

Submission to Senate Standing Committees on Legal and Constitutional Affairs

MIGRATION AMENDMENT (EVACUATION TO SAFETY)
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Introduction

The Refugee Advice and Case Work Service (**RACS**) provides critical free legal advice, assistance and representation to financially disadvantaged and vulnerable people seeking asylum in Australia. We advocate for systemic law reform and policy that treats refugees with justice, dignity, and respect.

RACS acts for and assists refugees and people seeking asylum in immigration detention centres, alternative places of detention, community detention and in the Australian community. Our services include supporting people to apply for protection visas, re-apply for temporary visas, apply for work rights and permission to travel, apply for family reunion, lodge appeals and complaints, assist with access to citizenship and challenging government decisions to detain a person.

RACS welcomes this introduction of legislation that will compel the Australian government to transfer all people subject to offshore processing still in Nauru or Papua New Guinea to Australia.

Our submission covers the following issues:

1. Offshore processing
 - a. Background to Australia's use of offshore processing
 - b. The conflict between offshore processing and Australia's international obligations
 - c. Negative impacts of offshore processing on people seeking asylum

2. Resettlement options
 - a. Lack of resettlement options for people subject to offshore processing
 - b. The need for relief to people currently in offshore processing centres
 - c. Transfer of people remaining in offshore processing centres to Australia

1. Offshore processing

A. Background to Australia's use of offshore processing

Since August 2012, the Australian Government has been forcibly transferring asylum seekers arriving in Australia by boat without valid visas to 'offshore' or 'third country' processing either in the Republic of Nauru (Nauru) or on Manus Island in Papua New Guinea (PNG).

This offshore processing policy also applies to people who applied for *"asylum immediately upon arrival in Australia or had characteristics warranting special consideration (such as being an unaccompanied minor, a survivor of torture and trauma, or a victim of trafficking; or having special health needs requiring treatment in Australia, or immediate family already living in Australia)."*¹

Since July 2013, *"successive Australian governments have consistently stated that no refugees will ever be resettled from Nauru or PNG in Australia"*.²

B. The conflict between offshore processing and Australia's international obligations

RACS submits that Australia's offshore processing is a cruel, harmful and inhumane policy that is contrary to Australia's international obligations. Australia is a party to the *Refugee Convention*, which gives particular rights to people seeking asylum and people found to be refugees.³ The *Refugee Convention* is grounded in Article 14 of the *Universal Declaration of Human Rights*, which declares the right for a person to seek asylum from persecution in other countries.⁴

Further, Australia has signed up to a number of other human rights treaties, including the *International Covenant on Civil and Political Rights* ('ICCPR'), the *Convention on the Rights of the Child* ('CRC'), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT') and the *International Covenant on Economic Social and Cultural Rights* ('ICESCR'), which impose on Australia further obligations in relation to treatment of people seeking asylum in Australia.⁵

*"It is true Australia has not fully implemented all of its convention obligations into Australian domestic law, and even without reference to offshore processing, it would be a far stretch to say Australia is fully complying with its international obligations to onshore asylum seekers and refugees."*⁶

¹ Kaldor Centre for International Refugee Law, 2021, Offshore processing: an overview, <<https://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-overview>>.

² Ibid.

³ Refugees Convention, 189 UNTS 137; Protocol Relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

⁴ Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 14.

⁵ International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 172 UNTS 1976 (entered into force 23 March 1976); Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3, (entered into force 3 January 1976).

⁶ Lisa Jane Archibold, QUT Law Review, November 2015, 'Offshore processing of asylum seekers - is Australia complying with its international legal obligations?' <file:///C:/Users/mratnam/Downloads/Offshore_Processing_of_Asylum_Seekers_-_Is_Austral.pdf>.

Non-refoulement

The *Refugees Convention*, *CAT*, *CRC* and *ICCPR* articulate the customary international legal principle of *non-refoulement*. The principle of non-refoulement essentially ensures that people are not forced to go back to their country of origin or to any other place where they would face threats to their life or liberty.⁷ RACS submits that the practice of offshore processing directly conflicts with Australia's non-refoulement obligations as a party under the aforementioned international instruments. By expelling asylum seekers to Nauru & PNG, where many have experienced real threats to their life and liberty, with very few options for resettlement, the Australian government is breaching its non-refoulement obligations.

