



## POST-EVENT REPORT

### ‘Offshore Processing and Asylum Policy – Lessons from Australia’

21 September 2022

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On 21 September 2022, the Human Rights Law Centre at the University of Nottingham and the Kaldor Centre for International Refugee Law at the University of New South Wales (UNSW) co-hosted an online meeting entitled ‘Offshore Processing and Asylum Policy – Lessons from Australia’. This meeting brought together a panel of Australian experts with a select group of advocates and civil society organisations in the United Kingdom (UK) to discuss recent asylum reforms and lessons which might be learned from the Australian experience of similar practices.

This report provides a record of the discussion and links to materials mentioned during the meeting and other resources.

#### Introduction

**Madeline Gleeson**

*Senior Research Fellow*

*Kaldor Centre for International Refugee Law at UNSW*

There have been two distinct periods of offshore processing in Australia. The first, which ran from 2001 to 2008, was the period when Alexander Downer was the Australian Minister for Foreign Affairs. Relevantly, given Mr Downer’s recent involvement in UK border policy, offshore processing at this time was very different from the policy we have seen in Australia more recently and which the UK is seeking to emulate.

Most importantly, the processing of asylum claims during this first period was done by either the UN High Commissioner for Refugees (UNHCR) or Australian immigration officials, applying the UNHCR procedures and standards used around the world,<sup>1</sup> and people found to be refugees were either permitted to return to and settle in Australia, or resettled in a third country.<sup>2</sup>

The second period of offshore processing began in 2012. This time around, Australia has gone to great lengths to maintain the fiction that offshore processing is entirely a matter for the governments of Nauru and Papua New Guinea (PNG), and that all Australian responsibility for people transferred offshore ceases the moment they leave Australian territory. Specifically,

<sup>1</sup> Commonwealth of Australia, *A Certain Maritime Incident* (2002) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Former\\_Committees/maritimeincident/report/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/maritimeincident/report/index)> Chapter 11, 316–319.

<sup>2</sup> Janet Phillips, ‘The “Pacific Solution” revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island’ (Background Note, *Australian Parliamentary Library*, 4 September 2012) <[https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1893669/upload\\_binary/1893669.pdf](https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1893669/upload_binary/1893669.pdf)> 16.

Australia has tried to maintain that the processing of asylum claims is wholly a matter for those States, despite Australia having played a significant role in establishing, funding and running those systems.<sup>3</sup>

The other major difference relates to durable solutions. When offshore processing was first reintroduced in August 2012 there was no clear answer as to what would happen to people found to be refugees. In July 2013 this answer came when the Rudd Labor government established the rule that no person found to be a refugee in Nauru or PNG would ever be permitted to settle in Australia.<sup>4</sup> But nor were any other suitable settlement alternatives available.

This bar on settlement in Australia is the main reason why there is still offshore processing today. Asylum seekers were only transferred offshore for a relatively brief period from August 2012 to mid-2014.<sup>5</sup> After that, the Australian government pivoted away from offshore processing in favour of boat turnbacks. This issue should now be in Australia's past, but the issue drags on because of the people who arrived back then remain stuck in limbo waiting for a durable solution.

*Further information:*

- Australia's offshore processing arrangements were established by a series of memoranda of understanding (MOUs) with Nauru and PNG. A first set of two MOUs founded the policy in August and September 2012. These agreements were superseded by a second set of two MOUs and a 'Regional Resettlement Arrangement' with PNG in July and August 2013, giving effect to the Australian policy change preventing settlement of refugees in Australia. Links to these documents can be found on the Kaldor Centre website at <https://www.kaldorcentre.unsw.edu.au/bilateral-agreements-offshore-processing>
- For more information about the circumstances surrounding the reintroduction of offshore processing in 2012, and the first four years of the policy, see: Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (NewSouth, 2016).

## Overview of Offshore Processing

**Dr Graham Thom**  
*Refugee Coordinator*  
*Amnesty International Australia*

Offshore processing was one part of a suite of deterrence policies that the Australian government initiated. In the 1990s, Australia introduced mandatory and indefinite detention, followed later by temporary protection visas. Neither of these policies had an effect on the number of people trying to reach Australia by boat to seek protection. After that, Australia introduced offshore processing and boat turnbacks. A research report by the Kaldor Centre shows that it is boat turnbacks, not offshore processing, that ultimately resulted in a reduction

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<sup>3</sup> 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. Please contact the author if you require access: [madeline.gleeson@unsw.edu.au](mailto:madeline.gleeson@unsw.edu.au).

<sup>4</sup> Prime Minister of Australia, '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>.

<sup>5</sup> Madeline Gleeson and Natasha Yacoub, *Cruel, Costly and Ineffective: The Failure of Offshore Processing in Australia* (Policy Brief 11, Kaldor Centre for International Refugee Law, August 2021) [https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy\\_Brief\\_11\\_Offshore\\_Processing.pdf](https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf) 2.

of boat arrivals.<sup>6</sup> But all of these policies have become linked politically. The former government<sup>7</sup> pushed the narrative that any movement on any of these policies would ‘send a message’ to people smugglers that the government was ‘soft on borders’.

This shows the interesting way in which the debate is framed in Australia. On the one hand, harsh border policies are justified by the need to ‘protect’ Australia and keep our borders ‘safe’. The other side of the debate is about saving lives, and this is the more insidious argument. Both sides of the political spectrum claim that the policies they are pursuing will save lives. Horrible images of people drowning while trying to reach Christmas Island have been used to support this view. The narrative now is that if you don’t support the policy, you are in favour of people drowning at sea, and that narrative has been very difficult to counter.

