



IN THE SAME CANOE:

BUILDING THE CASE FOR A REGIONAL HARMONISATION OF APPROACHES TO HUMANITARIAN ENTRY AND STAY IN 'OUR SEA OF ISLANDS'

By Bruce Burson,
Richard Bedford and
Charlotte Bedford

March 2021



**PLATFORM
ON DISASTER
DISPLACEMENT**

FOLLOW-UP TO THE NANSEN INITIATIVE

ACKNOWLEDGMENTS

This report has been prepared for the Platform on Disaster Displacement by Bruce Burson, Richard Bedford and Charlotte Bedford.

The authors would like to thank Professor Walter Kälin, Atle Solberg and Alisi Vosalevu from the Platform on Disaster Displacement for their support in preparing the report. We would like to also acknowledge the helpful review comments received from the Platform on Disaster Displacement, the International Organization for Migration (and in particular Sabira Coelho), the Internal Displacement Monitoring Centre, the Office of the High Commissioner for Refugees (and in particular Nai Jit Lam), the Office of the High Commissioner for Human Rights (and in particular Pia Oberoi), the International Federation of the Red Cross, Professor David J. Cantor (Refugee Law Initiative, University of London), Professor Jane McAdam (Kaldor Centre for International Refugee Law, University of New South Wales), and from Sanjula Weerasinghe (Institute for the Study of International Migration, Georgetown University).

The authors would also like to give particular thanks to Ewan Cameron (Ministry of Foreign Affairs, Cook Islands), Amelia Komaisavai (Immigration Department, Fiji), Sione Lolohea (Tonga Statistics Department), Professor Wei Li (Arizona State University), Kerry Murphy (Solicitor, New South Wales, Australia), Sabira Coelho (IOM, Suva) and Nai Jit Lam (UNHCR, Canberra) for assisting us gather relevant information.

With funding from the European Union, the Internal Displacement Monitoring Centre (IDMC) is collaborating with the International Organization for Migration (IOM) and the Platform on Disaster Displacement (PDD) to generate new evidence to help governments better understand, plan for, prevent and respond to disaster displacement in the Pacific region. The project will contribute to better policy responses and disaster planning, as well as new and improved operational tools.

Find out more at [internal-displacement.org/pacific-disaster](https://www.internal-displacement.org/pacific-disaster)





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EXECUTIVE SUMMARY

This report relates to one form of human mobility arising in the context of disasters and climate change. It seeks to build the case for the development of regionally harmonised approaches in the Pacific to allowing the entry and/or stay of non-nationals on humanitarian grounds when disaster strikes, including in the context of climate change.

By harmonisation, we do not mean standardisation. Immigration laws and policies need not be identical in all respects in each country, but they should include a *pathway* for entry and/or stay on humanitarian grounds, underpinned by a common understanding of need. Nor do we mean to imply that harmonisation can only be achieved through some legally binding international agreement.

We recognise that, mirroring global trends, current mobility in the Pacific in the context of disasters and climate change is mostly internal in nature. While this is likely to remain the case at a regional level, given climate change trends, it cannot be assumed that cross-border movement will remain at existing levels in the coming decades in terms of mitigating a need to develop harmonised approaches for entry to another country on humanitarian grounds. Further, our analysis of regional mobility demonstrates that in relation to the issue of stay, the need arises because cross-border movement between Pacific Island Countries and Territories (PICTs) is an existing reality.

REGIONAL ANCHORING POINTS FOR A FRAMEWORK

Key Point 1: There are multiple anchoring points in the Pacific region for the development of harmonised policy and practice in relation to humanitarian entry and stay.

Regional anchoring points for the development of harmonised policy and practice in relation to humanitarian entry and stay include:

- The 2000 **Biketawa Declaration** – at <https://bit.ly/3w0Y8Ko> – which emphasises the need for collaborative action by States, upon request, to deal with or avert crises or to deal with threats to their security “on the basis of all members of the Forum being part of the Pacific Islands extended family”.

- The 2008 **Niue Declaration on Climate Change** – at <https://bit.ly/3h2wjNE> – in which Pacific leaders expressed their deep concern over the “serious current impacts of and growing threat posed by climate change to the economic, social, cultural and environmental wellbeing and security of Pacific Island countries” and recognised “the importance of retaining the Pacific’s social and cultural identity, and the desire of Pacific peoples to continue to live in their own countries, where possible”.
- The 2015 **Hiri Declaration on Strengthening Connections to Enhance Pacific Regionalism** – at <https://bit.ly/3xaSoz5> – in which Pacific leaders recognised the regional history of intra- and inter-island mobility.
- The 2016 **Framework for Resilient Development in the Pacific 2017-2030** – at <https://bit.ly/3jpd1nf> – which calls for the integration of human mobility into resilient development processes to protect individuals and communities that are vulnerable to climate change and disaster displacement and migration.
- The 2018 **Boe Declaration on Regional Security** – at <https://bit.ly/3y77iGz> – which reaffirms that “climate change remains the single greatest threat to the livelihoods, security and wellbeing of the peoples of the Pacific”, and emphasises “human security, including humanitarian assistance, to protect the rights, health and prosperity of Pacific people” as an essential component of regional security.
- The development process for the 2050 Strategy for the Blue Pacific Continent – at <https://bit.ly/2UdcQ3I> – has already climate change as a key driver of change in the Pacific.

Key Point 2: A regional guide for facilitating harmonisation in the Pacific would complement similar developments in other regions and reflect increased recognition at the international level of the need for policy/practice coherence.

Developments at the regional level include:

- The 2016 Regional Conference on Migration, (North and Central America) Guide: **Protection for Persons Moving Across Borders in the Context of Disaster: a Guide to Effective Practices for RCM Member States** – at <https://bit.ly/3w63Drh>.
- The 2018 South American Conference on Migration **Regional Guidelines on Protection and Assistance for Persons Displaced across Borders and Migrants in Countries affected by Disasters of Natural Origin** – at (in Spanish) <https://bit.ly/2SC2utL>
- The 2019 consultations in Port-of-Spain, Trinidad and Tobago under the Caribbean Migration Consultations (CMC) to enhance regional cooperation in addressing human mobility in contexts of disasters and climate change.
- The 2020 Intergovernmental Authority on Development (IGAD) (East Africa) **Protocol on Free Movement of Persons**, which allows citizens of IGAD Member States to cross borders “in anticipation of, during or in the aftermath of disaster”, and enables disaster-affected people to remain in another country as long as return to their country of origin “is not possible or reasonable”. The Protocol has not yet been uploaded onto the IGAD website but the communique is at: <https://bit.ly/3ybhA8z>

Developments at the global level include:

- The 2015 **Nansen Initiative Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change** (Protection Agenda), which identifies “enhancing the use of humanitarian protection measures for cross-border disaster-displaced persons” as a “priority area of future action” – at <https://bit.ly/3h3t60g>
- The 2015 Paris Agreement under the **United Nations Framework Convention on Climate Change (UNFCCC)**. The recommendations of the Task Force on Displacement, established under the auspices of the UNFCCC, were welcomed by the Parties at the 24th session of the Conference of the Parties (COP 24).

These recommendations included that Parties “consider formulating laws, policies and strategies, as appropriate, that reflect the importance of integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change” – at <https://bit.ly/3AhcauW>

- **The Global Compact on Migration**, which recognises “necessary actions” to meeting Objective 2 the harmonising and development of approaches and mechanisms at subregional and regional levels. Objective 5 of the Compact relates to “Enhance availability and flexibility of pathways for regular migration” – at <https://bit.ly/3qzK1KZ>

THE PACIFIC AS A ‘SEA OF ISLANDS’: A SPECIFIC POLICY CONTEXT

Key Point 3: Immigration policy settings in the Pacific will be determinative of whether a person can seek protection from disasters and climate change by physically moving across an international border.

Epeli Hau’ofa’s descriptor of the Pacific neighbourhood as “our sea of islands” captures an important point in this regard: that while they are home to relatively small populations, frequently inhabiting limited total land areas, the islands of the Pacific are spread out over many millions of square kilometres of ocean. What this means is that persons seeking entry abroad in the context of a disaster will need to travel by boat or by air, often for great distances. Consequently, more than most other regions, immigration policy settings will be determinative of whether a person can seek protection from disasters and climate change by physically moving across an international border.

That the region’s immigration systems may be increasingly required to address the entry and/or stay of nationals from other Pacific countries due to the impacts of disasters and climate change stems from: (a) the region’s worsening hazard profile; and, (b) levels of intra-island mobility.

The Pacific region is prone to disasters linked to geo-physical and hydrometeorological hazards in relation to both sudden-onset

events and slow-onset processes – whether on a stand-alone basis or, as is often the case, as linked phenomena. Climate change will increase the frequency and/or intensity of these events and processes. Disaster risks are increasing as disasters increase in frequency, magnitude and complexity. This includes not just an increased risk of displacement, but also increased risk of disruption to work and education in countries of origin, transit and destination. It can be reasonably anticipated that in the coming, increasingly climate-change affected, decades, these increased risks render it more likely that immigration (and related) systems in PICTs will be called upon to respond to the predicament of persons impacted by a disaster.

There is a clear trend towards the modernisation of immigration systems in the region. The harmonisation of policy and practice on entry and stay would further render regional immigration systems ‘fit-for-purpose’, by future-proofing them for a world where disasters and climate change impacts increasingly affect the immigration needs of regionally mobile populations.

THE MOBILITY CONTEXT

Key Point 4: Data on intra-Pacific in-migrant and out-migrant stocks provide clear empirical evidence of the widespread extent of migration between PICTs as well as to the more familiar hub-state destinations on the Pacific rim. If a disaster were to make it impossible for people to return to a particular PICT for some time (such as the current COVID-19 pandemic), there is a high probability that temporary migrants from that PICT would be located in other parts of the region, and they may need some support before they can return to the country where they have full residence rights.

There is a distinctive structure to the architecture of contemporary voluntary migration in the Pacific that privileges a small number of sources and destinations or “hubs” in the region (Fiji), on the Pacific rim (especially Australia, New Zealand, the United States of America and Canada) and in Europe (the United Kingdom and France) for movers from specific groups of PICTs (“clusters”). Most of

these hubs and clusters have links with the region's colonial heritage and the associated post-colonial connections with the four Pacific rim countries mentioned above as well as with France, the one country in Europe that remains a colonial power in the region.

There is also considerable intra-Pacific mobility that has been greatly facilitated by reciprocal visa-waiver provisions between PICTs for short-term visits, usually for a maximum of three months. Movement of Pacific peoples for social visits, business activities, and to access professional services that are not available in their home country has never been actively discouraged by post-colonial governments in the Pacific. Navigating the "bloodlines" of culture, history and tradition, far more than seeking permission to cross the invisible international borders that are a legacy of colonialism, lies at the heart of much short-term population mobility within the region.

A contemporary manifestation of these bloodlines is the presence in any particular PICT of residents born in many of the other PICTs, especially those in the same Pacific sub-region (see [Tables 1](#) and [2](#), pp. 38 and 39). Our analysis of the stocks of in-migrants in each PICT around 2019 shows that other Pacific Islands account for 71,780 migrants born overseas while countries in Asia account for a further 103,030 migrants. While Asian countries have provided the largest global sub-regional stocks of in-migrants in Pacific countries, *the most consistent sources of in-migrants across the 21 PICTs are other Pacific countries*. It is also apparent that the primary sources of Pacific-born in-migrants in most PICTs are other countries in their Pacific sub-region, reflecting an important sub-regional clustering element in the regional mobility architecture.

Our analysis of estimated stocks of out-migrants born in the 21 PICTs, by global sub-region of usual residence in 2019, confirms that the dominant destinations remain the Pacific rim "hub states" of Australia, New Zealand, the United States of America and Canada. Eighty-eight percent of the 742,920 Pacific-born out-migrants were estimated to be usually resident in these four countries (see [Table 3](#), p. 41). However, other Pacific countries have the third largest aggregate stock of Pacific-born migrants (71,350). While countries in Asia

have become much more important sources of migrants to many PICTs in recent years, this does not seem to have been the case in terms of destinations for Pacific-born migrants.

As regards intra-Pacific out-migration stocks, again we see sub-regional variation (see [Table 4](#), p. 43). Around 2019, PICTs in Polynesia had almost three times as many Pacific-born migrants living in other parts of the Pacific region (35,210) than the much larger Melanesian countries and populations (12,830). Only six of the 21 PICTs had people born in their country living in all the three subregions: Fiji, Solomon Islands, Kiribati, Samoa, Tonga and Tuvalu. We suspect there are more PICTs with migrant stocks in the three sub-regions because there has been a trend in recent Pacific censuses to grouping birthplaces with small numbers into the general category "other countries".

The significance of these data on intra-Pacific and extra-Pacific in-migrant and out-migrant stocks in the context of the harmonisation of policy and practice relating to entry and stay is that they provide clear empirical evidence of the widespread extent of migration between PICTs as well as to the more familiar hub state destinations on the Pacific rim. In every PICT, except Papua New Guinea and French Polynesia, more than 10 percent of their in-migrant stocks had been born in other Pacific countries. In eight of the PICTs more than 30 percent of their in-migrant stocks were from other parts of the region.

If a disaster were to make return to a particular PICT impossible for some time, *there is a high probability that temporary migrants from that PICT would be located in other parts of the region*, and they may need some support before they can return to the country where they have full residence rights. Harmonising policy and practice relating to provisions for visa extensions and, possibly, some subsistence support during an extended period of forced stay by Pacific migrants because of highly destructive environmental events linked with climate change, thus, has real relevance in the context of intra-Pacific migration.

The largest documented flows of people into, out of and between countries in the Pacific travel on short-term visas, usually for three months or less, as visitors, tourists, entrepreneurs, consultants, members of sports teams or church groups or for a host of other reasons for wanting to spend time in a Pacific country where they do not have rights of residence, employment or citizenship. These short-term flows dwarf the annual flows of temporary labour migrants and long-term residents. In several PICTs, the annual number of short-term arrivals is equivalent to more than their total usually resident population and in five countries, visitor numbers exceed the resident population by more than five times (see [Table 7](#), p. 50).

The great majority of short-term arrivals in PICTs come from countries outside the region, with major source areas varying depending on transport links with tourist source countries on the Pacific rim and in Europe. Tourists from many of the main sources of short-term migrants, including most Pacific States, will have visa-waiver status for stays of three months or less in most PICTs. The large flows of short-term visitors in the region are not subject to the same visa requirements as those seeking approval for work or residence. There is little documentation on these visitors in their host countries and, in this regard, they are in somewhat more vulnerable positions than temporary migrants with specific visas in the event of a disaster that does not allow them to return home within the timeframe of their visa-waiver visit.

While the intra-Pacific component of the total visitor arrivals in PICTs is small, data from three of the major tourist destinations (Fiji, Samoa and Vanuatu) revealed a surprisingly consistent share of their short-term arrivals (5-7 percent) were citizens of other Pacific countries (see [Table 8](#), p. 51). Again, this is significant in that should a disaster occur on one of these three countries, there is every likelihood of there being citizens of other PICTs in the country at the time.

Three key dimensions of the contemporary Pacific migration system that have emerged from a systematic analysis of available data on migrant stocks and flows, and that have relevance for dealing with humanitarian responses to disaster, are summarised below.

- ❶ Intra-Pacific mobility tends to be ignored in much research on population movement in the region, but it is very significant and is responsible for the presence of resident Pacific migrant communities in all PICTs. These resident Pacific communities play a major role in assisting people from their countries who are on a range of short-term visas, or who are visiting under visa-waiver provisions. This assistance is especially important when disasters make it impossible for them to return home – a condition that has applied in all PICTs following the closing of borders as a response to the COVID-19 pandemic (see Part 4).
- ❷ All PICTs have diasporas in countries on the Pacific rim or in the countries of their former (and, for some, present) colonial rulers. These Pacific diasporas have been a major source of money and material goods that are used to sustain and develop the livelihoods of their kin in the islands. Remittances from overseas relatives and friends have long played a critically important part in responses to disasters in Pacific countries. In addition, Pacific diasporas and their institutions (especially their churches) provide considerable support to their fellow country men and women who are overseas on temporary visas. This support was readily apparent when Pacific temporary migrants could not get home from New Zealand and Australia after borders closed in March 2020.
- ❸ The Asian dimension to the Pacific migration system has changed significantly in recent years with China especially assuming an increasing role as a major aid donor and provider of technical assistance. This has been very apparent in some countries that regularly experience devastating weather events especially during the ‘wet’ or cyclone season. The increasing involvement of China in the development of infrastructure in Pacific countries has been accompanied by a growing presence of Chinese residents and a gradual increase in temporary flows of Pacific peoples into China and other Asia-Pacific rim countries in recent years. These more recent flows need to be factored into consideration of harmonised approaches to entry and/or stay of non-nationals both in

the PICTs as well as in the new destinations for Pacific migrants.

Addressing issues of entry and/or stay of non-nationals when disaster strikes has relevance for all Pacific governments. Of primary concern are short-term migrants within their countries, as well as migrants from their countries on temporary visas in other parts of the world. In contexts where there is an increasing incidence of extreme weather events (e.g. cyclones, droughts) as well as oceanic storm surges, the need for some harmonisation in humanitarian approaches to dealing with entry and/or stay of non-nationals when disaster strikes is logical. As the COVID-19 pandemic has shown, disasters are not always specific to particular countries or communities. They can affect temporary migrants everywhere who cannot get home before their visas expire.

THE REGIONAL LEGAL AND REGULATORY LANDSCAPE

Key Point 5: Provision for the entry and stay of non-nationals in some humanitarian contexts already features in some immigration systems in the Pacific. This suggests that a process led by the Governments of the Pacific aimed at recognising disasters and climate change as another immigration-relevant humanitarian context is best regarded as one of extending existing forms of State practice rather than a leap into the policy/practice unknown.

Key Point 6: There are existing administrative and Executive discretionary powers within some immigration systems which provide flexibility to allow the entry and stay of persons impacted by a disaster in countries of origin, transit and/or destination and which can be adapted or replicated.

Key Point 7: The development of a regional guide and associated legislative/regulatory development must be accompanied by the development of procedural or operational guidance to immigration officials to ensure effective and consistent implementation.

Key Point 8: Immigration responses may need to be accompanied by responses in other policy domains to ensure that disaster-affected non-nationals are adequately supported pending return home. The

immigration response must confer sufficient legal status to allow access to essential support.

The regional immigration legal landscape is one which promotes temporary migration patterns – all countries in the region provide for some form of temporary entry and stay on familiar grounds, such as: visiting for the purposes of tourism, to visit friends and family, or to attend conferences and meetings; to work in the labour market of the destination state; or, to study at one of its educational facilities.

Our analysis of the regional legal and regulatory landscape reveals that within existing immigration legislation in Australia and New Zealand there is already some accommodation given to some matters of humanitarian concern. Examples include allowing the entry of distressed vessels as an exception to ordinary entry requirements, entry for the purposes of accessing essential medical treatment or allowing the stay of persons who have been the victims of trafficking or domestic violence. Our review of immigration responses to the COVID-19 pandemic demonstrates a willingness by States to use existing migration tools to provide at least a degree of legal protection to those impacted and, in the case of New Zealand, an awareness that new class-based tools were needed.

Further, there are existing flexibilities of varying degrees across national immigration systems in the Pacific which can be drawn upon to create a harmonised regional approach (see [Table 10](#), p. 71). At the narrowest, these comprise refugee and protection mechanisms grounded in international law, which are mainly present in the more sophisticated systems in Australia and New Zealand. Notwithstanding legal developments in this area in recent years, which make it clear that refugee and protection law can apply, the reality is that few Pacific people are likely to be able to meet the relevant criteria at present.

While refugee and protection mechanisms must be part of the overall framework for those countries in the region where such mechanisms exist, more broadly distributed immigration tools provide more widely applicable building blocks for the process of harmonisation at the regional level. These include the ability to issue

limited or special purpose visas, the ability to issue new classes of visa, and the existence of Executive (Ministerial) discretion (see [Table 10](#), p. 71). Each of these mechanisms are capable of being utilised to provide for the entry and stay of persons impacted by, or at risk of being impacted by, a disaster.

Given that many of the flexibilities currently existing domestically involve the exercise of administrative or executive discretion, ensuring transparent and consistent application within national jurisdictions will be important. Therefore, alongside regional harmonisation at the policy and practice level, there is an accompanying need for predictability and certainty at the domestic operational level to avoid implementation gaps. This need is shared by both temporary migrants and immigration officials alike when confronted by the impacts of a disaster, particularly one at scale. Procedural guidance manuals, such as exists in Australia, offer greater predictability than more ad hoc approaches, such as the operational guidance notes issued by Immigration New Zealand following a disaster.

Other necessary tools

Key Point 9: Humanitarian entry and stay measures are but one of a range of tools necessary to meet the human mobility challenges of disasters and climate change in the Pacific in the coming decades.

The cross-border movement and stay of persons is but one form of mobility arising in the context of disasters and climate change. It is widely recognised that most mobility is likely to be internal in nature, although internal displacement can be a precursor to cross-border movement.

Ensuring regionally harmonised approaches for regulating entry and stay on humanitarian grounds, while important, is best regarded as but one tool in the tool-box States in the Pacific will need to meet the human mobility challenges posed by climate change in coming decades. Policy and practice development in relation to this particular form of mobility will need to be complemented by similar developments dealing with internal displacement, voluntary adaptive migration, immobility (both voluntary and involuntary) and planned relocation.

RECOMMENDATIONS

ARISING FROM THE MIGRATION MAPPING WORK

❶ A key problem facing policymakers and researchers attempting to document migrant stocks by birthplace is a trend in Pacific censuses towards aggregating data on the birthplaces of their resident population in ways which make it very difficult to produce source-destination migration matrices of the kind that the United Nations Department of Economic and Social Affairs (UN DESA) and the World Bank have been developing and using to obtain reasonably consistent estimates of migrant stocks at a national scale.

It is recommended that in the 2020/2021 round of national censuses in the Pacific, Statistics Offices are encouraged to produce detailed tables showing the countries of birth for their populations.

It is appreciated that there are limits imposed by confidentiality requirements to the levels of disaggregation that can be achieved. But it is possible to disaggregate the data on birthplace much more than is done in many Pacific censuses without breaching confidentiality requirements.

❷ In their recent report on labour migration in the Pacific, the International Labour Organisation (ILO) (2019) made reference to regional interest in exploring opportunities for greater intra-Pacific mobility of skilled and semi-skilled labour.

It is recommended that all PICTs contribute information on labour migration into and out of their countries regularly to the ILO for inclusion in the ILOSTAT database, as well as to the Pacific Community (SPC) for inclusion in the Pacific Data Hub.

③ Because of the very significant contributions Pacific communities resident in the four major Pacific rim destinations for migrants make to support their island-based kin at times of disaster, their governments should be included in discussions about regional harmonisation of policies relating to entry and stay.

It is recommended that Australia, New Zealand, the United States of America and Canada are included in high-level consultations about regional harmonisation of policies relating to entry and stay.

ARISING FROM THE LEGISLATIVE/ REGULATORY MAPPING WORK

AT THE NATIONAL LEVEL

4. It remains a problem that relevant immigration law, regulation and policy across the region is difficult to locate. It can be hard to find on government websites. There is no one single database which holds all relevant immigration legislation and regulations.

It is recommended that all PICTs take steps to ensure that immigration legislation and regulations are easily publicly accessible and contribute all relevant immigration-related legislation and regulations to the Pacific Immigration Development Community database, the University of the South Pacific (USP)'s Pacific Islands Legal Information Institute (PacLII) database and other relevant databases.

⑤ While there is potential flexibility within some immigration systems, where this exists it is typically not currently expressly configured to take account of the impacts of disasters and climate change.

It is recommended that:

- those countries which currently have provision in their immigration legislation/regulations for the issue of limited or special visas for specified purposes consider extending this to enable the person to enter and/or stay until it is safe to return home following a disaster in the list of specified purposes.
- those countries which currently have provision to add new classes of visa consider adding a visa to allow entry and/or stay of disaster-affected persons.
- all countries consider making express provision in their immigration legislation for the extension of existing temporary visas or transition to another visa type where the visa holder's ability to meet a current visa condition is compromised by the impact of a disaster.
- all countries publish guidance to immigration officers on:
 - how to exercise discretionary power to issue visas, including specifying the relevant criteria, in relation to persons seeking entry and/or stay in the context of disasters; and,
 - how existing immigration processes may need to be expedited.
- those countries which confer a discretion on specified Executive Office holders to grant entry and/or stay outside ordinary immigration requirements consider publishing guidelines on how that discretion will be exercised in the context of disasters and climate change.
- all countries ensure that relevant policy and guidance is accessible to the regional public by placing on government websites as well as on relevant regional databases such as the Pacific Immigration Development Community.

AT THE BILATERAL LEVEL

6. Both Tropical Cyclone Pam and the COVID-19 pandemic have revealed that, at scale, disasters may impact upon countries of origin and destination of migrants. Even if temporary migrants are able to maintain a lawful immigration status, they may require ongoing financial and other support.

It is recommended that where there are temporary migration flows between PICTs, the countries of origin, transit and destination enter into bilateral (or trilateral as required) discussions about providing necessary financial and social support to temporary visa holders impacted by a disaster.

AT THE REGIONAL LEVEL

7. There are existing policies and practices within the region which are amenable to replication and which provide a basis for beginning a process of regional harmonisation. There are also good practices relating to humanitarian entry and stay in other regions which can be brought into the process of regional harmonisation.

It is recommended that with a view to the development of a Guide to Effective Practices, the Platform on Disaster Displacement, together with relevant United Nations agencies and regional partners:

- convene a workshop (or series of workshops as required) of senior immigration officials from each PICT, Australia and New Zealand, plus Canada and the United States of America as key Pacific Island Forum dialogue partners; and,
- facilitate a dialogue between senior immigration officials in the Pacific with their counterparts in the Caribbean to exchange best practice ideas and lessons learned.

AT THE GLOBAL LEVEL

It is recommended that all countries feed policy and practice developments:

- into the Asia-Pacific Regional Review of Implementation of the Global Compact for Safe, Orderly and Regular Migration; and,
- into Activity 7 ‘Raise awareness on integrating displacement in the context of climate change into national laws, policies and strategies, including on disaster response, building on mappings and lessons learned’ of the 2019–2021 Plan of Action of the Task Force on Displacement – at <https://bit.ly/3jtwLWU>.

Introduction

1

In his influential and celebrated essay 'Our sea of Islands',¹ the eminent Tongan scholar, Epeli Hau'ofa (1993, p. 8), reminds us that prior to the establishment of national boundaries during the colonial era, the Pacific – a vast region centred on and united by the same waters and home to expert seafarers – was a region characterised by high levels of intra-island travel undertaken for a variety of temporary, as well as permanent, purposes:

'The world of our ancestors was a large sea full of places to explore, to make their homes in, to breed generations of seafarers like themselves. ... Theirs was a large world in which peoples and cultures moved and mingled unhindered by boundaries of the kind erected much later by imperial powers. From one island to another they sailed to trade and to marry, thereby expanding social networks for greater flow of wealth. They travelled to visit relatives in a wide variety of natural and cultural surroundings, to quench their thirst for adventure and even to fight and dominate.'

Hau'ofa (2008, p. 54), in an argument about survival among the regional population at large, later referred to a shared sense of a pan-island Oceanic identity (which included Australia and New Zealand) that:

*'... as far as ordinary people of Oceania are concerned, there are no national boundaries across the sea between our countries. Just about every year, for example, some lost Tongan fishers, who might well have been fishing in Fijian waters wash up in their frail vessels on the shores of Fiji. They have always been taken very good care of, then flown back home loaded with tinned fish.'*²

¹ Hau'ofa, E. (1993). *Our Sea of Islands*. In E. Waddell, V. Naidu and E. Hau'ofa (Eds.) *A New Oceania: Rediscovering Our Sea of Islands*, pp. 2-16. School of Social and Economic Development, the University of the South Pacific: Suva. For a broader discussion of Hau'ofa's legacy, see Bedford, R. 2016. Pacific migration futures: Ancient solutions to contemporary and prospective challenges? *The Journal of Pacific Studies*, Vol. 35, No. 3, pp. 111-126.

² Hau'ofa, E. 1997, *The Ocean in Us*, reproduced in Hau'ofa, E. (2008) *We Are the Ocean: Selected Works*. University of Hawaii Press: Honolulu. p. 54. For an account of inter-island cooperation as an integral component of pre-colonial resilience strategies in the Pacific, see John Campbell (2009) *Islandness: Vulnerability and Resilience in Oceania Shima: The International Journal of Research into Island Cultures* Vol. 3 No. 1, p. 91.

Participants in the Nansen Initiative Pacific Regional Consultation in Rarotonga, Cook Islands in May 2013 also noted the:

'long history of mobility in the Pacific and the support provided to people through existing clan or tribal networks. Participants also acknowledged the solidarity between Pacific island countries in assisting each other in the wake of natural disasters...'³

This report seeks to build the case for the harmonisation of regional migration policy and practice which, reflecting this deeply-rooted humanitarian tradition, allows for the temporary entry and/or stay of non-citizens from our sea of islands, who find themselves affected by disasters, including in the context of climate change.

Mapped against flows of people across international boundaries, this report highlights the strengths of and gaps in the current legislative and regulatory arrangements in Pacific Island countries and territories ('PICTs') as well as in Australia and New Zealand, in terms of facilitating such outcomes.

Part 1 provides some background context, highlighting factors which we believe lend support to the development of a harmonised approaches to entry and stay in the region. The nature and scale of contemporary population movement into and out of the various PICTs is assessed in Part 2 with particular reference to temporary flows. Part 3 contains an analysis of the current legal/regulatory landscape focussing on the extent to which existing mechanisms provide pathways for humanitarian entry and stay. Part 4 provides a brief overview of the impact of the COVID-19 pandemic on regional mobility, and outlines how migration policy tools have been used to mitigate the humanitarian impact of the pandemic on temporary migrants. Our conclusions and recommendations are contained in Part 5.

