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Andrew & Renata Kaldor Centre for International Refugee Law

Factsheet

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

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Between 2012 and 2014, Australia transferred certain asylum seekers offshore to Nauru and Papua New Guinea (PNG). Some remain there today, while others are back in Australia on a temporary basis. Did these transfer arrangements shift Australia's legal responsibility or obligations with respect to people who arrived in Australia by boat seeking asylum?

What is the context?

Since 13 August 2012, some asylum seekers arriving in Australia by boat have been subject to 'offshore processing' in the Pacific island nations of Nauru and Papua New Guinea (PNG). These asylum seekers underwent preliminary screening in Australia, before being transferred 'offshore'. In Nauru and PNG, they were initially detained for long periods in highly securitised, closed detention centres (operated and serviced by private companies contracted and overseen by the Australian government), in conditions consistently described as cruel, inhuman and degrading. Refugee status determination (RSD) was carried out under the laws of Nauru and PNG, but with significant Australian involvement.

According to Australian government records, all asylum seekers trying to reach Australia by boat since July 2014 have been turned back at sea or otherwise returned to their countries of origin, rather than brought to Australia and then transferred offshore.

By January 2021, almost half of the approximately 4,180 people transferred offshore between 2012 and 2014 were back in Australia, having been either transferred back following a policy change in July 2013 or medically evacuated to Australia due to the progressively spiralling health crises amongst the transferred populations in Nauru and PNG.

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

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

Successive Australian governments have denied responsibility for people sent to Nauru and PNG, claiming that their treatment is wholly a matter for those States. But Australia's

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

It is important to note that both Australia *and* each offshore processing country may be legally responsible for various aspects of the care and treatment of people transferred offshore, with this responsibility overlapping in some cases.

What are Australia's obligations under international law with respect to people transferred to Nauru and PNG?

Australia has a range of legal obligations under international human rights and refugee law that may be relevant to people transferred to Nauru and PNG. Most importantly, it must not transfer people to any place where they would face persecution or other significant harm *(refoulement)*, or from where they would subsequently be returned to persecution or significant harm ('chain *refoulement*'). Australia must also take steps to respect and ensure the right to life of every person transferred offshore, as well as their freedom from torture or cruel, inhuman or degrading treatment or punishment, indefinite and arbitrary detention, and unlawful interference in their family and private lives. Australia is also obliged to ensure that women are not exposed to gender-based violence and discrimination, and that the rights of children are protected. Finally, UNHCR has repeatedly affirmed that Australia has obligations to find humane and appropriate solutions for the people it has transferred to Nauru and PNG, which for most would involve settlement in Australia.

What about Australia's responsibility under domestic law?

The Australian Parliament has broad powers to enact legislation on the subject of immigration and take action in relation to offshore processing. Despite these broad powers, offshore processing has faced near constant legal challenges in Australian courts.

In marked distinction from other liberal democracies, Australia does not have a bill or charter of rights, and most of Australia's obligations under international human rights and refugee law are not enshrined in federal legislation. As a result, it has not been possible to challenge offshore processing in Australian courts on the basis that the policy violates fundamental rules of international law. Instead, domestic challenges have largely involved questions of constitutional and tort law.

While the constitutional law challenges are yet to be successful in striking down offshore processing or the legislation underpinning it, there have been a series of successful class actions and other tort cases, with more proceedings on foot in 2021.

This factsheet is part of the Kaldor Centre's series of publications on offshore processing.