

Factsheet

WHO IS LEGALLY RESPONSIBLE FOR OFFSHORE PROCESSING ON MANUS AND NAURU?

Last update: October 2018

Australia transfers certain asylum seekers to Papua New Guinea or Nauru, but do these arrangements shift Australia's legal responsibility or obligations?

What is the context?

Since 13 August 2012, asylum seekers who have arrived in Australia by boat (or who have been intercepted at sea and brought to Australia) without a valid visa have been subject to 'offshore processing' in the Pacific nations of Nauru and Papua New Guinea (PNG). Under the bilateral agreements between Australia and each of these countries, asylum seekers underwent health, security and identity checks in Australia before being transferred 'offshore' to have their refugees claims assessed.

Australian [government records](#) show that no new asylum seekers have been transferred from Australia to PNG or Nauru since 2014. Instead, all asylum seekers trying to reach Australia by boat since that time have been [turned back at sea](#) or otherwise returned to their countries of origin.

Which country is responsible for people transferred to Nauru and PNG?

Successive Australian governments have denied responsibility for people sent to Nauru and PNG, citing the fact that those countries are sovereign nations. However, while their sovereignty prevents Australia from imposing its own laws and exercising government functions in Nauru and PNG without their permission, it does not extinguish any obligations that Australia itself might have towards people it has sent to those countries, including under both Australian law and international human rights law. In short, both Australia *and* each offshore processing country will be responsible for various aspects of the care and treatment of people subject to these arrangements, and in some cases this responsibility may overlap.

Australia cannot avoid or 'contract out' of its international legal obligations by sending people seeking asylum to other countries, delegating the processing of their protection claims to those countries, and outsourcing detention and care to private contractors. Instead, international law sets out clear rules governing the scope of Australia's obligations, and the circumstances in which it is legally responsible for failing to comply with them.

So what are Australia's obligations under international law to people transferred to Nauru and PNG?

Australia has a range of legal obligations under international human rights and refugee law that may be relevant to people transferred to Nauru and PNG. Most importantly, international law prohibits Australia from expelling or returning asylum seekers and refugees to any place where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, and from sending people back to places where they would face a real risk of being arbitrarily deprived of their life, tortured or exposed to other cruel, inhuman or degrading treatment or punishment (*refoulement*).

Australia's human rights obligations also extend to any person outside its territory who falls within its 'jurisdiction', for example as a result of being under the effective control of Australian government officials or contractors.

Finally, UNHCR has [repeatedly affirmed](#) that Australia has obligations to find humane and appropriate solutions for the people it has transferred to Nauru and PNG, such as settlement in Australia or another appropriate country for everyone recognised as refugees.

What happens if Australia breaches these obligations?

Under international law, a country is legally 'responsible' for internationally wrongful acts – that is, conduct which is 'attributable' to the country and which breaches an international legal obligation which is binding on it. The fact that conduct is authorised by the country's domestic law does not excuse it from being responsible under international law.

This responsibility is different from moral or practical responsibility, or responsibility under domestic law (although these may overlap). Under the rules governing the international responsibility of States, any State that commits an internationally wrongful act has certain obligations, including to cease the wrongful conduct, offer appropriate assurances and guarantees of non-repetition, and make full reparation for any injury.

What about Australia's responsibility under domestic law?

Under Australian law, the Commonwealth Parliament has broad power to enact legislation on the subject of immigration. Australia's obligations to refugees under international law do not form part of Australian law unless these obligations are directly incorporated through legislation. Currently, the *Migration Act 1958* provides that [asylum seekers who enter Australia by boat must be removed to an offshore processing country](#). The High Court has found that this legislation is constitutionally valid. There are, however, [outstanding questions](#) about whether the Australian government might bear responsibility for its involvement in the conduct of offshore processing in other areas of law, such as tort law.