
LAW COUNCIL OF AUSTRALIA

ASYLUM SEEKER POLICY



Law Council
OF AUSTRALIA

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INTRODUCTION

A primary function of the Law Council of Australia is to promote and protect the Rule of Law.

As part of this work, the Law Council monitors the content and operation of laws, regulations and policies affecting the rights, status and treatment of people seeking asylum in Australia, including those who arrive without a valid visa.

These laws and policies have undergone continuing change by successive Governments over the last decade or more, and many have also been subject to judicial consideration and extensive public inquiry and review. The result is a system that is complex and difficult to access and understand. Changes have also occurred that have had an impact on the ability of protection visa applicants to access legal or migration advice.

The Law Council does not underestimate the challenges faced by Australian Governments in responding to irregular migration, including the risk of loss of life associated with the arrival of asylum seekers by boat.

This Policy Position is not designed to prescribe a certain legislative or policy response to these challenges, but rather to highlight the relevant Rule of Law and international human rights law principles that apply.

The Policy Position further articulates the view of the Law Council regarding the principles that should be respected by Government in dealing with those seeking asylum from persecution and fear of serious harm.

SUMMARY

1. Australia’s commitment to upholding and promoting the Rule of Law requires legislative and policy responses to irregular migration to be: clear and readily available, applied fairly and equally, and subject to appropriate oversight and review.¹
2. Compliance with the Rule of Law also requires the Australian Government to observe and give effect to the international obligations it has voluntarily assumed including the right to seek asylum from persecution, serious human rights violations and other serious harm.²

THE LEGAL RIGHT TO SEEK ASYLUM

3. It is clear that every person has the right to seek and enjoy asylum from persecution, serious human rights violations and other serious harm. This right is protected under the *Universal Declaration of Human Rights* and a number of international Conventions to which Australia is a party and has never been the subject of challenge over many decades of implementation of the *Convention Relating to the Status of Refugees* (as amended by its 1967 Protocol) (the Refugee Convention).³
4. This means that Australia is obliged under international law to recognise the right to seek asylum and to ensure that laws and policies concerning asylum seekers adhere to the principles contained in the Refugee Convention, and other relevant instruments including the *International Covenant on Civil and Political Rights* (the ICCPR) its *Second Optional Protocol* aiming at the abolition of the death penalty; the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT) and its *Optional Protocol*; the *Convention on the Rights of the Child* (CROC); and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).
5. The Law Council is of the view that all people seeking Australia’s protection should be treated with humanity and dignity and be provided with the services necessary to ensure that their basic needs are met, including publicly funded legal and migration advice.

1 The Law Council has outlined the key principles it considers to comprise the Rule of Law in its Policy Statement on the Rule of Law, available at www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf.

2 Australia is a party to the seven key international human rights treaties and has also signed or ratified a number of optional protocols to those treaties. The instruments which are most relevant to the detention of asylum seekers include: the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) and the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (collectively, ‘the Refugee Convention’); the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 277 (entered into force 23 March 1976) (‘the ICCPR’); the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force in 3 January 1976) (‘the ICESCR’); the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); the *Optional Protocol to the Convention against Torture*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006); and the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 3 (entered into force 2 September 1990) (‘the CROC’).

3 Art 14 of the *Universal Declaration on Human Rights*, G.A. res. 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810, (10 December 1948) (‘the UDHR’). See also the Refugee Convention; the ICCPR and the *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, opened for signature 15 December 1989, GA res 44/128 (entered into force 19 July 1991) (‘Second Optional Protocol to the ICCPR’); the CAT; and the CROC.

THE PRINCIPLE OF *NON-REFOULEMENT*

6. Chief among these binding international obligations is the obligation of *non-refoulement*. This non-derogable obligation prohibits States from ‘expelling or returning a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’.⁴

