

Chapter 4

Refugee Status Determination and Resettlement

4.1 The committee heard evidence of concerns raised in relation to the Refugee Status Determination (RSD) processes in Nauru and Papua New Guinea (PNG), and the resettlement options available to recognised refugees.

Refugee Status Determination

4.2 RSD is the legal or administration process by which governments, or the United Nations High Commissioner for Refugees (UNHCR), determine whether a person who claims international protection is a refugee, pursuant to international, regional or national law.¹ The UNHCR advises that, while RSD is the primary responsibility of states, the UNHCR may determine the status of asylum seekers where a state is either unable or unwilling to do so.

4.3 The RSD process in Australia involves the following steps:

- asylum seeker lodges an application with the Department of Immigration and Border Protection (the department);
- an officer of the department makes a primary decision as to whether or not the person is entitled to protection;
- if the officer refuses the application, the asylum seeker may apply for merits review from the Administrative Appeals Tribunal (AAT);
- if the AAT upholds the refusal, the asylum seeker can then appeal to the Federal Circuit Court (FCC), the Federal Court of Australia (FCA), or possibly the High Court of Australia, for judicial review of the decision (that is, examining whether a legal error was made in the decision making process, not examining the merits); and/or
- if the asylum seekers is still unsuccessful in their claim for asylum, they may ask the Minister for Immigration and Border Protection (the Minister) to intervene as a last resort, and grant him or her a visa.²

4.4 The department explained that, for asylum seekers in Nauru and PNG, RSD is the responsibility of the Governments of Nauru and PNG.³ The department supports both the Nauru and PNG RSD processes by funding an independent claims assistance provider to assist asylum seekers to prepare and lodge their primary, and if required (and provided for under domestic legislation), merits review and Supreme Court appeals applications. Departmental staff have also provided training and mentoring

1 UN High Commissioner for Human Rights (UNHCR), *Refugee Status Determination*, www.unhcr.org/en-au/refugee-status-determination.html (accessed 14 March 2017).

2 Andrew & Renata Kaldor Centre for International Refugee Law, *Factsheet: refugee status determination in Australia*, 3 June 2016.

3 Department of Immigration and Border Protection (DIBP), *Submission 23*, p. 63.

support to Nauruan and PNG protection claims assessors, and other support where required.⁴

4.5 The department advised that, at 31 January 2017, 1,204 RSDs have taken place in Nauru, 998 of which were positive, and 206 of which were negative.⁵

4.6 The department advised that, at 31 January 2017, 1,015 refugee status 'initial determinations' had been made at Manus Island, 510 of which were positive and 505 of which were negative.⁶ It explained that 689 refugees had been given a positive final determination, and 225 asylum seekers who had been given a negative final determination. It also advised that, at 31 January 2017, a total of 861 people remained in the Manus RPC.

4.7 The department also advised that, at 15 March 2017, 629 people (including 612 asylum seekers and 17 refugees) had elected to return to their country of origin.⁷

Nauru

4.8 The department explained that the RSD process in Nauru takes place pursuant to the *Refugees Convention Act 2012* (Nauru).⁸ The Nauruan Government has also developed a Refugee Status Determination Handbook.⁹

4.9 The *Refugees Convention Act 2012* (Nauru) states that:

- it gives effect to the *Refugee Convention 1951*;
- the Government of Nauru Secretary¹⁰ is the decision making delegate for refugee status determinations;¹¹
- an 'asylum seeker' is a 'person who applies to be recognised as a refugee' pursuant to the Act;¹²

4 DIBP, *Submission 23*, p. 20.

5 DIBP, media release, *Operation Sovereign Borders monthly update: January 2017*, <http://newsroom.border.gov.au/channels/media-releases/releases/operation-sovereign-borders-monthly-update-january-3> (accessed 2 March 2017).

6 DIBP, media release, *Operation Sovereign Borders monthly update: January 2017*, <http://newsroom.border.gov.au/channels/media-releases/releases/operation-sovereign-borders-monthly-update-january-3> (accessed 2 March 2017).

7 DIBP, response to questions on notice, 15 March 2017 (received 4 April 2017).

8 *Refugees Convention Act 2012* (Nauru), <http://www.naurugov.nr/media/33059/refugees-convention-act-2012.pdf> (accessed 23 February 2017).

9 Republic of Nauru, Department of Justice and Border Control, *Refugee Status Determination Handbook*, August 2013.

10 Secretary is defined to mean 'Head of Department', *Refugees Convention Act 2012* (Nauru), s. 3. The relevant department is the Nauru Department of Justice and Border Control.

11 *Refugees Convention Act 2012* (Nauru), s. 5(1).

12 *Refugees Convention Act 2012* (Nauru), s. 3.

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- upon application, the Secretary must determine whether an asylum seeker is a recognised refugee, and must do so 'as soon as practicable after a person becomes an asylum seeker under this Act';¹³
 - the Secretary must provide the reasons for their determination or decision;¹⁴
 - the Secretary may decline to make a determination if a negative determination has previously been made, and the Secretary is satisfied that the circumstances have not changed to such an extent that the application will be based on 'significantly different grounds';¹⁵
 - a Refugee Status Review Tribunal, which is not bound by technicalities, legal forms or rules of evidence,¹⁶ is established,¹⁷ and will sit 'from time to time as required';¹⁸
 - the Tribunal must hear applications for review in private,¹⁹ and decisions of the Tribunal may be published if it is a de-identified decision which 'the Principal Member thinks is of general interest';²⁰
 - applications for merits review of a decision relating to a RSD may be made, and must be received within 28 days after the person receives notice of the determination or decision;²¹
 - the Tribunal must complete such a review within 90 days from the day on which the Secretary provides it with documents relevant to the review;²²
 - the Tribunal may affirm or vary the determination or decision, remit the matter to the Secretary for reconsideration, or set the determination or decision aside and substitute a new determination or decision;²³
 - a person who, by a decision of the Tribunal, is not recognised as a refugee can appeal to the Supreme Court against that decision 'on a point of law' within 28 days of the Tribunal's decision;²⁴ and that

13 *Refugees Convention Act 2012* (Nauru), s. 6.

