country or by UNHCR; provided a 'bogus document' in support of their application without a reasonable explanation; or make a 'manifestly unfounded' claim.[102] As people can be excluded from review on the basis of the Minister's opinion, rather than on the basis of a more objective test, there is risk that people could be denied access to any form of merits review even if they have genuine claims.

A robust merits review process can play a critical role in preventing *refoulement*, through allowing errors made during earlier stages of decision-making to be corrected. Under the fast track process — which limits the ability of reviewers to thoroughly assess protection claims and excludes some asylum seekers from any form of review — it is less likely that these errors will be detected. Consequently, the introduction of the fast track process significantly increases the risk that people who are in need of protection will be wrongly denied refugee status and removed from Australia, in violation of our *non-refoulement* obligations.

(c) Access to legal advice

As noted above, many people seeking asylum face significant challenges in lodging applications for refugee status. Access to legal advice and application assistance can therefore play a critical role in ensuring that people who are in need of protection are able to understand the refugee status determination process and lodge applications which are complete, accurate and provide all relevant information. UNHCR argues that legal advice and representation is 'an essential safeguard, especially in complex asylum procedures'.[103]

The Immigration Advice and Application Assistance Scheme (IAAAS), funded by the Federal Government, provides access to free, independent migration advice and application assistance for people seeking asylum. However, as of 31 March 2014, people who arrived in Australia without a valid visa (whether by boat or by plane) are no longer eligible for IAAAS. Those who are eligible for IAAAS can receive advice at the primary stage of visa processing only (with the exception of unaccompanied children, who can also receive IAAAS support at the merits review stage).[104]

Some people who are no longer eligible for IAAAS can access application assistance through the Primary Application Information Service (PAIS). However, PAIS is only available to a small percentage of asylum seekers who are assessed by the Department to be exceptionally vulnerable. Furthermore, PAIS is available at the primary stage of decision-making only (again with an exception for unaccompanied children).[105]

Restrictions on access to legal advice further add to the risk that some asylum seekers will be mistakenly denied refugee status. The changes introduced by the Legacy Caseload Act have significantly increased the complexity of Australia's refugee status determination process. People seeking asylum must now establish their eligibility for refugee status against a more complicated set of criteria, and are expected to present all information relevant to their claims upfront.

As a result of restrictions on access to legal advice, most people seeking asylum will have to navigate this complex process without any professional advice or support. With many people seeking asylum subsisting on very low incomes, it is unlikely that those who do not have access to free advice will be able to afford private legal or migration agent fees. In the absence of this support, many people with genuine protection needs may be unable to fully articulate their claims, placing them at risk of being denied refugee status and returned to danger in violation of Australia's *non-refoulement* obligations.

(d) Removal of legislative safeguards against *refoulement*

Section 198 of the Migration Act sets a range of circumstances in which unlawful non-citizens are subject to mandatory removal from Australia.[106] As a result of changes introduced by the Legacy Caseload Act, Australia's *non-refoulement* obligations are now 'irrelevant' to removals carried out under section 198. Officers are obliged to remove a person to whom section 198 applies irrespective of whether there has been an assessment of Australia's *non-refoulement* obligations towards them and irrespective of whether Australia in fact has *non-refoulement* obligations towards them.[107]

4. Third country processing

International law does not prohibit third country processing of asylum claims. Transferring people seeking asylum to third countries does not release Australia from its obligations under international human rights law.[108] UNHCR affirms that, where asylum seekers are transferred elsewhere for processing of their claims, 'the primary responsibility to provide protection rests with the state where asylum is sought'.[109] Australia may remain liable for the consequences of transferring people to third countries for processing of their asylum claims, and must ensure that adequate safeguards are in place in those countries to ensure that the human rights of the people transferred are upheld.[110]

As at 31 December 2016, there were 866 people residing at the Regional Processing Centre in Manus Island, Papua New Guinea, and 380 people (including 45 children) residing at the Regional Processing Centre in Nauru.[111] In addition, approximately 800 people are residing in the Nauruan community after being released from the Regional Processing Centre.[112]

4.1 *Non-refoulement*

Australia has obligations under article 7 of the ICCPR, article 37(a) of the CRC and article 15(1) of the CRPD not to subject anyone to ***cruel, inhuman or degrading treatment or punishment****.*

Australia has obligations under article 3(1) of the CAT and article 33(1) of the Refugee Convention ***not to return a person*** *to another country if they would be* ***in danger of being persecuted or subjected to torture or cruel, inhuman or degrading treatment****.*

Australia has an obligation under article 3(1) of the CRC to ensure that in all actions concerning children, the ***best interests of the child*** *shall be a primary consideration.*

Australia also has an obligation under article 39 of the CRC to promote the physical and psychological ***recovery and social reintegration of a child victim of torture*** *or any other form of cruel, inhuman or degrading treatment or punishment.*

(a) Pre-transfer assessments

The pre-transfer assessments conducted before a person is sent to a regional processing country are intended to occur within 48 hours of the person arriving in Australia.[113] This short timeframe may not allow adequate time to consider all relevant factors which may engage Australia's *non-refoulement* obligations.

As a result, people may be sent to Nauru or Papua New Guinea even if they are at risk of persecution in those countries on the same or a similar basis to their claim for refugee status. For example, the Commission is aware of several cases in which same-sex attracted people have been removed to Nauru and Papua New Guinea, despite the fact that both countries criminalised same-sex sexual activity at the time. While Nauru has recently decriminalised same-sex sexual activity, it remained a criminal offence at the time that the transfers took place in these cases. These transfers represent a breach of Australia's *non-refoulement* obligations under the Refugee Convention.

