Australian Human Rights Commission

Externalisation of Migration and the Impact on the Human Rights of Migrants

Australian Human Rights Commission

Submission to the Special Rapporteur on the human rights of migrants

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1 Introduction

1. The United Nations Special Rapporteur on the human rights of migrants called for inputs for his forthcoming report to the General Assembly on the 'externalisation of migration and the impact on the human rights of migrants.'

2. This submission provides input on Australia's policies, specifically offshore processing and boat pushbacks, and our serious concerns regarding the impact of these ongoing practices on the human rights of migrants.

3. The Australian Human Rights Commission (Commission) is Australia's National Human Rights Institution, with recognised independent status and roles in UN human rights fora. The Commission promotes and protects human rights in Australia.

4. 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:

    a. investigating complaints from people in immigration detention (including offshore) about possible breaches of their human rights;

    b. inspecting immigration detention centres and reporting our findings and recommendations;

    c. running national inquiries to examine human rights issues; and

d. publishing guidelines that set minimum standards to help protect human rights and ensure the humane treatment of people in detention.[1]

2 Australia's Policies

5. Externalisation in the context of refugee and migration policies refers to measures taken by States which shift responsibility for protection and migration beyond their own borders. Externalisation includes preventing asylum-seekers and refugees from reaching a particular country or region and receiving protection there. Externalisation typically involves shifting responsibility for protecting refugees to another State or avoiding it altogether.

6. Australia approach toward asylum seekers and refugees who arrive by boat is one of the harshest in the world. Externalisation has been a key feature of policies adopted by successive Australian Governments to deter asylum seekers from travelling to Australia by sea.

7. People who reach Australian territory by boat who are found to be refugees are not permitted to settle in Australia. Boats carrying asylum seekers are turned back, or those on board transferred to a third country for processing of their asylum claims. Australia also enforces a long-standing policy of mandatory detention for all non-citizens who arrive without a valid visa.[2]

8. The Commission has consistently concluded that these policies are incompatible with Australia's international obligations.[3] Australia is obliged to uphold the rights of all asylum seekers and refugees – regardless of their mode or place of arrival, or whether they hold a valid visa – including those arriving by boat or transferred offshore.[4]

9. The Commission acknowledges the importance of preventing dangerous journeys and maintaining the integrity of Australia's migration system. It is critical, however, that all measures fully comply with Australia's international obligations. Australia should end these externalisation policies and adopt a fair and humane approach.[5] This includes ensuring access to fair and efficient asylum procedures on the Australian mainland and expanding resettlement and complementary pathways.

2.1 Offshore Processing Arrangements

10. Since 2012, asylum seekers arriving by boat without a valid visa have been transferred to Nauru or Manus Island in Papua New Guinea (PNG) for 'offshore' or 'third country' processing. From July 2013, it has been the policy of successive Australian Governments that all asylum seekers arriving by boat would not settle in Australia, even if recognised as refugees.[6]

11. 4,296 people have been transferred to Nauru and PNG since 13 August 2012.[7] As of 31 August 2024, 1,391 people have been resettled in other countries, predominantly New Zealand and the United States.[8] As of 31 December 2024, 927 people remained in Australia without permanent status who had been transferred from offshore processing.[9]

12. Australia maintains a regional processing centre (RPC) in Nauru and continues to send asylum seekers there. As of 31 August 2024, there were 94 'transitory persons' in Nauru.[10] It is unclear from the information that has been made publicly available whether this includes any children.

13. No new asylum seekers have been sent to Manus Island since 2014, and in 2021, Australia formally announced the end of regional processing in PNG.[11] In 2016, the Supreme Court of PNG ruled that the detention of asylum seekers on Manus Island violated the constitutionally protected right to liberty.[12] As of January 2025, 39 male refugees and asylum seekers, along with their families, remain in PNG. They currently live in Port Moresby in the community, having spent over a decade in PNG following their detention on Manus Island.[13]

14. These arrangements have faced widespread condemnation both internationally and domestically. Numerous reports and inquiries have documented serious human rights violations against people removed to Nauru and PNG. These include prolonged and arbitrary detention, inadequate living conditions, physical and sexual assault, child abuse, limited health care, poor physical and mental health outcomes, and the risk of *refoulement.*[14] Twenty-one people sent by Australia to offshore regional processing died between August 2012 and February 2024.[15]

15. The Commission has long maintained that transferring asylum seekers offshore does not release Australia from its international obligations and that its current regime of third country processing is inconsistent with international human rights law.[16]

16. In October 2024, the UN Human Rights Committee ruled that Australia bore responsibility for the arbitrary detention of asylum seekers transferred to offshore detention facilities in Nauru, in breach of the ICCPR.[17] The two cases involved 25 people who came to Australia by boat in 2013 and 2014, who were subsequently detained in Nauru under arrangements agreed between Australia and Nauru and funded by Australia. As Committee member Mahjoub El Haiba stated: "Where there is power or effective control, there is responsibility. The outsourcing of operations does not absolve States of accountability."[18]

17. The Committee called on Australia to take all steps necessary to prevent similar violations from occurring in the future and to review and modify its legislation, policies and transfer agreements to ensure their conformity with the ICCPR.[19]

18. The Commission remains seriously concerned about the conditions and treatment of asylum seekers and refugees in Nauru. In 2024, medical staff, caseworkers, and asylum seekers reported that healthcare in Nauru is inadequate and extremely limited, with no specialist care or dedicated counselling for trauma and torture survivors.[20] Detainees reported having their phones confiscated and replaced with basic phones unable to take photos, making it hard to contact family or support groups, or document their situation.[21]

19. The Commission also holds serious concerns about the individuals remaining in PNG. Disputes between the Australian and PNG Governments over unpaid bills has led to forcible evictions and cutting access to basic services like income and healthcare.[22] Minimal financial assistance was restored after a year to cover basic living expenses.[23]

The NZYQ Cohort

20. The Australian Government has adopted a new third country deportation arrangement in response to recent High Court decisions.

