

National Justice Project

Submission to the United Kingdom Parliamentary Committee
scrutinising the Nationality and Borders Bill

18 October 2021



CONTENTS

EXECUTIVE SUMMARY	3
RECOMMENDATIONS	3
To the United Kingdom Parliamentary Committee scrutinising the Nationality and Borders Bill	3
The National Justice Project’s capacity to comment.....	4
Objective: to remove those with no right to be in the UK more easily	5
Liability risks arising from offshore processing.....	5
Lack of durable solutions	6
Risks of relying on foreign sovereign states to resolve domestic obligations	7
Case Study: Manus Island Riots	8
Logistical challenges arising from relying on foreign sovereign governments	9
Offshore processing causes foreseeable, avoidable harm	10
Personal injury litigation.....	11
International legal ramifications of pre-emptive removal	12
Conclusion.....	13

EXECUTIVE SUMMARY

The National Justice Project (NJP) is a Not-for-Profit human rights legal service in Australia. We work collaboratively with community partners and clients to create systemic change through strategic litigation on behalf of disenfranchised communities harmed by government (in)action. As part of our work, we act for a significant cohort of refugees and asylum seekers who have been previously subjected to Australia's offshore processing regime. As such, the NJP is well placed to provide the committee with insight into the challenges that offshore processing can pose in terms of legal ramifications and costs.

This submission will provide recommendations for removing clauses within the UK's proposed Nationality and Borders Bill (the Bill) that we believe will give rise to significant costs and liability for the UK government. We will highlight the NJP's capacity to comment on this Bill and we will focus on one of the objectives of the Bill, namely *"to remove from the UK those with no right to be here"*. This submission will provide a detailed analysis of the liability risks arising from offshore processing, lack of durable solutions for resettlement of refugees, risks of relying on foreign sovereign states to resolve domestic obligations, logistical challenges arising from relying on foreign sovereign governments, the foreseeable and avoidable harm that offshore processing causes and the risks related to pre-emptive removal.

We argue that the Bill does not have the capacity to fulfil the objective mentioned above and that if the Bill were to pass into law, the UK government would be exposing itself to significant liability risk, as well as being likely to put the UK in breach of its international obligations and exposing asylum seekers and refugees to foreseeable and avoidable harm.

RECOMMENDATIONS

To the United Kingdom Parliamentary Committee scrutinising the Nationality and Borders Bill

We welcome the opportunity to make a submission to this inquiry in the hope that doing so will facilitate the UK to learn from the experiences that we have had as legal experts, navigating the legal and ethical challenges that offshore detention has given rise to in Australia.

We are deeply concerned that the UK's proposed the Bill emulates the worst aspects of Australia's refugee policy, which has led to significant litigation regarding the rights and obligations of the Australian government and foreseeable, avoidable harm to asylum seekers and refugees.

The NJP's recommendations are as follows:

- ◆ Members should oppose any arrangements that seek to outsource the processing of asylum seekers offshore; and
- ◆ Members should support an amendment to remove:
 - Clause 26
 - Clause 41 and schedule 5
 - Clause 11

The National Justice Project's capacity to comment

1. The NJP ran the first offshore duty of care test case, [*Plaintiff S99/2016 v Minister for Immigration and Border Protection*](#) which found that the Australian government owed a duty of care to refugees and asylum seekers who had been taken to Nauru or Papua New Guinea (PNG).¹
2. After this novel legal strategy was established, the NJP continued to build on this precedent.² This led the NJP to seek mandatory injunctions against the relevant Minister in 14 matters, with a further 69 injunctions sought by other firms. These cases were run in the Federal Court of Australia to force the Minister to bring hundreds of children, women and men to Australia for urgent and lifesaving medical treatment. This laid the foundation for the 'Kids off Nauru' campaign and legislative change against the wishes of the government of the day: The Medevac [Bill](#). More recently, the NJP has commenced compensation claims on behalf of 29 people in the Federal Court of Australia, mainly children, who were taken to Nauru by the Australian government for processing of their refugee claims and suffered psychiatric injury there.³

¹ *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483.

