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Mr Gehad Madi
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Dear Mr Reid,

CONTRIBUTION TO THE REPORT ON EXTERNALISATION

Thank you for the opportunity to provide input into your upcoming thematic report to the 80th session of the UN General Assembly. This submission focuses on questions 1 and 6 of your call for input, providing examples from Australia's extensive experience in externalisation. Headings are numbered in line with these question numbers.

I am the Strategic Litigation Network lead, an affiliate and a doctoral candidate at the Kaldor Centre for International Refugee law at the University of New South Wales (UNSW), Sydney. I also teach international refugee law at UNSW. Prior to commencing my academic career, I acted as a lawyer representing refugees[1] who had been subjected to Australia's offshore processing system. I have given evidence at multiple Parliamentary inquiries into Australian law and practice on offshore processing, most recently on behalf of the Kaldor Centre in November 2024. I provide this submission in my personal capacity.

This submission focuses on externalisation of refugee status determination, using the example of Australia's practice of sending asylum seekers to Nauru and Papua New Guinea (PNG) for the processing of their asylum claims, and more recent moves to externalise others. In response to question 1, the focus is on the health impacts of externalisation, the expansion of externalisation and risk of *refoulement* and the ongoing lack of durable solutions. In response to question 6, the focus is on human rights due diligence obligations of sending States[2] that employ externalisation. While Australia also engages in pushbacks, this practice is not the subject of this submission.

1. Examples of externalisation measures

Australia has employed refugee externalisation measures in various guises since 2001. Australia's experience with externalisation shows that this extremely high-risk practice poses a constant risk of human rights violations.

In its most recent iteration, which commenced in 2013[3] and continues today, people who arrive in (or attempt to reach) Australia by boat are sent to Nauru to have their asylum claims processed.

[1] In this submission, I use the term 'refugee' to refer to both refugees and people seeking asylum, in recognition of the fact that refugee status is declaratory.
[2] That is, the States where the refugee originally sought refuge, that has engaged with third countries to receive them.
[3] Offshore processing recommenced in September 2012, but the current policy under which no one subjected to offshore processing can permanently resettle in Australia, commenced in July 2013.

Similar arrangements were in place with PNG until 2021.[4] Those who are found to be refugees under this policy are offered third country resettlement outside Australia,[5] with people whose claims were processed in this way having been sent to Canada, New Zealand, the USA, and some European countries. In 2024, Australia passed new legislation, expanding the use of externalisation.

1.1 Health impacts of externalisation

Externalisation can have a direct impact on health, compromise access to adequate healthcare and cause and/or exacerbate permanent and avoidable health problems.

People transferred to Nauru or PNG since 2013 who required medical treatment that was not available in those countries were initially brought to Australia for treatment. Australia became less willing to facilitate medical treatment in Australia over time, '[t]o mitigate the risk of medical transfers being used as a pathway to Australia'.[6] Women were transferred from Nauru to PNG for pregnancy-related support (including pregnancy terminations) from at least 2016.[7] From January 2018 refugees held in those countries also received medical treatment in Taiwan.[8]

These arrangements did not adequately cater for the medical needs of the people transferred offshore by Australia, with refugees continuing to be brought to Australia for medical treatment where they could not have their medical needs met elsewhere. Due to the Immigration Minister often being unwilling to facilitate transfer to Australia, even where medical experts advised that this was necessary, dozens of court cases were commenced between 2017 and 2019 to secure the transfers and medical treatment that was needed.[9] The need for judicial intervention often arose in cases of severely mentally unwell children and adults, as there were no adequate facilities for them in Nauru, PNG or Taiwan.[10] Translation services were often inadequate in these locations, meaning informed consent to medical treatment could not always be guaranteed. This lack of access to adequate healthcare had a gendered impact, especially in relation to reproductive healthcare.[11]

In 2018 a number of children developed severe psychiatric illnesses, for which legal action became necessary. In some instances, the Minister agreed to facilitate the child's transfer to an appropriate facility in Australia, but would not agree to transfer all of the child's family members, despite medical evidence that this would inhibit recovery.[12] Symptoms included psychosis, acts of self-harm,

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[4] The arrangement with PNG ended following a finding by the PNG Supreme Court that detention of asylum seekers sent to PNG by Australia was unconstitutional: *Namah v Pato* (2016) Supreme Court of Justice, PNG, SC1497.
[5] It was originally intended that permanent resettlement would be available in Nauru and PNG, but this has not eventuated. Australia also formed an agreement with Cambodia to provide permanent resettlement for refugees who had been sent to Nauru, which led to four of the seven people who took up the offer choosing to return to their countries of origin, despite protection findings in relation to those countries: Kaldor Centre for International Refugee Law, *Factsheet – Australia-Cambodia Agreement for Refugees in Nauru* (2019).
[6] Documents released pursuant to freedom of information request to the Department of Home Affairs, Australia, FA 18/06/00469: Provision of medical care and treatment in Taiwan (2018) (hereafter, 2018 FOI documents), 34, para 1.
[7] *Plaintiff S99/2016 v Minister for Immigration* [2016] FCA 483 (hereafter, S99); *DCQ18 v Minister for Home Affairs* [2018] FCA 918.
[8] 2018 FOI documents, 34, paras 1-2.
[9] Anna Talbot and George Newhouse, 'Strategic litigation, offshore detention and the Medevac Bill', (2019) 13 *Court of Conscience* 85.
[10] *FRX17 as litigation representative for FRM17 v Minister for Immigration* [2018] FCA 63; Medecins sans Frontiers, *Indefinite Despair: the tragic mental health consequences of offshore processing on Nauru* (2018) (hereafter, MSF), 29
[11] See, for example, S99.
[12] *AYX18 v Minister for Home Affairs* [2018] FCA 283; *DWE18 as litigation representative of DWD18 v Minister for Home Affairs* [2018] FCA 1121 (hereafter, DWE18); MSF, 18.