The Commission is also concerned that the pre-transfer assessment process does not adequately take into account the best interests of children. As a result, children (including unaccompanied children) can be transferred to Regional Processing Centres even if it is clearly not in their best interests and could place them at risk of significant harm.[114]

In addition, the pre-transfer assessment process does not take into account whether a person is suffering from a mental illness or is a survivor of torture and trauma. Sending people with complex mental health needs to environments where there is limited access to mental health services, and where they are likely to face difficult living conditions and prolonged uncertainty, may further compromise their health and wellbeing. Similar concerns arise in cases where people brought temporarily to Australia for medical treatment are transferred back to regional processing countries, where the prevailing conditions could undermine their recovery and lead to further illness.

Sending people to Nauru and Papua New Guinea when there is a real risk that this action could negatively affect their health and wellbeing may constitute a form of cruel, inhuman or degrading treatment. As such, transfers under these circumstances could result in breaches of Australia's *non-refoulement* obligations.

(b) Refugee status determination

In the 2013 Snapshot Report, it was noted that there had been prolonged delays in the processing of asylum claims under third country processing arrangements. At the time of the Report's publication, only one claim for refugee status had been finally determined in Nauru over 14 months, and none had been finally determined in Papua New Guinea over 11 months.[115]

The rate of processing has increased significantly since 2013. As at 31 January 2017, 1,204 people in Nauru had received a decision on their application for refugee status (998 of which were positive and 206 negative). In Papua New Guinea, 689 people had been given a positive final determination and 225 had been given a negative final determination.[116]

The Commission welcomes the progress made with refugee status determination in Nauru and Papua New Guinea. The Commission has ongoing concerns regarding the quality of refugee status determination under third country arrangements, particularly in Papua New Guinea. UNHCR has previously expressed concern about the lack of an adequate legal and regulatory framework for conducting refugee status determination in Papua New Guinea, and the limited capacity

of Papua New Guinean officials to conduct status determination for complex caseloads.[117] It remains unclear whether these shortcomings have been adequately addressed.

(c) Risk of 'constructive *refoulement*'

The difficult living conditions and prolonged uncertainty faced by people subject to third country processing may compel some to consider returning to their country of origin, even if they have a well-founded fear of persecution. UNHCR has previously noted that third country processing could raise concerns around 'constructive *refoulement*' (that is, indirectly but effectively compelling people to return to situations where they are at risk of persecution or other forms of serious harm).[118]

4.2 Arbitrary detention

Australia has obligations under article 9(1) of the ICCPR and article 14(b) of the CRPD not to subject anyone to ***arbitrary detention****. Australia also has an obligation under article 9(4) of the ICCPR to uphold the right of people who are detained to* ***challenge the legality of their detention in court****.*

Australia has an obligation under article 37(b) of the CRC not to subject any child to ***arbitrary detention*** *and to ensure that children are detained only as a measure of* ***last resort*** *and for the* ***shortest appropriate period of time****. Australia also has an obligation under article 37(d) of the CRC to uphold the right of children who are detained to* ***challenge the legality of their detention in court****.*

The 2013 Snapshot Report raised concerns that people subject to third country processing (including children) were detained on a mandatory indefinite basis for prolonged periods, without any individualised assessment of the need for detention. In the intervening years, hundreds of refugees and people seeking asylum continued to be detained on an arbitrary basis for long periods of time.

Beginning in May 2014, people sent to Nauru who were found to be refugees were released from the detention facility and permitted to reside in the community.[119] Those whose claims were still being processed, however, remained in detention. As at April 2015, the average length of detention for people in Nauru was 402 days.[120]

In February of 2015, the Government of Nauru commenced the implementation of 'open centre' arrangements, which allowed a select number of asylum seekers to leave the detention facility for certain hours of the day.[121] These arrangements were expanded in October 2015, with all people residing in Regional Processing Centre now permitted to leave at any time without requiring permission.[122]

In Papua New Guinea, the vast majority of people sent to Manus Island for processing of their claims remained in indefinite detention until May 2016. A small number of people who were found to be refugees were released from detention to reside at a transit facility near the Regional Processing Centre.

On 26 April 2016, the Supreme Court of Papua New Guinea ruled that the detention of refugees and people seeking asylum on Manus Island had violated their right to personal liberty as guaranteed by the Papua New Guinea Constitution. The Court ordered the Governments of both Australia and Papua New Guinea to take all steps necessary to end the detention of refugees and people seeking asylum on Manus Island.[123] From May, those held at the Regional Processing Centre have been permitted to depart under 'open centre'-style arrangements.[124]

The transition from indefinite detention to 'open centre' arrangements is a welcome development. However, the Commission notes that both Nauru and Manus Island — in light of their small size, the geographic isolation of the Regional Processing Centres and the lack of permanent settlement options — remain restrictive environments both for those still residing at the Centres and those living in the community or under alternative arrangements.

