



24 February 2023

Committee Secretary  
Senate Legal and Constitutional Affairs Committee

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Committee Secretary

### **Migration Amendment (Evacuation to Safety) Bill 2023**

The Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney ('Kaldor Centre') welcomes the opportunity to provide a submission on the Migration Amendment (Evacuation to Safety) Bill 2023 ('the Bill'). The Bill would compel the Government to offer certain people who were forcibly transferred to Nauru and Papua New Guinea (PNG) pursuant to Australia's offshore processing regime the opportunity to be brought back to Australia to await permanent settlement.

The Kaldor Centre supports the general policy objective of the Bill. In doing so, we note that Australia has always had exclusive or primary power to transfer people back from Nauru and PNG and has in fact done so through a series of formal and discretionary mechanisms, both under the first iteration of offshore processing (2001–2008) and since its reintroduction in 2012.

The new transfer mechanism proposed by the Bill would constitute an important step in Australia meeting its obligations under domestic and international law with respect to people who were transferred to, and remain in, Nauru and PNG.

Under domestic Australian law, Australia has a duty of care towards people that it forcibly transferred to Nauru and PNG. This duty has been clearly established in relation to the provision of healthcare.<sup>i</sup> It also arises wherever Australian officials or agents put people at risk, or in fact harm them, including where people suffer physical or mental injury in regional processing centres or living in the community offshore.<sup>ii</sup> If Australia seeks to shift the obligations under its duty of care to other States or entities, it is obliged to take all reasonable steps to ensure that the duty will be fulfilled. Failure to do so may cause any breaches by those States or entities to be attributable to Australia. It is no defence that any injuries might arise in foreign countries, as the challenges that might arise in that regard were within the knowledge of the Australian government at the time people were forced to travel there.<sup>iii</sup> By offering people an opportunity to travel to Australia pending permanent settlement, the Bill would significantly decrease the risk of further harm arising for which Australia is likely to be liable under domestic tort law.

Under international human rights law, Australia is required to respect and ensure the fundamental rights of all people within its territory *and all people outside of its territory who are subject to Australian 'jurisdiction'* (which in this sense means power or effective control).<sup>iv</sup> As with obligations under domestic law, Australia's jurisdiction did not end, and therefore its international legal obligations were not extinguished, with the removal of asylum seekers from its territory. Instead, Australia's human rights obligations extended to their treatment in Nauru and PNG.<sup>v</sup> The serious human rights violations suffered by people transferred offshore have been well-documented, including by numerous Senate Committees.<sup>vi</sup> Given this knowledge, Australia has a duty to cease any ongoing violations and ensure that any person who has suffered past violations has an effective remedy.<sup>vii</sup> For the people who remain in Nauru and PNG, an important first step in providing this remedy is offering them the option of transfer to Australia where they will be accommodated in an appropriate residential setting and provided with timely medical and psychiatric assessment or treatment as needed.

Finally, we note that the Bill leaves the architecture of offshore processing in place and does not guarantee a permanent settlement solution in Australia for anyone found to be a refugee, address the ongoing human rights concerns of people previously transferred back to Australia, or provide protection against the same harms to any person who arrives in Australia and is transferred to Nauru or PNG in the future. These matters also warrant urgent consideration by the Parliament.

If we can be of further assistance to the Committee, please do not hesitate to contact us.

Kind regards

**Madeline Gleeson**

Senior Research Fellow

Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney

**Anna Talbot**

PhD Candidate

Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney

**Notes**

<sup>i</sup> *Plaintiff S99/2016 v Minister for Immigration and Border Protection* (2016) 243 FCR 17; [2016] FCA 483.

<sup>ii</sup> Specifically, liability may arise due to vicarious liability (which in recent case law has not required a strict employee-employer relationship) or a non-delegable duty of care. In relation to the former, see: *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 at [83]; *DP v Bird* [2021] VSC 850; *Prince Alfred College Inc v ADC* (2016) 258 CLR 134; [2016] HCA 37. In relation to the latter, non-delegable duties of care arise in circumstances where a person is detained. See, e.g.: *AS v Minister for Immigration & Border Protection & Anor* [2014] VSC 593; *Price v State of NSW* [2011] NSWCA 411.

<sup>iii</sup> *EUB18 v Minister for Home Affairs* [2018] FCA 1432 [36]. See also *Plaintiff S99/2016 v Minister for Immigration and Border Protection* (2016) 243 FCR 17; [2016] FCA 483. The situations of people held offshore in detention facilities and in the community are analogous, in that they have no freedom to leave without the consent and support of the Australian Government.

<sup>iv</sup> Human Rights Committee, *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (CCPR/C/21/Rev.1/Add. 13, 26 May 2004) para 10; Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties* (CAT/C/GC/2, 24 January 2008) paras 7 and 16; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, *Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the General Principles regarding the Human Rights of Children in the Context of International Migration* (CMW/C/GC/3-CRC/C/GC/22, 16 November 2017) para 12.

<sup>v</sup> Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia* (CCPR/C/AUS/CO/6, 1 December 2017) para 35; UN Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants on his Mission to Australia and the Regional Processing Centres in Nauru* (A/HRC/35/25/Add.3, 24 April 2017) para 73.

<sup>vi</sup> Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (Report, November 2014) Ch 12; Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (Report, 11 December 2014); Senate Select Committee into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, *Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru* (Report, 31 August 2015); Philip Moss, *Review into Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru* (Report, 6 February 2015); Senate Legal and Constitutional Affairs References Committee, *Conditions and Treatment of Asylum Seekers and Refugees at the Regional Processing Centres in the Republic of Nauru and Papua New Guinea* (Interim Report, 5 May 2016); Senate Legal and Constitutional Affairs References Committee, *Serious Allegations of Abuse, Self-harm and Neglect of Asylum Seekers in relation to the Nauru Regional Processing Centre, and any like Allegations in Relation to the Manus Regional Processing Centre* (Report, 21 April 2017); Médecins Sans Frontières, *Indefinite Despair: The Tragic Mental Health Consequences of Offshore Processing on Nauru* (December 2018) <https://msf.org.au/article/statements-opinion/indefinite-despair-mental-health-consequences-nauru>. For a list of UN reports on offshore processing and human rights violations from 2012 to 2021, see: UNHCR, 'United Nations observations on Australia's transfer arrangements with Nauru and Papua New Guinea (2012-present)' (webpage, 11 October 2021) <https://www.unhcr.org/en-au/publications/legal/6163e2984/united-nations-observations-on-australias-transfer-arrangements-with-nauru.html>. See also: Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (NewSouth, 2016).

<sup>vii</sup> International Covenant on Civil and Political Rights, art 3. See also: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art 14; Convention on the Rights of the Child, art 39; International Convention on the Elimination of All Forms of Racial Discrimination, art 6.