ADHERENCE TO INTERNATIONAL OBLIGATIONS

7. The principle of *non-refoulement* and other relevant obligations in these Conventions apply to all people seeking asylum in Australia regardless of their mode or time of arrival. These principles require that Australia:
 - (a) respect the internationally recognised right to seek asylum, and the system of refugee protection envisaged by the Refugee Convention, by providing durable (rather than temporary) protection outcomes for those found to invoke Australia’s protection obligations;
 - (b) enact robust safeguards in place to protect against *refoulement*, including:
 - (i) a clear, legal process for determining whether a person invokes any of Australia’s protection obligations. Important guidance can be gained in this area from the Guidelines and Statements issued by the United Nations High Commissioner for Refugees;
 - (ii) practical access to independent legal or migration advice for all people seeking Australia’s protection;⁵ and
 - (iii) access to merits review of all administrative decisions concerning protection status;
 - (c) enact and apply a consistent legal process for determining protection status that does not discriminate against applicants based on where they come from or how they arrive;⁶
 - (d) ensure that asylum seekers who enter Australia are not penalised for doing so without a valid visa, or for their mode of arrival, provided they present themselves to the authorities without delay and show good cause for their entry or presence;
 - (e) recognise, protect and promote the individual rights of those seeking asylum as protected under the human rights Conventions to which Australia is a party. Such protected rights include: the right to education, the right to health care, the right not to be arbitrarily detained and the right to work;
 - (f) recognise, protect and promote the right for those who invoke Australia’s protection obligations to be reunited with close family members; and
 - (g) recognise, protect and promote the rights of all children seeking protection in Australia, including those rights set out in CROC, which include the requirement that in all actions concerning children, the best interests of the child be a primary consideration.

4 Art 33 of the Refugee Convention. Narrow exceptions apply on grounds of national security or public order. Certain *non-refoulement* obligations also arise under the CAT, the ICCPR and the CROC, sometimes known as ‘complementary protection’ grounds: see for example, art 3 of the CAT and the Second Optional Protocol to the ICCPR.

5 See for example art 16 of the Refugee Convention, arts 9 and 14 of the ICCPR.

6 See for example art 16 of the Refugee Convention, arts 9 and 14 of the ICCPR.

8. As a matter of international law, these international obligations apply wherever Australia exercises effective control over, including custody of, a person.⁷ This includes in Australia’s territorial waters, contiguous zone, and exclusive economic zone; on the high seas; and within the territorial waters or other maritime areas of any other state (where Australia exercises custody or control of a person).

ADHERENCE TO
RULE OF LAW PRINCIPLES

9. Australia’s laws and policies concerning asylum seekers must also adhere to the Rule of Law. The Law Council considers that pertinent principles defining the Rule of Law require that:
- (a) the laws and policies affecting the status, rights and liberty of asylum seekers must be clear, able to be readily understood and accessible to asylum seekers and members of the public;
 - (b) the protection against *non-refoulement*, and the procedure to guarantee it, should be enshrined in clear and accessible legislation adopted by the Parliament;
 - (c) all people seeking protection in Australia must have access to legal assistance so as to understand their legal rights and the legal processes that apply to the determination of their protection status. This should cover all stages of the determination process, including screening processes, refusal of a visa on character grounds or for security reasons, age determination processes, primary visa applications and all merits and judicial review applications. This should also extend to access to legal advice for matters arising from the application of detention policies, such as advice in respect of criminal matters arising in a detention environment;
 - (d) executive powers to determine a person’s protection status must be subject to oversight and review by the judiciary;
 - (e) protection determination processes must include procedural fairness guarantees, such as the right to present and challenge evidence, and be accompanied by the provision of independent legal advice;
 - (f) laws and policies affecting asylum seekers may not have retrospective operation;
 - (g) protections must be put in place to avoid conflicts of interest, including conflicts of interest relating to guardianship arrangements for unaccompanied minors seeking protection; and
 - (h) if asylum seekers are detained, the purpose, length and conditions of their detention must adhere to Rule of Law standards and Australia’s voluntarily assumed international human rights obligations.

7 Human Rights Committee, *Munaf v Romania*, Communication No. 1539/2006, UN Doc CCPR/C/96/D/1539/2006 (2009) [14.2] (and the jurisprudence cited therein). This case provides that the relevant question to determine whether the State’s obligations apply extraterritorially is whether the State has ‘power or effective control’ over an individual to whom the State has obligations to respect and ensure that person’s rights.

