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Cruel, costly and ineffective: The failure of offshore processing in Australia

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Executive summary

'Offshore processing' is a method of border control which involves forcibly transferring asylum seekers to third States to have their claims processed.¹ It is not a new phenomenon.² However, whereas offshore processing was previously viewed as 'a significant exception to the normal practice',³ Australia's development of the policy over the past two decades has generated significant political interest elsewhere, such that other countries are looking to replicate it.⁴ In light of this development, this policy brief critically assesses Australia's experience of offshore processing against its stated policy objectives and other indicators of success or failure, including its cost, lawfulness and impact on the people subject to it.

For most of the past two decades, offshore processing has been a hallmark of Australia's approach to deterring people from seeking asylum by boat. First established by a conservative Coalition government in 2001, the policy operated until 2008 when it was dismantled by the new Labor government as an abject policy failure. Despite that assessment, Labor re-established offshore processing in 2012 following an increase in the number of people trying to reach Australia by boat, and a political impasse in Parliament as to how this should be addressed. In its second iteration, offshore processing saw asylum seekers transferred to Nauru and Papua New Guinea (PNG) for two years, under shifting policy settings, before Australia ceased new transfers in 2014 and reoriented its border protection policies to maritime interception. While offshore processing formally remains part of Australia's asylum policy in 2021, Australia has spent considerable effort and money since 2014 trying unsuccessfully to extract itself from its arrangements in Nauru and PNG.

This policy brief explores the objectives and practice of offshore processing since 2012, highlighting four distinct phases of the policy. It analyses the failure of offshore processing to achieve its border protection, humanitarian and foreign policy aims. In particular, it finds that the Australian model of offshore processing:

- does not deter irregular maritime migration, 'stop the boats' or 'break the business model' of people smuggling networks;
- does not 'save lives at sea' or achieve any other humanitarian objective; and
- suffers from other policy failures, including enormous financial costs for Australian taxpayers, violations of fundamental rules of international law, numerous legal challenges and systemic cruelty.

The policy brief concludes by recommending that:

- offshore processing immediately be brought to a formal end by providing everyone who has been subject to the policy since 2012 with settlement in Australia (or another appropriate country, provided the humanitarian solution is voluntary⁵), and repealing or terminating the legislative and administrative arrangements underpinning the policy; and
- Australia's offshore processing model not be adopted elsewhere.

1 The ‘Australian model’ of offshore processing

Offshore processing by Australia has occurred in two distinct phases: first, from 2001 to 2008 (under a conservative Coalition government, led by Prime Minister John Howard), and then again from 2012 (under successive Labor and Coalition governments). While these two iterations of the policy share many similarities, fundamental differences regarding refugee status determination (RSD) and durable solutions set them apart. Given the importance of these differences, and the fact that the second iteration has attracted recent international attention, this policy brief analyses the policy pursued since 2012.

The ‘Australian model’ of offshore processing discussed in this policy brief involves rescuing or intercepting asylum seekers trying to reach Australia by boat, taking them to Australia, and then forcibly transferring them to the Pacific island nations of either Nauru or PNG (specifically, to Manus Island). While offshore processing remains official policy in 2021, transfers offshore only took place from 2012 to 2014. Both in Nauru and on Manus Island, asylum seekers were detained on arrival in highly securitised, closed detention centres (operated and serviced by private companies contracted and overseen by the Australian government), in conditions consistently described as cruel, inhuman and degrading. People were transferred purportedly to have their asylum claims processed by Nauru and PNG, despite neither country having a legislative framework for RSD when transfers began in 2012, nor any prior direct experience of conducting RSD. Little processing occurred in the early stages of the policy, leading to lengthy delays, uncertainty and arbitrary detention.⁶ Besides the conditions of detention and processing delays, one of the greatest problems with this policy has been the lack of timely and appropriate humanitarian solutions for all those subject to offshore processing. In 2014, Australia stopped transferring new arrivals offshore, and instead returned people seeking protection by sea to their countries of departure.⁷

Despite being referred to as a single ‘offshore processing policy’, there have in fact been four distinct phases since 2012:

- In the first phase, under the Gillard Labor government, some asylum seekers arriving by boat in Australia **between 13 August 2012 and 18 July 2013** (the ‘first cohort’) were sent offshore. While formally the policy applied to everyone, only around 1,050 of the more than 24,000 people in this cohort were transferred offshore,⁸ with the vast majority remaining in Australia.

The first cohort was subject to a ‘no advantage’ policy, which stipulated that anyone recognised as a refugee offshore would not be granted a protection visa until they had waited as long as if they had been subject to the resettlement timeframes applied by UNHCR elsewhere in the region. This approach, which benchmarked settlement against non-existent average regional timeframes, would have proven unworkable had anyone in the first cohort completed RSD offshore.⁹ It was abandoned with the policy change of 19 July 2013, after which asylum seekers in the first cohort who had been sent offshore were progressively brought back to Australia and forced to wait several years before being permitted to begin the process of applying for asylum again in Australia.

- In the second phase, under the Rudd Labor government, asylum seekers arriving by boat **on or after 19 July 2013** (the ‘second cohort’) continued to be subject to offshore processing. However, the ‘no advantage’ policy was replaced by a new ban: refugees arriving by boat in this group were denied the opportunity ever to settle permanently in Australia. Instead, they were expected to integrate locally in Nauru and PNG or be resettled in another country.
- The policy entered its third phase with the election of the Abbott Coalition government in **September 2013**. Within days of taking office, the government launched Operation Sovereign Borders (OSB) – a military-led border security operation described as ‘the government’s response to stopping the flow of illegal boat arrivals to Australia’.¹⁰ While intercepting and turning back boats became the primary mechanism for deterring irregular maritime migration, offshore processing was retained as part of a ‘broad chain of measures end to end ... designed to deter, to disrupt, to prevent’ asylum seekers travelling by boat from obtaining protection in Australia.¹¹ The capacity of the offshore detention centres was expanded and the bar on refugee settlement in Australia was continued.

In the second and third phases, just over 3,100 asylum seekers who arrived in Australia by boat on or after 19 July 2013 were transferred offshore. Certain groups were exempted from transfer, primarily as a result of political deals done to ensure the passage of key legislation.¹² Beyond these limited cases, the policy made no exception for children (including unaccompanied minors), other vulnerable groups, or people who had close family members in Australia.

- Offshore processing entered its fourth phase in 2014, which continues to the present day. During this period, no new asylum seekers arriving in Australia by boat have been sent offshore. Instead, Australia has returned asylum seekers to their places of departure, going to extraordinary lengths to pursue maritime pushbacks despite the availability of offshore processing.¹³ While at first this policy shift was evident more in practice than in official statements, the government has become increasingly explicit about distancing itself from offshore processing.¹⁴

Thus, despite having formally pursued offshore processing since August 2012, Australia transferred asylum seekers to Nauru and PNG for less than two years. It has then spent the past seven years in a prolonged and costly policy bind, trying to find humanitarian solutions outside Australia for all those subject to the policy who cannot be returned to their countries of origin.

Australia transferred approximately 4,180 people offshore between 2012 and 2014 (see **Table 1**), almost half of whom had returned to Australia by 2021.¹⁵ Asylum seekers and refugees were either transferred back to Australia following the July 2013 policy change or medically evacuated to Australia due to the progressively spiralling health crises amongst the transferred populations in Nauru and PNG.¹⁶ The number of people detained on Manus Island peaked at 1,353 in January 2014, and in Nauru at 1,233 in August 2014.¹⁷

Table 1 Location of people transferred offshore since 2012 (as at 31 January 2021)¹⁸

	Transferred 13 August 2012 to 18 July 2013	Transferred after 19 July 2013	Total
In Australia	882	1161	2043
Offshore (Nauru and PNG)	0	263	263
Resettled in a third country	0	921	921
Returned to country of origin (voluntarily or involuntarily)	168	767	935
Deceased	5	13	18
Total	1055	3125	4180

2 The failure of offshore processing to meet its stated policy objectives

2.1 The policy objectives of offshore processing

2.1.1 Rudd and Gillard Labor Governments

In 2008, the newly elected Labor government dismantled the first iteration of offshore processing on the basis that it had been ‘a cynical, costly and ultimately unsuccessful exercise’.¹⁹ The number of people trying to reach Australia by boat began to increase from 2009, but deep ideological differences between the Labor government (which wanted to pursue a ‘regional’ solution involving government partners in Southeast Asia) and the Coalition opposition (which argued for a return to offshore processing and other Howard-era measures) created a political impasse that impeded productive action either way.

In an attempt to break this deadlock, Prime Minister Julia Gillard convened an Expert Panel to ‘provide advice and recommendations to the Government on policy options available ... to prevent asylum seekers risking their lives on dangerous boat journeys to Australia’.²⁰ The Expert Panel made a series of recommendations, including the reintroduction of offshore processing as a ‘short term ... circuit breaker to the current surge in irregular migration to Australia’ until a more comprehensive regional framework for processing asylum claims could be developed.²¹ Crucially, it was envisioned that this ‘circuit breaker’ would operate in parallel with other recommendations to increase protection pathways for refugees in the region.

In accepting the recommendation to reintroduce offshore processing, Prime Minister Gillard repeatedly described this decision as a ‘compromise’ made to ‘get things done’ on the asylum seeker issue.²² Thus, despite being portrayed publicly as a measure to ‘save lives’ at sea, the resurrection of offshore processing was more a matter of political necessity to secure the opposition’s support for other aspects of the government’s proposed asylum policy.

