Externalisation of Migration Governance: New Trends and Specific Aspects

Submission to the Special Rapporteur on the human rights of migrants

9 January 2026

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Australian Human Rights Commission

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Our vision is an Australian society where human rights are respected, promoted and protected and where every person is equal in dignity and rights.

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- Access to justice: We help people to resolve complaints of discrimination and human rights breaches through our investigation and conciliation services.
- Fairer laws, policies and practices: We review existing and proposed laws, policies and practices and provide expert advice on how they can better protect people's human rights. We help organisations to protect human rights in their work. We publish reports on human rights problems and how to fix them.
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Overview

1. This submission is made by the Australian Human Rights Commission (the Commission) to the United Nations Special Rapporteur on the human rights of migrants for his next report to the Human Rights Council on the 'Externalisation of migration governance: new trends and specific aspects'.
2. This submission provides a short update to the Commission's submission of 24 June 2025 to the Special Rapporteur for his report on 'Externalization of migration governance and its effect on the human rights of migrants' presented at the 80th session of the General Assembly.[1]
3. The update focuses on developments in Australia since 24 June 2025, particularly the new third country reception arrangement that Australia has entered into with Nauru through a memorandum of understanding and the commencement of removals from Australia to Nauru. It also addresses the passage of new legislation that strips procedural fairness for certain migrants prior to a decision being made regarding their deportation to a third country.
4. The submission reiterates the Commission's serious and growing concerns about the impact of these practices and policies on the human rights of migrants. It underscores the urgent need for transparency and independent monitoring and oversight to ensure accountability, uphold Australia's international human rights obligations and prevent harm to the people affected by these arrangements.
5. The Commission is Australia's National Human Rights Institution, with recognised independent status and roles in UN human rights fora.
6. The Commission undertakes a range of policy development and research tasks that promote compliance with Australia's human rights obligations. The Commission also investigates and conciliates complaints of unlawful discrimination and breaches of human rights. Our refugee and migration work includes:
    - investigating complaints from people in immigration detention (including offshore) about possible breaches of their human rights
    - inspecting immigration detention centres and reporting our findings and recommendations
    - running national inquiries to examine human rights issues
    - publishing guidelines that set minimum standards to help protect human rights and ensure the humane treatment of people in detention.[2]

Recommendations

7. The Commission recommends that the Special Rapporteur include the following recommendations in his forthcoming report:

Recommendations

1. Migration laws and policies should uphold human rights and international standards, ensuring transparency, independent oversight and monitoring, and robust procedural fairness safeguards.
2. States should avoid outsourcing their international responsibilities, particularly to countries with limited resources and capacity to provide effective protection. Instead, they should invest in community-based programs that promote safety, support integration and rehabilitation, and uphold human rights and dignity.
3. When entering into migration agreements with third countries that do not amount to outsourcing, States should assess and mitigate harmful impacts on the partner country, ensuring consistent promotion of transparency, accountability and the rule of law at home and abroad.

1 Third country reception arrangement with Nauru

This section discusses the new memorandum of understanding between Australia and Nauru and commencement of removals to Nauru, specifically:

- serious human rights risks, including *refoulement,* lack of access to adequate healthcare and family separation
- inadequate safeguards regarding treatment and safety
- lack of transparency and independent oversight.

This section also emphasises Australia's ongoing responsibilities towards people transferred offshore.