² See, for example, *FRX as litigation representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63; *AYX18 by his litigation guardian AYY18 v Minister for Home Affairs* [2018] FCA 283; *DCQ18 v Minister for Home Affairs & Ors* [2018] FCA 918; *DWE18 as litigation representative for DWD18 v Minister for Home Affairs* [2018] FCA 1121; *EWR8 v Minister for Home Affairs* [2018] FCA 1460; *AWP17 v Minister for Home Affairs & Ors*; *AVA18 as litigation representative for AVB18 v Minister for Home Affairs & Ors*; *DMX18 as litigation representative for DNC18 v Minister for Home Affairs & Ors*; *DWE18 as litigation representative for DWD18 v Minister for Home Affairs & Ors*; *EIV18 by her litigation representative EIW18 v Minister for Home Affairs*; *FJZ18 by her litigation representative FKM18 & Ors v Commonwealth of Australia & Ors*; *DWH17 & Ors v Minister for Immigration and Border Protection & Ors*; *D7 v Minister for Immigration and Border Protection & Anor*.

³ See: *NSG v Commonwealth of Australia*; *XKR v Commonwealth of Australia*; *TFH by his litigation guardian TFG v Commonwealth of Australia*; *GGH v Commonwealth of Australia*; *TFG v Commonwealth of Australia*; *ZQR by her litigation guardian TQR v Commonwealth of Australia*; *NNO v Commonwealth of Australia*; *Aziz Ghafel Majidi v COM Commonwealth of Australia*; *Leila Tofisalehi v Commonwealth of Australia*; *FQR by his litigation guardian TQR v Commonwealth of Australia*; *GEB v Commonwealth of Australia*; *Elaheh Nouri v Commonwealth of Australia & Anor*; *EBA v Commonwealth of Australia*; *BLN v Commonwealth of Australia*; *HZA v Commonwealth of Australia & Anor*; *NB v Commonwealth of Australia*; *GCT v Commonwealth of Australia & Anor*; *BNA by his litigation guardian BNB v Commonwealth of Australia*; *TU by her litigation guardian VU v Commonwealth of Australia*; *Benham Karimi v Commonwealth of Australia & Anor*; *OBA v Commonwealth of*

3. As such, our experience with engaging in lengthy and costly litigation processes in Australia places us in a unique position to advise the UK government of the challenges associated with offshore processing.

Objective: to remove those with no right to be in the UK more easily

Liability risks arising from offshore processing

4. Clause 26 of the Bill would amend the 2002 *Asylum and Immigration Act* to allow an asylum seeker to be removed from the UK while their claim is pending, making it possible for the UK to process asylum claims offshore. This clause could facilitate mimicking of Australia's offshore processing arrangements with Nauru and PNG. Our concerns with replicating this model are outlined below.
5. Australia has used variations of offshore processing since 2001. Similar to the objectives set out in relation to the Bill presently under consideration, Australia's offshore detention regime was ostensibly introduced to:
 - 5.1. deter asylum seekers from travelling to Australia by boat;
 - 5.2. save lives at sea; and
 - 5.3. to collapse the business model of people smugglers.
6. In practice, offshore processing has failed to achieve any of these [objectives](#).⁴
7. Over this time considerable expense has been incurred by the Australian government relating to:
 - 7.1. legal costs arising from challenges to offshore processing in domestic courts (see below);
 - 7.2. payment of compensation to individuals detained in offshore countries (see below);
 - 7.3. costs arising under contracts for provision of services; and
 - 7.4. costs arising from infrastructure investment in recipient countries.
8. Contract management in relation to offshore detention has been substandard, exposing the Australian government to risk and significant costs blowouts. According to the Australian National Audit Office (ANAO):
"The Department of Immigration and Border Protection's management of the garrison support and welfare

Australia; NNA by his litigation guardian GEB v Commonwealth of Australia; DEE21 by his litigation guardian DEG21 v Commonwealth of Australia; DKH21 by her litigation guardian DKI21 v Commonwealth of Australia; IHJ by her litigation guardian AIC v Commonwealth of Australia; THI by her litigation guardian AIC v Commonwealth of Australia; ZE by his litigation guardian SE v Commonwealth of Australia; DQM19 v Minister for Home Affairs & Ors.