4.3 Living conditions and safety concerns

*Australia has obligations under articles 6(1) and 9(1) of the ICCPR and article 10 of the CRPD to uphold the rights to **life** and **security of person**.*

*Australia has obligations under articles 19(1) and 34 of the CRC to protect children from all forms of **physical and mental violence, including sexual abuse**.*

*Australia has obligations under article 10(1) of the ICCPR and article 37(c) of the CRC to treat people in detention with **humanity and respect** for the inherent dignity of the human person. Children in detention should be treated in a manner which **takes into account the needs of people their age**.*

*Australia has obligations under article 11(1) of the ICESCR, article 27(1) of the CRC and article 28(1) of the CRPD to uphold the right to an **adequate standard of living**, and to ensure that children have a standard of living adequate for their physical, mental, spiritual, moral and social development.*

Numerous reports and inquiries as well as the Commission's own research have repeatedly documented serious shortcomings in living conditions for people subject to third country processing.[125] These include:

- substandard accommodation, with the main concerns including the use of temporary accommodation (such as tents) for prolonged periods, overcrowding, cramped living quarters and limited privacy
- the harshness of the physical environment, including extreme heat, rough and hazardous terrain and the presence of vermin
- the inadequacy of basic services, including water and hygiene facilities, provision of clothing and footwear, education and health services.

Available evidence suggests that there has been limited improvement in these conditions over time.[126]

Two separate Senate inquiries have identified inadequate living conditions as contributing factors to tension and unrest at third country processing facilities.[127] The first of these inquiries focused on a serious violent incident which occurred at the Manus Island Regional Processing Centre in February 2014. This incident was also the subject of an independent review by Robert Cornall AO. Following protests by some of the people detained at the facility (which in some instances had turned violent), dozens of people seeking asylum were assaulted by Papua New Guinea police, security guards and other local staff. Many of those assaulted had not been involved in the protests — in some cases, people taking shelter in their bedrooms were dragged outside to be beaten.[128]

Iranian asylum seeker Reza Berati was beaten to death and two other people sustained serious injuries (one losing his right eye and the other suffering a gunshot wound). At least 69 other people were also treated for a range of injuries, including broken bones and lacerations. Others likely received minor injuries which did not require medical treatment, and many reported negative impacts on their mental health.[129]

The second inquiry focused on serious allegations which emerged in September 2014, regarding multiple incidents of physical and sexual assault and other forms of abuse and exploitation involving people residing at the Regional Processing Centre in Nauru (including children). An independent review of these allegations by Philip Moss documented numerous reported and unreported claims of assault, harassment and exploitation, and found that many people held at the Regional Processing Centre in Nauru were apprehensive about their personal safety and had concerns about their privacy.[130]

The review made a number of recommendations to improve processes for preventing and responding to sexual and other physical assault in Nauru, all of which were accepted by the Department.[131] A Senate inquiry subsequently concluded that the Regional Processing Centre in Nauru 'is neither a safe nor an appropriate environment for children and that they should no longer be held there'. It recommended that all children and families be removed from the facility as soon as possible.[132]

In addition to incidents within the Regional Processing Centre, there have been several incidents in which people subject to third country processing have reportedly been physically attacked or sexually assaulted while residing in the Nauruan community, or while on release from the Regional Processing Centre.[133]

During a visit to the Wickham Point detention facility in October 2015, the Commission interviewed many children and adults who had been temporarily transferred from Nauru to Australia for medical treatment. The interviews revealed universal concerns about safety in Nauru, with most people reporting they would not leave the Regional Processing Centre despite the introduction of 'open centre' arrangements due to concerns about their safety in the Nauruan community.[134]

The Commission acknowledges that attempts have been made to improve security in both regional processing countries. However, it may be difficult to fully address security concerns given the operational limitations in both Nauru and Papua New Guinea.

4.4 Impacts of third country processing on physical and mental health

Australia has obligations under article 12(1) of the ICESCR, article 24(1) of the CRC and article 25 of the CRPD to uphold the right to the ***highest attainable standard of health****.*

Australia has obligations under articles 6(2) and 19(1) of the CRC to ensure to the maximum extent possible the ***survival and development of the child*** *and to protect children from all forms of* ***physical and mental violence****.*

Australia has obligations under article 7 of the ICCPR, article 37(a) of the CRC and article 15(1) of the CRPD not to subject anyone to ***cruel, inhuman or degrading treatment or punishment****.*

Since third country processing was reinstated in 2012, concerns have been consistently raised about the impacts of these arrangements on the physical and mental health of refugees and people seeking asylum.

Limited health care services and poor conditions of detention — including hot and humid conditions, inadequate sanitation and hygiene facilities, overcrowding in accommodation, presence of parasites and vermin and (in Nauru) proximity to phosphate mining — have been highlighted as key factors leading to physical illness amongst people held at Regional Processing Centres.[135]

In September 2014, Iranian asylum seeker Hamid Khazaei died from septicaemia after cutting his foot while detained at the Manus Island Regional Processing Centre. The severity of his illness was likely compounded by conditions at the Centre and difficulties in securing the necessary medical care in Papua New Guinea. Had a similar injury been sustained by a person in a detention facility in Australia, it is highly unlikely that it would have resulted in their death.

In relation to mental health, the combination of prolonged indefinite detention, delays in the processing of asylum claims, difficult living conditions, concerns about physical safety and uncertainty about the future have reportedly had a profoundly negative impact on the mental health outcomes of people subject to third country processing.

