Human Rights Law Centre

From indefinite detention to exile

Submission to the inquiry into the Migration Amendment Bill 2024

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Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia.

The Human Rights Law Centre acknowledges and pays respects to the Wurundjeri people and the Gadigal people, on whose unceded lands our offices sit. We acknowledge the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

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A. Summary

(1) The Migration Amendment Bill 2024 (Cth) (**Bill**) seeks to drastically expand the Federal Government's powers to monitor, detain and deport people who are not Australian citizens, by allowing it to warehouse people in third countries, reverse protection findings made for refugees, and continue imposing punitive visa conditions on those who remain here.

(2) The Bill is the latest in a series of rushed, poorly considered punitive measures primarily targeting the small group of people released from indefinite immigration detention following the High Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*[1] in November 2023. This Bill, along with previous changes to the Bridging R Visa regime and the introduction of a continuing detention regime, seeks to enact serious and disproportionate punishment on a group of people who are differentiated from other members of the Australian community purely by their visa status.

(3) These proposed laws would enable the Government to:

a. **pay foreign countries to indefinitely warehouse** the people that Australia wishes to deport but cannot return to their countries of origin – either because they are stateless, owed protection or too unwell;
b. **overturn existing protection findings** even if the person currently has a valid visa to remain in the community, in order to nullify protections that prevent their *refoulement*;
c. **avoid accountability for the harm** experienced by people who are subjected to the new offshore warehousing arrangements or the existing offshore processing regime;
d. **reimpose punitive curfews and electronic monitoring** for a small group of people who have already suffered indefinite immigration detention; and
e. **breach people's privacy** by drastically expanding the Government's power to disclose personal information, both within Australia and with foreign governments.

(4) Although the Bill is targeted at a small group of people, in practice its operation will be far broader. Thousands of people will be impacted, including many Bridging E Visa holders, people who have been transferred to Australia from Nauru and Papua New Guinea, and people who may be subject to visa cancellation or refusal in the future. The Government will have the power to abandon people and their children in third countries with no pathway out even if they have never been issued with so much as a parking fine, have lived in Australia their entire lives, or have family here.

(5) Externalising Australia's international protection obligations and warehousing people in third countries has never been, and will never be, an acceptable or effective response to political pressures. This approach has created enormous human suffering which should never be repeated. Sending people released from indefinite immigration detention to third countries will not leave them 'out of sight and out of mind', but will cause serious harm that will reverberate through families and communities in Australia for years to come.

Recommendations

The Committee should recommend that the Bill not be passed.

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[1] (2023) 415 ALR 254 (***NZYQ***).

B. Expanding failed offshore policies

(6) The Australian Government intends to pay other countries to accept people who cannot be returned to their countries of origin, by entering into arrangements reminiscent of the past decade of failed regional processing in Nauru and Papua New Guinea. There is no pretence that there is any purpose or end point to their transfer – meaning people will be warehoused offshore indefinitely.

(7) The Bill contemplates that the Australian Government will enter into "third country reception arrangements" with foreign states, regarding "the removal of non-citizens from Australia and their acceptance, receipt or ongoing presence in the foreign country."[2] The contents of such arrangements would be left entirely to the discretion of the Government. However, the Bill would empower the Government to take virtually unconstrained action pursuant to those arrangements, including by removing people to third countries and by making payments to those countries.[3]

Offshore warehousing should be abandoned, not expanded

(8) Over the past 12 years Australia's regional processing framework has proved to be an abject failure and caused immense, widely documented human suffering. Externalising Australia's legal responsibilities is an approach that should be abandoned, not expanded.

(9) The harm experienced by people subject to Australia's arrangements with Papua New Guinea and Nauru was highlighted by the United Nations High Commissioner for Refugees (**UNHCR**) as early as November 2013 and overwhelming evidence has emerged since, including the following:

a. in 2014 this Senate Committee found the Australian Government had failed in its duty to protect people on Manus Island from harm, and that harsh and inhumane conditions and a lack of resettlement pathways had contributed to the lethal violence which took place in February 2014;[4]
b. in 2015 the Moss Review uncovered numerous incidents of sexual abuse and exploitation of women held in Nauru;[5]
c. in 2015 a Senate Select Committee found that conditions in the Nauru Regional Processing Centre were not adequate, appropriate or safe for the people held there;[6]
d. in 2016 The Guardian released the Nauru Files, a cache of over 2,000 incident reports revealing the scale of abuse of children and others in Nauru;[7]
e. in 2016 this Committee noted evidence of poor living conditions, substandard health facilities, and hundreds of incidents of self-harm, serious assault or excessive use of force in regional processing centres;[8]

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[2] Migration Act 1958 (Cth) (**Migration Act**) proposed s 198AHB(1).
[3] Migration Act proposed s 198AHB(2).
[4] 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).
[5] Phillip Moss, *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru* (Report, 6 February 2015).
[6] Select Committee on the 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).
[7] Paul Farrell, Nick Evershed and Helen Davidson, 'The Nauru files: cache of 2,000 leaked reports reveal scale of abuse of children in Australian offshore detention', *The Guardian* (online, 10 August 2016) <https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention>.
[8] Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea* (Interim Report, May 2016).