⁴ Madeline Gleeson and Natasha Yacoub, *Kaldor Centre for International Refugee Law 'Policy Brief 11: Cruel, costly and ineffective: The failure of offshore processing in Australia' 2021*

https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf >.

services contracts at the offshore processing centres in Nauru and Papua New Guinea (Manus Island) has fallen well short of effective contract management practice”.⁵

9. Despite the cessation of transfer of new detainees, costs continued to be significant. Australia has continued to expend approximately \$1 billion AUD per year (conservative figure) for the last seven years to uphold offshore processing agreements.⁶ From August 2012 to 5 February 2021,⁷ Senate estimates show roughly \$6.5 billion of this taxpayer money has been spent on contractors alone.
10. Since offshore processing began on 13 August 2012, 4,183 people have been sent to either Nauru or PNG. Of this figure, approximately half are now in Australia (2,044) with, 1,161 of them being ‘transitory persons’.⁸ The *Migration Act 1958*⁹ allows for transitory persons to be brought to Australia from offshore processing for temporary purposes like obtaining medical treatment.¹⁰ The government, despite having the power to do so, has stopped taking people back to Nauru or PNG following treatment. Instead, it continues to detain refugees in onshore immigration detention or has granted community detention to some and bridging visas to others.¹¹ These people are subjected to highly restrictive conditions including lack of freedom to work or study. This means they are unable to contribute to Australian society.
11. Members should support an amendment to remove Clause 26.

Lack of durable solutions

12. Australia’s policy has failed to offer durable solutions for many refugees, who have lived in a state of limbo for eight years.

⁵ *Australian National Audit Office*, ‘Offshore Processing Centres in Nauru and Papua New Guinea: Contract Management of Garrison Support and Welfare Service’ 2017 <<https://www.anao.gov.au/work/performance-audit/offshore-processing-centres-nauru-and-papua-new-guinea-contract-management>>; *Refugee Council of Australia*, ‘Offshore Processing Statistics’ 2021 <<https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/6/>>; <<https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/5/>>.

⁶ Madeline Gleeson and Natasha Yacoub, *Kaldor Centre for International Refugee Law* ‘Policy Brief 11: Cruel, costly and ineffective: The failure of offshore processing in Australia’ 2021 <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf>.

⁷ *Refugee Council of Australia*, ‘Offshore Processing Statistics’ 2021 <<https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/6/>>.

⁸ *Refugee Council of Australia*, ‘Offshore Processing Statistics’ 2021 <<https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/8/>>.

⁹ (Cth); <https://www.legislation.gov.au/Series/C1958A00062> .

¹⁰ *Migration Act 1958* (Cth) s198AH <http://www5.austlii.edu.au/au/legis/cth/consol_act/ma1958118/s198ah.html>.

¹¹ Madeline Gleeson and Natasha Yacoub, *Kaldor Centre for International Refugee Law* ‘Policy Brief 11: Cruel, costly and ineffective: The failure of offshore processing in Australia’ 2021 <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf>.

13. As of 31 July 2021, 977 people who initially sought asylum in Australia from 2013 have been resettled in the United States, with another 265 people receiving provisional approval for resettlement.¹² Their resettlement is the result of a 2016 bilateral agreement between Australia and the US offering a solution for refugees who were sent offshore.¹³
14. Currently, 124 people remain in PNG and 107 on Nauru. It is estimated that 95 people will be 'left behind' in PNG, 120 in Nauru and 983 in Australia at the end of the US deal.¹⁴
15. Australia has failed to secure permanent resettlement for this cohort following the end of the US deal and has refused to accept New Zealand's offer of resettlement for refugees in Nauru. Those remaining in Australia and Nauru have no clear pathway towards permanent resettlement in any country.¹⁵ There is no durable solution that we are aware of available for these individuals. The Australian government has repeatedly pledged that members of this cohort will never be offered permanent resettlement in Australia, even if they currently reside here. Those in Nauru are only offered a 20-year visa, meaning that they may find themselves in an insecure visa situation for decades to come.
16. Australia has expended considerable diplomatic capital trying to resolve this domestic political issue. With the US resettlement deal, for example, Australia agreed to receive some asylum seekers or refugees from the Americas. The result therefore was not that fewer asylum seekers settle in Australia, simply that they are asylum seekers from different parts of the world, offered asylum here. This experience should serve as a warning to the UK that seeking to export domestic obligations toward refugees is unlikely to reduce the UK's ultimate obligations to refugees.

