UNSW
Kaldor Centre
for International
Refugee Law

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Public Bill Committee
UK House of Commons

By email: scrutiny@parliament.uk

Dear Chair

Submission on the Nationality and Borders Bill 2021

Thank you for this opportunity to provide a submission on the Nationality and Borders Bill 2021 ('the Bill'). This submission addresses a number of errors and misrepresentations in the evidence provided by the Honourable George Brandis QC, High Commissioner for Australia to the United Kingdom, at the Committee's third sitting on Thursday 23 September 2021. Some of the errors were serious, particularly concerning offshore processing and boat turnbacks, and require correction so that the Committee is not misled as it considers these and other policies in the context of the Bill.

About the Kaldor Centre

The Andrew & Renata Kaldor Centre for International Refugee Law is an academic research centre within the Faculty of Law & Justice at the University of New South Wales (UNSW) in Sydney. The Centre was established in 2013 to undertake rigorous research to support the development of legal, sustainable and humane solutions for displaced people, and to support evidence-based asylum policies. It is home to some of the world's leading international refugee law scholars, and is respected globally as an independent, non-partisan and credible organisation. The Centre's expert advice is regularly sought by Australian parliamentary committees and policymakers.

Summary of key concerns with Mr Brandis' evidence

Our key concerns with the evidence provided by Mr Brandis are as follows:

1. Mr Brandis provided incorrect information about when offshore processing in Nauru and Papua New Guinea (PNG) began, and relied on that misinformation to:

    a) claim that it was not possible to assess the effectiveness of offshore processing in isolation from other policies (which he described as a 'suite' of asylum policies), when in fact offshore processing operated for a full year prior to the introduction of boat turnbacks, and Australian government data from that year shows definitively that offshore processing did not deter people from seeking asylum in Australia by boat;

    b) wrongfully deny that Australia's offshore processing centres reached capacity three months after the policy was reintroduced in 2012; and

c) claim that 'the need for offshore processing significantly dwindled because of the efficacy of the policy', which mischaracterises the Australian experience of offshore processing and is not supported by evidence;

2. Mr Brandis made many serious errors in his evidence regarding legal challenges to Australia's offshore processing arrangements, which risk misleading the Committee as to the number, range and gravity of legal challenges that the UK might face were it to adopt a similar policy;

3. Mr Brandis wrongly asserted that offshore processing 'became less controversial with the passage of time', and minimised both the extent and sources of opposition to this policy. In fact, offshore processing has been an incredibly difficult, costly and controversial policy since its reintroduction in August 2012. The policy remains divisive in Australian society, with regular protests in the community and leading public figures taking a stand against it. International experts – including every UN body, committee and special procedure to review Australia's asylum policies since 2012 – have been unanimous in their criticism of offshore processing and their concerns about its failure to comply with Australia's obligations under international law. The unrelenting difficulty involved in implementing and maintaining such a policy should not be underestimated, particularly at a time when the UK is considering whether to embark on a similar course;

4. Mr Brandis' evidence regarding boat turnbacks contained serious errors, omissions and misleading statements which mischaracterised the nature and lawfulness of Australia's maritime activities under 'Operation Sovereign Borders'. Boat arrivals have not 'ceased completely'. Australia not only pushes boats back to Indonesia, but also transfers asylum seekers intercepted at sea directly to the authorities of the countries they fled without adequate screening for protection needs. These practices are inconsistent with international law;

5. Mr Brandis' assertion that Australia's offshore processing and boat turnback policies comply with its obligations under the Refugee Convention is not supported by evidence, and risks misleading the Committee by suggesting that such policies are consistent with Australia's international obligations; and

6. Mr Brandis' evidence regarding Australia's immigration programmes more generally contained various factual errors and omissions.

Please do not hesitate to contact us if we can provide any further information or assistance. Our lead contact is Madeline Gleeson, who may be reached at madeline.gleeson@unsw.edu.au.

Yours sincerely,

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Department of Home Affairs, Answers to questions on notice, Senate Standing Committee on Legal and Constitutional Affairs, Home Affairs Portfolio, Parliament of Australia

A: 2019–20 Additional Estimates, AE20-203

B: 2019–20 Additional Estimates, AE21-292

C: 2019–20 Additional Estimates, AE21-293

D: 2019–20 Additional Estimates, AE21-294

E: 2021–22 Budget Estimates, BE21-431

1 Offshore processing did not deter irregular maritime migration

1.1 Errors in Mr Brandis' evidence about when offshore processing began

In his responses to Q111, Q117 and Q118, Mr Brandis repeatedly claimed that offshore processing was introduced by the Abbott Coalition government in September 2013 as part of 'Operation Sovereign Borders' and, indeed, that he was 'both a member of the National Security Committee of Cabinet throughout that time and, in fact, the Attorney General who wrote the legal advice on the basis of which the policy was founded' (Q118).

In fact, offshore processing was reintroduced by a Labor government in August 2012, when Mr Brandis was in opposition and Labor MP Nicola Roxon was Attorney-General. The Abbott government, including Mr Brandis, inherited the policy after it had been re-established and operational for a full year.

During that first year from August 2012, offshore processing operated without the other elements of Operation Sovereign Borders – that is, without boat turnbacks and the disruption and deterrence activities which were introduced by the Abbott government in September 2013.

The data on boat arrivals in that first year allows an assessment of the effectiveness of offshore processing in isolation from other policies – despite Mr Brandis' claims in response to Q118, Q121 and Q131 that they were an inseparable 'policy suite'.

1.2 Government data shows offshore processing did not stop boat arrivals

Australian government data, which is set out in **Tables 1 and 2**, shows definitively that offshore processing did not deter people from seeking asylum in Australia by boat. During the first year after offshore processing was reintroduced in August 2012, more asylum seekers arrived in Australia by boat than at any other time since the 1970s, when asylum seeker boat arrivals were first recorded.[1] There was no noticeable change in the rate of arrivals over time, with boats continuing to arrive at a steady pace throughout that first year.[2]

The number of people arriving by boat never 'ceased completely' (see Part 4.1), but it did begin to drop significantly several months after Australia began boat turnbacks under Operation Sovereign Borders in September 2013. Thus, Mr Brandis was correct to advise (in response to Q108) that Operation Sovereign Borders had an 'implementation phase' of approximately nine months during which boats continued to arrive, and that 'as the policy began to take effect and be effective, that flow dwindled'. However, it should be clarified that Mr Brandis' evidence refers to *boat turnbacks* beginning to be effective over time, *not* offshore processing.

[1] Janet Phillips, 'Boat arrivals in Australia: A quick guide to the statistics' (Australian Parliamentary Library, Research Paper Series 2013–14, 23 January 2014) <https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp1314/QG/BoatArrivals>.

[2] Information about individual boat arrivals was reported in media releases by the Minister for Home Affairs, Jason Clare MP, and is available through the Newsroom on his archived website at <https://webarchive.nla.gov.au/awa/20130902035624/http://pandora.nla.gov.au/pan/122803/20130902-1346/www.ministerhomeaffairs.gov.au/Pages/Newsroom.html>.

Table 1 Number of asylum seekers arriving in Australia by sea, 2005–13[3]

Year	Number of boats	Number of people (excluding crew)
2005	4	11
2006	6	60
2007	5	148
2008	7	161
2009	60	2,726
2010	134	6,555
2011	69	4,565
2012	278	17,204
2013	300	20,587

Table 2 Number of asylum seekers arriving in Australia or turned back at sea since the launch of Operation Sovereign Borders in September 2013[4]

Year	Number of boats	Number of people (excluding crew)		
		Brought to Australia and transferred offshore	Returned	Total
2013 (Sept–Dec)	25	1,107	134	1,241
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 data not only proves that offshore processing on its own did not deter boats, but also that there is also no evidentiary basis for the claim that, following the commencement of boat pushbacks, offshore processing became an 'essential' (Q131) or even necessary part of a suite of deterrence measures. According to government data compiled by the Australian Parliamentary Library, no new asylum seekers have been sent offshore since 2014, despite the fact that people seeking asylum have arrived in Australia, and have been intercepted at sea and brought to Australia, since this time.[5]

Data provided by Australia's Department of Home Affairs to a Senate committee in 2020 (and attached to this submission as **Annexure A**) also shows that there have been no spikes or increases in boat arrivals while offshore processing has been progressively wound down. For example, there were no increases in boat arrivals around the times of the announcement and implementation of the United States resettlement deal, pursuant to which some people found to be refugees offshore were offered resettlement in the United States.[6] Nor were there increases in arrivals when resettlement opportunities to Canada and certain European States opened up,[7] or when the majority of people offshore were moved back to Australia for medical and other purposes.[8] Although not covered by the government data in

[3] Phillips, above n 1. These figures are sourced from Department of Immigration and Customs and Border Protection advice provided to the Parliamentary Library on 22 June 2009 and 17 January 2014.
[4] Department of Home Affairs, Answers to questions on notice, Senate Standing Committee on Legal and Constitutional Affairs, Home Affairs Portfolio, Parliament of Australia, 2019–20 Additional Estimates, AE20-203 (**Annexure A**).
[5] Elibritt Karlsen, 'Australia's offshore processing of asylum seekers in Nauru and PNG: A quick guide to statistics and resources' (Australian Parliamentary Library, Research Paper Series 2016–17, 19 December 2016) 8-9 <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4129606/upload_binary/4129606.pdf>.
[6] The US resettlement deal was made in September 2016 and announced in November 2016. A first group of 54 refugees was resettled in the US in September 2017.
[7] Refugees began to be resettled in Canada and other countries on an individual basis from 2016.
[8] See Part 1.4 below.

Annexure A, we also note that there has been no reported spike in arrivals following the announcement in October 2021 that Australia will withdraw entirely from its offshore processing arrangements in PNG by the end of the year.[9]

Overall, there is no evidence to suggest that offshore processing deters asylum seekers from trying to reach Australia by boat – either on its own or as part of a 'policy suite'.

1.3 Offshore centres reached capacity three months after policy announced

At Q117, Mr Brandis was asked whether the offshore detention centres reached capacity within a few months of the policy being announced. Mr Brandis' answer to this question was erroneous and misleading. He said:

> What happened is that from the introduction of the policy, beginning in September 2013, there was a period during which the effectiveness of the policy was tested by people smugglers. The numbers of people seeking to enter Australia in an irregular fashion continued and then dwindled to nothing by July 2014.