After Kevin Rudd became Prime Minister again in June 2013, he introduced a radical new policy according to which no person found to be a refugee in Nauru or PNG would ever be

permitted to settle permanently in Australia.²³ In deciding not just to continue offshore processing, but to entrench it by removing the most efficient and appropriate protection pathway for people found to be refugees, Prime Minister Rudd again invoked the need to save lives at sea. He also put greater emphasis on the need to suppress the 'scourge' of people smuggling and break smugglers' 'business model'.²⁴

2.1.2 Abbott, Turnbull and Morrison Coalition Governments

In 2013, the Abbott Coalition government came to power with a core election promise to 'stop the boats'. Maritime interception under OSB became the heart of the Coalition government's response to boat arrivals, but offshore processing also had a role to play, at least initially.

While the number and rate of transfers offshore continued at pace under the Abbott government in late 2013 and 2014, everyone moved had arrived between July and December 2013, with the only reported exception being the passengers on a boat that Australia intercepted in mid-2014.²⁵ Other than the passengers on that boat, successive Coalition governments claim to have intercepted and returned every asylum seeker to their departure country since December 2013.²⁶

Subtle changes in government messaging on offshore processing began to emerge from late 2014. Government statements attempted to shift responsibility for policy failures to Nauru and PNG by claiming that they were 'wholly a matter' for those States.²⁷ Over the coming years, the shift from expanding and filling detention centre capacity to emptying and closing the centres continued, most noticeably with Australia's closure of the Manus Island detention centre in 2017.²⁸

By the time of its closure, which risked descending into violence,²⁹ Australian government language on offshore processing had dramatically changed. Despite the Coalition having originally championed offshore processing and overseen the biggest expansion of transfers to the offshore detention centres, by late 2017 Home Affairs Minister Peter Dutton sought to justify his government's attempts to extricate itself from Nauru and PNG as 'cleaning up the mess' that former Labor governments had made.³⁰ He claimed Labor should be 'apologising ... for putting these people on Manus Island in the first place'³¹ and, in response to questioning as to whether they should be moved to Australia, said:

I didn't put people on Manus – I want to get them off, but I want to do it in a way that doesn't restart boats and the intelligence that's available to me from Indonesia, from Sri Lanka, from Vietnam, all of those areas where we have a footprint, we look at what people are saying; they are saying right now that if these people come from Manus to Australia, then the boats will restart...

I want to get people out of Manus. ... I want it closed. I don't want new arrivals filling the vacancies and we're trying to do that in the most sensible way possible.³²

Thus, under successive Coalition governments, offshore processing evolved from a policy that was actively pursued as part of a broader objective to 'stop the boats' in 2013 and 2014,

to a policy failure from which the government has been attempting a withdrawal for more than seven years.

On one view, the length and difficulty of this withdrawal is the result of successive governments' commitment to preventing people found to be refugees from settling in Australia, despite the absence of viable alternatives for many of the people subject to the policy. However, the reason given publicly for the government's failure to end offshore processing after so many years is the concern that doing so might encourage people smuggling ventures in the region. For example, the Minister for Home Affairs stated:

the fact is that people-smugglers are looking at the moment at what's happening on Manus and if they can pitch to people in Indonesia that you can wait on Manus for a couple of years and then come to Australia, I tell you now that the boats will be back in action and we would have the drownings at sea again.³³

The claims that offshore processing is necessary to prevent boat arrivals, save lives at sea and suppress people smuggling are countered below,³⁴ followed by an explanation of this policy's other failures.

2.2 Failures to meet stated policy objectives

2.2.1 Deterring irregular maritime migration

Offshore processing is not an effective deterrent to irregular maritime migration.

During the first phase (13 August 2012–18 July 2013), when offshore processing was implemented with the possibility of (deferred) settlement in Australia for people found to be refugees, more than 24,000 asylum seekers arrived in Australia by boat.³⁵ This number was considerably more than at any other time since the 1970s, when boats of asylum seekers were first recorded in Australia.³⁶ Moreover, as the months passed, and news of the policy presumably reached some of those who were contemplating travelling by sea to Australia, there was no noticeable change in the rate of arrivals, with boats of varying numbers of people (from two to more than 200) continuing to arrive on average several times per week.

During the second phase (19 July–17 September 2013), boats continued to arrive even after Prime Minister Rudd announced the new bar on settlement in Australia. More than 1,500 people on at least 21 boats arrived in the first 16 days of the policy change.³⁷

Boats continued to arrive during the third and fourth phases of the policy (since September 2013), with most being returned to their points of departure under OSB. As **Table 2** shows, the number of boat arrivals dropped dramatically after Australia began maritime interceptions and returned to pre-2007 levels by 2016 (two years after the government stopped transferring people offshore).

Table 2 Boat arrivals since September 2013³⁸

Year	Number of boats	Number of people (excluding crew)		
		Brought to Australia and transferred offshore	Returned	Total
2013	25	1107	134	1241
2014	12	157	293	450
2015	9	0	217	217
2016	6	0	51	51
2017	3	0	60	60
2018	2	0	24	24
2019	3	0	33	33

The fact that offshore processing was not a deterrent for irregular maritime migration was entirely foreseeable. Historically, the vast majority of asylum seekers trying to reach Australia by boat have been found to be refugees;³⁹ and very few had access to alternate safe and legal pathways to protection.⁴⁰ As McAdam explains:

The idea was that the inferior conditions [in Nauru and PNG], lack of legal advice and review mechanisms, and delayed resettlement (around five years) would deter asylum seekers from getting on boats. But it did not work, largely because it ignored the reasons why people seek protection in the first place.⁴¹

Despite having been responsible for the reintroduction of offshore processing, Labor admitted just weeks after transfers to Nauru began in 2012 that ‘Nauru by itself is not an effective deterrent’.⁴² Former (Liberal) Prime Minister Malcolm Fraser (1975–1983), who oversaw Australia’s response to the Indochinese refugee crisis, made similar observations in 2013 when he called for a Royal Commission into Australia’s offshore processing policies:

If they are genuine refugees, there is no deterrent that we can create which is going to be severe enough, cruel enough, nasty enough to stop them fleeing the terror in their own lands.⁴³

2.2.2 Saving lives

After offshore processing was reintroduced in 2012, deaths at sea both in international and Australian waters continued at broadly comparable rates to those seen since 2009.⁴⁴ While no deaths have been reported since 2014, that does not necessarily mean that offshore processing has deterred people from risking their lives at sea. Rather, it is better attributed to changes in Australia’s engagement with vessels at sea (turnbacks and takebacks) under OSB.

A close examination of the humanitarian objectives of offshore processing makes clear that the policy does not save lives, but rather destroys them. Since its reintroduction in 2012, eighteen people have died offshore (or in Australia, following medical evacuation).⁴⁵ Of these, at least six reportedly committed suicide,⁴⁶ at least one was murdered,⁴⁷ and at least two died from medical conditions after access to appropriate treatment was delayed or denied by Australia.⁴⁸ In at least one case, an Australian coroner found that the death was

'preventable', and that the deceased would have survived had he been promptly evacuated to Australia for treatment.⁴⁹

Most of those who survived were exposed to significant harm, described by some as worse than death. One Iraqi father who had survived living in a war zone said he had never experienced anything like his detention on Manus Island and that 'if we had died in the ocean, that would have been better'.⁵⁰ Another said: 'although we are alive, we are dead inside'.⁵¹ Such extreme levels of suffering were the foreseeable result of prolonged and indefinite detention in harsh conditions, repeated exposure to violence and abuse, denial of adequate healthcare and access to basic services, and the uncertainty, arbitrariness and perceived unfairness inherent in the policy's implementation.⁵²

Asylum seekers and refugees were exposed to such extreme harm offshore that by 2019, the Australian government was forced to medically evacuate back to Australia almost all of those still in Nauru and PNG. A special legislative scheme was established to facilitate those evacuations.⁵³ By 2021, the vast majority of those who had not already been resettled or returned to their countries of origin were back in Australia, receiving or awaiting treatment for physical and mental health concerns that arose during their time offshore.⁵⁴ The harm continues in Australia, where recovery is impeded by ongoing uncertainty about their legal status.

While a more detailed account of the harms offshore suffered is given below,⁵⁵ the physical and mental damage inflicted – and extensively documented, including by medical experts – negates any claim that offshore processing was intended to pursue a humanitarian objective.⁵⁶ Paediatricians reported that children transferred to Nauru were among the most traumatised they had ever seen.⁵⁷ Medical experts working with UNHCR found the rates of mental illness offshore to be among the highest recorded in any surveyed population,⁵⁸ and Médecins Sans Frontières (MSF) similarly reported that suffering on Nauru was some of the worst it had ever encountered, including in victims of torture.⁵⁹ The UN Special Rapporteur on the Human Rights of Migrants observed in 2017 that mental health issues were 'rife' in Nauru, where 'many refugees and asylum seekers [we]re on a constant diet of sleeping tablets and antidepressants'.⁶⁰ A senior trauma counsellor who worked in both offshore locations stated that in his 43-year career, he had 'never seen more atrocity than ... in the incarcerated situations of Manus Island an Nauru'.⁶¹ As the UN High Commissioner for Refugees, Filippo Grandi, observed: 'there is a fundamental contradiction in saving people at sea, only to mistreat and neglect them on land.'⁶²

2.2.3 'Breaking the business model' of people smugglers

The claim that offshore processing 'broke the business model' of people smuggling is refuted above in the analysis showing that it did not deter irregular maritime migration. There are also a number of deeper concerns with pursuing an anti-smuggling agenda through offshore processing.