When the government reintroduced offshore processing in 2012, it didn’t come with durable solutions (that is, an answer as to what would happen to people once found to be refugees). Refugees were used as hostages, indefinitely, in order to send a signal to others not to get on boats and seek asylum in Australia. The idea was that people were going to be stuck offshore forever in order to send this ‘deterrent’ message.

We quickly started to see people become very unwell. We saw suicides, medical neglect and sexual abuse, particularly of women and children on Nauru.

One of the lessons we learnt was how to make this information public. The governments of Australia, PNG and Nauru went to great lengths to stop information from the offshore processing facilities from becoming public. It was very deliberately “out of sight, out of mind.”

Ultimately, about 3,000 people were sent to Papua New Guinea and Nauru.<sup>8</sup> 1,000 of those people have been resettled in the United States – that was one of the solutions that we eventually had to come up with in terms of finding third countries for resettlement.<sup>9</sup> About 700–800 people decided to go home; very few of these were ‘forced’ returns, but there were concerns about the pressure they might have felt to go back.<sup>10</sup> Today we still have 100 people on Nauru and 100 people in Papua New Guinea.<sup>11</sup> We also have 1,000 people now in Australia

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<sup>6</sup> Ibid.

<sup>7</sup> There was a change of government following the federal election in May 2022. The new Labor government supports some of the existing asylum policies (including offshore processing and boat turnbacks), but not others (such as temporary protection visas).

<sup>8</sup> In addition, approximately 1000 people were transferred offshore from September 2012 to July 2013, but were brought back to Australia after the policy change in July 2013 (see note 4 above) and eventually permitted to apply for protection in Australia. These people, if found to be refugees, have only ever been eligible for temporary protection visas. For more information on the number of people transferred offshore and where they ended up, see: Gleeson and Yacoub, above note 5, at 4.

<sup>9</sup> Kaldor Centre for International Refugee Law, *The Australia-United States Refugee Resettlement Deal* (Factsheet, August 2021)

<[https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/factsheet\\_US\\_resettlement\\_deal.pdf](https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/factsheet_US_resettlement_deal.pdf)>

<sup>10</sup> Australia’s offshore detention centres were repeatedly described as being ‘returns-oriented environments’ that created risks of constructive *refoulement*. See, for example: UNHCR, *UNHCR Monitoring Visit to the Republic of Nauru, 7 to 9 October 2013* (26 November 2013) <<https://www.unhcr.org/uk/58117b931.pdf>> [136]–[139]; UNHCR, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea, 23 to 25 October 2013* (26 November 2013) <<https://www.unhcr.org/publications/legal/58117aff7/unhcr-monitoring-visit-to-manus-island-papua-new-guinea-23-to-25-october.html>> [116]–[118]; Amnesty International, *This is Breaking People: Human Rights Violations at Australia’s Asylum Seeker Processing Centre on Manus Island, Papua New Guinea* (December 2013) <<https://www.amnesty.org/en/documents/asa12/002/2013/en/>> 65–66; Ben Doherty, “It’s Simply Coercion”: Manus Island, Immigration Policy and the Men with No Future’ (*Guardian*, 29 September 2016) <<https://www.theguardian.com/australia-news/2016/sep/29/its-simply-coercion-manus-island-immigration-policy-and-the-men-with-no-future>>.

<sup>11</sup> As of 30 June 2022, there were 112 people left in Nauru (83 recognised refugees; 12 people still in the refugee status determination process; 17 people found not to be refugees): Australian Department of Home Affairs, ‘Statistics of transitory persons in Nauru and PNG’ (30 June 2022) <<https://www.homeaffairs.gov.au/about-us-subsite/files/population-number-resettled-30-june-2022.pdf>>. Since 31 December 2021, Australia no longer

who have been brought here for medical treatment and are either in community detention or on very short term bridging visas with limited rights. They remain in limbo, although the Australian government has recently agreed to resettle people to New Zealand.<sup>12</sup> But these are people who have built their lives in Australia – they have jobs and children and are being educated in Australia, and many want to remain here rather than pursue one of these third country settlement deals.

*Further information:*

- The Guardian have an interactive timeline which shows the movement of people to and from offshore detention, including voluntary returns.<sup>13</sup>

## **Working in Offshore Detention**

**Steven Caruana**

*Specialist Advisor on Immigration and OPGAT,  
Australian Human Rights Commission  
(formerly of the Australian Department of  
Immigration and Border Protection)*

On 19 July 2013, I was at the tail end of what was supposed to be a three-month deployment to the Nauru Regional Processing Centre as the Transferee Welfare Officer. There were a little over 500 adult single males in Nauru. As a result of their frustration and an announcement from the Australian government that no one offshore would be returned to Australia, there was a significant riot.<sup>14</sup> The following is something I wrote about being in Nauru in the aftermath of that riot.

The riot itself was over but I had no idea that it would be the next few days that would leave me eventually feeling traumatised. So much so that upon returning to Australia, I literally could not get myself to get up and do anything for a month. It would take at least a year from me to comprehend I was suffering the impact of vicarious and actual trauma.

The day after the riot, all non-essential staff had been ordered to leave the island. This was particularly sad for me; the people that had been my support for the last months were now abruptly gone. This departure meant welfare staffing were limited to a small group. A handful of people to the 500-plus transferees spread across the remains of the centre, the prison, and the hospital.