f. in April 2017 this Committee found that harsh living conditions and uncertainty about the future contributed to the widespread reports of abuse, self-harm and neglect in Nauru and Manus Island, and observed it would be a 'fiction' to suggest the Australian Government did not owe a duty of care to people it had transferred there;[9]
g. in 2018 Médecins Sans Frontières, the only independent mental health provider in Nauru at the time, published a report showing extreme levels of mental health suffering on the island.[10]

(10) Since its reintroduction in 2012, at least 14 people subject to regional processing have died.[11] The causes of their deaths included murder, suicide, and denial or delay of medical treatment. People in Papua New Guinea and Nauru were exposed to such poor conditions and medical neglect that by 2019, the Australian Government was forced to medically evacuate hundreds of people back to Australia. Today, 42 people remain abandoned in Papua New Guinea, and around 100 people are stuck in Nauru with no pathway to permanent safety. Close to 900 people previously subjected to regional processing continue to suffer from the consequences of the policy.[12] They remain in Australia, where they have built lives and families, despite the constant threat of deportation. It is inconceivable for the Government to contemplate repeating or expanding this failed and fatal approach.

(11) UNHCR has repeatedly condemned externalisation policies as being incompatible with international refugee law and undermining global solidarity with the refugee protection system.[13]

No guarantee of safety in undisclosed third countries

(12) The Government has provided no indication of the foreign countries with which it expects to enter "third country reception arrangements." It is not clear whether any bilateral discussions have commenced.

(13) The Bill sets out no conditions or restrictions on the countries with which Australia may enter arrangements. There is no requirement that a third country provide any level of safety or dignity for the people taken there. There is no requirement that the third country observe minimum human rights standards or commit to a particular standard of treatment of persons transferred. There is nothing to prevent the Australian Government from sending people to a third country where they may face inhumane conditions, arbitrary detention or other serious rights violations.

(14) In previous locations that Australia has chosen for offshore warehousing, people transferred were attacked, killed, and detained arbitrarily.[14] The 42 people who currently remain in Papua New Guinea, abandoned by the Australian Government, are facing destitution and homelessness.[15]

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[9] Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *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, April 2017).
[10] Médecins Sans Frontières, *Indefinite Despair* (Report, December 2018).
[11] See Human Rights Law Centre, *#ElevenYearsTooLong – Timeline of offshore detention* (web page, 19 July 2024) < https://www.hrlc.org.au/timeline-offshore-detention>.
[12] Department of Home Affairs, *BE24-0732 - Transitory Persons - Transferred to a Regional Processing Country* (answer to question on notice, Senate Standing Committee on Legal and Constitutional Affairs, Budget Estimates May 2024).
[13] See eg United Nations High Commissioner for Refugees, *UNHCR Note on the "Externalization" of International Protection* (Position Paper, 28 May 2021); UNHCR Representation in Australia, New Zealand and the Pacific, *Externalisation* (online legal publication, 24 January 2022).
[14] Helen Davidson, 'Leaked photos of Papua New Guinea prison reveal 'torture' of 18 asylum seekers cut off from world', *The Guardian* (online, 15 January 2020) <https://www.theguardian.com/world/2020/jan/15/leaked-photos-of-papua-new-guinea-prison-reveal-torture-of-18-asylum-seekers-cut-off-from-world>; Human Rights Law Centre, *Settlement reached over the murder of asylum seeker Reza Berati on Manus Island* (Media release, 14 August 2023).
[15] Asylum Seeker Resource Centre, *Cruel neglect of refugees abandoned in PNG continues as more people threatened with eviction* (media release, 28 October 2024).

(15) There is also no requirement that third countries afford people transferred the right to liberty. Rather, the Bill specifically contemplates that people may be detained by third countries.[16] These arrangements would allow the Australian Government to subvert the ruling of the High Court in *NZYQ* that people cannot be indefinitely detained, by paying another country to detain them instead.

No guarantee of permanency or non-refoulement

(16) For a person to be removed pursuant to a third country reception arrangement, there is no requirement in the Bill that the person have any right to reside permanently in that third country. It is entirely possible that people could be removed to third countries, only to be deported later from that country. While Bridging R Visa holders must have permission to "enter and remain" in a third country before they can be sent there, there is no specificity as to the length of time they must be granted permission to remain. For all other people who might be subjected to this regime, the Bill is silent on whether they must have even this limited right to "enter and remain" before being sent to a third country.

(17) The vast majority of people released from detention following *NZYQ* are either stateless or refugees.[17] At international law, a person who is a refugee may only be removed to a country other than their country of origin if they have a right to stay lawfully in that country and be treated in accordance with the Refugees Convention and other relevant human rights standards – including protection from refoulement.[18] Indirect or chain refoulement – removing a refugee to a country where they risk being returned to their country of origin – is contrary to Australia's obligations under the Convention.[19]

(18) There is no guarantee that countries who are party to third country reception arrangements will be signatories to the Refugees Convention. As such, people removed to third countries may face a real risk of being returned to their countries of origin, despite being recognised as refugees.