14 *Refugees Convention Act 2012* (Nauru), s. 9(b).

15 *Refugees Convention Act 2012* (Nauru), s. 8.

16 *Refugees Convention Act 2012* (Nauru), s. 22.

17 *Refugees Convention Act 2012* (Nauru), s. 11.

18 *Refugees Convention Act 2012* (Nauru), s. 22(1).

19 *Refugees Convention Act 2012* (Nauru), s. 23(1).

20 *Refugees Convention Act 2012* (Nauru), s. 27.

21 *Refugees Convention Act 2012* (Nauru), s. 31.

22 *Refugees Convention Act 2012* (Nauru), s. 33.

23 *Refugees Convention Act 2012* (Nauru), s. 34(2).

24 *Refugees Convention Act 2012* (Nauru), s. 43.

- the Supreme Court may either affirm the original decision of the Tribunal, or remit the matter back to the Tribunal for reconsideration in accordance with directions from the Court.²⁵

4.10 Pursuant to the *Refugees Convention Regulations 2013* (Nauru), a member of the Tribunal must have at least two years of experience in refugee merits review, and a 'thorough knowledge of UNHCR refugee status guidelines and standards'.²⁶

4.11 The Act also notes that, pursuant to section 44(c) of the *Appeals Act 1972* (Nauru), an appeal from the Republic of Nauru Supreme Court may be made to the High Court of Australia.²⁷

4.12 The Supreme Court of Nauru has handed down a number of judgements pursuant to this legislation, including the following decisions:

- a Bangladeshi man who appealed a negative RSD decision by the Tribunal, claiming that his interpreter was not sufficient (having allegedly only summarised translations of his evidence), and that the Tribunal did not consider current information about the political situation in his home country. The court dismissed the appeal on the basis that 'a perusal of the transcript [between the applicant and his interpreter] reveals that there was a fluent and coherent exchange', and found that the question of what information the Tribunal had relied upon in relation to the status of the applicant's home country was a question of fact, not of law;²⁸
- a decision by the Tribunal was remitted back to the Tribunal for reconsideration with the directions that the Tribunal determine whether the applicant was owed complementary protection because he would 'face harm on account of generalised sectarian and political violence'. This decision was made by the court 'upon hearing *amicus curiae* for the Appellant';²⁹
- a decision by the Tribunal be remitted back for reconsideration, noting that the Tribunal had erred in law by failing to take account of two written statements made by the applicant in relation to their claim;³⁰ and

25 *Refugees Convention Act 2012* (Nauru), s. 44.

26 *Refugees Convention Regulations 2013* (Nauru), reg. 4, http://ronlaw.gov.nr/nauru_lpms/files/subordinate_legislation/f2b2fac000f377be2fa09865b36ba6ba.pdf (accessed 23 February 2017).

27 *Refugees Convention Act 2012* (Nauru), s. 43.

28 *ROD128 v Republic of Nauru* [2017] NRSC 8; Appeal Case 22 of 2015 (7 February 2017), www.pacii.org/nr/cases/NRSC/2017/8.html (accessed 23 February 2017).

29 *SOS 011 v Republic of Nauru* [2016] NRSC 30; Appeal 40 of 2015 (14 November 2016), www.pacii.org/cgibin/sinodisp/nr/cases/NRSC/2016/33.html?stem=&synonyms=&query=SOS%20011 (accessed 23 February 2017).

30 *SOS 005 v The Republic of Nauru* [2016] NRSC 26; Asylum Seekers Appeal 58 of 2015 (23 March 2016), www.pacii.org/cgibin/sinodisp/nr/cases/NRSC/2016/26.html?stem=&synonyms=&query=SOS (accessed 23 February 2017).

- that a decision of the Tribunal be quashed because the Tribunal had relied upon information contained in articles about Afghanistan which were published after the Tribunal hearing had concluded, and therefore not providing the applicant with the ability to respond to them.³¹

Papua New Guinea

4.13 The RSD process in PNG takes place pursuant to the *Migration Act 1978* (PNG).³² The *Migration Act 1978* (PNG) states that:

- a 'refugee' is a non-citizen who is either permitted to remain in PNG 'pending his settlement elsewhere', or a non-citizen determined by the Minister to be a refugee;³³
- the PNG Minister (for Foreign Affairs and Immigration) may determine a non-citizen to be a refugee for the purposes of the Act;³⁴ and
- the Minister may declare a place to be a relocation centre for the accommodation of a refugee or a non-citizen who claims to be a refugee,³⁵ and can direct a refugee or class of refugees or non-citizens claiming to be refugees to reside within a relocation centre,³⁶ and such a direction will be sufficient authority for a police officer to detain and take into custody, using 'such force as is reasonably necessary',³⁷ the refugee or class of refugees or non-citizen claiming to be a refugee for the purposes of taking them to that centre and keeping them there.³⁸

4.14 The Act does not define an asylum seeker.

4.15 The Act also operates in connection with the *Migration Regulation 1979* (PNG),³⁹ as amended in 2013,⁴⁰ and later in 2014.⁴¹ The 2013 amendment to this regulation introduced regulation 14, which explains how the Minister may determine a

31 *SOS054 v Republic of Nauru* [2016] NRSC 32; Case 103 of 2015 (17 November 2016), www.pacii.org/cgibin/sinodisp/nr/cases/NRSC/2016/32.html?stem=&synonyms=&query=SOS054 (accessed 23 February 2017).

32 DIBP, *Submission 23*, p. 20.

33 *Migration Act 1978* (PNG), s. 2.

34 *Migration Act 1978* (PNG), s. 15A.

35 *Migration Act 1978* (PNG), s. 15B.

36 *Migration Act 1978* (PNG), s. 15C(1).

37 *Migration Act 1978* (PNG), s. 15C(3).

38 *Migration Act 1978* (PNG), s. 15C(2).

39 *Migration Regulation 1979* (PNG), www.pacii.org/pg/legis/consol_act/mr1979209/ (accessed 27 February 2017).

40 *Migration (Amendment) Regulation 2013* (PNG), www.pacii.org/pg/legis/sub_leg/mr2013289/ (accessed 27 February 2017).