First, focusing on smugglers misdirects attention from the root of the problem, namely, the number of people in need of protection. Offshore processing and other policies that seek to penalise and prevent irregular movements, rather than address protection needs, do not remove demand for smugglers' services but feed it, by ensuring a perpetual and growing

number of people with no other options for reaching safety.⁶³ People seeking protection by sea who are returned will likely flee again and be forced into even more dangerous smuggling routes.⁶⁴

Second, while it is common for States to portray smuggling as an egregious crime, and a threat to both national security and those who are smuggled,⁶⁵ a more nuanced narrative is necessary. Defined objectively, smuggling involves facilitating the movement of people across international borders, contrary to immigration and other laws, usually in exchange for some financial or other benefit. The experience of smuggling can indeed be harmful, particularly when it exposes people to irreparable harm or morphs into trafficking,⁶⁶ but the practice of smuggling itself takes many forms and is not inherently nefarious. For people forced to flee persecution and serious human rights violations in situations where where they cannot lawfully obtain entry to another country, smugglers may provide a lifeline, offering the only opportunity for escape. Indeed, some instances of smuggling could be characterised as humanitarian intervention or rescue.⁶⁷ Given these complexities, the suppression of smuggling in and of itself should not be the primary objective of an asylum policy, nor invoked to justify repressive and harmful measures that far outweigh the (perceived) threat posed by smuggling.

Finally, while politicians across the spectrum support the idea of ‘breaking the business model’ of smugglers through punitive deterrence measures,⁶⁸ it does not necessarily correspond with the reality of how irregular movement is facilitated in practice. An extensive survey of available literature in 2013 concluded that a range of organisations and individuals are involved in smuggling, and there is no single ‘business model’ but rather a variety of models, meaning ‘measures that are effective against one model may not be effective, or even feasible, against another’.⁶⁹ Moreover, ‘it is unlikely that any single measure will be effective on its own, and the practical limits on the extent to which [any State] can influence the factors driving a market that exists largely outside its jurisdiction must be recognised’.⁷⁰

3 Further indications of policy failure

3.1 The financial cost

The Australian government has only ever provided a high-level and incomplete indication of the financial costs of establishing and maintaining offshore processing in Nauru and PNG. The available information shows that these costs are extraordinarily high – particularly for a policy that has not met its stated aims – and very difficult to predict.

Table 3 shows two sets of Australian government estimates of some of the annual costs of offshore processing. Differences between the figures may be explained by certain costs being included in one but not the other. Nevertheless, both sets show that offshore processing costs on average at least A\$1 billion per year, and reached upwards of A\$1.49 billion in 2017–18. This figure is significantly more than it would have cost to allow asylum seekers to reside in the community in Australia while their claims were processed.⁷¹

Table 3 (Partial) cost of offshore processing according to Australian government figures

Financial year	Department of Home Affairs' annual budget statements (A\$) ⁷²	Department of Home Affairs' answers to Senate questions (A\$) ⁷³
2012–13		358,800,000 ⁷⁴
2013–14		1,307,000,000
2014–15	1,032,926,000	1,313,200,000
2015–16	1,128,573,000	1,138,900,000
2016–17	1,083,957,000	990,400,000
2017–18	1,492,174,000	1,037,700,000
2018–19	1,061,290,000	939,300,000
2019–20	961,680,000	815,100,000
2020–21	818,779,000	404,000,000 ⁷⁵

While the reported costs of offshore processing are high, a range of other significant costs associated with this policy may not be included in the figures set out in Table 3. For example, while they would appear to cover the costs of establishing and operating offshore detention centres, providing settlement services to refugees in the community in Nauru and PNG, and other costs that fall within this part of the Department's budget, it is unclear to what extent (if at all) they include the costs of:

- aid and development assistance provided to Nauru and PNG to secure their ongoing agreement to offshore processing;
- charter flights and escorts between Australia, Nauru and PNG;
- detaining and/or meeting the needs of the more than 1,100 people who have been transferred back to Australia on a temporary basis for medical or other reasons;
- numerous reviews and inquiries by Senate committees, the Australian Human Rights Commission and other government agencies and appointed experts;⁷⁶
- responding to concerns raised about offshore processing by UN bodies and in communications to the International Criminal Court (ICC);
- defending and settling legal claims with respect to offshore processing in Australian, Nauruan and PNG courts;
- repatriating asylum seekers and refugees;
- an agreement between Australia and Cambodia for the 'resettlement' of seven refugees who were held on Nauru (estimated to have cost up to A\$55 million);⁷⁷ and
- securing the agreement of Taiwan (and possibly other States) to receiving sick asylum seekers and refugees transferred from Nauru and PNG for medical treatment (so as to avoid returning them to Australia for treatment).⁷⁸

Once these and any other costs not included in the estimates set out in Table 3 are taken into account, the real cost of offshore processing could be considerably higher.

The difficulty in accurately forecasting the cost of offshore processing is another cause for concern. As **Table 4** shows, the actual cost has consistently exceeded government projections, reflecting ongoing challenges in budgeting for such a policy. The consistently

high annual expenditure (despite a dramatic reduction in the number of refugees and asylum seekers held on Nauru and PNG between its peak at 2,450 in April 2014, and May 2021 when only 239 people remained there), suggests that there are significant fixed costs involved in keeping the policy on foot regardless of the number of people actually kept offshore.⁷⁹ Further, whereas costs such as capital expenditure might be greater initially, new expenses have emerged over time, including the escalating costs of healthcare as the physical and mental health of people subject to the policy has deteriorated, and of defending and settling legal challenges to the policy.

Table 4 Forward projections and actual (partial) cost of offshore processing⁸⁰

Financial year	Forward estimate cost (A\$)				Actual cost (A\$)
	4 yrs prior	3 yrs prior	2 yrs prior	1 yr prior	
2015–16				810,786,000	1,128,573,000
2016–17				880,509,000	1,083,957,000
2017–18			357,044,000	713,641,000	1,492,174,000
2018–19		380,573,000	438,755,000	759,853,000	1,061,290,000
2019–20	370,352,000	426,799,000	378,359,000	525,646,000	961,680,000
2020–21	435,321,000	386,174,000	404,975,000	1,186,445,000	818,779,000
2021–22	394,746,000	411,099,000	307,530,000	811,836,000	

3.2 Failure to comply with fundamental rules of international law

The bilateral agreements underpinning Australia’s offshore processing regime provide that each government will undertake all activities in accordance with their respective international obligations, and treat people transferred offshore ‘with dignity and respect and in accordance with relevant human rights standards’.⁸¹ In practice, however, Australia has violated many of its obligations under international law, as well as the good faith promises it made to the international community through its ratification of core international human rights treaties and the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

Offshore processing poses threats to life, may amount to torture or cruel, inhuman or degrading treatment or punishment, involves prolonged, indefinite and arbitrary detention, constitutes an unlawful interference in family and private life, exposes women to gender-based violence and discrimination, and violates many obligations owed to children.

Various aspects of the policy may also result in a violation of the principle of *non-refoulement* (non-removal to persecution or other serious harm), which lies at the heart of the international protection regime. These include:

- the blanket application of the policy to all asylum seekers arriving by boat on or after 19 July 2013, without adequate screening for individual protection concerns in the country to which transfer was proposed;
- the transfer of asylum seekers to offshore processing countries with ineffective asylum systems, creating a risk of refugees being returned to their countries of origin (‘chain *refoulement*’);

- the creation offshore of a ‘return-oriented environment’, placing considerable pressure on people to return to their countries of origin, even if they continued to fear persecution or other serious harm there (‘constructive *refoulement*’);⁸² and
- the denial of durable solutions and family reunion to people recognised as refugees, which could compel them to return to serious harm in order to reunite with or rescue family members still in danger.⁸³

Every UN body, committee and special procedure that has reviewed Australia’s offshore processing regime expressed concern that Australia is contravening its obligations under international law.⁸⁴ These views are also reflected in reports and decisions by parliamentary inquiries,⁸⁵ the Australian Human Rights Commission,⁸⁶ the Supreme Court of Papua New Guinea,⁸⁷ and national and international non-governmental organisations.⁸⁸ The Office of the Prosecutor of the ICC determined that the conditions of detention offshore ‘appear to have constituted cruel, inhuman, or degrading treatment ... and the gravity of the alleged conduct thus appears to have been such that it was in violation of fundamental rules of international law’.⁸⁹

While some of these violations may have resulted from negligence, others are inherent in the Australian offshore processing model itself, which by design cannot be implemented in accordance with international law and basic human rights standards. This conclusion is based on the fact that the driving principle behind the policy is deterrence, meaning that the conditions offshore must be as bad as, or worse than, those from which people have fled. For the same reason, the policy cannot make exceptions for vulnerable people, such as children (including unaccompanied minors), pregnant women, people with disabilities, the elderly, and victims of trafficking and torture. A policy that complies with international law – providing asylum seekers with access to fair and efficient asylum procedures, humane living conditions, appropriate care, and timely durable solutions if found to be refugees – would have no deterrent value.

3.3 Legal challenges

Australia has sought to create distance between its actions and the legal consequences of offshore processing by emphasising the aspects of the policy that are governed by the laws of Nauru and PNG. Despite its efforts, though, Australia has not been successful in quarantining itself from international and domestic legal challenges, nor in avoiding responsibility for legal violations.