Thousands could be subject to offshore warehousing

(19) The Government's ability to warehouse people in third countries will not be limited to members of the *NZYQ* cohort. **Any person,** adult or child, who engages the removal duty at s 198 of the Migration Act may be taken to a third country pursuant to a 'reception agreement' if that country agrees to receive them. This includes not only people whose visas are cancelled on character grounds, but also people whose visas have expired, or have been refused or cancelled on other grounds such as failing to meet relevant criteria or providing incorrect information.

Bridging R Visa holders

(20) The Bill provides that if a Bridging R Visa holder receives permission from a third country to "enter and remain" in that country, their bridging visa will cease upon receipt of a notice from the Minister.[20] Without a valid visa,

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[16] Migration Act, proposed s 198AHB, definition of *third country reception functions*.
[17] In the course of the *NZYQ* proceeding, the Minister identified 92 people then in detention who would likely be impacted by the outcome of the case. Of those, 78 were owed protection obligations, 9 were stateless and 5 were described as 'intractable'. See Minister for Immigration, Citizenship and Multicultural Affairs, *Dashboard Document* (19 October 2023).
[18] See UN High Commissioner for Refugees (UNHCR), *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries* (Position paper, April 2018) <https://www.refworld.org/policy/legalguidance/unhcr/2018/en/120729>.
[19] See UN Human Rights Committee, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004 [12]; UN Committee against Torture, General Comment No. 1, "Implementation of Article 3 of the Convention in the Context of Article 22", UN Doc. A/53/44, Annex IX, 21 November 1997, [2], [3].
[20] Migration Act proposed s 76AAA.

a person will become liable to detention and removal[21] – allowing the Government to take them back into immigration detention in Australia until they are removed to the third country.

(21) Bridging R Visa holders – people who were released from indefinite detention pursuant to *NZYQ* – have spent the past months trying to recover from their experiences of arbitrary detention and rebuild their lives, in the face of intense political and media scrutiny and harsh, restrictive visa conditions. People in this group have already twice been deprived of their liberty by our Government – first by their indefinite detention, and then by the imposition of punitive curfew and monitoring arrangements. These people will once again face the loss of their liberty simply by virtue of their visa status. No other type of visa is liable to cease immediately following a decision of another country to grant them "permission" to enter.

Transitory persons

(22) Transitory persons in Australia,[22] who were previously subject to regional processing in Nauru or Papua New Guinea but have been brought here for medical treatment, family reunion or other purposes, may also be exposed to the risk of being warehoused offshore once again. Most transitory persons (and their children) hold short term Bridging E Visas, valid only for a few months at a time. If the Government chooses not to renew a bridging visa, a transitory person will become liable for detention and then removal from Australia. If the obligation to remove them to a regional processing country does not apply,[23] then the person will be subject to the general removal duty at s 198 and could be removed to a third country.

(23) The Albanese Government has already indicated that it intends to use third country reception arrangements to "help address the problem of non-citizens refusing to be resettled in New Zealand."[24] While the Australian Government has entered into a limited resettlement deal with New Zealand for people previously subjected to offshore processing, this is not an appropriate option for people who have family members who are Australian citizens or permanent residents, or who have built lives in Australia. Moreover, that arrangement is capped at 450 places. If every transitory person in Australia sought to take up this resettlement offer, some 700 people would miss out.

(24) A key condition of the resettlement arrangement with New Zealand has been its voluntary nature. It would be unconscionable and extremely unjust for the 700 adults and children who cannot be accommodated by the voluntary New Zealand arrangement to be arbitrarily subjected to forced relocation to another, potentially unsafe, third country.

(25) People who were previously subjected to regional processing experienced indefinite detention, extreme mistreatment and medical neglect offshore. Many have now spent close to a decade in Australia, rebuilding their lives to the extent possible on short term, insecure visas. Many have family in Australia, have raised their children here and have built friendships, careers and communities. They should not be forced to uproot their lives yet again.

Example: separating families by removal offshore

Rana came to Australia seeking safety, but instead was sent to Nauru where she endured mistreatment and medical neglect for several years before being brought to Australia to reunite with her husband. Since then, she has lived on short term bridging visas, while she and her husband try to rebuild their lives together.*

[21] Migration Act ss 189, 198.
[22] As defined in Migration Act, s 5(1).
[23] That obligation arising under s 198AD of the Migration Act.
[24] Paul Karp, "'We don't want them in Australia at all': Labor wants more powers to re-detain and remove non-citizens to third countries', *The Guardian* (online, 7 November 2024) <https://www.theguardian.com/australia-news/2024/nov/07/labor-immigration-detention-bill-tony-burke-pay-countries-unlawful-citizens>.

Rana's husband has established a successful career in Australia. He may soon be eligible for permanent residency. Despite this, the Australian Government expects Rana to resettle in New Zealand. Rana doesn't want her husband to uproot his life and his work yet again, and she also doesn't want to risk being separated indefinitely by going to New Zealand alone. They both feel that Australia is their home.