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publishes data on the number of people left in PNG, because that was the date on which Australia's formal offshore processing agreement with that country ended. As at that date, however, 105 people remained in PNG: Refugee Council of Australia, 'Offshore processing statistics: How many people are on Nauru and PNG?' (last updated 6 August 2022) <<https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/2/>>.

<sup>12</sup> Karen Andrews MP (former Minister for Home Affairs), 'Joint media release with the Hon Kris Faafoi, New Zealand Minister for Immigration – Australia-New Zealand Resettlement Arrangement' (24 March 2022) <<https://minister.homeaffairs.gov.au/KarenAndrews/Pages/australia-new-zealand-resettlement-arrangement.aspx>>.

<sup>13</sup> 'Interactive timeline: what happened to every person caught up in Australia's offshore processing regime' (Guardian, 9 December 2020) <<https://www.theguardian.com/australia-news/ng-interactive/2020/dec/10/timeline-australia-offshore-immigration-detention-system-program-census-of-asylum-seekers-refugees>>.

<sup>14</sup> The Australian government commissioned an independent inquiry into the riot, the report of which can be found here: Keith Hamburger, *Nauru Review 2013: Executive Report of the Review into the 19 July 2013 Incident at the Nauru Regional Processing Centre* (8 November 2013) <<https://www.homeaffairs.gov.au/reports-and-pubs/files/executive-report-nauru-2013.pdf>>.

The bulk of effort and time was immediately put into making another site operational. The Director tasked me with ensuring the men in the prison were being looked after.<sup>15</sup> There were about 153 men placed into a prison that had capacity for perhaps a quarter of that number. Men were sleeping head to toe, 20 to a cell that was intended for no more than four. At the time, I remember feeling like the prison resembled an animal holding facility, only the animal holding facilities I had visited were much better.

The provision of health care was the first thing we negotiated for, and then food, clothing, sanitation products and phone calls. It was the phone calls that mattered most to the men. They had spoken to family every day and now with no way to call they could not reassure them that they were safe. They begged me for a phone for the first few days, but it was completely out of my control.

I accompanied the nurses as they distributed medication. It was a different pair of nurses each day, but I could see they couldn't handle the experience. They were visibly upset and looked to me as if I had the power to change the circumstances but just didn't want to. I suppose I might have looked somewhat robotic to them. I was still operating on adrenaline, thinking strategically, looking at the bigger picture, the duty of care, ensuring they were not being abused by guards. In all, I slept about four to five hours that whole week.

I was in the prison from early morning to late afternoon for four days, but it all felt like one long day at the time. I had interviewed every single person there, and with whispers going around that rioting in Nauru held a lengthy prison term, elderly men and men who were barely adults begged me with tears to help them. Others would defiantly berate me in their native tongues. I understood that in their own way they were trying to cope with the prospect of never seeing their families again.

I felt helpless, I could not reassure them that things were going to be ok, after all they had been charged with participation in a riot. However, many had told me they did not take part in the chaos, that they were indiscriminately chosen to get on the bus and had surrendered to the guards well before the rioting had occurred. I would later read that the trial found that this was indeed the case. So, in the end, no one was convicted due to the haphazard way in which men were identified as rioters.

On Manus Island and Nauru, there was a complete lack of transparency and accountability. A lot of the information that we know about offshore detention has come from whistleblowers. At a minimum, there needs to be a process for inspection and oversight. When the processing takes place in a third country, out of sight unfortunately means out of mind. The human impact of the processes and their lack of transparency must be emphasised.

*Further information:*

- Mr Caruana's full article about his experiences working offshore is available here: Steven Caruana and Diana Johns, 'From detention officer to detention monitor: reflections on staff experiences in confinement' (2022) 3(2) *Incarceration* <<https://journals.sagepub.com/doi/10.1177/26326663221103439>>.

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<sup>15</sup> Many asylum seekers were taken into Nauruan police custody and detained at the Nauru prison in the aftermath of the riot: Associated Press, 'Nauru riot: 125 asylum seekers arrested' (*Guardian*, 21 July 2013) <<https://www.theguardian.com/world/2013/jul/21/nauru-riot-asylum-seekers-arrested>>.



- A review into the 2013 riot in Nauru later identified uncertainty about processing asylum claims and lack of oversight by the relevant Australian Department as major causes of the incident.<sup>16</sup>
- Mark Isaac's book, *Nauru Burning* (NewSouth, 2016), investigates the events leading up to the 2013 Nauru riot and its aftermath.
- Other serious incidents in the context of offshore processing included:
  - a deadly riot on Manus Island in 2014, which occurred when PNG police and locals entered the centre after days of escalating protests.<sup>17</sup> During the riot, an asylum seeker named Reza Barati was murdered.<sup>18</sup> An Australian Senate Inquiry later found the riot was 'eminently foreseeable and may have been prevented';<sup>19</sup>
  - an incident in 2017 when members of the PNG military shot at asylum seekers, possibly over a football dispute;<sup>20</sup> and
  - a stand-off later in 2017 when refugees and asylum seekers barricaded themselves inside the Manus Island detention centre, protesting their removal to alternative accommodation on the island. The men refused to leave the detention centre due to fears for their safety in the community on Manus Island following a series of assaults and violent incidents. The men were eventually forced out of the detention centre with force.<sup>21</sup>

## The Psychological Impact

**Dr Beth O'Connor**

*Psychiatrist*

*Médecins Sans Frontières (MSF)*

I spent almost a year working with the Médecins Sans Frontières (MSF) team on Nauru when the government of Australia was indefinitely detaining asylum seekers and refugees on the island. Our team provided mental healthcare to asylum seekers, refugees, and local Nauruans. After witnessing first-hand the impact of offshore detention on the asylum seekers and refugees I met on Nauru, I have grave concerns about the UK government's planned policy to forcibly remove asylum seekers to Rwanda.

