



Parliamentary Joint Committee on Human Rights
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Dear Committee Secretary,

The Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney is pleased to provide a submission to the inquiry into Australia's human rights framework.

The Kaldor Centre is the world's first and only research centre dedicated to the study of international refugee law. The Centre was established in October 2013 to undertake rigorous research to support the development of legal, sustainable and humane solutions for displaced people, and to contribute to public policy involving the most pressing displacement issues in Australia, the Asia-Pacific region and the world.

This submission focuses on:

- whether existing mechanisms to protect human rights in the federal context are adequate and if improvements should be made (focusing, in particular, on statements of compatibility);
- whether the Australian Parliament should enact a federal Human Rights Act, and if so, what elements it should include.

Our remarks are confined to our experience and analysis of legislative changes in the field of refugees and asylum. Please do not hesitate to contact us if we can be of further assistance.

Yours sincerely,

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Director

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General comments

1. Australia is one of the few liberal democracies without a federal human rights instrument of some kind. Despite the creation of domestic human rights legislative review and monitoring processes over a decade ago,¹ these processes have not prevented the passage of legislation contravening Australia's obligations under international human rights law. This is particularly so when it comes to laws concerning refugees and people seeking asylum – the focus of this submission.
2. Since 2011, each bill introduced to federal Parliament has had to be accompanied by a Statement of Compatibility explaining how the proposed law is compatible with Australia's obligations under seven core international human rights treaties to which Australia is a party. However, statements of compatibility are routinely perfunctory, misleading or inaccurate in their legal analysis.² Described as 'an expression of opinion by the relevant Minister or sponsor of the Bill',³ the 'opinion' expressed is often wrong as a matter of international law.
3. Notwithstanding the expert guidance of the independent Human Rights Legal Advisor – a role that has been held by some of Australia's leading international human rights law scholars – as well as expert input through the public submissions process, Parliamentary scrutiny of bills is often poor and overly deferential to the statements of compatibility. Even assessments by the Parliamentary Joint Committee on Human Rights that have found proposed laws to be incompatible with Australia's international obligations have been overlooked.⁴ This suggests that the process is largely performative and serves little substantive function in ensuring that domestic law compiles with international human rights law.⁵
4. Indeed, some of Australia's most egregious violations of international refugee law and human rights law have been legislated *since* the establishment of the statement of compatibility process, as discussed below.

Laws concerning refugees and people seeking asylum

5. Human rights review and monitoring processes have not stopped the passage of legislation and other practices which violate the rights of refugees and people seeking asylum, and which authorise Commonwealth officials to act in a way which violates international law. Crucially, the 1951 Refugee Convention and its 1967 Protocol are

¹ *Australia's Human Rights Framework* (Cth of Australia, 2010); Australia's National Human Rights Action Plan (Cth of Australia, 2012).

² For an example of misleading statements, see our discussion of the statement of compatibility to the Migration Amendment (Protection and Other Measures) Bill 2014) in Jane McAdam et al, [Submission No 167](#) to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (31 October 2014) paras 129–30. For inaccuracies, see the example provided at para 9 below.

³ Attorney-General's Department, '[Statements of Compatibility](#)'.

⁴ See eg Parliamentary Joint Committee on Human Rights, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and Related Legislation* (19 June 2013).

⁵ As the Australian Human Rights Commission has observed, '[i]n the absence of a Human Rights Act with "teeth" in relation to the executive, and domestic relevance, parliamentary scrutiny measures *alone* have not resulted in sufficient embedding of human rights thinking by parliamentarians, nor the development of a sufficiently strong human rights culture upstream in decision making and the design of Bills and legislative instruments': Australian Human Rights Commission, [Free and Equal: A Human Rights Law for Australia](#) (Position Paper, December 2022) para 69.

not listed as treaties that must be considered in a statement of compatibility, despite the former being one of the earliest post-war international human rights law treaties. Australia acceded to the Refugee Convention in 1954; its ratification in fact triggered the treaty's entry into force.⁶