If Rana does not go to New Zealand, the Australian Government could stop granting her bridging visas and send her to a foreign country under a "third country reception arrangement", where she may never see her husband, her friends or community again. Rana still carries deep trauma from her experiences in Nauru, and would be deeply distressed at the prospect of being warehoused offshore again.

** Pseudonym*

People failed by Fast Track who cannot be returned to their countries of origin

(26) Thousands of people who have been failed by the Coalition's defective 'fast track' refugee assessment process remain in limbo despite living in Australia for more than 10 years. They live without any visa or on precarious, short term Bridging E Visas. If at any time those bridging visas are not renewed, people will become liable to detention and removal to their countries of origin, despite fearing harm there. Yet many people in this position have been failed by a system that did not fairly assess their claims for refugee protection.

(27) Recognising the failures of the 'fast track' system, the Albanese Government recently abolished it, with effect from 14 October 2024.[25] But there remains no pathway for people to remain in Australia permanently. People who were unfairly refused through the 'fast track' system should be entitled to have their claims fairly and properly reassessed. Instead, under the provisions introduced by this Bill, the thousands of people who have been refused protection now face an additional risk: they could be forcibly expelled to third countries. This risk is particularly acute for people who come from countries that are unwilling to accept the involuntary return of their citizens.

Family separation

(28) There is no protection from 'third country reception arrangements' for people with family in Australia. There is no protection from such arrangements for children. Any person who is subject to the removal duty in s 198 of the Act could be ripped from their family and community and exiled offshore.

(29) Children who were born in Australia and have lived their entire lives here could be removed to foreign countries to which they have no connection. Parents of Australian citizen children could also be removed, separating them indefinitely from their children and partners.

Third country arrangements have a history of failure

(30) The Australian Government has previously entered a range of agreements with other countries regarding the transfer of migrants and refugees. Such agreements have invariably been fraught or defective, including:

a. Australia's regional processing agreements with Papua New Guinea, the implementation of which has been plagued by alleged corruption, fraud and criminal activity[26] and was found to be unconstitutional by

[25] On this date, the former 'fast track' Immigration Assessment Authority was replaced by the Administrative Review Tribunal, pursuant to s 2 of the *Administrative Review Tribunal Act 2024* (Cth).
[26] Nick McKenzie and Michael Bachelard, 'Police probe PNG minister in $3 million detention bribe investigation', *The Age* (online, 17 October 2024) <https://www.theage.com.au/national/police-probe-png-minister-in-3-million-detention-bribe-investigation-20241014-p5ki4f.html>; Dennis Richardson, *Review of Integrity Concerns and Governance Arrangements for the Management of Regional Processing Administration by the Department of Home Affairs* (report, 10 October 2023).

the PNG Supreme Court in 2016.[27] Despite the arrangement formally ending in 2021, 42 people still remain in PNG and the Australian Government continues to finance their presence in the country;[28]

b. Australia's regional processing agreements with Nauru, which have also been plagued by alleged corruption[29] and have cost in excess of $5 billion to date;[30]
c. Australia's resettlement arrangement with Cambodia, pursuant to which Australia paid $55 million to resettle 10 people, most of whom subsequently departed Cambodia due to harsh living conditions;[31] and
d. Australia's regional resettlement agreement with Malaysia, which was found to be invalid by the High Court of Australia.[32]

(31) The United Kingdom recently sought to follow Australia's lead by entering a bilateral agreement to externalise its refugee protection obligations to Rwanda. That plan was found to be unlawful, required multiple legislative fixes and was ultimately scrapped by the UK Government in July 2024.[33]

(32) It is doubtful whether any third country will agree to accept people Australia wishes to deport. In *NZYQ*, evidence showed the Australian Government had tried without success to seek agreement from the United States, the United Kingdom, Canada, New Zealand, Bangladesh and Saudi Arabia to accept the plaintiff. The High Court observed that no country in the world had an established practice of offering resettlement to people in circumstances such as the plaintiff's, and that the Department had never successfully removed such a person to a third country.[34]

(33) Countries which are more likely to be willing to accept monetary incentives to enter a third country reception arrangement are those in need of development aid or economic support. Australian governments have long sought to leverage aid relationships with countries in the Asia and Pacific region to broker resettlement deals. The failed Cambodia deal, mentioned above, came at the extraordinary cost of $55 million – those funds being divided between resettlement costs and aid contributions.[35] In part due to the prevailing economic and political conditions in Cambodia, refugees found it virtually impossible to access the formal job market or receive basic medical care, leaving them to face destitution.[36]