Over the 11 months I spent on Nauru, I witnessed high levels of depression, post-traumatic stress disorder (PTSD), anxiety, self-harm, suicidal thoughts, and suicide attempts among the 208 asylum seeker and refugee patients we treated. Among our asylum seeker and refugee patients, around 60% (124 patients) experienced suicidal thoughts and 30% (63 patients) attempted suicide during our time on Nauru from November 2017 until October 2018.

<sup>16</sup> Hamburger, above note 14.

<sup>17</sup> Helen Davidson and Oliver Laughland, 'Manus Island: One dead, 77 injured and person shot in buttock at Australian asylum centre' (*Guardian*, 19 February 2014) <<https://www.theguardian.com/world/2014/feb/18/manus-island-unrest-one-dead-dozens-injured-and-man-shot-in-buttock>>.

<sup>18</sup> Helen Davidson, 'Manus guards charged over death of Iranian asylum seeker Reza Barati' (*Guardian*, 19 August 2014) <<https://www.theguardian.com/world/2014/aug/19/manus-unrest-two-guards-charged-murder-reza-barati>>.

<sup>19</sup> Legal and Constitutional Affairs References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (December 2014) <<https://static.quim.co.uk/ni/1418272553524/Manus-Island-report-.pdf>>.

<sup>20</sup> Ben Doherty, 'Shots fired as armed mob tries to storm Manus detention centre, reports say' (*Guardian*, 14 April 2017) <<https://www.theguardian.com/australia-news/2017/apr/14/shots-fired-as-armed-mob-tries-to-storm-manus-detention-centre-reports-say>>.

<sup>21</sup> Ben Doherty, 'Manus Island police use long metal poles to beat refugees and asylum seekers' (*Guardian*, 24 November 2017) <<https://www.theguardian.com/australia-news/2017/nov/24/manus-island-police-use-long-metal-poles-to-beat-refugees-and-asylum-seekers>>.

During consultations with the men, women, and children seeking asylum and refuge, I began to gain an insight into the psychological damage inflicted on them by not knowing their future or feeling like they had any freedom or agency. One patient told me how they felt that if the Australian government could control their breathing, it would be in charge of that too. We found that having a lack of control over their life was associated with patients experiencing PTSD, depression, anxiety, suicidal thoughts, and suicide attempts. I saw how people's functioning steadily deteriorated, including their ability to care for themselves.

The severity and extent of mental illness among the people detained on the island was exemplified when a cluster of children developed a rare life-threatening psychiatric condition known as resignation syndrome. Ten children presented to us with symptoms of depression and social withdrawal, before progressing to refusing food and fluids, becoming bed bound, mute, and unresponsive. When children reach this life-threatening state, they require extended hospitalisation for supportive physical care, including nasogastric feeding, and psychiatric care. In Nauru this care was not available, and parents had to watch their child deteriorate while the slow process for seeking a transfer to Australia for care went through the court system. The parents' mental health understandably often deteriorated in response to this distressing situation.

Asylum seekers and refugees have generally experienced multiple traumas, first in their home country and then often during their migration journey. The asylum seekers and refugees we treated in Nauru were no different, with 75% (155 patients) having experienced one or more traumatic events in their country of origin and/or during their migration journey. Unfortunately, the decision by Australia's government to send these asylum seekers and refugees to offshore detention exposed them to further emotional distress and physical harm, with 23% of our patients (47 people) experiencing physical violence in Nauru.

People need a safe environment to aid their recovery from past trauma, but this is impossible under such a system. Any detention setting—be it actual detention or “de-facto” detention where people are taken against their will and removed from their families and support networks with no certain future—is an environment that not only prevents people's recovery from past traumas, but creates further anguish. We found that 37% of our patients (76 people) in Nauru were separated from a partner, child, or other close family member. Those who were separated expressed sadness, hopelessness, despair, and excessive guilt about their situation. I listened as fathers described how guilty they felt for not supporting their wife through the final trimester of her pregnancy and labour, and for not being there to witness their baby's birth, first smile, first word, first step.

In Nauru, I saw how this detention system shattered people's resilience, identity, and hope. It is unspeakably cruel to send asylum seekers who have struggled to reach a place of safety, such as Australia or the UK, to a third country. No pharmacological treatment or psychological therapy can help the people kept in these environments to fully recover. Although we sometimes supported people to develop coping mechanisms, ultimately, the environment in which they were trapped continued to cause their mental health to deteriorate.

*Further information:*

- Dr O'Connor's has published her concerns about offshore processing in the *British Medical Journal*: Beth O'Connor, 'I witnessed the horrors of offshore detention and am appalled by the UK's Rwanda plans' (2022) *British Medical Journal* <<https://www.bmj.com/content/bmj/377/bmj.o1502.full.pdf>>.
- MSF subsequently published a report, *Indefinite Despair: The Tragic Mental Health Consequences of Offshore Processing on Nauru*, which details the levels of

suffering they observed on Nauru. The report is available here:  
<<https://www.msf.org/indefinite-despair-report-and-executive-summary-nauru>>.