New memorandum of understanding and first removals

8. Australia's refugee policy has entered a troubling new chapter in response to recent High Court of Australia decisions. This includes the landmark 2023 decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*, which ruled that indefinite detention was unconstitutional and imposed important limits on detention powers. As a result, hundreds of people were released from immigration detention.[3]

9. On 29 August 2025, Australia and Nauru signed a memorandum of understanding (MOU) to facilitate the deportation of people to Nauru.[4] The Australian Government stated that the 'MOU will allow the continued management of the NZYQ cohort'.[5]

10. Under the MOU, Australia committed up to $2.5 billion over the 30-year life of the agreement, including an upfront payment of $408 million and annual payments of $70 million thereafter.[6]

11. This followed an interim agreement between Australia and Nauru in February 2025 under which Nauru agreed to receive 3 men from the *NZYQ* cohort.[7] As of 8 January 2026, none of these people have been removed due to ongoing legal proceedings.[8] The Australian Government committed not to remove any of the 3 men to Nauru until their legal challenges were resolved.[9] Their cases raise distinct legal grounds, including alleged unlawfulness of protection visa cancellations, a real risk of *refoulement*, lack of procedural fairness and the inadequacy of medical facilities in Nauru.

12. In October 2025, the first removals to Nauru began of other people, not including the 3 men impacted by the February 2025 interim agreement. The Minister for Home Affairs confirmed that an initial transfer to Nauru occurred on 24 October 2025 but did not disclose the number of people removed.[10] The

Australian Government later confirmed that, as of 2 December 2025, 5 people had been transferred to Nauru, including refugees.[11]

13. The Australian Government states that the people transferred are not being detained, have freedom of movement and can move freely around Nauru.[12] They are residing in what was formerly a Regional Processing Centre (RPC) facility for Australia's offshore asylum processing regime. The RPC was previously used to detain people. Although its gates are now open, the area is still surrounded by high wire fencing.[13]

14. Australia's new arrangements with Nauru raise serious human rights risks and lack transparency.

Lack of transparency and independent oversight

15. Information about Australia's arrangement with Nauru is emerging piecemeal through court proceedings and parliamentary processes rather than open public reporting by Government and independent oversight. Concerns about transparency and lack of oversight are heightened by longstanding reports about Nauru's limited capacity to provide effective protection, proper healthcare and adequate living conditions.

16. Since the interim arrangement with Nauru was first announced in February 2025, the Commission has made repeated requests to the Australian Government for transparency around the details of the agreement.[14] This includes the human rights guarantees received from Nauru, prospects of return to Australia if a person's Nauruan visa is cancelled for any reason or their rights are breached, and Australia's ongoing role. On 8 January 2026, the Commission received a response to the 3 letters it had sent to the Minister for Home Affairs seeking further information about the arrangements with Nauru, but this response did not fully address the specific questions raised in those letters.

17. There has been no independent oversight of Australia's offshore processing regime on Nauru since 2019, nor any oversight of the new arrangement with Nauru.

18. While some information has been disclosed through court cases and parliamentary statements, questions remain.[15] The Government's announcement about the MOU stated that the agreement contains undertakings to ensure the proper treatment of people transferred to Nauru.[16] In Parliament, the Government further indicated that compliance with the Refugee Convention is 'important' to both Australia and Nauru as signatories, and that is reflected in the MOU.[17] It also stated that Nauruan law commits Nauru to upholding the principle of *non-refoulement* and that Australia could consider withdrawing funding over non-compliance with the Refugee Convention.[18]

19. This information has not resolved concerns about human rights risks and Nauru's capacity to provide effective protection, as discussed below. Additionally, recent amendments to the *Migration Act 1958* (Cth) (the Migration Act) are specifically designed to remove a number of existing safeguards prior to removal from Australia (see section 2).

20. Parliamentarians have requested the MOU be published, but the Australian Government has declined to do so, claiming public interest immunity over the MOU and other details of the arrangement.[19]

21. As a result, it remains unclear how Nauru's commitments under the MOU will be enforced, given MOUs are non-binding; what recourse people will have if their rights are breached; and what mechanisms, if any, exist to ensure independent oversight and monitoring.

22. When the first removal occurred in October 2025, the Minister for Home Affairs did not disclose how many people were involved.[20] It remains unclear how many people from the *NZYQ* cohort have been re-detained in Australia or issued visas for Nauru pending removal there, as well as the current total number of people who have been removed to Nauru.