In fact:

- as clarified above, the Gillard Labor government reintroduced offshore processing on 13 August 2012;
- transfers to Nauru began in September 2012; and
- in November 2012, on the same day as the first transfers to PNG, the government admitted that, given the number of people who had already arrived by boat since 13 August, it would not be possible to transfer them all offshore, so some would instead be permitted to remain in Australia and live in the community while their protection claims were processed.[10]

Because the offshore detention centres reached capacity so quickly, most people arriving by boat were never actually sent offshore. As explained below, the fact that so many asylum seekers were and are in Australia, rather than offshore, provides further evidence that offshore processing did not 'work'.

1.4 Erroneous claim that offshore processing 'worked' over time

In his responses to Q108, Q119, Q126 and Q128, Mr Brandis gave evidence suggesting that Australia's deterrence policies 'worked' over time, resulting in a 'dwindling' number of boat arrivals and thus a reduced need for offshore processing. Specifically, he claimed (at Q126) that people had not been sent offshore since the early years of the offshore processing policy because 'once the people smugglers' business had been destroyed and the boats stopped coming, the need for that leg of the policy diminished'.

The primary source of error in this evidence appears to be Mr Brandis' wrongful insistence that offshore processing and boat turnbacks were introduced simultaneously in September 2013, and that – operating contemporaneously – the effectiveness of one could not be separated from the other. This position has already been refuted above. The 'need' for

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[9] Karen Andrews, 'Joint media release with the Hon Westly Nukundj MP – Finalisation of the Regional Resettlement Arrangement' (Media release, 6 October 2021) <https://minister.homeaffairs.gov.au/KarenAndrews/Pages/finalisation-of-the-regional-resettlement-arrangement.aspx>.

[10] Chris Bowen, 'No advantage onshore for boat arrivals' (Media release, 21 November 2012) <https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/2060961/upload_binary/2060961.pdf>; Simon Cullen, 'First asylum seekers arrive on Manus Island' (*ABC News*, 21 November 2012) <https://www.abc.net.au/news/2012-11-21/first-asylum-seekers-arrive-on-manus-island/4383876>.

offshore processing did not 'diminish' over time; rather, there was *never* a need for offshore processing, because it never deterred boat arrivals.

Additional evidence that offshore processing did not 'work' comes from the fact that most of the people still subject to the policy are now back in Australia. To understand why this is so, it is important to distinguish between two cohorts of asylum seekers: a first cohort of people who arrived in Australia between 13 August 2012 and 18 July 2013; and a second cohort of people who arrived on or after 19 July 2013, when a new policy was introduced dictating that no asylum seeker arriving by boat would ever be permitted to settle in Australia, even if found by Nauru or PNG to be a refugee.

Data about the location of the people in these two cohorts who were transferred offshore (as at 31 January 2021) has been provided by Australia's Department of Home Affairs.[11] It is reflected in **Table 3,** attached as **Annexures B, C and D**, and discussed below.

First cohort

As explained in Part 1.3 above, most of the people who arrived by boat between 13 August 2012 and 18 July 2013 never went offshore due to the detention centres in Nauru and PNG reaching capacity so quickly. Instead, they remained in Australia.

As Table 3 shows, of the approximately 1,055 people who were transferred to Nauru and PNG, 882 were back in Australia as at January 2021, having been moved from Manus Island either in June 2013 (when the government conceded that the facilities there were not fit for women, children and vulnerable men) or after the July 2013 policy change. By October 2015, no one from the first cohort remained offshore.[12]

Second cohort

Many asylum seekers arriving in the second cohort were sent offshore. However:

- exemptions were made for certain groups of asylum seekers who were permitted to remain in Australia. These exemptions were granted by the government in 2014 as political incentives to secure the passage of key legislation which introduced many of the policies that the UK is currently debating in the context of the Bill.[13] These exemptions may also have served a practical purpose, since in 2014 the offshore detention centres were once again at capacity; and
- according to government data, more than 800 asylum seekers were returned to their countries of origin or places of departure without adequate screening for protection needs, rather than sent offshore.[14]

Of the approximately 3,125 people who were transferred to Nauru and PNG after July 2013 (or born into transferred families), Table 3 shows that the vast majority of those not already resettled or returned to their countries of origin are currently in Australia.

[11] Department of Home Affairs, Answers to questions on notice, Senate Standing Committee on Legal and Constitutional Affairs, Home Affairs Portfolio, Parliament of Australia, 2019–20 Additional Estimates, AE21-292, AE21-293, AE21-294 (**Annexures B, C and D**).
[12] Karlsen, above n 5, 3.
[13] See Madeline Gleeson and Natasha Yacoub, Cruel, costly and ineffective: The failure of offshore processing in Australia (Kaldor Centre Policy Brief 11, August 2021) endnote 12 <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf>.
[14] Annexure A.

Indeed, the most recent data on the Department of Home Affairs' website states that only 231 people remained offshore as at 31 July 2021.[15] In contrast, more than 1,200 people were back in Australia as at 31 March 2021, having been medically evacuated on account of the progressively spiralling health crises in the transferred populations in Nauru and PNG from 2016–18.[16]

Table 3 Location of people transferred offshore since 2012 (as at 31 January 2021)[17]

	Transferred 13 August 2012 to 18 July 2013	Transferred after 19 July 2013	Totals
In Australia	882	1,161	**2,043**
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	**1,055**	**3,125**	**4,180**

1.5 Other observations on the failure of offshore processing to deter boat arrivals

Current and former members of the Australian government have themselves implied, and even expressly acknowledged on the public record, that offshore processing is not an effective deterrent for irregular maritime migration.

In 2008, the newly elected Rudd Labor government dismantled the first iteration of offshore processing (2001–08) on the basis that it had been 'a cynical, costly and ultimately unsuccessful exercise'.[18] Despite agreeing to reintroduce offshore processing four years later as a political 'compromise',[19] the Gillard Labor government admitted just weeks after transfers to Nauru began that 'Nauru by itself is not an effective deterrent'.[20] This was not a partisan view. Former Liberal Prime Minister Malcolm Fraser (1975–83), who oversaw Australia's response to the Indochinese refugee crisis, called for a Royal Commission into Australia's offshore processing policies in 2013 and stated that: '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'.[21]

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[15] Department of Home Affairs, 'Statistics of transitory persons in Nauru and PNG' (31 July 2021) <https://www.homeaffairs.gov.au/about-us-subsite/files/population-and-number-of-people-resettled.pdf> (accessed 12 October 2021).

[16] Department of Home Affairs, Answers to questions on notice, Senate Standing Committee on Legal and Constitutional Affairs, Home Affairs Portfolio, Parliament of Australia, 2021–22 Budget Estimates, BE21-431 (**Annexure E**). See also: Médecins Sans Frontières, *Indefinite despair: The tragic mental health consequences of offshore processing on Nauru* (December 2018) <https://msf.org.au/sites/default/files/attachments/indefinite_despair_4.pdf>.

[17] See Annexures B, C and D. There are some discrepancies in this data, but they are relatively minor.

[18] Chris Evans, 'Last refugees leave Nauru' (Media release, 8 February 2008) <https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/YUNP6/upload_binary/yunp61.pdf>.

[19] 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>.

[20] '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>.

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

After a brief period of championing offshore processing in late 2013, the Abbott Coalition government also pivoted away from this policy. Successive Coalition governments continued to claim (as Mr Brandis did in his evidence to the Committee) that offshore processing was part of a 'suite' of border protection measures, and that any person who could not safely be returned would be sent offshore. However, as discussed in Part 1.2 above, Australia stopped transferring new arrivals offshore in 2014, and instead began going to increasingly extreme lengths to return asylum seekers arriving by boat to their countries of origin or points of departure. Measures included:

- reportedly paying people smugglers to return to Indonesia with their passengers;[22]
- making unauthorised incursions into Indonesian sovereign waters;[23] and
- intercepting 157 asylum seekers (including 50 children) in Australia's contiguous zone and detaining them on an Australian vessel for more than three weeks while taking them back to, and unsuccessfully attempting to disembark them, in India.[24]

By late 2017, when Australia was struggling to extricate itself from the detention arrangements on Manus Island in PNG (see Part 2.3 below), Home Affairs Minister Peter Dutton sought to justify the difficult position his government was in by portraying the withdrawal as 'cleaning up the mess' that former Labor governments had made.[25] Despite the fact that the Coalition had transferred a large number of the people sent to PNG in 2013 and 2014, Mr Dutton claimed that Labor should be 'apologising… for putting these people on Manus Island in the first place'.[26] In response to questioning as to whether the men on Manus Island should be moved back to Australia, Mr Dutton said: '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'.[27]

2 Errors in Mr Brandis' evidence regarding legal challenges to offshore processing

There were many errors in the evidence provided by Mr Brandis to the Committee regarding legal challenges to Australia's offshore processing arrangements. These errors risk misleading the Committee as to the number, range and gravity of legal challenges that the UK might face were it to adopt a similar policy.

Our concerns with Mr Brandis' evidence are explained in detail below. In summary, we stress to the Committee that, contrary to what Mr Brandis' responses to Q112, Q113 and Q114 suggest:

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[22] These allegations were the subject of an Australian Senate inquiry: Senate Legal and Constitutional Affairs References Committee, *Payment of cash or other inducements by the Commonwealth of Australia in exchange for the turn back of asylum seeker boats* (Interim Report, 4 May 2016) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Payments_for_turn_backs/Interim_Report>.

[23] Senate Foreign Affairs, Defence and Trade References Committee, *Breaches of Indonesian territorial waters* (Final Report, March 2014) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Breach_of_Indonesian_Territorial_Waters/Report/index>.

[24] This case was the subject of litigation in the High Court of Australia: *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1; 255 CLR 514.

[25] 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/166106/20200 204-0324/minister.homeaffairs.gov.au/peterdutton/pages/interview-with-david-speers-sky-news- 19102017.html>.

[26] Peter Dutton, 'Press Conference, Brisbane' (Press conference, 24 November 2017) <https://webarchive.nla.gov.au/awa/20200203165447/http://pandora.nla.gov.au/pan/166106/20200 204-0324/minister.homeaffairs.gov.au/peterdutton/pages/Press-Conference-Brisbane- 24112017.html>.

[27] 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/166106/20200 204-0324/minister.homeaffairs.gov.au/peterdutton/pages/Interview-with-The-Project%2C-Channel- 10.html>.