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[27] *Namah v Pato* [2016] PJSC 13.
[28] Paul Karp, 'Australia to strike new funding deal with Papua New Guinea to manage transferred asylum seekers', *The Guardian* (online, 4 July 2024) <https://www.theguardian.com/australia-news/article/2024/jul/04/australia-to-strike-new-funding-deal-with-papua-new-guinea-to-manage-transferred-asylum-seekers>.
[29] Ben Doherty and Rafqa Touma, 'Morrison government paid corrupt businessman millions for offshore processing on Nauru', *The Guardian* (online, 25 May 2023) <https://www.theguardian.com/australia-news/2023/may/25/morrison-government-paid-corrupt-businessman-millions-for-offshore-processing-on-nauru>; Dennis Richardson, *Review of Integrity Concerns and Governance Arrangements for the Management of Regional Processing Administration by the Department of Home Affairs* (report, 10 October 2023).
[30] Department of Home Affairs, *BE22-088 - Offshore Processing in Nauru - Cost per year* (answers to questions on notice, Senate Standing Committee on Legal and Constitutional Affairs, Budget Estimates, March-April 2022).
[31] Kaldor Centre for International Refugee Law, 'Research Brief: the Australia-Cambodia Refugee Deal' (October 2019) p 14 <https://www.unsw.edu.au/content/dam/pdfs/unsw-adobe-websites/kaldor-centre/2023-09-research-briefs/2023-09-Research-Brief_Cambodia_Oct2019.pdf>.
[32] *Plaintiff M70/2011 v Minister for Immigration and Citizenship*; *Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32.
[33] Peter William Walsh, 'Q&A: The UK's former policy to send asylum seekers to Rwanda', *The Migration Observatory at the University of Oxford* (online, 24 July 2024) <https://migrationobservatory.ox.ac.uk/resources/commentaries/qa-the-uks-policy-to-send-asylum-seekers-to-rwanda/>.
[34] *NZYQ,* [5].
[35] Kaldor Centre for International Refugee Law, 'Research Brief: the Australia-Cambodia Refugee Deal' (October 2019) p 14 <https://www.unsw.edu.au/content/dam/pdfs/unsw-adobe-websites/kaldor-centre/2023-09-research-briefs/2023-09-Research-Brief_Cambodia_Oct2019.pdf>.
[36] Ibid pp 6-9.

(34) Seeking to displace Australia's responsibilities onto developing nations is not only unconscionable, it also means host nations are less likely to have the systems and structures required to properly support people and ensure their rights are protected.

Evading accountability for harm

(35) The only lesson the Australian Government appears to have taken from the disastrous offshore processing regime is that it can seek to legislate away its accountability for harm suffered by people who are warehoused offshore. That appears to be the animating premise of proposed new provisions at Schedule 2 of the Bill.

(36) The Bill proposes new provisions purporting to avoid civil liability for the Minister, the Commonwealth and its officers in relation to action taken to remove people from Australia, and for harm they might experience offshore. It specifically seeks to exclude liability:

a. for things done during the removal of a person whose visa has been refused or cancelled on character grounds, whose protection visa has been refused on the basis of s 5H(2) or 36(1C), or whose Bridging R Visa has ceased because they have been accepted under a third country reception arrangement;[37]
b. for anything that occurs while a person is in a third country pursuant to a third country reception arrangement;[38] and
c. for anything that occurs during a person's removal to a regional processing country or while a person is in a regional processing country.[39]

(37) While the Australian Government has repeatedly claimed that it owes no duty of care to people subjected to offshore processing, Australian courts have found otherwise on an interlocutory basis, and various UN bodies have concluded that Australia exercises effective control over regional processing centres.[40] The inclusion of these provisions in the Bill reveals an awareness on the Government's part that people are likely to suffer harm if removed to third countries, and the Government is likely to be legally responsible.

(38) Over recent years, the willingness of Australian courts to go behind the legal fiction of foreign State control over offshore processing centres and to fix the Australian Government with liability for conduct taking place there ultimately saved the lives of hundreds of people, by ensuring they received necessary medical treatment in Australia. In 2019 the Australian Labor Party, then in Opposition, supported the introduction of the 'Medevac' laws to streamline the process by which people in Nauru and Papua New Guinea could compel the Australian Government to provide adequate medical treatment, through transfer to Australia.[41] The relevant provisions giving effect to Medevac arrangements were inserted by amendments to government legislation moved by then-opposition leader, Bill Shorten. Introducing those amendments, Mr Shorten said:[42]

> I believe that we can keep our borders secure, we can uphold national security, and still treat people humanely. We can have strong borders while still fulfilling our duty of care to people in our care… In fact, this Bill and our amendments are about Australia's character, it is about how we treat sick people in our care.

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[37] Migration Act proposed s 198(12).
[38] Migration Act proposed s 198(13).
[39] Migration Act proposed s 198AD(11).
[40] See eg Committee Against Torture, *Concluding observations on the sixth periodic report of Australia,* UN Doc CAT/C/AUS/CO/6 (5 December 2022).
[41] 'Medevac' arrangements were introduced by way of the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth).
[42] The Guardian, *A test of 'Australia's character': leaders debate medical transfer bill* (video, 13 February 2019) <https://www.theguardian.com/australia-news/video/2019/feb/13/a-test-of-australias-character-leaders-debate-medical-transfer-bill-video>.

(39) It is precisely that duty of care that the Albanese Government now seeks to avoid for people transferred pursuant to 'third country reception arrangements.' The explicit exclusion of civil liability, as proposed by Schedule 2 of the Bill, purports to limit access to these forms of life-saving medical treatment.

(40) If these provisions took effect, and a refugee were to be removed to a third country, locked up in an Australian-funded detention centre, and abused or killed while in detention, the person and their family would have no recourse against the Australian Government.