Australia’s obligations under international refugee and human rights law do not end with the physical transfer of asylum seekers out of Australian territory. Instead, as the UN Human Rights Committee explicitly affirmed in 2017, ‘the significant levels of control and influence exercised by [Australia] over the operation of the offshore regional processing centres, including over their establishment, funding and service provided therein’ amount to effective control such as to establish Australia’s jurisdiction and engage its obligations.⁹⁰ The Special Rapporteur on the Human Rights of Migrants also concluded that ‘the Government of Australia is ultimately accountable for any human rights violations that occur in the regional processing centres’ in Nauru and PNG.⁹¹ Other UN bodies have likewise raised concerns with Australia about its policy.⁹²

Australia has faced the prospect of international criminal law challenges to offshore processing, with six communications made to the ICC between 2014 and 2017 by eminent international legal scholars, practitioners and others.⁹³ These communications argued that offshore processing constitutes multiple crimes against humanity.⁹⁴

At the domestic level, Australia has been forced to defend a near constant series of legal challenges to various aspects of the policy. In marked distinction from other liberal democracies, Australia does not have a bill or charter of rights, and most of Australia's obligations under international human rights and refugee law are not enshrined in federal legislation. As a result, it has not been possible to challenge offshore processing in Australian courts on the basis that the policy violates fundamental rules of international law. Instead, domestic challenges have largely involved questions of constitutional law, including whether the federal government has acted within the limits of its power.⁹⁵ While the constitutional challenges are particular to the Australian context, certain other legal challenges may be more relevant to foreign jurisdictions.

For example:

- In 2015, a group of asylum seekers and refugees who had been evacuated to Australia for urgent medical treatment, and the families of 37 babies born in Australia but liable to be sent to Nauru, challenged the lawfulness of offshore detention in the High Court of Australia.⁹⁶ While the challenge itself was ultimately unsuccessful (primarily due to the government passing retroactive legislation to circumvent the challenge while it was on foot⁹⁷), the government was compelled to give undertakings not to return 267 people linked to the case until a judgment was reached. A subsequent advocacy campaign garnered unprecedented public support for this group of people,⁹⁸ resulting in many being permitted to remain in Australia.⁹⁹
- In 2016, the Federal Court of Australia held that the government owed a duty of care to procure a safe and lawful abortion for a female refugee who had been transferred to Nauru, raped while unconscious after a seizure, became pregnant and wanted a termination.¹⁰⁰ The woman had been transferred to PNG for the procedure, but argued that it would be neither safe nor legal for her to undergo it there. The court held that there were reasonable grounds to apprehend that the government would breach its duty of care, and issued an injunction restraining Australia from procuring the abortion in PNG.
- Since 2016, Australian courts have heard more than 60 cases arguing that Australia owes a duty of care to critically ill asylum seekers and refugees offshore. In many of these cases, Australia was ordered to evacuate people to appropriate medical care (in Australia).
- In 2017, after several years of long and complex legal action, Australia settled a class action involving more than 1,900 people who had been held at the Manus Island detention centre. They claimed to have suffered physical and psychological harm as a result of Australia's failure to take reasonable care of them, and to have been falsely imprisoned.¹⁰¹ A settlement figure of A\$70 million, plus almost A\$20 million in legal costs,¹⁰² was believed to be the largest human rights class action settlement in Australian history.¹⁰³

- In 2021, the family of a man murdered in 2014 at the Manus Island detention centre sued the Australian government and one of its private contractors for wrongful death and mental harm suffered as a result of the murder.¹⁰⁴
- Former staff from offshore detention centres have commenced civil proceedings against the Australian government and/or the private contractors that employed them, alleging that they suffered harm (particularly trauma and other psychological harm) as a result of their unsafe working environments.¹⁰⁵
- There have been several Australian coronial inquiries launched into the deaths of asylum seekers and refugees who died after suffering harm offshore.¹⁰⁶

As this select summary shows, Australia's transfer of asylum seekers out of its territory has not enabled it to avoid legal liability for harm suffered offshore. In fact, at times, the offshore processing policy created additional legal difficulties for Australia in that its legal obligations continued, but its capacity to fulfil them was complicated by the involvement of other sovereign States. Australian courts have declined to relieve the government of its duties to people offshore on this basis.¹⁰⁷

Despite the considerable time and money required to defend constant legal challenges to offshore processing, the abovementioned litigation has not yet prompted an official end to the policy. The lack of systemic change has been attributed to the 'particularly challenging legal environment' in Australia, which arises both from the lack of a direct cause of action under Australian law for violations of human rights, and the government's 'agility' in responding to legal challenges.¹⁰⁸ Notably, the government has protected the policy from being struck down by the courts by:

- enacting legislation that retroactively authorises offshore processing (thereby circumventing proceedings on foot before an Australian court);¹⁰⁹
- enjoying bipartisan parliamentary support for legislation that grants broad discretionary powers to the government and relevant Minister to act almost without legislative or judicial constraint in relation to the policy;¹¹⁰ and
- introducing secrecy laws that prohibit those who work in immigration and border protection (including private contractors) from disclosing information obtained during the course of their employment (subject to certain exceptions, the limits of which are unclear), criminalise the making of such disclosures, and impose a penalty of two years imprisonment for those who commit an offence.¹¹¹

Such measures may not be accepted or even possible in other legal systems and political contexts.

Finally, Australia has had to field legal challenges to offshore processing before the courts of Nauru and PNG.¹¹² Notably, those States *do* have binding domestic human rights frameworks. The temporary collapse of the Nauruan judicial system may have helped Australia avoid a successful legal challenge to its policies there, but the Supreme Court of PNG found that the detention of men on Manus Island violated their rights and was unconstitutional, resulting in an order in 2016 that Australia and PNG 'forthwith take all steps necessary to cease and prevent the continued unconstitutional and illegal detention of the asylum seekers or transferees at the relocation centre on Manus Island and the continued

breach of [their] Constitutional and human rights'.¹¹³ This case demonstrated the importance of considering the risk of legal challenges in partner States before implementing offshore processing.

3.4 Systemic cruelty

The profoundly destructive effect of offshore processing on the physical and mental health of people subject to it has been consistently and extensively documented.¹¹⁴

There are strong grounds to conclude that the cruelty, suffering, abuse and neglect experienced by which asylum seekers and refugees in Nauru and PNG was deliberate and systemic. Notably:

- Australia has been on notice about the significant and escalating harm resulting from offshore processing since 2012, with UNHCR, in particular, 'consistently and repeatedly warn[ing] of the severe, negative health impacts of "offshore processing" which are as acute as they are predictable',¹¹⁵ and a team of medical experts warning as early as 2014 that there was 'a significant and ongoing risk of child abuse, including physical and sexual abuse, in the detention environment [in Nauru] where large numbers of children and adults are held in crowded conditions without normal social structure or meaningful activities';¹¹⁶
- this physical and psychological harm was a direct result of government policy, as documented in medical research evidencing the correlation between the detention of asylum seekers and mental health deterioration,¹¹⁷ and evidenced by Australia's persistent refusal to implement key recommendations to address the risks and harm inherent in its policy; and
- Australia had the authority and capacity to bring everyone, and at least the most vulnerable people, back from offshore locations at any time, but instead resisted doing so, in some cases resulting in preventable deaths and injuries.¹¹⁸

Certain human rights violations were so extreme, and unjustifiable, as to indicate systemic cruelty on their own. For example:

- Babies and children were exposed to extreme levels of violence, abuse, neglect, assault and trauma, both within the detention centres on Manus Island (2012–13) and Nauru (2013–) and subsequently in the community in Nauru, causing severe harm to their health, well-being and development. Parents reported that their children played with cockroaches because they had no toys.¹¹⁹ Children as young as five reportedly attempted to kill themselves.¹²⁰ Children were wetting the bed until early-to-mid adolescence.¹²¹ Despite being repeatedly warned of the potentially irreparable harm to children, Australia continued to transfer and hold them offshore, did not take steps to protect them effectively from identified harms, and resisted evacuating critically ill children even when they had been determined to be in need of immediate psychiatric treatment in an in-patient child mental health facility.¹²² By 2018, children on Nauru were so traumatised that several began to present with a rare psychiatric condition known as traumatic withdrawal syndrome (or 'resignation syndrome'), involving progressive social withdrawal and reluctance to engage in usual activities. The most serious stage of the disorder is when the child enters a

profound withdrawal and is unconscious or in a comatose state, at which stage many were evacuated to Australia.¹²³

- Women and girls exposed to rape and sexual assault in Nauru were denied appropriate medical treatment, had no access to justice and were exposed to repeated attacks because Australia refused to move them to places of safety.¹²⁴
- Families were deliberately separated, including spouses and parents/children. Some separation occurred due to family members arriving separately before and after the July 2013 policy change.¹²⁵ In other cases, families were separated by the Australian government's policy of medically evacuating critically ill refugees without their immediate relatives, even where this policy resulted in children being separated from their parents and exposed them to extreme trauma, given the circumstances of the separation.¹²⁶
- Men who fled persecution on the basis of their sexual orientation in their home countries were knowingly sent to PNG, where consensual same-sex acts between men are criminalised.¹²⁷ Gay men reportedly faced harassment and abuse inside the Manus Island detention centre, with one gay man saying: 'I have seen many of them not leaving their rooms ... and I have seen them crying – some of them for days and days and days'.¹²⁸

As explained above, exposure to harsh and cruel conditions was an inherent part of the implementation and purpose of the 'Australian model' of offshore processing.¹²⁹ A senior trauma counsellor described 'demoralisation' as 'the paramount feature of offshore detention'.¹³⁰ The UN Special Rapporteur on the Human Rights of Migrants concluded after his visit to Australia and Nauru in 2017 that 'Australia's responsibility for the physical and psychological damage suffered by these asylum seekers and refugees is clear and undeniable', and it is a 'situation [that is] purposely engineered by Australian authorities to serve as a deterrent for potential future unauthorized maritime arrivals'.¹³¹

Key findings and recommendations

1. The 'Australian model' of offshore processing has been a policy failure. It has not achieved any of its stated policy objectives, namely to deter irregular maritime migration, 'save lives at sea' and 'break the business model' of people smuggling networks. It has incurred enormous financial costs for Australian taxpayers, been implemented contrary to fundamental rules of international law, triggered numerous legal challenges, and involved systemic cruelty.
2. Australia should immediately bring offshore processing to a formal end. The small number of people still held offshore should be transferred back to Australia, and everyone who has been subject to the policy since 2012 should be settled in Australia (or another appropriate country, provided the humanitarian solution is voluntary). The legislative and administrative arrangements underpinning the policy should be repealed or terminated.
3. The 'Australian model' of offshore processing should never be repeated by future Australian governments, nor should it be replicated by other countries.