In April 2016, UNHCR visited Manus Island and Nauru accompanied by three expert medical consultants, who undertook mental health surveys of the asylum seekers and refugees residing there. Of 181 people surveyed on Manus Island, 88 per cent were suffering from a depressive or anxiety disorder and/or post-traumatic stress disorder.[136] Of the 53 people surveyed in Nauru, 83 per cent suffered from post-traumatic stress disorder and/or depression.[137]

UNHCR observed that

> the prolonged, arbitrary and indefinite nature of immigration detention in conjunction with a profound hopelessness in the context of no durable settlement options has corroded these individuals' resilience and rendered them vulnerable to alarming levels of mental illness.[138]

Most of the children interviewed during the Commission's visit to the Wickham Point detention facility in October 2015 had spent several months in Nauru. The consultant paediatricians accompanying the Commission reported that these children were among the most traumatised they had ever seen. Some had palpable anticipatory trauma at the mention of return to Nauru. The paediatricians concluded that 'Nauru is an inappropriate place for asylum seeking children to live, either in the detention centre or in the community'. It recommended that 'under no circumstances should any child detained on the mainland be returned to or transferred to Nauru'.[139] While the children detained at Wickham Point were subsequently released into community detention, there are still 178 children residing in Nauru under third country processing arrangements.[140]

The Commission requested information from the Department regarding the number of people receiving treatment for physical and mental health issues under third country processing arrangements, and the number of incidents of self-harm, attempted self-harm and attempted suicide which have occurred amongst refugees and asylum seekers in Nauru and Manus Island. This information had not been provided at the time of publication.

4.5 Resettlement arrangements

Australia has an obligation under article 34 of the Refugee Convention to facilitate as far as possible the ***assimilation and naturalisation*** *of refugees.*

Australia also has obligations under article 22(1) of the CRC to ensure that a child who is seeking or has refugee status receives ***appropriate protection and humanitarian assistance****; and under article 11 of the CRPD to take all necessary measures to ensure the* ***protection and safety of people with disabilities in situations of risk****, including humanitarian emergencies.*

In September 2014, the Australian Government signed a Memorandum of Understanding with Cambodia, whereby Cambodia will offer permanent resettlement to people who are determined to be refugees by Nauru and voluntarily elect to resettle in Cambodia.[141]

To date, six refugees have resettled in Cambodia under this arrangement. However, four of these refugees have subsequently returned to their countries of origin,[142] despite being determined to have a well-founded fear of persecution in those countries.

These returns raise questions as to whether resettlement in Cambodia can provide a genuine durable solution for refugees. Cambodia is one of the world's least developed countries[143] and does not have a strong tradition of immigration.[144] In addition, while Cambodia has signed the Refugee Convention, it has on several occasions breached its obligations towards people seeking asylum from China and Vietnam.[145] As such, it unlikely that Cambodia will have the capacity to provide adequate protection and support to a significant number of refugees over the long term (particularly if they have complex needs).

Furthermore, the Operational Guidelines for the implementation of the Memorandum of Understanding state that within 12 months of departing from the temporary accommodation provided to refugees on arrival, Australia will help to facilitate their voluntary repatriation to their country of nationality or another country where they have a right to enter and reside.[146] It remains unclear whether Cambodia will continue to provide protection to refugees who cannot safely return to their country of origin within this time period.

In August 2013, the then Australian Government signed a Memorandum of Understanding with Papua New Guinea, under which people determined to be refugees under third country processing arrangements on Manus Island would settle in Papua New Guinea.[147] According to the National Refugee Policy approved in October 2015, refugees settled under this arrangement will be permitted to apply for citizenship after living in Papua New Guinea for eight years.[148]

However, as with Cambodia, it is questionable whether resettlement in Papua New Guinea will provide a genuine durable solution for refugees. Following the announcement of the resettlement arrangement in 2013, UNHCR issued a statement expressing concern that 'sustainable integration of non-Melanesian refugees in the socio-economic and cultural life of [Papua New Guinea] will raise formidable challenges and protection questions'.[149] Following a visit to Manus Island in April 2016, UNHCR concluded that 'integration of transferred refugees in Papua New Guinea is not possible', thus settlement in Papua New Guinea 'is not a viable option for refugees, even on a temporary basis.'[150]

In November 2016, the Australian Government announced a new resettlement arrangement with the United States of America for refugees subject to third country processing. The Government has indicated that US authorities would conduct their own assessments of the refugees and decide which people will be resettled, with priority given to vulnerable groups such as women, children and families.[151] Few other details about the new arrangement were available at the time of publication, and it remains unclear whether this arrangement will provide solutions for all of the refugees currently subject to third country processing.

The Australian Government has also indicated that it is in the final stages of negotiation with Nauru to introduce a 20-year visa for refugees who refuse an offer of resettlement in the United States. Following an April 2016 visit to Nauru, however, UNHCR found that 'settlement on Nauru is not an option,

even on a temporary basis', as the needs of the refugee population 'grossly exceed the capacity of Nauruan services'. UNHCR concluded that 'attempting to resettle refugees in Nauru for any longer than a short duration carries considerable risk of harm to the refugees with regard to unmet health, educational and other needs.'[152]

4.6 Independent monitoring

Independent monitoring is essential to ensuring accountability and transparency, and thereby guarding against violations of human rights. The need for independent monitoring is heightened in Nauru and Manus Island due to the limited transparency in the operation of third country processing arrangements, and because their remote locations make them less accessible to media and monitoring bodies.

Advisory Committees have been established in both Nauru and Papua New Guinea to oversee the implementation of third country processing arrangements. These Committees are convened jointly by the governments of Australia, Nauru and Papua New Guinea, and include representatives from these governments as well as members of the Minister's Council on Asylum Seekers and Detention and observers from the office of the Commonwealth Ombudsman.