23. This raises serious questions about the Australian Government's commitment to transparency and accountability to the Australian public, undermining fundamental principles of the rule of law that should underpin any migration and asylum system.

Human rights risks

24. The Commission has serious concerns about Australia's compliance with its domestic and international human rights obligations in relation to the Nauru arrangements, including:

- access to adequate healthcare
- family unity and risk of family separation
- safety in Nauru
- the absence independent monitoring and oversight
- the adequacy of safeguards regarding the treatment of people sent to Nauru
- the risk of people being sent to a country where they face serious harm (direct and indirect *refoulement*).

25. On 24 November 2025, a third-party translation of a public interview given by the Nauruan President about the arrangements in February 2025 was read in the Australian Parliament, as no official translation was made available.[21] According to this translation, the Nauruan President suggested that the people who are being transferred to Nauru 'are not refugees' and that Nauru may 'over

time … find a way to return them home', raising a serious risk of chain *refoulement.*

26. The majority of people in the *NZYQ* cohort are either refugees or stateless, unable to be returned to their country of origin.[22] Many have deep community ties and have lived in Australia for years, with family members and children who are Australian citizens. Some of the people released were convicted of, and served sentences for, serious offences. Others have no convictions, have convictions but did not receive a sentence of imprisonment, or served only a short term of imprisonment.[23] People in the group have been subjected to indefinite immigration detention, curfews and electronic monitoring.[24]

27. There are also concerns about the availability and adequacy of healthcare facilities on Nauru for people removed there.[25]

28. The High Court is currently considering *TCXM v Minister for Immigration and Citizenship*, which challenges the removal of an Iranian man to Nauru under the interim arrangement and appeals an earlier Federal Court decision dismissing his case.[26] In that decision, the judge accepted that Nauru lacked adequate medical services to manage the applicant's severe, potentially life-threatening asthma. However, this did not render removal 'not reasonably practicable' under the Migration Act.[27]

29. The appellant has argued that his condition would worsen on Nauru due to his age, the weather conditions and 'insufficient' facilities to manage his condition on an ongoing basis or treat a severe and potentially fatal asthma attack, and that it is not reasonably practicable to remove a person to a country where there is 'a real risk the person will not live, but will die'.[28]

30. Frontline services report that at least 70% of their client's facing deportation to Nauru suffer from chronic health conditions, and approximately 90% live with a mental health condition.[29]

31. Asylum seekers sent to Nauru under Australia's offshore asylum processing regime (distinct from the third country reception arrangement) say they cannot afford food, forcing them to skip meals, and are prohibited from working to support themselves.[30] There has also been a reported increase in incidents of violence against asylum seekers sent by Australia to Nauru for offshore processing, including being severely beaten.[31]

32. There have been serious allegations of corruption by senior Nauruan officials, resulting in a Senate inquiry into Australia's 'offshore processing and resettlement arrangements' that will report in June 2026.[32] There are also ongoing concerns about the security arrangements on the island.[33]

33. The lack of transparency and absence of independent oversight and monitoring of the conditions and treatment of people transferred to Nauru (under both

offshore processing and the new third country reception arrangement) impedes assessment of Australia's compliance with its international human rights obligations.

34. The Commission has long maintained that transferring asylum seekers and refugees offshore does not release Australia from its domestic or international obligations, including the obligation to refrain from sending them to a place where they would face serious risks to their life or health or onward *refoulement*.[34]

35. The Commission is also concerned that legislative amendments passed in 2024 and the arrangements with Nauru may be used to deport people beyond those in the *NZYQ* cohort, including people whose refugee claims were refused under the now-discontinued, flawed 'fast-track' process.[35] These laws, including provisions permitting the Government to pay other countries to accept non-citizens (including refugees whose protection status has been reversed) under a third country reception arrangement, are not textually limited to the *NZYQ* cohort.

2 Stripping procedural fairness

This section examines recent amendments to the Migration Act that remove existing safeguards and procedural fairness for non-citizens facing removal to a third country.