Endnotes

¹ Offshore processing is factually and legally distinct from the transfer of asylum seekers to remote parts of a State's territory, such as from the Australian mainland to Christmas Island, since the latter involves neither the removal of people from a State's jurisdiction nor the transfer of people between States.

² In the first policy brief in this series, Professor Jane McAdam examined European proposals for the extraterritorial or 'offshore' processing of asylum seekers dating back to at least the mid-1980s: Jane McAdam, 'Extraterritorial processing in Europe: Is 'regional protection' the answer, and if not, what is?' (Policy Brief 1, Kaldor Centre for International Refugee Law, May 2015) <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Kaldor%20Centre_Policy%20Brief%201_2015_McAdam_Extraterritorial%20processing_0.pdf>.

³ Letters from UN High Commissioner for Refugees António Guterres to Australian Minister for Immigration and Citizenship Chris Bowen, 5 September 2012, 9 October 2012.

⁴ In June 2021, Denmark amended its *Aliens Act* to enable offshore processing and protection if a partner State can be identified: *Lov om ændring af udlændingeloven og hjemrejseloven (Indførelse af mulighed for overførsel af asylansøgere til asylsagsbehandling og eventuel efterfølgende beskyttelse i tredjelande)* (Denmark) 3 June 2021 <https://www.folketingstidende.dk/samling/20201/lovforslag/L226/20201_L226_som_vedtaget.pdf> In July 2021, the Nationality and Borders Bill 2021 (UK) was introduced in the United Kingdom, with a similar intended effect.

⁵ While the term 'durable solutions' is usually used to refer to the protection outcomes provided to people recognised as refugees, this brief uses the term 'humanitarian solution' to refer to appropriate permanent solutions for refugees and people found to be in need of international protection, as well as other individuals who have not been found to be refugees but who are entitled to a timely and humanitarian resolution of their situation due to the many years of harm they have suffered as a direct result of Australian policies. Much of this damage to their mental and physical health now requires assistance which may be available in their countries of origin, thus necessitating humanitarian solutions.

⁶ Madeline Gleeson, 'Protection Deficit: The Failure of Australia's Offshore Processing Arrangements to Guarantee "Protection Elsewhere" in the Pacific' (2019) 31(4) *International Journal of Refugee Law* 415.

⁷ Elibritt Karlsen, 'Australia's offshore processing of asylum seekers in Nauru and PNG: a quick guide to statistics and resources' (Quick Guide, Parliamentary Library, Parliament of Australia, 19 December 2016) 8–9 <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4129606/upload_binary/4129606.pdf>. Australia's practice of returning people seeking protection by sea also risks violating fundamental rules of international law: Violeta Moreno-Lax, 'The Interdiction of Asylum Seekers by Sea: Law and (mal)practice in Europe and Australia' (Policy Brief 4, Kaldor Centre for International Refugee Law, May 2017) <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief4_Interdiction_of_asylum_seekers_at_sea.pdf>.

⁸ Home Affairs Portfolio, Answers to questions on notice, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 2020-21 Additional Estimates, AE21-292, AE21-293, AE21-294. It is difficult to get a precise figure for the number of people who arrived by boat during this specific window, but it would appear to be at least 21,500 people and as many as 26,000. 25,173 people (excluding crew) arrived in financial year 2012-13, of which 1,800 to 3,700 arrived prior to the introduction of the new policy on 13 August 2012. The total number of boat arrivals in the first phase of the policy also includes anyone who arrived between 1 and 18 July 2013, being more than 2,300 people: Janet Phillips, 'Boat arrivals and boat "turnbacks" in Australia since 1976: a quick guide to the statistics' (Quick guide, Parliamentary Library, Parliament of Australia, 27 January 2017) <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4068239/upload_binary/4068239.pdf>; Commonwealth of Australia, *Parliamentary Debates*, Senate Legal and Constitutional Affairs Legislation Committee, *Estimates*, 15 October 2012, 43.

⁹ Guterres (n 3).

¹⁰ Scott Morrison, 'Operation Sovereign Borders' (Press conference, 23 September 2013) <<https://webarchive.nla.gov.au/awa/20131003014546/http://pandora.nla.gov.au/pan/143035/20131003-1143/www.minister.immi.gov.au/media/sm/2013/sm208387.htm>>.

¹¹ Ibid.

¹² Asylum seekers who arrived in Australia by boat after 19 July 2013 and had not been transferred offshore by December 2014, and the families of thirty-one babies who were born in Australia before 4 December 2014 after their mothers were transferred back from Nauru, were granted amnesties to remain in Australia: Scott Morrison, 'Reintroducing TPVs to resolve Labor's Asylum Legacy Caseload, Cambodia' (Press conference, 26 September 2014) <<https://webarchive.nla.gov.au/awa/20141221233755/http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm218131.htm>>; Scott Morrison, 'Babies Born to IMAs Transferred from Nauru to Remain in Australia' (Press conference, 18 December 2014) <<https://webarchive.nla.gov.au/awa/20141221233756/http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm220187.htm>>.

¹³ In one case in mid-2014, Australian officers intercepted 157 asylum seekers in Australia's contiguous zone and detained them on an Australian vessel for more than three weeks, while it sailed them back to and attempted to disembark them in India, rather than transferring them to an offshore processing country. This case was subject to a legal challenge in the High Court of Australia, during which the Australian government gave undertakings not to transfer the detained asylum seekers to Sri Lanka (their country of origin), India, or anywhere else, without notice. See Transcript of Proceedings, *JARK v Minister for Immigration and Border Protection* [2014] HCATrans 148-150; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514. Australia has also been accused of paying people smugglers to return to Indonesia with their passengers, and has admitted to making unauthorised incursions into Indonesian sovereign waters, in its efforts to push asylum seekers back to their places of departure rather than transfer them offshore.

¹⁴ See page 5 of this brief.

¹⁵ In its first iteration, offshore processing resulted in the majority of transferred individuals being given asylum in Australia: Janet Phillips, 'The "Pacific Solution" revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island' (Background note, Parliamentary Library, Parliament of Australia, 4 September 2012) 16 <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1893669/upload_binary/1893669.pdf>.

¹⁶ See page 8 of this brief.

¹⁷ Karlsen (n 7) 4.

¹⁸ Home Affairs Portfolio (n 8). There are some minor discrepancies in this data, such that an additional three people may have been transferred as part of the first cohort between 13 August 2012 to 18 July 2013.

¹⁹ Chris Evans, 'Last refugees leave Nauru' (Press release, 8 February 2008) <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FYUNP6%22;src1=sm1>>.

²⁰ Australian Government, *Report of the Expert Panel on Asylum Seekers* (August 2012) 9 <<https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/expert-panel-report.pdf>>.

²¹ Ibid 47–49.

²² Julia Gillard and Chris Bowen, 'Transcript of press conference' (Press conference, 13 August 2012) <<https://webarchive.nla.gov.au/awa/20120816171835/http://pandora.nla.gov.au/pan/121064/20120817-0000/www.pm.gov.au/press-office/transcript-press-conference-canberra-28.html>>.

²³ Kevin Rudd, 'Australia and Papua New Guinea Regional Settlement Arrangement' (Media release, 19 July 2013) <<https://webarchive.nla.gov.au/awa/20130730234007/http://pandora.nla.gov.au/pan/79983/20130731-0937/www.pm.gov.au/press-office/australia-and-papua-new-guinea-regional-settlement-arrangement.html>>.

²⁴ Kevin Rudd et al, 'Transcript of Joint Press Conference' (Press conference, 19 July 2013) <<https://webarchive.nla.gov.au/awa/20130730234007/http://pandora.nla.gov.au/pan/79983/20130731-0937/www.pm.gov.au/press-office/transcript-joint-press-conference-2.html>>.

²⁵ See note 13.

²⁶ Home Affairs Portfolio, Answers to questions on notice, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 2019-20 Additional Estimates, AE20-203.

²⁷ See, eg, comments of then Minister for Immigration and Border Protection Scott Morrison in Felicity Ogilvie, 'Unaccompanied teenager on Nauru fears locals will try to kill him', *PM* (online, 28 October 2014) <<https://www.abc.net.au/pm/content/2014/s4116551.htm>>; Peter Dutton, 'Operation Sovereign Borders, High Court decision, Manus Island situation' (Transcript, 28 January 2015) <<https://webarchive.nla.gov.au/awa/20171219230619/http://pandora.nla.gov.au/pan/143035/20171220-0959/www.minister.border.gov.au/peterdutton/2015/Pages/Operation-Sovereign-Borders%2C-High-Court-decision%2C-Manus-Island-situation.html>>.

²⁸ In 2016, the Supreme Court of PNG ruled the detention of asylum seekers and refugees at the Manus Island detention centre unlawful and ordered the Australian and PNG governments to bring this situation to an end (see [46] above). Following this ruling, PNG asked Australia to make alternative arrangements for the people held at the centre. After a period of operating as a semi-open centre, Australia formally closed the Manus Island detention centre in October 2017, with all remaining asylum seekers and refugees being moved into temporary accommodation sites built and managed by Australia elsewhere on Manus Island, before later being moved to the capital Port Moresby, and then the majority being medically evacuated back to Australia.