³ Summary of Conclusions, Nansen Initiative Pacific Regional Consultation, 21-24 May 2013 Rarotonga, Cook Islands, at p. 5. <https://bit.ly/365rzk7>. Last Accessed 30 January 2021.

2

Background

2.1

BACKGROUND TO THE PROJECT

This report has been commissioned by the Platform on Disaster Displacement (PDD). As outlined in the Terms of Reference under which this report has been prepared, building on the work of the Nansen Initiative and achievements reached under the PDD Strategy and Workplan 2016-2019, the Steering Group of the PDD decided to continue the work of the PDD under a new Strategy and Workplan 2019-2022, with the following overall objective for the PDD:

'To support States and other stakeholders to strengthen the protection of persons displaced across borders in the context of disasters and the adverse effects of climate change, and to prevent or reduce disaster displacement risk in countries of origin.'

In 2019, the PDD joined partners in developing a project proposal for a regional project in the Pacific, submitted to the European Commission Directorate-General for International Cooperation and Development (DG DEVCO) on 'Understanding and enhancing response capacity to risks of disaster displacement in the Pacific' (Hereinafter Pacific Response to Disaster Displacement - PRDD). The Norwegian Refugee Council's (NRC) Internal Displacement Monitoring Centre (IDMC) exercises the role of overall grant manager of the project with the International Organization for Migration (IOM) and the PDD as partners.

Project implementation of the PRDD started on 1 September 2019, and the PDD and IOM have assumed responsibilities to deliver and implement a range of activities in order to reach expected result 2.1:

'Advice provided on regional and national guidelines and policy instruments on human mobility, climate change adaptation and disaster risk reduction to reflect disaster displacement (human mobility as a protection challenge), in coordination with ongoing activities focusing on mobility as an opportunity (planned relocation, migration as adaptation).'

One strand of this work is on development of guidelines and policy instruments that can facilitate and support admission and stay for disaster displaced persons and others moving in such contexts. This report seeks to build the case for the development of a 'Guide on Humanitarian Admission and Stay in Climate Change and Disaster Contexts in the Pacific.' In so doing, it supports both the PDD's responsibilities under the PRDD and its Strategy and Workplan 2019-2022.

The work of the PRDD is linked to other ongoing projects in the Pacific and the PRDD collaborates closely with the ongoing regional efforts to develop a 'human security based regional framework on climate change-related displacement, migration and planned relocation' under the joint-agency programme on Pacific Climate Change Migration and Human Security (PCCM-HS), led by IOM and funded by the United Nations Trust Fund on Human Security (UNTFHS). The guide being advocated for in this report can be seen as but one component – albeit an important one – of this wider effort at promoting enhanced regional harmonisation of policy and practice.

2.2

BACKGROUND TO THE REPORT

This report builds on earlier work by the authors which has contributed to our shared belief in the desirability of harmonising policy and practice (also collectively referred to as 'approaches') around humanitarian entry and/or stay.

Our research draws on the vision of a more skilled and increasingly inter-connected and mobile Pacific family – itself a contemporary echo of Hau'ofa's vision – which emerged at a workshop held in Auckland between 24 and 27 October 2012 as part of the Global Migration Futures project.⁴

⁴ A joint initiative by the James Martin 21st Century School, the International Migration Institute (IMI) at the University of Oxford, and the Dutch Foundation, The Hague Process on Refugees and Migration. The outcomes of the Global Migration Futures Auckland workshop can be found in Bonfiglio, A. et al. (2013) *Global Migration Futures. Pacific Region: Drivers, Processes and Future Scenarios of Migration*, Project Report, International Migration Institute, University of Oxford. <https://bit.ly/3w18UQQ>

This report builds on our 2013 *Clusters and Hubs*⁵ report prepared for the Nansen Initiative, in which we identified a highly variegated legislative and regulatory architecture framing regional mobility patterns. We noted a dense network of policy nodes around which regional State interest could converge.⁶ Of particular relevance to the current issue, we noted an existing high degree of privileging of entry of PICTs citizens as visitors and recommended that States should be encouraged to develop humanitarian policies which expressly allow for the temporary entry or, at the very least, the non-expulsion of non-nationals affected by disasters linked to natural hazards, including the adverse effects of climate change.⁷ It also builds on the *Compendium on Labour Migration*⁸ published by the International Labour Organisation (ILO) in 2014 as part of Pacific Climate Change and Migration (PCCM) project, where we mapped legislative and institutional arrangements relating to labour migration as a particular form of temporary migration in selected PICTs.

The report reflects the recommendations from the Nansen Initiative Pacific Regional Consultation. The Outcome Report from this consultation identified, in Conclusion 2, a need to review existing admission policies to:

'introduce mechanisms for temporary or permanent protection for people displaced from another country in the aftermath of a natural disaster'.

Conclusion 3 identified:

*'a need to develop appropriate normative frameworks at the regional level to address the protection needs of those displaced by disasters. This included temporary entry schemes, which take into account lessons from past experiences, and draw upon existing good practice.'*⁹

⁵ Burson, B. and Bedford, R.D. (2013). *Clusters and Hubs: Towards a Regional Architecture for Voluntary Adaptive Migration in the Pacific*. Technical Paper. The Nansen Initiative: Disaster Induced Cross-Border Displacement: Geneva. <https://bit.ly/2U78Q4N>

⁶ Ibid, p. 38.

⁷ Ibid, p. 49.

⁸ ILO, *Compendium of Legislation and Institutional Arrangements for Labour Migration In 11 Pacific Countries* Office for Pacific Island Countries (August 2014).

⁹ Human Mobility, Natural Disasters and Climate Change in the Pacific. Outcome Report, Report from the Nansen Initiative Pacific Regional Consultation, 21-24 May 2013 Rarotonga, Cook Islands. <https://bit.ly/2Uf4i2R>

Key Terms and Understandings

3

It is important to state at the outset that:

- By humanitarian entry/or stay we mean the laws, policies and practices adopted by States to permit the admission and lawful presence of cross-border disaster-affected persons on their territory.
- By 'harmonising', we do not mean standardisation. We do not argue that immigration laws and policies should be identical in all respects in each country, but simply that immigration law and/or policy should include such a *pathway* for entry and/or stay, which is effectively implemented, underpinned by a common understanding of need. Nor do we mean to imply that harmonisation can only be achieved through some legally binding international agreement.
- Our approach to humanitarian entry and/or stay is not simply as a compendium phrase describing a desired policy goal, but to recognise that each word comprises a separate but interlinked element of significance.
- We set out below the definitions of some key terms and also, where relevant, our understandings of them which have shaped the content and presentation of this report.

Clusters refers to "a grouping of states united by some past historical association or other shared characteristic in which privileged rights of entry and stay are mutually, but not necessarily co-extensively, conferred."¹⁰

Cross-border disaster-displacement occurs when disaster-displaced persons cross an international border.¹¹

Disaster describes a "serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts."¹²

¹⁰ Cluster and Hubs, Fn 5 at 7.

¹¹ Nansen Initiative, Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (Protection Agenda) (2015), pp. 16 -17 at C[18]. <https://bit.ly/3h3t60g> Accessed 28 August 2020.

¹² UN Office for Disaster Risk Reduction, 'Terminology', <https://bit.ly/3qFJM0T>

We recognise that the hazards which give rise to disasters and thereby create a need for humanitarian measures to be deployed may be in the nature of sudden-onset events or slow-onset processes linked to climate change. We further recognise that the sudden-/slow-onset distinction is not absolute such that slow-onset processes can contribute to more intense and frequent sudden-onset events thereby increasing disaster risks, including risk of displacement.

A disaster in the country of origin – whether imminent, current or past— may:

- Prevent a person otherwise intending to return home as required upon the expiry of their visa after a period of temporary stay elsewhere from doing so.
- Prevent a person currently lawfully staying in another country from being able to fulfil the conditions of their visa. For example, a student's family may be no longer able to continue to provide funds necessary for the financial support of a student.

A disaster in a country of transit may:

- Prevent a person from onward travel such that they can no longer fulfil obligations to arrive at the country of destination within the specified timeframe or return to their country of origin. For example, transport infrastructure may be damaged, or travel documentation lost.

A disaster in a country of destination may:

- Prevent a person from being able to continue to fulfil a condition of their visa. For example, a disaster may cause an educational facility to no longer be able to provide a course specified in a visa, or an employer to no longer be able to provide the employment specified in a visa.

A single event may result in a disaster occurring simultaneously in countries of origin, transit and destination.

Disaster-affected person refers to a person displaced, or at risk of being displaced, in the context a disaster in their home country, or whose lawful presence in the territory of another country is negatively impacted by a disaster. In the context of humanitarian entry and stay, these persons will be non-nationals or non-residents of the destination state.

Disaster displacement refers to “situations where people are forced or obliged to leave their homes or places of habitual residence as a result of a disaster or in order to avoid the impact of an immediate and foreseeable natural hazard.” Disaster displacement may take the form of:

- Spontaneous flight.
- An evacuation ordered or enforced by authorities.
- An involuntary planned relocation process.¹³

Where arising in the aftermath of a disaster, displacement may occur:

- Immediately, due to the need to access emergency assistance.
- In the weeks or months following a disaster due to its negative impacts on livelihoods or damage to critical infrastructure or basic services.

Exceptional migration measures refer to discretionary responses (i.e. those not grounded in international obligations) to the particular circumstances of an individual or group of individuals (such as, but not limited to, disaster-affected persons) due to concerns relating to their life, safety, and wellbeing.

Hub State refers to “a state within a cluster, which by reason of its historical roles and responsibilities or some other factor, acts as a mobility pivot and exerts considerable influence on mobility patterns within a cluster.”¹⁴

¹³ Protection Agenda, Fn 11, at C[16].

¹⁴ Clusters and Hubs, Fn 5.

Humanitarian measures refer to the laws, policies and practices adopted by States to permit the admission and stay of disaster-affected persons on their territory.¹⁵

Humanitarian measures:

- Are grounded in concern that harm to the life and/or wellbeing of the person will arise in the absence of deploying such measures.
- Can be grounded in international obligations (e.g. protection under the Refugee Convention or complementary protection under international human rights law) or be discretionary in nature.
- Can be either of a temporary or permanent nature.

Regular migration measures refer to those for which both entry and stay are expressly accounted for in the legal framework, albeit for purposes other than in response to matters of humanitarian concern, such as to visit, study or work.

Temporary humanitarian measures are deployed by States to:

- Allow **entry** into their country by means of a lawful administrative action which gives legal permission for a disaster-affected person to arrive into the territory of the State. This can be given prior to, on arrival, or after physical arrival into the territory of the State.
- Allow **stay** in the territory of the State by means of a lawful administrative action which gives legal permission for a disaster-affected person to be present in the territory of the State for a specified time for a specified purpose.

The need for temporary humanitarian measures to be deployed may arise due to a disaster occurring in the country of origin, transit or of destination.

¹⁵ Protection Agenda, Fn 11 at C[19]. For the purposes of this report, unlike the Protection Agenda, we have not used protection' in the specific context of the Pacific to make clear that such measures are not necessarily dependent on the obligations of PICTs under international human rights law. This is important because many of the reference PICTs have are not Parties to the relevant human rights Conventions and humanitarian measures will derive from domestic and not international law. See here, Pacific Community (SPC) and Office for the High Commissioner for Human Rights (OHCHR), Human rights in the Pacific – A situational analysis (2016) at p4. At: <https://bit.ly/3qztdUg> Accessed 21 March 2021.

4

Methodology

The PICTs for the purpose of this report are: Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Kiribati, Nauru, New Caledonia, Niue, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

For information on the legal frameworks, searches using the terms 'immigration' and 'entry' were conducted of the following databases: USP PacLII database, PIDC Secretariat Database (which covers Australia, Fiji, Federated States of Micronesia (FSM), Kiribati, Republic of the Marshall Islands, Nauru, Niue, New Zealand, Samoa, Tonga, Tuvalu, Vanuatu). A search was also undertaken of the ILO Natlex database under 'migrant labour' as the search term (covering Papua New Guinea, Fiji, Kiribati, Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu).

Freedom of Information requests were made of Immigration New Zealand (INZ) and the Australian Department of Home Affairs (DHA) (29 September 2020) regarding the application of relevant policies and procedures to disasters in Pacific countries or, respectively, in New Zealand and Australia themselves. The information received from INZ has been incorporated into this report. By email (30 September 2020) the Freedom of Information and Records Management Section of DHA advised that the "Freedom of Information Act 1982 provides a right to obtain access to "a document of an agency". As such, it is not possible for the Department to provide responses to questions under the FOI Act." The material was eventually obtained through communications with members of the Australian legal community.

Due to COVID-19 travel restrictions, it has not been possible to undertake in-country research in the Pacific. Communication by email was undertaken with officials in the Pacific Islands Forum Secretariat, Fiji, Tonga, and the Cook Islands.¹⁶ A Zoom interview was held with Fiji's Director of Immigration. Despite requests for information being sent to various countries only Fiji responded substantively, and it has not been possible to confirm our understanding of current legislative/regulatory position or identify other examples of relevant state practice.

The report is constrained by the fact that there is no one central database which holds all relevant immigration legislation and regulations. In some instances, government gazettes that have been used to publish relevant regulations, notices and orders have been dormant for many years, as is the case with Kiribati.¹⁷ Also, significant data gaps exist in relation to population movement into and out of PICTs which have made it difficult to estimate volumes and flows within, into and out of the region. Relevant issues are discussed in Part 2.

¹⁶ Contact was made with officials from other PICTs, but no substantive response has been forthcoming.

¹⁷ ILO Compendium, Fn 9, p. 10.

The Case for Regional Harmonisation

5

PART 1

There are a number of contextual factors which, in our view, support the need for harmonisation of regional approaches to humanitarian entry and stay.

5.1

'OUR SEA OF ISLANDS' AS A SPECIFIC POLICY CONTEXT

Hau'ofa's descriptor of the Pacific neighbourhood as "our sea of islands" captures an important point when considering the degree to which current legal and regulatory frameworks allow for or impede access to other countries for humanitarian reasons. This is, that while they are home to relatively small populations, frequently inhabiting limited total land areas, the islands of the Pacific are spread out over many millions of square kilometres. Indeed, the combined Exclusive Economic Zone (EEZ) of the Pacific region is well over 20 million sq. km.¹⁸

In contrast to many other regions (the Caribbean is an obvious exception), persons seeking entry abroad in the context of a disaster will need to travel by boat or by air, often for great distances. As we recognised in the Clusters and Hubs report:¹⁹

'As a manifestation of the nation-state, the modern border is as much a legal construct as a physical one, especially in a region of islands where most borders are lines on a map through spaces occupied by ocean.'

It is simply not possible to walk across a border in any country other than Papua New Guinea (PNG) in our region, and the overwhelming majority of arrivals will be by way of scheduled vessel - whether seaborne or airborne. What this means is that, more than most other regions, immigration policy settings will be determinative of whether a person can seek protection from disasters and climate change by physically moving across an international border.

¹⁸ UN Country Team in the Pacific, UN Strategic Framework for the Pacific (UNSPF) 2018-2022, Common Country Analysis (CCA) – Meta Analysis (2016) p. 9 at <https://bit.ly/3jlsghM>. Accessed 25 August 2020.

¹⁹ Burson and Bedford, Clusters and Hubs, Fn 5, p. 13.

5.2

SUCCESSIVE DISASTERS EVIDENCING A LOOMING CLIMATE EMERGENCY

That the Pacific region is prone to disasters linked to geo-physical and hydrometeorological hazards in relation to both sudden onset events and slow-onset processes – whether on a stand-alone basis or, as is often the case, as linked phenomena – is well-known and understood.²⁰ It is equally well recognised that climate change will increase the frequency and/or intensity of these events and processes. Disaster and displacement risks are increasing as disasters increase in frequency, magnitude and complexity.

While fatalities are not increasing in per capita terms, more of the regional population is affected by disasters, and economic losses are increasing.²¹ Disasters often strike those in situations of greatest vulnerability the hardest, including those in informal settlements with poor security of tenure, with limited capacity to cope in the aftermath of disasters or enhance resilience to future ones, as well as those who have been subject to historical discrimination and marginalization. Displacement (including life-saving evacuations) – where people are forced or compelled to leave their homes or places of habitual residence as a result of a disaster, or to avoid the foreseeable impacts of a natural hazard – is already commonplace.

This reality is reflected in numerous reports detailing the often-devastating impacts disasters have on affected households and communities across the Pacific. For example, in 2019, some 31,000 persons were displaced in Papua New Guinea due to volcanic eruptions alone.²²

2020 has been book-ended by devastating cyclones. In April 2020, Tropical Cyclone (TC) Harold impacted Fiji, Solomon Islands, Vanuatu and Tonga. A category 5 storm when it struck Vanuatu, and the strongest to hit the country since Cyclone Pam in 2015, 30,996 households from 345 communities, totalling 92,274 persons, were affected. In Tonga, a total of over 900 households were impacted. In Fiji, 107,000 families were severely affected. By then a category 4 storm, TC Harold forced more than 1,000 people to take shelter in evacuation centres and caused widespread flooding and damage. People living in coastal areas were moved to higher ground in anticipation of powerful storm surges.²³

More recently, Fiji bore the brunt of TC Yasa which made landfall on Vanua Levu on 17 December 2020. The first category 5 storm to hit Fiji since Cyclone Winston, 93,000 people, some 10 percent of Fiji's population, were in its direct path. Two people were killed, and widespread damage occurred to housing and crops especially in the northern islands of Vanua Levu and Taveuni.

²⁰ Barnett, J. and Campbell, J.C. (2010) *Climate Change and Small Island States. Power, Knowledge and the South Pacific*. London, Routledge.

²¹ For a general overview see UN Economic and Social Commission for Asia and the Pacific (UNESCAP) *The Disaster Riskscape Across Asia-Pacific: Pathways for resilience, inclusion and Empowerment* (Bangkok 2019) Chapter 1. <https://bit.ly/3AkBGPd>. Accessed 25 August 2020.

²² Internal Displacement Monitoring Centre Global Report on Internal Displacement 2020 (Geneva, April 2020) p. 43.

²³ IFRC Pacific Islands: Widespread damage reported as Cyclone Harold hammers Vanuatu and Fiji (8 April 2020). <https://bit.ly/3hhbCxH> Last accessed 3 January 2021. Pacific Resilience Partnership Information on COVID-19 Available <http://www.resilientpacific.org/covid-19/> Last accessed 3 January 2021.

Reflecting on the fact that the then-approaching Yasa would be the 12th Cyclone to hit Fiji since TC Evan in December 2012, Fijian Prime Minister Vorege (Frank) Bainimarama has forthrightly observed:

*'This is not normal... This is a climate emergency.'*²⁴

We recognise that, mirroring global trends, current mobility in the Pacific in the context of disasters and climate change is mostly internal in nature. While this is likely to remain the case at a regional level, given climate change trends, it cannot be assumed that cross-border movement will remain at existing levels in the coming decades in terms of mitigating a need to develop harmonised approaches for entry to another country on humanitarian grounds. Further, our analysis of regional mobility in Part 2 demonstrates that in relation to the issue of stay, the need arises because cross-border movement between PICTs is an existing reality.

5.3

A MULTIPLICITY OF ANCHORING POINTS FOR HARMONISATION

The regional history of intra- and inter-island mobility was specifically recognised by Pacific leaders in the 2015 *Hiri Declaration "Strengthening Connections to Enhance Pacific Regionalism"*.²⁵ In this, Pacific leaders:

1. Acknowledge the rich historical and cultural heritage that the People of the Pacific were engaged in, particularly extensive barter networks and the protection and utilization of our Ocean and its resources, especially fisheries. Further acknowledge that these traditional and cultural trading networks provided

sustenance and brought together our People;

2. Pay homage to our ancestors for setting the legacy, cultural and traditional networks, and note the various trading and social interactions including the Lapita culture, the Hiri and Rai trading systems in the Pacific region and similar interactions and exchanges by the indigenous peoples of Australia and New Zealand;

3. Recognize that these interactions and exchanges created our identity, promoted cooperation and integration at people-to-people level, improved trading and barter systems, encouraged transfer of traditional knowledge, skills and values and taught us the importance of strong connections and cooperation among the People of the Forum Member Countries.

Unsurprisingly given this context, the harmonisation of approaches to humanitarian entry and stay finds multiple anchoring points in other regional declarations. In particular:

❶ *The Niue Declaration on Climate Change*,²⁶ in which Pacific leaders expressed their deep concern over the "serious current impacts of and growing threat posed by climate change to the economic, social, cultural and environmental wellbeing and security of Pacific Island countries" and recognised "the importance of retaining the Pacific's social and cultural identity, and the desire of Pacific peoples to continue to live in their own countries, where possible".

❷ *The Boe Declaration on Regional Security*²⁷ which reaffirms that "climate change remains the single greatest threat to the livelihoods, security and wellbeing of the peoples of the Pacific"²⁸, and which emphasises "human security, including humanitarian assistance, to protect the rights, health and prosperity

²⁴ Irwin Loy 'Counting costs: Fiji's Cyclone Yasa, by the numbers' *The New Humanitarian* (18 December 2020). <https://bit.ly/2SKhohK> Accessed 23 December 2020. PM Bainimarama repeated these concerns when opening the High-Level Panel discussion at the recent five-year commemoration of the endorsement of the Nansen Initiative Protection Agenda, the Adoption of the Sendai Framework for Disaster Risk Reduction, and the Paris Agreement under the UNFCCC. See <https://bit.ly/3hpSRXD>. Last accessed 10 March 2021.

²⁵ At <https://bit.ly/368Ujhw>. Accessed 26 October 2020.

²⁶ At: <https://bit.ly/3jBNDKQ>. Accessed 26 October 2020.

²⁷ At: <https://bit.ly/3Aosnyb>. Accessed 26 October 2020.

²⁸ Article 1.1.

of Pacific people” as an essential component of regional security.²⁹ The express linkage of humanitarian assistance and the protection of human security – including the rights of Pacific peoples – reflects a core objective of a regional framework harmonising entry and stay.

③ *The Biketawa Declaration*,³⁰ the key mechanism for dealing with regional crises, emphasises the need for collaborative action by States, upon request, to deal with or avert crises or to deal with threats to their security “on the basis of all members of the Forum being part of the Pacific Islands extended family.”³¹ The adverse impacts of climate change and disasters – whether linked to climate change or not – are felt by all nations of the Pacific. While manifesting differently according to the hazard profile of each PICT, and the differentials in the exposure and vulnerability of populations within and between them, climate change and disasters impact upon the wellbeing of all Pacific peoples. The need to protect Pacific peoples from disasters, including through appropriate immigration policy, comfortably sits within the ambit of the Biketawa Declaration.

Indeed, it was this Declaration that formed the keystone of the regional response to COVID-19. On 7 April 2020, Pacific Foreign Ministers met virtually, and invoked the Biketawa Declaration to establish the Pacific Humanitarian Pathway on COVID-19 (PHP-C), to enable “the provision of medical and humanitarian assistance from regional, international and development partners in a timely, safe, effective and equitable manner.”³² In adopting the PHP-C, references were made to Pacific concepts which resonate equally as forcefully to the need for a common approach to humanitarian entry and stay:

‘The Chair of the Special Foreign Ministers Meeting, the Honourable Simon Kofe of Tuvalu, said that responding to COVID-19 as a region reflected the Tuvaluan concept of te

fale-pili, which literally means houses in close proximity to one another and which implies a moral responsibility to protect neighbours. It also went to the very essence of The Blue Pacific Way, where, in times of hardship, we help each other and ourselves to get through times of distress—together.’

④ At the sub-regional level, in the 2018 *Amatuku Declaration on Climate Change and Oceans*, the Heads of Government of the Polynesian Leaders Group – Tuvalu, Tonga, American Samoa, Samoa, Tokelau and Wallis and Futuna – recognised climate change displacement as a specific issue. The declaration states:³³

‘We also believe that the issue of climate change displacement and migration requires a regional response. In this regard, we call for the establishment of a Grand Coalition of Pacific Leaders on Climate Change Displacement and Migration to find regional solutions to the issue of climate change displacement and migration. This Grand Coalition should consist of leaders from government, churches and other civil society organisations and should be tasked with finding workable and socially acceptable options for addressing climate change displacement and migration in our region.’

In 2016, the Funafuti Declaration on Climate Change was adopted and signed by leaders of the Coalition of Atoll Nations on Climate Change: Kiribati, Tuvalu, Marshall Islands and Tokelau. The Declaration expressly acknowledges the existing reality of displacement. The Declaration states:³⁴

‘We recognise that people around the world are already being displaced due to climate change. This includes people within our own countries. We strongly believe that people displaced by the impacts of climate change shall be afforded proper protection of their rights to a safe and a secure future. To this

²⁹ Article 7.1.

³⁰ At: <https://bit.ly/3hhbA93>. Accessed 26 October 2020.

³¹ Articles 1(vi) and (vii) and 2.

³² ‘Pacific Islands Forum Foreign Ministers Agree to Establish a Pacific Humanitarian Pathway on COVID-19’ <https://bit.ly/365qAjb>. Accessed 26 October 2020.

³³ *Amatuku Declaration*, para 11. Available at: <https://bit.ly/3yiZ6TE> Accessed 21 January 2021.

³⁴ The text of the Declaration is available at: <https://bit.ly/3xchDw1> Accessed 21 March 2021.

end, we call for the development of a legal regime to protect people displaced by climate change and shall work together to further progress a UN resolution to protect people displaced by climate change.'

Finally, 2017 Micronesian President Summit's communique also references labour and immigration harmonization.³⁵

The development of a Guide aimed at facilitating such harmonisation – as we recommend should take place – would sit at the intersection of two forms of regionalism expressed in the Framework for Pacific Regionalism,³⁶ namely:

- *'Economic integration: defined as greater economic prosperity founded on regional economic integration and sustainability and the equitable distribution of benefits and costs. This is to be achieved through lowering physical and technical market barriers to enable freer movement of people and goods within and among countries.*
- *Administrative / legal / institutional integration: defined as "a secure and well governed Pacific region pledged to upholding regional values." This is to be achieved through agreeing to common rules, standards and institutions to foster and sustain integration.'*

Significantly, the FRDP addresses both displacement and migration.³⁷ FRDP Goal 1 refers to Strengthened Integrated Adaptation and Risk Reduction to Enhance Resilience to Climate Change and Disasters. Priority actions include, at the national level:³⁸

'Integrate human mobility aspects, where appropriate, including strengthening the capacity of governments and administrations to protect individuals and communities

that are vulnerable to climate change and disaster displacement and migration, through targeted national policies and actions, including relocation and labour migration policies.'

And, at the regional level:³⁹

'Support the protection of individuals and communities most vulnerable to climate change displacement and migration through targeted national and regional policies and regional labour migration schemes where appropriate.'

The FRDP is supported by the Pacific Resilience Partnership (PRP), which is to facilitate effective implementation of the FRDP. To achieve this, a number of technical working groups have been established, including one on human mobility.⁴⁰

Finally, in terms of regional anchoring points, it is noteworthy that the development process for the 2050 Strategy for the Blue Pacific Continent has already climate change as a key driver of change in the Pacific.⁴¹

5.4

INTERNATIONAL RECOGNITION OF THE NEED FOR POLICY AND PRACTICE COHERENCE

While the Pacific's core characteristic as a sea of islands differentiates it from other disaster-affected regions, the question of how immigration policy can be utilised to enhance the protection of disaster-affected persons has been addressed by States in other fora and processes. Of particular relevance are the following:

³⁵ <https://bit.ly/3xerC99>

³⁶ Framework for Pacific Regionalism, p. 4. At, <https://bit.ly/3675YHR> Last accessed 30 January 2021.

³⁷ The aim is to provide "high level strategic guidance to different stakeholder groups on how to enhance resilience to climate change and disasters, in ways that contribute to and are embedded in sustainable development", p. 10.

³⁸ Priority action i(p).

³⁹ Priority action iv(t).

⁴⁰ See, <http://www.resilientpacific.org/technical-working-groups/>. Accessed 10 March 2021.

⁴¹ See, <https://www.forumsec.org/pacific-regionalism/> Accessed 26 March 2021.

5.4.1 AT THE (SUB-) REGIONAL LEVEL

The *Regional Conference on Migration*, (RCM) or the Puebla process, a regional inter-governmental process composed of eleven disaster-affected member States, mostly from North and Central America, has been concerned with how disasters impact migration and migrants for the last decade, with particular impetus being provided by the impacts of Hurricane Mitch which devastated the region in 1998. In many instances, the borders between member States are land borders, and cross-border displacement due to disasters is a long-standing regional reality to which member States had responded using a variety of migration and humanitarian policy measures.⁴²

The topic of cross-border migration was specifically addressed in a Vice-Ministerial declaration in 2014, which paved the way for a regional workshop on ‘Temporary Protection and/or Humanitarian Visas in Disaster Situations’, held in 2015.⁴³ This workshop, facilitated by the Nansen Initiative, in turn provided further impetus to the development, and publication in November 2016, of a *Guide: Protection for Persons Moving Across Borders in the Context of Disaster: a Guide to Effective Practices for RCM Member Countries*.⁴⁴ The Guide provides a common framework for understanding how a disaster may impact upon migration patterns and migrants, and sets out a range of effective practices using both regular migration pathways or exceptional measures on humanitarian grounds to regulate both the entry and stay of disaster-affected non-nationals. The Guide is clear as to its purpose:⁴⁵

‘This Effective Practices Guide does not create a new set of State obligations, extend existing State obligations, or require that new laws be passed. Rather, it is intended to support the more effective and consistent

use of existing law, policy and practice to ensure an appropriate response to the needs of cross-border disaster displaced persons and foreign migrants affected by disasters. In this way, it seeks to improve the overall humanitarian response to this complex challenge.’

