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Re: The Nationality and Borders Bill 2021

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Executive Summary

- This submission draws on Australia's 'Operation Sovereign Borders' to highlight the costs and risks of implementing extraterritorial processing and boat pushbacks in the United Kingdom.
- Australia's policies of offshore detention and boat turnbacks were associated with substantial human, financial and reputational costs.
- Offshore detention exposed asylum seekers to significant harm, including psychological harm. These harms were associated with structural aspects of offshore detention's design, suggesting that other systems of extraterritorial processing might encounter similar issues.
- By turning back asylum seeker boats rather than escorting asylum seekers to shore, Australia increased the risk of harm to asylum seekers. Any policy that prolongs the time that asylum seekers spend in the water will exacerbate the risk of harm to asylum seekers.
- Australia's policies of offshore detention and boat turnbacks generated significant financial costs, not all of which were fully predictable in advance. As these are continuing policy measures, Australia continues to incur costs related to offshore detention and boat turnbacks today.
- Australia's migration policies have damaged Australia's reputation and international standing. Australia now experiences diminished credibility when it speaks out on human rights issues.

- For these reasons, this submission argues against legislating to enable extraterritorial processing and boat pushbacks.
- The best way to prevent people from undertaking risky sea voyages is by increasing the opportunities for asylum seekers to travel to the United Kingdom safely through recognised routes. If people are provided with safe and lawful ways to seek asylum in England, they will no longer need to rely on people smugglers to undertake dangerous boat voyages.

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Introduction

2. This submission focuses on two aspects of the National and Borders Bill 2021:
 1. The possibility of removing asylum seekers to third safe countries for extraterritorial processing; and
 2. The possibility of introducing a regime of boat pushbacks.
3. This submission discusses how similar policies have been implemented in Australia through 'Operation Sovereign Borders'. This submission draws on the Australian experience to highlight the costs and risks of implementing such policies in the United Kingdom.
4. This submission strongly supports the Government's aim to 'protect the lives' of asylum seekers.¹ However, based on the Australian experience, this submission argues that the above proposed policies may increase the risk of harm to asylum seekers and come at a significant financial and reputational cost to the United Kingdom.

¹ Explanatory Notes to the Nationality and Borders Bill, para 1.

5. This submission argues against legislating to enable extraterritorial processing and boat pushbacks.
6. This submission suggests that the best way to ensure that asylum seekers do not undertake risky maritime journeys, thereby 'breaking the business model of people smuggling networks and protecting the lives of those they endanger',² is to increase the opportunities for asylum seekers to travel safely to the United Kingdom through recognised routes.

Offshore Detention and Operation Sovereign Borders

7. Given that this submission will be drawing lessons from Australia's asylum seeker policy, it is relevant to begin with a brief overview of Australia's history of offshore detention and 'Operation Sovereign Borders'.
8. In 2012, in response to increasing numbers of asylum seekers travelling to Australia by boat, the Labor Australian Government established a system of offshore detention. Commencing 13 August 2012, asylum seekers who arrived in Australia by boat were sent to offshore detention centres on Manus Island (Papua New Guinea) and Nauru.³ Asylum seekers were detained in these centres while their asylum claims were processed and a third country resettlement option was made available.
9. Initially, only some asylum seekers who arrived by boat were sent to offshore detention and asylum seekers found to be refugees were permitted to resettle in Australia. However, on 19 July 2013, Prime Minister Kevin Rudd announced a change to this policy.⁴ From this date onwards, all asylum seekers who arrived in Australia by boat were transferred to offshore detention and these asylum seekers were not eligible for resettlement in Australia.
10. In September 2013, the Coalition was elected to Government. On 18 September 2013, the Coalition introduced 'Operation Sovereign Borders'.⁵ Operation Sovereign Borders

² Ibid.

³ See *Migration Act 1958* (Cth) ss 198AB(2), 198AD(2).

⁴ Kevin Rudd, 'Regional Resettlement Arrangement' (press conference, 19 July 2013) <https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/2611766/upload_binary/2611766.pdf;fileType=application%2Fpdf#search=%22media/pressrel/2611766%22> accessed 20 October 2021.