It highlights the serious implications of stripping the right to be heard, especially when decisions carry profound consequences involving a person's safety and future.

New procedural fairness law

36. In September 2025, the Government passed new legislation that strips certain non-citizens of the right to procedural fairness in key migration decisions, including deportation and removal.[36] The law permits the removal of non-citizens to a third country (including refugees) without providing a meaningful opportunity to be informed or to present their case before a decision is made about removal, despite the significant consequences for their rights to life, safety, health and family.[37]

37. While the Government states that these laws are 'primarily directed to noncitizens who have exhausted all legitimate avenues to remain in Australia', they appear to have a broader reach.[38] Immediately following the Government's claim, the Human Rights Law Centre confirmed that 'Two of the three people initially targeted by the Government for deportation to Nauru had not yet completed all appeal options relating to their visas'.[39]

38. Procedural fairness is a cornerstone of proper decision-making and a critical safeguard against error. Its explicit removal from decisions concerning third country deportations creates a significant risk of serious harm, notably *refoulement*. Doing so limits the opportunity to correct factual errors or provide new information that could be essential to ensuring the decision is fair and safe.

39. The law also authorises the Government to retrospectively validate any actions and decisions related to third country reception arrangements prior to its commencement, such as removal pathway directions.[40] This potentially exposes people to retrospective criminal liability for conduct that was not an offence at the time (i.e. non-compliance with removal directions), raising rule of law concerns.

40. The case of *TCXM* before the High Court raises important questions about procedural fairness. The appellant argues that he was denied procedural fairness both under the interim arrangement with Nauru and in relation to the Government's decision to apply for a Nauruan visa on his behalf without notice. The Federal Court judge held that the powers to enter into the interim

arrangement or to apply for a Nauruan visa were not conditioned by an obligation to afford the applicant procedural fairness, noting that recent amendments to the Migration Act expressly provide that the rules of natural justice do not apply to the giving of a notice concerning a third country arrangement.[41]

3 Promotion of the rule of law and impact on Nauru

This section briefly discusses the impact of Australia's externalisation policies on the international rule of law and Nauru, highlighting:

- the contradiction between Australia's foreign policy and offshoring practices
- the implications of stripping procedural fairness rights
- the need to consider the impact on Nauru and the Nauruan people.

It emphasises the importance of transparency, accountability and respect for international norms, applied consistently at home and abroad.

41. Australia's new third country reception arrangement with Nauru raises critical questions about respect for fundamental international legal norms, including accountability, transparency and the rule of law.

42. Australia's foreign policy and development program in the Indo-Pacific seeks to advance a more 'peaceful, stable, and prosperous' region.[42] This is underpinned by the rule of law and recognition that Australia's 'national interests are advanced by an international system that is anchored in international law and we seek a world in which the rights of all people are upheld'.[43]

43. At a time when international norms are under unprecedented pressure and threat globally, it is essential for countries like Australia to defend and strengthen these norms and to lead by example both at home and abroad. This is critical to maintaining a rules-based international order.

44. Australia's externalisation practices and the stripping of procedural fairness rights not only harm the rights of refugees and asylum seekers but also undermine the international rule of law and broader human rights protections.

45. Greater attention should be paid to the impact of these policies and arrangements on Nauru and its people, particularly given Australia's historic relationship with Nauru, the country's status as one of the most aid-reliant countries in the world and Australia being its main development partner.[44]

46. Upholding accountability, transparency and the rule of law is essential to maintaining confidence that Australia is meeting its domestic and international obligations, and its actions in the Indo-Pacific should consistently reflect these principles.

Endnotes

[1] G Madi, *Report of the Special Rapporteur on the human rights of migrants on Externalization of migration governance and its effect on the human rights of migrants,* UN Doc A/80/302 (4 August 2025); Australian Human Rights Commission (AHRC), *Externalisation of Migration and the Impact on the Human Rights of Migrants*, AHRC, 2025, accessed 15 December 2025.