A similar process has occurred in South America. With the support of the PDD, similar non-binding guidelines – the *Regional Guidelines on Protection and Assistance for Persons Displaced across Borders and Migrants in Countries affected by Disasters of Natural Origin* were developed and adopted in 2018 through the South American Conference on Migration (SACM), a sub-regional forum of twelve South American States.⁴⁶

The Intergovernmental Authority on Development (IGAD) – a grouping of seven East African States recently endorsed a *Protocol on the Free Movement of Persons* which provides broad protection for people affected by disasters and climate change. It facilitates entry and lawful stay for those who have been displaced and allows those at risk of displacement to move pre-emptively as a way of avoiding, or mitigating, the impacts of a disaster. It allows citizens of IGAD Member States to cross borders “in anticipation of, during or in the aftermath of disaster”, and enables disaster-affected people to remain in another country as long as return to their country of origin “is not possible or reasonable”.⁴⁷

Although not yet manifesting in any framework, the PDD and IOM organized two consultations in Port-of-Spain, Trinidad and Tobago in June 2019 to enhance regional cooperation in addressing human mobility in contexts of disasters and climate change. One of the aims of the consultations was to “develop concrete, practical policy and programmatic guidance

⁴² See, David J Cantor (2015) *Law, Policy and Practice Concerning the Humanitarian Protection of Aliens on a Temporary Basis in the Context of Disasters Climate Change and Displacement* Background Paper, States of the Regional Conference on Migration and Others in the Americas Regional Workshop on Temporary Protection Status and/or Humanitarian Visas in Situations of Disaster.

⁴³ Ibid, p. 27. Cantor notes the RCM is one of a number of sub-regional inter-state groupings which had taken up the issue.

⁴⁴ Available <https://bit.ly/2URqjoU>. Accessed 2 September 2020.

⁴⁵ Ibid, at p. 8.

⁴⁶ For an overview, see: Cantor, David J. (2021) “Environment, Mobility, and International Law: A New Approach in the Americas,” *Chicago Journal of International Law* Vol. 21, No. 2, pp. 263-322. Available at: <https://bit.ly/3AIO56X>. Last accessed 28 January 2021.

⁴⁷ Article 16, Protocol On Free Movement Of Persons in the IGAD Region endorsed By Committee Of Ambassadors, Ministers Of Interior And Ministers Of Labour Of IGAD Member States, Khartoum 26 February 2020.

to enhance the region's overall preparedness and response capacity to these challenges under the work of the Caribbean Migration Consultations (CMC).⁴⁸ This ongoing process is significant in that, like the Pacific, the Caribbean is a region of Small Island States separated by mainly oceanic boundaries. It is useful to note here the evacuation overseas of the entire island population of Montserrat due to a volcanic eruption and significant levels of international movement from Haiti in the wake of the devastating 2010 earthquake.⁴⁹

5.4.2 AT THE GLOBAL LEVEL

Telescoping out to the global level, "Enhancing the Use of Humanitarian Protection Measures for Cross-Border Disaster-Displaced Persons" was identified as a "Priority Area of Future Action" in the Nansen Initiative *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (Protection Agenda)*.⁵⁰ This recommended a number of key actions including:

'I. Reviewing existing domestic laws, policies and strategies to determine to what extent they allow for the temporary admission, stay or non-return, as well as lasting solutions for cross-border disaster-displaced persons, and revising them where appropriate, taking into account the specific needs of women and children, particularly vulnerable persons and, where relevant, members of indigenous peoples;

II. Exploring the need to harmonize approaches to admission, stay and non-return of cross-border disaster-displaced persons at (sub-)regional levels;'

The United Nations Framework Convention on Climate Change's (UNFCCC) 21st session of the Conference of the Parties (COP 21) adopted the Paris Agreement which in its preamble acknowledges that:

*'...climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights [...] (and that of) migrants [...].'*⁵¹

The Parties mandated the Warsaw International Mechanism for Loss and Damage to establish the Taskforce to "develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change".⁵² The recommendations of the Taskforce on Displacement were welcomed by the Parties at the 24th session of the Conference of the Parties (COP 24). These recommendations included that Parties:

*'..consider formulating laws, policies and strategies, as appropriate, that reflect the importance of integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change and in the broader context of human mobility, taking into consideration their respective human rights obligations and, as appropriate, other relevant international standards and legal considerations;'*⁵³

A regional framework regulating humanitarian entry and stay will cohere with the 2018 Global Compact for Safe, Orderly and Regular Migration (GCM).⁵⁴ The Compact is notable as the first inter-governmentally negotiated agreement, prepared under the auspices of the United Nations and grounded in international human rights law, to holistically address all

⁴⁸ See: <https://bit.ly/3AIOJ3p>. Accessed 10 March 2021.

⁴⁹ See, here: Cantor, David J. (2018) Cross-Border Displacement, Climate Change and Disasters: Latin America And The Caribbean; Study Prepared For UNHCR and PDD at Request Of Governments Participating In The 2014 Brazil Declaration And Plan Of Action. Available at: <https://bit.ly/3w6IDk8>

⁵⁰ Fn 10, p 46.

⁵¹ Decision 1. CP/21 FCCC/CP/2015/10/Add.1 (29 January 2016) At: <https://bit.ly/3dCTSKJ>. Accessed 7 March 2021.

⁵² Para 49.

⁵³ Decision 10/24 Report of the Conference of the Parties on its twenty-fourth session, held in Katowice from 2 to 15 December 2018. Annex 1, at 1(g)(i). At: <https://bit.ly/3xq4ZyJ> Accessed 7 March 2021.

⁵⁴ United Nations General Assembly (UNGA). (2018). Draft Outcome of the Conference. Intergovernmental conference to adopt the Global Compact for Safe, Orderly and Regular Migration. A/CONF.231.3. Available at <https://undocs.org/A/CONF.231/3>. Accessed 23 January 2021.

dimensions of international migration. The GCM recites 23 objectives, followed by a range of actions “considered to be relevant policy instruments and best practices” from which the Parties “will draw from these actions to achieve safe, orderly and regular migration along the migration cycle.”⁵⁵ Objective 2 refers to “Minimize the adverse drivers and structural factors that compel people to leave their country of origin” and explicitly references climate change and disasters as a driver of migration. The necessary actions under this objective include:⁵⁶

‘Harmonize and develop approaches and mechanisms at subregional and regional levels to address the vulnerabilities of persons affected by sudden-onset and slow-onset natural disasters, by ensuring they have access to humanitarian assistance that meets their essential needs with full respect for their rights wherever they are, and by promoting sustainable outcomes that increase resilience and self-reliance, taking into account the capacities of all countries involved .’

Objective 5 of the Compact relates to “Enhance availability and flexibility of pathways for regular migration” and specifically references the following actions of direct relevance:

‘(g) Develop or build on existing national and regional practices for admission and stay of appropriate duration based on compassionate, humanitarian or other considerations for migrants compelled to leave their countries of origin owing to sudden-onset natural disasters and other precarious situations, such as by providing humanitarian visas, private sponsorships, access to education for children, and temporary work permits, while adaptation in or return to their country of origin is not possible;

(h) Cooperate to identify, develop and strengthen solutions for migrants compelled to leave their countries of origin owing to

slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea level rise, including by devising planned relocation and visa options, in cases where adaptation in or return to their country of origin is not possible.’

Objective 12 of the Compact relates to “Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral” and the relevant actions include:

‘(a) Increase transparency and accessibility of migration procedures by communicating the requirements for entry, admission, stay, work, study or other activities, and introducing technology to simplify application procedures, in order to avoid unnecessary delays and expenses for States and migrants;’

Finally, although not resulting in any formal endorsement by States, the *Migrants in Countries in Crisis (MICIC) Initiative* was conceived to address the challenges faced by migrants due to by conflict and disasters. Arising out of the conflict in Libya and disasters such as the earthquake and tsunami in Tohoku, Japan (2011), the floods in Thailand (2011), and hurricane Sandy in the United States (2012), this stand-alone initiative, co-chaired by the United States of America and the Philippines, produced *Guidelines to Protect Migrants in Countries Experiencing Conflict or Natural Disaster*.⁵⁷ Guideline 10 relates to the need to “[f]acilitate migrants’ ability to move to safety.” As an aspect of preparedness, the Guidelines encourage States to consider bilateral agreements or memoranda of understanding which regulate the rights and obligations of migrants in the event of a crisis or emergency.⁵⁸ In terms of emergency response, the Guidelines note that “Legal and policy requirements in the host State may present barriers to relocating, evacuating, or transiting to a place of safety, or

⁵⁵ At Para 16.

⁵⁶ Objective 2k.

⁵⁷ IOM Guidelines to Protect Migrants in Countries Experiencing Conflict or Natural Disaster (2016) <https://bit.ly/36aVozw>. Accessed 28 August 2020.

⁵⁸ Ibid, at p. 77.

to otherwise receiving lifesaving assistance”, and set out a range of measures, including immigration measures which States can take. The Guidelines encourage States of origin to negotiate with States of transit and host States to negotiate “temporary waivers or exceptions to barriers.”⁵⁹

5.5

A CLEAR TREND TOWARDS THE MODERNISATION OF REGIONAL IMMIGRATION SYSTEMS

Existing migration legislation in the PICTs can be of some vintage. For example, Papua New Guinea’s Migration Act dates from 1978 while in the Cook Islands, immigration is currently controlled by the Entry, Residence and Departure Act 1971–1972, which does not contain any specific provisions for entry permission for the purposes of study, despite the presence of a University of the South Pacific campus there (Government of the Cook Islands 2018 :70). In a recently published review, the Government of the Cook Islands made observations of regional relevance, noting:⁶⁰

‘The Cook Islands Entry, Residence and Departure Act 1971-72 (the ERD Act) is not fit for purpose. It does not provide Cook Islands Immigration with the legislative foundation it needs to effectively manage the travel, entry, stay and departure of non-Cook Islanders to the Cook Islands.’

Since the ERD Act was enacted there have been major changes in the Cook Islands and in the international environment. In the Cook Islands, tourist numbers jumped from approximately 73,000 visitors in the year 2000 to around 160,000 visitors in 2016. The rapid increase in visitor numbers has led to growth in the tourism sector, construction sector and

other sectors. For example, building approvals jumped from approximately 8,000 in 2012 to 22,000 in 2016. This growth, combined with decreasing rates of unemployment, has created a shortage of workers in a number of sectors.

A critical feature of the regional landscape has been a trend towards updating and modernising immigration legislation.⁶¹ Fiji (2003); Samoa (2004); Tuvalu (2008); Vanuatu (2010); Niue (2011); and Solomon Islands (2012), Nauru (2014) and Kiribati (2019) have each enacted new immigration legislation since 2000. The process is ongoing. In March 2020, a new Immigration Bill was introduced into the Cook Islands Parliament and is anticipated to pass into law in April 2021.⁶² The Pacific Immigration Development Community Secretariat (PIDC Sec) has been assisting member States with the process of modernisation. The Secretariat has developed a two-part framework to support member States in the development of immigration legislation which identifies key issues and approaches, as well key parts and provisions to consider when developing new immigration legislation.⁶³

The proposal for regional harmonisation of policy and practice on entry and stay seeks to make regional immigration systems ‘fit-for-purpose’, future-proofing the regional migration system for a world where disasters and climate change impacts increasingly affect the immigration needs of regionally mobile populations.

The nature and volume of this mobility, and some implications for regional harmonisation of policy and practice on humanitarian entry and stay, are addressed in Part 2.

⁵⁹ Ibid, at pp. 98 -100.

⁶⁰ Government of the Cook Islands Immigration Act Review – Proposed Regulations Consultation: Proposals for regulations to support the new immigration system (30 October 2018) p. 4.

⁶¹ Burson and Bedford, Clusters and Hubs, Fn 5, p. 25.

⁶² Email Communication. Government of Cook Islands, 24 October 2020.

⁶³ At: <https://www.pidcsec.org/legislation>. Accessed 10 November 2020.

A Mobility Context for Regional Harmonisation of Approaches to Humanitarian Entry and Stay

6

PART 2

6.1

PACIFIC MOBILITY IN ITS CULTURAL CONTEXT

The movement of Pacific peoples between the various PICTs, that emerged from a century of European colonisation and the imposition of invisible national borders in the late 20th century, has been facilitated by reciprocal visa-waiver provisions between PICTs for short-term visits, usually for a maximum of three months. While these provisions are not universal for all Pacific peoples in all PICTs⁶⁴, they are at the heart of a regional political consensus that the Pacific is “a large world in which peoples and cultures moved and mingled unhindered by boundaries of the kind erected ... by imperial powers”.⁶⁵

Movements of Pacific peoples for social visits, business activities, and to access professional services that are not available in their home country, have never been actively discouraged by post-colonial governments in the Pacific. Navigating the “bloodlines” of culture, history and tradition, far more than seeking permission to cross invisible international borders, lies at the heart of much short-term population mobility within the region. A contemporary manifestation of these bloodlines is the presence in any particular PICT of residents born in many of the other PICTs, especially those in the same Pacific sub-region. Evidence for this is provided later in this section.

The mobility context for regional harmonisation of policy on entry and stay spans the three key types of voluntary migration: entry for residence, entry for temporary work (labour migration including managed seasonal mobility), and entry for short-term visits. Policymakers and migration specialists differentiate between these types of movement but there is a continuum of processes for individuals who choose to enter another country. In prominent destinations for Pacific-born migrants such as Australia and New Zealand, it is possible for short-term visitors to seek to transition onshore to temporary work visas. Temporary work can then assist movers

⁶⁴ Burson and Bedford, Clusters and Hubs Fn5, p. 43.

⁶⁵ Hau’ofa, Our Sea of islands, Fn 1, p. 8.

– used here to describe short-term visitors/tourists – to qualify for longer-term residence which might eventually lead to approval for permanent residence and, after a qualifying period, citizenship if desired.⁶⁶

These transitions in visa status are not necessarily easy to achieve, but the possibility of moving from one visa category to another onshore has blurred the boundaries between migration for residence, temporary labour migration and short-term visits. For this reason, the data used in this section to map contemporary migration in the Pacific is not restricted to temporary labour migration. Short-term visitors, temporary labour migrants, and migrants who are seeking residence visas can be negatively affected by sudden disasters, especially if their ability to return to countries where they have residence rights is compromised as in the case of the current COVID-19 pandemic.⁶⁷ These people may need support from a policy allowing for temporary protection and a continued right to stay legally at their destination until they can return home or have their on-going residence at the destination approved.

The mobility context for regional harmonisation of policy on entry and stay, especially for humanitarian reasons, also includes two critical spatial and political domains: the country the mover is from and the country the mover is spending time in overseas. Most immigration policy addresses priorities and concerns of governments and societies in the nation state that is receiving migrants. However, when disasters make it impossible for temporary migrants to return to countries where they have residence rights, immigration policy responses need to be sensitive to concerns by governments, civil society and other stakeholders in both the migrant origin and destination countries.

An inevitable consequence of Hau’ofa’s process of “world enlargement” for Pacific peoples

for millennia has been the diffusion of their cultures across and beyond the region. This is reflected in variable stocks of Pacific-born migrants living in a wide range of countries outside the region. These Pacific diasporas – constituting trans-national Pacific communities – frequently provide major support for their kin in the islands when disasters of any kind (environmental, social, economic, political) cause major disruption to livelihoods. Pacific migrants living overseas also provide support for kin who have been granted visas for short-term visits or temporary employment in their countries. In Part 4 we provide evidence of this support when the COVID-19 pandemic made it impossible for people on short-term visas of various types (visitor, study, business, temporary work, meetings and conferences) to return home after international borders were closed.

6.2

THE CONTEMPORARY PACIFIC REGIONAL MOBILITY SYSTEM

As we have demonstrated elsewhere⁶⁸, there is a distinctive structure to the architecture of contemporary voluntary migration in the Pacific that privileges a small number of sources and destinations (“hubs”) from specific groups of PICTs (“clusters”). Most of these hubs and clusters have links with the region’s colonial heritage and the associated connections with three countries on the Pacific rim (Australia, New Zealand and the United States of America), and France, the one country in Europe that remains a colonial power in the region. The role of other former colonial powers (the United Kingdom, Germany, Japan) as hubs for contemporary Pacific mobility clusters is no longer significant outside of flows linked with tourism, education, technical advice, official development assistance and, in the case of Fiji, service in the British army.

⁶⁶ Visa-transition processes in New Zealand are discussed in Bedford, R.D., Ho, E. and Bedford, C.E. (2010) Pathways to residence in New Zealand 2003-2010, pp. 1-49 in A. Trlin, P. Spoonley and R. Bedford (eds) *New Zealand and International Migration. A Digest and Bibliography*, Number 5. Massey University, Palmerston North.

⁶⁷ We discuss the impact that the COVID-19 pandemic has had on population movement in the Pacific region in Part 4.

⁶⁸ Burson and Bedford, Clusters and Hubs. See also Bedford, R.D. (1992) International migration in the South Pacific region, in M.M. Kritz, L.L. Lim and H. Zlotnik *International Migration Systems: A Global Approach*, International Studies in Demography, Oxford, Clarendon Press, pp. 41-62; Bedford, R.D. and Hugo, G. (2012) *Population Movement in the Pacific: A Perspective on Future Prospects*, Department of Labour, Wellington; Bedford, R.D. (2020) Australasia and the Pacific Islands, pp. 311-325 in C. Inglis, W. Li and B. Khadria, *The Sage Handbook of International Migration* London, Sage Reference.

The place of countries on the Asia-Pacific rim, along with India in South Asia, as sources and destinations for migrants in the Pacific has been very significant in specific countries at particular times. The colonial legacies of indentured labour from India in Fiji, and from Laos, Cambodia and Vietnam (former Indochina) in the French territories of New Caledonia and French Polynesia, have had lasting impacts on the demographic and cultural landscapes of the respective Pacific destination countries. Resident and itinerant Chinese traders have played variable roles in most Pacific economies since the 19th century and, in recent years, the Chinese have assumed a much more significant presence in long-term as well as short-term population flows into the region.

Commercial fishing fleets based in Asia are a dominant presence in the Exclusive Economic Zones of most Pacific countries although their crew are rarely counted in any assessments of population movement in the region. As Crocombe (2007) argued more than a decade ago:

*'A spectacular transition is underway in the Pacific Islands. For the past 200 years, external influences, whether cultural, economic, political or other, have come overwhelmingly from Western countries. This is in the process of shifting to predominantly Asian sources.'*⁶⁹

As we show below, Asian sources of migrants have certainly become more significant in many PICTs over the past decade, but countries on the Asia-Pacific rim continue to play a minor role as destinations for Pacific-born migrants.

6.3

MIGRANT STOCKS IN THE PACIFIC REGIONAL MOBILITY SYSTEM: A METHODOLOGICAL NOTE

A number of key elements of the contemporary Pacific regional mobility system are summarised in four Tables. In Tables 1 and 2 the stocks⁷⁰ of migrants usually resident in each PICT around 2019 are shown by their global and Pacific sub-regions of birth (the in-migrants to Pacific countries). In Tables 3 and 4 the stocks of migrants born in the different PICTs are shown by the global and Pacific sub-regions where they were usually resident⁷¹ around 2019 (the out-migrants from Pacific countries). The data come from several sources that are detailed and discussed briefly in Appendix 2.

The in-migrant and out-migrant stocks do not refer specifically to temporary migrants or to labour migration per se. The migrant stock estimates relate to populations born in countries other than the one in which they are usually resident at the reference year in the database. There is no information on when or why the migrants arrived in the country, or whether they moved directly to their country of usual residence from their country of birth, or via a third country. They could be children who were born in a hospital overseas, students studying at an institution in the country (like the University of the South Pacific), visitors who decided to stay, parents and other kin joining a resident family member, or migrant workers employed on contract at the destination. The in-migrant and out-migrant stock data by birthplace are not, in themselves, a surrogate for labour migration per se although they are sometimes used in this way in analyses of population movement between countries.⁷²

⁶⁹ Crocombe, R.G. (2007) *Asia in the Pacific Islands. Replacing the West*, IPS Publications, University of the South Pacific.

⁷⁰ The term "stock" is used widely in the literature on migration, and in demography more generally, to refer to the number of people in a place at a particular time such as a population census, or at a specified date in the year. "Stock" is used to differentiate cross-sectional numbers of people at a particular time from "flows" of people (immigrants, visitors, students) into or out of a place over a specified period of time (usually a year). We use the term "migrant stocks" in this report to refer to the numbers of people resident in a particular country in a specified year who were born in countries other than the one in which they are resident.

⁷¹ The concept of "usual residence" is used in population censuses to differentiate short-term visitors to a place from people who usually reside there at the time the census is taken. It is not a definition of the people who have residence rights or visas entitling them to stay in a particular country. In some countries, like Australia, a specific time period of residence in a place (6 months) is used to identify the usually resident population. In others, including New Zealand, a more flexible approach is used to establish who should be included in the usually resident population and who should not. Temporary migrants on visas for 12 months or more are frequently included in the usually resident census populations. The usually resident population thus includes a mix of migrants on temporary as well as residence visas, in addition to all the usual residents who were born in the country where the census is being held.

⁷² ILO (2019) *Labour Mobility in Pacific Island Countries*. ILO Office for Pacific Island Countries, Suva. See Table 4, p. 7 which is headed "Number of migrant workers in Pacific Island countries, 2017" using data from the UN DESA Migrant Stock matrix for 2017. The numbers refer to migrant stocks in the specified countries who were born overseas not to "migrant workers" per se. (<https://bit.ly/3hrtBQK>).

6.4

IN-MIGRANT STOCKS

In Table 1 the stocks of in-migrants in each PICT around 2019 are shown by their global sub-regions of birth. At the Pacific region level, this table shows that other Pacific Islands (71,780 intra-Pacific migrants) and countries in Asia (103,030 migrants) have provided the largest global sub-regional stocks of in-migrants in Pacific countries – a rather surprising finding given the frequently cited domination of Australia, New Zealand and the United States of America in the Pacific mobility system.

Empty cells in Table 1 and in subsequent tables in this section should not be interpreted automatically as an indication that there are no applicable entries. They simply indicate that the particular country or sub-region has not been specifically identified in the census or the source of the birthplace data. When interpreting data obtained from birthplace tables in censuses everywhere it is important to keep in mind that there is always a category for “other countries” which contains data on birthplaces with very small numbers.⁷³ Some of these empty cells in the tables may have had entries if specific birthplaces for those in the “other country” category had been identified.

While this is not the place for a detailed discussion of sources of migrants, it can be noted that Asia-born migrants are heavily concentrated in three PICTs, two of which are administered by the United States of America. The Population Division in the United Nations Department of Economic and Social Affairs (UN DESA) and the World Bank estimate that Guam (44,860), with its large American military base, had over 30,000 migrants born in the Philippines around 2019 (see Appendix 2). Many of these are people who were relocated to Guam following closure of the large US naval base in Subic Bay in the Philippines in 1991. There is also a large Philippines-born population (over 12,000) in the US-

administered Commonwealth of the Northern Mariana Islands employed in service industries, along with over 5,000 in-migrants born mainly in China and Japan. The only other very large Asia-born in-migrant stock is in Papua New Guinea and these migrants are mainly from neighbouring Indonesia, especially from its western province of Irian Jaya or West Papua.

The World Bank’s migrant stock matrix records China-born in-migrants in most PICTs, unlike the UN DESA’s migrant stock matrix which does not record in-migrants from China in any PICT. The largest China-born migrant stocks were recorded for Guam (2,924) and Northern Marianas (2,892), followed by Fiji (935), American Samoa (849) and French Polynesia (732). These are very much “estimates” by the World Bank given that these PICTs do not have recent censuses which record the birthplaces of their usually resident populations.

The big numbers (over 10,000) for in-migrant stocks from other global sub-regions in Table 1 include the 11,530 Australia-born migrants in its former colony of Papua New Guinea, over 23,000 US-born migrants in Guam, and 46,600 and 25,000 in-migrants born in France in New Caledonia and French Polynesia respectively. These sizeable in-flows from current or former colonial powers indicate the on-going significance of hubs linked with European colonisation in the region. The largest migrant stocks born in countries in the “rest of the world” global sub-region recorded in the World Bank’s matrix are found in New Caledonia (1,800) and French Polynesia (700) – they are people born in former French colonies in North Africa: Algeria, Morocco and Tunisia.

6.4.1 INTRA-PACIFIC IN-MIGRANT STOCKS

While the largest aggregate numbers of in-migrants to PICTs in the contemporary Pacific mobility system were born in the Asian (103,030) and UK/Europe (78,440) global sub-regions, the most consistent sources of in-migrants across the 21 PICTs have been other Pacific countries (Table 1).

⁷³ The birthplaces listed in published census volumes for Pacific countries are often restricted to a small number of individual countries with a general “other countries” category containing several hundred people. In the Kiribati 2015 *Population and Housing Census*, for example, there were 7 named birthplaces: Tuvalu (209), Nauru (1,251), Fiji (577), Australia (87), United Kingdom (4), New Zealand (54) and the United States (28) and an “other countries” category covering 709 people (Table 52, *Population by island and by birthplace*, 2015, pp. 129-30).

Table 1. Estimates of in-migrants to PICTs around 2019

	Global sub-region of birth						Total
	Other Pacific Is	Australia and NZ	Canada and USA	Asia	UK and Europe	Rest of world	
Pacific region	71,780	28,060	36,940	103,030	78,440	3,210	330,460
MELANESIA	23,560	17,800	2,570	28,630	52,890	2,280	127,730
Fiji	3,810	4,130	500	7,670	2,900	50	19,060
New Caledonia	17,400	520	100	3,860	46,600	1,800	70,280
Papua New Guinea	590	11,530	1,730	15,500	2,500	260	32,110
Solomon Islands	1,020	660	70	1,200	200	20	3,170
Vanuatu	740	960	170	400	690	150	3,110
MICRONESIA	23,570	290	28,250	69,080	120	210	130,520
Guam	15,330		23,570	44,860	10		83,770
Kiribati	2,340	190	170	250	40		2,990
Marshall Islands	770	20	1,440	920	20		3,170
Micronesia (Fed. States of)	1,050	30	530	1,010	20		11,640
Nauru	440	50		410		210	1,110
Northern Mariana Islands	2,740		2,180	17,880	10		22,810
Palau	900		360	3,750	20		5,030
POLYNESIA	24,650	9,970	6,120	5,320	25,430	720	72,210
American Samoa	17,470	1,030	3,600	3,150	10		25,260
Cook Islands	410	1,420	30	180	100		2,140
French Polynesia	2,660	220	650	830	25,080	700	30,140
Niue	170	350	10	30			560
Samoa	2,350	5,060	1,200	130	100		8,840
Tokelau	240	200					440
Tonga	1,000	1,260	600	950	130	10	3,950
Tuvalu	140	430	30	40	10		650
Wallis and Futuna Islands	210			10		10	230

Data sources: See Appendix 2

Reflecting the sub-regional clustering element of the regional mobility architecture, the large number of Pacific-born migrants in New Caledonia (17,400) are in-migrants from France's former (Vanuatu)⁷⁴ and current (French Polynesia, Wallis and Futuna) Pacific colonies. Similarly, in the case of Guam, the 15,330 Pacific-born in-migrants are almost entirely from other PICTs in the northern Pacific (Micronesia) that were formerly part of the US-administered Trust Territory of the Pacific

Islands. American Samoa's 17,470 Pacific-born in-migrants are mainly from its neighbour, Samoa.

Another perspective on intra-Pacific in-migrant stocks is provided in Table 2. It is clear from Table 2 that the primary sources of Pacific-born in-migrants in most PICTs are other countries in their Pacific sub-region. These sub-regional clusters, highlighted in blue, span Melanesia

⁷⁴ Vanuatu (formerly the New Hebrides) was jointly administered by France and the United Kingdom until 1980.

Table 2. Estimates of Pacific-born in-migrants to PICTs from Pacific sub-regions around 2019

Country of residence	In-migrants				
	Pacific sub-region of birth			Pacific-born in-mig stock	% all in-migs to PICTs
	Melanesia	Micronesia	Polynesia		
PACIFIC REGION	13,110	23,460	35,200	71,780	22.3
MELANESIA	7,970	1,080	14,510	23,560	18.4
Fiji	910	790	2,110	3,810	20.0
New Caledonia	5,070		12,330	17,400	24.8
Papua New Guinea	560		30	590	1.8
Solomon Islands	760	260		1,020	32.2
Vanuatu	670	30	40	740	23.8
MICRONESIA	810	22,290	470	23,570	19.4
Guam		15,330		15,330	18.3
Kiribati	510	1,530	300	2,340	78.3
Marshall Islands	130	570	70	770	24.3
Micronesia (Fed. States of)		990	60	1,050	39.8
Nauru	170	230	40	440	39.6
Northern Mariana Islands		2,740		2,740	12.0
Palau		900		900	17.9
POLYNESIA	4,330	90	20,220	24,650	34.1
American Samoa	330		17,140	17,470	69.2
Cook Islands	140		270	410	19.2
French Polynesia	2,620		30	2,660	8.8
Niue	40		130	170	30.4
Samoa	240	20	2,090	2,350	26.6
Tokelau			240	240	54.5
Tonga	690		310	1,000	25.3
Tuvalu	60	70	10	140	21.5
Wallis and Futuna Islands	210			210	91.3

Data sources: See Appendix 2

(western Pacific), Micronesia (northern and central Pacific) and Polynesia (eastern Pacific).⁷⁵

A small number of exceptions to this pattern are indicated in red including Fiji and New Caledonia which have larger migrant stocks born in Polynesia than Melanesia and, conversely, French Polynesia, Wallis and Futuna

and Tonga have larger migrant stocks born in Melanesia than Polynesia. In the cases of New Caledonia, French Polynesia and Wallis and Futuna this is the result of links between the three French colonies. In Tonga's case, strong cultural and commercial ties with Fiji provide part of the explanation. In Fiji's case, the explanation lies in its role as a sub-regional hub

⁷⁵ It should be noted that the labels used most commonly for sub-regions in the Pacific – Melanesia, Micronesia and Polynesia – are colonial constructs. They are often used by people outside the region to ascribe a sense of cultural homogeneity to the indigenous inhabitants of various groups of islands within the sub-region, but this is not necessarily how they are seen by the inhabitants themselves. In this report the sub-regional labels are used for convenience to group islands respectively in the western Pacific (Papua New Guinea to Fiji, or Melanesia), the central and northern Pacific (Kiribati, Nauru, and the islands north of the equator or Micronesia) and the eastern Pacific (Cook Islands, French Polynesia, Niue, Samoa and American Samoa, Tokelau, Tonga, Tuvalu, and Wallis and Futuna – Polynesia).

in the Pacific mobility system (discussed further later in this section).