10. The Rule of Law standards and principles relating to detention are set out in the Law Council’s Policy Statement on Principles applying to the Detention of Asylum Seekers.⁸ These principles require:
- (a) that detention of asylum seekers only occur as a measure of last resort and there should be a general presumption against the detention of asylum seekers;⁹
 - (b) that detention must be in accordance with and authorised by law.¹⁰ This means that executive discretion relating to the detention of asylum seekers must be subject to prescribed limits and to judicial review;
 - (c) that no asylum seeker may be subjected to arbitrary or mandatory detention. This means that an asylum seeker should only be detained when: it is necessary, reasonable in all the circumstances and proportionate to a legitimate purpose; and based on a detailed assessment of an individual’s particular circumstances and clear, objective criteria;
 - (d) observance of the principle of proportionality which requires the balancing of the rights to liberty and security of the person and freedom of movement with the public policy initiatives of detention, and that detention should only be applied where it is strictly necessary to achieve the pursued purpose in each individual case;¹¹
 - (e) that maximum limits on detention should be established in law to guard against indefinite detention;
 - (f) that detention not be discriminatory. For example, there should be no discrimination or difference in treatment based on the country of origin, or the mode or manner of a person’s arrival into Australia;
 - (g) that decisions to detain or extend detention be subject to procedural safeguards. For example, asylum seekers should: be fully and promptly informed of the reasons for, and their rights in relation to, their detention; be able to challenge the lawfulness of his or her detention before a court; have full, confidential access to a competent and independent legal adviser of their choice to establish and defend their rights. Asylum seekers who are subject to adverse security assessments must be given the opportunity to be informed of the case against them, the opportunity to be heard and the right to seek a review of the adverse security assessment and any decision based on the assessment;
 - (h) that in all actions concerning children, the interests of the child be a primary consideration. Detention of children for the purpose of determining their immigration status is unlikely to ever comply with this principle. If children are detained, they should be detained only as a measure of last resort and for the shortest appropriate period of time. If necessary as a last resort, community-based detention should be used for children and families, provided that it includes appropriate access to services and facilities, including healthcare¹² and education¹³
 - (i) that the special circumstances and needs of other vulnerable asylum seekers be taken into account; and
 - (j) that policy and practice in the detention of asylum seekers be accountable, transparent, and subject to independent monitoring.

8 A copy of this statement is available at www.lawcouncil.asn.au/lawcouncil/index.php/current-issues/immigration-detention-and-asylum-seekers.

9 Office of the United Nations High Commissioner for Refugees, ‘Detention Guidelines: guidelines on the Applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention’ (2012) (‘UNHCR Guidelines’) at Guideline 4.1.

10 Ibid at Guideline 6.

11 Ibid at Guideline 4.2.

12 The right to access health care is protected by art 24 of the CROC.

13 The right to access education is protected by arts 28(1) and 31 of the CROC.

- 11. The protection and promotion of rights of individuals, whether under rules of domestic law or of international law, can only be effectively secured in a society where those rules are valued. In order that those rules and rights are valued in a democratic society, it is necessary that the citizens of that society are properly informed about the nature of the laws and regulations that are imposed in the name of that society and the mode of implementation of those laws and regulations.

OFFSHORE PROCESSING ARRANGEMENTS

- 12. The system of international refugee protection envisaged by the Refugee Convention assumes that Australia, as a State party, will take responsibility for assessing the claims of those seeking asylum in Australia, and provide protection for those found to engage Australia’s protection obligations. The United Nations High Commissioner for Refugees has recognised that it is possible for burden sharing arrangements made between State parties to the Refugee Convention to be developed in a way that adheres to the Articles of the Refugee Convention and other internationally recognised human rights.¹⁴
- 13. Where arrangements are entered into between Australia and other States for the purpose of determining the protection claims of those seeking asylum in Australia, or for resettlement of those found to be owed protection, such arrangements must adhere to the full range of international human rights Conventions to which Australia is a party.¹⁵
- 14. These obligations cannot be transferred by Australia to other States.¹⁶ Australia remains responsible for ensuring that appropriate processes are put in place for determining whether protection is owed to an individual who seeks asylum in Australia, and for ensuring that such people are treated in accordance with the international obligations that Australia has assumed.¹⁷
- 15. When arrangements have been entered into between Australia and other States for the purpose of processing protection claims and providing resettlement, Australia also remains responsible for ensuring that Rule of Law principles and human rights obligations are adhered to under any such arrangements.
- 16. Recent experience suggests that processing of asylum claims by third countries often raises legitimate human rights concerns.¹⁸ To ensure that the applicable standards are adhered to, regular, public, independent and objective oversight is required, in particular for all immigration detention facilities that may form part of these arrangements.