- in 2017, after several years of complex legal action, Australia settled a large class action brought on behalf of more than 1,900 people formerly detained at the Manus Island centre, for A$70 million plus A$20 million in costs;
- Australia has been forced to defend and/or settle more than 60 other lawsuits from people harmed by offshore processing, including asylum seekers, refugees and former staff and/or contractors. There have also been several Australian coronial inquiries with respect to asylum seekers and refugees who died after suffering harm offshore. Australia's liability for harm suffered offshore extends well beyond the time taken for processing people's protection claims, and indeed may endure beyond the formal end of the policy;
- Australia and PNG were forced to close the detention centre on Manus Island after the Supreme Court of PNG ruled unanimously in 2016 that asylum seekers transferred from Australia were being detained there contrary to their constitutional rights to freedom and personal liberty; and
- Australia has been referred to the International Criminal Court (ICC) at least six times since 2014 with respect to offshore processing, and public officials – including Mr Brandis himself and current and former Prime Ministers – have faced the risk of being subject to an arrest warrant and put on trial for their individual criminal responsibility in relation to the policy.

As Attorney-General at the relevant times (September 2013 to December 2017), Mr Brandis should have had close knowledge of these legal challenges.

In addition to these legal challenges, we also refer the Committee to our evidence below in Part 3, and to **Appendix 1**, which contains a select list of the UN bodies and experts who have expressed concern about offshore processing not complying with Australia's obligations under international law. We can provide details of the reports from these bodies and experts at the Committee's request.

2.1 Erroneous evidence about a class action against Australia

In response to Q113, regarding a class action brought by people detained on Manus Island in PNG, Mr Brandis incorrectly advised 'that that is entirely a matter for the Government of [Papua] New Guinea'.

The class action in question was *Kamasaee v Commonwealth of Australia & Ors*.[28] This action was brought in an Australian court (the Supreme Court of Victoria) against the Commonwealth of Australia and various private companies which had been contracted by Australia to manage and provide services within the Manus Island detention centre. The PNG government was not a party to the case. There is no basis for Mr Brandis' claim that the case was 'entirely a matter for the Government of [Papua] New Guinea'.

The case involved two claims: first, that the defendants had failed to take reasonable care of people held at the Manus Island detention centre; and second, that they had falsely imprisoned people there. The case was filed in 2014, but in 2017, shortly before the trial was due to begin, it was settled for A$70million plus costs estimated to be more than A$20million. Mr Brandis was Attorney-General throughout this period.

[28] *Kamasaee v Commonwealth of Australia & Ors*, S CI 2014 6770. Pleadings and settlement details are available at <https://www.supremecourt.vic.gov.au/court-decisions/case-list/manus-island-detention-centre-class-action>.

2.2 Other misleading evidence as to Australia's liability for offshore processing

After providing erroneous evidence about the *Kamasaee* class action in response to Q113, Mr Brandis went on to summarise the findings of a different case in the High Court of Australia – known as *Plaintiff M68*[29] – which challenged the legal and constitutional validity of the offshore processing arrangements.

Our primary concern with Mr Brandis' response is that it risks misleading the Committee as to the potential legal liability of the UK were it to adopt a similar policy.

General remarks on legal challenges in the Australian context

The Australian government has gone to great lengths to distance itself from the legal consequences of offshore processing, including by refusing to establish appropriate accountability mechanisms and by emphasising those aspects of the policy governed by the laws of Nauru and PNG. However, these efforts have ultimately been unsuccessful, since Australia has been forced to defend a series of complex, lengthy and costly legal challenges in multiple fora ever since offshore processing was reintroduced in 2012. Some of these challenges are set out below.

When considering the relevance of these challenges, it is crucial for UK policymakers to recall that, unlike most liberal democracies, Australia has neither a Bill or Charter of Rights nor human rights legislation implementing its obligations under international human rights and refugee law. The lack of any human rights framework at the domestic level is compounded by a similar absence of any human rights law or court at the regional level. Accordingly, in the Australian context, human rights law is not a constraining factor in the implementation of offshore processing in the way it would be in the UK.

While Australia's offshore processing policy has been challenged on other legal grounds (as set out below), there is very limited scope to do so directly on the basis that it violates human rights law. By contrast, if the UK were to adopt a similar policy, it would carry the legal risks set out below and would also face more direct challenges on the basis of the policy violating fundamental principles of human rights law.

Australian constitutional challenges to offshore processing

The High Court case referred to by Mr Brandis, *Plaintiff M68,* was brought on behalf of a group of asylum seekers and refugees who had been evacuated back to Australia from offshore for urgent medical treatment, and the families of dozens of babies born in Australia but liable to be sent to Nauru. It was one of a series of cases challenging the constitutional validity of aspects of Australia's offshore processing arrangements.[30] These cases involved particular matters of Australian constitutional law and statutory interpretation and were decided on the basis of narrow sets of agreed facts, without full discovery of evidence or cross-examination of key witnesses. As noted above, the lack of human rights legislation has rendered the possible grounds for constitutional review very limited, and as such, these cases did not centre around human rights arguments.

While the direct legal relevance of these cases to the UK context is limited, certain of their social and political effects are worth noting. For example, while the constitutional law challenge in *Plaintiff M68* was ultimately unsuccessful (as a result of the government passing

[29] *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors* [2016] HCA 1; 257 CLR 42.
[30] See also: *Plaintiff S156/2013 v Minister for Immigration and Border Protection* [2014] HCA 22; *Plaintiff M96A/2016 v Commonwealth of Australia* [2017] HCA 16; *Plaintiff S195/2016 v Minister for Immigration and Border Protection* [2017] HCA 31.

retroactive legislation to circumvent the challenge while it was before the Court[31]), 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, resulting in many being permitted to remain in Australia despite the High Court's verdict.[32] This campaign is discussed further in Part 3 below.

Other domestic legal challenges to offshore processing

Despite the inability to challenge offshore processing on human rights grounds, Australia has faced many challenges on other grounds. The *Kamasaee* class action has already been detailed above. In addition, the Federal Court of Australia held in 2016 that Australia owed a duty of care to procure a safe and lawful abortion for a female refugee who had been transferred to Nauru, fell pregnant there as the result of a rape, and was transferred to PNG for an abortion but argued, successfully, that it would be neither safe nor legal for her to undergo the procedure there.[33] The Federal Court held that there were reasonable grounds to apprehend that Australia would breach its duty of care, and issued an injunction restraining Australia from procuring the abortion in PNG.

Since then, Australian courts have heard more than 60 cases arguing that Australia owes a duty of care to critically ill asylum seekers and refugees offshore.[34] In many of these cases, Australia was ordered to evacuate people to appropriate medical care in Australia. As a result of these cases and related developments, the vast majority of people technically subject to offshore processing are not offshore, but rather back in Australia for medical care and treatment.[35]

Former Australian staff and/or contractors who worked in the offshore detention centres have also engaged in legal action against the 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.[36]

Finally, there have been several Australian coronial inquiries with respect to asylum seekers and refugees who died after suffering harm offshore. 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.[37]

Australia's liability for harm suffered offshore extends well beyond the time taken for processing people's protection claims, and indeed may endure beyond the formal end of the

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[31] *Migration Amendment (Regional Processing Arrangements) Act 2015* (Cth). For more information, see: David Hume, 'Plaintiff M68-2015 – offshore processing and the limits of Chapter III' *(AusPubLaw Blog*, 26 February 2016) <https://auspublaw.org/2016/02/plaintiff-m68-2015/>.

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

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

[34] Proceedings details of many of these cases are available at <https://www.kaldorcentre.unsw.edu.au/medical-transfer-proceedings>.

[35] See text accompanying n 16 above.

[36] 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 for example: Nicole Hasham, 'Detention centre workers suffering their own trauma in dealing with asylum seekers' (*Sydney Morning Herald*, 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>.

[37] See, for example: 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>.

policy. For example, Australia recently announced the formal end of offshore processing in PNG,[38] yet several legal challenges remain on foot in relation to it, and others may be launched in the future. Of note, the family of a man murdered in 2014 at the Manus Island detention centre is currently suing Australia and one of its private contractors for wrongful death and mental harm suffered as a result of the murder.[39]

International challenges

There have also been challenges at the international level: referrals to the ICC are detailed in Part 2.4 below, and concerns raised by other UN bodies are detailed in Part 3. We can provide further information on the legal challenges in Nauru and PNG at the Committee's request.

2.3 PNG Supreme Court ruled offshore detention illegal

In response to Q112, Mr Brandis incorrectly advised that 'there was litigation in [Papua] New Guinea about the agreement between their Government and the Australian Government in relation to a particular processing centre on the [Papua] New Guinea mainland. It is not my understanding that that affected the other processing centre within [Papua] New Guinea, on Manus Island.'

The case in question is *Namah v Pato*, which was decided by the Supreme Court of PNG on 26 April 2016.[40] The case concerned the legality of the arrangement between Australia and PNG, and the legality of detaining asylum seekers at the facility on Manus Island.

In *Namah v Pato,* the Supreme Court held unanimously that the asylum seekers transferred to PNG by Australia were detained on Manus Island contrary to their rights under the PNG Constitution, including their rights to freedom and personal liberty under sections 32 and 42. In declaring the detention of asylum seekers on Manus Island unconstitutional and illegal, the Court ordered that:

> Both the Australian and Papua New Guinea governments shall 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 the asylum seekers or transferees Constitutional and human rights.[41]

The day after the Court's ruling, the PNG Prime Minister, Peter O'Neill, announced that the centre on Manus Island would close, and that PNG would 'immediately ask the Australian Government to make alternative arrangements for the asylum seekers currently held at the Regional Processing Centre'.[42]

These developments created a very difficult situation for Australia. There was pressure to close the detention centre as quickly as possible, but Australia continued to insist that no person sent to PNG would be permitted to settle in Australia, despite not having viable resettlement options elsewhere. Over the course of the next 18 months, some refugees were relocated to a 'transit facility' closer to Manus Island's main town of Lorengau, but most

[38] Andrews, n 9.
[39] 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>.
[40] *Namah v Pato* [2016] PGSC 13; SC1497 (26 April 2016) <http://www.paclii.org/cgi-bin/sinodisp/pg/cases/PGSC/2016/13.html>.
[41] Ibid per Kandakasi J at [72].
[42] Office of the Prime Minister (PNG), 'PM O'Neill: Manus Regional Processing Centre will close' (27 April 2016) <https://s3.documentcloud.org/documents/2813891/PNG-PM-Peter-O-Neill-s-statement.pdf>.

asylum seekers and refugees remained at the Manus Island detention centre, albeit under slightly less restrictive conditions.