²⁹ The closure of the Manus Island detention centre was ill-planned, poorly managed and had the potential to result in catastrophic harm to the several hundred men who remained there in October 2017. Due to concerns that there was insufficient temporary accommodation and fearing harm in the community, these men refused to leave the detention centre, even after Australia withdrew all its staff and cut off water and electricity. After a stand-off which lasted almost a month, and periodically risked escalating into violence involving locals and police, the men were forced to leave the centre in late November: Michael Koziol and Fergus Hunter, "'We all are going": Manus Island standoff ends as police re-enter in second day of force', *Sydney Morning Herald* (online, 24 November 2017) <<https://www.smh.com.au/politics/federal/we-are-all-crying-police-reenter-manus-island-camp-in-second-day-of-force-against-refugees-20171124-gzrx0j.html>>; UNHCR, 'UNHCR Statement: Australia must prevent looming humanitarian emergency in Papua New Guinea' (Press release, 18 October 2017) <<https://www.unhcr.org/en-au/news/press/2017/10/59e8a0384/unhcr-statement-australia-must-prevent-looming-humanitarian-emergency-papua.html>>.

³⁰ See, eg, Peter Dutton, 'Interview with David Speers, Sky News' (Transcript, 19 October 2017) <<https://webarchive.nla.gov.au/awa/20200203165447/http://pandora.nla.gov.au/pan/166106/20200204-0324/minister.homeaffairs.gov.au/peterdutton/pages/interview-with-david-speers-sky-news-19102017.html>>.

³¹ Peter Dutton, 'Press Conference, Brisbane' (Press conference, 24 November 2017) <<https://webarchive.nla.gov.au/awa/20200203165447/http://pandora.nla.gov.au/pan/166106/20200204-0324/minister.homeaffairs.gov.au/peterdutton/pages/Press-Conference-Brisbane-24112017.html>>.

³² Peter Dutton, 'Interview with *The Project*, Channel 10' (Transcript, 27 November 2017) <<https://webarchive.nla.gov.au/awa/20200203165447/http://pandora.nla.gov.au/pan/166106/20200204-0324/minister.homeaffairs.gov.au/peterdutton/pages/Interview-with-The-Project%2C-Channel-10.html>>. Similar comments were made on an ongoing basis in following years. See, eg, Peter Dutton, 'Interview with Ray Hadley, Radio 2GB-4BC' (Transcript, 24 May 2018)

<https://webarchive.nla.gov.au/awa/20200203165446/http://pandora.nla.gov.au/pan/166106/20200204-0324/minister.homeaffairs.gov.au/peterdutton/pages/Hadley-Ray%2C-2GB.html>>.

³³ Peter Dutton, Minister for Immigration and Border Protection, 'Interview with Ray Hadley, Radio 2GB/4BC' (Transcript, 26 October 2017) <<https://webarchive.nla.gov.au/awa/20200203165446/http://pandora.nla.gov.au/pan/166106/20200204-0324/minister.homeaffairs.gov.au/peterdutton/2017/Pages/interview-with-ray-hadley-26102017.html>>. See also Peter Dutton, 'Asylum seeker children off Nauru' (Opinion piece, 3 February 2019) <<https://webarchive.nla.gov.au/awa/20200203165447/http://pandora.nla.gov.au/pan/166106/20200204-0324/minister.homeaffairs.gov.au/peterdutton/pages/Opinion-Piece---Kids-off-Nauru.html>>.

³⁴ See pages 6-9 of this brief.

³⁵ See comments in note 8 above regarding the number of boat arrivals in this period.

³⁶ Phillips (n 8).

³⁷ Information about boat arrivals in this period were reported by the Minister or Home Affairs until 5 August 2013 when Caretaker Conventions came into effect ahead of the federal election: see Jason Clare, *Media Releases* (webpage, undated) <<https://webarchive.nla.gov.au/awa/20130902035623/http://pandora.nla.gov.au/pan/122803/20130902-1346/www.ministerhomeaffairs.gov.au/Mediareleases/Pages/default.html>>.

³⁸ Home Affairs Portfolio (n 26).

³⁹ Janet Phillips, 'Asylum seekers and refugees: what are the facts?' (Research paper, Parliamentary Library, Parliament of Australia, 2 March 2015) 9 <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/HGNW6/upload_binary/HGNW6.pdf>.

⁴⁰ For many refugees trying to reach Australia by boat, Australia is the first country they reach which is a State party to the Refugee Convention. Global resettlement needs continue to far outstrip the available places; and resettlement to Australia was removed as an option entirely for asylum seekers who registered with UNHCR in Indonesia on or after 1 July 2014, pursuant to a shift in Australian policy introduced in November 2014: Scott Morrison, 'Changes to resettlement another blow to people smugglers' (Media release, 18 November 2014) <<https://webarchive.nla.gov.au/awa/20141221233756/http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm219307.htm>>.

⁴¹ Jane McAdam, 'Australia and Asylum Seekers' (2013) 25(3) *International Journal of Refugee Law* 435, 439.

⁴² 'Bowen admits Nauru won't deter boats', *9 News* (online, 15 October 2012) <<https://www.9news.com.au/national/bowen-admits-nauru-won-t-deter-boats/8d60e939-7d7d-4f2a-ac4f-81470dd03a48>>.

⁴³ 'Former PM Malcolm Fraser calls for royal commission into Australia's management of offshore processing', *ABC News* (online, 25 July 2013) <<https://www.abc.net.au/news/2013-07-25/malcolm-fraser-manus-island-asylum-seekers-immigration/4842884>>.

⁴⁴ According to the Australian Border Deaths Database, there were 131, 164, 231, 418 and 231 deaths en route to and in Australian waters in 2009 to 2013 inclusive: Australian Border Deaths Database, 'Annual report on border-related deaths, 2020' (Research Brief 18, Border Crossing Observatory, March 2021) <https://www.monash.edu/data/assets/pdf_file/0018/2523141/BOB-Research-Brief-18-border-deaths-annual-report-2020-Final.pdf>.

⁴⁵ See Table 1.

⁴⁶ Ben Doherty, Nick Evershed and Andy Ball, 'Deaths in offshore detention: the faces of the people who have died in Australia's care,' *Guardian* (online, 20 June 2018) <<https://www.theguardian.com/australia-news/ng-interactive/2018/jun/20/deaths-in-offshore-detention-the-faces-of-the-people-who-have-died-in-australias-care>>; Helen Davidson, 'Afghan man dies in Brisbane two years after medical transfer from Manus Island', *Guardian* (online, 17 October 2019) <<https://www.theguardian.com/australia-news/2019/oct/17/afghan-man-dies-in-brisbane-two-years>>.

[after-medical-transfer-from-manus-island](#)>; Mel Vujkovic, 'Inquest into death of Iranian refugee Omid Masoumali considers medical treatment delay', *ABC News* (online, 25 February 2019) <<https://www.abc.net.au/news/2019-02-25/omid-masoumali-refugee-inquest/10845120>>.

⁴⁷ Reza Berati, a 24-year-old Iranian man, was murdered inside the Manus Island detention centre during a riot in February 2014 when contractors, police and locals stormed the centre. He was attacked with a wooden pole spiked with nails and then, while prone, had a rock dropped on his head. Staff and other refugees present at the time continue to be affected by the trauma of witnessing this event. In December 2014 an Australian Senate Committee recommended that Australia provide compensation to Berati's family and other asylum seekers injured during the incident: 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, December 2014) xi. In 2021, Berati's family commenced legal action against Australia and a private contractor over the death (see n 104).

⁴⁸ Hamid Kehazai, a 24-year-old Iranian man, died after a minor infection in his leg was not effectively treated on Manus Island and Australian officials resisted medical requests to medically evacuate him. He became septic, suffered a massive heart attack, and was subsequently declared brain dead. Faysal Ishak Ahmed, a 27-year-old Sudanese man, suffered repeated seizures on Manus Island but was denied medical treatment and eventually fell and sustained a fatal head injury during a seizure: Doherty, Evershed and Ball (n 46).

⁴⁹ Coroners Court of Queensland, *Inquest into the death of Hamid Khazaei* (30 July 2018) [14] <https://www.courts.qld.gov.au/data/assets/pdf_file/0005/577607/cif-khazaei-h-20180730.pdf>.

⁵⁰ Amnesty International, *This is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea* (December 2013) 61–62.

⁵¹ Michael Koziol "Although we are alive, we are dead inside": Refugees despair at on-off US resettlement deal', *Sydney Morning Herald* (online, 2 February 2017) <<https://www.smh.com.au/politics/federal/although-we-are-alive-we-are-dead-inside-refugees-despair-at-onoff-us-resettlement-deal-20170202-gu3un4.html>>.

⁵² See sources in note 56.

⁵³ *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth) sch 6. This 'medevac' scheme was repealed later in 2019 after the government struck a secret deal with a key Senate crossbencher. By then, however, most of the people who had been transferred offshore in the second cohort had already been returned to Australia, with the majority returning on the basis of government decisions to move them, rather than the legislated and short-lived 'medevac' scheme.

⁵⁴ Some of the people were transferred for medical treatment, and others were accompanying them (although some medical evacuees were unable to be accompanied by family members). As at 31 March 2021 1,219 people who had arrived in Australia after 19 July 2013 as part of the second cohort and been transferred offshore had been brought back to Australia (including 267 children, 146 of whom were born in Australia or Nauru); as of 30 April 2021, 240 people remained in Nauru and PNG: Home Affairs Portfolio, Answers to questions on notice, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 2021-22 Budget Estimates BE21-431, BE21-425.

⁵⁵ See pages 15-16 of this brief.

⁵⁶ See, eg, Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (NewSouth Press, 2016); the documentation of physical and mental health decline cited in note 114; and reports from numerous UN bodies cited in n 84.

