

# Refugees and the Right to Seek Asylum Policy

DRAFT – for EC Working Group

## Introduction

1. NSW Young Lawyers is the largest body of young and newly practising lawyers, and law students, in Australia with over 15,000 members. Each lawyer under 36 years of age and/or in their first five years of practice, and each law student, within NSW is a Member of NSW Young Lawyers.
2. NSW Young Lawyers Members represent a significant proportion of the legal profession in NSW. This statement of policy reflects the views of the *Members* of NSW Young Lawyers. It does not reflect the views of The Law Society of New South Wales.

## Everyone has the Right to Seek Asylum from Persecution

3. NSW Young Lawyers supports Australia's adherence to its international legal obligations including the right to seek asylum and rights of refugees under the *Universal Declaration of Human Rights*,<sup>1</sup> and the *Refugee Convention*<sup>2</sup> to which Australia is a party.
4. NSW Young Lawyers recommends Australia aligns its statutory definition of a refugee and other non-refoulement obligations with the *Refugee Convention* and other international instruments which provide for complementary protection.<sup>3</sup>
5. Refugee status determinations should be made in good faith<sup>4</sup> and should benefit from rigorous protections such as independent administrative review and judicial review. NSW Young Lawyers is concerned that the "enhanced screening" process<sup>5</sup> compromises these protections. NSW Young Lawyers has concerns about limitations on the independent administrative review process for "fast track review applicants" at the Immigration Assessment Authority<sup>6</sup> and encourages Australia to implement a fair and robust process.

## Australia's Non-refoulement Obligations Matter

6. The principle of non-refoulement requires that States must not return people seeking asylum in their jurisdiction to territories where their life or freedom is at real risk. Any interdictions in international waters or other territories by the Australian authorities that turn away people seeking asylum prior to the assessment of their claims for protection is a breach of the non-

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<sup>1</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess 183rd plen mtg, UN Doc A/810, 10 December 1948, Art 14(1).

<sup>2</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) as amended by the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (together, the *Refugee Convention*).

<sup>3</sup> *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). *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>4</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Art 26.

<sup>5</sup> Australian Human Rights Commission, *Tell Me About: The 'Enhanced Screening Process'* (June 2013) <<https://www.humanrights.gov.au/sites/default/files/document/publication/enhanced-screening.pdf>>.

<sup>6</sup> *Migration Act 1958* (Cth), s 473DD.

refoulement obligation which should be avoided.

### Obligations to People who are Stateless

7. In addition to Australia's non-refoulement obligations, NSW Young Lawyers recommends Australia adheres to its additional obligations, including naturalisation, to stateless adults and children who seek asylum.<sup>7</sup>

### Australia's Responsibility Extends to Offshore Processing

8. Under the international legal principle of 'State responsibility', Australia shares responsibility for the offshore processing of people seeking asylum and their asylum applications as Australia exercises control over the movement of people and the system of offshore processing. Australia's responsibilities continue even when it engages other countries to act as agents in undertaking offshore processing.
9. NSW Young Lawyers joins the Australian Human Rights Commission, the Special Rapporteur on violence against women, its causes and consequences,<sup>8</sup> the Special Rapporteur on the human rights of migrants,<sup>9</sup> the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the United Nations High Commissioner for Refugees, the Committee against Torture pursuant to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and its optional protocol,<sup>10</sup> and the Human Rights Committee pursuant to the International Covenant on Civil and Political Rights and its optional protocol,<sup>11</sup> in expressing concerns about violations of the rights of people seeking asylum or breaches of international law in Australia's current offshore processing system.
10. In order to meet Australia's international obligations, NSW Young Lawyers recommends that Australia provide a durable solution for people currently subject to offshore processing.
11. Australia's offshore processing system breaches international legal obligations as it operates to penalise people seeking asylum based on mode of arrival through the use of limitations on freedom of movement, extended time for processing of refugee claims, and previously, extended detention. Inadequate safeguards of the conditions in the offshore processing system could lead to Australia being liable for breaches of international law.<sup>12</sup>

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<sup>7</sup> *Convention relating to the Status of Stateless Persons*, opened for signature on 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960). *Convention on the Reduction of Statelessness*, opened for signature on 4 December 1954, 989 UNTS 175 (entered into force 13 December 1975). *Special Protocol concerning Statelessness*, opened for signature on 12 April 1930, 2252 UNTS 435 (entered into force 15 March 2004).