Australia subsequently announced that it intended to withdraw from Manus Island entirely on 31 October 2017, leaving behind all asylum seekers and refugees still there. Davis Steven, the PNG Attorney-General, stated that the PNG government was 'not going to allow a situation where Australia has withdrawn and leaves behind all these international fugitives who they expect us to carry on our steam'.[43] The UN High Commissioner for Refugees (UNHCR) also called on Australia to 'take responsibility and address the imminent humanitarian crisis for refugees and asylum-seekers in Papua New Guinea'.[44] In a statement issued less than a fortnight before the 31 October deadline, UNHCR said:

> appropriate steps to avoid further tragedy and harm to vulnerable people have not been taken. … A lack of proper planning for the closure of existing facilities, insufficient consultation with the Manusian community, and the absence of long-term solutions for those not included in the relocation arrangement to the United States of America, has increased an already critical risk of instability and harm.[45]

Despite these concerns, Australia withdrew all staff and contractors from Manus Island on 31 October 2017, and cut off all essential services and supplies (including food, water and electricity) to the more than 600 men who still remained at the Manus Island facility. UNHCR staff on the ground warned that a 'humanitarian emergency' was unfolding, that there was neither adequate nor sufficient accommodation for those held on the island, that asylum seekers and refugees had resorted to storing water in garbage bins and building makeshift rain catchment systems, and that tensions within the local community were rising.[46]

Since UNHCR was present on Manus Island at this time, we would encourage the Committee to seek first-hand testimony from that organisation about the situation at the time of the detention centre's closure, in order to gain a full understanding of the difficulties, risks and potential liabilities that arise when offshore processing arrangements break down.

2.4 Potential criminal responsibility of public officials

At Q114, Mr Brandis was asked about Australia being referred to the ICC with respect to its offshore processing policies in Nauru and PNG. Mr Brandis replied: 'I do not think that is correct. I think it would be correct to say that there was a complaint made by people who disagree with the policy to the United Nations Human Rights Council.'

Our concerns with Mr Brandis' response are threefold. First, Australia's offshore processing policies have been the subject of at least six separate communiqués to the ICC since 2014. The six known communiqués called upon the ICC to launch investigations regarding crimes against humanity which may have been committed against asylum seekers and refugees in

[43] Eric Tlozek, 'PNG tells Australia it can't shut Manus Island detention centre and leave asylum seekers behind' (*ABC News*, 25 August 2017) <https://www.abc.net.au/news/2017-08-25/png-says-australia-cant-shut-down-manus-island-detention-centre/8844082>.
[44] UNHCR, 'UNHCR Statement: Australia must prevent looming humanitarian emergency in Papua New Guinea' (18 October 2017) <https://www.unhcr.org/en-au/news/press/2017/10/59e8a0384/unhcr-statement-australia-must-prevent-looming-humanitarian-emergency-papua.html>.
[45] Ibid.
[46] UNHCR Regional Representation in Canberra, 'UNHCR urges Australia to stop unfolding humanitarian emergency' (2 November 2017) <https://www.unhcr.org/en-au/news/press/2017/11/59e6b5c77/unhcr-urges-australia-to-stop-unfolding-humanitarian-emergency.html>.

Nauru and PNG.[47] It is unlikely that Mr Brandis, who was Attorney-General at the time, was unaware of or forgot these communiqués.

Second, Mr Brandis' reference to 'people who disagree with the policy' minimises the credibility and expertise of the authors of the communiqués, who include pre-eminent international jurists, scholars and legal practitioners (see **Appendix 2**).

Third, Mr Brandis' evidence risks misleading the Committee by failing to alert it to the fact that members of the UK government and other public officials who choose to adopt similar policies may open themselves to the risk of individual criminal responsibility for their role in any arrangements that meet the threshold for an international crime.

As argued in one communiqué to the ICC:

> there is a reasonable basis to believe that public officials and corporate actors may have committed and may continue to commit the crimes against humanity of unlawful imprisonment, torture, deportation, persecution and other inhumane acts. These crimes are at the heart of Australia's immigration detention policy and constitute a widespread and systematic attack against a civilian population, within the meaning of Article 7 of the Rome Statute of the International Criminal Court.[48]

In 2020, the Office of the Prosecutor (OTP) at the ICC determined that 'some of the conduct at the processing centres on Nauru and on Manus Island appears to constitute the underlying act of imprisonment or other severe deprivations of physical liberty under article 7(1)(e) of the Statute'.[49] The OTP found that:

> The duration and conditions of detention caused migrants and asylum seekers—including children—measurably severe mental suffering, including by experiencing anxiety and depression that led many to engage in acts of suicide, attempted suicide, and other forms of self-harm, without adequate mental health care provided to assist in alleviating their suffering.[50]

The OTP concluded that the conditions offshore appeared to have constituted 'cruel, inhuman, or degrading treatment', and that 'the gravity of the alleged conduct thus appears to have been such that it was in violation of fundamental rules of international law'.[51] However, the OTP was not convinced that there was sufficient evidence to demonstrate that the underlying act of imprisonment or severe deprivation of physical liberty was committed pursuant to, or in furtherance of, a State or organisational policy to commit such attack.[52] This aspect of the decision was subject to criticism, including from Professor Kevin Jon Heller,[53] who was recently appointed a Special Advisor on International Criminal Law Discourse to the OTP. In contrast to the OTP's determination, multiple academics have

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[47] One of the six communiqués invites the ICC also to investigate Australia's system of indefinite mandatory detention of asylum seekers who arrive in Australia by boat without a visa: Courtenay Barklem et al, 'In the matter of a Prosecution of the Australian Government in relation to Indefinite Detention and Forcible Removal of Asylum Seekers', Communiqué to the Prosecutor at the International Criminal Court (2017) <http://www.julianburnside.com.au/whatsinside/uploads/2016/11/Communiqu%C3%A9-to-ICC.pdf>.

[48] Tendayi E Achiume et al, 'The Situation in Nauru and Manus Island: Liability for crimes against humanity in the detention of refugees and asylum seekers', Communiqué to the Office of the Prosecutor of the International Criminal Court (2017) 5 <https://docs.wixstatic.com/ugd/b743d9_e4413cb72e1646d8bd3e8a8c9a466950.pdf>.

[49] Letter from the Office of the Prosecutor of the ICC to Andrew Wilkie MP (12 February 2020) 2 <https://andrewwilkie.org/wp-content/uploads/2020/02/200213-Andrew-Wilkie-Response-from-International-Criminal-Court-Australian-Government-treatment-of-asylum-seekers.pdf>.

[50] Ibid.

[51] Ibid.

[52] Ibid, 4; Rome Statute of the International Criminal Court, art 7(2)(a).

[53] Kevin Jon Heller, 'The OTP Lets Australia off the Hook' (*Opinio Juris,* 17 February 2020) <http://opiniojuris.org/2020/02/17/the-otp-lets-australia-off-the-hook/>.

suggested that there are strong grounds for arguing that Australia's offshore detention of asylum seekers did amount to crimes against humanity (such as the crimes of deportation or forcible transfer; imprisonment or other severe deprivation of physical liberty; torture; persecution; or other inhumane acts of a similar character).[54]

As the Prosecutor's decision is not legally binding, it can be revisited in the future.[55] If an investigation were opened, any Australian public official who had knowledge of the relevant facts and was involved in the implementation of offshore processing in Nauru and PNG (including Mr Brandis) would be at risk of being subject to an arrest warrant issued by the ICC and being put on trial for individual criminal responsibility in relation to the policy.

3 Misleading evidence as to the extent of opposition to offshore processing

In response to Q128, Mr Brandis wrongly asserted that offshore processing 'became less controversial with the passage of time'. He minimised both the extent and sources of opposition to this policy by stating that 'a number of community organisations, universities and various institutions and faculties within universities continued to criticise the policies, which they are perfectly at liberty to do, and a lot of figures were thrown around'.

Both statements are incorrect. They risk misleading the Committee as to the challenges the UK might face were it to pursue a similar policy.

Domestic opposition to offshore processing

The Australian experience of offshore processing has proven to be an incredibly difficult, costly and controversial policy. Strong and growing opposition to offshore processing extends well beyond the 'community organisations' and universities mentioned by Mr Brandis. Beyond the legal challenges set out in Part 2, concerns have been expressed about the way the policy has been implemented, the harm suffered by people offshore, and the extent to which offshore processing violates Australia's obligations under international law, including in independent inquiries set up by the government to investigate allegations of abuse and wrongdoing, several large Senate inquiries, reports by the Australian Human Rights Commission and reports by the Australian National Audit Office (see **Appendix 3** for a select list of documents). Peak legal and medical bodies have also challenged offshore processing and/or called for asylum seekers and refugees offshore to be urgently evacuated back to Australia (see **Appendix 4** for a select list of organisations).

Large protests and social campaigns have periodically disrupted the government's pursuit of offshore processing, forcing it to backtrack on its hard-line approach to the policy. For example, after the unsuccessful *Plaintiff M68* legal challenge discussed in Part 2.2, a nationwide social movement emerged to prevent asylum seekers and refugees from being sent back offshore.[56] Churches across Australia took the extraordinary step of invoking the historical concept of 'sanctuary' and offering to open their doors to shelter any asylum

[54] Rome Statute of the International Criminal Court, art 7. See Ioannis Kalpouzos, 'International Criminal Law and the Violence Against Migrants' (2020) 21 *German Law Journal* 571; Claire Henderson, 'Australia's treatment of asylum seekers: From human rights violations to crimes against humanity' (2014) 12 *Journal of International Criminal Justice* 1161. See also Ioannis Kalpouzos and Itamar Mann, 'Banal crimes against humanity: The case of asylum seekers in Greece' (2015) 16 *Melbourne Journal of International Law* 1; Vincent Chetail, 'Is There any Blood on my Hands? Deportation as a Crime of International Law' (2016) 29 *Leiden Journal of International Law* 917.

[55] Rome Statute of the International Criminal Court, art 15(6).

[56] Ben Doherty, '"Let them stay": Backlash in Australia against plans to send asylum seekers to detention camps', (*Guardian,* 10 February 2016) <https://www.theguardian.com/australia-news/2016/feb/10/let-them-stay-australia-backlash-267-asylum-seekers-island-detention-camps>.

seeker facing removal.[57] Leaders of Australian states and territories from both sides of politics publicly called on the Prime Minister to let the 267 people associated with that case remain in Australia.[58]

In another case, in February 2016, doctors at an Australian hospital refused to discharge a baby who had been injured in Nauru and flown to Australia for emergency medical treatment, on the basis that it was not safe to return her to Nauru and that a 'suitable home environment' for her needed to be identified.[59] This move was supported by the Australian Medical Association, the peak professional body for doctors in Australia.[60] The incident generated widespread media coverage, and protesters were reported to have stationed themselves at the hospital exits and 'formed human walls to block and check police cars' to ensure that the baby was not removed.[61]

International opposition to offshore processing

Unequivocal opposition to the policy has also come from leading international experts, including every UN body, committee and special procedure to review Australia's asylum policies since 2012, and Médecins Sans Frontières (MSF), which provided healthcare in Nauru for 11 months before being forced to leave by the Nauruan government in October 2018.[62] These experts have been unanimous in their criticism of offshore processing and their concerns about its failure to comply with Australia's obligations under international law. A select list of UN bodies and experts who have criticised Australia's offshore processing policies is attached as **Appendix 1.**

4 Errors in Mr Brandis' evidence regarding boat turnbacks

Mr Brandis' evidence in response to Q108, Q109, Q111, Q117, Q122 and Q132 with respect to boat turnbacks under Operation Sovereign Borders was erroneous and/or risked being misleading in several parts.