Risks of relying on foreign sovereign states to resolve domestic obligations

17. A number of risks have arisen in relation to Australia's outsourcing of its international obligations, risks that Australia is not able to properly manage due to the complications that emerge from relying on foreign sovereign states to assist with meeting Australia's domestic obligations to asylum seekers and refugees. These risks should serve as a warning to the UK.

¹² *Refugee Council of Australia*, 'Offshore Processing Statistics' 2021 <<https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/4/>>.

¹³ *Kaldor Centre for International Refugee Law*, 'Australia- United States Resettlement Arrangement' 2021, <<https://www.kaldorcentre.unsw.edu.au/publication/australia%E2%80%93united-states-resettlement-arrangement>>.

¹⁴ *Refugee Council of Australia*, 'Offshore Processing Statistics' 2021 <<https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/4/>>.

¹⁵ *Kaldor Centre for International Refugee Law*, 'Australia- United States Resettlement Arrangement' 2021, <<https://www.kaldorcentre.unsw.edu.au/publication/australia%E2%80%93united-states-resettlement-arrangement>>.

Case Study: Manus Island Riots

18. The Manus Island riots demonstrate the risks of inadequate planning and funding before sending asylum seekers offshore. More than 70 refugees and asylum seekers were injured during two days of unrest and rioting in February 2014. In the six months leading up to the violent riots, tensions had increased at the centre, and the number of detainees had increased tenfold from 130 in July 2013 to 1,340 in February 2014. The detention centre had been built to house 500 people. Dozens were injured and at least two detainees were stabbed. One detainee, Reza Barati, a 24-year-old Iranian asylum seeker was brutally murdered by two detention centre workers contracted by the Australian Government. A Senate inquiry found the violence was “eminently foreseeable” and blamed the riots on delays in processing asylum seeker claims.¹⁶
19. In April 2016, PNG’s Supreme Court ruled that the Manus Island detention centre was unconstitutional.¹⁷ The centre was subsequently closed, and detainees were forced against their will to move to the local community. This demonstrates the challenges in relying on another country for a solution to domestic policy issues.
20. In June 2017 the Australian government and its contractors settled a class action, *Kamasae v Commonwealth of Australia & Ors* paying out \$70 million dollars in compensation monies plus \$20 million in legal fees to detainees for false imprisonment in dangerous and damaging conditions in the Manus Island detention centre.¹⁸ At the time, this was the largest human rights settlement in Australian legal history.¹⁹
21. While Australia’s position remains that it does not exercise effective control over asylum seekers taken to PNG and Nauru for processing, the UN Human Rights Committee considers that “*the significant levels of control and influence exercised by the State party over the operation of the offshore regional processing centres, including over their establishment, funding and service provided therein, amount to such effective control.*”²⁰

¹⁶ Senate Standing Committee on Legal and Constitutional Affairs, ‘Incidents at the Manus Island Detention Centre from 16 February to 18 February 2014’ 2014

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island/Report/c01> ; Ben Doherty, *The Guardian* ‘Reza Barati’s parents sue Australia over son’s murder on Manus’ 2021 <<https://www.theguardian.com/australia-news/2021/jul/26/reza-baratis-parents-sue-australia-over-sons-on-manus>>; Helen Davidson et al, *The Guardian* ‘Manus Island: One dead, 77 injured and person shot in buttock at Australian asylum centre’ 2014 <<https://www.theguardian.com/world/2014/feb/18/manus-island-unrest-one-dead-dozens-injured-and-man-shot-in-buttock>>; Eric Tlozek, *ABC News* ‘Reza Barati death: Two men jailed over 2014 murder of asylum seeker at Manus Island detention centre’ 2016 <<https://www.abc.net.au/news/2016-04-19/reza-barati-death-two-men-sentenced-to-10-years-over-murder/7338928>>.