⁵ *The Coalition's Operation Sovereign Borders Policy* (policy statement, July 2013) <http://past.electionwatch.edu.au/sites/default/files/docs/Operation%20Sovereign%20Borders_1.pdf> accessed 20 October 2021.

was designed to save lives and prevent asylum seeker deaths at sea, stop people smugglers, and restore the integrity of Australia's immigration system.⁶ Operation Sovereign Borders comprised three limbs:

1. The offshore detention of asylum seekers (which continued in largely the same form as under the previous Government);
 2. The reintroduction of temporary protection visas for asylum seekers already in Australia; and
 3. People-smuggling disruption activities, including boat turnbacks and other activities conducted in cooperation with regional partners to prevent asylum seekers departing for Australia.⁷
11. Boat turnbacks were authorised to commence on 17 December 2013. From this date onwards, the majority of asylum seeker boats travelling to Australia were interdicted and returned to their port of departure.
 12. From 19 July 2013, a total of 3,127 asylum seekers were sent to offshore detention.⁸ In March 2021, it was reported that of these asylum seekers, 1,463 remained subject to Australia's offshore detention regime and 1,198 had no immediate resettlement option.⁹ That is, eight years after they had arrived in Australia, more than one-third of asylum seekers who were subject to Australia's offshore detention policy were still waiting to be resettled. Australia's offshore detention system continues to operate today.
 13. From 17 December 2013, 818 asylum seekers on 41 boats have been involved in a turnback operation.¹⁰ This includes three boats carrying 33 asylum seekers that were turned back from Australia in 2019 and one boat carrying six asylum seekers that was

⁶ See, eg, Parliament of Australia, House of Representatives Debate, 1 September 2014, 9155 (Scott Morrison); Parliament of Australia, House of Representatives Debate, 20 October 2014, 11255 (Scott Morrison); Parliament of Australia, House of Representatives Debate, 2 December 2015, 14453 (Peter Dutton); Parliament of Australia, House of Representatives Debate, 7 November 2016, 2912 (Malcolm Turnbull).

⁷ *The Coalition's Operation Sovereign Borders Policy* (n 5).

⁸ Parliament of Australia, Additional Estimates Hearing (27 February 2017) Question AE17-170 <https://www.aph.gov.au/~media/Committees/legcon_ctte/estimates/add_1617/DIBP/QoNs/AE17-170.pdf> accessed 20 October 2021.

⁹ Parliament of Australia, Senate, Legal and Constitutional Affairs Legislation Committee, Estimates Hearing (22 March 2021) 172–73.

¹⁰ Refugee Council of Australia, 'Statistics on Boat Arrivals and Boat Turnbacks' (21 July 2021) <https://refugeecouncilms.sharepoint.com/:x/s/Public/EbZuBRnxtJxDr8CjkRtm_yIBBS04uz42kVzguhjyqLVetQ?rttime=cqXWBLyN2Ug> accessed 20 October 2021.

turned back from Australia in 2020. Eight years after Australia started turning back asylum seeker boats, this practice continues to form part of Australia's policy response towards asylum seekers today.

The Costs of Operation Sovereign Borders

14. Operation Sovereign Borders demonstrates a number of potential risks for the UK in introducing policies of extraterritorial processing and boat pushbacks. In particular, the Australian experience suggests that such policies come with significant human, financial and reputational costs.

The Human Costs of Australia's Policy

The Human Costs of Offshore Detention

15. Offshore detention had a significant and profound impact on asylum seekers.
16. There were extensive shortcomings in the detention centre environment. The large number of asylum seekers held in offshore detention meant that accommodation quickly became overcrowded.¹¹ This overcrowding put strain on the facilities and services provided in offshore detention. Concerns were raised about the availability and quality of food and water provided to asylum seekers.¹² Asylum seekers frequently had to queue

¹¹ See Amnesty International, *This is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea* (report, 11 December 2013) <<https://www.amnesty.org/en/documents/ASA12/002/2013/en/>> accessed 20 October 2021, 6; Amnesty International, *This is Still Breaking People: Update on Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea* (report, May 2014) <<https://www.amnesty.org/en/documents/ASA12/002/2014/en/>> accessed 20 October 2021, 5; Parliament of Australia, Legal and Constitutional Affairs References Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (Report, December 2014) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island/Report> accessed 20 October 2021, paras 1.54, 3.3, 3.4; Parliament of Australia, Select Committee on the Recent Allegations Relating to the Conditions and Circumstances at the Regional Processing Centre in Nauru, *Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru* (report, August 2015) para 3.40; Parliament of Australia, Legal and Constitutional Affairs References Committee, *Serious Allegations of Abuse, Self-Harm and Neglect of Asylum Seekers in Relation to the Nauru Regional Processing Centre, and any Like Allegations in Relation to the Manus Regional Processing Centre* (report, April 2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Report> accessed 20 October 2021, paras 2.83, 2.84.