14 United Nations High Commissioner for Refugees, ‘Protection Policy Paper – Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing’ (November 2010) (‘Protection Policy Paper’).

15 These include: the Refugee Convention; the ICCPR; the ICESCR; the CAT; and the CROC.

16 Protection Policy Paper. Part B of this paper sets out the following legal standards that are to apply to extraterritorial processing: the processing State provides formal authorisation; there is protection against *refoulement*; reception arrangements must address the basic needs of new arrivals and provide for a stay that is consistent with the standard of living; timely outcomes are required; and transfer of responsibility for processing asylum claims is possible where (i) there are links with the proposed country of transfer; and/or (ii) there is an agreement between the States concerned regarding the standard of treatment and procedural and substantive rights.

17 G Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd ed, 2007), 408-411; Human Rights Committee, *Munaf v Romania*, Communication No. 1539/2006, UN Doc CCPR/C/96/D/1539/2006 (2009) [14.2] (and the jurisprudence cited therein). This case provides that the relevant question to determine whether the State’s obligations apply extraterritorially is whether the State has ‘power or effective control’ over an individual to whom the State has obligations to respect and ensure that person’s rights.

18 Letter from High Commissioner for Refugees, Antonio Guterres to Minister for Immigration Chris Bowen MP, 5 September 2012. The Commissioner outlined his concerns about Australia’s proposal to use Nauru as a regional processing country.

DEVELOPMENT OF REGIONAL RESPONSES TO IRREGULAR MIGRATION

- 17. To be effective and sustainable, Australia’s laws, regulations and policies concerning asylum seekers must be developed with due regard to regional efforts to address irregular migration. This includes working with regional partners to develop a long term, durable response to migration and solutions for refugees and asylum seekers in line with Australia’s international obligations.¹⁹
- 18. The development of laws and regulations should also include careful consideration of the scope and focus of Australia’s humanitarian migration program.

CONDITIONS OF DETENTION

- 19. Conditions of immigration detention must be humane and dignified.²⁰ This means that:
 - (a) no asylum seeker should be held in conditions of detention which amount to torture or cruel, inhuman or degrading treatment.²¹ This includes being held in incommunicado or lengthy solitary detention;²²
 - (b) asylum seekers should not be held with prisoners or in prison-like facilities;²³
 - (c) asylum seekers should be detained in a manner appropriate to their status – for example, unless they are family members, men and women should be segregated, and children should be separated from adults;²⁴
 - (d) detained asylum seekers should have appropriate access to key services such as education and health services, including appropriate mental health services;²⁵ and
 - (e) risks of suicide and self harm by detained asylum seekers must be identified and removed or minimised.²⁶

19 The Law Council considers that the Optional Protocol to the CAT, which Australia has signed but has not ratified, provides an appropriate oversight model.

20 Art 10.1 of the ICCPR; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA res 43/173 (1998) (UN Detention Principles), Principle 1; Guideline 8 of the UNHCR Guidelines.

21 Art 7 of the ICCPR; art 16 of the CAT; Principle 6 of the UN Detention Principles and Principle 7 of the Law Council’s Rule of Law Principles.

22 Human Rights Committee, *General Comment 20: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment)*, 44th sess, HRI/GEN/1/Rev.9 (Vol. I) (10 March 1992); Office of the High Commissioner for Human Rights, United Nations Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, A/HRC/16/47(2010); Office of the High Commissioner for Human Rights, United Nations Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, E/CN.4/2005/6 (2005). See also: Law Council of Australia, submission to National Consultation on Human Rights, *A Charter: Protecting the rights of all Australians*, 6 May 2009.

23 Art 10.2(a) of the ICCPR; Principle 8 of the UN Detention Principles; Guideline 8 of the UNHCR Guidelines.

24 Guideline 8, UNHCR Guidelines, see discussion for example in Law Council of Australia, submission to Joint Select Committee on Australia’s Immigration Detention Network, *Inquiry into Australia’s Immigration Detention Network*, 17 August 2011 (‘LCA Immigration Detention Submission’).