6. McAdam and Garcia's submission to the 2009 human rights inquiry detailed how Australian refugee laws and policies fell short of Australia's international legal obligations, including with respect to mandatory detention, temporary protection visas, excision of territory and offshore processing, and the lack of effective remedies for human rights violations.⁷
7. Numerous domestic and international bodies and inquiries have documented similar breaches of international refugee and human rights law.⁸ With respect to offshore processing alone, Appendices 1–2 below set out a select list of UN bodies, experts and other organisations that have expressed concerns about the policy's violations of international law, including:

violations of the principle of *non-refoulement*; exposure to harms including rape, sexual and other physical abuse; acts of intimidation, taunting and provocation; a lack of access to justice for people exposed to harm; long, indefinite periods in detention; acute isolation; suicide and self-harm; separation of families; limited access to basic services, including social, education and health services; unlawful discrimination between refugees on the basis of mode and date of arrival; overcrowded living conditions; a lack of independent oversight (including severe restrictions on access to, and information about, offshore processing facilities); and a lack of durable solutions.⁹

8. Most of these concerns persist. The Kaldor Centre Principles for Australian Refugee Policy,¹⁰ and the accompanying Key Priorities document,¹¹ set out specific recommendations to bring Australian law into line with international law.¹² For example:

As a matter of priority, Australia should abolish laws and practices that could result in people being sent to places where they risk being persecuted, tortured,

⁶ Pursuant to article 43 of the Refugee Convention (Australia was the sixth State to deposit an instrument of ratification or accession).

⁷ Jane McAdam and Tristan Garcia, [National Human Rights Consultation: Submission on Refugees and Asylum Seekers](#) (11 June 2009).

⁸ See eg Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014); Parliamentary Joint Committee on Human Rights (n 4); Human Rights and Equal Opportunity Commission (now Australian Human Rights Commission), *A Last Resort? Report of the National Inquiry into Children in Immigration Detention* (2004); *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN doc A/HRC/37/50 (26 February 2018); UN Committee on the Elimination of Discrimination against Women, 'Concluding Observations on the Eighth Periodic Report of Australia', UN doc CEDAW/C/AUS/CO/8 (20 July 2018) para 53; UN Committee on Economic, Social and Cultural Rights, 'Concluding Observations on the Fifth Periodic Report of Australia', UN doc E/C.12/AUS/CO/5 (11 July 2017) para 17; UN Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia*, UN doc CCPR/C/AUS/CO/6 (1 December 2017) paras 37–38; *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Juan E Méndez, UN doc A/HRC/28/68/Add.1 (6 March 2015) paras 16–31.

⁹ Jane McAdam and Fiona Chong, *Refugee Rights and Policy Wrongs* (UNSW Press, 2019) 134–35.

¹⁰ [Kaldor Centre Principles for Australian Refugee Policy](#) (2022).

¹¹ [Kaldor Centre Principles for Australian Refugee Policy: Summary and Key Priorities](#) (2022).

¹² See [Kaldor Centre Principles](#) (n 10) and [Key Priorities](#) (n 11).

killed or otherwise subjected to cruel, inhuman or degrading treatment or punishment. In particular, Australia should stop turning back boats at sea without engaging in a full consideration of the international protection claims of those on board. Australia should ensure that all those who seek its protection are able to have their claims determined fairly and with due process.

Australia should repeal those sections of the *Migration Act* that are specifically intended to exclude its international obligations from being considered under domestic law. These include section 197C, which states that Australia's non-refoulement obligations are 'irrelevant' to the removal of unlawful non-citizens brought temporarily to Australia; section 197D, which empowers the Home Affairs or Immigration Minister to disregard a person's refugee status for the purposes of Australian law; sections 5H–5M, which set out Australia's own interpretation of its international protection obligations; and a number of legislative 'bars' in the *Migration Act* which prevent many asylum seekers from applying for a protection visa in Australia. In addition, Australia should reinsert those references to the Refugee Convention that were removed from the *Migration Act* and ensure that the Act's provisions on complementary protection fully reflect Australia's *non-refoulement* obligations. Australia should also adopt a legal framework and procedure for the identification and protection of stateless persons.¹³