(41) If these provisions had been in effect in 2012, when the regional processing regime was re-established, the Australian Government may not have been accountable to Reza Berati's family after his death. The hundreds of people who suffered extreme medical neglect may not have been able to bring claims in tort to compel their transfer to receive medical treatment. The Australian Government has settled at least four claims for damages relating to harm sustained due to medical neglect offshore,[43] and dozens more remain before the courts.

(42) The Australian Government should not be permitted to wash its hands of responsibility for the inevitable harm that will occur if it chooses to warehouse people in third countries indefinitely. The Committee should treat the attempted exclusion of civil liability as a foreboding acknowledgment of the harm that these arrangements are likely to cause.

Real solutions needed to allow people to rebuild their lives

(43) The presence of people in Australia who no longer have visas but who cannot be returned to their countries of origin is a function of our harsh and dysfunctional migration laws – in particular, the failed 'fast track' asylum regime and widely-criticised visa cancellation regime.

(44) One such person is AZC20, whose circumstances were recently considered by the High Court.[44] AZC20 is an Iranian man who was detained for over eleven years, while his protection claims were assessed through the failed 'fast track' system. He has never been convicted of any crime. Over the course of his detention, AZC20 became profoundly unwell.[45] He was finally released from detention after the Federal Court ruled that he was too unwell to cooperate with his own removal from Australia.[46] It is unconscionable to consider that people in the position of AZC20 might be subjected to further suffering through 'third country reception arrangements,' yet this is precisely the power that the Government now seeks.

(45) Over the past decade, rates of visa cancellation on 'character' grounds have increased more than tenfold due to the introduction of mandatory visa cancellation powers.[47] Increasingly this has led to the cancellation of visas held by refugees and people to whom Australia owes protection. Visa cancellation constitutes a form of double punishment for people who are convicted of certain offences. However, no amount of punishment will subvert Australia's international protection obligations or render it safe to return people to the countries from which they have fled.

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[43] *BXD18 (by her litigation representative Marie Theresa Arthur) v Minister for Home Affairs (No 2)* [2024] FCA 16; *DZQ18 as litigation representative for DZP18 v Minister for Home Affairs* [2024] FCA 38; *FBV18 v Commonwealth of Australia* [2024] FCA 947; *AYX18 (by his litigation representative AYY18) v Minister for Home Affairs* [2024] FCA 974.
[44] AZC20 was granted leave to intervene in *ASF17 v Commonwealth of Australia* [2024] HCA 19.
[45] The effect of AZC20's detention on his physical and mental health are set out at length in *AZC20 v Secretary, Department of Home Affairs (No 2)* [2023] FCA 1497 at [65(d)].
[46] Ibid [66].
[47] Department of Home Affairs, 'Visa Cancellation Statistics' <https://web.archive.org/web/20220324232828/https:/www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>.

(46) The Government must face the consequences of its visa cancellation regime and the failed 'fast track' process and develop real solutions that allow people to rebuild their lives. Locking people up in immigration detention for the rest of their lives was not a solution, just as warehousing them offshore forever will not be a solution.

(47) Every year, some 60,000 people leave Australian prisons.[48] Their sentences do not last forever and are designed to allow for their rehabilitation and re-entry into the community. Instead of building a parallel legal system for non-citizens which seeks to exile them forever, the Government should be investing in the programs and supports that can keep citizens and non-citizens alike out of the criminal legal system in the first place. Carceral responses only serve to tear families apart, cause intergenerational trauma and allow the factors that contribute to offending to continue unaddressed.

C. Eroding our refugee protection system

(48) The Bill seeks to erode Australia's refugee protection system by significantly expanding the Minister's power to overturn existing protection findings. It would allow the Minister to determine that any "removal pathway non-citizen" who was previously assessed as a refugee is no longer owed protection,[49] in order to nullify laws that provide some limited protection against their removal to a country where they would face harm.

(49) "Removal pathway non-citizens" include people in detention who are liable for removal, but also Bridging R Visa holders in the community, Bridging E Visa holders in the community who were granted their visa on the basis that they are making arrangements to depart Australia, as well as other people in the community holding a type of visa that might be prescribed by regulations in future. [50]

(50) The proposed amendments expand upon s 197D of the Act, which has been subject to extensive criticism by refugee and human rights bodies. That provision allows the Minister to reverse a protection finding made in relation to a non-citizen in the course of removing the person under s 198 of the Act. The power, as it is currently framed, is available only in relation to people in detention who are immediately subject to the removal duty. The proposed amendments would expand the power such that people who are lawfully in the community and not presently facing removal could be stripped of their refugee status.