21. In 2023, the High Court of Australia (High Court) ruled in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs (NZYQ)* that it is unlawful to detain a person without a valid visa indefinitely in immigration detention when there is no real prospect of their removal from Australia in the foreseeable future.[24] This landmark ruling overturned nearly two decades of legal precedent.[25]

22. As at 18 October 2024 there have been 196 people released from immigration detention due to the *NZYQ* decision.[26] In response, the

Government has enacted a series of laws that raise significant concerns about compliance with Australia's international obligations.[27] One law allows the Government to pay other countries to accept non-citizens, including refugees whose protection status has been reversed.[28] This law will potentially impact a much wider group of people, beyond those in the NZYQ cohort with criminal records.

23. In February 2025, the Government announced a new third country reception arrangement with Nauru to resettle three people from the NZYQ cohort. These individuals had been released from immigration detention but were subsequently re-detained pending removal to Nauru. They were granted long term visas to live in Nauru for a minimum of 30 years and would have the rights to work, move freely around the island, and access social services.[29]

24. The Australian Human Rights Commissioner wrote to the Minister for Home Affairs on 19 February 2025 requesting transparency around the details of the arrangement and raised concerns about the human rights implications of Australia's attempt to outsource its international obligations.[30] At the time of writing, the Commission has not yet received a direct response to this letter.

25. The three individuals concerned have filed separate legal proceedings against their removal to Nauru and, at the time of writing, it does not appear that any of them have been removed. In June 2025, the Federal Court of Australia ruled that one of the individuals, an Iranian national to whom Australia owes protection obligations, could lawfully be transferred to Nauru.[31] At the time of writing, he remains in Australia, with media reports suggesting that the decision is likely to be appealed.[32] A second individual has commenced a legal challenge in the High Court, with the case being heard on 16 June 2025 and the High Court reserving its decision.[33] It has been reported that the Minister for Immigration and Multicultural Affairs has given undertakings to the High Court that the individual will not be removed from Australia while the case is ongoing.[34]

2.2 Boat Turnbacks and Takebacks

25. Since December 2013, under a policy of turnbacks and takebacks implemented as part of Operation Sovereign Borders (OSB), Australia has intercepted boats carrying asylum seekers and returned them to their point of departure. In some instances, individuals have been returned directly to their countries of origin following a brief and inadequate screening process conducted at sea.

26. These practices have been widely criticised and pose a serious risk of *refoulement,* including chain *refoulement*.[35] Onboard screenings lack proper safeguards and access to legal advice. The circumstances under which they take place – at sea, potentially via teleconference, and while the person is detained on board an Australian vessel – make it nearly impossible to fairly or thoroughly assess protection claims.[36]

27. Since OSB's commencement, the Government has maintained a policy of secrecy regarding 'on-water matters'. This lack of transparency makes it difficult to assess whether turnbacks are being conducted in accordance with Australia's international obligations, including the prohibition of *refoulement* and duty to guarantee safety of life at sea. Between December 2013 and 28 February 2024, 47 boats carrying more than 1,123 people, including 141 children, have been intercepted and returned.[37]

28. The *Maritime Powers Act 2013* (MPA) grants the Minister and officers powers to detain vessels and people and take them to a destination outside Australia.[38] These powers may be exercised without consideration of Australia's international obligations and even if their exercise would be inconsistent with these obligations.[39] The rules of natural justice also do not apply to their exercise.[40] The High Court has, however, clarified that under the MPA, it would be unlawful for a maritime officer to require a person to disembark at a place outside Australia unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place.[41]

29. Asylum seekers travelling by boat who do manage to arrive and are not transferred to a third country for offshore processing are only eligible to apply for temporary protection.[42] However, a statutory bar prevents them from lodging such an application unless the Minister for Home Affairs personally lifts the bar.[43]

3 Not a 'Model' to Follow

30. Australia has provided safety and a new life in peace and freedom for more than 950,000 refugees and others in humanitarian need since the end of World War II.[44] However, externalisation policies implemented by successive Australian Governments have caused significant harm to people seeking asylum by boat.

31. Other countries have sought to copy aspects of Australia's harmful policies.[45] Instead of fuelling a race to the bottom and contributing to the erosion of international protection norms, Australia should lead by example

– protecting people fleeing violence and persecution, upholding our obligations under international law and encouraging other countries to follow suit.

4 Recommendations

The Commission recommends that the Special Rapporteur include the following recommendations and findings in his forthcoming report:

Recommendation 1:
States should shift from externalisation and deterrence-based policies to rights-based asylum and refugee policies that uphold international law and protect the fundamental rights of refugees, asylum seekers and other migrants, regardless of their mode of arrival or migration status. This includes expanding access to resettlement and complementary pathways.

Recommendation 2:
States should end offshore processing arrangements. Asylum seekers should have access to fair and efficient asylum procedures on State territory. Where offshore processing persists, States must ensure adequate safeguards, compliance with international human rights standards, and independent monitoring and oversight.

Recommendation 3:
Refugee status determination and assessment of *refoulement* risks, including during interceptions and turnbacks, must comply with obligations under international human rights law and the Refugee Convention, and guarantee safety of life at sea.

Endnotes

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