⁵⁷ Elizabeth Elliott and Hasantha Gunasekera, *The health and well-being of children in immigration detention: Report to the Australian Human Rights Commission, Monitoring Visit to Wickham Point Detention Centre, Darwin, NT, October 16th – 18th 2015* (Report, 4 February 2016) 18

<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/health-and-well-being-children-immigration>>.

⁵⁸ UNHCR, Submission No 43 to the Senate Legal and Constitutional Affairs 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 2016* (12 November 2016) <<https://www.unhcr.org/en-au/publications/legal/58362da34/submission-to-the-senate-legal-and-constitutional-affairs-committee-serious.html>>.

⁵⁹ MSF, *Indefinite despair: The tragic mental health consequences of offshore processing on Nauru* (Report, December 2018), 4 <https://msf.org.au/sites/default/files/attachments/indefinite-despair_3.pdf>.

⁶⁰ 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* UN Doc A/HRC/35/25/Add.3 (24 April 2017) [77].

⁶¹ Ben Doherty and David Marr, 'The worst I've seen – trauma expert lifts lid on 'atrocities' of Australia's detention regime', *Guardian* (online, 20 June 2016) <<https://www.theguardian.com/australia-news/2016/jun/20/the-worst-ive-seen-trauma-expert-lifts-lid-on-atrocities-of-australias-detention-regime>>.

⁶² UNHCR, 'UNHCR chief Filippo Grandi calls on Australia to end harmful practice of offshore processing' (Press release, 24 July 2017) <<https://www.unhcr.org/en-au/news/press/2017/7/597217484/unhcr-chief-filippo-grandi-calls-australia-end-harmful-practice-offshore.html>>.

⁶³ Leanne Weber and Michael Grewcock, 'Criminalising people smuggling: Preventing or globalising harm?' in Felia Allum and Stan Gilmour (eds), *Routledge Handbook of Transnational Organized Crime* (Routledge, 2012) 379.

⁶⁴ For a recent example, see interviews with women in: Natasha Yacoub, Nikola Errington, Wai Wai Nu, Alexandra Robinson, 'Rights Adrift: Sexual Violence Against Rohingya Women on the Andaman Sea' (2021) 22(1) *Asia-Pacific Journal on Human Rights and the Law* 96.

⁶⁵ For an analysis of how forced migration has been reduced to smuggling as transnational crime, see: Sharon Pickering, 'Transnational Crime and Refugee Protection' (2007) 34(2) *Social Justice* 47.

⁶⁶ Consider, for example, the treatment of Rohingya refugees and Bangladeshi migrants smuggled into Thailand and Malaysia, and the experience of those abandoned at sea, both prior to and during the Andaman Sea crisis of 2015.

⁶⁷ See, eg, Eugenio Cusumano and Matteo Villa, 'From "Angels" to "Vice Smugglers": The Criminalization of Sea Rescue NGOs in Italy' (2021) 27(1) *European Journal on Criminal Policy and Research* 23. Consider also the individuals and groups who helped Jews and other persecuted groups escape the Nazis and the Holocaust during World War II.

⁶⁸ Cat Barker, 'The people smugglers' business model' (Research paper, Parliamentary Library, Parliament of Australia, 28 February 2013) <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/2262537/upload_binary/2262537.pdf>; 'Borders Bill: Post-Brexit overhaul of asylum rules unveiled', *BBC News* (online, 6 July 2021) <<https://www.bbc.com/news/uk-politics-57732761>>.

⁶⁹ Barker (n 68) 41–42.

⁷⁰ *Ibid* 42.

⁷¹ A 2016 report determined that Australia would have saved A\$400,000 per person per year by issuing asylum seekers visas and permitting them to remain in the community in Australia rather than detaining them offshore: Save the Children Australia and UNICEF Australia, *At What Cost? The Human, Economic and Strategic Cost of Australia's Asylum Seeker Policies and the*

Alternatives (Report, 2016) 43 <<https://www.unicef.org.au/Upload/UNICEF/Media/Documents/At-What-Cost-Report.pdf>>.

⁷² These figures are the actual costs of the Department of Home Affairs' 'IMA [Illegal Maritime Arrival] Offshore Management' program, as reported in annual Portfolio Additional Estimates Statements: see Department of Home Affairs, *Reports – Budgets* (webpage, undated) <<https://www.homeaffairs.gov.au/reports-and-publications/reports/budgets>>.

⁷³ These figures are the combined totals of the costs incurred by Australia under the Memoranda of Understanding with Nauru and PNG for 'offshore processing and resettlement', as reported by the Department of Home Affairs: Home Affairs Portfolio, Answers to questions on notice, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 2020-21 Additional Estimates, AE21-376, AE21-379.

⁷⁴ The costs in this year were lower than in others because the decision to restart offshore processing was not made until 13 August 2012.

⁷⁵ Actual costs for financial year 2020–21 will not be available until Additional Estimates Statements are published in February 2022. Costs estimated prior to the Additional Estimates Statements have consistently been lower than actual costs in all previous years, suggesting actual costs will be higher than A\$818,779,000. The Department of Home Affairs' answers to Senate questions on costs for financial year 2020-21 were only to 28 February 2021.

⁷⁶ See, eg, notes 85,86.

⁷⁷ Madeline Gleeson, 'The Australia-Cambodia refugee deal' (Research Brief, Kaldor Centre for International Refugee Law, October 2019) <[https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Research Brief Cambodia Oct2019.pdf](https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Research%20Brief%20Cambodia%20Oct2019.pdf)>.

⁷⁸ Gleeson (n 6) 428.

⁷⁹ Australia is expected to spend just under A\$3.4m for each of the 239 people still held offshore in the coming year, or A\$9,305 per person per day: Ben Doherty, 'Budget immigration costs: Australia will spend almost \$3.4m for each person in offshore detention', *Guardian* (online, 12 May 2021) <<https://www.theguardian.com/australia-news/2021/may/12/australia-will-spend-almost-34m-for-each-person-in-offshore-detention-budget-shows>>.

⁸⁰ See Department of Home Affairs (n 72).

⁸¹ See *Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*, Nauru and Australia (signed and entered into force 29 August 2012) [12]; *Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*, Nauru and Australia (signed and entered into force 3 August 2013) [17]; *Memorandum of Understanding Between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to and Assessment of Persons in Papua New Guinea, and Related Issues*, Papua New Guinea and Australia (signed and entered into force 8 September 2012) [15]; *Memorandum of Understanding Between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues*, Papua New Guinea and Australia (signed and entered into force 6 August 2013) [17]. The memoranda are available at Kaldor Centre for International Refugee Law, *Bilateral Agreements – Offshore Processing* (webpage, undated) <<https://www.kaldorcentre.unsw.edu.au/bilateral-agreements-offshore-processing>>.

⁸² See, eg, UNHCR, *UNHCR monitoring visit to the Republic of Nauru: 7 to 9 October 2013* (Report, 26 November 2013) [140] <<https://www.unhcr.org/en-au/publications/legal/58117b931/unhcr-monitoring-visit-to-the-republic-of-nauru-7-to-9-october-2013.html>>; UNHCR, *UNHCR monitoring visit to Manus Island, Papua New Guinea: 23 to 25 October 2013* (Report, 26 November 2013) [119] <<https://www.unhcr.org/en-au/publications/legal/58117aff7/unhcr->

[monitoring-visit-to-manus-island-papua-new-guinea-23-to-25-october.html](#)>; UNHCR, 'Australia should not coerce vulnerable people to return to harm' (Press release, 29 August 2017) <<https://www.unhcr.org/en-au/news/press/2017/8/59a558104/australia-coerce-vulnerable-people-return-harm.html>>; UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) [35(a)].

⁸³ Ben Doherty, 'Afghan refugee sues Australian government, saying detention prevents him saving his family from Taliban', *Guardian* (online, 22 July 2021) <<https://www.theguardian.com/australia-news/2021/jul/22/afghan-refugee-sues-australian-government-saying-detention-prevents-him-saving-his-family-from-taliban>>.

⁸⁴ For a list of UN reports on offshore processing from 2012 to 2019, see: UNHCR, 'United Nations Observations: Australia's transfer arrangements with Nauru and Papua New Guinea (2012–present)' (webpage, undated) <<https://www.unhcr.org/en-au/united-nations-observations.html>>.

⁸⁵ See, eg, Senate Legal and Constitutional Affairs References Committee (n 47); 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) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Final_Report>; Philip Moss, *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru* (Report, 6 February 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* (Report, April 2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Report>.

⁸⁶ Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (Report, 2014) 181–196 <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children>>.

⁸⁷ *Namah v Pato* [2016] PJSC 13 (26 April 2016) ('*Namah*').

⁸⁸ See, eg, Amnesty International (n 50); Amnesty International, *Island of Despair: Australia's "Processing" of Refugees on Nauru* (Report, 2016) <<https://www.amnesty.org/download/Documents/ASA1249342016ENGLISH.PDF>>; Human Rights Watch, 'Australia: Appalling Abuse, Neglect of Refugees on Nauru' (2 August 2016) <<https://www.hrw.org/news/2016/08/02/australia-appalling-abuse-neglect-refugees-nauru>>.

⁸⁹ Letter from the Office of the Prosecutor to Andrew Wilkie MP, 12 February 2020, 2 <[https://uploads.guim.co.uk/2020/02/14/200213-Andrew-Wilkie-Response-from-International-Criminal-Court-Australian-Government-treatment-of-asylum-seekers_\(1\).pdf](https://uploads.guim.co.uk/2020/02/14/200213-Andrew-Wilkie-Response-from-International-Criminal-Court-Australian-Government-treatment-of-asylum-seekers_(1).pdf)>.

⁹⁰ UN Human Rights Committee (n 82) [35].

⁹¹ UN Human Rights Council (n 60) [73].

⁹² See note 84.