¹⁷ Ben Doherty et al., *The Guardian* ‘Papua New Guinea court rules detention of asylum seekers on Manus Island illegal’ 2016 <<https://www.theguardian.com/australia-news/2016/apr/26/papua-new-guinea-court-rules-detention-asylum-seekers-manus-unconstitutional>>.

¹⁸ Slater and Gordon ‘Manus Island Class Action’ <<https://www.slatergordon.com.au/class-actions/current-class-actions/manus-island>>; Supreme Court of Victoria ‘Manus Island Detention Centre Class Action’ <<https://www.supremecourt.vic.gov.au/court-decisions/case-list/manus-island-detention-centre-class-action>>.

¹⁹ Slater and Gordon ‘Manus Island Class Action’ <<https://www.slatergordon.com.au/class-actions/current-class-actions/manus-island>>.

²⁰ UN Human Rights Committee, Concluding Observations on Australia, 1 December 2017, CCPR/AUS/CO/6, [35] (<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsoAl3%2fFsnSQx2VAmWrPA0uA3KW0kpmSGOue15UG42EodNm2j%2fnCTyghc1kM8Y%2fLQ4n6KZBdggHt5qPmUYCI8eCslXZmnVIMq%2foYCNPyKpq>).

22. There is no reason why similar legal action would not be available against the UK if the same path is taken.
23. Relying on a separate sovereign country for a solution to a domestic policy issue involves inherent and significant risk. Doing so will clearly not limit exposure to liability. In fact, even if significant effort is engaged in to reduce legal liability (as Australia has attempted to do) the UK is highly likely to lose control of what takes place in offshore facilities, while also being likely to be liable for harm caused.
24. Additionally, the UK will not have any influence on the domestic legislation of the chosen host state and in particular how the courts or government of that country choose to interpret or enforce legislation. As noted above, the Manus Island detention centre was found to be illegal by the PNG Courts despite Australia's best efforts to process asylum seekers there, leading to substantial compensation payments.

Logistical challenges arising from relying on foreign sovereign governments

25. There is a high risk of running into logistical problems when trying to respond to urgent situations that might arise in offshore detention, as the experience of Australia demonstrates.
26. Omid Masoumali was a 23-year-old Iranian refugee who self-immolated on Nauru. It took 30 hours for him to be medically evacuated to Australia, where he ultimately died. The coronial inquest into his death heard that he would have had a higher chance of survival if he were treated at a major Australian hospital in a "timely fashion".²¹ The NJP acted in this inquest and the findings are currently pending. This case highlights the logistical problems that arise from offshore processing arrangements.
27. Similarly, Hamid Khazaei a 24-year-old Iranian asylum seeker held on Manus Island, died from septicaemia caused by an infected lesion on his leg. An inquest into his death found that Mr Khazaei's death was "preventable" and resulted from "a series of clinical errors, compounded by failures in communication that led to poor handovers and significant delays in his retrieval from Manus Island."²² This case highlights the inherent risks of relying on a foreign medical system and a contractor to provide medical support to asylum seekers.

²¹ *The Guardian*, 'Omid Masoumali set himself on fire on Nauru after UN officials 'upset' partner, inquest told' 2019 <<https://www.theguardian.com/australia-news/2019/feb/25/omid-masoumali-set-himself-on-fire-on-nauru-after-un-officials-upset-partner-inquest-told>>; *The Guardian*, 'Iranian refugee Omid Masoumali asked to see a psychologist before setting himself on fire on Nauru, inquest told' 2019 <<https://www.theguardian.com/australia-news/2020/sep/02/iranian-refugee-omid-masoumali-asked-to-see-a-psychologist-before-setting-himself-on-fire-on-nauru-inquest-told>>; Melanie Vujkovic, *ABC News* 'His burns were 'very survivable' but Omid Masoumali died slowly over two days' 2020 <<https://www.abc.net.au/news/2019-03-01/inquest-death-iranian-refugee-omid-masoumali-burns/10854742>>; Warren Barnsley, *Brisbane Times* 'Nauru refugee's burns were 'very survivable', doctor says' 2019 <<https://www.brisbanetimes.com.au/national/queensland/nauru-refugee-s-burns-were-very-survivable-doctor-says-20190227-p510o1.html>>.