41 *Migration (Amendment) Regulation 2014* (PNG), www.pacii.org/pg/legis/sub_leg/mr2014289/ (accessed 27 February 2017).

non-citizen to be a refugee, and sets out a number of grounds upon which the Minister may exclude an individual from recognition as a refugee in PNG. These grounds for exclusion include where the non-citizen has 'during the period of his or her residency at the regional processing centre anywhere or within [PNG], exhibited a demeanour incompatible with a person of good character and standing'.⁴²

4.16 The department advised that pursuant to PNG's 'refugee determination guidelines', an asylum seeker who has received a negative initial refugee assessment can seek independent merits review of that decision from the Refugee Assessment Review Panel.⁴³ This Panel is not legislated for.

4.17 The department also explained that the PNG Minister for Foreign Affairs and Immigration is the delegate for all refugee determinations,⁴⁴ and noted that a decision by the Minister **cannot** be appealed to a court.⁴⁵ Indeed, the *Migration Act 1978* (PNG) provides that:

An act, proposed act or decision of the Minister relating to the grant or cancellation of an entry permit or to the removal of a person from the country, or any decision of a Committee of Review under Section 6, is not open to review or challenge in any court on any ground.⁴⁶

4.18 As the department explained, where the Minister has found that an asylum seeker is not in need of international protection, the Minister will issue a 'removal order and a detention order' and the asylum seeker will be deported, subject to a deportation risk assessment.⁴⁷

4.19 It has been reported that the PNG Government has commenced deporting asylum seekers from the Manus RPC. On 7 February 2017, it was reported that in the previous week five asylum seekers had accepted an offer of \$20,000 to voluntarily return to Nepal.⁴⁸ A few days later, Mr Behrouz Boochani, a refugee at the Manus RPC, was reported to have explained that asylum seekers had been offered more money to leave as a group, and were told that the financial incentives would reduce the longer it took them to deliberate.⁴⁹ It was reported that the following week, the PNG Government had sought travel documents for 60 men in PNG whose asylum claims had been detained, with a view to deporting them.⁵⁰

42 *Migration Regulation 1979* (PNG), reg. 14(2)(h).

43 DIBP, *Submission 23*, p. 20.

44 DIBP, *Submission 23*, p. 20.

45 DIBP, *Submission 23*, p. 20.

46 *Migration Act 1978* (PNG), s. 19(2).

47 DIBP, *Submission 23*, p. 20.

48 Sydney Morning Herald, *Papua New Guinea moves to deport up to 60 asylum seekers from Manus Island*, 7 February 2017.

49 Radio NZ, *Asylum seekers offered bribes to leave PNG*, 10 February 2017.

50 Sydney Morning Herald, *Papua New Guinea moves to deport up to 60 asylum seekers from Manus Island*, 7 February 2017.

4.20 On 9 February 2017, Mr Boochani was reported to have advised that PNG Police had arrived at the camp at approximately 4 am that day. He was reported to have stated that the police removed two Nepalese men, one of whom escaped from them. On 1 March 2017 it was reported that approximately 30 asylum seekers on Manus Island had voluntarily returned to their home countries after having been offered payments of up to \$20,000 from the Australian Government.⁵¹

Concerns raised by submitters

4.21 Several submitters raised concerns about the capacity of the Governments of Nauru and PNG to adequately process claims for asylum, and highlighted limitations built into both legal systems which prevent the same level of judicial review as would be available to an asylum seeker in Australia.

4.22 Amnesty International argued that PNG's RSD process is developing, and there was no refugee framework in place when refugees began arriving there in 2013.⁵² It cited the UNHCR findings from 2012, when the UNHCR concluded that PNG did not have an effective legal or regulatory framework to address refugee issues, had no laws or procedures in place to determine refugee status, and no immigration officers with the skills or experience to undertake the RSD process.⁵³

4.23 The UNHCR conducted a monitoring visit to Manus Island from 11 to 13 June 2013, after which time it outlined a number of criticisms about PNG's RSD system.⁵⁴ It concluded that several provisions of the *Migration Regulation 1979* (PNG) were inconsistent with the 1951 Refugee Convention in that they reinforced differential treatment of asylum seekers based on the manner of their arrival, incorrectly applied exclusion provisions for recognition of refugee status, and did not provide adequate procedural safeguards.⁵⁵ Consequently, the UNHCR urged the PNG Government to amend the law and regulations to cover complementary protection and non-refugee statelessness, and develop a framework which assessed international protection needs for asylum seekers regardless of the means of their arrival.⁵⁶ It also

51 The Huffington Post, *Dozens Of Asylum Seekers Agree To Leave Manus After \$20,000 Payments*, 1 March 2017.

52 Amnesty International, *Submission 6*, Attachment 3, (*This is Breaking People: Human rights violations at Australia's Manus Island Asylum Seeking Processing Centre, Papua New Guinea*, 2013), p. 90.

53 Amnesty International, *Submission 6*, Attachment 3, p. 90 (UNHCR, *Antonio Guterres' Letter to Chris Bowen, Minister for Immigration and Citizenship of Australia*, 9 October 2012, p. 2).

54 UNHCR, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea 11-13 June 2013*.

55 UNHCR, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea 11-13 June 2013*, p. 6.

56 UNHCR, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea 11-13 June 2013*, p. 6.

assessed that it would take a period of at least six months before PNG officials would be able to undertake a RSD process 'with any degree of self-sufficiency'.⁵⁷

4.24 Amnesty International also noted comments made by the UNHCR at a further monitoring visit over 23-25 October 2013.⁵⁸ These comments highlighted that asylum seekers in the RPC at that time would have very complex cases, and argued that PNG RSD officers would 'have great difficulty in producing timely, accurate and fair assessments, unless DIBP decision makers are available to ensure adequate mentoring and quality assurance for the foreseeable future'.⁵⁹

4.25 The UNHCR raised similar concerns in relation to the RSD process in Nauru, observing in October 2013, that the legal framework, operational approaches and harsh physical conditions of the RPC did not comply with international law.⁶⁰ It also observed that, despite a sound legal framework, Nauru's policies did not provide for a fair, efficient and expeditious system for assessing refugee claims, and did not provide adequate and timely solutions for refugees.⁶¹