- Further information about the children presenting in Nauru with resignation syndrome is available in MSF's *Indefinite Despair* report (see above), was covered by Australian and international media,<sup>22</sup> and has been published in medical literature.<sup>23</sup>
- Expert medical consultants employed by UNHCR also found that 88% of asylum seekers on Manus Island and 83% of asylum seekers on Nauru suffered from a serious mental disorder. Similar levels of mental illness were not observed in comparable populations, leading the experts to conclude that the prevalence and severity of mental disorders among asylum seekers were attributable to the offshore detention environment. That evidence was presented to an Australian Senate Committee investigating allegations of abuse, self-harm and neglect of asylum seekers offshore and is available here:  
<<https://www.unhcr.org/uk/publications/legal/58362da34/submission-to-the-senate-legal-and-constitutional-affairs-committee-serious.html>>.
- After 12 months of providing health services to asylum seekers and the local community, MSF was forced to leave Nauru. While no clear reason was given, media reporting speculated on some of the possible reasons.<sup>24</sup>

## Legal Challenges

### Dr Natalie Hodgson

Assistant Professor in Law, University of Nottingham  
Head of the Forced Migration Unit, Human Rights Law Centre

In section 494AA of the *Migration Act 1958* (Cth), the Australian Government prevented legal cases relating to transfer to offshore detention from being brought in the Federal Court. This prevented initial challenges to people's removal to offshore detention.

One of the more effective series of litigation came through tort law. There were a series of cases beginning with *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483 which argued that the Minister of Immigration was risking being in breach of his duty of care in not providing access to appropriate medical treatment offshore.<sup>25</sup> People were awarded injunctions to secure their return to Australia for medical treatment. For a while that was a hugely effective strategy of getting people out of detention and back to Australia.

<sup>22</sup> See, for example: Louise Newman, 'What is resignation syndrome and why is it affecting refugee children?' (ABC News, 22 August 2018) <<https://www.abc.net.au/news/2018-08-22/resignation-syndrome-and-why-is-it-affecting-refugee-children/10152444>>; Ben Doherty, "'Begging to die": succession of critically ill children moved off Nauru' (Guardian, 25 August 2018) <<https://www.theguardian.com/australia-news/2018/aug/25/begging-to-die-succession-of-critically-ill-children-moved-off-nauru>>; Siobhán O'Grady, 'Children in Australia's offshore migrant center are so distraught, some have attempted suicide' (The Washington Post, 20 September 2018) <<https://www.washingtonpost.com/world/2018/09/20/children-australias-off-shore-migrant-center-are-so-distraught-some-have-attempted-suicide/>>.

<sup>23</sup> Louise Newman, Beth O'Connor and George Newhouse, 'Pervasive refusal syndrome in child asylum seekers on Nauru' (2020) 28(5) *Australasian Psychiatry* <<https://journals.sagepub.com/doi/abs/10.1177/1039856220956251>>.

<sup>24</sup> See, e.g.: Luke Henriques-Gomes, 'Nauru orders MSF to stop mental health work on island' (Guardian, 6 October 2018) <<https://www.theguardian.com/world/2018/oct/06/nauru-orders-msf-to-stop-mental-health-work-on-island>>; Helen Davidson, 'MSF confirms forced exit from Nauru as refugee mental health "beyond desperate"' (Guardian, 10 October 2018) <<https://www.theguardian.com/world/2018/oct/10/msf-confirms-forced-exit-from-nauru-as-refugee-mental-health-beyond-desperate>>.

<sup>25</sup> See the Kaldor Centre's casenote on *Plaintiff S99/2016*, available at <<https://kaldorcentre.unsw.edu.au/publication/plaintiff-s992016-v-minister-immigration-and-border-protection-2016-fca-483>>.



Australia's offshore detention policy was only possible because there were businesses willing to contract with the Government to operate the detention centres. A class action against the Government and offshore detention contractors was settled by the Government prior to trial for A\$70 million (*Kamasee v Commonwealth of Australia & Ors*).<sup>26</sup> That lawsuit sent a strong message to businesses about their potential liability for being involved in offshore detention. Alongside this lawsuit, there were also advocacy campaigns targeting the businesses involved in operating offshore detention, highlighting the potential risk of being involved in offshore detention.<sup>27</sup> Law was used, not just in courts against the Government, but also as a form of advocacy against those who enabled the state's policy.

Another effective legal challenge to offshore detention was the case of *Namah v Pato* [2016] PGSC 13.<sup>28</sup> This case was heard in the Papua New Guinea Supreme Court and found that offshore detention was unconstitutional under the Papua New Guinea Constitution, which provides a human right to liberty. The case forced the Government to close the Manus Island Detention Centre, although the offshore detention policy itself continued with asylum seekers being housed in other forms of accommodation. This suggests that, in relation to the UK, if/when asylum seekers get sent to Rwanda, there is also a possibility for legal challenges under Rwandan law.

Legal strategies of resistance were most effective when accompanied by other forms of public advocacy. For example, to prevent 267 asylum seekers being returned to offshore detention from Australia, there were both legal challenges and also significant public pressure. As part of the 'Let them Stay' campaign, protests occurred in capital cities throughout Australia,<sup>29</sup> doctors refused to discharge patients from hospital,<sup>30</sup> churches proposed to invoke the right to sanctuary to prevent asylum seekers being removed from Australia,<sup>31</sup> and state governments offered support for the asylum seekers to stay.<sup>32</sup> One of the reasons why this campaign captured the Australian imagination is because it involved the detention of children, including 12 month old baby Asha.<sup>33</sup> Ultimately, despite refugee advocates losing the legal case, the Government backed down and most of the asylum seekers involved in the case were allowed to remain in Australia because of the significant public outcry.

*Further information:*

<sup>26</sup> See the Kaldor Centre's casenote on *Kamasee*, available at

<<https://www.kaldorcentre.unsw.edu.au/publication/kamasee-v-commonwealth-australia-ors-2017-vsc-537>>.