[2] AHRC, *Human rights standards for immigration detention*, AHRC, 2013, accessed 15 December 2025.

[3] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137. See also AHRC, *Externalisation of Migration*, paragraphs 20-25.

[4] The Hon Tony Burke MP, Minister for Home Affairs, *Statement on Nauru MOU* [media release], 29 August 2025, accessed 15 December 2025.

[5] The Hon Tony Burke MP, *Statement on Nauru MOU*.

[6] M Truu, 'Nauru deportation deal set to cost Australia $2.5 billion over 30 years', *ABC News,* 3 September 2025, accessed 15 December 2025.

[7] See AHRC, *Externalisation of Migration*, paragraphs 23-25.

[8] See *Plaintiff S22/2025 v Minister for Immigration and Multicultural Affairs* [2025] HCA 36; *TCXM v Minister for Immigration and Citizenship & Anor* (High Court of Australia, S146/2025, commenced 29 September 2025).

[9] E Byrne, 'Iraqi asylum seeker slated for removal to Nauru loses High Court challenge', *ABC News,* 3 September 2025, accessed 15 December 2025.

[10] M Truu, 'First NZYQ cohort member deported to Nauru under opaque deal potentially worth billions', *ABC News,* 28 October 2025, accessed 15 December 2025; AHRC, *Human Rights Commissioner calls for transparency in Nauru deportation arrangement* [media release], AHRC, October 2025, accessed 15 December 2025.

[11] Legal and Constitutional Affairs Legislation Committee, *Estimates*, Department of Home Affairs, 2 December 2025, 92.

[12] *Estimates*, 2 December 2025, 98-99.

[13] *Estimates*, 2 December 2025, 98.

[14] See AHRC, *Human Rights Commissioner says NZYQ Nauru resettlement announcement raises more questions than it answers* [media release], AHRC, 19 February 2025, accessed 15 December 2025; AHRC, *Human Rights Commissioner calls for transparency in Nauru deportation.*

[15] See *TCXM v Minister for Immigration and Multicultural Affairs* [2025] FCA 540; *Estimates*, 2 December 2025, 70-75, 84-86, 90-94, 98-99.

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[16] The Hon Tony Burke MP, *Statement on Nauru MOU*.

[17] *Estimates*, 2 December 2025, 92-93.

[18] *Estimates*, 2 December 2025, 92-93.

[19] Senate Legal and Constitutional Affairs Legislation Committee, *Parliamentary Inquiry Spoken Question on Notice Number 3, Review into Home Affairs Legislation Amendment (2025 Measures No. 1) Bill 2025*, 3 September 2025; *Estimates*, 2 December 2025, 70.

[20] See Truu, 'First NZYQ cohort member deported to Nauru'; AHRC, *Human Rights Commissioner calls for transparency in Nauru deportation.*

[21] See M Truu, 'Government refuses to release translation of public interview about opaque Nauru deal', *ABC News,* 30 October 2025, accessed 15 December 2025; Australian Senate, *Adjournment - International Relations: Australia and Nauru*, 24 November 2025.

[22] See *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCATrans 154, 137; Human Rights Law Centre (HRLC), *Indefinite immigration detention unlawful: High Court rules* [media release], HRLC, 8 November 2023, accessed 15 December 2025; *Estimates*, 2 December 2025, 93.

[23] HRLC, *Explainer: High Court ruling in NZYQ* [media release], HRLC, 29 November 2023, accessed 15 December 2025.

[24] See *Migration Amendment (Bridging Visa Conditions) Act 2023,* (Cth) for punitive visa conditions ruled unlawful in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40.

[25] See AHRC, *Externalisation of Migration*, paragraphs 14, 18.

[26] *TCXM* (High Court).

[27] *TCXM* (Federal Court) paragraphs 89-90, 185.