4.26 Amnesty International explained that in PNG, by the end of 2013:

- only 160 of more than 1000 asylum seekers in detention had been able to submit a claim for asylum;
- only 55 RSD interviews had been held since 2012; and
- no decision had yet been reached in any case in the 11 months since the initial Regional Resettlement Agreement between Australia and PNG was in place.⁶²

4.27 It recommended that all asylum seekers held in the Manus RPC be transferred back to Australian territory and given 'full access to asylum procedures in Australia'.⁶³

4.28 In May 2014, Amnesty International again raised these concerns, noting that no refugee assessments had been completed in the 18 months since the RPC opened.⁶⁴ It highlighted a failure 'to provide an individualised assessment of the need to detain asylum seekers pending the outcome of their refugee claims'.⁶⁵ It also submitted that the RSD process was placed on hold until children in detention turned 18, resulting in

57 UNHCR, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea 11-13 June 2013*, p. 7.

58 Amnesty International, *Submission 6*, Attachment 3, p. 90.

59 UNHCR, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea 23-25 October 2013*, p. 8.

60 UNHCR, *UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013*.

61 UNHCR, *UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013*, p. 1.

62 Amnesty International, *Submission 6*, Attachment 3, p. 90.

63 Amnesty International, *Submission 6*, Attachment 3, p. 4.

64 Amnesty International, *Submission 6*, Attachment 4, p. 22.

65 Amnesty International, *Submission 6*, Attachment 4, p. 22.

a 'punitive' policy which ensured that young people would remain in immigration detention for longer.⁶⁶

4.29 As stated above, the department advised that at 31 January 2017, 1,015 refugee status 'initial determinations', and 689 positive final determinations, had been made in PNG.⁶⁷

4.30 On 9 February 2017, Professor Jane McAdam of the Andrew & Renata Kaldor Centre for International Refugee Law stated that PNG's RSD process still 'falls far short of the standards required by international law'.⁶⁸ She argued that the definition of 'refugee' contained in the regulation 14 of the *Migration Regulations 1979* (PNG) 'goes well beyond the very strict grounds of exclusion under the Refugee Convention',⁶⁹ echoing the concerns raised by the UNHCR nearly four years earlier in June 2013.⁷⁰

4.31 As stated above, the department explained that it has assisted the governments of PNG and Nauru to establish 'robust refugee status determination and removal processes'.⁷¹

Resettlement

4.32 The department explained that the settlement options available to asylum seekers and refugees living in Nauru and PNG vary, and confirmed that asylum seekers who arrive by boat will not settle in Australia:

The transfer and processing arrangements with Nauru and Papua New Guinea are designed to provide transferees with a durable outcome, whether settlement in Papua New Guinea, third country resettlement, voluntary return to their home country or removal. Only persons found to be in need of protection by Nauru or Papua New Guinea will be provided durable settlement outcomes in those nations or in third countries. Persons found by Nauru or Papua New Guinea not to be in need of international protection are expected to return home, whether voluntarily or involuntarily.⁷²

66 Amnesty International, *Submission 6*, Attachment 4, p. 10.

67 DIBP, media release, *Operation Sovereign Borders monthly update: January 2017*, <http://newsroom.border.gov.au/channels/media-releases/releases/operation-sovereign-borders-monthly-update-january-3> (accessed 2 March 2017).

68 Professor Jane McAdam, *Manus deportation reports raise legal concerns*, 9 February 2017, <http://www.kaldorcentre.unsw.edu.au/news/manus-deportation-reports-raise-legal-concerns> (accessed 27 February 2017).

69 Professor Jane McAdam, *Manus deportation reports raise legal concerns*, 9 February 2017, <http://www.kaldorcentre.unsw.edu.au/news/manus-deportation-reports-raise-legal-concerns> (accessed 27 February 2017).

70 UNHCR, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea 11-13 June 2013*, p. 6.

71 DIBP, *Submission 23*, p. 5.

72 DIBP, *Submission 23*, p. 63.

4.33 The department explained that 'Australia is actively working to assist Nauru and PNG to find appropriate, durable resettlement options for people determined by Nauru and PNG to be in need of protection'.⁷³

4.34 Refugees in Nauru can settle temporarily for up to 10 years,⁷⁴ (now revised to 20 years),⁷⁵ and have the option of pursuing settlement in the Kingdom of Cambodia (Cambodia). Refugees in PNG can permanently settle in PNG.⁷⁶ In October 2016, PNG Minister for Foreign Affairs, Mr Rimbink Pato was reported as stating that, at that time, just 24 of the 560 recognised refugees in PNG had been resettled in the country.⁷⁷

Resettlement in Nauru or Papua New Guinea

4.35 The UNHCR cautioned that neither Nauru nor PNG are suitable for long-term RPC refugee settlement. It submitted that 'long-term, viable solutions are not available in Nauru or Papua New Guinea, even on a temporary basis'.⁷⁸ In particular, the UNHCR argued that the health, educational, child protection and welfare, and social and vocational needs of refugees on Nauru 'grossly exceed' the capacity of Nauruan services.⁷⁹ It also argued that refugee settlements on Nauru hinder the integration of refugees into the community by 'projecting a continuation of the detention environment and separation from the local community'. It noted concerns about discrimination against refugees and asylum seekers based on sexual orientation and gender identity, as well as concerns about the lack of protections for torture and trauma survivors, and people with physical disabilities.⁸⁰

4.36 The UNHCR also highlighted its 'grave concerns about inadequate protection measures for woman and children in Nauru' and the long-term effects for children:

The impact of impaired parenting due to parental despair and mental illness, the absence of family or community support and the challenging physical environment place young children (zero to five years) at significant risk of compromised development from emotional, cognitive and physical perspectives. In this context, the intolerable situation for asylum-seekers and refugees, as well as the breakdown of normal family structures and intra-familial relationships may place women and children at heightened risk. Living in these conditions, as well as a physically hostile environment

73 DIBP, *Submission 23*, p. 63.

74 DIBP, *Submission 23*, p. 63.

75 Mr Andrew Goledzinowski, Ambassador for People Smuggling and Human Trafficking, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Wednesday 15 March 2017, p. 38.