The clusters highlighted in blue in Table 2 also happen to coincide with three post-colonial Pacific sub-regional political initiatives -- the Melanesian Spearhead Group (MSG), the Polynesian Leaders Group (PLG) and the Micronesian Chief Executives Summit (MCES).⁷⁶ In 2012 the MSG developed a Skilled Migration Scheme to facilitate labour mobility between countries in Melanesia. This scheme allows for up to 400 workers from each of the member States to work in another MSG country. The ILO's (2019) report on Pacific Labour Mobility noted that the only evidence for labour migration under the scheme "was for some teachers and nurses from Fiji who have moved to Vanuatu".⁷⁷ To the best of our knowledge there have been no specific mobility initiatives developed by the PLG or the MCES.

The significance of these data on intra-Pacific in-migrant stocks in the context of the harmonisation of policy and practice relating to entry and stay is that they provide clear empirical evidence of the widespread extent of migration between PICTs. In every country, except Papua New Guinea and French Polynesia, more than 10% of their in-migrant stocks had been born in other Pacific countries (Table 2). In eight of the PICTs more than 30% of their in-migrant stocks were from other parts of the region.

If a disaster were to make return to a particular PICT impossible for some time, *there is a high probability that temporary migrants from that PICT would be located in other parts of the region*, and they may need some support before they can return to the country where they have full residence rights. This was an issue that had to be addressed in virtually all Pacific countries after they closed their borders in response to the COVID-19 pandemic.⁷⁸ Harmonising policy and practice relating to provisions for visa extensions and, possibly, some subsistence support during an extended

period of forced stay by Pacific migrants because of highly destructive environmental events linked with climate change, thus has real relevance in the context of intra-Pacific migration.

6.5

OUT-MIGRANT STOCKS

Table 3 summarises the estimated stocks of out-migrants born in the 21 PICTs, by global sub-region of usual residence around 2019. The dominant destinations remain the hubs described in our *Clusters and Hubs* report: Australia, New Zealand, the United States of America and Canada. Eighty-eight percent of the 742,920 Pacific-born out-migrants were estimated to be usually resident in these four countries around 2019 (Table 3).

Other Pacific countries have the third largest aggregate stock of Pacific-born migrants (71,350). The absence of data on Pacific-born migrant stocks in France from the country's Pacific colonies has reduced the potential importance of Europe as a destination in Table 3. While countries in Asia have become much more important sources of migrants to many PICTs in recent years, it is clear from Table 3, that this does not seem to have been the case in terms of destinations for Pacific-born migrants. However, it should be noted that the very small numbers of Pacific-born migrants in large Asian populations are never going to be identified by specific countries of birth in their censuses.

It is much more likely that migrants born in Asia who are in the PICTs at the time of a census will be identified by country or sub-region than it is that Pacific-born migrants will get specific mention in censuses in Asia. There has been an increase in movement by Pacific Islanders to countries on the Asia-Pacific rim for education and training and there are several bilateral

⁷⁶ Now the Micronesian Presidents Summit. These initiatives are described briefly in Burson and Bedford (2013), pp 34-37.

⁷⁷ ILO Labour Mobility Fn 72, p. 25. See also Voigt-Graf, C. (2016b) "Why do so few Pacific Islanders take advantage of opportunities in Papua New Guinea's labour market?", NRI Issues Paper 22 (Port Moresby, The National Research Institute). Available at: <https://bit.ly/3AqJrGB>.

⁷⁸ A very useful review of responses by Pacific governments to temporary migrants in their countries who could not return because of border closures can be found in The Australia Pacific Security College COVID-19 Pacific Island Response Matrix which is discussed in Part 4 of this report.

Table 3. Estimates of out-migrants from PICTs around 2019

Country of Birth	Country of residence						Total
	Other Pacific Is	Australia and NZ	Canada and USA	Asia	UK and Europe*	Rest of world	
Pacific region	71,350	343,930	311,700	2,140	13,000	800	742,920
MELANESIA	12,830	180,500	78,160	730	11,390	380	283,990
Fiji	2,320	139,470	73,870	320	7,500	120	223,600
New Caledonia	2,670	1,750	770	40	190	50	5,470
Papua New Guinea	670	36,030	3,180	200	2,000	130	42,210
Solomon Islands	1,140	3,210	150	100	500	30	5,130
Vanuatu	6,030	40	190	70	1,200	50	7,580
MICRONESIA	23,310	4,420	150,620	1,270	410	240	180,270
Guam	1,380	180	99,220	1,050	10	20	101,860
Kiribati	1,630	3,010	1,900	30	270	20	6,860
Marshall Islands	630	60	9,070	30	30	10	9,830
Micronesia (Fed. States of)	12,940	40	19,780	20	30	30	32,840
Nauru	1,540	1,040			20	60	2,660
Northern Mariana Islands	2,750	50	17,650	100	20	60	20,630
Palau	2,440	40	3,000	40	30	40	5,590
POLYNESIA	35,210	159,010	82,920	140	1,200	180	278,660
American Samoa	1,840	1,350	38,200		50	10	41,450
Cook Islands	40	19,970	20	10	10	20	20,070
French Polynesia	750	1,030	2,780	30	130	40	4,760
Niue	20	4,910				10	4,940
Samoa	16,620	87,890	20,380	50	500	40	125,480
Tokelau	110	1,930					2,040
Tonga	3,310	39,810	21,380	30	450	40	65,020
Tuvalu	710	2,080	140	20	60	10	3,020
Wallis and Futuna Islands	11,810	40	20			10	11,880

* Data on migration from French territories to France were not available.

Data sources: See Appendix 2

agreements to facilitate access to healthcare, education/exchange and professional development but these movements are rarely documented in statistics relating to migration in Asian countries.

Pacific-born migrant stocks in countries on the southern and north eastern Pacific rim have grown rapidly since the 1950s and the descendants of earlier migrants from some PICTs now outnumber their island-based resident populations. These large transnational Pacific populations in Australia, New Zealand

and North America provide considerable support for their island-based kin at times of disaster. They also support kin who are visiting or on temporary work visas and who cannot get back to the places where they have residence rights because of disruption to transport networks and other factors linked with a disaster. Evidence of this support in the context of the COVID-19 pandemic is provided in Part 4. Because of the very significant contributions Pacific communities in these four Pacific rim countries make to support their island-based kin at times of disaster, their

governments should be included in discussions about regional harmonisation of policies relating to entry and stay.

6.5.1 INTRA-PACIFIC OUT-MIGRANT STOCKS

Around 2019, PICTs in Polynesia had almost three times as many Pacific-born migrants living in other parts of the Pacific region (35,210) as the much larger Melanesian countries and populations (12,830). The largest intra-Pacific flows were from Samoa to American Samoa (around 16,000) and from the Federated States of Micronesia to Guam (just under 13,000) (Table 2). The only other out-migrant stock that exceeded 10,000 was the Wallis and Futuna-born population in Melanesia (New Caledonia) (Tables 2 and 4).

Table 4 contains a break-down of the intra-Pacific out-migrant stocks by their Pacific sub-region of residence. As with the in-migrant stocks, there is a strong sub-regional clustering in the destinations of the out-migrants and this can be seen in the columns highlighted in blue. Only six of the 21 PICTs had people born in their country living in all three subregions (highlighted in red in Table 4): Fiji, Solomon Islands, Kiribati, Samoa, Tonga and Tuvalu according to the sources of data listed in Appendix 2. In two of these cases (Fiji and Kiribati) their largest intra-Pacific out-migrant stock was in a different sub-region – Polynesia in the case of Fiji and Melanesia in the case of Kiribati. In Fiji's case this reflects its role as a regional migration hub (see below). In Kiribati's case the stock of Kiribati-born people in Melanesia is partly a legacy of resettlement schemes in Fiji and the Solomon Islands in the 1940s and 1960s.⁷⁹

We suspect there are more PICTs with migrant stocks in the three subregions because there has been a trend in recent Pacific censuses to grouping birthplaces with small numbers into the general category "other countries". Evidence for this comes from the very detailed

list of birthplaces for Tonga's population in 2016 which we were able to obtain from Tonga's Statistics Department. In this unpublished table, over 50 specific birthplaces were listed, including 11 for PICTs other than Tonga. This compares with a total of 7 specific birthplaces listed in Kiribati's 2015 census, only 2 of which were PICTs.⁸⁰

A key problem facing policy makers and researchers attempting to document migrant stocks by birthplace is a trend towards aggregating birthplace data in ways which make it very difficult to produce source-destination matrices of the kind that UN DESA and the World Bank have been developing to obtain reasonably consistent estimates of migrant stocks at a national scale. A recommendation arising from the migration mapping work for this report is that in the 2020/2021 round of national censuses, Statistics Offices everywhere are encouraged to produce detailed tables showing the countries of birth for their populations. It is appreciated that there are limits imposed by confidentiality requirements to the levels of disaggregation that can be achieved. But it is possible to disaggregate the data on birthplace much more than is done in many Pacific censuses without breaching confidentiality requirements.

6.6

FIJI: A PACIFIC MIGRATION HUB?

In the UN DESA and World Bank migrant stock matrices, Fiji stands out as a source country for Pacific-born migrants in other countries in the region, as well as a destination for migrants born in other PICTs (Table 5). However, the record of Fiji's in-migrant stocks of people born in other Pacific countries in both these databases looks incomplete, especially for Polynesian and Micronesian birthplaces. Fiji's Pacific in-migrant stocks in Table 5 only include Solomon Islands and Vanuatu in Melanesia,

⁷⁹ These resettlement schemes have been the subject of considerable research both around the time they were initiated as well as in recent years. See, for example, an excellent collection of essays edited by Michael Lieber (1977) *Exiles and Migrants in Oceania* ASAO Monography No. 5, University of Hawaii Press, and Katarina Teawia's (2015) personal reflections on the resettlement of Banabans (Kiribati) in Fiji, *Consuming Ocean Island. Stories of People and Phosphate from Banaba*, Indiana University Press.

⁸⁰ See footnote 8.

Table 4. Estimates of Pacific-born out-migrants from PICTs to Pacific sub-regions around 2019

Country of birth	Out-migrants				
	Pacific sub-region of residence			Pacific-born out-mig stock	% out-migs from PICTs
	Melanesia	Micronesia	Polynesia		
PACIFIC REGION	23,840	23,260	24,250	71,350	9.6
MELANESIA	8,150	800	3,880	12,830	4.5
Fiji	420	730	1,170	2,320	1.0
New Caledonia	290		2,380	2,670	48.8
Papua New Guinea	620		50	670	1.6
Solomon Islands	1,060	70	10	1,140	22.2
Vanuatu	5,760		270	6,030	79.6
MICRONESIA	1,050	22,180	80	23,310	12.9
Guam		1,380		1,380	1.4
Kiribati	1,050	510	70	1,630	23.8
Marshall Islands		630		630	6.4
Micronesia (Fed. States of)		12,940		12,940	39.4
Nauru		1,530	10	1,540	57.9
Northern Mariana Islands		2,750		2,750	13.3
Palau		2,440		2,440	43.6
POLYNESIA	14,640	280	20,290	35,210	12.6
American Samoa		30	1,810	1,840	4.4
Cook Islands	30		10	40	0.2
French Polynesia	750			750	15.8
Niue			20	20	0.4
Samoa	300	20	16,300	16,620	13.2
Tokelau			110	110	5.4
Tonga	1,370	20	1,920	3,310	5.1
Tuvalu	420	210	80	710	23.5
Wallis and Futuna Islands	11,770		40	11,810	99.4

Data sources: See Appendix 2

Kiribati in Micronesia and Cook Islands, Samoa, Tonga and Tuvalu in Polynesia.⁸¹

Fiji has long been a centre of economic and social development in the region. The country hosts a regional university (USP), a substantial medical and technical training facility (now the National University of Fiji), the regional offices of several UN agencies as well as the Secretariat of the Pacific Forum and some of

the agencies linked with the Pacific Community. The country also has one of the region's largest cities (Suva, 186,000 inhabitants as of 2017), a major trading port and one of the country's two international airports which serve as the base for Fiji Airways, the largest regional airline. Fiji has one of the most ethnically diverse populations in the region and its institutions and business interests have played a prominent role in economic and social

⁸¹ IOM has recently completed a migration profile for Fiji which summarises data on immigration, emigration and internal migration. At the time of writing, this was still in draft form but when it is published online by IOM it will fill quite a few gaps in the existing data on migration in Fiji.

Table 5. Intra-Pacific in-migrant and out-migrant stocks for Fiji around 2019

Source/destination country	PICT-born in-migrants resident in Fiji	Fiji-born out-migrants resident in other PICTs
PACIFIC REGION	3,808	2,740
MELANESIA	904	489
Fiji*	n.a.	n.a.
New Caledonia		
Papua New Guinea		160
Solomon Islands	717	100
Vanuatu	187	229
MICRONESIA	791	733
Guam		
Kiribati	791	514
Marshall Islands		118
Micronesia (Fed. States of)		
Nauru		101
Northern Mariana Islands		
Palau		
POLYNESIA	2,113	1,518
American Samoa		417
Cook Islands	33	127
French Polynesia		37
Niue		40
Samoa	302	156
Tokelau		
Tonga	1,359	473
Tuvalu	419	54
Wallis and Futuna Islands		

* Fiji is the destination for or the source of the migrants in this table
Data sources: UN DESA (2019), World Bank (2017). See Appendix 2

change for many years in Polynesia and Kiribati and, more recently, in the Solomon Islands and Vanuatu.

One of the reasons for the paucity of information on Fiji's in-migrant stocks is the absence of comprehensive published data by birthplace and ethnicity in its 2007 and 2017 Censuses of Population and Housing. It is highly likely that Fiji has residents who were born in New Caledonia (the base for the Pacific Community's headquarters) and Papua New Guinea in Melanesia; a wider range of Micronesian sources, especially Nauru and

possibly Palau, FSM and the Marshall Islands; and several more Polynesian countries, especially American Samoa, Niue, and French Polynesia. Some of these in-migrants to Fiji would be Fijians born in other Pacific countries. Evidence for these observations is presented with reference to data available from ILOSTAT which are discussed later in this section.

The data on Fiji's out-migrant stocks in other PICTs that is contained in Table 5 is more comprehensive. Fourteen of the 20 potential PICT destinations had estimated Fiji-born resident populations in either the UN DESA or World Bank migrant stock matrices. The data contained in Table 5 is a mix from these two sources, amended where appropriate using recent census data, to give the most comprehensive list possible (see Appendix 2). The data on stocks of Fiji-born out-migrants in the different PICTs do capture an essential feature of Fiji's place as a prominent source of skilled migrants in the region, especially teachers, doctors, nurses, tradesmen, security personnel, retailers and merchant seamen.⁸²

In recent years, Fiji has also become an important source of labour in the tourism and domestic care industries in some Pacific countries, especially Cook Islands and Samoa. Fiji's involvement in intra-Pacific labour migration initiatives is discussed at some length in the ILO's report on labour migration in the Pacific, including the role of the Fiji Volunteer Scheme that was introduced around 2009.⁸³ This scheme has seen small numbers of retired Fiji professionals being recruited for employment in a range of skilled occupations in several Polynesian and Micronesian countries. The ILO (2019) notes that the Tongan Government was considering establishing a similar scheme for retired teachers in 2018.

6.7

OTHER DIMENSIONS OF THE PACIFIC REGIONAL MOBILITY SYSTEM

The architecture of the contemporary Pacific regional mobility system has been sketched out in this section using migrant stock estimates. In the next two sections, we examine some of the available data related to temporary labour migration and the short-term movement of people on visitors' visas. The data on both are less comprehensive in terms of their coverage of movements to and from the various sub-regions identified in Table 1 and 4 for the birthplace data. The discussion of temporary labour migration draws on two sources: 1) information that can be obtained from the ILOSTAT database, with particular reference to Fiji, and 2) our ongoing research on seasonal labour migration between several PICTs and Australia and New Zealand. The information relating to short-term visitor visa flows comes from the SPC's Pacific Data Hub and from the websites for Statistics Departments in selected Pacific countries.

6.7.1 TEMPORARY LABOUR MIGRATION

There are no comprehensive databases, like the UN DESA and World Bank matrices, for temporary labour migration between the 21 PICTs and the various Pacific and global sub-regions that comprise the contemporary Pacific migration system. The ILO does publish some data on temporary labour migration, but these are not presented for all PICTs as consistently as the migrant stock data in the UN DESA and World Bank matrices.

⁸² See, for example, Iredale, R.C., Voigt-Graf, C. and Khoo, S.E. (2012) Trends in international and internal teacher mobility in three Pacific Island countries, *International Migration* 53(1), 98-114, and ILO (2019) *Labour mobility in Pacific Island countries*. ILO Office for Pacific Island Countries, Suva, p. 20.

⁸³ ILO Labour Mobility, Fn 72, p. 34.

Table 6. Some examples of labour-related and migration data for Fiji

Country of citizenship	Other Pacific nationals employed in Fiji 2016**	Fiji citizens returning from Pacific countries 2017***	PICT-born in-migrant stocks in Fiji (from Table 5)
PACIFIC REGION	1,023	66	3,808
MELANESIA	210	38	904
Fiji*	n.a.	n.a.	n.a.
New Caledonia	21		
Papua New Guinea	54	27	
Solomon Islands	87		717
Vanuatu	48	11	187
MICRONESIA	233	3	791
Guam			
Kiribati	206	3	791
Marshall Islands	15		
Micronesia (Fed. States of)			
Nauru	12		
Northern Mariana Islands			
Palau			
POLYNESIA	580	25	2,113
American Samoa		18	
Cook Islands	7		33
French Polynesia	4		
Niue			
Samoa	154		302
Tokelau			
Tonga	341	25	1,359
Tuvalu	74		419
Wallis and Futuna Islands			

* Fiji is the destination for migrants in this table

** Data source: ILOSTAT "Employed non-citizens by sex and country of citizenship" table MST_NCTE_SEX_CCT_NB_A_EN, <https://ilostat.ilo.org/topics/labour-migration/>

*** Data source: ILOSTAT "Inflow of nationals returned from abroad by sex and country of previous residence", table MNA_XRET_SEX_CPR_NB_A_EN <https://ilostat.ilo.org/topics/labour-migration/>

The ILO's global reference for labour statistics is ILOSTAT which contains a comprehensive database and resources for producing labour statistics.⁸⁴ This is not a database dealing specifically with labour migration – most of the data relates to labour forces and employment,

not to labour migration per se. There is a labour migration section of ILOSTAT which has several tables relating to stocks of labour migrants in a range of countries.⁸⁵ But most of the labour migration tables only contain reference to Fiji (and occasionally Samoa) in the

⁸⁴ <https://ilostat.ilo.org>

⁸⁵ <https://ilostat.ilo.org/topics/labour-migration/>

Pacific⁸⁶ Given that the ILO's Regional Office for Pacific Countries is located in Suva, and Fiji is an important source of labour migrants for other countries in the region, it is not surprising that this Pacific country features in the ILOSTAT data system.

6.7.2 LABOUR MIGRANTS IN FIJI: ILOSTAT EXAMPLES

Table 6 contains two examples of data obtained from ILOSTAT on the movement of citizens of Pacific countries to Fiji, and the return migration of Fiji citizens from Pacific countries. For comparative purposes, data on the Pacific-born in-migrant stocks in Fiji from Table 5 are added in the last column.⁸⁷

The data on citizens from other Pacific countries who were employed in Fiji in 2016 presumably refer to people who arrived for work in Fiji during that year, although this is not clear from the source table in ILOSTAT where it is simply noted that the data are "official estimates". The data in column 1 of Table 6 confirm the role of Fiji as a Pacific regional migration hub with workers present from 12 of the region's 20 countries and territories (excluding Fiji). These data reinforce the point made earlier that the data on Pacific-born migrant stocks in Fiji (reproduced from Table 5 in column 3 in Table 6) understate the role of Fiji as a destination for migrants from other Pacific countries.

The data in column 2 in Table 6 refer to Fiji citizens who returned to Fiji in 2017 after a period of work in another Pacific country. Only five Pacific countries are mentioned as sources of returning Fiji migrants and the numbers are very small. Given that the UN DESA/World Bank migrant stock matrices had Fiji-born populations present in 13 of the PICTs around 2019 (Table 5), it was surprising to see only five countries in the list of sources of return

migrants in the ILOSTAT data shown in Table 6. Most of the tables in ILOSTAT that contain information on Fiji do not identify specific Pacific countries as sources of labour. Only a small number of major sources on the Pacific rim or in Europe are listed by specific country.

There are in-country sources of data on temporary labour migration in all PICTs, the two most important of which are their visa approval statistics and their labour employment statistics. But these data are not readily accessible to desk-based research. Obtaining these data usually requires visits to the relevant departments of Statistics and Labour/Employment. In their recent report, the ILO (2019) noted that there is regional interest in exploring opportunities for greater intra-Pacific mobility of skilled and semi-skilled labour. In this context we would encourage all PICTs to contribute information on labour migration regularly to the ILO for inclusion in the ILOSTAT database, as well as to the SPC for inclusion in the Pacific Data Hub.

Looking ahead, the ILO (2019) observed:

*'As the largest economies and the two most populous countries in the region, Papua New Guinea and Fiji have taken regional leadership roles. There has been growing Papua New Guinea investment in Fiji, particularly in the tourism industry. There have also been some notable Fijian investments in Papua New Guinea. It is possible that these investments have already impacted the flow of labour, and there is potential for more labour migration in the future. One relatively recent labour flow is that of hospitality and tourism workers who have moved from Fiji to Papua New Guinea, which can be linked to Fiji's developed tourism industry and the existence of good hospitality and tourism training in Fiji, as well as increased economic links between Fiji and Papua New Guinea.'*⁸⁸

⁸⁶ There are some data relating to Samoa in ILOSTAT table MST_NCTE_SEX_CCT_NB_A_EN "Employed non-citizens by sex and country of citizenship" but the only Pacific country listed as a source of labour in Samoa is Fiji. In 2017 there were 150 Fiji citizens employed in Samoa, according to records maintained by the Employment Office, the second highest number, behind China (169), from any of the listed sources. Fijians were employed in domestic service roles in hotels and guest houses as well as in Samoan households.

⁸⁷ It should be noted that migrants are often defined by their citizenship, not their birthplace, in the ILOSTAT tables. The data presented in Table 5 on migrant stocks by birthplace are not directly comparable, therefore, with the data on migrants by citizenship in Table 6.

⁸⁸ ILO, Labour Migration, Fn 72, p. 26.

Citing research by Voigt-Graf, the report points out that “In May 2015, the total number of active work permits held by non-citizens in Papua New Guinea was 41,096, only 511 of which were held by Pacific Islanders.”⁸⁹ In this regard, the report’s authors recommend that “The ILO could commission research into the labour markets of the main Pacific migrant-receiving countries to explore opportunities: (a) for localization; and (b) for Pacific Islanders from neighbouring countries taking up these positions rather than migrants from more distant countries.”⁹⁰

6.7.3 TEMPORARY LABOUR MIGRATION TO AUSTRALIA AND NEW ZEALAND

There is extensive recent literature on temporary labour migration from selected PICTs to Australia and New Zealand. During the year ending 30 June 2019 there were around 24,000 citizens from nine PICTs employed in Australia’s Seasonal Worker Program (SWP) and New Zealand’s Recognised Seasonal Employer (RSE) scheme.⁹¹ Participating Pacific countries include four in Melanesia (Papua New Guinea, Solomon Islands, Vanuatu, Fiji), two in Micronesia (Kiribati and Nauru) and three in Polynesia (Samoa, Tonga and Tuvalu). The New Zealand scheme allows workers to spend seven to nine months in approved seasonal work⁹² while in Australia workers can spend up to nine months, after which time workers must return to their home countries. Workers cannot transition from seasonal work visas to other types of temporary work visas while in New Zealand and Australia – these are managed circular migration schemes with strict requirements for return home at the end of the seasonal work contract. Given the ready availability of data and recent reports on these seasonal work schemes, we do not discuss them further in this report.

In Part 4 of this report, we review some of the responses by governments, NGOs and civil society in both the Pacific sending States and in Australia and New Zealand to the plight of thousands of seasonal workers trapped by sustained border closures linked to the COVID-19 pandemic. The unprecedented situation that these sustained border closures created for temporary migrants, both within PICTs as well as those from PICTs in other countries, has necessitated a range of policy responses and humanitarian initiatives to allow for visa extensions and welfare support for migrants who could not return home. These responses and initiatives have direct relevance for the harmonisation of policies relating to entry and stay in the context of disasters that prevent people on temporary visas overseas from returning to their homes within the timeframes of their visas.

6.8

SHORT-TERM FLOWS

The largest documented flows of people into, out of and between countries in the Pacific, travel on short-term visas (up to three months) as visitors, tourists, entrepreneurs, consultants, members of sports teams or church groups or for other reasons. These short-term flows dwarf the annual flows of temporary labour migrants and long-term residents. In several PICTs the annual number of short-term arrivals is equivalent to more than their total usually resident population and in five countries visitor numbers exceed the resident population by more than five times (Table 7). By contrast, in five other countries the number of short-term arrivals is equivalent to less than 0.1% of the resident population. Table 7 shows that the impact of short-term migration on Pacific countries is highly variable.

⁸⁹ ILO, Labour Migration, Fn 72, p. 7, citing Voigt-Graf, C. (2016a) “Papua New Guinea’s Work Permit System and non-citizen workforce”, NRI Issues Paper 21 (Port Moresby, The National Research Institute). Available at: <https://bit.ly/3hvw3pc>

⁹⁰ ILO (2019), p. 44.

⁹¹ For a general overview of the seasonal work schemes, see Bedford, R.D., Bedford, C.E., Wall, J. and Young, M. (2017) Managed temporary labour migration of Pacific Islanders to Australia and New Zealand in the twenty-first century, *Australian Geographer* 48(1): 37-57. Three recent reports by C. Bedford, R.D. Bedford, and H. Nunns, on the impacts of New Zealand’s Recognised Seasonal Employer (RSE) scheme on New Zealand and participating Pacific states can be found at <https://bit.ly/2UloJVb>. A detailed report on governance of Australia’s Seasonal Worker Program (SWP) in participating countries completed in December 2020, can be accessed at <https://bit.ly/3ycudAv>

⁹² Seasonal workers from Kiribati and Tuvalu are eligible for temporary work visas for up to nine months employment in New Zealand.

The great majority of arrivals in PICTs come from countries outside the region, with major source areas varying depending on transport links with tourist source countries on the Pacific rim and in Europe. Tourists from many of the main sources of short-term migrants, including most Pacific States, will have visa-waiver status for short-term stays in most PICTs. The large flows of short-term visitors in the region are not subject to the same visa requirements as those seeking approval for work or residence. There is little documentation on these visitors in their host countries and, in this regard, they are in somewhat more vulnerable positions than temporary migrants with specific visas in the event of a disaster that does not allow them to return home within the timeframe of their visa-waiver visit.

In this section, we focus on intra-Pacific short-term flows – these have particular relevance for regional harmonization of policy on entry and stay. While the intra-Pacific component of the total visitor arrivals in PICTs that are detailed in Table 7 is small, data from three of the major tourist destinations (Fiji, Samoa and Vanuatu) revealed a surprisingly consistent share of their short-term arrivals (5-7%) were citizens of other Pacific countries (Table 8, p. 53).

Short-term arrival flows have strong seasonal peaks and troughs. The large flows are during the cooler dry months between May and October with lower numbers of short-term arrivals during the wet season, between November and April when hurricanes often occur in the western Pacific. In some countries, like Samoa and Tonga, there is a short-lived peak in December when Christmas visits by Pacific Islanders resident overseas are common.

When border closures became a common response to the COVID-19 pandemic in March 2020, visitor numbers in Pacific countries were, fortuitously, at relatively low levels. In Fiji, for example, there were 27,972 short-term arrivals of non-residents in March 2020 compared with 59,306 in March 2019 and 60,058 in March 2018.⁹³

It is important not to conflate short-term arrivals just with tourists – there are many

other reasons for people entering and leaving countries on a short-term basis. Information on reasons for short-term entry to Pacific countries is not collected consistently across the region. Fiji has better statistics on arrivals and departures than most PICTs, and these data tend to be published in a timely manner. Table 9 contains a summary of the available data on reasons for short-term arrival in Fiji during four calendar years, 2016-2019. The data refer to non-resident arrivals from all countries – not specifically to arrivals from other PICTs. These data are not available just for Pacific Island arrivals.

There are also flows of people into and out of Pacific countries that are not captured in either the short-term arrival and departure statistics or the information available on temporary labour mobility and residential migration. The region is home to hundreds of fishing boats and small inter-island trading vessels as well as extensive recreational sailing and power boats and canoes. The transient populations transported on these vessels cross the invisible boundary lines in the ocean that separate Pacific countries, often without consistent documentation. Nevertheless, when mapping migration in the region, they represent an important part of the fabric of contemporary Pacific societies, economies and the associated mobility within, into and out of the region.

With regard to intra-Pacific mobility, Epeli Hau'ofa (1993) reminds us of this “informal” cross-border movement of people when he observed that thousands of people in the region regularly travel to access customary lands, traditional fishing grounds and to maintain their ancestral ties to families and communities in neighbouring countries. In his words, they do this “under the very noses of academic and consultancy experts, regional and international development agencies, bureaucratic planners and their advisers, and customs and immigration officials, making nonsense of all the national and economic boundaries, borders that have been defined only recently, crisscrossing an ocean that has been boundless for ages before Captain Cook’s apotheosis.”⁹⁴

⁹³ Data obtained from: <https://bit.ly/36aV7wu>

⁹⁴ Hau'ofa, E. (1994) Our sea of islands, *The Contemporary Pacific*, 6(1), 147-161, p.151.