4.1 Boat arrivals have not 'ceased completely'

While the number of asylum seekers trying to reach Australia by boat did reduce significantly after the turnback policy was implemented (from September 2013), it is not correct to say – as Mr Brandis did in response to Q108 – that the 'flow' of boats 'dwindled to a point where … by July 2014, it had ceased completely'. Mr Brandis' subsequent comment that, '[s]ince then, there has not been a single irregular maritime arrival on Australia's shores, as far as we can tell', is also false.

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[57] Michael Edwards, 'Sanctuary offered to asylum seekers facing removal to offshore detention by churches across Australia' *(ABC News,* 4 February 2016) <https://www.abc.net.au/news/2016-02-04/churches-offer-sanctuary-to-asylum-seekers/7138484>.
[58] Rebel Wylie, 'Remarkable offers from Australian premiers: we will take your refugees' (*News.com.au,* 4 July 2017) <https://www.kidspot.com.au/parenting/remarkable-offers-from-australian-premiers-we-will-take-your-refugees/news-story/7a3d030190d846230bd4362aacae59cb>.
[59] Caroline Mortimer, 'Baby Asha: Doctors refuse to discharge refugee child from hospital because it is "not safe" to take her back to Nauru' *(Independent,* 12 February 2016) <https://www.independent.co.uk/news/world/australasia/baby-asha-doctors-refuse-discharge-refugee-child-hospital-because-it-not-safe-take-her-back-nauru-a6870941.html>.
[60] Australian Medical Association, 'Transcript - Asylum Seeker Health' (22 February 2016) <https://www.ama.com.au/media/transcript-asylum-seeker-health>.
[61] Jorge Branco, 'Baby Asha Lady Cilento vigil to continue until government guarantee made' (*Brisbane Times,* 20 February 2016) <https://www.brisbanetimes.com.au/national/queensland/baby-asha-lady-cilento-vigil-to-continue-until-government-guarantee-made-20160220-gmzd3o.html>.
[62] Médecins Sans Frontières, above n 16.

To understand our concerns with this evidence, it is necessary to provide some context to how the Australian government reports on boat arrivals.

Progressive reduction in transparency with respect to boat arrivals

Prior to September 2013, the Australian government provided regular updates about the fact, number and interception or rescue location of asylum seekers trying to reach Australia by boat. This approach changed with the launch of Operation Sovereign Borders in September 2013 and the new military-led response to maritime migration. At the very first press conference, the Minister for Immigration and Border Protection (and now Prime Minister) Scott Morrison stated that the previous government had been running 'a shipping news service for people smugglers', and henceforth the government would provide less information about boat arrivals, and less regularly.[63] He did guarantee, however, that 'the Australian people … will know how many boats are arriving' and that those numbers would be provided weekly.[64]

This commitment was short-lived. By mid-2014, the Operation Sovereign Borders operational updates had been reduced from weekly to monthly,[65] and reporting ceased almost entirely between October 2017 and December 2019. Similarly, Operation Sovereign Borders media releases, which had previously been released monthly, stopped almost entirely in 2018 and 2019.[66] Both forms of update resumed in 2020.

Of even greater concern was the fact that every official update except one from July 2014 to November 2018 reported that no 'Illegal Maritime Arrivals' (asylum seekers) had been 'transferred to Australian immigration authorities', giving the impression that boats had stopped altogether (in line with Mr Brandis' claim in evidence to the Committee). The only operational update to report asylum seeker arrivals in this period was the December 2014 update, which claimed four people were 'transferred to Australian immigration authorities'.[67] Government data on boat arrivals (discussed below and included at Annexure A) does not include a boat arrival in December 2014, so it is unclear to whom this operational update referred. From December 2019, the wording of operational updates changed to state that 'Operation Sovereign Borders intercepted no illegal maritime ventures and returned no potential illegal immigrants' in each reporting period, except for January 2020, when a vessel carrying six Chinese nationals and two Indonesian nationals was intercepted and 'successfully returned to Indonesia in close cooperation with the Indonesian Government'.[68] To our knowledge, this vessel is the only one from the government data in Annexure A to be reported in the Operation Sovereign Borders operational updates since July 2014.

Various ministers also made public statements suggesting that the government had 'stopped the boats'. For example, Prime Minister Tony Abbott marked 100 days without a boat arrival

[63] 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>.
[64] Ibid.
[65] Operation Sovereign Borders operational updates are available from the Australian Border Force newsroom at <https://newsroom.abf.gov.au/channels/operational-updates/releases>.
[66] Operation Sovereign Borders media releases are available from the Australian Border Force newsroom at <https://newsroom.abf.gov.au/channels/media-releases/releases>.
[67] Australian Border Force, 'Monthly Operational Update: December 2014' (30 January 2015) <https://newsroom.abf.gov.au/channels/operational-updates/releases/monthly-operational-update-december-2>.
[68] Australian Border Force, 'Operation Sovereign Borders monthly update: January 2020' (13 March 2020) <https://newsroom.abf.gov.au/channels/operational-updates/releases/operation-sovereign-borders-monthly-update-january-2020>.

in March 2014.[69] In February 2015, the Minister for Immigration and Border Protection, Peter Dutton, marked 200 days without a boat arrival, and claimed that only one boat had arrived in the previous year.[70]

Contrary to these claims, data provided by Australia's Department of Home Affairs to a Senate committee in 2020 (and attached to this submission as **Annexure A**) shows that boats have in fact continued to approach Australia and be intercepted by the authorities. There have also been periodic media reports of boats reaching Australian territory. In May 2016, for example, a vessel believed to be carrying asylum seekers was reported to have reached the Cocos (Keeling) Islands (remote Australian territory in the Indian Ocean between Australia and Sri Lanka).[71] In August 2018, 17 Vietnamese people were reported to have waded ashore on the north-east coast of Australia after their vessel ran aground.[72]

The Australian government does not count all boat arrivals as 'arrivals'

The absence of more than six years' worth of boat arrivals from the official Operation Sovereign Borders operational updates, and remarks by various ministers and public officials suggesting boats have 'stopped', can be explained by the way the government characterises some boats as 'arrivals', and others not. It appears that only asylum seekers who are intercepted at sea, brought to Australia and permitted to enter a formal refugee status determination procedure are officially counted as 'arrivals'. The last time this happened, according to the Department of Home Affairs data in Annexure A, was in July 2014 – the date provided by Mr Brandis in his evidence.

By contrast, asylum seekers who are:

- turned back at sea;
- intercepted at sea and handed over directly to the authorities of their country of origin; or
- not intercepted, reach Australian territory, and are returned to their countries of origin without accessing a formal refugee status determination procedure

do not appear to be formally counted as 'arrivals' – even if they fall under the jurisdiction of Australian officials at sea or, indeed, enter Australian territory prior to being flown back to their country of origin.

Thus, when the Operation Sovereign Borders operational updates state that no asylum seekers have been 'transferred to Australian immigration authorities', politicians claim that a certain number of days have passed 'without a boat arrival', and Mr Brandis testifies that 'there has not been a single irregular maritime arrival on Australia's shores' since July 2014, that does not mean that the boats have 'ceased completely'. Rather, it means that Australia has not allowed asylum seekers approaching or reaching Australia by boat to access an asylum procedure. This practice raises serious international law concerns (see Part 5).

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[69] 'Operation Sovereign Borders: Prime Minister Tony Abbott marks 100 days without an asylum seeker boat arrival' (*ABC News,* 29 March 2014) <https://www.abc.net.au/news/2014-03-29/pm-hails-100-days-without-an-asylum-seeker-boat-arrival/5354100>.

[70] Peter Dutton, 'Two hundred days without an Illegal boat arrival' (Media release, 12 February 2015) <https://minister.homeaffairs.gov.au/peterdutton/Pages/2015/Two-hundred-days-without-an-Illegal-boat-arrival.aspx>.

[71] 'Asylum boat reaches Australia's Cocos Islands territory' (*BBC News,* 4 May 2016) <https://www.bbc.com/news/world-australia-36156762>.

[72] Helen Davidson and Ben Doherty, 'Suspected asylum seekers who fled boat in Daintree taken to Christmas Island' *(Guardian,* 29 August 2018) <https://www.theguardian.com/australia-news/2018/aug/29/suspected-asylum-seekers-who-fled-boat-in-daintree-taken-to-christmas-island>.

Inability to test the Australian government's claims about boat arrivals

A final issue worth noting in relation to the claims by both Mr Brandis and the Australian government about boat arrivals is that they remain untested, and untestable.

Since November 2013, successive Coalition governments have maintained a blanket public interest immunity claim over all 'operational' or 'on water' matters to justify their refusal to disclose information about boat arrivals and turnback practices, even to the Australian Parliament.[73] This claim goes well beyond what could reasonably be argued is necessary to ensure national security and/or the integrity of the policy to 'stop the boats' and combat people smuggling.

The Australian Senate has repeatedly rejected the government's public interest immunity claim, including in the context of inquiries into breaches of Indonesia's sovereign waters and allegations that Australian officials paid cash or gave other inducements to people smugglers in exchange for them taking asylum seekers back to Indonesia.[74] Despite these rejections, the immunity claim has been maintained by the government and invoked to justify failures to provide information and documents sought by the Parliament about Operation Sovereign Borders, effectively precluding it from performing its proper function of scrutinising and ensuring accountability for executive action.

In 2015, secrecy about 'on water' matters escalated further with the passage of the *Australian Border Force Act 2015*, which made it an offence for almost anyone with first-hand knowledge of Australia's border protection policies – including boat turnbacks – to make a record of or disclose that information. This offence, which is sweeping in terms of the people and information it captures, carries a penalty of two years' imprisonment.[75]

The result is that neither the Australian public nor the Parliament can test the government's claims about how many asylum seekers continue to approach or reach Australia by boat, and what happens to them at sea or on land. The inability to test these claims, and the need to rely on data provided by the Department of Home Affairs in the form it sees fit, is concerning because it runs counter to the basic principles of democratic accountability, and because errors and omissions in past reporting have already been revealed.