(51) Rather than expanding s 197D of the Act, that provision should be completely repealed. It fundamentally conflicts with Australia's international obligations. The Australian Human Rights Commission has made the following observations in relation to Australia's obligation to provide refugees with durable, permanent protection:[51]

> The Office of the United Nations High Commissioner for Refugees (UNHCR) provides guidance on the narrow circumstances within which a person's refugee status may cease. Its guidelines state that a 'strict approach is important since refugees should not be subjected to constant review of their refugee status'…
>
> The UNHCR recommends that cessation of refugee status should only occur once there have been significant and profound changes in a country of origin, and usually over sufficient time to ensure the durability of the change. However, the UNHCR also identifies that there would be exceptions to cessation even in these circumstances, such as where the person found to be in need of protection has suffered such grave persecution that they cannot reasonably be expected to return. Similarly, those who have been long-term residents in the country of asylum and who have established ties, should not be expected to leave.

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[48] Australian Bureau of Statistics, *Corrective Services, Australia, June quarter 2024* (catalogue no. 4512.0, 19 September 2024).
[49] Migration Act proposed s 197D(1).
[50] Migration Act proposed s 5(1), definition of *removal pathway non-citizen*.
[51] See eg Australian Human Rights Commission, *Submission to Review of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (20 June 2023), available online: <https://humanrights.gov.au/sites/default/files/review_of_the_migration_amendment_clarifying_australias_obligations_for_removal_act_2021_0.pdf> [54]-[56].

(52) Despite this, the Bill seeks to expand upon a power that is already in conflict with Australia's obligations at international law through amendments that would allow the Minister, in an unspecified process, to unilaterally review protection findings for visa holders, some of whom have been in the community lawfully for years. The proposed power is at large: it is not limited by or referable to considerations ordinarily relevant to the cessation of refugee status, such as the past persecution suffered by the visa holder and the extent of their connection to the community.[52] The proposed expansion of the s 197D power is a matter of grave and serious concern.

D. Ongoing unconstitutional punishment

(53) Most people released from indefinite detention pursuant to *NZYQ* have been subject to harsh visa conditions including a nightly curfew and the imposition of constant electronic monitoring via ankle bracelets. Curfews and electronic monitoring are extensions of immigration detention. People cannot live normal lives while the Government is controlling and monitoring their every move. These conditions disrupt families, impose huge stigma and psychological harm, and make it near impossible for people to find work. They also mean people live in constant fear of being sent to prison if they are just a few minutes late arriving home. The Government now seeks the power to reimpose these punitive conditions on people, relying on a differently-framed legal test.

Example: punitive conditions extend immigration detention walls

Zak spent years in immigration detention in Australia, during which he was subjected to the failed 'Fast Track' refugee processing system. He has never been charged with any crime in the Australian community, but remained locked up because the Australian Government could not deport him to his country of origin.*

After NZYQ, Zak was finally released. Readjusting to life out of custody was a huge challenge, as Zak sustained significant psychological harm from his time in detention. But just hours after Zak was given his freedom, Australian Border Force officers fitted him with an ankle bracelet, and told him he must obey a nightly curfew or face a prison sentence.

With this visual sign around his ankle that he ought to be viewed as a risk, Zak struggled with shame and anxiety. He also needed to stay at home to charge the device for several hours every day. The curfew meant Zak could not travel to visit friends interstate, and Border Force officers turned up at his home unannounced in the night to check on his compliance. These visa conditions made it nearly impossible to find regular work, leaving Zak in serious financial insecurity. With government support running out soon, Zak is facing potential homelessness.

**Pseudonym*

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(54) In *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*[53] the High Court of Australia ruled that the imposition of curfew and electronic monitoring conditions on Bridging R Visa holders was contrary to Chapter III of the Constitution and invalid. The majority held the conditions are punitive on their face and were not justified by any legitimate purpose. The Court made clear that the Government cannot punish an entire group of people merely because of their visa status.[54] It described the curfew and monitoring conditions as "a form of extra-judicial collective punishment" based on membership of the *NZYQ* cohort and noted that fundamental protections against arbitrary interference with liberty and bodily integrity apply equally to citizens and non-citizens.[55]

[52] UNHCR, 'Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees' (HCR/GIP/03/03) 10 February 2003.
[53] [2024] HCA 40 (***YBFZ***).
[54] *YBFZ,* [81].
[55] *YBFZ,* [12], [87].

(55) In that case, the Minister argued that the protection of the Australian community from future offending was a legitimate non-punitive purpose justifying the imposition of the conditions. Importantly, the majority noted:

> While it is not essential to so observe, even if protection of the Australian community from the risk of harm arising from future offending were accepted to be a legitimate and non-punitive purpose, cl 070.612A(1)(a) and (d) are not reasonably capable of being seen as necessary for that purpose.[56]

(56) Provisions of the Bill together with the *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (Cth) seek to avoid the operation of the High Court's decision and permit the Minister to continue imposing the very same punitive conditions on Bridging R Visa holders, pursuant to a reformulated legal test.

(57) The new test permits the Minister to impose certain conditions, including the curfew and electronic monitoring conditions, only if the Minister is satisfied on the balance of probabilities that:

a. the person poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence;[57] and
b. the imposition of the conditions is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the Australian community by addressing that risk.[58]

(58) While curfews and electronic monitoring will only be imposed in more limited circumstances, the reformulated test does not change the *prima facie* punitive nature of curfews and ankle bracelets - it allows the Government to continue imposing conditions that limit people's freedom and bodily integrity. It specifies a purpose for the conditions which the High Court has already doubted could constitute a legitimate and non-punitive purpose. It continues to place decisions about whether such measures are necessary or reasonable in the hands of the Minister. And it gives no indication that the conditions themselves will be modified or adapted in any way to align with their purported purpose.