Table 7. Visitor arrivals, Pacific countries 2019

Country	Visitors 2019	Population June 2019	Visitors per capita 2019	Av. Visitors /month 2019
MELANESIA				
Fiji	968,926	891,296	1.09	80,744
New Caledonia	474,420	272,289	1.74	39,535
Papua New Guinea	210,980	8,746,363	0.02	17,582
Solomon Islands	30,821	696,470	0.04	2568
Vanuatu	255,985	288,153	0.89	21,332
MICRONESIA				
Guam	1,666,665	175,016	9.52	138,889
Kiribati	7,454	116,766	0.06	621
Marshall Islands	6,109	54,632	0.11	509
Micronesia (Fed States of)*	19,207	105,227	0.18	1,601
Nauru*	1,000	11,505	0.09	83
Northern Mariana Islands	487,008	56,397	8.64	40,584
Palau	94,115	17,893	5.26	7,843
POLYNESIA				
American Samoa	58,668	56,687	1.03	4,889
Cook Islands	171,606	15,216	11.28	14,301
French Polynesia	305,898	277,914	1.10	25,492
Niue	10,210	1,583	6.45	851
Samoa	198,068	197,495	1.00	16,506
Tokelau	11	1,503	0.01	1
Tonga	93,972	100,061	0.94	7,831
Tuvalu	3,611	10,495	0.34	301
Wallis and Futuna	4,637	11,502	0.40	386

* Estimate based on 2018 arrivals (FSM) and 2016 arrivals (Nauru)

Data source: <https://bit.ly/2TmGHXA>

Table 8. Visitor arrivals from other Pacific countries in Fiji, Samoa and Vanuatu (calendar years)

Country	2016	2017	2018	2019
FIJI				
Total visitor arrivals	792,320	842,884	970,309	894,389
Arrivals from other PICTS	49,741	53,720	51,654	54,369
% from other PICTS	6.3	6.4	5.3	6.1
SAMOA				
Total visitor arrivals	140,065	157,515	172,496	151,024
Arrivals from other PICTS	7,760	7,944	7,493	10,892*
% from other PICTS	5.5	5.0	4.3	7.2
VANUATU				
Total visitor arrivals	95,117	109,170	115,634	120,628
Arrivals from other PICTS	5,705	7,147	6,545	6,560
% from other PICTS	6.0	6.5	5.7	5.4

* Significant increase in 2019 when Samoa hosted the Pacific Games

Data sources: Fiji: <https://bit.ly/3wd3KRN>; Samoa: <https://bit.ly/36mile1>; Vanuatu: <https://bit.ly/2UgqIKz>

Table 9. Short-term arrivals in Fiji by reason for visit, 2016-2019 (calendar years)

Reason for visit	2016	2017	2018	2019
NUMBERS				
Business	32,922	33,222	29,755	29,882
Conference/official meeting	13,993	14,708	14,629	18,443
Holiday	600,887	630,700	658,585	656,249
Visiting friends and relatives	68,262	74,492	80,441	92,026
Education/training	7,559	8,541	7,921	8,608
Other	68,697	81,221	78,978	89,181
Total	792,320	842,884	870,309	894,389
PERCENTAGES				
Business	4.2	3.9	3.4	3.3
Conference/official meeting	1.8	1.7	1.7	2.1
Holiday	75.8	74.8	75.7	73.4
Visiting friends and relatives	8.6	8.8	9.2	10.3
Education/training	1.0	1.0	0.9	1.0
Other	8.7	9.6	9.1	10.0
Total	100.0	100.0	100.0	100.0

Data source: <https://bit.ly/3wd3KRN>

6.9

IMPLICATIONS FOR REGIONALLY HARMONISED APPROACHES TO ENTRY AND/OR STAY

Having assessed the nature and scale of contemporary population movement into and out of the various PICTs, it is useful to conclude with a summary of some of the key points that have relevance for development of regionally harmonised approaches to allowing the entry and/or stay of non-nationals on humanitarian grounds when disaster strikes. Three key dimensions of the contemporary Pacific migration system that have emerged from a systematic analysis of available data on migrant stocks and flows, and that have relevance for dealing with humanitarian responses to disasters, are summarised below.

First, intra-Pacific mobility tends to be ignored in much research on population movement in the region, but it is very significant and is responsible for the presence of resident Pacific migrant communities in all PICTs. These resident Pacific communities play a major role in assisting people from their countries who are on a range of short-term visas, or who are visiting under visa-waiver provisions. This assistance is especially important when disasters make it impossible for them to return home – a condition that has applied in all PICTs following the closing of borders as a response to the COVID-19 pandemic (see Part 4).

Second, all PICTs have diasporas in countries on the Pacific rim or in the countries of their former (and, for some, present) colonial rulers. These Pacific diasporas have been a major source of money and material goods that are used to sustain and develop the livelihoods of their kin in the islands. Remittances from overseas relatives and friends have long played a critically important part in responses to disasters in Pacific countries. In addition, Pacific diasporas and their institutions (especially their churches) provide considerable support to their fellow country men and women who are overseas on temporary visas. This support was readily apparent when Pacific temporary migrants could not get home from New

Zealand and Australia after borders closed in March 2020.

Third, the Asian dimension to the Pacific migration system has changed significantly in recent years with China especially assuming an increasing role as a major aid donor and provider of technical assistance. This has been very apparent in some countries that regularly experience devastating weather events especially during the ‘wet’ or cyclone season. The increasing involvement of China in the development of infrastructure in Pacific countries has been accompanied by a growing presence of Chinese residents and a gradual increase in temporary flows of Pacific peoples into China and other Asia-Pacific rim countries in recent years. These more recent flows need to be factored into consideration of harmonised approaches to entry and/or stay of non-nationals both in the PICTs as well as in the new destinations for Pacific migrants.

Addressing issues of entry and/or stay of non-nationals when disaster strikes has relevance for all Pacific governments. Of primary concern are short-term migrants within their countries, as well as migrants from their countries on temporary visas in other parts of the world. In contexts where there is an increasing incidence of extreme weather events (e.g. cyclones, droughts) as well as oceanic storm surges, the need for some harmonisation in humanitarian approaches to dealing with entry and/or stay of non-nationals when disaster strikes is logical. As the COVID-19 pandemic has shown, disasters are not always specific to particular countries or communities. They can affect temporary migrants everywhere who cannot get home before their visas expire.

Having assessed the nature and scale of contemporary population movement into and out of the various PICTs, we document, in Part 3, the extent to which existing legislative and regulatory frameworks provide for entry and stay on humanitarian grounds, which can serve as a basis for the development more widespread and harmonised policy and practice.

The Legislative and Regulatory Landscape: A Flexible Framework for Future Action

7

PART 3

The regional immigration legal landscape is one which, as is to be expected, promotes temporary migration patterns: all countries in the region provide for some form of temporary entry and stay on familiar grounds, such as: visiting for the purposes of tourism, to visit friends and family, or to attend conferences and meetings; to work in the labour market of the destination state; or, to study at one of its educational facilities. In relation to temporary entry for the purpose of visiting, there is a privileging within PICTs' immigration laws of allowing visa-on-arrival entry for citizens of fellow PICTs (in contrast to the position vis-à-vis New Zealand and Australia). This contributes to the high degree of intra-island mobility.

This section will first examine to what extent regional immigration legislation and policy allows for humanitarian entry and stay generally and specifically in relation to disasters and climate change. It will then consider the extent to which regular migration pathways have been or are capable of being leveraged to secure entry and stay in this context.

7.1

EXISTING HUMANITARIAN ENTRY AND STAY PATHWAYS

7.1.1 RIGHTS OF TRADITIONAL PASSAGE

In perhaps the clearest legislative expression of the region's rich mobility history, the Solomon Islands Immigration Act 2012 preserves rights of entry for 'traditional passage' for a person defined as meaning:⁹⁵

'a traditional inhabitant who arrives in the Solomon Islands under free movement and for traditional activities as set out in the Agreement between the Government of Papua New Guinea and the Government of Solomon Islands concerning the Administration of Special Areas; or, by regulation, any similar agreement entered into by the Government from time to time.'

⁹⁵ At section 2.

Persons exercising rights of traditional passage are exempt from the otherwise mandatory obligation on all persons arriving in the Solomon Islands to present themselves to an immigration officer at a designated port, airport or other designated place to obtain permission to enter the country. A similar privileging of rights of traditional passage exists in relation to departure.⁹⁶

In a similar vein sits the Torres Strait Treaty. Signed in December 1978, and coming into force in February 1985, the treaty defines the maritime border between Australia and Papua New Guinea. It provides a framework for the management of the common border area, including the protection of the ways of life of traditional inhabitants in the Torres Strait Protected Zone. Free movement provisions permit the traditional inhabitants of the Torres Strait and the 13 coastal villages of Papua New Guinea's South Fly District to travel between Papua New Guinea and Australia for traditional purposes.⁹⁷

It has not been possible to test the extent to which these arrangements protecting 'traditional activities'⁹⁸ have been leveraged for the purposes of humanitarian entry and stay in the context of disasters. However, given the traditional practice of granting entry for broadly humanitarian purposes outlined in the introduction to this report, these arrangements constitute a potential humanitarian pathway. At the very least, a person who has exercised their right of traditional passage to undertake a traditional activity but is prevented from returning home because of the impacts of a disaster there, would arguably be able to rely on such agreements to continue to stay in the country of destination until such time as it was safe to return home.

7.1.2 REFUGEE (ASYLUM AND RESETTLEMENT) AND COMPLEMENTARY PROTECTION PATHWAYS

Refugee and complementary protection pathways feature entry and stay arrangements that are perhaps the most well-known example of humanitarian entry, for which both offshore (i.e. the person is outside the territory of the asylum/protection state at the date of application) and onshore (i.e. inside the territory of the asylum/protection state at the date of application) pathways exist. These pathways are grounded in international refugee law and international human rights law.

The humanitarian purpose of the Refugee Convention is widely recognised, as is that "unless it [the Convention] is seen as a living thing, adopted ... for a humanitarian end which is constant in motive but mutable in form, the Convention will eventually become an anachronism."⁹⁹

Refugee and protection pathways feature in the legislative/regulatory arrangements of relatively few PICTs but are well-entrenched in Australia and New Zealand.

The offshore pathway largely caters for persons recognised by the Office of the United Nations High Commissioner for Refugees (UNHCR) as refugees under the agency's Mandate, for whom the resettlement country agrees to provide a pathway to residence as part of its commitment to the global refugee resettlement regime. Very few countries participate in the international refugee regime and presently only New Zealand and Australia do so in the Pacific region. In each instance, there is a domestic process for determining the extent and content of its resettlement programme. In New Zealand, the Refugee Quota Programme is decided in three-year cycles, with the composition of the quota agreed to annually by the Minister of Immigration and the Minister of

⁹⁶ Sections 6(4)(a) and 8(2)(a).

⁹⁷ Australian Department of Foreign Affairs and Trade 'The Torres Strait Treaty'. Available <https://bit.ly/2TsVsYL>. Accessed 6 December 2020.

⁹⁸ Article 1(k) of the Treaty defines "traditional activities" as "activities performed by the traditional inhabitants in accordance with local tradition, and includes, when so performed: (i) activities on land, including gardening, collection of food and hunting; (ii) activities on water, including traditional fishing; (iii) religious and secular ceremonies or gatherings for social purposes, for example, marriage celebrations and settlement of disputes; and (iv) barter and market trade."

⁹⁹ Sedley J in *R v Immigration Appeal Tribunal, Ex p Shah* [1997] Imm AR 145, 152, cited with approval by Lord Bingham in *Sepet (FC) and Another (FC) v. Secretary of State for the Home Department*, [2003] UKHL 15, at [6].

Foreign Affairs.¹⁰⁰ In September 2018, New Zealand increased its quota from 1,000 to 1,500.¹⁰¹ In Australia, each year refugee caseloads and numbers of refugee referrals for resettlement are set through a consultative process which takes into account “advice from UNHCR on global resettlement needs and priorities” among other factors.¹⁰² Within each programme, specific caseloads are prioritised. These include cases involving split families, particularly where an applicant has an immediate family member living in Australia, and women-at-risk.

These programmes have historically applied to conflict/violence-related displacement. However, given the complex interrelationship between conflict and environmental drivers of some refugee flows, this entry mechanism could *in fact* already facilitate entry and stay of some refugees whose predicament includes a disaster-related element, although this is unlikely to be the sole or dominant driver, and less likely to be explicitly weighted in resettlement policy decisions.

Looking to the future, Australia’s Department of Home Affairs Procedures Advice Manual also recognises that there may be “emerging caseloads” which need to be factored into decisions around the size and composition of the annual intake.¹⁰³ As UNHCR increasingly recognises the relationship between conflict and the environment, and State practice on refugee status determination (RSD) increasingly reflects these realities,¹⁰⁴ it is possible that these negotiations on referrals to resettlement may come to include discussions around

entry and stay of persons for whom the environmental driver is more pronounced. While this mechanism provides a pathway to a permanent status, places are limited and decisions can take many months, or even years. This means this mechanism is not useful for those seeking entry and stay in anticipation of a looming disaster or in the immediate aftermath of one.

Governments may also settle specific refugee populations on an *ad hoc* basis. There is precedent, such as in 2001 when the New Zealand Government agreed to resettle 131 ‘Tampa’ refugees - mainly ethnic Afghani Hazara who had been rescued from a sinking craft by the Norwegian vessel MV Tampa. A second example was in September 2015 when Australia announced it would resettle an additional 12,000 people displaced by conflicts in Syria and Iraq.¹⁰⁵

Outside the refugee entry programmes, Australia’s offshore regime also provides for a ‘Global Special Humanitarian Visa’ (Subclass 202). The person must face substantial discrimination or human rights abuses. The regime includes a Community Support Programme that allows for individuals, community organisations and businesses to help people in humanitarian need to resettle in Australia.¹⁰⁶ This programme does not expand the humanitarian intake and has faced criticism for ‘privatizing’ humanitarianism by prioritising ‘work-ready’ applicants, leading to proposal for an expanded programme. If adopted, this could represent a future humanitarian pathway.¹⁰⁷

¹⁰⁰ <https://bit.ly/2TwuteN>. Accessed 18 September 2020.

¹⁰¹ Rt Hon Jacinda Ardern, Refuge quota increase to 1500 in 2020 <https://bit.ly/3hpl5BS>. Accessed 18 September 2020.

¹⁰² *Procedural Guidelines for the Offshore Humanitarian Program as at 01 July 2017* Department of Home Affairs Procedures Advice Manual <https://bit.ly/3AkT4no>, at p14. Last accessed 10 March 2021. Currently, however, this programme caters for community-linked cases; see Refugee Council of Australia, Less than one third of refugees in Australia’s humanitarian program are resettled from UNHCR (9 May 2020). At: <https://bit.ly/3qGeFSU> Accessed 24 March 2021.

¹⁰³ Procedural Guidelines, *ibid*.

¹⁰⁴ See, Burson, B., (2010) ‘Environmentally Induced Displacement and the 1951 Refugee Convention’ in Afifi, T and Jaeger, J (eds) *Environment, Forced Migration and Social Vulnerability*, Springer-Verlag (2010); Sanjula Weerasinghe. (2018) *In Harm’s Way: International Protection in the Context of Nexus Dynamics Between Conflict or Violence and Disaster or Climate Change*, UNHCR. At <https://www.unhcr.org/5c1ba88d4.pdf> Accessed 4 August 2020; UN High Commissioner for Refugees (UNHCR), Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters (1 October 2020) at: <https://www.refworld.org/docid/5f75f2734.html> Accessed 10 March 2021.

¹⁰⁵ Australia, Department of Home Affairs Procedural Guidelines, Fn101 p. 18.

¹⁰⁶ <https://bit.ly/3dAuchT>. Accessed 4 August 2020.

¹⁰⁷ Hirsch, A. L., Hoang, K., & Vogl, A. (2019). Australia’s Private Refugee Sponsorship Program: Creating Complementary Pathways Or Privatising Humanitarianism?. *Refuge: Canada’s Journal on Refugees*, 35(2), 110–123. <https://doi.org/10.7202/1064823ar> Accessed 21 March 2021. For discussion of an initiative for a more open and direct community sponsorship programme, see: Community Refugee Sponsorship initiative, A New Model for Community Refugee Sponsorship in Australia, At: <https://bit.ly/2TqSjIC> Accessed 21 March 2021.

Another visa pathway exists for 'Women at Risk' (Subclass 204), being women who do not "have the protection of a male relative and [are] in danger of victimisation, harassment or serious abuse because of her sex."¹⁰⁸ The Global Special Humanitarian Visa as well as the Woman at Risk Visa are both permanent residence visas with the prospect of citizenship. Both residence permits allow the individual to stay in Australia indefinitely, work and study in Australia, enrol in Australia's scheme for health-related care and expenses, apply for Australian citizenship (after they have lived in Australia for four years) and propose family members for permanent residence.

While disasters can undoubtedly provide a context in which human rights abuses can occur, there are features which limit the potential application of Australia's Global Special Humanitarian Visa to disaster-affected persons. First, the person is required to be not only outside Australia but also outside their home country. This will not be the reality for most Pacific populations impacted or at risk of being impacted by a disaster, although it would capture those in another country on a temporary basis. Second, as with the refugee resettlement pathway, there is limited availability and potentially lengthy processing delays.

Onshore processes involve refugee status determination (RSD). An onshore process allows a person entering unlawfully (for example on a fake or stolen passport) or as the holder of another visa to make a claim to be recognised as a refugee. While this can become a pathway to permanent stay, there is nothing in the Refugee Convention which mandates this, and the immigration status

flowing from a being recognised as a refugee via RSD processes varies between countries. New Zealand and Australia also allow for complementary protection pathways, whereby visas can be granted to persons for whom removal exposes major risks.

Fiji, Nauru, Papua New Guinea, Samoa, the Solomon Islands and Tuvalu are parties to the Refugee Convention.¹⁰⁹ Of these Fiji, Papua New Guinea, Nauru and Vanuatu have enacted refugee-specific national legislation and accompanying regulations.¹¹⁰ In the Solomon Islands, under the 2012 Immigration Act, entry permission cannot be refused to a person who does not meet the prescribed general requirements for entry if the person has "made a claim for protection within the meaning of the Refugee Status Determination Act."¹¹¹ However, this Act does not yet appear to be in force, nor does the relevant Bill appear on the Parliamentary website for the period 2003-2020.¹¹² In contrast, Vanuatu, while not a party to the 1951 Convention or the 1967 Protocol, introduced legal provisions on RSD into its 2010 Immigration Act.¹¹³

Samoa has developed a bill on RSD, but this has not yet been completed. UNHCR provides RSD support under its mandate to Micronesia, Palau, Samoa, Solomon Islands and Tonga. Caseloads across the 14 PICTs covered by UNHCR's Regional Office in Canberra are typically small.¹¹⁴

In the case of both PNG and Nauru, the provision of humanitarian entry is linked to their participation in the Australian regional offshore processing programme which, controversially, transfers certain persons seeking asylum in Australia to Manus Island in PNG or Nauru to

¹⁰⁸ Reg. 204.222.

¹⁰⁹ 1951 Convention Relating to the Status of Refugees. 189 U.N.T.S. 150, entered into force April 22, 1954. The definition under the Refugee Convention is contained in Article 1A(2) which provides that a refugee is a person who: '...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it...'

¹¹⁰ UNHCR *Help in the Pacific*. At <https://bit.ly/3xcfmWt>. Last Accessed 27 January 2021.

¹¹¹ Section 7(2).

¹¹² National Parliament of the Solomon Islands *Acts of Parliament* <https://bit.ly/368vNHK> and *Bills Before Parliament* <https://bit.ly/3hpkMac> Last accessed 6 October 2020.

¹¹³ Section 65 of the 2010 Immigration Act effectively domesticates the CSR refugee definition.

¹¹⁴ Email communication, UNHCR Regional Office, 27 January 2021.

have their claims for protection determined.¹¹⁵ In the case of Nauru, section 5 of the Refugees Convention Act 2012 provides for “a person to apply for refugee status”. That year, the Government also enacted the Asylum Seekers (Regional Processing Centres) Act, and the 2014 regulations specifically provide for a ‘regional processing centre’ visa to be issued to persons who have or are to be transferred to Nauru under the enabling provisions of Australia’s Migration Act 1958. In PNG, the 1979 Migration Regulations were amended in 2013 to allow for refugee status to be recognised, but only for persons transferred to PNG under its agreement with Australia, Migration (Amendment) Regulation 2014, which expanded the refugee definition to all persons who apply for asylum.¹¹⁶ Those persons who are recognised are eligible to be granted a ‘refuge entry permit’.¹¹⁷

The RSD process also provides a potential pathway to an immigration status and, indeed, persons have been lodging disaster-related claims before both the New Zealand and Australian courts and tribunals since at least 1995.¹¹⁸ Since 2013, the New Zealand Immigration and Protection Tribunal (IPT) has systematically examined how international refugee and protection law may apply in the disaster and climate change context. In a well-known case concerning Kiribati, the IPT recognised that disasters and climate change is a context which can result in breaches of international human rights sufficient to potentially give rise to an entitlement to refugee status, or to complementary protection as expressed in New Zealand’s Immigration Act.¹¹⁹ The case failed on the facts.

The matter came before the New Zealand Supreme Court which denied the I-Kiribati

claimant permission to appeal. In so doing, however, the Court also emphasised that, although the appeal was not successful on the facts, this did not mean that “environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction. Our decision in this case should not be taken as ruling out that possibility in an appropriate case.”¹²⁰

In January 2020, the UN Human Rights Committee upheld the Tribunal’s approach and concurred that disasters and climate change may provide a context in which international protection law may in principle apply. Although the decision of the New Zealand Tribunal was upheld, the Committee emphasised that States were obligated to keep the situation under review.¹²¹

In this and in a subsequent case concerning Tuvalu, the Tribunal has explored how both the Refugee Convention and complementary protection mechanisms grounded in international human rights law can apply to disasters. The principal rights which underpin both forms of protection considered by the IPT have been the right to life (Article 6 ICCPR) and the right not to be subjected to cruel, inhuman, or degrading treatment (Article 7 ICCPR).¹²²

¹¹⁵ PNG provided for determination of a non-citizen as a refugee in the 1989 amendments to the Migration Act 1978 – section 15A – but had no formal enabling legislation providing a process for status determination until 2013. Details of the bilateral agreement underpinning the transfers can be found at Kaldor Centre for International Refugee Law *Fact Sheet: Bilateral Agreements - Offshore Processing*. <https://bit.ly/3yeyqMD>. Accessed 23 October 2020. The Manus Island Processing Centre was forcibly closed in October 2017. For details of numbers of persons transferred see Refugee Council of Australia *Offshore Processing Statistics* <https://bit.ly/3h8KBMH>. Accessed 23 October 2020.

¹¹⁶ Migration (Amendment) regulation 2013, introducing a new regulation 14 and 15.

¹¹⁷ Regulation 2(5) Immigration Regulations 1979, as amended by the Migration (Amendment) regulations 2014.

¹¹⁸ McAdam, J., (2015) The emerging New Zealand jurisprudence on climate change, disasters and displacement *Migration Studies*, Vol. 3, No.1.

¹¹⁹ *AF (Kiribati)* [2013] NZIPT 800413 <https://bit.ly/36717aZ>. Accessed 18 September 2020.

¹²⁰ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107 at [13]. <https://bit.ly/3xghMUO>. Accessed 18 September 2020.

¹²¹ *Teitiota v New Zealand* CCCPR/C/127/D/2728/2016 (20 January 2020). <https://bit.ly/365q9pN>. Accessed 18 September 2020.

¹²² *AC (Tuvalu)* [2014] NZIPT 800517- 520 at [75] <https://bit.ly/3qFzxcF>. Accessed 18 September 2020.

The reality, however, is that even under this more nuanced approach to disasters and protection, no cases have been successful to date. Moreover, the New Zealand approach is very much at the vanguard of legal developments. As yet, no Australian tribunal or court has considered the New Zealand approach.¹²³ But this cannot be ruled out. There is evidence of disaster-related concerns being amplified within claims for protection in Australia, just as they are in New Zealand, in relation to the Pacific. For example, a case in 2017 concerning Fiji, considered a request for complementary protection in relation to political upheavals and the impacts of Tropical Storm Winston.¹²⁴ The claim was dismissed because of the particular wording of Australia's Migration Act which directs decision makers to disregard risks "faced by the population generally and is not faced by the applicant personally".¹²⁵

While jurisprudential precedent now exists such that protection law as developed in New Zealand represents, at least as a matter of principle, a clear humanitarian pathway for entry and stay in the context of disasters and climate change, the mix of complex factual and legal issues arising in these cases means, at least at the present time, many if not most disaster-affected persons in the region may struggle to meet the criteria.

Nevertheless, the net effect of this approach is to sharpen one edge of the gap between hard-edged law and discretionary State policy. International protection law is projected outwards, and it cannot be ruled out that these pathways may become more easily engaged in other future factual settings. This is important in two ways. First, UNHCR recently issued a Guidance Note on *Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters*¹²⁶ that draws substantially on the New Zealand jurisprudence. Should it now begin to also align

its Mandated RSD with the new approach, this may, over time, see disaster-affected persons whose predicaments give rise to serious human rights concerns admitted to the international refugee resettlement regime.

Second, there is growing recognition that disasters and conflict cannot always be neatly siloed as discreet drivers of refugee flows and may in fact coexist. Should this understanding become more widely accepted and reflected in the information provided in support of regional State RSD processes, RSD may yet increasingly feature as a pathway for humanitarian stay in the context of disasters and climate change.

Overall, however, the legal and factual complexities surrounding the reach of international protection law are such that it is in the realm of domestic immigration law that the predicament of disaster-affected populations in the Pacific will be more directly and immediately addressed. Indeed, as the next section demonstrates, this is already happening to some extent.

7.2

HUMANITARIAN PATHWAYS OUTSIDE REFUGEE AND PROTECTION

Outside of general, but limited, pathways for humanitarian entry and stay provided by refugee and protection law, the regional legislative/regulatory landscape expressly provides for entry and stay in relation to specific categories of person or for specific purposes which can be seen to have a humanitarian concern at their centre.

¹²³ The Kaldor Centre for International Refugee Law maintains a comprehensive database of both Australian and New Zealand complementary protection decisions. Available at: <https://bit.ly/3h7xPOp>

¹²⁴ 1517812 (Refugee) [2017] AATA 1530. A similar view taken in relation to disasters in Pakistan in 1418483 (Refugee) [2016] AATA 3975.

¹²⁵ S 36(2B)(c) Migration Act.

¹²⁶ UN High Commissioner for Refugees (UNHCR), *Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters*, 1 October 2020. Available at: <https://bit.ly/3yic7NE>. Accessed 9 November 2020.

7.2.1 GENERAL HUMANITARIAN ENTRY

In March 2020, an Immigration Bill was tabled in the Cook Islands Parliament which aims to modernise the country's immigration system. The existing legislation contains an exception relating to the general prohibition on unlawful entry. This includes persons who enter the Cook Islands "[i]n any other circumstances which, on humanitarian grounds, in the opinion of the Principal Immigration Officer, reasonably warrants his entry into the Cook Islands." There is nothing on the face of this which precludes application to disaster-affected persons. However, this general humanitarian exception relating to entry has not been expressly replicated in the Immigration Bill.

In the past, New Zealand had a specific policy for allowing humanitarian entry and stay as a resident as did Australia.¹²⁷ However, threshold requirements were high, with applicants having to establish that their circumstances caused serious physical and/or serious emotional harm to themselves or a New Zealand party, that they were sponsored by a New Zealand citizen or eligible New Zealand resident, and that the only "reasonable solution" to their situation was being granted residence in New Zealand. It also had to be "not contrary to the public interest to allow them to reside in New Zealand".¹²⁸ Under New Zealand's current 2009 Immigration Act, matters of humanitarian concern can only be relied upon as a shield against a deportation liability, for example when someone becomes unlawful in New Zealand. At least some of the cases which may have fallen within the ambit of the old humanitarian residence policy will now be captured by the 2009 Act's protected person jurisdiction which allows an immigration status, usually residence, to be granted to persons who are found to be at risk of torture or cruel, inhumane or degrading treatment or

punishment in the country of origin¹²⁹ While the threshold for relief is high, there is no requirement that such persons be sponsored although the qualifying harm must be to the person concerned and not a New Zealand party. It need not be established that the only reasonable solution is the grant of residence.

In the case of French Polynesia, there is a discretion to grant an entry visa on an exceptional basis due to "unforeseen imperative circumstances" which mean a person was unable to gain an entry visa in advance. The person must, however, be in possession of a valid passport or other travel document and satisfy maintenance, public order, public health and security criteria.¹³⁰

7.2.2 DISTRESSED VESSELS

One corollary of the 'sea of islands' as the regional context is the widespread recognition in the relevant laws that unforeseen circumstances might compel a ship or aircraft to unintentionally enter the territory of a country. This can be regarded as a form of humanitarian entry. It represents the most regionally prevalent example of the pre-colonial traditions referred to by Hau'ofa relating to the entry into territory of persons whose vessel or aircraft is in distress due to mechanical trouble, 'stress of the weather' or because of an unspecified 'emergency'.

The form in which the distressed entry concession applies is variable. In some instances, persons compelled to physically enter a State's territory are deemed by law not to have 'entered' for the purposes of domestic immigration legislation and the person will be deemed not to have unlawfully entered the country, which will typically be an offence under applicable immigration legislation. This

¹²⁷ For a discussion about the Australian approach, see: McAdam, J., From Humanitarian Discretion to Complementary Protection - Reflections on the Emergence of Human Rights-based Refugee Protection in Australia [(2011) 18 Australian International Law Journal 53.