The Australian Red Cross, Commonwealth Ombudsman and UNHCR have also conducted visits to the Regional Processing Centres in both Nauru and Manus Island, although only UNHCR has reported its findings publicly.[153] The United Nations Subcommittee on the Prevention of Torture visited Nauru in 2015[154] but the report of its findings has not been publicly released. Visits to the Nauru and Manus Island facilities were also undertaken for the Moss and Cornall reviews, the findings of which were released publicly.[155]

Overall, there is no monitoring body with all of the key features necessary to be fully effective. These include:

- independence from the governments of all countries involved in third country processing
- adequate funding to fulfil the role
- the capacity to maintain an ongoing or regular presence in Nauru and Manus Island
- a specific statutory power to enter immigration detention facilities
- comprehensive public reporting for transparency
- the capacity to require a public response from governments.

A Senate inquiry into allegations of physical and sexual abuse at the Regional Processing Centre in Nauru also expressed concerns about the lack of transparency surrounding third country processing arrangements. The inquiry noted that 'greater transparency is an important prerequisite to improving accountability of all involved for the welfare and safety of persons at the [Regional Processing Centre]'. It recommended that Australia increase the transparency of conditions and operations at the Regional Processing Centre, including through facilitating reasonable access by the Commission and the media.[156]

5. Discrimination based on mode of arrival

Australia has obligations under article 2(1) of the ICCPR, article 2(2) of the ICESCR and article 2(1) of the CRC to ensure that everyone can ***enjoy human rights without discrimination of any kind****.*

Australia also has obligations under article 26 of the ICCPR to uphold the right to ***freedom from discrimination*** *on any ground; and under article 2(1) of the CRC to ensure that a children are protected against all forms of* ***discrimination or punishment on the basis of the status and activities of their parents****, guardians or family members.*

Australia also has an obligation under article 31(1) of the Refugee Convention ***not to impose penalties*** *on refugees who enter or are present in Australia* ***without authorisation****.*

Australia continues to maintain a range of policies which discriminate against people seeking asylum and refugees on the basis of their mode of arrival in Australia (specifically, whether they arrived by boat and whether they held a valid visa on arrival). A number of these policies — such as 'fast track' merits review and third country processing — have already been discussed in this Report. This section focuses on policies that discriminate against people who have been recognised as refugees and permitted to settle in Australia.

5.1 Temporary protection

Australia has obligations under article 34 of the Refugee Convention to facilitate as far as possible the ***assimilation and naturalisation*** *of refugees; and under article 11 of the CRPD to take all necessary measures to ensure the* ***protection and safety of people with disabilities in situations of risk****, including humanitarian emergencies.*

Australia has obligations under article 12(1) of the ICESCR, article 24(1) of the CRC and article 25 of the CRPD to uphold the right to the ***highest attainable standard of health****.*

Australia has an obligation under article 3(1) of the CRC to ensure that in all actions concerning children, the ***best interests of the child*** *shall be a primary consideration.*

Australia has an obligation under article 6(2) of the CRC to ensure to the maximum extent possible the ***survival and development of the child****.*

Australia also has obligations under articles 22(1) and 39 of the CRC to ensure that a child who is seeking or has refugee status receives ***appropriate protection and humanitarian assistance****, and to promote the physical and psychological* ***recovery and social reintegration of a child victim of torture*** *or any other form of cruel, inhuman or degrading treatment or punishment.*

Temporary protection for refugees is not prohibited under the Refugee Convention or international human rights law. However, UNHCR recommends that temporary protection arrangements are best suited to situations where 'individual status determination is either not applicable or feasible' (such as large-scale influxes) and should not be used if the stay becomes prolonged or to discourage people from seeking asylum.[157] UNHCR also emphasises that 'refugees should not be subjected to constant review of their refugee status', and any review of their status should be triggered by 'fundamental' and 'durable' changes in their country of origin, rather than occurring periodically.[158]

Temporary protection arrangements for refugees were first used in Australia under the Temporary Protection Visa (TPV) regime, which was introduced in 1999. TPVs were granted to refugees who had arrived in Australia without valid visas and were valid for up to three years, after which time the person had to reapply for protection and have their asylum claims reassessed. If they were found to be in ongoing need of protection, they could be granted a permanent Protection Visa.

During this period, numerous studies found that the granting of protection to refugees on a temporary basis had a detrimental impact on their mental health. Uncertainty about their future, the inability to make long-term plans and the stress associated with having to reapply for protection (including the anticipatory distress of potentially being returned to the country from which they had fled) caused significant distress and anxiety amongst TPV holders, hampered their capacity to recover from past trauma and resulted in poorer settlement outcomes as compared to permanent Protection Visa holders.[159] A Senate inquiry conducted in 2006 concluded in relation to the TPV regime that 'there is little real evidence of its deterrent value … but there is no doubt that its operation has had a considerable cost in terms of human suffering'.[160]

The Commission's first National Inquiry into Children in Immigration Detention, conducted in 2004, also examined the impacts of Temporary Protection Visas on children. It found that granting temporary protection was more likely to compound mental health problems for these children than facilitate their rehabilitation and integration into Australian society. The Inquiry concluded that the use of TPVs for refugee children had resulted in breaches of those children's rights to mental health, maximum possible development and recovery from past torture and trauma, and of Australia's obligations to address the best interests of the child as a primary consideration.[161]