²² Elaine Pearson, *Human Rights Watch* 'Australian Coroner's Report Documents a Refugee Tragedy' 2018 <<https://www.hrw.org/news/2018/07/30/australian-coroners-report-documents-refugee-tragedy>>; *Minter Ellison* 'Inquest into the Death of Hamid Khazaei' 2018 <<https://www.minterellison.com/articles/inquest-into-the-death-of-hamid-khazaei>>;

28. These cases demonstrate the inherent risk in creating systems that rely on contractors, foreign medical systems, bureaucratic decision making and political considerations responding to foreseeable health emergencies. We would caution against the UK exposing itself and asylum seekers to similarly foreseeable harm.

Offshore processing causes foreseeable, avoidable harm

29. *Médecins Sans Frontières* (MSF) provided independent mental healthcare in Nauru for 11 months and published their findings following their exile from Nauru in October 2018. Their data “shows that the mental health suffering on Nauru is among the worst MSF has ever seen, including in projects providing care for victims of torture”.²³ According to their report, one-third of their refugee and asylum seeker patients had attempted suicide, while 12 patients were diagnosed with the rare psychiatric condition of ‘resignation syndrome’, a “rare psychiatric condition where patients enter a comatose state and require medical care to keep them alive”.²⁴

30. These problems have been apparent for many years. The Nauru files were 2,116 leaked incident reports from offshore detention in Nauru between May 2013 and October 2015 documenting the harm involved with processing asylum seekers offshore. The following statistics have been extracted from the incident reports:²⁵

- ◆ 1,086 incidents with 51.3% involving children
- ◆ 7 reports of sexual assault of children
- ◆ 59 reports of assault on children
- ◆ 30 incidents of self-harm involving children
- ◆ 159 reports of threatened self-harm involving children
- ◆ 335 reports of threatened self-harm
- ◆ 185 reports of abusive/aggressive behaviour

31. Had incidents of this nature arisen in Australia, the Australian legal and support system would ensure that perpetrators were investigated and where appropriate prosecuted, and survivors of abuse would be offered

Josh Robertson, *ABC News* ‘Asylum seeker Hamid Khazaei’s death from leg infection was preventable, Queensland coroner finds’ 2018 <<https://www.abc.net.au/news/2018-07-30/asylum-seeker-hamid-khazaei-coronial-inquest-death-preventable/10050512>>; Inquest into the death of Hamid KHAZAEI, Coroners Court Brisbane, 2018 <https://www.courts.qld.gov.au/_data/assets/pdf_file/0005/577607/cif-khazaei-h-20180730.pdf>.

²³ *Médecins Sans Frontières*, ‘Report: Infinite Despair’ 2018< <https://www.msf.org/indefinite-despair-report-and-executive-summary-nauru>>.

²⁴ *Médecins Sans Frontières*, ‘Report: Infinite Despair’ 2018< <https://www.msf.org/indefinite-despair-report-and-executive-summary-nauru>>.

²⁵ Nick Evershed et al., *The Guardian*, ‘The lives of asylum seekers in detention detailed in a unique database’ <<https://www.theguardian.com/australia-news/ng-interactive/2016/aug/10/the-nauru-files-the-lives-of-asylum-seekers-in-detention-detailed-in-a-unique-database-interactive>>.

appropriate support. While Australia sought to assist Nauru in terms of capacity building for police and providing contractors to offer support, ultimately Australia was not able to ensure that basic Australian standards were complied with. This has had ramifications for Australia's ability to comply with its own international obligations, as recognised by the Committee on the Elimination of Discrimination against Women.²⁶

Personal injury litigation

32. The Australian government and contractors have paid substantial out-of-court settlements to injured detainees,²⁷ workers and service providers as a result of events occurring in offshore detention. For example, Wilson Security who were contracted by the Australian government to manage and operate security in offshore detention, reached an out-of-court settlement for a matter involving a young female who alleged she was raped by a Wilson Security employee.²⁸
33. The Australian government is also facing substantial ongoing litigation following the transfer of dozens of people from offshore detention. The NJP alone has sought mandatory injunctions against the relevant Minister in 14 matters, with a further 69 injunctions being sought by other firms. Many of these applicants have ongoing claims for damages on foot.²⁹ We are currently running an additional 29 compensation claims against the Australian government for predominantly children who suffered psychiatric or other injury in offshore detention.³⁰ It is likely that other firms are involved in similar litigation.
34. The litigation that has commenced in this way has been complex and the Australian government has thus far been unsuccessful in its attempts to stem it.