76 DIBP, *Submission 23*, p. 63.

77 The Guardian, *Papua New Guinea asks Australia for help resettling refugees from Manus Island*, 4 October 2016.

78 Office of the United Nations High Commissioner for Refugees (UNHCR), *Submission 43*, p. 1.

79 UNHCR, *Submission 43*, p. 19.

80 UNHCR, *Submission 43*, pp. 19-20.

in poorly ventilated tents, is especially traumatizing to children, in the context of mandatory and open-ended detention that will exacerbate or precipitate mental and physical illness into the future for them.⁸¹

4.37 PNG accepts refugees in accordance with its National Refugee Policy.⁸² Refugees who settle in PNG are expected to be self-sufficient, and compete for jobs as local workers do.⁸³ The Policy emphasises that in order for refugees to be 'accepted' within PNG they 'must not be perceived to be provided special treatment or distinct advantages over local people'. It also explains that once refugees have successfully established themselves and become self-sufficient, they can sponsor their families to join them.⁸⁴ It also states that where refugees have complex needs and cannot become self-sufficient, PNG will work with the UNHCR or other 'resettlement countries' to find durable solutions.⁸⁵

4.38 The UNHCR submitted that this policy 'does not take account of the inherent disadvantages faced by refugees', who may be isolated from their families and lack cultural support.⁸⁶ It also noted that refugees in PNG cannot own land, and are therefore required to cover the cost of housing and food on an 'ongoing basis', something which makes it difficult to meet basic needs.⁸⁷ The UNHCR further argued that PNG services would not receive the mental health care they require, leading to people going untreated, or receiving inadequate treatment. The UNHCR concluded that settlement in PNG is not a viable option because refugees do not have access to 'integration possibilities' and cannot return to their country of origin (leaving them in a 'state of limbo'), and that this uncertainty about the future is a major contributing factor to mental deterioration, and consequently a barrier to settlement.⁸⁸

Resettlement in Cambodia

4.39 At the date of this report, the only third country resettlement arrangement which has been formally agreed to, and resulted in the resettlement of any refugees, is the agreement between Australia and Cambodia relating to the resettlement of Nauru-determined refugees.⁸⁹

4.40 The department explained in its submission that since June 2015 only six refugees had settled in Cambodia. It also advised that, of those six refugees, four have

81 UNHCR, *Submission 43*, p. 23.

82 Government of Papua New Guinea, *National Refugee Policy*, www.immigration.gov.pg/images/PNG_National_Refugee_Policy_FINAL_ENDORSED_BY_CABINET.pdf (accessed 27 February 2017).

83 Government of Papua New Guinea, *National Refugee Policy*, p. 9.

84 Government of Papua New Guinea, *National Refugee Policy*, p. 10.

85 Government of Papua New Guinea, *National Refugee Policy*, p. 10.

86 UNHCR, *Submission 43*, pp. 17-18.

87 UNHCR, *Submission 43*, p. 18.

88 UNHCR, *Submission 43*, p. 18.

89 DIBP, *Submission 23*, p. 63.

subsequently decided to return to their home countries.⁹⁰ On 14 February 2017 it was reported that two more refugees had volunteered to resettle in Cambodia.⁹¹

4.41 The department stated that the funding for this agreement consists of two components: an aid component of \$40 million, and a settlement and support services component, capped at \$15 million.⁹² The department advised that, of that \$15 million allocated to pay for services, it has expended \$3.48 million in the 2014-15 and 2015-16 financial years on 'fees for the establishment and delivery of contracted support services' in Cambodia.⁹³ At 11 November 2016, it advised that it had already spent \$1.2 million in the 2016-17 financial year.⁹⁴

4.42 The Edmund Rice Centre (ERC) labelled the Cambodia arrangement an 'abject failure'.⁹⁵ Australian Lawyers for Human Rights (ALHR) highlighted comments by Mr Phay Siphon, a spokesperson for the Cambodian government and Cambodian Council of Minister.⁹⁶ Mr Siphon was reported to have described the agreement as a 'failure', and noted Cambodia's lack of social services and funding to support refugees.⁹⁷

4.43 Several Nauru RPC incident reports, which were contained in the leaked documents termed 'the Nauru files', seem to indicate distress among refugees when considering the prospect of settling in Cambodia, as well as unease at the prospect of being refused permission to go to Cambodia.⁹⁸

Third country resettlement negotiations

4.44 The committee experienced difficulty in obtaining complete and current information about third country resettlement negotiations. The department claimed that these negotiations involve 'sensitive discussions' with a number of countries, and

90 DIBP, *Submission 23*, p. 63.

91 The Cambodia Daily, *More Nauru refugees opt for Cambodia as Paths to US Narrow*, 14 February 2017.

92 Mr Michael Pezzullo, Secretary, DIBP, *Committee Hansard*, Tuesday 11 November 2016, p. 28.

93 DIBP, response to question on notice, 11 November 2016 (received 25 November 2016).

94 Ms Clare Roennfeldt, Acting First Assistant Secretary, Children, Community and Settlement Services Division, DIBP, *Committee Hansard*, Tuesday 11 November 2016, p. 28.

95 Edmund Rice Centre (ERC), *Submission 7*, p. 4.

96 Australian Lawyers for Human Rights (ALHR), *Submission 25*, p. 14.

97 Sydney Morning Herald, *Australia's Cambodia refugee resettlement plan 'a failure'*, 3 April 2016.

98 The Guardian Australia, *the Nauru files*, minor incident 'threat to self-harm', 4 May 2015, <https://interactive.guim.co.uk/2016/08/nu-files/pdf/sca150319.pdf> (accessed 2 March 2017); minor incident 'threat to self-harm', 5 May 2015, <https://interactive.guim.co.uk/2016/08/nu-files/pdf/sca150324.pdf> (accessed 2 March 2017); minor incident 'self-harm threat', 14 May 2015, <https://interactive.guim.co.uk/2016/08/nu-files/pdf/sca150341.pdf> (accessed 2 March 2017).

explained that the details of those discussions remain confidential.⁹⁹ On 7 January 2017, Minister the Hon Peter Dutton MP, made a public interest immunity claim (PII claim) in relation to questions about third country resettlement negotiations. Minister Dutton claimed that the disclosure of information relating to third country resettlement negotiations could damage international relations.