⁹³ Natalie Hodgson, 'International criminal law and civil society resistance to offshore detention' (2020) 26(3) *Australian Journal of Human Rights* 449.

⁹⁴ *Ibid* 451. Despite finding that the conditions of detention appeared to be cruel, inhuman or degrading treatment contrary to fundamental rules of international law, the Office of the Prosecutor declined to formally open a preliminary examination to examine crimes against humanity. Irrespective of the outcome, the communications 'demonstrate the illegality of Australia's offshore

detention of asylum seekers, hold government officials criminally responsible for their conduct, and exert pressure on the government to cease offshore detention': Hodgson (n 93) 450.

⁹⁵ *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 ('*Plaintiff M68*').

⁹⁶ *Plaintiff M68*.

⁹⁷ *Migration Amendment (Regional Processing Arrangements) Act 2015* (Cth).

⁹⁸ Ben Doherty, "'Let them stay": backlash in Australia against plans to send asylum seekers to detention camps', *Guardian* (online, 10 February 2016) <<https://www.theguardian.com/australia-news/2016/feb/10/let-them-stay-australia-backlash-267-asylum-seekers-island-detention-camps>>; Adam Gartrell, 'Churches become potential flashpoint after offering sanctuary to asylum seekers in wake of High Court verdict', *Sydney Morning Herald* (online, 4 February 2016) <<https://www.smh.com.au/politics/federal/churches-become-potential-flashpoint-after-offering-sanctuary-to-asylum-seekers-in-wake-of-high-court-verdict-20160204-gml5qk.html>>.

⁹⁹ Thomas Oriti, 'Let Them Stay labelled a success, more than half of 267 asylum seekers in community detention', *ABC News* (online, 2 April 2016) <<https://www.abc.net.au/news/2016-04-02/let-them-stay-labelled-success-asylum-seeker-community-detention/7294456>>.

¹⁰⁰ *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483.

¹⁰¹ *Kamasae v Commonwealth of Australia & Ors*, S CI 2014 6770.

¹⁰² Supreme Court of Victoria, 'Manus Island Detention Centre class action: Court approves \$70M settlement' (6 September 2017) <<https://www.supremecourt.vic.gov.au/news/manus-island-detention-centre-class-action>>.

¹⁰³ 'Australia agrees to pay A\$70m to Manus Island detainees', *BBC News* (14 June 2017) <<https://www.bbc.com/news/world-australia-40269543>>.

¹⁰⁴ Human Rights Law Centre, 'Family seeks justice for the murder of Reza Berati on Manus Island' (26 July 2021) <<https://www.hrlc.org.au/news/2021/7/26/family-seeks-justice-for-the-murder-of-reza-berati-on-manus-island>>.

¹⁰⁵ The details of most of these proceedings are confidential and/or otherwise not on the public record. However, these claims are consistent with the well-documented risks of vicarious trauma for staff working with traumatised people, and statements made on the public record by present and former staff to government inquiries and the media. See, eg Nicole Hasham, 'Detention centre workers suffering their own trauma in dealing with asylum seekers', *Sydney Morning Herald* (online, 26 February 2016) <<https://www.smh.com.au/politics/federal/detention-centre-workers--suffering-their-own-trauma-in-dealing-with-asylum-seekers-20160225-gn3buk.html>>.

¹⁰⁶ See, for example: Coroners Court of Queensland (n 49).

¹⁰⁷ *EUB18 v Minister for Home Affairs* [2018] FCA 1432 [36].

¹⁰⁸ Gabrielle Holly, 'Challenges to Australia's Offshore Detention Regime and the Limits of Strategic Tort Litigation' (2020) 21(3) *German Law Journal* 549, 550.

¹⁰⁹ See note 97.

¹¹⁰ For example, the relevant Minister has a broad personal, discretionary, non-compellable and non-reviewable power to decide who should and should not be sent offshore: *Migration Act 1958* (Cth) s 198AE. See also s 198AHA.

¹¹¹ *Australian Border Force Act 2015* (Cth) pt 6, ss 41-51.

¹¹² *AG v Secretary of Justice* [2013] NRSC 10; *Namah* (n 87). There were other legal challenges to offshore processing in both Nauru and PNG, including judicial human rights inquiries launched by Justice David Cannings of the PNG National Court to examine conditions in the Manus Island detention centre, but these were quashed by the Australian and PNG governments: Michael Gordon, 'Abbott and O'Neill agree: No human rights inquiry for Manus Island', *Sydney Morning*

Herald (online, 23 March 2014) <<https://www.smh.com.au/politics/federal/abbott-and-oneill-agree-no-human-rights-inquiry-for-manus-island-20140322-35a6e.html>>. Under the agreements with Nauru and PNG, Australia was responsible for bearing 'all costs' of offshore processing, including costs incurred in and by those States defending legal challenges.

¹¹³ *Namah* (n 87) [72(6)].

¹¹⁴ Seven years of reports documenting the progressive mental health deterioration of people offshore were summarised for an Australian Senate Committee in 2019: Kaldor Centre for International Refugee Law, Submission No 53.1 to the Senate Standing Committee on Legal and Constitutional Affairs, *Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions]* (10 September 2019) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/RepairMedicaltransfers/Submissions>. See also the leaked cache of more than 2,000 incident reports from Nauru known as the 'Nauru Files': 'The Nauru Files', *Guardian* (online, 10 August 2016) <<https://www.theguardian.com/news/series/nauru-files>>.

¹¹⁵ UNHCR, 'UNHCR urges Australia to evacuate off-shore facilities as health situation deteriorates' (Briefing note, 12 October 2018) <<https://www.unhcr.org/en-au/news/briefing/2018/10/5bc059d24/unhcr-urges-australia-evacuate-off-shore-facilities-health-situation-deteriorates.html>>.

¹¹⁶ Physical and Mental Health Subcommittee of the Joint Advisory Committee for Nauru Regional Processing Arrangements, 'Nauru site visit report: 16-19 February 2014' (Report, 2014) 3 <<https://s3.documentcloud.org/documents/1175048/hmhsc-jac-site-visit-report-final-1.pdf>>.

¹¹⁷ Trine Marianne Kastrup et al, 'The impact of detention on the health of asylum-seekers: a systematic review' (2015) 11(1) *Campbell Systematic Reviews* 1; Melissa Bull et al, 'Sickness in the system of long-term immigration detention' (2012) 26(1) *Journal of Refugee Studies* 47; Guy Coffey et al, 'The meaning and mental health consequences of long-term immigration detention for people seeking asylum' (2010) 70(12) *Social Science & Medicine* 2070.

¹¹⁸ This resistance was widespread and well-documented. See, eg, Paul Hayes, 'Problem cases, red tape and detention fatigue: A GP on Nauru' (Feature, RACGP, 27 March 2018) <<https://www1.racgp.org.au/newsgp/professional/problem-cases,-red-tape-and-detention-fatigue-a-g>>.

¹¹⁹ Elliott and Gunasekera (n 57) 18.

¹²⁰ Felicity Ogilvie, 'Five-year-old girl attempted suicide in fear of going back to Nauru, father says', *ABC News* (online, 28 March 2015) <<https://www.abc.net.au/news/2015-03-28/father-says-5yo-girl-attempted-suicide-in-fear-of-going-to-nauru/6355566>>.

¹²¹ UNHCR (n 58) [43].

¹²² See, for example, the case of the child known as 'BXD18' detailed in linked proceedings *FRM17 v Minister for Home Affairs* [2019] FCAFC 148.

¹²³ In 2018, the Guardian documented several cases, including one girl who, '[b]efore she got sick ... was the best-performing student... She had a dream to be a doctor in Australia and to help others. Now, she is on food-and-fluid refusal and begging to die as death is better than Nauru': Ben Doherty, 'Begging to die': succession of critically ill children moved off Nauru', *Guardian* (online, 25 August 2018) <<https://www.theguardian.com/australia-news/2018/aug/25/begging-to-die-succession-of-critically-ill-children-moved-off-nauru>>. See also Louise Newman, 'What is resignation syndrome and why is it affecting refugee children?' *The Conversation* (online, 22 August 2018) <<https://theconversation.com/explainer-what-is-resignation-syndrome-and-why-is-it-affecting-refugee-children-101670>>.

¹²⁴ See, eg, Nauru files (n 114); Refugee Council of Australia and Asylum Seeker Resource Centre, *Australia's Man-Made Crisis on Nauru: Six Years On* (Report, September 2018), 9–10 <<https://www.refugeecouncil.org.au/nauru-report/2/>>.

¹²⁵ Refugee Council of Australia and Asylum Seeker Resource Centre (n 124) 8–9; Human Rights Law Centre, *Together in safety: A report on the Australian Government's separation of families*

seeking safety (Report, 2020), 12–15 <[https://static1.squarespace.com/static/580025f66b8f5b2dabb4291/t/6082667935d08840b1aabae8/1619158657519/HRLC Together in Safety REPORT.pdf](https://static1.squarespace.com/static/580025f66b8f5b2dabb4291/t/6082667935d08840b1aabae8/1619158657519/HRLC+Together+in+Safety+REPORT.pdf)>.

¹²⁶ Refugee Council of Australia (n 125) 8–9; UNHCR (n 58) [32], [43], [50].

¹²⁷ Amnesty International (n 50), 73–74.

¹²⁸ Dominic Godfrey, 'Gay detainees on Manus Island are outlaws in PNG', *RNZ* (online, 1 September 2017) <<https://www.rnz.co.nz/international/programmes/datelinepacific/audio/201856867/gay-detainees-on-manus-island-are-outlaws-in-png>>.

¹²⁹ See page 12 of this brief.

¹³⁰ Doherty and Marr (n 61).

¹³¹ UN Human Rights Council (n 60) [79].