9. Many, although not all, of these laws were brought into effect by a legislative package introduced in 2014 to give effect to 'Operation Sovereign Borders'. In the legislation and associated explanatory materials, the repudiation of international refugee and human rights law was clear and unapologetic. For instance, the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* (Cth) expressly:
 - a. empowered the Minister to detain people on the high seas and transfer them to countries even if this amounted to *refoulement*, and in circumstances that also violated the international legal prohibition on arbitrary detention;
 - b. authorised other violations of Australia's *non-refoulement* obligations under international law, including the return of people to persecution or other forms of significant harm;
 - c. removed important references to the *1951 Convention relating to the Status of Refugees* from the *Migration Act 1958* (Cth).¹⁴

With respect to (b) above, the Statement of Compatibility attached to the bill claimed that the introduction of this provision would not violate international law because 'anyone who is found through visa or ministerial intervention processes to engage Australia's *non-refoulement* obligations will not be removed in breach of these obligations'.¹⁵ As noted in our submission at the time, this statement was inaccurate because a 'mere discretion to consider *non-refoulement* obligations is insufficient to comply with the absolute and non-derogable requirement under international law that Australia will not expose people to a real risk of torture; cruel, inhuman or degrading treatment or punishment; the death penalty; or arbitrary deprivation of life.'¹⁶

10. The Explanatory Memorandum to the bill boldly asserted that:

¹³ *Kaldor Centre Principles* (n 10) 5 (fns omitted).

¹⁴ See McAdam et al (n 2).

¹⁵ *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Cth), Statement of Compatibility with Human Rights, 28.

¹⁶ McAdam et al (n 2) 12.

as a matter of domestic law, the failure to consider or comply with Australia's international obligations or a failure to consider the domestic law or international obligations of another country should not be able to form the basis of a domestic legal challenge to the exercise of the powers to give an authorisation under Division 2 of Part 2 of the MPA.¹⁷

However, legislative attempts to quarantine domestic law and policy from Australia's international legal obligations cannot relieve Australia of those obligations as a matter of international law, and Australia remains liable under international law for any violations that do occur.

Recommendations

11. We broadly endorse the Australian Human Rights Commission's call for a Human Rights Act for Australia¹⁸ and its submission to this inquiry.¹⁹ This would improve public awareness, understanding of and respect for human rights, and would help to ensure that Australia's international human rights law obligations were better reflected and monitored in a domestic legal framework.
12. As the Australian Human Rights Commission notes, the lack of a strong human rights framework in Australia 'acutely affect[s] people who experience disadvantage, marginalisation and discrimination',²⁰ including the fact that they 'may be subject to unfair decision making by public authorities'.²¹ The introduction of a Human Rights Act would help to ensure that the rights of asylum seekers and refugees are properly protected and respected under Australian law. McAdam and Garcia's 2010 submission detailed how the absence of a federal domestic human rights framework had facilitated the implementation of numerous laws and policies which overlooked, and at times directly violated, Australia's international human rights law obligations when it came to refugees and people seeking asylum²² – concerns that remain today.
13. A Human Rights Act would play a particularly important role in ensuring that the rights of refugees and people seeking asylum are seen, respected and protected.

¹⁷ Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), Explanatory Memorandum, para 16.

¹⁸ Australian Human Rights Commission (n 5).

¹⁹ Australian Human Rights Commission, [Inquiry into Australia's Human Rights Framework: Australian Human Rights Commission Submission to the Parliamentary Joint Committee on Human Rights](#) (Submission No 1, May 2023).

²⁰ Australian Human Rights Commission (n 5) 86.

²¹ *Ibid*, 87.

²² McAdam and Garcia (n 7).