¹² See Amnesty International, *This is Breaking People* (n 11) 41, 43; Amnesty International, *This is Still Breaking People* (n 11) 7; Parliament of Australia, *Incident at the Manus Island Detention Centre* (n 11) paras 3.18–3.21; Parliament of Australia, *Taking Responsibility* (n 11) para 3.70–

to use the bathroom,¹³ leading to some asylum seekers becoming incontinent.¹⁴ There was a significant demand for medical care, but only a limited range of services were available in offshore detention, and the local hospitals had a limited capacity to meet the complex needs of asylum seekers.¹⁵ Many asylum seekers had significant medical issues that went untreated.¹⁶

17. Responsibility for refugee status processing in offshore detention was ostensibly passed from the Australian Government to the Governments of Papua New Guinea and Nauru.¹⁷ Because these Governments had limited experience in refugee status determination, significant delays and deficiencies emerged.¹⁸ The Australian Government refused to permit asylum seekers to be resettled in Australia, and there were delays by the Australian Government in arranging and negotiating a suitable and durable resettlement option for refugees.¹⁹ This meant that asylum seekers were effectively held in a state of indefinite detention for a number of years.

3.77; Parliament of Australia, *Serious Allegation of Abuse, Self-Harm and Neglect* (n 11) paras 2.15, 2.84. See further Behrouz Boochani, *No Friend but the Mountains* (Anansi 2018) 173–77, 197, 204; Javiet Ealom, *Escape from Manus* (Penguin 2021) 118, 124–25.

¹³ See Amnesty International, *This is Breaking People* (n 11) 38, 40–41; Parliament of Australia, *Taking Responsibility* (n 11) para 3.65; Ealom (n 12) 112, 115.

¹⁴ See Parliament of Australia, *Taking Responsibility* (n 11) para 3.65.

¹⁵ See Amnesty International *This is Breaking People* (n 11) 52–57; Parliament of Australia, *Incident at the Manus Island Detention Centre* (n 11) paras 3.22–3.26, 3.29–3.34; Parliament of Australia, *Taking Responsibility* (n 11) paras 3.108–3.126; Parliament of Australia, *Serious Allegations of Abuse, Self-Harm and Neglect* (n 11) paras 2.46–2.65; Amnesty International, *Island of Despair: Australia’s “Processing” of Refugees on Nauru* (report, 2016) <<https://www.amnesty.org/en/documents/asa12/4934/2016/en/>> accessed 20 October 2021, 24–25.

¹⁶ See Amnesty International, *This is Breaking People* (n 11) 54; Amnesty International, *This is Still Breaking People* (n 11) 9; Parliament of Australia, *Incident at the Manus Island Detention Centre* (n 11) paras 3.22–3.26, Parliament of Australia, *Serious Allegations of Abuse, Self-Harm and Neglect* (n 11) para 2.60.

¹⁷ Parliament of Australia, *Incident at the Manus Island Detention Centre* (n 11) para 4.7, see also paras 4.11–4.13.

¹⁸ Parliament of Australia, *Incident at the Manus Island Detention Centre* (n 11) paras 4.29–4.63

¹⁹ The Australian Government only agreed to a refugee resettlement deal with the United States in 2016. While other resettlement options were proposed (in Papua New Guinea, Nauru and Cambodia), these countries were criticised by refugee advocates for being unsuitable and unable to support refugees’ complex needs.

18. The Office of the Prosecutor at the International Criminal Court, among others,²⁰ has determined that the conditions in detention amounted to ‘cruel, inhuman and degrading treatment’.²¹
19. The consequence of these factors was a harsh and punitive environment for asylum seekers. Behrouz Boochani, a Kurdish-Iranian journalist and asylum seeker who was held on Manus Island, explained the impact of detention on asylum seekers’ mental state:

The main policy here on Manus is to put asylum seekers in a time tunnel. In other words, none of the asylum seekers are aware of the stage of their own application and others’. They have no idea about the period of time they would be kept in the detention and what future is waiting for them. They do not even know which country or city they would live after getting released... Being in perpetual limbo has so many destructive impacts on the mental health of every single person. Several times I have witnessed a large number of detainees become mentally shattered due to being kept under such pressure. I have seen many cases of self-harm and suicide attempt. Inflicting torture by the use of time is the best and complete explanation of this situation.²²