suicide attempts and 'resignation syndrome', a dangerous condition in which children and young adults entered a semi-comatose state, ceased eating or drinking or responding to pain stimuli. The condition can be life-threatening and requires 'high-level medical care'.[13]

Medecins sans Frontiers (MSF) ran a mental health clinic in Nauru in 2017 and 2018. In a first-hand report about its experiences there, it found that the high incidence of mental illness was 'an expected an unfortunately predictable consequence of long-term, indefinite processing'.[14] Sixty per cent of MSF's clients had suicidal ideation, including children as young as nine. MSF considered that 'being held indefinitely and arbitrarily deprived of any control over their futures' was a direct cause of the dangerous mental illness that their clients experienced.[15]

1.2 Expanding externalisation and the risk of *refoulement*

In December 2024, the Australian Parliament amended legislation to expand externalisation.[16] This amendment responded to a series of cases in Australian courts, starting with *NZYQ v Minister for Immigration*,[17] which ended the previous practice of indefinite detention in Australia of non-citizens where there was no reasonable prospect of their removal (which arose where detainees were refugees whose visas had been cancelled, stateless or their home country refused to take them back).[18] According to the December 2024 reforms, certain visas 'cease' when the visa-holder is granted permission to enter a third country pursuant to an arrangement between Australia and the third country, with no need for consent of the person concerned.[19] This cessation triggers a requirement for the person to be detained pending deportation.[20] The Kaldor Centre's submission to the Parliamentary inquiry, **enclosed**, summarises concerns regarding this development.[21]

Australia has since forged an agreement with Nauru to receive people in this situation, with Nauru introducing Regulations granting such people 30-year visas, with a $1,000AUD annual fee.[22] This concerning development gives rise to a risk of *refoulement* and fails to secure durable solutions.

The holder of a 30-year visa will ostensibly be protected from 'chain *refoulement'* and removal to risks of deprivation of life, 'cruel, inhumane or degrading treatment, punishment or persecution'.[23] However, as the experience of refugees who were resettled in Cambodia attests,[24] people may 'choose' to return to a country where they face risk, if they are unable to build a sustainable life in Nauru. People subjected to this policy will be entitled to depart and re-enter Nauru, work and have

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[13] MSF, 24; for judicial consideration of resignation syndrome, see DWE18.
[14] MSF, 27.
[15] MSF, 36.
[16] *Migration Amendment Act 2024* (Cth).
[17] [2023] HCA 37.
[18] Daniel Ghezelbash and Anna Talbot, 'Another rushed migration bill would give the government sweeping powers to deport potentially thousands of people', *The Conversation*, 18 November 2024.
[19] *Migration Act 1958* (Cth) ss 76A(2), 76AAA, 198AHB.
[20] *Migration Act 1958* (Cth) ss 189, 198.
[21] Kaldor Centre for International Refugee Law, *Submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into Migration Amendment Bill 2024 (Cth)* 2024 Submission to the Senate Legal and Constitutional Affairs Committee on the inquiry into the Migration Amendment Bill 2024 (Cth) (November 2024), see in particular pp 4-9.
[22] Immigration (Long Term Stay Visa) Regulations 2025 (Nauru), reg 7. The validity of removals under this law has recently been confirmed by the Federal Court of Australia in *TCXM v Minister for Immigration* [2025] FCA 540.
[23] Immigration (Long Term Stay Visa) Regulations 2025 (Nauru), reg 5.
[24] See footnote 5, above.

access to housing, a living allowance, healthcare and education.[25] They will not, however, be entitled to citizenship[26] and so will not enjoy a durable solution. There is also no guarantee that they will have access to travel documents, potentially effectively confining them to Nauru.[27] This policy could see similar health concerns emerging as has been described by MSF, detailed above, in relation to people subjected to the policy, including refugees.

1.3 Lack of durable solutions

Hundreds of people who have been subjected to offshore processing now reside in Australia, having been 'temporarily' transferred there for health or other reasons. Additionally, there are people in PNG who remain in precarious situations. The recent policy of removing more people to Nauru risks creating a further cohort of people with no durable solution, as described above.