CRC

The CRC applies to children who have arrived by boat. "*The overarching right under the CRC is that organisations should be treating the best interests of the child as the paramount consideration when making any decisions about them.*"⁸ *There is also the right that children should not be separated from their parents unless it is in their best interest.*"⁹

CAT

The main provision in this convention imposes obligations on states to prevent any act of torture in any territory under its jurisdiction.¹⁰

ICCPR

The *ICCPR* contains "*important rights relevant to people arriving in Australia to seek asylum including the right to not be subject to arbitrary arrest or detention,*"¹¹ *and if they are deprived of liberty, to be treated with humanity and respect for the inherent dignity of the human person.*"¹²

Refugees Convention

Article 31 prevents state parties from punishing people who are forced to seek asylum undocumented or through unlawful entry.¹³ Punishing those who have arrived in Australia by boat, is a direct contravention of this Article.

Continued mistreatment of refugees has further diminished Australia's standing in the international community and damaged our reputation as a welcoming and humane nation. This is a concern particularly as our failed asylum seeker policies are receiving more widespread attention as governments of countries such as the UK look to emulate them. Australia's approach to refugee policy, particularly

⁷ Lisa Jane Archibold, QUT Law Review, November 2015, 'Offshore processing of asylum seekers - is Australia complying with its international legal obligations?' p 141. <file:///C:/Users/mratnam/Downloads/Offshore_Processing_of_Asylum_Seekers_-_Is_Austral.pdf>.

⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3.

⁹ *Ibid* art 9; Lisa Jane Archibold, QUT Law Review, November 2015, 'Offshore processing of asylum seekers - is Australia complying with its international legal obligations?' p 142.

¹⁰ Lisa Jane Archibold, QUT Law Review, November 2015, 'Offshore processing of asylum seekers - is Australia complying with its international legal obligations?' p 142.

¹¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 172 UNTS 1976 (entered into force 23 March 1976) art 9.

¹² *Ibid* art 10(1).

¹³ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) Article 31.

offshore detention, has been publicly criticised by groups including UN bodies and non-governmental organisations and highlighted by international media¹⁴.

In 2014, then-UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein called Australia out by name in his first address to the UN Human Rights Council, stating:

"Australia's policy of offshore processing for people seeking asylum arriving by sea, and its interception and turning back of vessels, is leading to a chain of human rights violations, including arbitrary detention and possible torture following return to home countries."¹⁵

In July 2017, UN High Commissioner for Refugees Filippo Grandi lamented the contrast between Australia's "proud humanitarian tradition" and its offshore processing policy, stating that:

"There is a fundamental contradiction in saving people at sea, only to mistreat and neglect them on land."¹⁶

In 2022, the UN Committee against Torture issued findings on countries including Australia, and noted its concerns with parts of the *Migration Act 1958* and Australia's detention policies, including "Operation Sovereign Borders", for unauthorised arrivals, including children. The Committee called for the repeal of:

"...legal provisions establishing the mandatory and indefinite detention of persons entering the country irregularly, and ensure that detention is only applied as a last resort and for the shortest possible period of time, and guarantee that children and families with children are not detained solely because of their immigration status."¹⁷

More recently, Australia's treatment of refugees has been strongly criticised by those who seek to warn the UK government against adopting similar policies, primarily to stop Channel crossing, through its Nationality and Borders Bill.¹⁸ Coordinated by charity Detention Action, a letter from detainees added to calls from lawyers, politicians, and doctors "who witnessed Australia's offshore asylum policies and temporary visa regime play out" and who believe the UK would risk "international embarrassment" if it pursued similar immigration policies.¹⁹ Australia's policies were also infamously revealed to have enthused former US President Donald Trump, and Denmark has recently approved its own offshore processing policy.²⁰ The saga surrounding tennis star Novak Djokovic's detention in a Melbourne hotel

¹⁴ See, e.g., Lisa Pryor, New York Times, 16 November 2017, *Australia's Refugee Policy of Cruelty*,

<<https://www.nytimes.com/2017/11/16/opinion/australia-refugees-manus-island.html?searchResultPosition=2>>; BBC, 18 November 2016, *Australia asylum: UN criticises 'cruel' conditions on Nauru*, <<https://www.bbc.com/news/world-australia-38022204>>.

¹⁵ Refugee Council of Australia, 3 September 2017, *Rebuilding our damaged reputation: A strategy for Australian leadership on refugee protection*, <<https://www.refugeecouncil.org.au/unisa-2017/3/>>.