<sup>27</sup> See No Business in Abuse, *Business in Abuse: Transfield's Complicity in Gross Human Rights Abuses within Australia's Offshore Detention Regime* (November 2015) <[https://cdn.getup.org.au/1321-NBIA\\_Report-20Nov2015b.pdf](https://cdn.getup.org.au/1321-NBIA_Report-20Nov2015b.pdf)>.

<sup>28</sup> For a casenote on *Namah v Pato*, see: Lili Song, 'Unconstitutionality of Transfer and Detention of Asylum Seekers from Australia to Papua New Guinea' <[https://www.usp.ac.fj/discipline-of-law/wp-content/uploads/sites/128/2022/01/Case\\_Note\\_Namah\\_v\\_Pato-LILI-SONG.pdf](https://www.usp.ac.fj/discipline-of-law/wp-content/uploads/sites/128/2022/01/Case_Note_Namah_v_Pato-LILI-SONG.pdf)>.

<sup>29</sup> #LetThemStay: Thousands Gather in Australia-Wide Protests Against Return of Asylum Seekers to Nauru' (ABC, 8 February 2016) <<https://www.abc.net.au/news/2016-02-08/let-them-stay-protests-against-return-of-asylum-seekers-to-nauru/7150462>>.

<sup>30</sup> Ben Doherty, 'Doctors refuse to discharge "Baby Asha" because of fears for safety on Nauru' (*Guardian*, 12 February 2016) <<https://www.theguardian.com/australia-news/2016/feb/12/doctors-refuse-to-discharge-baby-asha-because-of-fears-for-safety-on-nauru>>.

<sup>31</sup> Paul Farrell, 'Churches offer sanctuary to asylum seekers facing deportation to Nauru' (*Guardian*, 3 February 2016) <<https://www.theguardian.com/australia-news/2016/feb/04/churches-offer-sanctuary-to-asylum-seekers-facing-deportation-to-nauru>>.

<sup>32</sup> Ben Doherty, 'Victoria will take the 267 asylum seekers, Daniel Andrews tells Malcolm Turnbull' (*Guardian*, 6 February 2016) <<https://www.theguardian.com/australia-news/2016/feb/06/victoria-will-take-refugee-children-says-premier-daniel-andrews>>.

<sup>33</sup> See note 30.

- Dr Hodgson has also written about legal strategies of resistance against offshore detention<sup>34</sup> and the use of international criminal law to campaign against offshore detention.<sup>35</sup>
- The filings related to the *Kamasae* class action can be found on the Supreme Court of Victoria's page relating to the Manus Island Detention Centre class action, available here: <<https://www.supremecourt.vic.gov.au/court-decisions/case-list/manus-island-detention-centre-class-action>>
- Please contact the event organisers for further information about legal challenges to offshore processing.

## Discussion and Questions<sup>36</sup>

### 1 **What were the most impactful advocacy and campaigning strategies in Australia?**

#### The role of doctors and other medical professionals

Doctors played a crucial role in raising awareness and advocating against offshore processing. Almost all of the peak medical bodies issued statements against offshore processing and/or supporting calls for better medical care for people offshore, including the Australian Medical Association (AMA), Australasian College for Emergency Medicine, Australasian College of Dermatologists, Australian College of Rural and Remote Medicine, Australian and New Zealand College of Anaesthetists, College of Intensive Care Medicine of Australia and New Zealand, Royal Australasian College of Physicians; Royal Australasian College of Medical Administrators, Royal Australian College of General Practitioners, Royal Australian and New Zealand College of Obstetricians and Gynaecologists, Royal Australian and New Zealand College of Psychiatrists, and Royal Australian and New Zealand College of Radiologists.<sup>37</sup> Almost 6,000 doctors wrote to the Australian Prime Minister in October 2018, calling on him to evacuate the 80 children on Nauru to Australia due to serious mental and physical health concerns.<sup>38</sup>

These efforts were particularly important at a time when the Australian government was adopting a hostile position towards lawyers involved in challenging offshore processing,<sup>39</sup>

<sup>34</sup> Natalie Hodgson, 'Law as Resistance: Legal and Advocacy Strategies Against Australia's Offshore Detention Policy' (Centre for Crime, Law and Justice, UNSW Law, 29 June 2022) <<https://www.cclj.unsw.edu.au/article/law-resistance-legal-and-advocacy-strategies-against-australias-offshore-detention-policy>>.

<sup>35</sup> Natalie Hodgson, 'International Criminal Law and Civil Society Resistance to Offshore Detention' (2020) 26(3) *Australian Journal of Human Rights* 449–467 <<https://www.tandfonline.com/doi/abs/10.1080/1323238X.2020.1864805>>. Please contact the author if you require access: [natalie.hodgson@nottingham.ac.uk](mailto:natalie.hodgson@nottingham.ac.uk).

<sup>36</sup> Some questions were received by the organisers after the event.

<sup>37</sup> See, for example: AMA, 'AMA calls for Government action to get kids off Nauru' (6 November 2018) <<https://www.ama.com.au/e-dit/issue-157/articles/ama-calls-government-action-get-kids-nauru>>; AMA, 'AMA calls for urgent action to ensure proper health care for asylum seeker children on Nauru' (18 August 2018) <<https://www.ama.com.au/article/ama-calls-urgent-action-ensure-proper-health-care-aylum-seeker-children-nauru>>; AMA, 'AMA calls on Prime Minister to move asylum seeker children and families off Nauru to better health care' (20 September 2018) <<https://www.ama.com.au/media/ama-calls-prime-minister-move-asylum-seeker-children-and-families-nauru-better-health-care>>; Paul Hayes, 'Peak medical bodies united in support of Medevac law' (*newsGP*, 14 October 2019) <<https://www1.racgp.org.au/newsqp/professional/peak-medical-bodies-united-in-support-of-medevac-l>>.