²⁶ Committee on the Elimination of Discrimination Against Women, Concluding observations on the eighth periodic report of Australia, 20 July 2018, CEDAW/C/AUS/8

(<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsgcjdM0xgERNalXh22nhTUm50pQrNrI4Ci8qYwIOTk4Tfvt3axFLnaCi4v3wbkWktgQK5ZQHB5uXt9bKJxBel0RV%2b9U29%2boamoXUKoKJguOH> at [53] and [54]).

²⁷ Sarah Farnsworth, ABC News 'Wilson Security reaches settlement with refugee woman allegedly raped on Nauru' 2019 <<https://www.abc.net.au/news/2019-11-25/wilson-security-to-pay-nauru-refugee-compensation/11735934>>.

²⁸ Sarah Farnsworth, ABC News 'Wilson Security reaches settlement with refugee woman allegedly raped on Nauru' 2019 <<https://www.abc.net.au/news/2019-11-25/wilson-security-to-pay-nauru-refugee-compensation/11735934>>; Miki Perkins, Sydney Morning Herald 'Wilson Security settles alleged rape claim from refugee on Nauru' 2019 <<https://www.smh.com.au/national/wilson-security-settles-alleged-rape-claim-from-refugee-on-nauru-20191125-p53dzi.html>>.

²⁹ *FRX as litigation representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63; *AYX18 by his litigation guardian AYY18 v Minister for Home Affairs* [2018] FCA 283; *DCQ18 v Minister for Home Affairs & Ors* [2018] FCA 918; *DWE18 as litigation representative for DWD18 v Minister for Home Affairs* [2018] FCA 1121; *EWR8 v Minister for Home Affairs* [2018] FCA 1460; *AWP17 v Minister for Home Affairs & Ors*; *AVA18 as litigation representative for AVB18 v Minister for Home Affairs & Ors*; *DMX18 as litigation representative for DNC18 v Minister for Home Affairs & Ors*; *DWE18 as litigation representative for DWD18 v Minister for Home Affairs & Ors*; *EIV18 by her litigation representative EIW18 v Minister for Home Affairs*; *FJZ18 by her litigation representative FKM18 & Ors v Commonwealth of Australia & Ors*; *DWH17 & Ors v Minister for Immigration and Border Protection & Ors*; *D7 v Minister for Immigration and Border Protection & Anor*.

³⁰ See references above at footnote 3.

35. Following the commencement of dozens of injunctions in 2017-2019 as described above, there have been appeals by the Australian government to the Federal Court and High Court of Australia on technical points of law.³¹ These appeals have not prevented the litigation, which is ongoing. Such litigation costs and appeals on technical points of law have required the expenditure of significant amounts of tax payer money in legal costs, in addition to any compensation that might ultimately be payable.
36. If the UK were to emulate Australia, offshore detention will inevitably cause avoidable harm to people who are subjected to it, and likely protracted litigation. This harm will have ongoing impacts on the UK health system and community if those people are ultimately granted temporary or permanent asylum in the UK and require substantial medical treatment. Practising any form of immigration detention, whether onshore or offshore, will lead avoidable and foreseeable injury. Consideration must also be given to the human cost of implementing such policies.
37. Members should oppose any arrangements that seek to outsource the responsibilities of housing or caring for asylum seekers.
38. Members should support amendments to remove clause 11 of the Bill.

International legal ramifications of pre-emptive removal

39. Clause 41 and Schedule 5 proposes an expansion of the UK's maritime enforcement powers, enabling them to detect, prevent, investigate, and prosecute 'illegal entry' of migrants, emulating Australia's Operation Sovereign Borders. If passed into law, this clause will put the UK in breach of its international obligations.
40. In relation to Australia, the UN Human Rights Committee, responsible for monitoring the implementation of the ICCPR, has found that:³²
- 40.1.** Australia's domestic legal framework governing extradition, transfer or removal of non-citizens, including asylum seekers and refugees, does not provide full protection against non-refoulement.
- 40.2.** Persons intercepted at sea are subject to "on-water" assessments of their international protection needs at sea through a rapid process, without access to legal representation or appropriate mechanisms to legally challenge decisions.