The United States of America

4.45 On 13 November 2016, the Commonwealth Government announced that it had negotiated a one off arrangement with the Obama Administration of the United States (US) Government, which would see refugees located in PNG and Nauru resettled in the US.¹⁰⁰ The department explained that any person currently in Australia (having been transferred from either Nauru or PNG) would have to return to either Nauru or Manus in order for their case to be determined by US Government officials.¹⁰¹

4.46 Since this announcement, US President Donald Trump has taken office, leading to speculation that this arrangement may not proceed. This speculation arose largely due to the President's stated immigration position, and the signing of executive orders relating to immigration.

4.47 On 27 January 2017, President Trump signed an executive order, stating that:

- the US Refugee Admissions Program shall be suspended for 120 days;
- the entry of Syrian nationals would be 'detrimental to the interests of the United States' and is therefore suspended;
- the entry of more than 50,000 refugees in the 2017 fiscal year would be similarly detrimental, and the President suspended such entry 'until such time as I determine that additional admissions would be in the national interest; and
- the Secretaries of State and Homeland Security can jointly determine to admit individuals as refugees on a 'case-by-case basis...only so long as they determine that the admission of such individuals is in the national interest'.¹⁰²

4.48 The order also stated that:

...immigrant and [non-immigrant] entry into the United States of aliens from countries referred to in section 217(a)(12) of the [Immigration and Nationality Act], 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United

99 DIBP, *Submission 23*, p. 63.

100 See, www.minister.border.gov.au/peterdutton/Pages/Refugee-resettlement-from-Regional-Process-Centres.aspx (accessed 10 April 2017).

101 Mr Michael Pezzullo, Secretary, DIBP, *Committee Hansard*, Tuesday 15 November 2016, p. 25.

102 Office of the Federal Register, *Protecting the Nation from Foreign Terrorist Entry into the United States*, <https://www.federalregister.gov/documents/2017/02/01/2017-02281/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states> (accessed 22 February 2017).

States, as immigrants and [non-immigrants], of such persons for 90 days from the date of this order (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas).¹⁰³

4.49 Both section 217(a)(12) of the Immigration and Nationality Act, and section 1187(a)(12) of the US Code provide the same information. They both describe any alien who is a national of either Syria or Iraq, or has been presented in either of those countries at any time on or after 1 March 2011.¹⁰⁴ The same sections also describe an alien who is a national of, or has been present in at any time on or after 1 March 2011, 'a country, the government of which has repeatedly provided support to acts of international terrorism', as well as 'any other country or area of concern designed by the Secretary of Homeland security'.

4.50 There has been some debate as to whether the Australia/US refugee resettlement arrangement will proceed, and how it could be reconciled with this new policy stance. On 1 February 2017, President Trump tweeted 'Do you believe it? The Obama Administration agreed to take thousands of illegal immigrants from Australia. Why? I will study this dumb deal'.¹⁰⁵ The following day, however, it was reported that the US Embassy in Australia had advised that President Trump would honour the deal.¹⁰⁶

4.51 This Executive Order, as well as revisions, has been the subject of Supreme Court challenges in the US. On Wednesday 15 March 2017 it was reported that US District Judge Derrick Watson issued orders halting President Trump's revised executive order to temporarily close American borders to refugees and nationals from six countries.¹⁰⁷

4.52 Also on 15 March 2017, the Department of Foreign Affairs and Trade (DFAT) advised the committee that:

The US administration has confirmed and reconfirmed that the arrangement is on foot, that it is progressing according to their own rules concerning the assessment of refugee protection claims and also the vetting on security grounds of applicants...[T]ime frames are a little bit hard for us to predict because these are the arrangements and the operations of another country and, like us, the US is very rigorous in its assessment both of refugee

103 Office of the Federal Register, *Protecting the Nation from Foreign Terrorist Entry into the United States*.

104 8 US Code 1187 – Visa waiver program for certain visitors, <https://www.law.cornell.edu/uscode/text/8/1187> (accessed 22 February 2017), section 1187(a)(12)(A); *Immigration and Nationality Act*, s. 217(a)(12), <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-4391.html> (accessed 10 April 2017).

105 President Donald Trump, Twitter, 2 February 2017 https://twitter.com/realDonaldTrump/status/827002559122567168?ref_src=twsrc%5Etfw, (accessed 22 February 2017).

106 SBS, *Trump to honour refugee deal with Australia: US Embassy*, 2 February 2017.

107 PRI, *A judge in Hawaii just blocked Trump's revamped immigration order*, 15 March 2017.

asylum status and on security grounds. But the good news is that those are progressing.¹⁰⁸

4.53 In relation to any numerical 'caps' on this agreement, DFAT further advised that:

...it was part of the understanding reached between Australia and the United States that 1,250 would be taken, but I would not think that it is correct to characterise it as an upper limit. The US administration has undertaken to take 50,000 this year globally. Whether they end up taking more than 1,250 from Manus and Nauru or significantly less is impossible to say at this stage. It will be a function of how many apply to go to the United States. It will be a function of how many are determined by the US to qualify for their refugee intake requirements and then of course there is security vetting on top of that. It could well be that the US eventually chooses to take more than 1,250.¹⁰⁹

4.54 DFAT also stated that the arrangement does not require the US to take any refugees.¹¹⁰ The department, by contrast, stated that it did not agree that the number taken could be zero, and explained that the number 1,250 is an 'aim' or 'goal'.¹¹¹

4.55 At the date of this report, the domestic legal challenges to President Trump's migration-related executive orders are ongoing. The effect of this and any further executive orders on the refugee deal with Australia is unclear. The department advised that, at 20 March 2017, US Citizenship and Immigration Services officers were at Nauru, and that they would travel to Manus from 4 April to 8 April 2017.¹¹²

4.56 The department confirmed, at 20 March 2017, that there were no other third country agreements being negotiated.¹¹³

New Zealand

4.57 The New Zealand Government has previously offered to accept up to 150 refugees from the Nauru and Manus RPCs each year. However, this offer has not resulted in a resettlement agreement.