20. Another asylum seeker, Javiet Ealom, wrote about the impact of detention on his mental state:

While the Manus Island detention centre looked like a military camp located inside a prison, it was in fact the reverse: a prison in a naval base... To say I spent my time thinking would be overstating things. It was worrying rather than reflecting, and it happened in a never-ending loop. For the first time in my life, I lost the capacity for progressive reasoning. There

²⁰ Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E Méndez, Observations on Communications Transmitted to Governments and Replies Received, 38th sess, Agenda Item 3, UN Doc A/HRC/28/68/Add.1 (5 March 2015) para 18; Human Rights Council, Report of the Special Rapporteur on the Human Rights of Migrants on his mission to Australia and the Regional Processing Centres in Nauru, 35th sess, Agenda Item 3, UN Doc A/HRC/35/25/Add.3 (24 April 2017) para 80; United Nations Office of the High Commissioner of Human Rights, ‘Australia: UN Experts Urge Immediate Medical Attention to Migrants in its Offshore Facilities’ (Media item, 18 June 2019) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24709&LangID=E>> accessed 20 October 2021. See further United Nations Committee Against Torture, Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia, UN Doc CAT/C/AUS/CO/4-5 (23 December 2014).

²¹ Office of the Prosecutor, OTP-CR-322/14/001 (Letter, 12 February 2020) <[https://uploads.guim.co.uk/2020/02/14/200213-Andrew-Wilkie-Response-from-International-Criminal-Court-Australian-Government-treatment-of-asylum-seekers_\(1\).pdf](https://uploads.guim.co.uk/2020/02/14/200213-Andrew-Wilkie-Response-from-International-Criminal-Court-Australian-Government-treatment-of-asylum-seekers_(1).pdf)> accessed 20 October 2021, 4.

²² Behrouz Boochani, ‘This is Manus Island. My Prison. My Torture. My Humiliation’, *Guardian Australia* (19 February 2016) <<https://www.theguardian.com/commentisfree/2016/feb/19/this-is-manus-island-my-prison-my-torture-my-humiliation>> accessed 20 October 2021.

was no way to step outside the misery, even in sleep, to return with a fresh mind and puzzle through the problem.²³

21. Medical evidence verifies the significant impact of offshore detention on asylum seekers.
22. In 2016, a UNHCR delegation including three expert medical consultants conducted surveys of asylum seekers on Manus Island and Nauru. The medical experts observed that the overwhelming majority of asylum seekers and refugees had no pre-existing psychiatric disorder prior to their detention.²⁴ However, since entering detention, 88% of the asylum seekers on Manus Island had developed a depressive or anxiety disorder and/or post-traumatic stress disorder, and 83% of the asylum seekers on Nauru had developed post-traumatic stress disorder and/or depression.²⁵ This rate was significantly higher than comparable populations (including newly resettled refugees in Australia and asylum seekers living in the Australian community)²⁶ providing a strong indication that it was the offshore environment that caused and exacerbated asylum seekers' mental distress.
23. In 2018, Médecins Sans Frontières provided healthcare on Nauru for 11 months. Among their 208 refugee and asylum seeker patients, 62% were diagnosed with moderate or severe depression, 60% had suicidal thoughts and 30% had attempted suicide, including children as young as nine years old.²⁷ Médecins Sans Frontières reported that the mental suffering among asylum seekers on Nauru was 'among the most severe MSF has ever seen, including in projects providing care for victims of torture.'²⁸
24. In 2016, consultant paediatricians employed by the Australian Human Rights Commission interviewed children detained at Wickham Point Detention Centre, who had formerly been held on Nauru. The paediatricians noted that these children were 'among

²³ Ealom (n 12) 92.

²⁴ United Nations High Commissioner for Refugees, Submission 43 to Commonwealth of Australia, Commonwealth of Australia, 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* <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Submissions> accessed 20 October 2021, para 28.

²⁵ Ibid paras [33], [41].

²⁶ Ibid para [34].

²⁷ Médecins Sans Frontières, *Indefinite Despair: The Tragic Mental Health Consequences of Offshore Processing on Nauru* (report, December 2018) <https://msf.org.au/sites/default/files/attachments/indefinite_despair_3.pdf> accessed 20 October 2021, 4.