25 Ibid.

26 Guideline 8 of the UNHCR Guidelines. See also LCA Immigration Detention Submission.

ASYLUM SEEKERS WITH ADVERSE SECURITY ASSESSMENTS

- 20. Asylum seekers who are subject to adverse security assessments must be given the opportunity to be heard and the right to seek effective merits review and judicial review of the adverse security assessment and any decision based on the assessment:
 - (a) meaningful review requires that such a person must be given sufficient information to know the basis for their assessment;
 - (b) where national security concerns preclude full disclosure of the reasons for the assessment and the evidence allegedly substantiating it, mechanisms must be available to allow for partial disclosure and independent review;
 - (c) adverse security assessments should be subject to periodic internal review; and
 - (d) alternatives to detention that are appropriate in light of the specific security risk posed if an adverse security assessment is upheld should be identified. The principle of proportionality requires the balancing of the rights to liberty and security of the person and freedom of movement with the public policy initiatives of detention, and that detention should only be applied where it is strictly necessary to achieve the pursued purpose in each individual case.²⁷ Special consideration should be given to the wellbeing of the children of any asylum seekers against whom an adverse security assessment is made.

NAVAL INTERDICTION AND SUMMARY RETURN

- 21. All rescues, interdictions, interceptions, ‘push-backs’, ‘tow backs’, and transfers of persons at sea by Australian Government personnel of vessels carrying suspected irregular arrivals must comply with the international law of the sea, international refugee law, and international human rights law.
- 22. In particular, in all circumstances Australia has obligations to:
 - (a) ensure the safety of life at sea;²⁸
 - (b) treat humanely all people in its custody or control;²⁹
 - (c) refrain from arbitrarily or unlawfully detaining people contrary to international human rights law,³⁰ including by incommunicado detention;
 - (d) respect the obligation of *non-refoulement* under international refugee law and human rights law, namely, not to return a person at risk to a country of risk (including by transfers at sea to a vessel of the country of persecution);
 - (e) respect freedom of navigation on the high seas.³¹

²⁷ See Guideline 4.2 of the UNHCR Guidelines.

²⁸ Art 98(1) of the *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) (‘UNCLOS’). See also Chapter V, Reg 33(1) of the *International Convention for the Safety of Life at Sea*, opened for signature 1 November 1974, 1184 UNTS 2 (entered into force 25 May 1980).

²⁹ See, for example: UDHR, ICCPR (arts 2, 7 and 10) and ICESCR.

³⁰ Art 9 of the ICCPR.

³¹ Art 110 of the UNCLOS: Interference with the freedom of navigation of foreign vessels outside territorial sea is only permissible under treaty arrangements (including in the case of rescue at sea), with authorisation of the flag State, or in cases such as slave trading or piracy.

- (f) respect the sovereign maritime boundaries and areas of other countries;³² and
- (g) provide accessible, timely and effective remedies for alleged violations of Australia’s international human rights law obligations.³³
- 23. Every person rescued or intercepted at sea by Australian personnel who expresses a fear for their safety if returned to their country of origin has a right to access effective procedures for the determination of their refugee or complementary protection claims.³⁴ It is not lawful to transfer at sea a person claiming protection to the authorities of the state from which the person fears harm, without processing the person’s claim in accordance with minimum international standards on the determination of refugee status set out above under paragraph [7].
- 24. Expedited asylum processing (including ‘enhanced screening’) at sea of persons rescued or intercepted at sea are unlikely to meet the minimum international standards. Further, the summary maritime expulsion or return of a person claiming protection to the frontiers of a third country which lacks effective asylum procedures amount to indirect *refoulement* contrary to international law.³⁵ This would include summary return on an interdicted vessel, by transfer onto a life boat or other vessel (including the vessel of a third state or a private or commercial vessel).

CONCLUSION

- 25. As a signatory to many significant international conventions which were established to provide fundamental protections for individual human rights, Australia is bound to deal with those who seek asylum from persecution in accordance with a number of specific standards. These standards support the Law Council’s fundamental policy position that those persons legitimately seeking recognition as refugees, or complementary protection, must be treated with fairness, humanity and respect.

³² Art 2 of the UNCLOS provides that the sovereignty of a coastal state extends to its territorial sea. Under UNCLOS, coastal states also enjoy certain rights in their contiguous and exclusive economic zones.

³³ Art 2 of the ICCPR.

³⁴ Pursuant to the Refugee Convention; the ICCPR; the Second Optional Protocol to the ICCPR; the CROC and, the CAT.

³⁵ *Hirsi Jamaa and Others v Italy*, App. No. 27765/09, European Court of Human Rights, 23 February 2012.

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