4.58 In April 2016, it was reported that Minister for Immigration and Border Protection the Hon Peter Dutton MP described the proposal as a 'green light to people smugglers' that would create a 'back-door way to get into Australia'.¹¹⁴

108 Mr Andrew Goledzinowski, Ambassador for People Smuggling and Human Trafficking, DFAT, *Committee Hansard*, Wednesday 15 March 2017, p. 37.

109 Mr Andrew Goledzinowski, Ambassador for People Smuggling and Human Trafficking, DFAT, *Committee Hansard*, Wednesday 15 March 2017, p. 38.

110 Mr Andrew Goledzinowski, Ambassador for People Smuggling and Human Trafficking, DFAT, *Committee Hansard*, Wednesday 15 March 2017, p. 39.

111 Mr Michael Pezzullo, Secretary, DIBP, *Committee Hansard*, Monday 20 March 2017, p. 2.

112 Ms Rachel Noble, Deputy Secretary, DIBP, *Committee Hansard*, Monday 20 March 2017, p. 6.

113 Mr Michael Pezzullo, Secretary, DIBP, *Committee Hansard*, Monday 20 March 2017, p. 3.

4.59 ALHR explained that it wrote to the New Zealand Minister of Immigration, the Hon Michael Woodhouse MP, in September 2016 in relation to New Zealand's offer. It stated that, in response, the Minister reiterated to ALHR that New Zealand's offer to resettle refugees each year still stood, and emphasised that it was up to Australia to take up the offer.¹¹⁵ In February 2017, it was reported that the Prime Minister of Australia, the Hon Malcolm Turnbull, stated that the offer is one 'we appreciate' but stated that 'our focus is on completing the arrangements with the United States'.¹¹⁶

4.60 Both SHS Law and Mr Tim McKenna submitted that Australia should accept New Zealand's offer to take asylum seekers.¹¹⁷ Amnesty International recommended that the Australian Government not block any offers made by third countries to resettle refugees from Manus or Nauru.¹¹⁸ The ERC likewise recommended that the offer be taken seriously.¹¹⁹

Resettlement other than by a resettlement agreement

4.61 On 21 February 2016, it was reported that father and son Mr Ahmed Kharsa and Mr Ali Kharsa, who had been detained in Nauru for three years, were resettled in Canada pursuant to a family reunification visa.¹²⁰ The report stated that the father and son were believed to be the 'first offshore refugees given protection by a western country'.

Alternative proposals regarding resettlement

4.62 The committee heard a number of suggestions about alternative mechanisms by which to secure safe long term resettlement arrangements for the refugees and asylum seekers in Nauru and PNG, as well as future asylum seekers.

Resettlement in Australia

4.63 Several submitters argued that asylum seekers and refugees in Manus and Nauru should be resettled in Australia. ALHR argued that, pursuant to the *Refugee Convention 1951*, these refugees 'have the right to protection in Australia'.¹²¹ The ERC submitted that this would be the 'most efficient and practical means by which to resettle transferees', and noted that while the policy of not settling any such asylum

114 The Guardian Australia, *Turnbull rejects New Zealand offer to take 150 refugees from detention*, 29 April 2016.

115 ALHR, *Submission 25*, p. 15.

116 Sydney Morning Herald, *Turnbull rejects New Zealand's refugee offer to focus on US deal*, 19 February 2017.

117 SHS Law, *Submission 3*, p. 5; Mr Tim McKenna, *Submission 4*, p. 1.

118 Amnesty International, *Submission 6*, Attachment 1, p. 57.

119 ERC, *Submission 7*, p. 4.

120 ABC News, *Asylum seeker pair leaves Nauru 'black hole' to be reunited with family in Canada*, 21 February 2016.

121 ALHR, *Submission 25*, p. 12.

seekers in Australia has bipartisan support, no alternative durable solution has yet been proposed.¹²² The RCA similarly posited that resettlement in Australia would be much simpler and cheaper than the current approaches being taken.¹²³ SHS Law argued that Australia should resettle asylum seekers in Australia, describing such a move as 'the last opportunity for Australia to remit its errors from its previous dumping behaviours'.¹²⁴

4.64 The Royal Australia College of General Practitioners (RACGP) argued that Australia must be included as an option for resettlement because of the ongoing psychological harm being caused to those asylum seekers and refugees in detention. They submitted that, 'In the current international refugee crisis, ethical and fair settlement options must be expedited as a matter of urgency'.¹²⁵ The Royal Australian and New Zealand Society of Psychiatrists (RANZCP) noted that Australia bears the ultimate responsibility for refugees and asylum seekers in Nauru and PNG, arguing that:

In the absence of viable options for third country resettlement, Australia maintains its legal and ethical obligations to the protection of asylum seekers and refugees detained under its aegis. As such, the social and economic costs of current policies and practices will rest with the Commonwealth Government and the Australian people for many years to come.¹²⁶

4.65 The University of Newcastle Legal Centre (UNLC) submitted that Australia should bring every asylum seeker and refugee in Nauru and PNG to Australia for processing and/or resettlement, and should, where required, make third country resettlement arrangements in destinations where 'the human rights of refugees can be assured in a comparable manner to those available to members of the Australian community'.¹²⁷

4.66 The ERC noted the argument that reconsidering resettlement in places such as Australia or New Zealand could create a 'pull factor' for people smugglers in the Asia-Pacific. It disagreed that such a pull factor would necessarily eventuate, arguing that:

Firstly, past experience indicates that when people on Nauru and Manus were resettled in countries such as Australia and New Zealand between 2001 and 2008, the so-called pull factor did not eventuate. Secondly, even if a pull-factor did exist, its impact can be overcome through the

122 ERC, *Submission 7*, p. 4.

123 RCA, *Submission 19*, p. 2.

124 SHS Law, *Submission 3*, p. 6.

125 RACGP, *Submission 17*, p. 6.

126 Royal Australian and New Zealand Society of Psychiatrists (RANZCP), *Submission 8*, p. 16.

127 University of Newcastle Legal Centre (UNLC), *Submission 12*, p. 10.

establishment of a genuine and durable regional cooperation framework that helps people before they decide to come to Australia by boat.¹²⁸