(59) Neither the Bill nor any extrinsic materials indicate the process by which the Minister may arrive at an assessment of the 'risk' posed by the visa-holder. In itself, this is a significant concern that should give the Senate pause. This indicates the Government's intention is to reimpose the curfew and monitoring conditions on Bridging R visa holders through a generalised process which is given the veneer of individualised decision-making. Such a process would involve the infliction of conditions found by the High Court to be *prima facie* punitive through a process that is equally driven by a punitive purpose.

(60) Parliament should not permit the Government to engage, once more, in rushed, ill-considered and potentially Constitutionally-defective law-making.

E. Unrestricted powers to breach privacy

(61) The Bill would give the Australian Government nearly unrestricted powers to share personal information with foreign governments and other unspecified persons and bodies in Australia.

(62) Firstly, the Bill empowers the Minister to disclose information about a person's previous interactions with the criminal legal system to any "person or body".[59] This information can include charges that were subsequently dropped, as well as information that would otherwise be protected from disclosure such as spent convictions.[60]

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[56] *YBFZ,* [84].
[57] *Migration Regulations 1994* (Cth) (**Migration Regulations**) cl 070.111 of Schedule 2 - a "serious offence" is defined as an offence punishable by imprisonment for life or for a period or maximum period of at least five years and where the offence involves certain conduct including, among other things, loss of life or risk of loss of life, serious injury or risk of serious injury, sexual assault and offences against children.
[58] Migration Regulations cl 070.612A(1) of Schedule 2; Migration Act proposed s 76E(4)(b).
[59] Migration Act proposed s 501M.
[60] Migration Act proposed s 501M(3)(a).

(63) This power relates to the criminal history information of *any person*, for the purpose of performing *any function or exercise of power* under the Act or Regulations. It is not limited to the context of removals, or to removal pathway non-citizens (or even to non-citizens in general). It would, for example, allow the Department to disclose a person's criminal history information to an employer in the course of an application for a sponsored work visa, or to a university in the course of an application for a student visa. It could allow the Department to disclose an Australian citizen's previous convictions to a visa applicant and invite the applicant to comment, if it suspected the two people were associated.

(64) Secondly, the Bill empowers the Minister to disclose personal information about a removal pathway non-citizen (or former removal pathway non-citizen) to the government of a foreign country, for the purpose of attempting to remove the person from Australia or to subject them to a third country reception arrangement.[61] It would allow the Government to disclose information about people who have sought asylum but do not have formal protection findings to the governments of their countries of origin. It would allow the Government to disclose information that may put a person at risk of persecution in the third country to which they are being removed, for example information pertaining to religion or sexual orientation.

(65) Under current law, the Minister and officers of the Department are subject to restrictions on how they may deal with personal information. The Department of Home Affairs is subject to the Australian Privacy Principles set out in the *Privacy Act 1988* (Cth) (**Privacy Act**), which limit use and disclosure of personal information. Breaches of the Australian Privacy Principles can attract civil penalties and court-ordered injunctions.[62]

(66) Officers of the Department are also subject to express legal duties preventing the disclosure of personal information in certain circumstances - for example, any information that is supplied by a law enforcement or intelligence agency under the condition of confidentiality must not be disclosed.[63] Australian public servants are also subject to a broad duty not to disclose information obtained in the course of their employment if it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government.[64] Breaches by Commonwealth officers of legal duties not to disclose information constitute a criminal offence, punishable by imprisonment of up to 2 years.[65]

(67) It also presently unlawful under Federal and many State or Territory laws to disclose information about a person's spent convictions, except in certain circumstances.[66] Spent conviction schemes were introduced as a way to combat stigma and discrimination against people on the basis of minor or outdated offences. In Victoria, convictions may be spent for reasons including a person's young age or mental impairment at the time of offending. The Bill seeks to override those protections, and allow the Government to disclose information about spent convictions for any reason directly or indirectly related to the performance of functions or exercise of powers under the Migration Act.

(68) The Bill also seeks to validate any unlawful sharing of personal information that may have occurred in the past.[67] This suggests that the Government may have already unlawfully disclosed personal or criminal history information, for example to the Community Protection Board, and is now seeking to avoid accountability for those actions.

(69) The Government has not explained why it should be granted such broad powers to disregard the important existing limits on its ability to share people's personal information. This power grab should be unequivocally rejected.

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[61] Migration Act proposed s 198AAA.
[62] Privacy Act ss 80U, 80W.
[63] Migration Act s 503A.
[64] *Public Service Regulations 2023* (Cth) s 7.
[65] Criminal Code Act 1995 (Cth), Schedule, cl 122.4.
[66] See eg *Crimes Act 1914 (Cth)* s 85ZW; *Spent Convictions Act 2021* (Vic) s 23.
[67] Migration Act proposed s 501M(4).