4.2 Australia does not only turn boats back to Indonesia

Mr Brandis' responses to Q109, Q111, Q122 and Q132 gave the impression that boat turnbacks occur only in relation to vessels coming from, and being returned to, Indonesia, and that these returns comply with international law. For example, in response to Q111, Mr Brandis said:

> The turnaround operation, which was conducted in international waters, repelled the vessels and returned them to the Indonesian shore, where it was safe to do so. … It is important to stress that Australia's obligations under the 1951 refugee convention were complied with at all times, for several reasons. First, Indonesia in particular was a transit country for these people—none of them claimed to have been persecuted by the Indonesian Government.

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[73] Senate Legal and Constitutional Affairs References Committee, *A claim of public interest immunity raised over documents* (Final Report, 6 March 2014) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Public_Interest_Immunity/Report/index>.

[74] Senate Legal and Constitutional Affairs References Committee, above n 22, 39-42; Senate Foreign Affairs, Defence and Trade References Committee, above n 23, 19-21.

[75] *Australian Border Force Act 2015,* s 42.

In fact, evidence from the Department of Home Affairs and the Australian Border Force to the Australian Senate has confirmed that there are two distinct types of return under Operation Sovereign Borders:

- 'turnbacks' occur 'where a vessel is removed from Australian waters and returned to just outside the territorial seas of the location from which it departed';[76] and
- 'takebacks' occur when Australia works with the authorities of a country of departure to return people directly to them. This can involve an 'at-sea transfer' directly from one sovereign authority to another,[77] or Australia bringing intercepted asylum seekers to Australia and then flying them straight back to their country of origin without granting them access to a formal refugee status determination procedure.[78]

Mr Brandis' evidence spoke only to the former practice – 'turnbacks' to Indonesia. By contrast, the government has confirmed that it has agreements in place to conduct 'takebacks' to Sri Lanka and Vietnam.[79] It may also conduct takebacks to other countries.

As noted below, and discussed more fully elsewhere,[80] both practices risk violating international refugee law, human rights law and the law of the sea, and being inconsistent with anti-smuggling laws.

5 Violations of international law

Mr Brandis' evidence in response to Q111 that 'Australia's obligations under the 1951 Refugee Convention were complied with at all times', and that 'Australia observed its *non-refoulement* obligations at all times', is not supported by evidence, and risks misleading the Committee by suggesting that Australia's offshore processing and boat turnback policies are consistent with its obligations under international law.

Contrary to Mr Brandis' evidence, and as detailed above in Parts 2 and 3 above, there is an overwhelming consensus amongst international law experts that Australia's asylum policies are not consistent with its obligations under international law, including the obligation not to send, expel or return asylum seekers and refugees to any place where they may face persecution or serious harm such as torture or death (*non-refoulement*).

Historical statistics provided by the Australian Parliamentary Library indicate that between 70 and 100% of asylum seekers arriving in Australia by boat since the 1970s have been found to be refugees and granted protection either in Australia or in another country.[81] In light of these statistics, it is implausible that not a single person trying to reach Australia by sea since July 2014 has engaged Australia's protection obligations. When questioned on the discrepancy between the historical rates of successful asylum claims, and the Australian government's position that almost no one trying to reach Australia by boat since July 2014 has engaged Australia's protection obligations, the Department of Home Affairs and the Australian Border Force have been unable to provide an explanation, simply stating that: 'we

[76] Senate Legal and Constitutional Affairs Legislation Committee, Official Committee Hansard, 23 February 2015, 137.
[77] Ibid.
[78] Senate Legal and Constitutional Affairs Legislation Committee, Official Committee Hansard, 21 May 2018, 76.
[79] Senate Legal and Constitutional Affairs Legislation Committee, Official Committee Hansard, 22 May 2017, 125.
[80] See, for example: Jane McAdam and Fiona Chong, *Refugee Rights and Policy Wrongs: A frank, up-to-date guide by experts* (UNSW Press, 2019) 161-172; UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, on means to address the human rights impact of pushbacks of migrants on land and at sea* (A/HRC/47/30, 12 May 2021).
[81] Janet Phillips, 'Asylum seekers and refugees: what are the facts?' (Australian Parliamentary Library, Research Paper Series 2014–15, 2 March 2015) 9 <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/HGNW6/upload_binary/HGNW6.pdf>.

understand that we meet our international and domestic legal obligations, and found that we owed them no protections'.[82]

We are available to provide a more detailed account of these international law concerns if it would assist the Committee. For present purposes, we refer the Committee to **Appendix 1**, which contains a select list of UN bodies and experts who have raised concerns about, and/or challenged, Australia's policies since 2012. These are in addition to the views of the OTP of the ICC set out in Part 2.4 above. We also draw the Committee's attention to UNHCR's most recent Note on International Protection, which states that 'proposals made by some States to externalize international protection … are inconsistent with the responsibility-sharing objectives of the [Global Compact on Refugees] and the principle of cooperation underlying international refugee law'.[83]

6 Clarifying inaccuracies regarding Australia's immigration programmes

Finally, certain other errors and/or potentially misleading statements in Mr Brandis' evidence about Australia's immigration programme warrant correction.

6.1 Misleading statements about the size of Australia's refugee programme

In response to Q123, Mr Brandis told the Committee that, in recent years, Australia has had 'per capita the most generous humanitarian and refugee programme in the world, second only to Canada'. He made a similar statement in response to Q133.

This claim is not accurate. When Mr Brandis made the same claim on Australian national television in December 2017, a factcheck by the ABC, Australia's national broadcaster, concluded that the claim was 'misleading'.[84]

To understand why, it is necessary to appreciate that Australia's refugee and humanitarian programme comprises both 'offshore' and 'onshore' elements. The 'offshore' element (not to be confused with offshore processing) refers to people whom Australia selects from overseas for resettlement. The 'onshore' component relates to people who arrive in Australia – whether by plane or by boat – and then seek asylum.

With respect to the 'offshore' – or resettlement – component of Australia's refugee and humanitarian programme, Australia has historically been among the most generous countries in per capita terms. Mr Brandis was correct that Australia ranked second to Canada in 2016 with respect to resettlement.[85] However:

- this number was higher than usual because of a special intake of 12,000 people from Syria and Iraq, plus delays in processing refugee applications which resulted in lower arrivals in 2015; and
- when the onshore component is taken into account, Australia fell far down the list, coming in at 16th in 2016.[86]

[82] See, for example: Senate Legal and Constitutional Affairs Legislation Committee, Official Committee Hansard, 21 May 2018, 77.
[83] UNHCR, 'Note on international protection' (A/AC.96/1211, 1 October 2021) [8] <https://www.unhcr.org/en-au/611d1bac7>.
[84] 'Fact check: Does Australia run the most generous refugee program per capita in the world?' (*ABC News,* 21 December 2017) <https://www.abc.net.au/news/2017-12-21/fact-check-george-brandis-refugees-per-capita/9241276>.
[85] 'Top 20 countries for resettlement from abroad per 1000 population, 2016' (undated) <https://public.tableau.com/app/profile/matt.martino/viz/Resettlementarrivals/Dashboard1>.
[86] 'Top countries for total resettlement from abroad and recognition at home of refugees per 1000 population, 2016' (undated) <https://public.tableau.com/app/profile/matt.martino/viz/Resettlementandrecognition/Dashboard1>.

Detailed analysis by the Refugee Council of Australia shows that in the 10-year period from January 2009 to December 2018, Australia accepted a total of 180,790 refugees through the offshore and onshore components of its refugee and humanitarian programme.[87] This figure represented 0.89% of the 20.3 million refugees recognised globally over that period.[88] Australia's total contribution for the decade was ranked 25th overall, 29th per capita, and 54th relative to national GDP.[89]

6.2 References to a fictional 'front door' into Australia for 'genuine' refugees

Mr Brandis also made reference in his answers to Q133 and Q134 to the idea of people entering Australia 'through the front door as genuine refugees', as opposed to seeking the services of smugglers to enter by boat.

Under international refugee law, there is no 'back' or 'front' door for refugees. There is simply the refugee, who must be recognised, protected and treated according to the legal commitments voluntarily assumed by States. A refugee's method of arrival only becomes relevant in relation to article 31 of the 1951 Convention relating to the Status of Refugees, which provides that Contracting States shall not impose penalties on refugees for having entered their territories 'illegally', provided they have come directly from a territory where their life or freedom was threatened, present themselves without delay to the authorities, and show good cause for their illegal entry or presence.

Even leaving aside this problematic reference to a 'front/back door', Mr Brandis' statement was misleading. Most refugees will never be able to access a 'front door' to protection in Australia.

The main safe and legal pathway to protection is resettlement – that is, 'the transfer of refugees from an asylum country to another State, that has agreed to admit them and ultimately grant them permanent residence'.[90] However, less than one per cent of the world's refugees are resettled annually. Indeed, 'based on the current number of resettlement places available worldwide, it would take two decades before even today's resettlement needs were met – let alone future needs, which are growing'.[91]

The situation for refugees in Indonesia is particularly difficult, with recent research confirming that 'for most refugees in Indonesia, resettlement is unlikely'.[92] In November 2014, the Australian government announced that it would cease resettling refugees who had registered with UNHCR in Indonesia after 1 July 2014.[93] This decision was part of Australia's broader deterrence measures, since Indonesia was a transit point for refugees who hoped to reach Australia by boat. Those refugees in Indonesia who did register before the cut-off date also face long wait times, with Australia's resettlement numbers from Indonesia amounting to fewer than 100 refugees each year since 2018.[94] As a result of this approach, a large

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[87] Refugee Council of Australia, *How Generous is Australia's Refugee Program Compared to Other Countries?* (31 December 2018) 2 <https://reliefweb.int/sites/reliefweb.int/files/resources/2018-Global-Trends-analysis.pdf>.
[88] Ibid.
[89] Ibid.
[90] UNHCR, 'Resettlement' (undated) <https://www.unhcr.org/en-au/resettlement.html>.
[91] McAdam and Chong, above n 80, 68.
[92] Mixed Migration Centre, *A Transit Country No More: refugees and asylum seekers in Indonesia* (MMC Research Report, 27 May 2021) 14 <https://reliefweb.int/sites/reliefweb.int/files/resources/170_Indonesia_Transit_Country_No_More_Research_Report.pdf>.
[93] Australian Department of Immigration and Border Protection and Australian Customs and Border Protection, 'Resettlement cut-off date for refugees in Indonesia' (Talking points, 19 November 2014) <https://www.homeaffairs.gov.au/foi/files/2015/20151203_FA150200596-documents-released.pdf>.
[94] Mixed Migration Centre, above note 92, 14.

proportion of the more than 13,700 refugees and asylum seekers currently living in Indonesia have been stuck in precarious conditions for several years, waiting for the slim chance of resettlement in another third country, and with no access to a ‘front door’ to Australia.[95]

‘Complementary pathways’ to protection in Australia through existing migration schemes are also closed to most refugees. Australia uses ‘immigration risk’ assessment mechanisms to make it harder for individuals from refugee-producing countries to obtain work, study or tourist visas.[96] Australia also actively de-prioritises applications for family reunion lodged by refugees who arrived by boat.[97] This makes it 'effectively impossible' for refugees to reunite with their families through the Migration Program.[98]

In summary, Australia has closed all except a few tightly regulated points of access to its territory for refugees.