<sup>38</sup> 'Almost 6,000 doctors sign letter to PM demanding children be taken off Nauru' (*Guardian*, 15 October 2018) <<https://www.theguardian.com/australia-news/2018/oct/15/almost-6000-doctors-sign-letter-to-pm-demanding-children-be-taken-off-nauru>>.

<sup>39</sup> Bianca Hall, 'Lawyers representing asylum seekers are "un-Australian": Peter Dutton' (*Sydney Morning Herald*, 28 August 2017) <<https://www.smh.com.au/politics/federal/lawyers-representing-asylum-seekers-are-unaustralian-peter-dutton-20170828-gy5ci7.html>>; Melissa Coade, 'Lawyers decry minister's "un-Australian" slur'

rejecting the findings of United Nations bodies,<sup>40</sup> and attacking the Australian Human Rights Commission over its role in scrutinising asylum policy.

One particularly important strategy was getting MSF to Nauru. Another strategy was a legal challenge brought by doctors. The Australian government criminalised whistleblowing and threatened contractors with two years in prison if they spoke out against conditions offshore.<sup>41</sup> These silencing efforts made advocacy a lot more difficult. However, doctors challenged the government's efforts by arguing that staying quiet about abuse went against their medical ethics, took the matter to court, and succeeded in a partial repeal of the gag laws.<sup>42</sup>

### Media and public advocacy

The *Guardian* published an exposé on sexual abuse of asylum seeker and refugee women and children in Nauru,<sup>43</sup> which led to an official inquiry.<sup>44</sup> Investigative journalism was very significant in getting the facts out about offshore detention.

The most important way to raise awareness was by giving people a human face. Media reporting had focused on the riots and the purported dangerousness of people offshore. But it made a real difference to showcase the stories and faces of people offshore, which was mainly done by the *Guardian* and amplified through several organisations. Amnesty International partnered with refugees like Behrouz Boochani,<sup>45</sup> facilitating them to tell their own stories. That brought the human face to the campaign. Another big shift was the Kids Off Nauru campaign,<sup>46</sup> which used photographs to draw attention to children who were faceless.

In addition, high profile people like Craig Foster (former national footballer) and Sonny Bill Williams (rugby league player) were asked to do advocacy work.<sup>47</sup> This strategy was mainly about keeping the issue in the media and pressuring the government to come to a solution.

Another strategy, albeit not as effective as telling the human story, was to emphasise how costly the system was to the Australian taxpayers, especially given that it was not effective at deterring irregular migration.<sup>48</sup>

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(*Lawyers Weekly*, 29 August 2017) <<https://www.lawyersweekly.com.au/wig-chamber/21764-lawyers-decry-minister-s-un-australian-slug>>.

<sup>40</sup> Danuta Kozaki, 'Abbott says Australians "sick of being lectured to by UN" after scathing report on asylum policies' (*ABC*, 8 March 2015) <<https://www.abc.net.au/news/2015-03-09/tony-abbott-hits-out-united-nations-asylum-report/6289892>>.

<sup>41</sup> *Australian Border Force Act 2015* (Cth), Part 6, available at <<https://www.legislation.gov.au/Series/C2015A00040>>; Greg Barns, 'Australia's veil of Secrecy' (*Law Society Gazette*, 17 July 2015) <<https://www.lawgazette.co.uk/commentary-and-opinion/australias-veil-of-secrecy/5050020.article>>.

<sup>42</sup> See the Kaldor Centre's casenote on the *Doctors for Refugees* case, available at <<https://www.kaldorcentre.unsw.edu.au/publication/doctors-refugees-case>>.

<sup>43</sup> Paul Farrell, Nick Evershed and Helen Davidson, 'The Nauru files: cache of 2,000 leaked reports reveal scale of abuse of children in Australian offshore detention' (*Guardian*, 10 August 2016) <<https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention>>. For more reporting, see 'Explore the Nauru Files' (*Guardian*) <<https://www.theguardian.com/news/series/nauru-files>>.

<sup>44</sup> Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Serious Allegations of Abuse, Self-Harm and Neglect of Asylum Seekers in Relation to the Nauru Regional Processing Centre, and any Like Allegations in Relation to the Manus Regional Processing Centre* <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/NauruandManusRPCs](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs)>.

<sup>45</sup> See Eleanor Ainge Roy, 'Free but restless, Behrouz Boochani takes tentative first steps into new life' (*Guardian*, 31 July 2020) <<https://www.theguardian.com/world/2020/jul/31/free-but-restless-behrouz-boochani-takes-tentative-first-steps-into-new-life>>.

<sup>46</sup> #KidsOffNauru, <<https://www.kidsoffnauru.com/>>.

<sup>47</sup> See '#GameOver' (*craigfoster.net*, 2021) <<https://craigfoster.net/humanrightsactivism/game-over/>>.

<sup>48</sup> The Kaldor Centre's report (Gleeson and Yacoub, above note 5, 9–10) details the costs of offshore processing, which were, at a conservative estimate, A\$1 billion per year.