Those in Australia remain in a situation of 'permanent impermanency', being told that they will never be allowed to remain on a permanent basis. They are restricted to temporary visas which must be renewed multiple times a year, with no study rights beyond high school.[28] A generation of child refugees has no access to further education, limiting their life prospects. This impermanence has severe ongoing mental health impacts, as people have difficulty planning their lives and are unable to travel. While they have been encouraged to resettle in third countries, including New Zealand and the USA, there were never enough places in those resettlement agreements to accommodate the whole cohort. There is no known ongoing effort to find durable solutions for this cohort.

Children born to refugees who were subjected to externalisation are also at high risk of statelessness. Australian citizenship is only available to people with an Australian parent or those born in Australia (when they reach 10 years of age).[29] Approximately 29 children born to refugees in Nauru or PNG are stateless, having no right to citizenship anywhere in the world.[30]

As of November 2024, 42 people remained in PNG. Australia withdrew support for this group for a period, before restarting the support a year later at a much lower rate, giving rise to fears of homelessness and compromised access to healthcare, which must be paid for.[31]

6. Human rights implications

States continue to be bound by their human rights obligations when engaging in externalisation measures both prior to removing people from the sending State and on an ongoing basis where the sending State retains a level of 'power or effective control'[32] over the transferred person. Power or effective control can be demonstrated where the sending State establishes or is involved in

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[25] Immigration (Long Term Stay Visa) Regulations 2025 (Nauru), regs 2(a), (f), 3.
[26] Nauruan citizenship is available to adults with no family ties to Nauru pursuant to the *Naoero Citizenship Act 2017* by marriage to a Nauruan citizen (s 13). The President may also grant honorary citizenship (s 19).
[27] Which has a land mass of 21 square kilometres.
[28] As of March 2024, of the 3,189 who were sent to Nauru or PNG as a part of offshore processing, 982 are in Australia: Refugee Council of Australia Offshore processing statistics (hereafter, RCOA) (under heading *What happened to people who were transferred to offshore processing counties since 19 July 2013*).
[29] *Australian Citizenship Act 2007* (Cth) s 12(1).
[30] RCOA (under heading *Children born to people transferred to regional processing country on or after 19 July 2013*).
[31] Amy Nethery and Jemima McKenna, 'Dozens of refugees are still stranded in precarious situations in PNG – and support from Australia is dwindling', *The Conversation*, 18 November 2024.
[32] UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2024), UN doc CCPR/C/21/Rev.1/Add. 13, para 10.

maintaining detention facilities, and where the sending State exercises significant control over people who are subjected to externalisation without detention. These obligations are discussed in a recent article in the *International Journal of Refugee Law* in April 2024, entitled 'The Gender- and Sexuality-Based Harms of Refugee Externalisation: A Role for Human Rights Due Diligence', co-authored by myself, Anthea Vogl and Sara Dehm, **enclosed**.[33]

Due diligence obligations are particularly important when externalisation practices are implemented, as these practices are often entered into to limit sending States' obligations. Due diligence obligations require sending States to conduct individualised pre-transfer assessments of the conditions in the receiving State[34] and refrain from removing the person in question if it is reasonably foreseeable that they will suffer human rights violations there. These assessments must be based on information that is reasonably knowable to the sending State[35] including, at a minimum, research reports that the sending State have been involved in and UN information.

States must also conduct continuous risk assessments during periods of externalisation where they become aware (or should become aware) of human rights risks or where there is a change in circumstances that could increase risk.[36] Such awareness should arise where people subjected to this form of externalisation notify the State of reasonably anticipated risks (such as threats of sexual assault), where there have been reports of events that could amount to human rights violations (such as sexual or other types of assault), where there is a real risk of environmental changes giving rise to risks to life, limb or livelihoods or other reasonable bases. Part of the assessment should include the capacity of the local authorities to adequately mitigate and respond to the risk, which should include assessment of prosecutions and availability of effective support services. If these risk assessments reveal human rights risks, States should take adequate mitigating action.

Australia retains the requisite level of power and effective control over people living in the Nauruan community, due to the ongoing role of Australia in securing and paying for accommodation and healthcare, and exercising control over access to medical care outside of Nauru (by way of consent and facilitation of transport). This level of power and effective control may arise on a case-by-case basis. In the case of *Plaintiff S99 v Minister for Immigration*, for example, the Federal Court of Australia held that, having undertaken to provide S99 with medical care, the State had an obligation to provide it in a safe and lawful manner. This finding was made notwithstanding the fact that S99 was living in the community in Nauru at the time that the need for medical care arose.[37]

Please do not hesitate to contact me if I can be of further assistance.

Yours sincerely,

Anna Talbot

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[33] Anna Talbot, Anthea Vogl and Sara Dehm, 'The Gender- and Sexuality-Based Harms of Refugee Externalization: A Role for Human Rights Due Diligence', (2024) 36 *International Journal of Refugee Law* 60 (hereafter, Talbot, Vogl and Dehm).
[34] Refugee Law Initiative, 'Declaration on Externalisation and Asylum' (2022) 34 *International Journal of Refugee Law* 114, 118.
[35] Talbot, Vogl and Dehm, 66-67.
[36] Talbot, Vogl and Dehm, 69, 70.
[37] S99, para 243.