TPVs were abolished in 2008 but were reintroduced in 2014 through the Legacy Caseload Act. The Act also introduced a new class of temporary visa, the Safe Haven Enterprise Visa (SHEV), which is valid for up to five years.[162] As at the beginning of 2017, 2,970 people had been granted a TPV and 1,107 people had been granted a SHEV.[163]

As was the case under the first TPV regime, TPV or SHEV holders who are in ongoing need of protection after their visa expires must have their asylum claims reassessed. TPV holders can only apply for another TPV or a SHEV.[164] SHEV holders, however, may be eligible to apply for a range of temporary and permanent

migration visas (but not a permanent Protection Visa) if they meet certain 'pathway requirements'. To meet these requirements, a SHEV holder must be either employed in a designated regional area without receiving certain social security benefits, enrolled and physically attending full-time study in a designated regional area, or a combination of the two, for at least three-and-a-half years.[165]

Many SHEV holders are likely to face challenges in meeting these pathway requirements, given their limited access to support services and entitlements (discussed in the following section). Furthermore, even those who are able to meet these requirements are likely to face challenges in satisfying the eligibility criteria for migration visas. For example, people applying for skilled visas generally have to demonstrate competent English, hold a recognised qualification and be below a certain age — criteria which may be difficult for many SHEV holders to meet.

Due to the limited pathways to permanent residency available to TPV and SHEV holders, it is likely that these refugees will face ongoing mental health issues and settlement challenges.

5.2 Support services and entitlements

*Australia has obligations under article 11(1) of the ICESCR, article 27(1) of the CRC and article 28(1) of the CRPD to uphold the right to an **adequate standard of living**, and to ensure that children have a standard of living adequate for their physical, mental, spiritual, moral and social development.*

*Australia has obligations under article 13 of the ICESCR, article 28 of the CRC and article 24(1) of the CRPD to uphold the right to **education**, including through making higher education accessible to all.*

*Australia also has obligations under articles 21, 22, 23 and 24 of the Refugee Convention to treat refugees in the **same manner as citizens** with regards to primary education, public relief and social security, and **at least as favourably as non-citizens in the same circumstances** with regards to housing and secondary and tertiary education.*

Refugees who hold temporary humanitarian visas do not have access to the same support services and entitlements as refugees on permanent humanitarian visas. The table below summarises the entitlements available to each group of visa holders.

Table 2: Access to support services and entitlements by humanitarian visa holders[166]

Support service or entitlement	Offshore resettlement (200-204)	Onshore permanent Protection (866)	TPV (785) and SHEV (790)
Education			
Free primary and secondary education	✔	✔	✔
Local student fees for tertiary education	✔	✔	✖
Higher education loans and Commonwealth-supported places	✔	✔	✖
English language tuition	✔	✔	✔
Employment			
Work rights	✔	✔	✔
Employment support services	✔	✔	✔
Social services			
Medicare	✔	✔	✔
Social security*	✔	✔	–
On-arrival settlement services**	✔	–	✖
Longer term settlement services	✔	✔	✖

*TPV and SHEV holders are eligible for a limited range of payments and primarily receive income support through Special Benefit.[167]

**Protection Visa holders are only eligible for on-arrival services if they were not living in the community prior to their visa grant, or if they are unaccompanied children.[168]

TPV and SHEV holders have access to a wider range of services than was the case under the previous TPV regime. The provision of English language tuition to these visa holders is particularly welcome.

However, TPV and SHEV holders still do not have access to several key services that play a critical role in ensuring positive settlement outcomes. In particular, access differs significantly between permanent and temporary visa holders in relation to:

- *Tertiary education:* While TPV and SHEV holders can undertake tertiary study, they are considered to be international students and thus must pay far higher fees than local students. As they are not eligible for higher education loans or Commonwealth-supported places, it is unlikely that most will have the capacity to meet these fees. In addition, TPV and SHEV holders are not eligible for social security payments designed specifically for students, which may limit their ability to receive income support while studying.[169] This is likely to be a particularly significant issue for young people finishing secondary education, who may have very few opportunities for further study.
- *Settlement services:* These services are designed to support refugees to rebuild their lives and develop the knowledge and skills they will need to live independently in Australia. As TPV and SHEV holders are not eligible to receive settlement services of any kind, they will have to navigate life in Australia without ongoing guidance and support.

As a result of these restrictions, TPV and SHEV holders may face significant challenges in maintaining an adequate standard of living and achieving positive settlement outcomes.

5.3 Family reunion

Australia has obligations under articles 23(1) of the ICCPR and 10(1) of the ICESCR to afford ***protection and assistance to the family*** *as the natural and fundamental group unit of society.*

Australia has obligations under article 17(1) of the ICCPR and article 16(1) of the CRC not to subject anyone to ***arbitrary or unlawful interference with their family****.*

Australia has an obligation under article 10(1) of the CRC to treat applications by a child or their parents for family reunification in a ***positive, humane and expeditious manner****.*

There are several avenues under the Refugee and Humanitarian Program through which people in Australia can seek to reunite with relatives in humanitarian need overseas:

- 'split family' provisions, which allow humanitarian visa holders in Australia to propose their immediate family members (that is, their partner and children or, in the case of a child, their parents) for resettlement[170]

- the Special Humanitarian Program, which allows eligible people and organisations in Australia to propose a person overseas for resettlement, with applications prioritised on the basis of the closeness of the relationship between the proposer and the person being proposed[171]
- the Community Proposal Pilot, which offers up to 500 places within the Program for people proposed for resettlement through an approved proposing organisation. Proposers are required to pay substantial application and processing fees but applications lodged under the Pilot receive priority processing.[172]