¹⁶ Filippo Grandi, UNHCR, 24 July 2017, *UNHCR chief Filippo Grandi calls on Australia to end harmful practice of offshore processing*, <<https://www.unhcr.org/en-au/news/press/2017/7/597217484/unhcr-chief-filippo-grandi-calls-australia-end-harmful-practice-offshore.html>>.

¹⁷ Office of the United Nations High Commissioner for Human Rights, 25 November 2022, *Un Committee against Torture publishes findings on Australia, Chad, El Salvador, Malawi, Nicaragua, Somalia and Uganda*, <<https://www.ohchr.org/en/press-releases/2022/11/un-committee-against-torture-publishes-findings-australia-chad-el-salvador>>; UN Committee against Torture, *Concluding observations on the sixth periodic report of Australia*, 5 December 2022, CAT/C/AUS/CO/6.

¹⁸ Guy Aitchison, Open Democracy, 23 May 2022, *Barbaric system: Australia's offshore victims warn UK against Rwanda plan*, <<https://www.opendemocracy.net/en/uk-rwanda-plan-australia-offshore-detention-centre-priti-patel/>>; Andrew Sparrow, The Guardian, 17 April 2022, *Home Office chief questions whether Rwanda plan will deter asylum seekers*, <<https://www.theguardian.com/uk-news/2022/apr/17/home-office-chief-doubts-sending-asylum-seekers-to-rwanda-will-be-a-deterrent>>.

¹⁹ Diane Taylor, Guardian, 6 December 2021, *UK warned not to replicate Australia's immigration detention centres*, <<https://www.theguardian.com/uk-news/2021/dec/05/uk-warned-not-to-replicate-australias-immigration-detention-centres>>; May Bulman, Independent, 4 July 2021, *UK warned not to replicate Australia's 'dark and bloody chapter' on asylum*, <<https://www.independent.co.uk/news/uk/home-news/uk-warned-not-to-replicate-australia-s-dark-and-bloody-chapter-on-asylum-b1872277.html>>.

²⁰ Osman Faruqi, Sydney Morning Herald, 16 June 2022, *Australia's descent into cruelty inspires other nations*, <<https://www.smh.com.au/politics/federal/australia-s-descent-into-cruelty-inspires-other-nations-20220615-p5atti.html>>.

in 2021 also attracted embarrassing attention on Australia's years-long inhumane detention of refugees and asylum seekers in that very same hotel, as well as across the nation.²¹

Finally, Australia has garnered consistent criticism from NGOs for its failures in the asylum seeker and refugee policy arena. For example, in 2021, after Australia rejected recommendations from UN member countries to change its policies regarding detention and offshore processing, Human Rights Watch researcher Sophie McNeill called out Australia as painting "...a picture of itself for the global stage that doesn't match the reality at home", with claims of commitment to the human rights of refugees and asylum seekers "absurd" when considered against its own policies.

Continuing to pursue this type of hypocritical approach to the protection of human rights will further damage Australia's reputation on the world stage - as a human rights leader and as an open, welcoming place for migrants, particularly if it becomes known as the blueprint for other countries' similar policies in coming years.

C. Dire impacts of offshore processing on people seeking asylum

RACS submits that offshore processing has significant and long-lasting negative impacts on people seeking asylum including on their mental health. These negative impacts extend to the mental and physical wellbeing of those forcibly subjected to offshore processing.

In December 2018, Médecins Sans Frontières (MSF) reported on the tragic mental health consequences of offshore processing on Nauru.

MSF reported the following mental health statistics among the 208 refugees and asylum seekers they treated in Nauru:²²

- 65% felt that they had no control over their lives and were significantly more likely to be suicidal or diagnosed with major psychiatric conditions;
- 60% experienced suicidal thoughts;
- 47% had psychosis;
- 37% had been separated from a partner, child or other close family member in due to offshore processing;
- 30% attempted suicide, including children;
- 62% were diagnosed with severe or moderate depression;
- 25% were diagnosed with anxiety disorder; and
- 18% were diagnosed with post-traumatic stress disorder.