[95] Ibid.
[96] Australian Human Rights Commission, Pathways to Protection: A Human Rights-Based Response to the Flight of Asylum Seekers by Sea (2016) 35-36 <https://humanrights.gov.au/sites/default/files/20160913_Pathways_to_Protection.pdf>.
[97] Ministerial Direction 80 available at <https://migrationlawupdates.com.au/direction-no-80/>.
[98] Refugee Council of Australia, 'Family separation and family reunion for refugees: the issues, Denial of family reunion for people who arrived by boat' (1 March 2021) <https://www.refugeecouncil.org.au/family-reunion-issues/5/>.

Appendix 1

Select list of UN bodies and experts who have raised concerns about and/or challenged Australia's offshore processing policies since 2012[99]

UN human rights treaty bodies

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

Special Procedures of the Human Rights Council

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

Other UN bodies and experts

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

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

[99] Links to many reports and statements from UN experts and bodies can be found at: UNHCR, United Nations Observations: Australia's transfer arrangements with Nauru and Papua New Guinea (2012-present) (undated) <https://www.unhcr.org/en-au/united-nations-observations.html>. Others can be found at OHCHR's Australia page at <https://www.ohchr.org/en/countries/asiaregion/pages/auindex.aspx>.

Appendix 2

Authors of six known communiqués referring Australia to the ICC in relation to offshore processing

Global Legal Action Network (GLAN) and Stanford International Human Rights and Conflict Resolution Clinic submission[100]

1. Tendayi E Achiume, Assistant Professor of Law (International Human Rights Law, International Refugee Law), Los Angeles School of Law, University of California

2. T Alexander Aleinikoff, University Professor and Director, Zolberg Institute on Migration and Mobility, The New School; Former United Nations Deputy High Commissioner for Refugees (2010-15)

3. James Cavallaro, Professor of Law and Director, International Human Rights and Conflict Resolution Clinic, Stanford Law School

4. Vincent Chetail, Professor of International Law and Director of the Global Migration Centre, Graduate Institute of International and Development Studies, Geneva

5. Robert Cryer, Professor of International and Criminal Law, Birmingham Law School

6. Gearóid Ó Cuinn, Director, Global Legal Action Network; Academic Fellow at Lancaster University Law School

7. Tom J Dannenbaum, Lecturer in Human Rights, University College London

8. Kevin Jon Heller, Professor of Criminal Law, SOAS University of London; Associate Professor of Public International Law at the University of Amsterdam

9. Ioannis Kalpouzos, Lecturer, City Law School, University of London

10. Itamar Mann, Senior Lecturer (international law), University of Haifa, Faculty of Law

11. Sara Kendall, Lecturer in International Law, University of Kent

12. Makau Mutua, SUNY Distinguished Professor; Chair, Board of Advisors, International Development Law Organization; Former Dean, University at Buffalo, School of Law

13. Gregor Noll, Associate Professor, Lund University

14. Anne Orford, Redmond Barry Distinguished Professor, Michael D Kirby Chair of International Law, and ARC Kathleen Fitzpatrick Australian Laureate Fellow (Melbourne Law School) and Raoul Wallenberg Visiting Chair of Human Rights and Humanitarian Law (Raoul Wallenberg Institute & Lund University)

15. Diala Shamas, Lecturer in Law, Stanford Law School's International Human Rights and Conflict Resolution Clinic

[100] Communiqué to the Office of the Prosecutor of the International Criminal Court under Article 15 of the Rome Statute, 'The Situation in Nauru and Manus Island: Liability for crimes against humanity in the detention of refugees and asylum seekers' (February 2017) <https://docs.wixstatic.com/ugd/b743d9_e4413cb72e1646d8bd3e8a8c9a466950.pdf>.

16. Gerry Simpson, Chair in Public International Law, London School of Economics

17. Beth Van Schaack, formerly Deputy to the Ambassador-at-Large for War Crimes Issues in the Office of Global Criminal Justice of the US Department of State, Visiting Professor in Human Rights, Stanford Law School

Submission from UK and Australian lawyers[101]

18. Courtenay Barklem, Solicitor-Advocate, England and Wales; Attorney at Law, California; member of the Human Rights Committee of the Law Society of England and Wales

19. Alison Battisson, Director and Principal Lawyer, Human Rights 4 All

20. Bill Bowring, Barrister, England and Wales; Professor at Birkbeck College, University of London; member of the Bar Human Rights Committee of England and Wales

21. Julian Burnside AO QC, Barrister, Australia

22. Tony Fisher, Solicitor, England and Wales; Senior Partner of Fisher Jones Greenwood; Chair of the Human Rights Committee of the Law Society of England and Wales

23. Mary Johnson, Attorney at Law, California; Founder of Fair Play human rights consultancy

24. Oliver Kidd, Lawyer, Australia

Other submissions

25. Andrew Wilkie MP, Member for Clark, Tasmania, Australia[102]

26. Tracie Aylmer, Australian lawyer[103]

27. Refugee Action Collective (Victoria)[104]

28. U Ne Oo, refugee rights activist[105]

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[101] Communiqué to the Prosecutor at the International Criminal Court, 'In the matter of a Prosecution of the Australian Government in relation to Indefinite Detention and Forcible Removal of Asylum Seekers' (2016) <http://www.julianburnside.com.au/whatsinside/uploads/2016/11/Communiqu%C3%A9-to-ICC.pdf>.
[102] Letter to the Office of the Prosecutor (22 October 2014) <http://andrewwilkie.org/wp-content/uploads/2015/10/First-Letter-to-the-ICC.pdf>; 'Communiqué for the Office of the Prosecutor regarding Mr Andrew Wilkie MP's application relating to crimes against humanity in Australia' (23 January 2015) <http://andrewwilkie.org/wp-content/uploads/2015/10/Brief-for-the-ICC-OTP-CR-322-14.pdf>.
[103] 'Breaches of the Rome Convention by the Current Australian Government' (2014) <http://rac-vic.org/wp-content/uploads/2018/04/1.-T.-Aylmer-ICC-Submission-unredacted.pdf>.
[104] 'Communiqué for the Office of the Prosecutor regarding the application to the International Criminal Court by Refugee Action Collective (Victoria)' (July 2015) <https://rac-vic.org/2015/07/08/rac-submission-to-the-international-criminal-court/>.
[105] 'Enslavement in Manus Island and Nauru' (2017) <http://www.netipr.org/saorg/docs/20170701_enslavement-in-manus-nauru.pdf?fbclid=IwAR0AsTTdhUEKjRtpIcXuBtvpj-TFHT8ZEkjoTEOvqu6pP6MBHP7XbboCzII>.

Appendix 3

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

Independent inquiries set up by the government

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

Parliamentary inquiries

- Parliamentary Joint Committee on Human Rights, *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and Related Legislation* (Final Report, 19 June 2013) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2013/2013/92013/index>
- Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (Final Report, 11 December 2014) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island/Report>
- Senate Select Committee on the Recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, *Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru* (Final Report, 31 August 2015) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Final_Report>
- Senate Legal and Constitutional Affairs References Committee, *Conditions and Treatment of Asylum Seekers and Refugees at the Regional Processing Centres in the Republic of Nauru and Papua New Guinea*, (Interim Report, 5 May 2016) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Offshore_RPCs/Interim_Report>
- Senate Legal and Constitutional Affairs References Committee, *Serious Allegations of Abuse, Self-harm and Neglect of Asylum Seekers in relation to the Nauru Regional Processing Centre, and any like Allegations in relation to the Manus Regional Processing Centre* (Final Report, 21 April 2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Report>

Other government agencies

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

Appendix 4

Select list of peak legal and medical bodies which have challenged offshore processing and/or called for the evacuation of asylum seekers and refugees back to Australia

Legal

- Australian Bar Association
- Law Council of Australia
- Law Institute of Victoria
- Law Society of New South Wales

Medical

- Australasian College for Emergency Medicine (ACEM)
- Australasian College of Dermatologists (ACD)
- Australian and New Zealand College of Anaesthetists (ANZCA)
- Australian Association of Social Workers (AASW)
- Australian College of Mental Health Nurses (ACMHN)
- Australian College of Rural and Remote Medicine (ACRRM)
- Australian Medical Association (AMA)
- Australian Nursing and Midwifery Federation (ANMF)
- College of Intensive Care Medicine of Australia and New Zealand (CICM)
- Royal Australasian College of Physicians (RACP)
- Royal Australasian College of Medical Administrators (RACMA)
- Royal Australian College of General Practitioners (RACGP)
- Royal Australian and New Zealand College of Obstetricians and Gynaecologists (RANZCOG)
- Royal Australian and New Zealand College of Psychiatrists (RANZCP)
- Royal Australian and New Zealand College of Radiologists (RANZCR)

Public statements from these bodies can be provided to the Committee at its request.

Annexure A

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ADDITIONAL ESTIMATES
2 MARCH 2020

Home Affairs Portfolio

Operation Sovereign Borders

AE20-203 - Update Previous Data and Tables Provided to Committees

Senator Nick McKim asked:

"Previously provided tables setting out the number of boat arrivals, turn backs, take backs and assisted returns since September 2013, and including:

i. the total number of people on board each venture, with breakdowns by passengers and crew;
ii. the number of children on each venture;
iii. the outcome of the venture (arrival, turn back, take back or assisted return);
iv. in the case of arrivals, where those people are now;
v. in the case of non-arrivals, the country to which people were returned and the method of return (by plane via an Australian airfield, turned back on own vessel, provided with alternate vessel, handed over to authorities of another State either at sea or in that State's territory, etc.); and
vi. the number of people on board each venture who:
    - indicated that they wished to seek asylum in Australia (whether formally or informally, in exact terms or by implication);
    - underwent screening (including where that screening took place, and whether there was access to interpreters and legal representatives); or
    - were determined to engage or possibly engage Australia's protection obligations.
vii. whether that venture was reflected in the Operation Sovereign Borders monthly update for that month.
    a. If not, why not?"