<sup>8</sup> Dubravka Šimonović, United Nations Special Rapporteur on Violence against women, its causes and consequences, End of mission statement - Australia (27 February 2017) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21243&LangID=E>>. This report states "While cognizant of both the Government and Senate reports about the conditions in the Regional Processing Centre on Nauru (RPC), the latter concluding at the inadequacy, inappropriateness and unsafety of the asylum seekers detained there and efforts made to improve the situation, concerns remain, including in relation to the insufficient access to justice and lack of a children protection framework in Nauru."

<sup>9</sup> UN Human Rights Council, Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru (24 April 2017) A/HRC/35/25/Add.3 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/098/91/PDF/G1709891.pdf?OpenElement>>. Paragraph 80 states "The forced offshore confinement (although not necessarily detention anymore) in which asylum seekers and refugees are maintained constitutes cruel, inhuman and degrading treatment or punishment according to international human rights law standards."

<sup>10</sup> *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). *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>11</sup> *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>12</sup> See above nn 8, 9.

### Better Integration of Refugees into the Community

12. People seeking asylum should only be held in closed detention for a lawful purpose which must be carried into effect as soon as reasonably practicable.<sup>13</sup> NSW Young Lawyers supports the release of people seeking asylum into the community and the independent monitoring of immigration detention both in Australia and in offshore processing centres, in order to encourage compliance with the law.<sup>14</sup>
13. NSW Young Lawyers supports the principle in s 4AA of the *Migration Act 1958* (Cth) that “a minor shall only be detained as a measure of last resort.” NSW Young Lawyers recommends the introduction of an administrative review process for children in detention to support this principle and ensure the best interests of the child are being upheld as a primary consideration.<sup>15</sup> NSW Young Lawyers supports the appointment of an independent guardian for unaccompanied minors seeking asylum.
14. NSW Young Lawyers endorses the use of durable solutions such as permanent protection visas, for people that are owed protection obligations. For refugees on temporary protection visas, NSW Young Lawyers recommends a pathway for refugees to progress their case to a permanent visa including for refugees with disability or other exceptional circumstances.
15. NSW Young Lawyers recognises the importance of family unity and therefore supports family reunification for refugees, including the timely and non-discriminatory processing of applications by refugees to sponsor members of their family unit.<sup>16</sup>
16. NSW Young Lawyers supports the provision of the right to work, or where required, welfare assistance, to people seeking asylum who are in the community while they undergo refugee status determination.

### Accountability and Transparency is Critical to Justice

17. NSW Young Lawyers supports policies that require government agencies to disclose suitable information in a timely manner. NSW Young Lawyers supports the repeal of secrecy provisions, except those necessary for national security purposes.
18. Judicial review is critical to ensure that government power is used properly, proportionately and according to law. NSW Young Lawyers supports the retention of independent and unfettered judicial review for all exercises of Government power, including the repeal of any privative clauses.

### Access to Justice

19. NSW Young Lawyers supports the provision of appropriate levels of funding for legal services and interpreting services at all stages of the refugee status determination process, including but not limited to funding through the Immigration Advice and Application Assistance Scheme, in order to provide access to justice to people seeking asylum.

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<sup>13</sup> *Plaintiff S4-2014 v Minister for Immigration and Border Protection* [2014] HCA 34, [26]-[29].

<sup>14</sup> Law Council of Australia, *Independent oversight of immigration detention and border protection laws needed following Nauru leaks* (12 August 2016) <<https://www.lawcouncil.asn.au/media/media-releases/independent-oversight-of-immigration-detention-and-border-protection-laws-needed-following-nauru-leaks>>.

<sup>15</sup> *Convention on the Rights of the Child*, opened for signature on 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), Art 3.

<sup>16</sup> *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Art 23. *International Covenant on Economic, Social and Cultural Rights*, opened for signature on 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), Art 10. *Convention on the Rights of the Child*, opened for signature on 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), Art 8.