4.67 A number of submitters submitted that Australia will continue to struggle to find third country resettlement options. The ERC posited that the ongoing failure to secure third country resettlement is not surprising, given that 'the global community is dealing with the highest number of displaced people than at any time since UNHCR records began'.¹²⁹ It argued that 'very few countries are willing to deal with Australia's challenges when they also face their own'.¹³⁰ The Refugee Council of Australia (RCA) echoed this sentiment, highlighting that the decision to not settle any of the asylum seekers or refugees in question is an Australian domestic political decision:

The reality is that, after more than three years, we have failed to find another country (other than Cambodia) to take these people. This is not surprising. The world is seeing unprecedented levels of forced displacement, and it is therefore not surprising that other countries are reluctant to help Australia with its extremely small, and entirely political, problem.¹³¹

4.68 ALHR further submitted that Australia should not call on other countries to resettle refugees within its responsibility, 'particularly those countries with less capacity to protect and support' them.¹³² It stated that, if further third country resettlement options were to be pursued, any refugees with family in Australia 'must be brought to Australia, pursuant to their right to family reunion', arguing that

The number of refugees that would be settled in Australia pursuant to family reunion is small. It would go unnoticed. Yet it would be consistent with the strong family values that most Australians hold.¹³³

A regional solution

4.69 A number of submitters discussed the development of a regional cooperation framework to help address the issue of asylum claims. The ERC was critical of the bilateral agreements Australia has entered into, as well as those it is currently negotiating. It submitted that 'ad-hoc bilateral deals do not constitute genuine regional cooperation frameworks' and are not a 'durable solution', particularly where the agreement would involve a 'people swap'.¹³⁴ The UNLC similarly argued that to date, Australia has 'only sought to make resettlement arrangements with third countries that are poorly resourced to protect the rights of refugees or enable their social

128 ERC, *Submission 7*, p. 5.

129 ERC, *Submission 7*, p. 4.

130 ERC, *Submission 7*, p. 4.

131 Refugee Council of Australia (RCA), *Submission 19*, p. 2.

132 ALHR, *submission 25*, p. 12.

133 ALHR, *Submission 25*, p. 16.

134 ERC, *Submission 7*, p. 6.

integration'.¹³⁵ As an example, it highlighted Cambodia's past poor human rights record and its forcible deportation of 20 Chinese refugees in 2009 who were subsequently sentenced to death in the Peoples Republic of China (PRC).¹³⁶

4.70 The ERC submitted that any attempts to negotiate a third country resettlement arrangement needs to reflect Australia's non refoulement obligations and be part of 'a genuine and durable regional cooperation framework'.¹³⁷ It argued that programs developed in response to the Indo-Chinese refugee crisis in the 1970s and 1980s provide a good model because they ensured that asylum seekers did not have to take a boat to try and claim asylum, but rather they could access a safe place close to their homeland where their refugee claim could be processed and an orderly resettlement process could take place.¹³⁸ It submitted that a regional cooperation framework in Australia should include:

- removal of barriers to RSD processes in countries like Indonesia, Malaysia and Thailand;
- establishment of 'protected spaces' for international agencies like the UNHCR, and non-government organisations (NGOs) to provide services to refugees and asylum seekers;
- cooperation between host countries, the UNHCR and resettlement states to provide durable solutions, which might include resettlement, integration into the country, or assisted voluntary repatriation;
- consistent asylum processes across the region based on the Refugee Convention (including legislation dealing with the RSD process, and independent rights review mechanisms); and
- improvement of conditions for refugees and asylum seekers in 'host and transit countries' (such as legal permission to be in the country, the right to work, and the right to access basic services).¹³⁹

4.71 Amnesty International submitted that Australia should increase its resettlement program significantly, and ensure that it is assisting those most in need by giving priority to individuals who had been referred for assistance by the UNHCR.¹⁴⁰ The ERC echoed these recommendations, and argued that increasing Australia's humanitarian intake and investment in UNHCR activities are affordable activities:

...if the Government is prepared to spend \$9.6 billion over three years preventing people from entering Australia by boat, it can invest even one-

135 UNLC, *Submission 12*, p. 8.

136 UNLC, *Submission 12*, p. 8.

137 ERC, *Submission 7*, p. 2.

138 ERC, *Submission 7*, p. 6.

139 ERC, *Submission 7*, p. 14.

140 Amnesty International, *Submission 6*, p. 2.

third of that funding on programs to help people before they need to get on a boat.¹⁴¹

4.72 The Law Council of Australia (LCA) noted that in 2016 the Australian Human Rights Commission (AHRC) recommended that Australia focus on improving access to effective protection within the Asia Pacific region to help prevent 'flight by sea'.¹⁴² The Australia Council for International Development (ACFID) similarly recommended an 'enhanced and well-targeted aid program that works with Australia's neighbours to better understand and address the root causes and increase in the number of forcibly displaced persons'.¹⁴³

Further third country resettlement options

4.73 ALHR argued that if Australia does pursue further third country resettlement arrangements, any host countries should, at a minimum:

- be party to the 1951 Refugee Convention;
- have an existing legal and policy framework which will provide refugees with a secure legal status on arrival, and the prospect of securing citizenship;
- have an institutional framework to support resettlement;
- have a reception and integration program to deliver services including reception, orientation, housing, financial assistance, medical care, language, employment preparation, education, and community engagement, and given the traumatic conditions which RPC refugees have already endured, 'appropriate psychological support'; and
- not be countries which may return refugees to their countries of origin.¹⁴⁴

4.74 ALHR submitted that neither Nauru, Cambodia nor PNG meet this description, and that as such, any refugees who have already accepted the offer to settle in PNG or Cambodia should have the opportunity to take up a third country resettlement option which does meet the description.¹⁴⁵

141 ERC, *Submission 7*, p. 6.

142 Law Council of Australia (LCA), *Submission 39*, p. 23.

143 Australia Council for International Development (ACFID), *Submission 45*, p. 2.

144 ALHR, *Submission 25*, p. 15.

145 ALHR, *Submission 25*, p. 15.