[28] Applicant, 'Appellant's Outline of oral argument', Submission in *TCXM v Minister for Immigration and Citizenship & Anor*, S146/2025, 9 December 2025, paragraphs 3-6; S Basford Canales, 'Australia deporting refugee to Nauru may cause his 'imminent' and 'preventable' death, court hears', *The Guardian*, 9 December 2025, accessed 15 December 2025.

[29] HRLC, *High Court challenge to Albanese Government's Nauru deportation powers begins today* [media release], HRLC, 9 December 2025, accessed 15 December 2025.

[30] B Doherty and S Basford Canales, 'Asylum seekers on Nauru going hungry despite government spending $1.5m a year for each person', *The Guardian*, 3 October 2025, accessed 8 December 2025. See also AHRC, *Externalisation of Migration*, pt 2.1.

[31] ASRC, *Hundreds of millions of taxpayer dollars wasted amid safety and human rights concerns for people transferred to Nauru* [media release], ASRC, 1 October 2025, accessed 8 December 2025.

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[32] See 'How Australia got rid of illegal immigrants', *60 Minutes Australia* (Nine Network, 9 November 2025); Australian Senate, *Debates*, 25 November 2025, 110-112.

[33] e.g. C Houston, 'Leader of Australian bikie gang strikes deal to provide security on Nauru', *The Sydney Morning Herald*, 6 August 2025, accessed 8 December 2025; N McKenzie and C Houston, '"Mind-boggling": Whistleblower reveals how global bikie boss won Nauru security deal', *The Age,* 8 November 2025, accessed 15 December 2025.

[34] See e.g. AHRC, *Human rights issues raised by the third country processing regime,* AHRC, 2013, accessed 9 December 2025; AHRC, Submission to Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, *Inquiry into the responsibilities of the Commonwealth Government in connection with the management and operation of the Regional Processing Centre in Nauru* (27 April 2015); AHRC, *Asylum Seekers, Refugees and Human Rights: Snapshot Report (2nd edition)*, AHRC, 2017, accessed 9 December 2025, pt 4; *Ms BK, Ms CO and Mr DE on behalf of themselves and their families v Commonwealth of Australia (Department of Home Affairs)* [2018] AusHRC 128.

[35] See AHRC, *Human Rights Commissioner says NZYQ Nauru resettlement announcement raises more questions than it answers*; AHRC, *Externalisation of Migration*, para 22.

[36] *Home Affairs Legislation Amendment (2025 Measures No. 1) Act 2025*, (Cth).

[37] See AHRC, *Human Rights Commissioner concerned about proposed changes to Migration Act* [media release], AHRC, 29 August 2025, accessed 15 December 2025; L Finlay, *Fairness isn't something that can be selectively applied. Australia is better than this*, [opinion piece], AHRC, 1 September 2025, accessed 15 December 2025.

[38] Australian House of Representatives, *Bills - Home Affairs Legislation Amendment (2025 Measures No. 1) Bill 2025 Second Reading*, 26 August 2025, 505-506.

[39] HRLC, *Explainer: The Anti-Fairness Bill: entrenching deportation powers*, HRLC, 26 August 2025, accessed 15 December 2025.

[40] *Home Affairs Legislation Amendment (2025 Measures No. 1) Act 2025*, pt 1, div 2.

[41] *TCXM* (Federal Court) paragraphs 130-133, 155-164.

[42] Department of Foreign Affairs and Trade (DFAT), *Australia's International Development Policy*, DFAT, Australian Government, 2023, 7.

[43] DFAT, *Australia's International Development Policy*, 13.

[44] See JC Morris, *Asylum and Extraction in the Republic of Nauru,* Cornell University Press, New York, 2023; S Ward, 'Nauru's latest deportee deal with Australia repeats old mistakes', *The Interpreter,* 17 November 2025, accessed 15 December 2025; DFAT, *Australia's development program to Nauru*, DFAT website, n.d., accessed 15 December 2025; Lowy Institute, *Pacific Aid Map – Nauru,* Lowy Institute website, n.d., accessed 1 January 2026.