People who hold a permanent Protection Visa or Resolution of Status visa, regardless of their mode of arrival in Australia, are considered the lowest processing priority for family reunion applications under the Refugee and Humanitarian Program (although decision-makers can depart from the order of priority if relevant special circumstances exist or where processing would be unreasonably delayed).[173] They must also meet additional eligibility criteria.[174] TPV and SHEV holders and people who arrived in Australia by boat on or after 13 August 2012 are not eligible to propose relatives for resettlement under the Refugee and Humanitarian Program.[175]

Similar restrictions apply under the family stream of the Migration Program. Applications lodged by permanent visa holders who arrived in Australia by boat receive the lowest processing priority,[176] while TPV and SHEV holders (due to their temporary status) are not eligible to apply for family stream visas.[177]

In addition, TPV and SHEV holders are not permitted to travel overseas without losing their visa unless there are 'compassionate or compelling circumstances' to justify their travel and they have received written approval. 'Compassionate and compelling circumstances' can include visiting close relatives who the person has not seen in over a year, caring for close relatives who are seriously ill or attending the funeral of close relatives.[178] This precludes TPV and SHEV holders from travelling overseas on a regular basis to visit their relatives with whom they cannot reunite.

As a result of these restrictions, refugees who arrived in Australia by boat face the prospect of indefinite and potentially permanent separation from their relatives, including in many cases their immediate family. Because these restrictions do not have a proper justification, the Commission has found that they breach Australia's international obligations to protect the family and refrain from arbitrarily interfering in family life.[179] In addition, the negative impact of prolonged family separation on mental health, wellbeing and settlement outcomes of refugees in Australia[180] could lead to breaches of other rights (such as the right to health).

Appendix 1

Summary of progress since last Snapshot Report

Issue	Summary of developments	Progress rating
Immigration detention		
Decisions to detain are made on a case-by-case basis	Detention remains mandatory for all unlawful non-citizens	–
Detention is allowed only for a strictly limited time	No legislative time limit on detention Average length of detention has increased significantly	⌄
Decisions to detain are subject to regular review by a court or tribunal	No regular review of decisions to detain	–
Conditions of detention meet international standards	Several remote detention facilities have been closed	^
Minimum standards of treatment are codified in law	No minimum standards are codified in law	–
Detention of children		
There is a legislative presumption against the detention of children	Mandatory detention applies equally to adults and children	–
Children are not held in closed detention facilities	Number of children held in closed facilities has reduced dramatically	^
Unaccompanied children have an independent legal guardian	Minister remains the guardian of unaccompanied children	–
Detention resulting from security and character assessments		
People who have received adverse security and character assessments can seek review from the AAT	Non-citizens who have received adverse security assessments cannot seek review from the AAT People who have had a visa refused or cancelled on character grounds can seek review from the AAT but only if the decision was made by a delegate of the Minister	–

Issue	Summary of developments	Progress rating
Detention resulting from security and character assessments (continued)		
Minister cannot set aside decisions of the AAT	Minister can set aside decisions of the AAT in relation to character matters	–
Alternatives to detention are explored for refugees and people seeking asylum who have received adverse security assessments	Most people who have received adverse security assessments have been released from closed detention	^
Alternatives to detention are explored for people whose visas have been refused or cancelled on character grounds	Number of people in detention due to having a visa cancelled on character grounds has increased significantly	⌄
Alternatives to detention		
Community-based alternatives are considered for all refugees and people seeking asylum	Number of people seeking asylum in detention has reduced Use of alternatives to detention for people seeking asylum has increased	^
Asylum seekers living in the community have the right to work	Work rights reinstated for asylum seekers living in the community on Bridging Visas	^
Asylum seekers living in the community enjoy an adequate standard of living	Services for asylum seekers living in the community are insufficient to ensure an adequate standard of living	–
Applications for refugee status are processed in a timely fashion	Many people who arrived some years ago still have not had their claims processed	⌄
Protection against *refoulement*		
All people seeking asylum have access to a robust refugee status determination process	Asylum claims are screened at sea without adequate safeguards Boats carrying asylum seekers are turned back without a full assessment of claims	⌄

Issue	Summary of developments	Progress rating
Protection against *refoulement* (continued)		
Refugee status determination process reflects international obligations and provides safeguards against *refoulement*	Changes to criteria for refugee status do not reflect international obligations 'Fast track' review process increases the risk of erroneous decision-making Legislative protections against *refoulement* have been removed	
Asylum seekers who are disadvantaged have access to free government-funded legal advice	Free government-funded legal advice is available at the primary stage only (except for unaccompanied children) Most asylum seekers who arrived without visas are not eligible for free government-funded legal advice	
Third country processing		
Pre-transfer screening process affords protection against *refoulement*	Pre-transfer screening process does not adequately consider *non-refoulement* obligations, best interests of children and complex mental health needs	
Refugee status determination process reflects international obligations and provides safeguards against *refoulement*	Ongoing concerns about the quality of refugee status determination under third country arrangements	
Applications for refugee status are processed in a timely fashion	Rate of processing has increased significantly	
Detention is used as a last resort and for the shortest possible time	Regional Processing Centres are now operating under 'open centre' arrangements	
People subject to third country processing enjoy an adequate standard of living	Limited improvement in living conditions	