²⁸ Ibid.

the most traumatised children the paediatricians have ever seen.²⁹ 19 of the 20 children administered the Childhood Trauma Screening Questionnaire were in the clinical range signifying risk for Post-Traumatic Stress Disorder.³⁰ 20 of the 21 children administered the Hunter Opinion and Personal Expectations Scale received the highest possible score for hopelessness, and 18 of 21 received the highest possible score for despair.³¹ In 2018, evidence emerged that some children in offshore detention were suffering 'resignation syndrome', a condition where the child ceases eating or drinking, appears 'floppy' and enters a comatose state brought on by 'an intolerable reality.'³²

25. 12 asylum seekers and refugees have died while in immigration detention on Manus Island and Nauru.³³ These deaths include Reza Barati, who was killed during an attack on the detention centre by Manus Island locals; Faysal Ishak Ahmed and Hamid Kehazaei, who both died after failing to receive appropriate and timely medical attention; and multiple asylum seekers with histories of significant and worsening mental health conditions who committed suicide.³⁴
26. It is important to note that the harms experienced by asylum seekers in offshore detention are not merely the result of deficiencies or inadequacies in the Australian regime. The risk of harm to asylum seekers is embedded within the policy structure of extraterritorial processing.
27. When detention centres are located offshore in a developing country, there is inevitably a risk that the infrastructure in that country will be insufficient to meet the needs of asylum seekers. Australia invested significant funds in offshore detention (see below

²⁹ Elizabeth Elliott and Hasantha Gunasekera, *The Health and Well-being of Children in Immigration Detention: Report to the Australian Human Rights Commission - Monitoring Visit to Wickham Point Detention Centre, Darwin, NT* (report, 4 February 2016) <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/health-and-well-being-children-immigration>> accessed 20 October 2021, 18.

³⁰ Ibid 15.

³¹ Ibid 17.

³² Médecins Sans Frontières (n 27) 4; Louise Newman, 'Explainer: What is Resignation Syndrome and why is it Affecting Refugee Children?', *The Conversation* (22 August 2018) <<https://theconversation.com/explainer-what-is-resignation-syndrome-and-why-is-it-affecting-refugee-children-101670>> accessed 20 October 2021.

³³ Ben Doherty, Nick Evershed and Andy Ball, 'Deaths in Offshore Detention: The Faces of the People who have Died in Australia's Case' *Guardian Australia* (19 June 2018) <<https://www.theguardian.com/australia-news/ng-interactive/2018/jun/20/deaths-in-offshore-detention-the-faces-of-the-people-who-have-died-in-australias-care>> accessed 20 October 2021.

³⁴ Ibid.

para 37) and undertook capacity building activities in Papua New Guinea and Nauru. Despite this assistance, as detailed above, there were still significant shortcomings in how offshore detention and processing were operated.

28. Any closed detention environment creates a risk of harm to asylum seekers. There is a relationship between human rights abuses and closed detention environments.³⁵ This is exacerbated in detention centres located offshore, where external oversight is geographically limited and the state is dependent on foreign state and private actors to assist with the operation and management of extraterritorial processing.
29. It is worth noting that, under international law, the state that asylum seekers are transferred from (such as Australia or the United Kingdom) remains jointly responsible for those asylum seekers.³⁶ Therefore, the state will be responsible for any breaches of international law connected with the detention of asylum seekers extraterritorially.
30. **What lessons for the United Kingdom?** The evidence from Australia demonstrates that offshore detention did not 'protect the lives' of asylum seekers. To the contrary, offshore detention exposed asylum seekers to significant harm, including mental harm, and played a role in asylum seekers' deaths. These harms were connected to structural aspects of offshore detention's design, suggesting that any extraterritorial processing policies might encounter similar issues.

The Human Costs of Boat Turnbacks

31. The ocean is a dangerous and unpredictable environment. The boats used in asylum seeker journeys are often unseaworthy and overcrowded, without appropriate safety equipment. As such, asylum seekers undertaking a journey by boat are often in a situation where there is a considerable risk to their health and safety.
32. Any policy that prolongs the time that asylum seekers spend in the water will extend the risk of harm to asylum seekers. The Australian experience demonstrates that, even

³⁵ See Amy Nethery and Rosa Holman, 'Secrecy and Human Rights Abuse in Australia's Offshore Immigration Detention Centres' (2016) 20(7) *The International Journal of Human Rights* 1018, 1021-23; Bronwyn Naylor, Julie Debeljak, and Anita Mackay, 'A Strategic Framework for Implementing Human Rights in Closed Environments' (2015) 41(1) *Monash University Law Review* 218.