¹²⁸ INZ Operations Manual (Immigration Act 1987) 4/97 at POL3-61.

¹²⁹ See sections 130 and 131 of the 2009 Act.

¹³⁰ Decree of 29 December 2011 Relating to the Documents and Visas Required for the Entry of Foreigners into the Territory of French Polynesia NOR: IOCL1133590A (Consolidated version as of 22 September 2016). At <https://bit.ly/3AlxaAA>. Accessed 16 October 2020. It is possible that this is intended to operate as a distressed vessel exception but the English language translation we have had access to does not use this language so we have recorded it separately.

is the case with Fiji, Vanuatu, Tuvalu, the Cook Islands, Tonga, and Nauru.¹³¹ In other cases, distressed entry is framed as an exception to an obligation on a ship or aircraft to only enter a country at a designated port, provided the persons aboard present themselves to immigration officials as soon as possible. This is the case in Palau, Samoa and the Solomon Islands.¹³² In Nauru, distressed entry is provided for as an exception to the requirement that an applicant for a visa to enter the country holds a passport of at least three months' validity. Specific provision is made for them to be granted a visa.¹³³

While typically provided for in the main national immigration legislation, in some instances, this humanitarian concession to ordinary entry requirements is contained in separate 'Ports of Entry' legislation, as in the case of the Republic of the Marshall Islands and FSM.¹³⁴

7.2.3 ADMISSION FOR MEDICAL TREATMENT

Admission for the purposes of receiving medical treatment unavailable in country of origin can also be regarded as a form of humanitarian entry and stay insofar as it is expressly aimed at ensuring the health, wellbeing and even in some instances the life of the migrant. In keeping with their development status, this does not feature in the immigration frameworks of PICTs, but does in those of Australia and New Zealand. In Australia, a sub-class of a visitor exists (Subclass 602). Criteria include that arrangements for the treatment must have already been concluded and that the associated costs can be met.¹³⁵

In New Zealand, both the 1987 and the 2009 Immigration Acts allow persons to enter and stay in the country to access medical treatment and services. Such persons are granted an ordinary visitor visa for up to six months if they can show they have been accepted for and are able to pay for medical treatment or consultation in New Zealand.¹³⁶ Citizens of South Pacific countries may be funded for specialised medical treatment in New Zealand if such treatment is not available in their home country and is funded by either their home Government or by New Zealand as part of its Official Development Assistance (ODA) Programme. Family members may also travel as an escort to the patient, if this is necessary due to the nature of the condition. Applicants must complete the required form and provide evidence of the type and cost of treatment, plus ability to pay.

Significantly, in the context of entry and stay in New Zealand in the aftermath of a disaster, immigration instructions expressly allow for the granting of a visa to enter New Zealand for emergency medical treatment to both the patient and the accompanying support person as an exception to the ordinary requirements of instructions.¹³⁷ However, the threshold criteria are high. Immigration instructions stipulate that:

'An emergency includes, but is not limited to, a situation where:

local health authorities judge that it is vital to the patient's survival to transfer them immediately to New Zealand.'

¹³¹ Fiji Immigration Act 2003, sections 2(1) and 6(1); Vanuatu Immigration Act, sections 4(2) and 20(4)(b); Tuvalu Immigration Act (2008 Revised Edition) CAP. 24.15, section 2; Cook Islands, Entry Residence and Departure Act 1971-1972, section 10 (this features in the Immigration Bill tabled in the Cook Islands parliament in March 2020. Clauses 113 and 114 of the Bill deal with situations where persons arrive in the Cook Islands in circumstances where passages are unable to obtain entry clearance because of "weather conditions or other unforeseen circumstances" Available at <https://bit.ly/3hrPC1L>. Tonga Immigration Act 1969 (1988 Revision) section 2; Nauru Immigration Act 2014, section 10(5).

¹³² Palau, Laws of Palau, Title 13 Citizenship and Immigration, Division 2, Chapter 10 §1101; Samoa, Immigration Act 2004, section 4(4); Solomon Islands Immigration Act 2012, section 43(4)(b).

¹³³ Immigration Act 2014 section 9(3); Immigration Regulations 2014, regulations 5(10) and 15.

¹³⁴ Republic of the Marshall Islands Revised Code (2004) Title 43 Citizenship Immigration and Emigration Chapter 2, Ports of Entry Act 1966, §202(1); Federated States of Micronesia Revised Code (1999), Title 18 Territory, Economic Zones and Ports of Entry, Chapter 2, Ports of Entry §201.

¹³⁵ Regulation 602.212 (2).

¹³⁶ Immigration Instructions at V3.40 (Effective, 23 March 2012).

¹³⁷ Ibid, V3.40.25.

The relatively high degree of risk to life required means this pathway would not capture all persons who may need some form of medical treatment in the wake of a disaster. These persons would need to be issued with either a visitor visa or a limited purpose visa.

In yet other instances, a medical emergency on board a ship or aircraft is treated the same way as entry caused by stress of the weather. This features in the legislation in the Solomon Islands.¹³⁸

7.3

REGULAR TEMPORARY MIGRATION PATHWAYS

As is to be expected, it is a general feature of regional immigration law that persons be in possession of a valid visa to lawfully enter the country.

7.3.1 SPECIAL PURPOSE VISAS (SPVS)/ LIMITED PURPOSE VISAS (LPVS)

One potentially significant existing flexibility derives from the capacity within some immigration legislation which allows for the granting of 'limited' or 'special purpose' visas, which allow for the lawful entry and stay in the destination state for a specified purpose for a specified period of time. This is an express feature of immigration systems in New Zealand, Australia, Fiji, Vanuatu, Kiribati and Nauru. The grant of such visas is in the nature of a discretionary administrative action.

In some instances, the relevant legislation specifies classes of person (and family members) who are eligible for such visas. For example, section 32 of Vanuatu's Immigration Act 2010 specifies that a "special category visa" may be granted to Government

employees or secondees and members of donor organisations for up to five years. The list is not closed; other classes of person can become eligible if prescribed by regulations. In 2018, section 27 of Vanuatu's Immigration Act was amended to allow for the creation of other classes of visa by Ministerial Order including visas which "serves the purpose of facilitating... entry for a range of special purposes."¹³⁹

Nauru's 2014 immigration regulations also provide for a 'special purpose visa', including "a person who arrives in Nauru due to stress of weather or a medical or other emergency or other similar cause".¹⁴⁰ The reference to an 'emergency' is clearly apt to include the impacts of a disaster.

Other systems specify the type of purpose for which such visas may be granted. For example, New Zealand's immigration instructions, issued under the 2009 Immigration Act, specify that 'limited purpose visas may be granted to attend short-term fee-paying courses, to attend specified events such as conferences, sports tournaments, weddings, funerals and other significant cultural or religious events. Workers admitted to New Zealand under its well-known RSE scheme are granted LPVs.¹⁴¹ Again, there is a catchall provision. New Zealand's immigration instructions provide that LPVs may be granted for 'any other specific purpose other than employment ... where the circumstances justify granting a limited visa.'¹⁴²

Yet other immigration systems do not specify an eligible class or purpose. This is this case with Kiribati.¹⁴³ Similar is this regard is Fiji, where the immigration regulations provide for the issuing of a 'special purpose permit' for up to three years. The "Permanent Secretary must be satisfied that the non-citizen should be allowed entry into the Fiji Islands for a specific period or until a certain date, while the non-citizen has a certain status, or on such other ground as the Permanent Secretary considers

¹³⁸ Section 43(4)(b)(i) Immigration Act 2012.

¹³⁹ Immigration (Amendment) Act 2018, Schedule, para 2.

¹⁴⁰ Regulation 11(2)(f).

¹⁴¹ Immigration New Zealand Operational Manual Immigration Instructions (20 August 2020), effective 29 November 2010. <https://bit.ly/3h8Ke4L>. Accessed 11 September 2020.

¹⁴² L.2.30.g

¹⁴³ Immigration Act 2019, section 54.

appropriate.”¹⁴⁴ The visas may be granted subject to conditions relating to work or study, among others. As with the New Zealand example, there is scope for such a visa being granted to disaster-affected populations.

Alongside these expressly stipulated examples, it is also noteworthy that in Niue, the Immigration Act 2011 confers a power for regulations to be promulgated which amend the purposes of any visitor, work or study permits or create “other types of temporary permits and the purposes for them”.¹⁴⁵ While the Government website does not establish that any further visa types have been created to date, much less in relation to disaster-affected populations,¹⁴⁶ this is also an existing avenue of potential application, and represents another node of inherent flexibility. A similar general power to provide for other types of temporary entry visas for a prescribed purpose exists under the 2012 Immigration Act of the Solomon Islands.¹⁴⁷ Associated Regulations issued in 2013 set out the requirements for a ‘special purpose visa’, of which there is, alongside volunteer, research and exchange-related purposes, a residual ‘other’ category for which the Director of Immigration must be “satisfied that it is appropriate in all the circumstances to grant a visa” in addition to the generic visa requirements.¹⁴⁸

According to the website of Papua New Guinea’s Immigration and Citizenship Authority, a Special Exemption visa may be granted for a range of reasons.¹⁴⁹ The website provides a “non-exhaustive list” which includes seeking “entry to provide emergency relief following a natural or national disaster”. It is not entirely clear where authority derives from, but possibly section 20 of the Migration Act 1978, which empowers the Minister to “grant an exemption

to a person or a class or description of persons”.

These entry and stay mechanisms, although discretionary administrative actions, are flexibilities which could, in theory, be extended to disaster-affected populations to facilitate entry and/or stay. There is nothing on the face of any of the currently existing special/limited purpose visa types which would preclude entry for the purpose of, for example, staying with relatives for six months while homes and livelihoods, destroyed by a Cyclone X in country of origin, are restored.

7.3.2 EXECUTIVE DISCRETION

Another common feature of regional immigration law is the existence of a residual power vested in the executive branch – typically expressed as the relevant Minister or Cabinet – to grant exemption to a general requirement for entry and/or stay only to the holder of the relevant visa and/or permit. This can be conferred on persons or ‘classes of persons’, typically heads of state, and holders of diplomatic passports. This is a feature of the immigration legislation in Fiji, the Solomon Islands, Papua New Guinea, Tonga, Kiribati, Nauru, Tuvalu and Vanuatu.¹⁵⁰ In the case of Palau, this authority is vested in the President, as is the case with FSM although here this power can be delegated.¹⁵¹ Typically, there is a requirement that this power is to be exercised by notification in a public Gazette, or similar.

This too, constitutes a potentially significant existing flexibility by which a disaster-affected person could be admitted on humanitarian grounds to the territory of the country concerned. Further, given this mechanism has the additional flexibility of rendering lawful

¹⁴⁴ Regs 45 – 47 Immigration Regulations 2007.

¹⁴⁵ Section 14(8).

¹⁴⁶ Government of Niue *Tau Fakatufono Tohi ha Niue* <https://bit.ly/2UR82RQ>. Accessed 6 October 2020.

¹⁴⁷ Section 17(e).

¹⁴⁸ Immigration Regulations 2013, Regs 7 and 63(1)(d).

¹⁴⁹ The Authority was established by the Immigration and Citizenship Service Act 2010. Its functions include performing the functions and exercising the powers conferred on persons under the Migration Act and to assist Ministers with the discharge of their functions under that act: see section 5.

¹⁵⁰ Fiji Immigration Act 2003, section 7(2); Solomon Islands, Immigration Act 2012, section 11(1) (e); Papua New Guinea, Migration Act 1978, section 20; Tonga Immigration Act 1988 Revised Edition, section 7(1)(k); Kiribati Act 2019, section 45; Nauru Immigration Act 2014 section 10(4); Tuvalu, section 7(1)(i) Immigration Act; Vanuatu Immigration Act 2010, section 26B (inserted by Immigration (Amendment) Act 2018).

¹⁵¹ Laws of Palau, Title 13 Citizenship and Immigration, Division 2, Chapter 10 §1010; Laws of FSM, Title 50, Immigration §102.

the entry of classes of persons, it constitutes an entry pathway for whole communities of disaster-affected persons.

While the Australian Migration Act 1958 and the New Zealand Immigration Act 2009 each also provide for the exercise of Ministerial discretion these are configured in slightly different terms. The former allows the Minister to substitute more a favourable decision “ in the public interest”. The latter allows the Minister to issue a visa to persons unlawfully in New Zealand. However, as these powers are discretionary, the relevant Minister cannot be compelled to issue a visa and we know of no evidence of such power as yet being exercised for this purpose.

7.3.3 LABOUR MIGRATION PATHWAYS

The Australian government has announced it is considering introducing a pilot scheme aimed at offering skilled employment in Australia to up to 100 skilled refugees. Commenting on the utility of such schemes for displaced persons, the Kaldor Centre for International Refugee law has observed:¹⁵²

‘Labour mobility schemes can enable displaced people to safely enter or remain in another country because they are legally authorised to take up employment there. In this way, a refugee is able to access a temporary or durable solution to their displacement by using an ordinary migration process, which, depending on the circumstances, may offer greater opportunities for self-reliance and effective protection than remaining in their own country or in the country where they first sought asylum. A labour mobility scheme may also provide a migration pathway for the applicant’s immediate family members.’

While not a humanitarian pathway as such, such a scheme demonstrates how regular migration measures could be adapted to meet the needs of persons whose predicament raises humanitarian concern, including in the context of disasters and climate change.

7.4

CONSTRAINTS

As we also note in the *Clusters and Hubs* report, there are aspects of this current legal landscape which constrain the feasibility of existing pathways outside the exercise of Executive discretion being leveraged to facilitate temporary entry on humanitarian grounds. These include the need for a passport to travel, something not all disaster-affected persons may have, or that may be lost or damaged beyond use in the disaster.

Other features include the imposition of carrier sanctions – a common feature of regional immigration law, which create obligations on the operator of a ship or aircraft not to embark or disembark non-nationals of the destination State who do not possess a passport or other travel document. It is not uncommon for it to be an offence to do so. This is a feature present in the legislation in Samoa, Fiji, Tuvalu, Vanuatu, Niue, Solomon Islands, FSM, as well as in New Zealand and Australia.¹⁵³ While in many instances, it may be that military assets are deployed to convey disaster-affected persons across a border, it cannot be assumed that this will hold true in all cases. Any regional framework will therefore also need to address the liability of carriers such as Fiji Airways or Air Vanuatu, should these carrier assets be utilised.

Other potential obstacles concern the need to prove a financial ability to meet maintenance costs, and for some obstacles relating to generic health and character requirements. Moreover, a common criterion is that the applicant establishes a genuine intent to have only temporary presence for the purpose specified in the visa and to require proof of an intention to depart within a specified time, each of which may be difficult for a disaster-affected person to establish to the satisfaction of the visa issuing authority. It worth noting here that in Australia, immigration officers previously were expressly directed, when

¹⁵² Kaldor Centre for International Refugee Law, Fact Sheet *Complementary Refugee Pathways: Labour Mobility Schemes* (4 August 2020) <https://bit.ly/367HKgB>. Accessed 23 October 2020.

¹⁵³ Samoa Immigration Act 2004, section 9; Fiji Immigration Act 2005, section 6(3)(c), (4); Tuvalu Immigration Act (2008 Revision), section 5(d) (2); Vanuatu Immigration Act 2010, sections 22(1) (1), 52 and 79; Niue Immigration Act 2011 Section 31(1); Solomon Islands, Immigration Act 2012, section 50; Federated States of Micronesia Title 50 FSM Code, Immigration Act § 109; New Zealand Immigration Act sections 101(1)(a), 349 (2) (a); Australia Migration Act 1958, section 229.

deciding whether an applicant intends a genuine visit to consider “economic disruption, including shortages, famine, or high levels of unemployment, or natural disasters in the applicant’s home country”.¹⁵⁴ Direction No. 33 was replaced by Direction No. 36 in 2005. Direction No. 36 was revoked and not replaced in 2009.¹⁵⁵

Any process aimed at the regularisation of entry in the context of disasters linked with climate change will also need to address these potential constraints.

7.5

STAY ON HUMANITARIAN GROUNDS

7.5.1 REFUGEE AND PROTECTION PATHWAYS

Refugee and protection pathways can be a basis for stay, in that persons already in-country on temporary visas can make applications to stay because of protection needs. In terms of the capacity of these existing refugee and protection pathways to apply to claims grounded in disasters and climate change, the same issues arise as in relation to entry.

Beyond this, in some immigration legislation, provision is made for specific categories of person to be granted permission to stay on grounds which are of a humanitarian character. Examples include victims of domestic/family violence and victims of trafficking.

7.5.2 VICTIMS OF DOMESTIC/FAMILY VIOLENCE

New Zealand has special residence categories for victims of domestic and family violence.¹⁵⁶ The objectives of the policy are to “enable partners of New Zealand citizens or residence class visa holders to remain in New Zealand where they intended to seek residence class visas on the basis of their relationship which has ended because of family violence to either the non-resident partner or their dependent child and cannot return home because of the impacts of stigma, or because they would have no means of independent financial support from employment or other means”. The policy is anchored in New Zealand’s commitment to observe its international obligations concerning the elimination of all forms of discrimination against women under Article 16 of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, and the protection of children from physical and mental violence in accordance with Article 19 of the 1989 United Nations Convention on the Rights of the Child.

Australia has a similar pathway under the Migration Act and Regulations. Persons who have entered Australia as holders of various temporary visas based on a relationship which has ended due to violence against the spouse/partner of family members may still be entitled to be granted a visa.¹⁵⁷

¹⁵⁴ Direction No.33 of 21 August 2003 issued by the Minister under section 499 of the Act, at Clause 8.

¹⁵⁵ <https://bit.ly/3yaMRZi> Accessed 24 March 2021.

¹⁵⁶ INZ Operations Manual S.4.5. <https://bit.ly/3xplcDW> Accessed 10 November 2020.

¹⁵⁷ Department of Home Affairs, Immigration and Citizenship Division *Family Violence and Your Visa* <https://bit.ly/2UfPWsw>. Accessed 10 November 2020. There are concerns, however, that the legal status conferred by the bridging visa to which persons applying under this policy transition during the application process preclude them from accessing support in shelters: see, Asher, N., Advocates call for changes to protect women on temporary visas fleeing family violence, ABC News 22 October 2020. At: <https://ab.co/3yh7RxC> Accessed 28 March 2021.

7.5.3 VICTIMS OF TRAFFICKING

New Zealand also has a special residence category for victims of human trafficking.¹⁵⁸ The objectives are to “enable victims of people trafficking to remain in New Zealand where they cannot return home because they will be endangered, at risk of being re-victimised or at risk of suffering significant social stigma and financial hardship as a result of being trafficked.” As with the domestic and family violence category, the policy is anchored in a desire to comply with international obligations concerning the protection of victims of trafficking. The eligibility criteria are strict, including that the applicant holds a ‘special temporary visa for victims of people trafficking’. Nevertheless, this demonstrates two important points: first, it is an example of how regular migration measures are being deployed to respond to a situation of humanitarian concern; second, that in some humanitarian contexts, it will be appropriate that there be a legal pathway to transition from temporary to permanent visa status.

Likewise, Australia operates a Human Trafficking Visa Framework (Visa Framework) comprised of the Bridging F Visa and the Referred Stay Visa. These visas enable foreign nationals who do not already hold a valid visa and are suspected victims of human trafficking or slavery to remain lawfully in Australia. Importantly, they are then able to access support through a programme delivered by the Australian Red Cross in partnership with relevant government agencies.¹⁵⁹

Some immigration legislation, such as in Fiji and Nauru, already criminalises human trafficking.¹⁶⁰ In other instances, the criminalisation arises under the criminal law, or in specific anti-trafficking legislation, and sometimes in both.¹⁶¹ Although in both the Marshall Islands and Nauru, a victim of trafficking can be issued with a temporary visa to allow the victim to remain pending investigations and/or prosecutions, there is nothing expressly exempting them from removal.¹⁶² Indeed, non-exemption from removal is a widespread feature of PICT immigration systems and associated regulations do not typically specifically provide for visa pathways for victims.

Notable exceptions are the Solomon Islands and Papua New Guinea. In the Solomon Islands, trafficking victims can apply for a ‘trafficked person protection visa’ which allows the person to remain in Solomon Islands and stay for 6 months, although visa duration is expressly linked to the evidence.¹⁶³ Subject to the requirements of the 2012 Immigration Act regarding change of visa status, it may be possible for the victim to apply for another class of visa. In Papua New Guinea, 2013 amendments Criminal Code authorises the Minister to making “arrangements for the ongoing presence of persons in PNG on humanitarian grounds ... where the persons are not citizens of PNG”.¹⁶⁴ In Vanuatu, 2018 amendments to the 2010 Immigration Act allow for the Minister, to grant ‘any other class of visa prescribed by the Minister by Order’ including those that serve the purpose of facilitating “temporary stay of recognised refugees and victims of trafficking”. It is not clear if implementing regulations have been promulgated. It appears, however, that a number of Bangladeshi nationals trafficked to Vanuatu for labour were allowed to stay pending prosecutions of the offenders.¹⁶⁵

¹⁵⁸ INZ Operations Manual S.4.15. <https://bit.ly/3AlhSvO> Accessed 10 November 2020.

¹⁵⁹ Australia Department of Social Services, Support for Trafficked People Program. At: <https://bit.ly/3wbOaWA> Accessed 21 March 2021.

¹⁶⁰ Fiji, Immigration Act 2003, Part 5; Nauru Immigration Act 2014, section 16.

¹⁶¹ For example, in the Marshall Islands trafficking is criminalised under the Criminal Code 2011 and the Prohibition of Trafficking in Persons Act 2017.

¹⁶² Marshall Islands, *Prohibition of Trafficking in Persons Act 2017, section 109(3) and (4)*; Nauru, *Immigration Regulations 2014, r11(d)*.

¹⁶³ Immigration Regulations, 2013, reg. 71.

¹⁶⁴ Criminal Code Amendment Act 2013, inserting a new division into section 208 of the Criminal Code Act 1974, at section 208G(e).

¹⁶⁵ Radio New Zealand, Bangladeshi trafficking victims leave Vanuatu (19 June 2019). At: <https://bit.ly/3wbFYG2> Accessed 28 March 2021.

In those PICTs where the immigration system provides for the issuing of special or limited purpose visas, it possible these could be applied to at least allow the lawful stay of victims of trafficking. It is not clear if in fact this is being done and, if so, the duration of any temporary visa granted and whether it is linked to investigation and/or prosecution of the traffickers.

In February 2019, the Pacific Islands Development Community (PIDC) Secretariat hosted an Executive Seminar to Combat Human Trafficking and People Smuggling in Apia, Samoa at which participants developed key recommendations to inform the development of a draft regional framework. A draft framework was presented to Members, which is in the process of being finalised for endorsement by the Membership.¹⁶⁶ It is not known whether immigration status features as an element of the draft Framework under consideration by PIDC members. However, it is notable that a 2010 Policy Brief by the PIDC Secretariat on human trafficking and people smuggling noted that one of the key measures Member States could adopt was legislation which was regarded as “essential to deter smugglers and traffickers, to enable their prosecution, to protect victims and to facilitate cooperation between countries.”¹⁶⁷ States in the Pacific have in fact recognised the need for cooperation and capacity building to respond to trafficking in persons. The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime has a number of PICT member-States: Fiji, Kiribati, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga and Vanuatu. New Zealand and Australia are also members.¹⁶⁸

7.6

HUMANITARIAN APPEALS AGAINST REMOVAL/ DEPORTATION

Some immigration systems provide for a general right of appeal for persons who are at risk of being deported or removed from the country. While not expressly on rights of appeal on humanitarian grounds, matters of humanitarian concern such as the adverse impacts of disasters are not precluded from being raised.

Across the region, such rights of appeal are to different bodies or persons. For example, in Vanuatu, the 2010 Immigration Act stipulates that a person who enters and/or stays in Vanuatu without a visa or breaches their visa conditions becomes a prohibited immigrant and is subject to removal action by way of the issuing of a removal order.¹⁶⁹ However, before issuing the order, the Minister must give the person notice in writing of an intention to issue a removal order. The person has 14 days to make representations as to why they should not be removed, which the Minister is obliged to consider.¹⁷⁰ A similar process exists in Fiji.¹⁷¹

A similar right of appeal lies under Nauru’s Immigration Act 2014.¹⁷² In Tonga, the Immigration Act confers on a person, who is liable to be removed from Tonga because they have remained unlawfully in Tonga after a visa has been cancelled, a general right of appeal to the Prime Minister.¹⁷³ The Immigration Act 2006 of the Republic of the Marshall Islands allows an appeal to the High Court against the service of a removal order.¹⁷⁴ So too does the Immigration Act 2012 of the Solomon Islands. This legislation also gives the Minister power to allow person being deported to leave voluntarily within a specified time.¹⁷⁵ It is possible to envisage a person otherwise unlawfully in the Solomon Islands because a

¹⁶⁶ ‘PIDC Regional Immigration Human Trafficking and People Smuggling Framework’ 20 December 2019 <https://bit.ly/3yeJyQX>. Accessed 11 November 2020.

¹⁶⁷ PIDC Understanding human trafficking and people smuggling Policy Brief 2/2010, p. 4. <https://bit.ly/2V2fFoL>. Accessed 11 November 2020.

¹⁶⁸ <https://www.baliprocess.net/membership/> Accessed 21 March 2021.

¹⁶⁹ Sections 50(1)(b) and s 53(1).

¹⁷⁰ Sections 53(2) (c) and 53(2A).

¹⁷¹ Immigration Act 2003, section 51.

¹⁷² Section 13.

¹⁷³ Section 23(2).

¹⁷⁴ Sections 48(4) and 71.

¹⁷⁵ Sections 32 and 33.

disaster means they cannot safely return home making representations about the need for an extended period of time to affect their return.

Other systems provide for a power to revoke a removal order on unspecified grounds. In Papua New Guinea, it is the Minister who may revoke a removal order,¹⁷⁶ as is the case in Nauru.¹⁷⁷ There are also cases of general discretion to grant a further temporary permit to persons unlawfully in the country. This is a feature of Niue's immigration legislation.¹⁷⁸

In New Zealand, a right to appeal against deportation liability on humanitarian grounds exists, among others, in relation to persons who become unlawful in New Zealand by remaining after the date of expiry of a temporary visa. A failed refugee and protection claimant may also have a right to lodge an appeal against any existing or future deportation liability on humanitarian grounds. This requires, among other criteria, that "exceptional circumstances of a humanitarian nature" be established.¹⁷⁹ Kiribati's 2019 Act has a similar right of appeal on the same grounds.¹⁸⁰ In the case of New Zealand, this element has been interpreted in a case concerning a Tuvaluan family to include the impacts of disasters and climate change. It has also been accepted that the "young age makes them inherently more vulnerable to natural disasters and the adverse impact of climate change." While notice was taken that Tuvalu is "particularly vulnerable to the adverse impacts of climate change", ultimately, residence was granted to the family on grounds relating to preserving family unity and cultural needs.¹⁸¹

¹⁷⁶ Section 12 (3).

¹⁷⁷ Immigration Act 2014, section 11(5).

¹⁷⁸ Section 19(1) Immigration Act 2011.

¹⁷⁹ Immigration Act 2009, section 207.

¹⁸⁰ Immigration Act 2019, section 95.

¹⁸¹ *AD (Tuvalu)* [2014] NZIPT 501370 – 501371. <https://bit.ly/3qER594>. Accessed 18 September 2020.

7.7

EXTENSIONS TO REGULAR MIGRATION VISAS DUE TO IMPACTS OF DISASTERS

In contrast to entry-related arrangements, there is greater recognition of 'natural disasters' as a factor necessitating positive consideration in those relating to stay.

7.7.1 PROCEDURAL GUIDANCE MANUALS

No country has express legislative or regulatory provision for extensions of stay due to the impacts of disasters. However, Australia has the most developed recognition of 'natural disasters' embedded within its procedural guidance as to the implementation of legislative/regulatory provisions expressly relating to the extension of temporary visas on more general grounds. The 1958 Migration Act and associated 1994 regulations expressly allow for a condition to be imposed that a visa holder cannot be granted a further visa while in Australia unless that visa is a protection visa or a visa of "a temporary specified kind." The Act renders invalid visa applications by a person who has had such a condition – Condition 8503 – applied to their visa.¹⁸² However, this will not apply to a person to whom the Minister of immigration has granted a waiver "in prescribed circumstances, by writing." Regulation 2.05(4) of the Regulations defines prescribed circumstances as being:

'(a) since the person was granted the visa that was subject to the condition, compelling and compassionate circumstances have developed:

(i) over which the person had no control; and

(ii) that resulted in a major change to the person's circumstances'¹⁸³

¹⁸² Sections 41(2) (a), 46(1A)(a),(c), 41(2A) Migration Act, 1958; Condition 8503, Schedule 8 Migration Regulations 1994.

¹⁸³ At: <https://bit.ly/3ykTx7v>. Accessed 29 July 2020.

The Procedures Advice Manual (PAM3) is a lengthy document providing advice on the exercise of many provisions under the Migration Act and Regulations, including the waiver of the condition rendering in-country applications invalid. Section 19 of the PAM3 dealing with Regulation 2.05 gives examples of situations in which an individual's circumstances will be regarded as compelling and compassionate so as to fall within the statutory definition of a prescribed circumstance. It identifies "natural disaster in the visa holder's home country" as an example. The PAM3 gives the following guidance to immigration officers:¹⁸⁴

'Natural disaster in home country

A natural disaster in the visa holder's home country as a result of which it would be unreasonable to expect the visa holder to return at this time might satisfy regulation 2.05(4) requirements for a waiver.

When assessing such claims, officers should consider the extent to which the visa holder may be personally affected by the disaster, such as the proximity of their home or other property to the exact location of the disaster.'

Officers are directed to contact the nearest Australian government post for further advice.