## Legislation

For a brief window, a minority government in Australia allowed the crossbench in the lower house to join with the opposition and force through ‘medevac’ legislation, which created a streamlined process for people to be medically evacuated from Nauru or PNG if they were assessed as needing a transfer by doctors.<sup>49</sup> Before that, all requests for medical transfers had to go through the Australian Department of Immigration and Border Protection (now Home Affairs), which meant that a decision was made by a bureaucrat. At least one person died because of delays in being medically transferred.<sup>50</sup>

### **2 *What could be done to stop offshore processing in the UK before it comes into place?***

One of the most important developments in Australia was the formation of a cohesive and well-connected refugee ‘sector’, which has learned to work well together to achieve common objectives. This sector is largely coordinated by the Refugee Council of Australia, which hosts regular nation-wide teleconferences, but sub-groups have also emerged (such as a national legal centres teleconference, coordinated by the Kaldor Centre). The sector is now sufficiently developed that most people and organisations know each other, have each other’s contact details, and are experienced at cooperating on advocacy and legal/policy reform campaigns.

The UK has the advantage of the Australian experience, from which civil society and advocates can draw to demonstrate why the policy will not succeed. Depending on the audience, civil society in the UK may use evidence from the Australian context to emphasise the human toll, the economic cost, the fact that it is not an effective policy for border protection, the legal issues arising from the policy, the practical/logistical challenges, etc.

The Australian experience provides detailed case studies of vulnerable groups, including pregnant women, children, people with disabilities and the elderly, being subjected to cruel, inhuman and degrading treatment offshore. Those stories may influence public opinion in the UK, especially where they involve photographic or visual images of the affected people.<sup>51</sup>

In Australia, the government pursued offshore processing because it thought it would win elections. Every year of a federal election, the government amped up the rhetoric about border protection and offshore detention, until the most recent election when the government lost, in part, due to its position on asylum issues. What the UK may take from this, is that politicians will stick to the Rwanda policy if they think it will win them votes. The best way to show them that it won’t is by getting people out marching in the streets, showing them that this is not a policy that people support.

### **3 *What is the relevance of the Australian experience of offshore detention to the UK, given that the Rwanda deal is not expected to involved detention?***

When offshore processing was reintroduced in Australia in 2012, much of the rhetoric was the same as has been used in the UK with regards to Rwanda. In particular, it was envisaged that the offshore centres would not be detention camps, and that basic human rights would be

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<sup>49</sup> For more information, see the Kaldor Centre’s explainer on medical transfers and the Medevac law, available at <<https://www.kaldorcentre.unsw.edu.au/publication/medevac-law-medical-transfers-offshore-detention-australia>>.

<sup>50</sup> Coroners Court of Queensland, *Inquest into the death of Hamid Khazaei* (30 July 2018) <[https://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0005/577607/cif-khazaei-h-20180730.pdf](https://www.courts.qld.gov.au/_data/assets/pdf_file/0005/577607/cif-khazaei-h-20180730.pdf)>.

<sup>51</sup> *The Forgotten Children* (ABC’s Four Corners, 17 October 2016) <<https://www.abc.net.au/4corners/the-forgotten-children-four-corners/7930052>>.

respected.<sup>52</sup> Even the Nauruan Foreign Minister at the time did not expect the processing centre in his country to involve cramped tents in a detention setting.<sup>53</sup> This is not the reality that came to pass. For this reason, civil society in the UK should be alert to the possibility that the Rwanda agreement could at a later date follow the Australian experience of harsh, prison-like detention facilities.

#### **4 Was it always Australia's intention to send children offshore?**

From the outset in 2012, it was intended that children would be subject to offshore processing. The documents tabled in the Australian Parliament at the time that Nauru and PNG were designated as 'regional processing countries' in 2012 reference the education facilities that will be made available to children and unaccompanied minors.<sup>54</sup>

In 2014, Gregory Lake, the former Director of Offshore Processing and Transfers at the Australian Department of Immigration and Border Protection gave evidence to an Australian Human Rights Commission inquiry that he had been directed to choose the 'youngest-looking' children to be transferred first to Manus Island in November 2014.<sup>55</sup> According to his evidence, 'they wanted to send a deterrent message, it was important to send some children, to say that children are not exempt from transfer'.<sup>56</sup>

*Meeting summary prepared by Rebecca Brueckers, Natalie Hodgson and Madeline Gleeson.*

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<sup>52</sup> See, for example, the documents tabled in Parliament by the Australian government in 2012 when designating Nauru and PNG as 'regional processing countries':

<<https://humanrights.gov.au/sites/default/files/Docs%20tabled%20with%20Instrument%20of%20Designation.Nauru.pdf>> and

<<https://humanrights.gov.au/sites/default/files/Docs%20tabled%20with%20Instrument%20of%20Designation.PNG.pdf>>. These documents refer to people being able 'have freedom of movement throughout Nauru' and being 'permitted to leave the Centre with an escort for approved activities' in PNG.

<sup>53</sup> Former Nauruan Foreign Affairs Minister Kieren Keke, interviewed in: 'No Advantage' (*Four Corners*, ABC, 29 April 2013) <<https://www.abc.net.au/4corners/no-advantage/4660004>>.

<sup>54</sup> See above note 52.

<sup>55</sup> Peter Trute, "'Young-looking' refugees sent offshore' (*Sydney Morning Herald*, 31 July 2014) <<https://www.smh.com.au/national/young-looking-refugees-sent-offshore-20140731-3cx2n.html>>.

<sup>56</sup> *Ibid.* For more information about the transfer and treatment of children offshore, see: Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (NewSouth, 2016), Chapters 3, 10, 14 and 24.