²¹ Zoe Osborne, Al Jazeera, 8 January 2022, 'Speak up': Australia refugees urge Djokovic to advocate for them, <<https://www.aljazeera.com/news/2022/1/8/speak-up-australia-refugees-urge-djokovic-to-advocate-for-them>>; Sophie McNeill, Human Rights Watch, 10 January 2022, Djokovic Case Highlights Australia's Cruel Immigration Policies, <<https://www.hrw.org/news/2022/01/10/djokovic-case-highlights-australias-cruel-immigration-policies#:~:text=Since%20July%202013%20the%20Australian,cruel%20policies%20has%20been%20huge>>.

²² Médecins Sans Frontières, December 2018, *Infinite Despair: The tragic mental health consequences of offshore processing on Nauru* 25.

Several reports have been made by the Australian Parliament, by civil society organisations and the UN documenting sexual and other forms of abuse, of seriously deficient medical treatment and appalling conditions amounting to cruel, inhuman or degrading treatment.²³

"27% of the Nauruan patient group appeared to have been neglected in terms of medical care, mainly due to a lack of available mental healthcare prior to MSF's arrival. In some cases, the lack of medical care was due to the physical health needs of patients with severe psychiatric conditions being disregarded. This indicates that access to quality healthcare was a problem in Nauru, even for the local community."²⁴

In October 2020, the Refugee Council of Australia reported on the negative impacts of offshore detention on asylum seekers.

"Australia's policy has traumatised children so much that they are giving up eating and trying to kill themselves. Australian courts are increasingly forced to step in so that people can get the medical treatment they urgently need, as the Australian Government repeatedly ignores doctors' advice and does everything it can to avoid people being transferred to Australia, including sending them to Taiwan and Papua New Guinea. It has even tried to coerce a 63-year-old man dying of lung cancer to die in Taiwan, and to send a woman to Papua New Guinea to terminate her pregnancy, despite it being illegal there."²⁵

"It has also separated around 35 people from their families, between Nauru, Papua New Guinea and Australia. There are fathers who have never held their babies, mothers who have had to leave behind their children on Nauru. By insisting that family members stay behind when others need medical treatment, the Australian Government puts people's lives at risk. In one case, by the time the Australian Government agreed to let a young boy with traumatic withdrawal syndrome be transferred with his family, he was 36 kilograms and could not even stand. Every family member of every child (except for parent staying in hospital) has been detained on arrival."²⁶

Ultimately, there has been 14 deaths as a result of offshore processing since 2013.

2. Lack of resettlement options for people subject to offshore processing

RACS submits that the current Australian offshore processing policy lacks viable resettlement options for all asylum seekers. Australia's resettlement offerings has insufficient places for people impacted by this policy.²⁷ Further the protracted delays have caused significant hurdles for individuals to engage in such processes.

²³ Refugee Council of Australia, 4 October 2020, *Australia's man-made crisis on Nauru* < <https://www.refugeecouncil.org.au/nauru-report/>>.

²⁴ Médecins Sans Frontières, December 2018, *Infinite Despair: The tragic mental health consequences of offshore processing on Nauru* 25.

²⁵ Refugee Council of Australia, 4 October 2020, *Australia's man-made crisis on Nauru* < <https://www.refugeecouncil.org.au/nauru-report/>>.

²⁶ Refugee Council of Australia, 4 October 2020, *Australia's man-made crisis on Nauru* < <https://www.refugeecouncil.org.au/nauru-report/>>.

²⁷ Natasha Yaqoub, *The Conversation*, 2022, *Aus-NZ refugee deal is a bandage on a failed policy. It's time to end offshore processing*, < <https://theconversation.com/aus-nz-refugee-deal-is-a-bandage-on-a-failed-policy-its-time-to-end-offshore-processing-180241>>.

In 2016, Human Rights Watch (HRW) interviewed several of the asylum seekers subject to offshore processing on Nauru.²⁸ Those interviewed overwhelmingly reported that *"when they were sent to Nauru, immigration authorities told them they were being transferred for "processing" and would be then resettled in a third country."*²⁹ Further, they reported that the Australian government's *"description of the time they would be held on Nauru has changed frequently since August 2013 – with every new version of the timetable accompanied by a denial that Australian officials had ever announced a different version."*³⁰

HRW reports even asylum seekers who have received positive refugee status determinations are *"unable to receive any clear answers from Nauruan or Australian authorities."*³¹ RACS submits that those facing offshore processing *"have no way of leaving the island, even if they have financial means to do so, and even when they have been issued 'travel documents'".*³²