It is not clear how this clause has been interpreted in relation to 'natural disasters'. The relevant appellate body, the Administrative Appeals Tribunal (AAT), does not publish all its decisions made in the Migration and Refugee Division. While decision summaries are produced for a selection of AAT decisions that have been published in full on the AustLII website, none of those deal with Reg 2.05.

A review of MRT decisions on AustLII has yielded no results.¹⁸⁵ It is to be noted that a 'natural disaster' occurring in Australia would not qualify. However, the PAM3 also lists the closure of an educational institution, and the inability of that institution to continue to provide a course in the case of a student visa holder, as another example. This has potential to capture disruption by disasters to education services in Australia.

As regards student visas, Australia's Migration Act requires that a student visa is to be cancelled where the visa holder has not complied with the condition to remain enrolled and to make satisfactory course attendance or progress, unless the non-compliance was due to "exceptional circumstances beyond the visa holder's control".¹⁸⁶ Ministerial Direction 61, issued under section 499 of the Migration Act,¹⁸⁷ requires decision-makers to have "... due regard to a political upheaval or natural disaster in a particular country. Decision-makers must give consideration to whether that country is the student's home country and to whether the particular political upheaval or natural disaster has affected the student's ability to comply with condition 8202".

A review of the AAT database reveals that this provision has been raised in relation to the 2008 earthquake in Chengdu, China (successfully);¹⁸⁸ super Typhoon Haiyan (Yolanda) in the Philippines (unsuccessfully);¹⁸⁹ the April 2015 Earthquake in Nepal (successfully);¹⁹⁰ and 2015 floods in Viet Nam (unsuccessfully).¹⁹¹ While there is no record at the appellate level of this being applied to the circumstances of a student from a PICT, there is clearly potential within the scope of this Direction. Therefore, if a disaster impacts the ability of a PICT citizen to remain enrolled, or to continue to meet costs associated with

¹⁸⁴ At pp16-17.

¹⁸⁵ Searches used "natural disasters"; "Natural disasters" and "PAM3"; as well as "natural disasters" and selected PICTs such as PNG, Vanuatu, Samoa, Fiji.

¹⁸⁶ Migration Act, s137L(b).

¹⁸⁷ Direction No 61 – Guidelines for considering cancellation of student visas for non-compliance with student visa condition 8202 (or for the review of such cancellation decisions) and for considering revocation of automatic cancellation of student visas' (2014). This replaced the earlier Direction 38 'Guidelines for considering cancellation of student visas for non-compliance with student visa condition 8202 (or for the review of such cancellation decisions) and for considering revocation of automatic cancellation of student visas (or for the review of decisions not to revoke such cancellations)' (19 September 2007).

¹⁸⁸ 0901956 [2009] MRTA 1942.

¹⁸⁹ 418470 (Migration) [2015] AATA 3630.

¹⁹⁰ Kandel (Migration) [2018] AATA 1383; BISTA (Migration) [2019] AATA 6646.

¹⁹¹ Le (Migration) [2018] AATA 3537.

studying, the current regime allows for that to be taken into account.

In relation to visitor visas, amendments to the Migration Act in 2015 provide another potential pathway for the adverse impacts of disasters and climate change to be raised in relation to the persons wishing to remain in Australia for more than 12 months as the holder of a visitor visa. Such visas can be granted in “exceptional circumstances”.¹⁹² The Explanatory Statement to the relevant legislation, the Migration Legislation Amendment (2015 Measures No. 3) Regulation 2015, states:¹⁹³

‘Exceptional circumstances may include:

... a change in the applicant’s circumstances (or the circumstances of an Australian resident) that:

- could not have been anticipated at the time their visitor visa was granted; and*
- is beyond the visa applicant’s control; and*
- where not granting a visa would cause significant hardship to an Australian resident or citizen.’*

This language echoes that in Regulation 2.05 and there is no reason why the interpretive approach in the PAM3 as regards that regulation, which includes “natural disaster in the claimant’s home country” as an example, would not also be maintained here.

Furthermore, in a recent decision, the AAT (Migration and Refugee Division) noted that “The phrase ‘exceptional circumstances’ is a broad term and the examples in the Explanatory Statement are not exhaustive”.¹⁹⁴ Once again, utility is constrained in that the person concerned must be able to satisfy the necessary criteria for the grant of a visitor’s visa, including that they have access to adequate means to support themselves.¹⁹⁵

While not referring expressly to disasters, Clause 89 of the Cook Island’s Immigration Bill, now tabled before Parliament, allows visas to be extended “in emergency situations”:

‘Extension or suspension of visas or permits in situations of emergency

The principal immigration officer may, if there is an emergency situation that affects the ability of persons to travel to and from or stay in the Cook Islands,—

extend the visas or permits of any persons or class of persons in the Cook Islands;’

Again, there is no reason why this could not be applied to disasters.

7.7.2 AD HOC OPERATIONAL RESPONSES

In contrast, New Zealand has not expressly provided for disasters in any immigration-related procedural manual, and instead has opted for guidance being made at the operational level on an ad hoc, case-by-case basis.

Information obtained under a request under the Official Information Act reveals that in the last 10 years, Immigration New Zealand (INZ) has issued operational advice to immigration staff with the objective of assisting them “to interpret and apply immigration instructions in a fair and consistent way” in relation to persons whose ability to return home is affected because of disasters in their home country.¹⁹⁶

¹⁹² Migration Regulations 1994, Schedule 2, cl 600.515.

¹⁹³ <https://bit.ly/3xpkOW0>. Accessed 31 July 2020.

¹⁹⁴ *Yassa (Migration)* [2019] AATA 1078. Available <https://bit.ly/3qHMCmj>. Accessed 31 July 2020.

¹⁹⁵ Migration Regulations 1994, Schedule 2, cl 600.

¹⁹⁶ Letter to author, Ministry of Business Innovation and Employment, DIA1920–1749, (3 July 2020).

This advice was initially issued in response to the 2010 earthquake in Chile and the 2009 tsunami that affected Samoa and Tonga. It stated:

'As you are aware there have been a number of recent natural disasters that have occurred in a range of countries. In some cases, there may well be significant communities from those countries living in New Zealand and therefore there are also significant numbers of visitors from those countries who may be visiting family or here for other reasons.

You may well receive or have received requests for further temporary visas from people who live in the affected areas of the country concerned when a natural disaster occurs. All we ask is that you:

- *consider all such requests on a case by case basis*
- *view sympathetically requests for a longer stay where the person is from an affected area*
- *use the discretion available in temporary instructions when you judge this is appropriate*
- *ensure [electronic records] show in sufficient detail why a further visa was granted (e.g. rather than "further visa for humanitarian reasons" state. "further visa issued because Customer is from the area affected by [square bracket development disaster] and has requested a longer stay with family until it is safe to return home.")*

In short – where we have customers in distress through natural disaster in their home country, please use your common sense of empathy when dealing with further applications from them.'

This advice has since been confirmed as remaining "best practice when immigration officers receive queries/ applications from customers who wish to extend their stay in New Zealand in response to uncertainty caused by a tragedy in their home country."¹⁹⁷ It has been re-issued in relation to tornadoes in the Philippines in 2013;¹⁹⁸ Tropical Cyclone Winston affecting "the Pacific" in 2016;¹⁹⁹ and to Tropical Cyclone Gita "affecting Tonga and other parts of the Pacific" in 2018.²⁰⁰

In most cases, INZ staff communicate individually with customers on the basis of the application that is being assessed. In some cases, such as during the current COVID-19 pandemic, INZ will provide updates on the INZ website to keep affected people informed.

INZ has also made operational decisions on a case-by-case basis with respect to migrants in New Zealand affected by the 2011 Christchurch earthquake, the 2016 Kaikoura earthquake and the 2019 eruption of Whakaari/White Island. With regards to the earthquakes in Christchurch (2011) and Kaikoura (2016), INZ extended visas for affected individuals and did not undertake enforcement activity against them. With regard to the 2019 Whakaari/White Island eruption, there were some affected people whose reason for entry expired when the vessel they arrived on left New Zealand. In these cases, INZ's Customer Service would be aware of this issue and create new visa records for these people in INZ's electronic application management system.²⁰¹

¹⁹⁷ Visa Pak Issue 186 (31 October 2014) *Further visitor visas for people who are unable to return home due to circumstances in their home country*. This operational advice explicitly states this approach is not restricted to 'natural disasters'.

¹⁹⁸ Visa Pak Issue 137 (15 November 2013) *Further visitor visas for customers where a natural disaster has occurred in their home country*.

¹⁹⁹ Visa Pak Issue 248 (26 February 2016) *Reminder on further visitor visas for people who are unable to return home due to circumstances in their home country*.

²⁰⁰ Visa Pak Issue 345 (16 February 2018) *Reminder on further visitor visas for people who are unable to return home due to circumstances in their home country*.

²⁰¹ Ibid Fn 196.

Table 10. Distribution of existing tools

	Regular Migration Measures	Exceptional Migration Measures				
	Limited/Special Visa	Entry in Exceptional Circumstance	Stay due to disaster impacts	Executive Discretion	Appeal or review of deportation or removal	International protection
MELANESIA						
Fiji	✓	✗	✗	✓	✓	✓
New Caledonia						
Papua New Guinea	✓	✗	✗	✓	✓	✓
Solomon Islands	✓	✗	✗	✓	✓	✗
Vanuatu	✓	✗	✗	✓	✓	✓
MICRONESIA						
Kiribati	✓	✗	✗	✓	✓	✗
Marshall Islands	✗	✗	✗	✗	✓	✗
Micronesia (Fed. States of)	✗	✗	✗	✓	✗	✗
Nauru	✓	✗	✗	✓	✓	✓
Palau	✗	✗	✗	✓	✗	✗
POLYNESIA						
Cook Islands	✗	✗	✓*	✗	✗**	✗
French Polynesia	✗	✓	✗	✗	✗	✗
Niue	✗	✗	✗	✗	✗	✗
Samoa	✗	✗	✗	✗	✗	✗
Tonga	✗	✗	✗	✗	✓	✗
Tuvalu	✗	✗	✗	✓	✗	✗
HUB						
New Zealand	✓	✗	✓***	✓	✓	✓
Australia	✓	✗	✓***	✓	✗	✓

*In Immigration Bill currently before Parliament. Expressed as in terms of an 'emergency.' **Clause 154 of the Bill expressly precludes making an appeal against deportation liability on humanitarian grounds. *** as procedural/operational guidance only.

Table 10 maps the distribution of the existing legislative or regulatory tools by sub-region and which are either expressly directed towards the impact of disasters, or being general in nature, are capable of being extended to apply. These include tools such as operational guidance notes where known. It does not include tools existing in relation other humanitarian contexts such as distressed vessels. The blank space for New Caledonia reflects that we have not been able to locate relevant information, but this is not an indication that it does not exist.

COVID-19 and Immigration Responses



PART 4

8.1

ARRIVAL PROHIBITIONS

In the Pacific, as elsewhere, the onset of the COVID-19 pandemic brought to an abrupt end existing patterns of mobility. In common with other States, PICTs closed their borders creating pools of temporary migrants who were unable to either leave their temporary destination or transit state or enter their country of origin. Table 11 shows the extent of travel restrictions in place as of 30 March 2020. Red indicates a country where there was an arrival prohibition in place; green indicates no such prohibition was in place.

Table 12 provides a more nuanced picture of the nature of the arrival restrictions in place. Column 1 gives the total number of restrictions imposed by each PICT as well as Australia and New Zealand. Column 2 details the number of days for which a prior presence in the country meant an arrival prohibition applied also gave rise to an entry prohibition. Where no time limit applied such that any prior presence gives rise to an arrival prohibition, this is recorded as 'no time parameter'. Column 3 details the extent to which the restrictions in place applied to arrivals from or presence in other PICTs. It also details entry permissions in place for arrivals from specified countries in Asia.

These tables show that by the end of March 2020, the majority of PICTs had put in place stringent border control measures and effectively shut their borders to all international travel, including travel from other PICTs. The only countries which at that date still permitted arrivals from other PICTs were Palau, Papua New Guinea, Niue, FSM, and Nauru.

Table 11. Arrival prohibitions (as at 30 March 2020)

Place Of Arrival	Place of embarkation/prior presence																	
	Cook Isl.	FSM	Fiji	Fr. Pol.	Kir	Nru	New Cal.	Niue	Pal	PNG	RMI	Sam	Sol. Isl.	Tonga	Tuv	Van	NZ	Aust
Cook Isl.		x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
FSM	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Fiji	x	x		x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Fr. Pol.	x	x	x		x	x	x	x	x	x	x	x	x	x	x	x	x	x
Kir	x	x	x	x		x	x	x	x	x	x	x	x	x	x	x	x	x
Nru	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
New Cal.	x	x	x	x	x	x		x	x	x	x	x	x	x	x	x	x	x
Niue	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Pal	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓
PNG	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓
RMI	x	x	x	x	x	x	x	x	x	x		x	x	x	x	x	x	x
Sam	x	x	x	x	x	x	x	x	x	x	x		x	x	x	x	x	x
Sol. Isl.	x	x	x	x	x	x	x	x	x	x	x	x		x	x	x	x	x
Tonga	x	x	x	x	x	x	x	x	x	x	x	x	x		x	x	x	x
Tuv	x	x	x	x	x	x	x	x	x	x	x	x	x	x		x	x	x
Van	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x		x	x
NZ	x	x	x	x	x	x	✓	x	x	x	x	x	x	x	x	x		x
Aust	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	

Source: IOM Mobility Impacts COVID – 19 at <https://migration.iom.int/> Last Accessed 20 November 2020

Table 12. Arrival prohibition by reference PICT as of 30 March 2020

	Total # of Restrictions	# of days presence prior to arrival for restriction to apply	Restrictions include arrivals from reference PICT
Cook Islands	245	14	Yes
FSM	0	n/a	Travel allowed between PICTs subject to medical measures (e.g. quarantine). No restriction for New Caledonia.
Fiji	240	No time parameter	Yes
Fr. Polynesia	241	No time parameter	Yes
Kiribati	246	No time parameter	Yes
Nauru	6	20	No. Travel allowed from PICTs subject to medical measures. Travel restrictions for PR China, Hong Kong (SAR), Macao (SAR).
N Caledonia	240	No time parameter	Yes
Niue	44	14	No. Restrictions for Australia, PR China, Hong Kong (SAR), Macao (SAR), Japan, Republic of Korea, Taiwan.
Palau	3	14	No. Restrictions for PR China, Hong Kong (SAR), Macao (SAR).
PNG	5	14	No. Restrictions for PR China, Japan, Republic of Korea.
RMI	241	No time parameter	Yes
Samoa	247	No time parameter	Yes
Solomon Is	246	No time parameter	Yes
Tonga	227	No time parameter	Yes
Tuvalu	246	No time parameter	Yes
Vanuatu	246	No time parameter	Yes
NZ	243	14	Yes. No New Caledonia restrictions.
Australia	239	No time parameter	Yes

Table 13. Temporary migrants from selected PICTs in NZ as of 24 June 2020

	Total Stranded Temporary Migrant	RSE workers
Fiji	11,541	461
Kiribati	561	158
Nauru	23	5
PNG	581	131
Samoa	5150	2253
Solomon Islands	948	717
Tonga	4900	1610
Tuvalu	355	133
Vanuatu	4128	3845

8.2

REPATRIATION AS A PROXY MEASURE OF TEMPORARY MIGRATION

It has proven difficult to obtain information from PICTs on what COVID-19 restrictions have meant for the movements of temporary migrants since late March 2020.²⁰² Nevertheless, analysis of the information contained from other sources provides a snapshot of some of the stocks of Pacific temporary migrants that have been trapped in New Zealand by the border closures.

A summary issued by New Zealand's Ministry of Foreign Affairs in June 2020, provided information on the number of Pacific Islanders stranded in New Zealand from 10 source countries due to border closures, together with an indication of how many were RSE workers (Table 13).²⁰³ The RSE worker estimates understate the total number of RSE workers still in New Zealand in June 2020.²⁰⁴

The Australia Pacific Security College COVID-19 Pacific Island Response Matrix has information relating to repatriations and this provides another window on temporary flows between some of the reference PICTs. Table 14 sets out details of recorded repatriations/returns in this database as of 1 December 2020. Where details were provided, the numbers of persons repatriating or returning and visa type are set out. Not all PICTs had entries, which is represented by a blank space in the Table, but this is not an indication that nationals were not in reference PICTs as temporary migrants. If repatriation flights are indicated but the number of persons repatriated or to be repatriated is not specified, this is represented by '-'. In some instances, the visa type is specified, but not the number of visa holders being repatriated. In other instances, repatriation details were provided in relation to non-reference PICTs, such as the repatriation of Palauans from Guam and of Samoans from America Samoa.

Analysis of this valuable database reveals further information about temporary migration in the Pacific during the COVID-19 pandemic. Some key points are summarised below.

²⁰² A number of requests for information were made to government officials in several Pacific states. A reply from Fiji had been received at the time this report was drafted.

²⁰³ The MFAT summary was published by Summerfruit NZ, the industry body that represents the interests of approximately 280 apricot, cherry, nectarine, peach and plum growers nationwide, some of whom make use of RSE labour. Available <https://bit.ly/2SFSW0m>. Accessed 4 September 2020.

²⁰⁴ The MFAT summary understates the numbers of RSE workers still in New Zealand in June 2020. Data from MBIE show that there were 286 I-Kiribati seasonal workers in New Zealand around 20 March 2020 and none of them have been able to return to Kiribati since then.

Table 14. Indicative intra-PICT migration by volume/visa

Country of Origin	Country of Repatriation st= student visa; usp= unspecified visa; vm = visitor visa(missionary); wk= work visa									
	PNG	Solomon Islands	Vanuatu	Fiji	Kiribati	Samoa	Kiribati	RMI	NZ	AU
PNG		- usp	- usp	- usp						
Solomon Islands	3 usp		104 st	200 st	- usp	24 usp			- usp	175 usp
Vanuatu						6 st			119 wk	- usp
Tonga		- vm	- vm	- usp		- vm	- usp		141/140 usp/wk	
Samoa				- usp						
Kiribati				62 usp				20 usp		
Cook Islands									66 usp	

Table 15. Fiji visitor arrivals pre- and under COVID-19 travel restrictions

	2019	2020
April	76,813	678
June	85,862	413

First, entry restrictions have not remained static. For example, in October 2020, PNG allowed entry from Australia, New Zealand, the Solomon Islands, New Caledonia, Kiribati, Marshall Islands, Tonga, Tuvalu, Nauru, Vanuatu, the Cook Islands, Samoa, Palau and Niue subject to a seven-day on-arrival quarantine.²⁰⁵ There were few flights operating at the time, however, so the numbers travelling to PNG have been very limited.

Second, the impacts on the inflows of visitors have been dramatic in some instances. For example, as shown in Table 15, Fiji experienced dramatic declines in visitor numbers after the borders closed.

In French Polynesia, visitors continued to be allowed into the territory but in greater numbers, with some 7,500 mostly American or French tourists arriving between mid-July and mid-August 2020. Some 4,100 persons arrived within two weeks of a court ruling (in May 2020) that it was illegal to quarantine arrivals

(71% of whom were tourists) on premises determined by the government. However, in August 2020, the United States government began discouraging travel to French Polynesia, and in November 2020, French tourists were suspended from travelling there until further notice.²⁰⁶

Third, limited temporary labour migration in and out of some Pacific Island countries has continued during the pandemic. These flows of workers tend to fall within categories significant in the national context. In Papua New Guinea, for example, 175 workers from China were allowed to enter the country in August 2020 to work on critical infrastructure projects and a further 48 in the mining sector.²⁰⁷ In the Solomon Islands, 80 Chinese workers were allowed into the country to work on construction related to the 2023 Pacific games.²⁰⁸ In terms of flows out of the PICTs, small numbers of workers have been permitted to enter Australia from Vanuatu (in October 2020), and from Tonga, Solomon Islands and

²⁰⁵ p. 5.

²⁰⁶ pp. 72-73. See also, 'Court quashes French Polynesia Covid-19 quarantine rules' Radio New Zealand (17 May 2020) <https://bit.ly/3qDOVXq>. Accessed 23 November 2020.

²⁰⁷ pp. 5,12.

²⁰⁸ p. 25.

Fiji (in November 2020) to take part in the Seasonal Worker Programme and Pacific Labour Scheme.²⁰⁹

Fourth, “informal” cross-border movement continued in 2020 despite attempts to enforce strict border closures in Pacific countries.²¹⁰ In particular:

- Solomon Islands authorities on the porous western border [with Papua New Guinea] have said they will no longer be detaining border crossers due to a lack of quarantine facilities on the western border (08/09/2020).
- Two Bougainville fishermen who were caught fishing in Solomon Islands waters, near Nunungari Island, were allowed to return home after just three days in quarantine in Kulitanai, at the joint COVID-19 border post.
- The Solomon Islands government has taken steps to provide food to the Shortland Islands under the National Disaster Framework, following concerns of food shortages on the islands after the national government closed the border between PNG and the Solomon Islands due to COVID-19. People in the Shortland Islands have traditionally relied heavily upon trade in food and other goods with Bougainville.

Fifth, there is evidence that some humanitarian entry into New Caledonia was allowed from Wallis and Futuna and from Kiribati for the purposes of medical treatment.

8.3

THE USE OF IMMIGRATION MECHANISMS TO REGULATE ENTRY AND STAY DUE TO COVID-19

8.3.1 FIJI

An interview with a senior Fijian immigration official revealed that existing flexibilities within the country’s immigration law relating to the exercise of executive discretion and the granting of special purpose permits have been utilised to meet the needs of persons impacted by this health crisis. In particular, using discretionary powers under section 9(7) of the Immigration Act, responses in relation to COVID-19 have included the following:

- Persons holding visitor permits have been allowed to transition to a special purpose permit of up to six months, and for longer depending on the situation regarding closure of borders.
- Persons holding student permits have been allowed to transition to a special purpose permit. In the cases of students from Vanuatu and Tuvalu, bilateral agreements were made between the governments, as a result of which, the students were not required to pay the fee normally associated with such permits.
- Temporary work permit holders who faced problems returning due to border restrictions were able to obtain extensions to their work permits. Workers who had been laid off were able to vary their work permit to allow their employment to be transferred to another employer.²¹¹

²⁰⁹ pp. 39, 44.

²¹⁰ pp. 23-25.

²¹¹ Interview, 11 November 2020.

8.3.2 NEW ZEALAND

A large number of people on a variety of temporary visas were in New Zealand when borders closed on 19 March 2020. The departmental disclosure statement, prepared by the Ministry of Business Innovation and Employment (MBIE) to assist parliamentarians with their scrutiny of an Immigration Amendment Bill,²¹² indicated the following as of May 2020:

- As of 27 April 2020, there were approximately 350,000 temporary visa holders in New Zealand.
- 200,400 had work visas whose visa employment conditions may need to be varied as we respond to the effects of COVID-19.
- 74,800 were student visa holders whose visa conditions may need to be relaxed, to enable them to change their course or work extra hours until education providers are able to reopen.
- 56,500 held visitor visas, who may need to have the expiry date extended, if commercial flights out of New Zealand continue to be unavailable.
- Between 3 February (when border restrictions started) and 20 April 2020, Immigration New Zealand received over 63,000 offshore applications for temporary visas, of which approximately half were for visitor visas.

The Immigration Act 2009, as it was at the time of the border closure, contained some emergency powers, introduced in 2006, which were triggered once the Prime Minister issued an Epidemic Notice and Epidemic Management Notice on 24 March 2020.²¹³ In particular, valid visas held by people in New Zealand which would otherwise be due to expire, were automatically extended and would expire three months after the day on which the epidemic management notice expired. More

than 80,000 temporary visas were extended through the Epidemic Management Notice with information conveyed to migrants on INZ's website.²¹⁴ All were due to expire on 26 September 2020.

It was quickly recognised that the Act, being "predicated on individual applications managed on an individual basis" was, unlike the case in Fiji, not fit-for-purpose to deal with the scale of impact that the pandemic had on temporary migrants in the country, in that existing migration tools were insufficient. Accordingly, the Act was amended by means of the Immigration (COVID-19 Response) Amendment Bill.²¹⁵ The Act was amended by introducing eight time-limited powers²¹⁶ enabling the similar treatment of classes of visa holders, including:

- the power to impose, vary, or cancel conditions for classes of temporary entry class visa holders;
- the power to waive any regulatory requirements for certain classes of applications;
- the power to grant visas to individuals and classes of people in the absence of an application;
- the power to extend the expiry dates of visas for classes of people; and,
- the power to waive the requirement to obtain a transit visa in an individual case.

The Amendment Act came into force on 15 May 2020. Exercising these new class-based powers, on 4 September 2020, Immigration New Zealand announced that it was automatically extending current onshore visitor visas that were due to expire between 4 September and the end of October 2020 by five months. A new two-month COVID-19 short-term visitor visa was also introduced to allow temporary migrants stranded in New Zealand, who may not meet the requirements for another visa, more time to arrange their

²¹² <https://bit.ly/2TkpdLr>. Accessed 3 January 2021.

²¹³ Section 78 Immigration Act 2009. Under Clause 2 of the Epidemic Management Notice, the Immigration Act measure activated by the Notice came into effect of 2 April 2020.

²¹⁴ Available at: <https://bit.ly/3hvTpuS>. Last accessed 3 January 2020.

²¹⁵ Government Bill 243—1. Available at: <https://bit.ly/3wezzto>. Accessed 3 January 2021.

²¹⁶ All the powers will be automatically repealed 1 year after entering into force of the Amendment Act on 15 May 2020.

travel home. Employment while on this visa was not permitted.²¹⁷

In recognition that the pandemic may coincide with the impacts of a disaster, MBIE observed in its disclosure statement:

'... the power to grant an individual a visa in the absence of an application ... is not tied to managing COVID-19, to allow the Government the ability to manage the immigration status of individuals in other emergency situations that may arise during the COVID-19 outbreak (e.g. natural disasters that may result in individuals being hospitalised and unable to submit a visa application).'

In terms of humanitarian entry, in June 2020, New Zealand's Immigration Instructions were amended to clarify the rights to apply for temporary entry notwithstanding the closure of the border. The amendment clarified that, alongside essential health workers and their dependents, citizens of Samoa and Tonga making essential travel to New Zealand which has been bilaterally agreed between the countries' governments and "people coming to New Zealand for humanitarian reasons" may be granted entry permission.²¹⁸

It is also notable that concerns relating to the effects of COVID-19 in the country of origin are being raised by persons in their humanitarian appeals against deportation before the IPT. In no case has the existence of COVID-19 in a country of origin of itself been sufficient to establish the statutory threshold of 'exceptional circumstances of a humanitarian nature'. However, in some instances, the impact of COVID-19 on an appellant has been weighed alongside other vulnerabilities – such as being pregnant – and this standard has been considered to have been met.²¹⁹

8.3.3 AUSTRALIA

Similar to the response by the government in New Zealand, the Australian government has regularised the stay of temporary migrants caught by travel restrictions, although in all cases these migrants have been strongly encouraged to return home. Depending on the visa category, some visa holders have been able to apply for an extension of their existing visa, or a new visa under the same conditions.²²⁰ For example, Working Holiday Makers (WHM) visa holders cannot extend their visas, but can apply for a second and third WHM visa if they have completed 3-6 months of 'specific work' in Australia. From 19 August 2020, WHM visa holders were able to count critical COVID-19 work in the healthcare and medical sectors undertaken after 31 January 2020 as specified work to apply for a second or third WHM visa.²²¹ In other instances, visas cannot be extended, and the visa holder must apply under another visa class. This is the case for the seasonal workers from the Pacific who hold Seasonal Worker programme (SWP) (403) visas.²²²

The Australian government has introduced new measures for those working in critical sectors in response to COVID-19, including agriculture and food processing, and SWP workers have been switched onto the "Temporary Activity Visa (subclass 408) Australian Government Endorsed Agreement Event stream (COVID-19 Pandemic Event Visa)". To be eligible for this visa, the applicant has to demonstrate that they have no other visa options and are unable to depart Australia due to COVID-19 travel restrictions. It allows the person to remain in Australia for up to 12 months if working in a specified critical sector during COVID-19 such as in agriculture, food processing, healthcare, aged-care, disability-care and child-care, or for up to 3 months if not working in a critical sector.²²³ The website makes clear, however

²¹⁷ Immigration New Zealand 'Visitor visas extended and new COVID-19 short-term visitor visa' 4 September 2020. Available: <https://bit.ly/3jysr8z>. Accessed 3 January 2021.

²¹⁸ Amendment Circular No. 2020-20 (9 June 2020).

²¹⁹ See, for example, *Khushwinder* [2020] NZIPT 504884; *Ji (India)* [2020] NZIPT 504670 (health system overstretched due to COVID-19, pregnant women more susceptible to COVID-19). *CV (South Africa)* [2020] NZIPT 505000 (couple expecting child, South African public health system stretched, unemployment and economic hardship further increased, partner cannot accompany appellant as South African border closed to all but its nationals).

²²⁰ See <https://bit.ly/3jAkAHG>. Accessed 24 January 2021.

²²¹ <https://bit.ly/3xc4Yyc>. Accessed 24 January 2021.

²²² See <https://bit.ly/3hr2yoA>. Accessed 24 January 2021.

²²³ <https://bit.ly/3xezrvh>

that: “if you are a visitor and cannot support yourself, you should make arrangements to return home”.

8.4

IMPLICATIONS FOR HUMANITARIAN ENTRY AND STAY IN THE CONTEXT OF DISASTERS AND CLIMATE CHANGE

While specific information on responses by PICTs is limited, the detail which has been sourced in relation to Fiji, New Zealand and Australia allows some important points to be made for humanitarian entry and stay in the context of disasters and climate change.

First, a range of effective practices occurred in destination States which ensured that temporary visa holders whose lawful presence there was potentially negatively impacted by a public health emergency of significant scale were able to continue to stay lawfully. This is a welcome development in regional State practice, and one which can provide a basis for similar policy and practice development into the sphere of disasters and climate change.