Issue	Summary of developments	Progress rating
Third country processing (continued)		
People subject to third country processing enjoy physical safety	Multiple incidents and allegations of physical and sexual assault, including one death resulting from assault	⌄
Refugees have access to timely durable solutions	Resettlement arrangements with Cambodia and Papua New Guinea are unlikely to provide long-term solutions Details of resettlement arrangement with USA remain unclear	–
Third country processing arrangements are subject to independent monitoring	No monitoring body with all the key features necessary to be fully effective	–
Discrimination based on mode of arrival		
All refugees have access to permanent residency	Temporary protection reintroduced for refugees who arrived without visas	⌄
Refugees who hold temporary visas have access to the same services and entitlements as permanent Protection Visa holders	Temporary visa holders are eligible for fewer services and entitlements, particularly in relation to tertiary education and settlement services	⌄
All refugee and humanitarian entrants have equal access to family reunion opportunities	Protection Visa holders and people who arrived by boat and/or without visas face restrictions on access to family reunion opportunities	⌄

Appendix 2

Timeline of key developments since the introduction of mandatory immigration detention in Australia

1992

Mandatory immigration detention (for up to 273 days) introduced as an interim measure for designated non-citizens who arrive by boat without visas

1994

Mandatory detention broadened to apply to all non-citizens who arrive without visas and the 273-day time limit removed. Bridging Visas introduced as an alternative to detention

1998

Commission releases report: *Those who've come across the seas: Detention of unauthorised arrivals*

1999

Temporary Protection Visas (TPVs) introduced for refugees who arrive without visas

2001

Third country processing established in Nauru and Papua New Guinea (PNG), a policy which becomes known as the 'Pacific Solution'

Offshore territories including Christmas Island excised from Australia's migration zone. Non-statutory refugee status determination process introduced for asylum seekers who arrive in excised territories without visas

Operation Relex, a border protection operation aimed at preventing boats carrying asylum seekers from arriving in Australia, commences

2004

Commission releases report: *A last resort? National Inquiry into Children in Immigration Detention*

Al-Kateb case: High Court finds that indefinite immigration detention is lawful

Behrooz case: High Court finds that harsh conditions do not render immigration detention unlawful

Woolley case: High Court finds that mandatory detention of children is lawful

2005

New alternatives to detention introduced, including 'community detention' arrangements for families with children and Removal Pending Bridging Visas for people in long-term detention whose removal is not currently practicable

2008

Third country processing facilities in Nauru and PNG's Manus Island closed, marking the end of the 'Pacific Solution'

TPVs abolished

'New Directions in Detention' policy announced, including a commitment to use detention as a last resort and for the shortest practicable time

2010

Expansion of alternatives to detention for children and families commences

M61 & M69 case: High Court finds that the non-statutory refugee status determination process is still bound by the provisions of the Migration Act and decisions of Australian courts

2011

'Swap' arrangement with Malaysia announced, under which 800 asylum seekers arriving in Australia by boat would be transferred to Malaysia in exchange for Australia resettling 4,000 refugees from Malaysia

M70 case: High Court finds that the 'swap' arrangement with Malaysia is unlawful

Complementary protection framework introduced

Non-statutory refugee status determination process for asylum seekers who arrive without visas abolished

2012

Expert Panel on Asylum Seekers recommends introduction of a 'no advantage' policy, including reinstatement of third country processing

Third country processing re-established in Nauru and PNG's Manus Island

'Enhanced screening' process introduced for asylum seekers from Sri Lanka who arrive by boat

Due to the 'no advantage' policy, asylum seekers released from detention onto Bridging Visas are no longer granted work rights

2013

Excision policy extended to the Australian mainland, with the result that asylum seekers arriving by boat anywhere in Australia are subject to third country processing

Regional Resettlement Agreement with PNG announced, under which refugees subject to third country processing will be permitted to settle permanently in PNG but not Australia

Operation Sovereign Borders commences

2014

Access to government-funded legal advice withdrawn from asylum seekers who arrive without visas

Resettlement arrangement with Cambodia signed, under which refugees subject to third country processing in Nauru may elect to resettle in Cambodia

Major changes to the Migration Act passed, including reintroduction of TPVs, removal of most references to the Refugee Convention, changes to the criteria for refugee status and introduction of a 'fast track' review process

Reinstatement of work rights for asylum seekers on Bridging Visas announced

2015

Commission releases report: *The Forgotten Children: National Inquiry into Children in Immigration Detention*

'Open centre' arrangements introduced in Nauru

2016

M68 case: High Court finds that the Australian Government has the necessary legal authority to send asylum seekers to Nauru for processing on their claims and participate in a regime where they would be detained in Nauru while their claims were processed

PNG Supreme Court finds that the detention of refugees and asylum seekers on Manus Island is illegal

Australian Government announced resettlement arrangement with USA for refugees subject to third country processing

Appendix 3

Acronyms used in this report

AAT	Administrative Appeals Tribunal
APOD	Alternative Place Of Detention
ASIO	Australian Security Intelligence Organisation
CAT	Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
HECS	Higher Education Contribution Scheme
IAA	Immigration Assessment Authority
IAAAS	Immigration Advice and Application Assistance Scheme
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDC	Immigration Detention Centre
IDP	Internally Displaced Person
IRH	Immigration Residential Housing
ITA	Immigration Transit Accommodation
OPCAT	Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
PAIS	Primary Application Information Service
SHEV	Safe Haven Enterprise Visa
SRSS	Status Resolution Support Services
TPV	Temporary Protection Visa
UNHCR	United Nations High Commissioner for Refugees

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