Answer:

Question i

See Table 1 for turn backs, take backs and assisted returns.

See Table 2 for persons unable to be safely returned.

Question ii

See Table 1 for turn backs, take backs and assisted returns.

See Table 2 for persons unable to be safely returned.

Question iii

See Table 1 for turn backs, take backs and assisted returns.

See Table 2 for persons unable to be safely returned.These individuals were taken to a Regional Processing Country.

Question iv:

As at 1 March 2020, the individuals unable to be safely returned were located as follows:

- 569 are temporarily in Australia for medical treatment or engaged in litigation to prevent their removal
- 364 have returned to their country of origin
- 253 have resettled in a third country
- 116 are in Nauru
- 0 are in Papua New Guinea

Question v:

See Table 1 for take backs, turn backs and assisted returns.

These individuals were returned to either Indonesia, Sri Lanka or Vietnam.

Question vi:

The public's right to know about the details of on-water operations under OSB is balanced against operational security requirements and the safety of all persons involved in operations, including those on board the venture. Information about operational activities that can be safely released is provided on a regular basis either through the monthly OSB updates, or via other forums such as Senate Estimates at a later stage when the information is no longer deemed to be operationally sensitive.

Information provided by individuals intercepted at sea under OSB is appropriately considered, consistent with Australia's domestic and international obligations. Returns are conducted only when safe to do so and when Australia is able to meet its domestic and international obligations.

If individuals are unable to be safely returned to their country of origin or departure, they are transferred to a regional processing country in order for their claims for protection to

be assessed by that country. A table providing an overview of ventures that were unable to be safely returned since the commencement of OSB is included below.

Question vii:

For operational reasons, current sensitive operational activity has occasionally not been released in the relevant OSB monthly updates. However, information on all ventures is captured in OSB's public statistics when it is no longer operationally sensitive to do so.

Further details will not be provided in order to preserve operational security.

Table 1 – Overview of Returned People Smuggling Ventures

The total number includes all persons on board the returned venture. Where applicable, The number of crew and children included within the total number is shown in brackets.

Number	Date	Total Number of People on Board	Summary
Financial Year 2013 – 2014			
1	December 2013	49 (2 crew, 17 children)	Turnback
2	December 2013	50 (1 crew, 8 children)	Turnback
3	December 2013	40 (2 crew, 4 children)	Turnback
4	January 2014	47 (2 crew, 13 children)	Assisted Return
5	January 2014	27 (2 crew, 4 children)	Turnback
6	January 2014	58 (2, crew, 2 children)	Turnback
7	February 2014	38 (2 crew, 3 children)	Turnback
8	February 2014	28 (2 crew, 2 children)	Turnback
9	May 2014	20 (2 crew)	Turnback
10	May 2014	3 (1 crew)	Turnback
11	May 2014	3 (2 crew)	Turnback
Financial Year 2014 - 2015			
12	July 2014	41 (1 crew, 9 children)	Takeback
13	September 2014	10 (3 crew)	Assisted Return
14	November 2014	37 (6 children)	Takeback
15	January 2015	3 (2 crew)	Assisted Return
16	February 2015	4	Takeback

17	March 2015	17 (2 crew, 3 children)	Turnback
18	April 2015	46 (2 crew, 22 children)	Takeback
19	May 2015	71 (6 crew)	Assisted Return
Financial Year 2015 - 2016			
20	July 2015	46 (18 children)	Takeback
21	August 2015	27 (2 crew)	Turnback
22	November 2015	3 (2 crew)	Assisted Return
23	November 2015	17 (1 crew)	Turnback
24	February 2016	5	Takeback
25	March 2016	8 (2 crew)	Assisted Return
26	May 2016	12 (2 children)	Takeback
27	May 2016	3 (2 crew)	Assisted Return
28	June 2016	21 (4 children)	Takeback
Financial Year 2016 - 2017			
29	August 2016	6	Takeback
30	March 2017	25	Takeback
31	June 2017	6	Takeback
Financial Year 2017 - 2018			
32	December 2017	29 (2 children)	Takeback
33	June 2018	10 (3 crew)	Turnback
Financial Year 2018 - 2019			
34	September 2018	17 (2 children)	Takeback
35	May 2019	20 (5 crew, 3 children)	Takeback
Financial Year 2019 - 2020			
36	July 2019	5	Takeback
37	August 2019	13	Takeback
38	January 2020	8 (2 crew)	Turnback

Table 2 – Overview of Maritime People Smuggling Ventures Unable to be Safely Returned

The total number includes all persons on board the venture. Where applicable, the number of crew and children included within the total number is shown in brackets.

Venture Number	Date	Total Number of People on Board
Financial Year 2013 – 2014		
1	September 2013	33 (2 crew, 9 children)
2	September 2013	21 (2 crew, 1 child)
3	September 2013	7 (1 child)
4	September 2013	72 (2 crew, 8 children)
5	September 2013	82 (3 crew, 11 children)
6	October 2013	79 (25 children)
7	October 2013	55 (2 crew, 14 children)
8	October 2013	42 (2 crew, 7 children)
9	October 2013	42 (1 crew, 3 children)
10	October 2013	128 (2 crew, 25 children)
11	November 2013	63 (2 crew, 11 children)
12	November 2013	68 (2 crew, 13 children)
13	November 2013	40 (4 crew, 8 children)
14	November 2013	39 (4 crew, 7 children)
15	November 2013	11 (2 crew, 2 children)
16	December 2013	31 (2 crew, 3 children)
17	December 2013	27 (2 crew, 2 children)
18	December 2013	72 (2 crew, 13 children)
19	December 2013	63 (2 crew, 14 children)
20	December 2013	5 (2 crew)
21	December 2013	71 (2 crew, 13 children)
22	December 2013	100 (2 crew, 25 children)
Financial Year 2014 – 2015		

23	July 2014	157 (50 children)
Financial Years 2015 - 2016 to 2018 - 2019 – no ventures unable to be returned		
Financial Year 2019 - 2020 – no ventures unable to be returned as at 1 March 2020		

Annexure B

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ADDITIONAL ESTIMATES
22 MARCH 2021

Home Affairs Portfolio
Department of Home Affairs

Program 1.4: IMA Offshore Management

AE21-292 - Asylum-Seekers - since 1 August 2012

Senator Stirling Griff asked:

Of the total 4,183 irregular maritime arrivals transferred to a regional processing country since 1 August 2012, please provide the current number of people:
a. who were returned to Australia
b. who have been transferred to Australia.
c. who remain in Papua New Guinea and Nauru.
d. who are residing in a third country.
e. who have returned to their country of origin.
f. who are deceased.

Answer:

As at 31 January 2021:

a. 882
b. 1,161
c. 263 (140 in PNG and 123 in Nauru)
d. 921
e. 938
f. 18

Annexure C

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ADDITIONAL ESTIMATES
22 MARCH 2021

Home Affairs Portfolio
Department of Home Affairs

Program 1.4: IMA Offshore Management

AE21-293 - Asylum-Seekers - 1 August 2012-19 July 2013

Senator Stirling Griff asked:

Of the asylum-seekers transferred to a regional processing country during the period 1 August 2012 to 19 July 2013, please provide the current number of people:
a. who are in Australia.
b. Who have been granted a visa, broken down by subclass
c. Who are in the Australian community without a visa.
d. Who are currently in a detention facility.
e. Who have returned to their country of origin.
f. Who are residing in a third country.
g. Who remain in a regional processing country.
h. Who are deceased.

Answer:

As at 31 January 2021:

a. 882 were in Australia.

b. 671 were in the Australian community with a visa in effect.

- 288 who were on a Subclass 050 (Bridging E) visa,
- 324 who were on a Subclass 790 (Safe Haven Enterprise) visa,
- 58 who were on a Subclass 785 (Temporary Protection) visa,
- Less than five who were on a Subclass 100 (permanent Partner) visa,

c. 204 were in the Australian community without a visa.

d. Six were in an immigration detention facility.

e. 168 were returned or removed to their country of origin

f. Zero were resettled in a third country.

g. Zero were in a regional processing country.

h. Five were deceased.

Annexure D

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ADDITIONAL ESTIMATES
22 MARCH 2021

Home Affairs Portfolio
Department of Home Affairs

Program 1.3: Onshore Compliance and Detention

AE21-294 - Asylum-Seekers - After 19 July 2013

Senator Stirling Griff asked:

Of the asylum-seekers transferred to a regional processing country on or after 19 July 2013, please provide the current number of people:
a. who are in Australia.
b. Who have been granted a visa, broken down by subclass
c. Who are in the Australian community without a visa.
d. Who are currently in a detention facility.
e. Who have returned to their country of origin, broken down by voluntary and involuntary
f. Who have been resettled in a third country (broken down by destination country)
g. Who remain in a regional processing country.
h. Who remain living in Cambodia.
i. Who are deceased.

Answer:

As at 31 January 2021:

a. 1160 (*Note: Figure excludes babies born onshore who had not been taken to a regional processing country.)*
b. 507, of which:
   - 439 were on a Subclass 050 (Bridging E) visa;
   - 64 were on a Subclass 790 (Safe Haven Enterprise) visa; and
   - Less than five were on a Subclass 785 (Temporary Protection) visa.
c. 446, of which:
   - 16 were on an expired Bridging E visa awaiting regrant; and
   - 430 were under a residence determination.
d. 207
e. 767, of which:
   - 747 were voluntary; and
   - 20 were involuntary.
f. 921, of which:
   - 890 were resettled in the United States;
   - seven were resettled in Cambodia; and
   - 24 were resettled in other third countries
g. 260
h. The Department does not maintain information on refugees who remain living in Cambodia
i. 13

Annexure E

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
BUDGET ESTIMATES
24-25 MAY 2021

Home Affairs Portfolio
Department of Home Affairs

Program 2.4: IMA Offshore Management

BE21-431 - Transitory persons in Australia

Senator Nick McKim asked:

The number of transitory persons in Australia (update of AE21-457):
a. In total;
b. Under the age of 18;
c. In held immigration detention;
d. Subject to a residence determination;
e. Holding a Bridging Visa E;
f. Who are unlawful non-citizens;
g. Who were born in Australia;
h. Who were born in a regional processing country?

Answer:

As at 31 March 2021:

a. there were 1,219 transitory persons in Australia
b. 267 were under the age of 18
c. 143 were in held detention
d. 514 were in the community under residence determination
e. 541 were holding a BVE
f. 678 were unlawful non citizens
g. 107 were born in Australia
h. 39 were born in a regional processing country