Second, it is important that States are cognisant of the limits of processing capacities relative to volumes of temporary migrants. For example, Fiji was able to rely on existing migration management tools such as special purpose permits, because of the low number of affected temporary migrants relative to its capacity. In the case of New Zealand, however, the sheer volume of affected temporary migrants exceeded the existing processing capacity. Immigration New Zealand needed to quickly introduce new tools, specifically tailored to increase systemic capacity to manage the immigration impacts. Flexibility was key, not only to ensure processing efficiencies, but also for the protection of migrants by providing a mechanism by which they remained lawfully present in the country. These flexibilities included being able to extend visas by class

and without the need for an application in some instances. Each may be invaluable in national systems in the region with limited processing capacity.

Third, that the regularisation of entry and stay is only part of the response and that other support – particularly financial support – may also be needed.

8.5

FINANCIAL SUPPORT FOR TRAPPED TEMPORARY MIGRANTS

A report by IOM in 2020 has detailed how, across the Pacific, countries of origin and destination have introduced a range of support packages for stranded migrants, including in some instances, such as in New Zealand, measures that are aimed specifically at supporting migrants in temporary and seasonal work.²²⁴ For example, in the Marshall Islands a one-off payment of USD 500 was issued for each eligible citizen caught outside of country, Tuvalu has provided financial support to citizens studying overseas, and Kiribati has provided a one-off payment to seasonal workers trapped overseas.

In New Zealand, in addition to the use of immigration mechanisms to regularise the stay of temporary migrants caught by the border closures, the government has provided humanitarian assistance in the form of the Department of Internal Affairs’ (DIA) Foreign Nationals Support Programme - Visitor Care Manaaki Manuhiri. The programme, implemented on 1 July 2020 and delivered in association with the New Zealand Red Cross, provided NZ\$ 37.6 million in funding to support all classes of temporary visa holders in New Zealand experiencing serious hardship due to COVID-19.

Temporary visa holders were required to submit individual applications to DIA/Red Cross, and access to funding was available

²²⁴ International Organisation for Migration (IOM) *Rapid Assessment of the Socioeconomic Impacts of COVID-19 on Labour Mobility in the Pacific Region* (Geneva 2020) pp. 33-39.

to those who could: a) prove they were experiencing serious hardship; and, b) show that all other avenues of financial support had been exhausted. For eligible applicants, in-kind assistance was provided to cover costs such as rent, utility bills, food and household goods, and basic medical costs (e.g. over-the-counter medication costs). Support payments were initially made for up to four weeks and could be extended following further assessment by DIA/Red Cross.

In terms of eligibility requirements, an exception was made for seasonal workers under the RSE scheme. Any RSE worker who was employed for less than 30 hours per week, and without the ability to return home, was entitled to support. RSE workers were not required to exhaust their savings before being able to demonstrate they were in serious hardship. This exception was granted to RSE workers in recognition of the importance of savings and remittances to support workers' island-based families in the Pacific.

In another departure from other temporary visa holders, RSE workers were not required to make individual applications to DIA/Red Cross for support. Rather, the RSE employer applied on the workers' behalf. This resulted in some delays in uptake of funding for eligible workers, largely due to a lack of understanding among RSE employers of the eligibility requirements. However, by 20 November 2020, 5,374 RSE workers had been supported under the Foreign Nationals Support Programme, accounting for 56% of the total number of people (12,321) supported since 1 July 2020.²²⁵

The programme was a temporary and transitional mechanism that was initially available for three months, and was further extended until 30 November 2020. Following cessation of the DIA/Red Cross programme, another temporary scheme was implemented to provide a level of continued support.

Temporary migrants on a non-sponsored visa such as a visitor, student or certain categories of work visa, who could establish that they were taking "all reasonable steps to find other means of support, including looking for work; consular assistance; or support from family, friends and organisations in NZ or overseas", and were arranging return flights as soon as they could or as soon as they became available, were eligible to apply for an emergency benefit from 1 December 2020 to 28 February 2021.²²⁶

Australia has been the exception, offering minimal financial support to temporary visa holders caught in the country during the COVID-19 pandemic. As of 31 March 2020, there were approximately 1,125,200 temporary visa holders in Australia on employer-sponsored work, study, working holiday, temporary protection and bridging visas.²²⁷ In addition, as of 15 May 2020, there were approximately 7,400 workers from the Pacific and Timor Leste in the country under the Seasonal Worker Programme (6,940) and Pacific Labour Scheme (460).²²⁸

One of the few forms of support offered by the Australian government to temporary visa holders was the ability to access their superannuation. However, this decision was reversed on 1 July 2020. State governments, recognising the lack of federal government support and the precarious financial situations facing many temporary migrants, gradually established their own state-based relief packages. Australia's exclusion of temporary migrants from wage support programs and other forms of financial support has been strongly criticized.²²⁹

²²⁵ Foreign Nationals Support Programme – Visitor Care Manaaki Manuhiri Dashboard 21, Friday 20 November 2020.

²²⁶ <https://bit.ly/2TsUZpw>. Accessed 24 January 2021. Applications for and administration of this emergency benefit have not been straight-forward for everyone. Putting these sorts of measures in place after the event and in haste inevitably has led to some people missing out on support services.

²²⁷ See Australian Red Cross, *Locked down and left out?* (2021) at p.13. At: <https://bit.ly/3hsfz1b>. Berg, L. and Farbenblum, B. (2020) *As if We Weren't Humans: The Abandonment of Temporary Migrants in Australia during Covid-19*, Migrant Worker Justice Initiative, pp 13-14. However, their data only cover certain categories of temporary visa holders. There's no mention of Seasonal Worker Programme and Pacific Labour Scheme workers. They also haven't included those on visitor visas.

²²⁸ IOM 2020, p. 22

²²⁹ Berg & Farbenblum 2020, p.10.

8.6

SUPPORT FROM PACIFIC
DIASPORA

Although it is difficult to provide specific references as evidence of the support that resident Pacific populations have provided to temporary migrants from their ancestral island homes who have been unable to return because of border closures, their role in facilitating extended stay through humanitarian responses must not be ignored. Pacific churches, community groups, and extended families have played a major role in supporting temporary migrants. Discussions with Samoan, Tongan and I-Kiribati colleagues have emphasized the support provided by Pacific residents in New Zealand to what Hau'ofa (1993) termed their "homeland relatives"²³⁰ who have been trapped in New Zealand by the border closures. This support has taken many forms – provision of food and clothing, temporary accommodation, professional services (legal, medical, social) and, most importantly, what Māori call *manaakitanga* (hospitality) and *whanaungatanga* (relationship/kinship).

We began this report with a reference to Epele Hau'ofa's (1994) seminal essay "Our sea of islands". In the context of the support Pacific peoples have been providing to their stranded kin in New Zealand, and in any other migrant hubs on the Pacific rim and elsewhere in the world, it is worth noting his observations about the interdependence of the island-based and overseas-based Pacific populations:

'Ordinary Pacific people depend for their daily existence much, much more on themselves and their kinfolk wherever they may be, than on anyone's largess ... The funds and goods homes-abroad people send their homeland relatives [are earned] through hard physical toil in their new locations that need and pay for their labour. ...

On the other hand, islanders in their homelands are not parasites on their relatives abroad that misinterpreters of 'remittances'

would have us believe. Economists do not take account of the ancient practice of reciprocity, the core of all Oceanic cultures. They overlook the fact that for everything homelands relatives receive they reciprocate with goods they themselves produce, and they maintain ancestral roots and lands for everyone ... This is not dependence but interdependence, which is purportedly the essence of the global system.²³¹

²³⁰ Hau'ofa, Fn 1.

²³¹ Hau'ofa Sea of Islands, Fn 76, pp 12-13.

Conclusions and Recommendations

9

PART 5

9.1

CONCLUSIONS

1. THERE IS A STRONG CASE FOR A PROCESS LEADING TO REGIONAL HARMONISATION OF HUMANITARIAN ENTRY AND STAY POLICY AND PRACTICE.

The Pacific remains a 'Sea of Islands' linked by the intra-regional movement of the peoples to which it is home, on both a temporary and permanent basis. The foundational lines of the modern nation-state, which came to overlay the Pacific's vast ocean-scape as a by-product of the colonisation of the region, intersected and disrupted pre-colonisation mobility patterns, bringing with it 'national' immigration laws, policies and processes. Nevertheless, despite these changes, inter-island mobility remains a constant feature of Pacific life that has created a rich network of transnational Pacific communities. The data in Parts 2 and 4 make clear that thousands of Pacific people continue to be on temporary visas in many other countries in the region, on the Pacific rim and in many other parts of the world. Further, PICTs also attract human mobility through tourism with significant numbers from abroad visiting many parts of the region at any given time.

The case for harmonised regional policy/practice setting on humanitarian entry and stay in the context of disasters and climate change is strong in our view, and one which reaches into the Pacific's past, present and future.

From the past, it draws on Pacific custom and tradition, outlined in Part 1, that provides protection from harms arising from the vicissitudes of a seafaring life, itself anchored in reciprocity as a shared pan-Pacific value.

It also draws on the present. Part 3 of the report has charted to some extent how immigration laws and policies of a number of countries in the region feature both entry and stay arrangements responding to circumstances of particular humanitarian concern, such as entry for the purposes of seeking medical treatment, or for persons who have been victims of domestic violence in the

destination country or trafficked there. Their existence is shaped by the vast oceanic setting of the region, such as in the case of distressed entry provisions, hub-state identity (in the case of New Zealand), and in some instances, international law obligations of the country in question.

Finally, the case for harmonisation of policy and practice on humanitarian entry and stay responds to the fact the Pacific future will be one shaped by ongoing mobility – both between PICTs as well as into and out of the region – and by disasters, whether linked to climate change or not. People from other countries will continue to arrive on temporary visas in PICTs (including visitors entering under visa-waiver provisions). It also draws upon the regional tendency towards the modernisation of immigration systems, and strives to enhance the fit-for-purpose goal of this modernisation process.

We have shown that specific humanitarian entry and stay contexts already feature in the regional legislative/regulatory landscape. This suggests that a process led by the Governments of the Pacific, by which disasters and climate change are accepted as immigration-relevant humanitarian contexts, is the best regarded one for extending existing forms of State practice rather than a leap into the policy unknown. Moreover, such a process would be in step with developments in other regions and sub-regions as outlined in Part 1.

2. THERE ARE EXISTING POLICIES AND GOOD PRACTICES WHICH CAN BE ADAPTED OR REPLICATED FOR THIS PURPOSE.

Part 3 of the report has revealed that presently, no PICTs immigration system expressly provides for entry and/or stay on humanitarian grounds in the context of disasters and climate change. Nevertheless, there are existing flexibilities in some systems which can be developed or built upon to provide the core features of a regionally harmonised approach. New Zealand, while no longer providing for rights of entry on general humanitarian grounds, expressly provides for a humanitarian shield against removal in which exposure to

the impacts of disasters and climate change has already featured. Other immigration systems—such as in Vanuatu, the Solomon Islands, Kiribati, Nauru, Tonga, the Marshall Islands and Papua New Guinea – provide for a general right of appeal/review for persons who are at risk of being deported or removed from the country from which matters of humanitarian concern, such as the adverse impacts of disasters, are not precluded from being raised.

Further, migration tools not currently expressly configured to deal with disaster-related mobility but more broadly represented in the domestic immigration legislation across the region, could be extended to regulate entry and/or stay of disaster-affected persons. In our view, the most suitable existing tool is the ability to issue Limited or Special Purpose Visas, but Ministerial discretion to permit entry as an exception to normal visa requirements is also an important existing tool. The latter has the additional flexibility of permitting class-based action. Finally, the clause proposed in the new Immigration Bill currently making its way through Cook Islands' legislative process, expressly providing for the extension of visas in 'emergency situations,' is another important potential flexibility.

Albeit of limited scope, the review of immigration responses to the COVID-19 pandemic in Part 4 has demonstrated a willingness by States to use existing migration tools to provide at least a degree of legal protection to those impacted, and in the case of New Zealand, an awareness that new class-based tools were needed.

As to the form which such a framework should take, we are not of the view that this must necessarily involve an international agreement with binding commitments. While this is clearly one possible form, it may be that a 'softer', less binding form – such as a Guide or Guidelines to Effective Practices developed by Member Countries of the Regional Consultative Processes (RCPs) on Migration in Central, North and South America referenced in Part 1 – may be a more politically feasible and effective way forward, at least in the short-term. Such an approach, while anchored in the international law norm of cooperation and the associated principle of

common but differentiated responsibilities,²³² would promote the regionally consistent use of existing laws, policies and practices at the domestic level. This report has identified existing policy nodes and State practice which can inform the development of such a Guide, albeit one relevant for the specific context of the Pacific as a ‘Sea of Islands’.

3. POLICY AND PRACTICE HARMONISATION MUST RESULT IN TRANSPARENT, PREDICTABLE AND CERTAIN PATHWAYS FOR ENTRY AND STAY.

Given that many of the flexibilities currently existing domestically involve the exercise of administrative or Executive discretion, ensuring transparent and consistent application within national jurisdictions will be important. Therefore, alongside regional harmonisation at the policy and practice level, there is an accompanying need for predictability and certainty at the domestic operational level. This need is shared by both temporary migrants and immigration officials alike when confronted by the impacts of a disaster, particularly one at scale. The domestic immigration frameworks of Australia and New Zealand feature guidance to immigration officials relating to regulating the stay of disaster-affected persons. In our view, procedural guidance manuals such as Australia’s PAM3 offer greater predictability than more *ad hoc* approaches, such as the operational guidance notes issued by Immigration New Zealand following a disaster.

Further, in those PICTs which allow for the exercise of an Executive/Ministerial discretion to issue visas outside normal immigration rules, consideration should be given to issuing guidelines setting out the criteria relevant to the exercise of this discretion.

It will also be important that there be a review of existing processes to identify how applications can be expedited – for example, by the waiving of fees or prioritisation over other caseloads – to better ensure the rapid determination of entry and stay applications.²³³ While not limited to applications in the context of sudden-onset events, it will be in relation to these that the need to have expedited processing may be particularly acute.

Finally, that humanitarian entry and stay in another PICT may be possible must be brought to the attention of the regional public. Policy outcomes and/or practice development and associated guidance should be uploaded onto Government websites and included in relevant regional databases such as that of the Pacific Immigration Development Community.

4. IMMIGRATION-RELATED RESPONSES MAY NOT BE SUFFICIENT ON THEIR OWN.

Beyond immigration-status related responses, the immigration-related constraints outlined in Part 3 relating to the need for passports to enter lawfully and carrier sanctions will also need to be addressed. More broadly, the COVID-19 pandemic has highlighted the need for a regional framework to consider not just immigration-related factors, but the potential need for financial support pending eventual return home. The immigration status should in our view confer on the visa holder a sufficient legal status in the destination state to be able to access essential support services where required. It is likely that disasters of sufficient scale to cause the need for immigration related-responses to be activated under the framework we envisage, will mean that it may be some time before recovery-phase operations have been completed sufficiently to allow safe return home or for prior maintenance support to resume. Provision for some financial support for Pacific workers and students trapped overseas may need to

²³² See, discussion in Jane McAdam, Bruce Burson, Walter Kälin and Sanjula Weerasinghe (2016) *International Law and Sea-Level Rise: Forced Migration and Human Rights* Fridtjof Nansen Institute and Kaldor Centre for International Refugee Law, FNI Report 1/2016, p. 46; International Law Association, Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise, Annex to Res. 6/2018 (Aug. 2018), principle 4, and commentary in D. Vidas, D. Freestone & J. McAdam (eds.) (2018) *International Law and Sea Level Rise: Report of the International Law Association Committee on International Law and Sea Level Rise*, Leiden/Boston, Brill, pp. 52–57.

²³³ This was a notable feature in the immigration response to the Haitian earthquake by Canadian immigration authorities. See Weiss-Fagan, P., (2013) *Receiving Haitian Migrants in the Context of the 2010 Earthquake Discussion Paper*, Nansen Initiative, p.23. Available: http://www.nanseninitiative.org/wp-content/uploads/2015/03/DP_Receiving_Haitian_Migrants_in_the_Context_of_the_2010_earthquake.pdf

be considered. There also needs to be more explicit recognition of the role that Pacific diasporas in the Pacific, as well as in New Zealand, Australia, the United States and other countries, play in assisting people from their ancestral homes who cannot return because of the border closings.

5. THERE IS A NEED TO CLOSE DATA GAPS TO ENSURE THE EFFECTIVE IMPLEMENTATION OF HUMANITARIAN ENTRY AND STAY POLICY/PRACTICE.

We note there are challenges in quantifying the number of temporary migrants in many PICTs due to lags in collecting relevant data. The development of a regionally harmonised policy and practice must be accompanied by capacity building to equip PICTs with adequate human, financial and technical resources to create accurate and up-to-date data of temporary flows of migrants and short-term visitors into and out of their countries.

6. HUMANITARIAN ENTRY AND STAY POLICY/PRACTICE IS BUT ONE OF A RANGE OF TOOLS NECESSARY TO MEET THE HUMAN MOBILITY CHALLENGES OF DISASTERS AND CLIMATE CHANGE IN THE PACIFIC IN THE COMING DECADES.

It is in our view critical that ensuring regionally harmonised approaches for regulating entry and stay on humanitarian grounds, while important, is but one tool in the tool-box States in the Pacific will need to meet the human mobility challenges posed by climate change in coming decades. Policy and practices in relation to this particular form of mobility will need to be complemented by similar developments dealing with internal displacement, voluntary adaptive migration, immobility (both voluntary and involuntary) and planned relocation.²³⁴

²³⁴ The current joint-agency programme on Pacific Climate Change Migration and Human Security (PCCM-HS), led by IOM and funded by the United Nations Trust Fund on Human Security (UNTFHS) seeks to develop a 'human security based regional framework on climate change-related displacement, migration and planned relocation'. See, <https://www.unescap.org/announcement/pacific-climate-change-migration-and-human-security-pccm-hs> Accessed 14 March 2021. For a discussion of what aspects of this may look like in the Australian context, see Jane McAdam and Jonathan Pryke Climate Change, Disasters and Mobility: A Roadmap for Australian Action Kaldor Centre for International Refugee Law Policy Brief No 10 (October 2020). At: https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_brief%2010_Climate_Change.pdf. Accessed 10 March 2021. Also relevant in this context is IFRC's Disaster Law Programme, at <https://media.ifrc.org/ifrc/what-we-do/disaster-law/> Accessed 21 March 2021.

9.2

RECOMMENDATIONS

9.2.1 ARISING FROM THE MIGRATION MAPPING

❶ A key problem facing policymakers and researchers attempting to document migrant stocks by birthplace is a trend in Pacific censuses towards aggregating data on the birthplaces of their resident population in ways which make it very difficult to produce source-destination migration matrices of the kind that UN DESA and the World Bank have been developing and using to obtain reasonably consistent estimates of migrant stocks at a national scale.

It is recommended that in the 2020/2021 round of national censuses in the Pacific, Statistics Offices are encouraged to produce detailed tables showing the countries of birth for their populations.

It is appreciated that there are limits imposed by confidentiality requirements to the levels of disaggregation that can be achieved. But it is possible to disaggregate the data on birthplace much more than is done in many Pacific censuses without breaching confidentiality requirements.

❷ In their recent report on labour migration in the Pacific, the International Labour Organisation (ILO) (2019) made reference to regional interest in exploring opportunities for greater intra-Pacific mobility of skilled and semi-skilled labour.

It is recommended that all PICTs contribute information on labour migration into and out of their countries regularly to the ILO for inclusion in the ILOSTAT database, as well as to the SPC for inclusion in the Pacific Data Hub.

③ Because of the very significant contributions Pacific communities resident in the four major Pacific rim destinations for migrants make to support their island-based kin at times of disaster, their governments should be included in discussions about regional harmonisation of policies relating to entry and stay.

It is recommended that Australia, New Zealand, the United States of America and Canada are included in high-level consultations about regional harmonisation of policies relating to entry and stay.

9.2.2 ARISING FROM THE LEGISLATIVE/REGULATORY MAPPING

At the national level

④ It remains a problem that relevant immigration law, regulation and policy across the region is difficult to locate. It can be hard to find on government websites. There is no one single database which holds all relevant immigration legislation and regulations.

It is recommended that all PICTs take steps to ensure that immigration legislation and regulations are easily publicly accessible and contribute all relevant immigration-related legislation and regulations to the Pacific Immigration Development Community database, the University of the South Pacific (USP)'s Pacific Islands Legal Information Institute (PacLII) database and other relevant databases.

⑤ While there is potential flexibility within some immigration systems, where this exists, it is typically not currently expressly configured to take account of the impacts of disasters and climate change.

It is recommended that:

- those countries which currently have provision in their immigration legislation/regulations for the issue of limited or special visas for specified purposes consider extending this to enable the person to enter and/or stay until it is safe to return home following a disaster in the list of specified purposes.

- those countries which currently have provision to add new classes of visa, consider adding a visa to allow entry and/or stay of disaster-affected persons.
- all countries consider making express provision in their immigration legislation for the extension of existing temporary visas or transition to another visa type where the visa holder's ability to meet a current visa condition is compromised by the impact of a disaster.
- all countries publish guidance to immigration officers on:
 - how to exercise discretionary power to issue visas, including specifying the relevant criteria, in relation to persons seeking entry and/or stay in the context of disasters; and,
 - how existing immigration processes may need to be expedited.
- those countries which confer a discretion on specified Executive Office holders to grant entry and stay outside ordinary immigration requirements consider publishing guidelines on how that discretion will be exercised in the context of disasters and climate change.
- all countries ensure that relevant policy and guidance is accessible to the regional public by placing on government websites as well as on relevant regional databases such as the Pacific Immigration Development Community.

At the bilateral level

⑥ Both Tropical Cyclone Pam and the COVID-19 pandemic have revealed that, at scale, disasters may impact upon countries of origin and destination of migrants. Even if temporary migrants are able to maintain a lawful immigration status, they may require ongoing financial and other support.

It is recommended that where there are temporary migration flows between PICTs, the countries of origin, transit and destination enter into bilateral (or trilateral as required) discussions about providing necessary financial and social support to temporary visa holders impacted by a disaster.

At the regional level

7 There are existing policies and practices within the region which are amenable to replication and which provide a basis for beginning a process of regional harmonisation. There are also good practices relating to humanitarian entry and stay in other regions which can be brought into the process of regional harmonisation.

It is recommended that with a view to the development of a Guide to Effective Practices, the Platform on Disaster Displacement, together with relevant United Nations agencies and regional partners:

- *convene a workshop (or series of workshops as required) of senior immigration officials from each PICT, Australia and New Zealand, plus Canada and the United States of America as key Pacific Island Forum dialogue partners; and,*
- *facilitate a dialogue between senior immigration officials in the Pacific with their counterparts in the Caribbean to exchange best practice ideas and lessons learned.*

At the global level

It is important that policy and practice developments in PICTs are included into global processes and fora relating to migration governance and management and climate change.

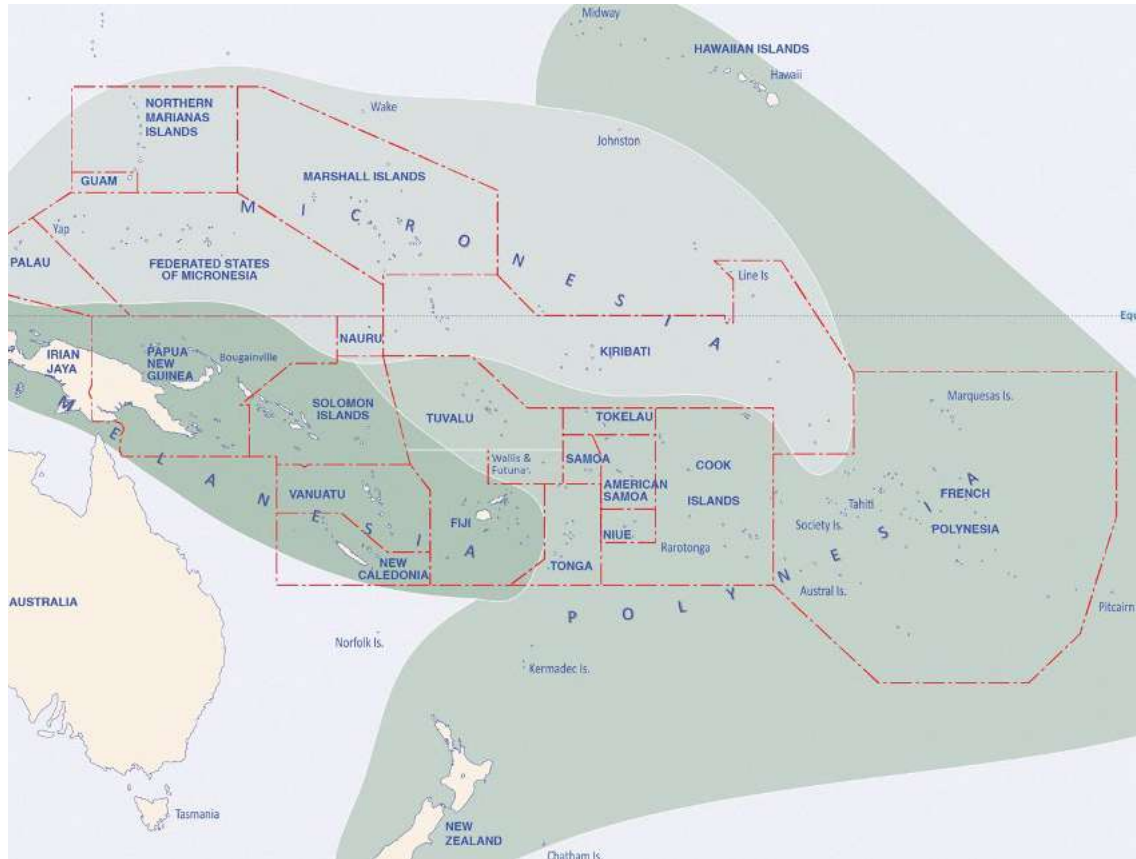
It is recommended that all countries feed policy and practice developments:

- *into the Asia-Pacific Regional Review of Implementation of the Global Compact for Safe, Orderly and Regular Migration; and,*
- *into Activity 7 ‘Raise awareness on integrating displacement in the context of climate change into national laws, policies and strategies, including on disaster response, building on mappings and lessons learned’ of the 2019 – 2021 Plan of Action of the Task Force on Displacement – at <https://bit.ly/3jtwLWU>*

APPENDICES

APPENDIX 1:

MAP OF PACIFIC SUB-REGIONS



IN THE SAME CANOE

APPENDICES

APPENDIX 2:

MIGRANT DATA SOURCES

New estimates of in-migrant and out-migrant stocks in and from Pacific countries, by sub-region, have been derived drawing on data from the United Nations Department of Economic and Social Affairs (UN DESA) and World Bank sources, supplemented by census and other data where this has been available. In all sub-regions, mixes of UN DESA and World Bank data have been used so the data matrices produced for this report do not match those in either of these sources.

The data on migrant stocks produced by UN DESA and the World Bank are readily available to anyone wishing to access them. The URLs for these two data sources are:

UN DESA <https://bit.ly/2TrOVO1>

World Bank <https://bit.ly/2SGUJTo>

These databases are up-dated regularly and, while they contain some anomalies, they are the best available data on migrant stocks at a national level. The UN DESA database covers a more complete list of countries than the World Bank database, which is restricted to members of the organisation, but the World Bank database contains more comprehensive data on some sources of migrants (e.g. China) than the UN DESA database.

When selecting estimates from these and other sources, the higher ones have been preferred unless there are obvious errors such as the entries in the UN DESA migrant stock matrix for 241,622 PNG-born resident in Northern America, or the 927 Tongans in Guinea. There has also been a preference for recent census data over estimates in the UN DESA and World Bank migrant stock matrices. This has led to some quite significant differences in estimates of in- and out-migrant stocks in some sub-regions.

URLs for the additional sources of data on migrant stocks by birthplace, which relate to specific countries, and which are accessible on line, are listed below.

Australia <https://bit.ly/3hdCC0Z>

Canada <https://bit.ly/3Ak67Wg>

Cook Islands <https://bit.ly/3hbtGZN>

Kiribati <https://bit.ly/3wdBqi4>

New Zealand: <https://bit.ly/2UcZ1IT>

Niue <https://bit.ly/367EqCf>

Tokelau <https://bit.ly/3dwRgy3>

Samoa <https://bit.ly/3wbJUqd>

Solomon Islands <https://bit.ly/3AjVVgz>

United States of America

<https://bit.ly/2TrQmvT>

<https://bit.ly/2TthdHV>

<https://bit.ly/3huznkE>

Vanuatu <https://bit.ly/3wbVS3c>

Consistent and comparable data on contemporary temporary migration flows between countries in the Pacific or between PICTs and countries in other parts of the world are not readily available. The ILO's extensive ILOSTAT database, which can be accessed at <https://ilostat.ilo.org>, contains substantial .csv data files on most PICTS. However, their readily accessible tables in Excel contain information on a small range of countries, often including Fiji. These can be accessed at <https://bit.ly/3dDKO8x>.

All governments in the Pacific collect information from people entering or leaving their countries legally but these data are not always processed in a timely fashion or presented in a consistent way. Much of the basic data on short-term arrivals can be obtained from the Pacific Community's Pacific Data Hub (<https://pacificdata.org>), but much of the data filed with the Hub cannot be accessed directly – access needs to be requested.

In the absence of consistent data on temporary labour migration, migrant stock data of the kind produced by UN DESA and the World Bank can serve a useful purpose of indicating where there are resident populations who might be able to assist people from their country of birth who are working, studying or visiting another country on a temporary visa at a time of disaster. For example, Pacific-born migrants, resident in New Zealand and Australia have played a major role in assisting seasonal workers from their country of birth to adjust to a sustained change in circumstance and fortune while they have been unable to return home because of border closures in response to the pandemic.



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