Appendix 1

Select list of UN bodies and experts who have raised concerns about and/or challenged Australia's offshore processing policies since 2012²³

UN human rights treaty bodies

- Committee against Torture
- Committee on Economic, Social and Cultural Rights
- Committee on the Elimination of Discrimination Against Women
- Committee on the Elimination of Racial Discrimination
- Convention on the Rights of Persons with Disabilities
- Committee on the Rights of the Child
- Human Rights Committee

Special Procedures of the Human Rights Council

- François Crépeau, Special Rapporteur on the human rights of migrants (2011–17)
- Michel Forst, Special Rapporteur on the situation of human rights defenders (2014–20)
- Christof Heyns, Special Rapporteur on extrajudicial, summary or arbitrary executions (2010–16)
- Nils Melzer, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2016–)
- Juan E Méndez, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2010–16)
- Felipe González Morales, Special Rapporteur on the human rights of migrants (2017–)
- Dainius Puras, Special Rapporteur on the right to everyone to the enjoyment of the highest attainable standard of physical and mental health (2014–20)
- Dubravka Šimonović, Special Rapporteur on violence against women, its causes and consequences (2015–21)
- Working Group on Arbitrary Detention
- Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Other UN bodies and experts

- United Nations High Commissioner for Refugees (UNHCR)
- Office of the High Commissioner for Human Rights (OHCHR)
- Zeid Ra'ad Al Hussein, High Commissioner for Human Rights, OHCHR (2014–18)
- Michelle Bachelet, UN High Commissioner for Human Rights, OHCHR (2018–)
- Filippo Grandi, High Commissioner for Refugees, UNHCR (2016–)
- António Guterres, High Commissioner for Refugees, UNHCR (2005–15)

See also criticism by States of Australia's offshore processing policies in the Report of the Working Group on the Universal Periodic Review (A/HRC/47/8, 24 March 2021).

²³ Links to many reports and statements from UN experts and bodies can be found here: <https://www.unhcr.org/au/publications/united-nations-observations-australias-transfer-arrangements-瑙鲁-and-papua-new>.

Appendix 2

Select list of reports from government inquiries which have raised concerns about how offshore processing has been implemented, the harm suffered by people offshore, and potential violations of international law

Independent inquiries set up by the government

- Keith Hamburger AM, *Nauru Review 2013: Executive Report of the Review into the 19 July 2013 Incident at the Nauru Regional Processing Centre* (8 November 2013) <https://www.homeaffairs.gov.au/reports-and-pubs/files/executive-report-nauru-2013.pdf>
- Robert Cornall AO, *Review into the events of 16–18 February 2014 at the Manus Regional Processing Centre* (23 May 2014) <https://www.homeaffairs.gov.au/reports-and-pubs/files/review-robert-cornall.pdf>
- Philip Moss, *Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru* (6 February 2015) <https://www.homeaffairs.gov.au/reports-and-pubs/files/review-conditions-circumstances-nauru.pdf>
- Christopher Doogan AM, *Review of Recommendation Nine from the Moss Review* (26 June 2015) <https://www.homeaffairs.gov.au/reports-and-pubs/files/doogan-report.pdf>

Parliamentary inquiries

- Parliamentary Joint Committee on Human Rights, *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and Related Legislation* (Final Report, 19 June 2013) https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2013/2013/92013/index
- Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (Final Report, 11 December 2014) https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island/Report
- Senate Select Committee on the Recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, *Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru* (Final Report, 31 August 2015) https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Final_Report
- 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) https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Offshore_RPCs/Interim_Report
- 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* (Final Report, 21 April 2017) https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Report

Other government agencies

- Australian Human Rights Commission, *Human Rights Issues raised by the Third Country Processing Regime* (March 2013)
<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/human-rights-issues-raised-third-country-processing>
- Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention (2014)* (12 February 2015)
<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children>
- Australian Human Rights Commission, *Children in Immigration Detention in Nauru* (16 June 2015)
<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/tell-me-about-children-immigration-detention>
- ANAO, *Offshore Processing Centres in Nauru and Papua New Guinea: Procurement of Garrison Support and Welfare Services* (13 September 2016)
https://www.anao.gov.au/sites/default/files/ANAO_Report_2016-17_16.pdf
- ANAO, *Offshore Processing Centres in Nauru and Papua New Guinea: Contract Management of Garrison Support and Welfare Services* (16 January 2017)
https://www.anao.gov.au/sites/default/files/ANAO_Report_2016-2017_32.pdf
- Australian Human Rights Commission, *Statement on Ending Offshore Processing in PNG* (6 October 2021)
<https://humanrights.gov.au/about/news/media-releases/statement-ending-offshore-processing-png>