³¹ *Minister for Home Affairs v DMA as litigation guardian for DLZ18* [2020] HCA 43; *FRM17 v Minister for Home Affairs* [2019] FCAFC 148; (2019) 271 FCR 254.

³² UN Human Rights Committee, Concluding observations on the sixth periodic report of Australia, 1 December 2017, CCPR/C/AUS/6 ([https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsoAl3%2fFsnSQx2VAmWrPA0uA3KW0KkpmSGOue15UG42EodNm2j%2fnCTyghc1kM8Y%2fLQ4n6KZBdggHt5qPmUYCI8eCslXZmnVIMq%2foYCNPyKpq, \[33\]](https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsoAl3%2fFsnSQx2VAmWrPA0uA3KW0KkpmSGOue15UG42EodNm2j%2fnCTyghc1kM8Y%2fLQ4n6KZBdggHt5qPmUYCI8eCslXZmnVIMq%2foYCNPyKpq, [33]))).

- 40.3.** All asylum seekers, regardless of their mode of arrival, should have access to fair and efficient refugee status determination procedures and non-refoulement determinations. The policy of turning back asylum seekers without adequate assessment of their protection claims, breaches Australia's nonrefoulement obligation in article 6 and 7 of the ICCPR.
41. Any attempt by the UK to engage in similar activities is likely to put the UK in breach of its own obligations under international law.
42. Members should support amendments to remove Clause 41 and Schedule 5.

Conclusion

43. The NJP recommends that clause 26, clause 11, clause 41 and schedule 5 not be passed into law by the UK Parliament. To do so would expose the UK to significant avoidable risk and put the UK in breach of its obligations under international law.
44. Conclusively, this submission has argued that:
- 44.1.** Processing asylum seekers offshore gives rise to significant liability risks. The Australian government has been exposed to such risk and significant costs blowouts associated with substandard contract management. Despite the cessation of transfer of new detainees to PNG or Nauru, costs continue to be significant.
- 44.2.** Australia has failed to secure durable solutions for resettlement of refugees from offshore despite having vastly reduced numbers of spontaneous arrivals in comparison to the UK. Australia has expended considerable political and diplomatic capital trying to resolve this domestic political issue.
- 44.3.** There are inherent risks involved with relying on foreign sovereign states to resolve domestic obligations. Australia, as a result of outsourcing its international obligations, has been unable to properly manage its risks due to the complications that arise from relying on foreign sovereign states to assist with meeting Australia's domestic obligations to asylum seekers and refugees.
- 44.4.** There is a high risk of running into logistical problems when trying to respond to urgent situations that might arise in offshore detention as seen in the case of asylum seekers, Omid Masoumali and Hamid Khazaei, whose delayed transfer from offshore detention ultimately contributed to their deaths.
- 44.5.** Offshore processing causes foreseeable and avoidable harm. While Australia sought to assist Nauru in terms of capacity building for police and providing contractors to offer support, ultimately Australia was not able to ensure that basic Australian standards were complied with.

44.6. Offshore detention will inevitably cause avoidable harm to people who are subjected to it, and likely protracted litigation, regardless of the ultimate outcome of those cases. This harm will have ongoing impacts on the UK health system and community if those people are ultimately granted temporary or permanent asylum in the UK and require substantial medical treatment.

44.7. The Australian government and contractors have paid substantial out-of-court settlements to injured detainees,³³ workers and service providers as a result of events occurring in offshore detention and continue to face ongoing litigation for damages at present. There is no reason why similar action cannot be taken against the UK government.

44.8. Any attempt by the UK to engage in pre-emptive removal of asylum seekers would put the UK at risk of breaching its own obligations under international law.

³³ Sarah Farnsworth, *ABC News* 'Wilson Security reaches settlement with refugee woman allegedly raped on Nauru' 2019 <<https://www.abc.net.au/news/2019-11-25/wilson-security-to-pay-nauru-refugee-compensation/11735934>>.