One asylum seeker on Nauru said:

*"Even if they had said when I came to Nauru that it would be 10 years, no problem. But they said it would be a maximum of five years and then we would go to another country. Which country, I don't know. But after two years in Nauru, the government said 10 years here or Cambodia or return home."*³³

Another asylum seeker on Nauru said:

*"Refugee status in Nauru is not permanent. The government has only offered us temporary resettlement. They give us a travel document which is useless, because we cannot leave here. We are still in prison. We cannot leave this island."*³⁴

A. The need for relief to people currently in offshore processing centres

RACS submits that there is a dire need for relief to be provided to people currently in offshore processing centres run by the Australian government. This need is attributed to the following:

- The cruelty of offshore processing;

²⁸ Human Rights Watch, 2016, *Australia: Appalling Abuse Neglect, Neglect of Refugees on Nauru*, <<https://www.hrw.org/news/2016/08/02/australia-appalling-abuse-neglect-refugees-nauru>>, Accessed on 24 February 2023.

²⁹ Human Rights Watch, 2016, *Australia: Appalling Abuse Neglect, Neglect of Refugees on Nauru*, <<https://www.hrw.org/news/2016/08/02/australia-appalling-abuse-neglect-refugees-nauru>>, Accessed on 24 February 2023.

³⁰ Human Rights Watch, 2016, *Australia: Appalling Abuse Neglect, Neglect of Refugees on Nauru*, <<https://www.hrw.org/news/2016/08/02/australia-appalling-abuse-neglect-refugees-nauru>>, Accessed on 24 February 2023.

³¹ Human Rights Watch, 2016, *Australia: Appalling Abuse Neglect, Neglect of Refugees on Nauru*, <<https://www.hrw.org/news/2016/08/02/australia-appalling-abuse-neglect-refugees-nauru>>, Accessed on 24 February 2023.

³² Human Rights Watch, 2016, *Australia: Appalling Abuse Neglect, Neglect of Refugees on Nauru*, <<https://www.hrw.org/news/2016/08/02/australia-appalling-abuse-neglect-refugees-nauru>>, Accessed on 24 February 2023.

³³ Human Rights Watch, 2016, *Australia: Appalling Abuse Neglect, Neglect of Refugees on Nauru*, <<https://www.hrw.org/news/2016/08/02/australia-appalling-abuse-neglect-refugees-nauru>>, Accessed on 24 February 2023.

³⁴ Human Rights Watch, 2016, *Australia: Appalling Abuse Neglect, Neglect of Refugees on Nauru*, <<https://www.hrw.org/news/2016/08/02/australia-appalling-abuse-neglect-refugees-nauru>>, Accessed on 24 February 2023.

- The conflict between offshore processing policy and Australia's human rights obligations;
- The negative impact of offshore processing on asylum seekers; and
- The lack of resettlement options for those subject to offshore processing.

RACS supports the efforts made in this Bill to transfer those asylum seekers held in offshore processing centres to Australia.

B. Transfer of people remaining in offshore processing centres to Australia

RACS notes that the proposed Bill and the Explanatory Memorandum discuss where asylum seekers should be held once transferred to Australia. The Explanatory Memorandum suggests that all people transferred into Australia under the Bill will be placed into community detention with the Minister retaining powers to later grant bridging visas.

RACS submits that such assessments should be made on a case-by-case basis to ensure people are able to access the appropriate levels of support as necessary.

3. Conclusion & recommendations

Offshore processing of people seeking safety is in breach of Australia's international obligation, it is a cruel and inhumane response to people seeking safety and it has dire negative impacts on the mental and physical health of people subject to it. People currently in Australia's offshore processing countries should be evacuated to safety and provided with a genuine, realistic and imminent pathway for resettlement. As such the Committee ought to recommend the the Bill be passed.

However, to ensure that people seeking asylum are not subject to the cruelty of offshore processing, RACS recommends further legislations to repeal offshore processing in its entirety, including the provision of safe, permanent resettlement in a 3rd country if sought, otherwise afforded such safety in Australia.

Australia's Offshore Processing regime has been an abject failure of policy. It has failed to process nor resettle people expeditiously, at an insurmountable financial cost, and most critically has left those impacted by this system in perpetual trauma and suffering.

This policy must come to an end, but most urgently, those experiencing this policy at the most critical point, still offshore must have access to safety and healing in Australia.

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