³⁶ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001* chapter IV. See further discussion in *Incident at the Manus Island Detention Centre* (n 11) paras 7.20–7.39.

where precautions are taken to minimise the risk of harm to asylum seekers, the safety of asylum seekers cannot be guaranteed in boat pushback operations.

33. The Australian Government's position was that it only turned boats back to Indonesia when it was safe to do so. Asylum seekers were either returned in their own vessel (which had been repaired and made seaworthy by the Navy if necessary) or a purpose-build lifeboat provided by the Australian Government.³⁷ Asylum seekers were escorted to within three or four hours of Indonesia's shoreline before being released by the Australian Government.
34. Multiple reports have emerged of asylum seekers getting into distress after being released by the Australian authorities. These include asylum seekers having to swim for an hour to reach the shore after their boat ran out of fuel,³⁸ local villagers having to rescue asylum seekers from the ocean after they became stranded,³⁹ and asylum seekers requiring rescue from the Indonesian Navy.⁴⁰ In 2001, three asylum seekers drowned while trying to swim to shore after being turned back to Indonesia by Australia.⁴¹
35. Under the Law of the Sea, vessels have a duty to render assistance to other vessels in distress.⁴² 'Rescue' includes retrieving people in distress, attending to their medical and other needs, and delivering them to 'a place of safety'.⁴³ A 'place of safety' is 'a location

³⁷ See Ben Doherty and Helen Davidson, 'Orange Lifeboats Used to Return Asylum Seekers to be Replaced by "Fishing Boats"', *Guardian Australia* (5 March 2015) <<https://www.theguardian.com/australia-news/2015/mar/05/orange-lifeboats-used-to-return-asylum-seekers-to-be-replaced-by-fishing-boats>> accessed 20 October 2021.

³⁸ Peter Alford, 'Fishing boat was intercepted, refuelled, repaired and steered back: asylum-seeker' *The Australian* (24 January 2014) <<http://www.theaustralian.com.au/national-affairs/policy/fishing-boat-was-intercepted-refuelled-repaired-and-steered-back-asylum-seeker/story-fn9hm1gu-1226809036471>> accessed 20 October 2021; Michael Bachelard, 'Vomitous and terrifying: the Lifeboats used to turn back asylum seekers', *Sydney Morning Herald* (2 March 2014) <<https://www.smh.com.au/national/vomitous-and-terrifying-the-lifeboats-used-to-turn-back-asylum-seekers-20140301-33t6s.html>> accessed 20 October 2021.

³⁹ Michael Bachelard, 'Australia turns back asylum seeker boat from Indonesia', *Sydney Morning Herald* (15 January 2014) <<https://www.smh.com.au/politics/federal/australia-turns-back-asylum-seeker-boat-from-indonesia-20140115-30vds.html>> accessed 20 October 2021.

⁴⁰ Michael Bachelard, 'Asylum seekers from two boats combined onto one for turn-back to Indonesia', *Sydney Morning Herald* (6 May 2014) <<https://www.smh.com.au/politics/federal/asylum-seekers-from-two-boats-combined-onto-one-for-turnback-to-indonesia-20140506-zr5kb.html>> accessed 20 October 2021.

⁴¹ ABC TV, 'To Deter and Deny', Four Corners, 15 April 2002. For a transcript, see <http://sievx.com/articles/psdp/20020415FourCorners.html>.

⁴² *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) Article 98.

⁴³ *International Convention on Maritime Search and Rescue*, opened for signature 27 April 1979, 1405 UNTS 119 (entered into force 22 June 1985) annex, para 1.3.2.

where rescue operations are considered to terminate,' 'where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met', and 'a place from which transportation arrangements can be made for the survivors' next or final destination.'⁴⁴ Expert opinion suggests that Australia's policy of leaving asylum seekers to navigate back to Indonesia, both in their own vessels and in lifeboats provided by Australia, failed to satisfy Australia's obligations to return asylum seekers in distress to a 'place of safety'.⁴⁵

36. **What lessons for the United Kingdom?** The evidence from Australia demonstrates that, by failing to escort asylum seekers to a place of safety, Australia increased the risk of harm to asylum seekers. When asylum seekers are left to navigate themselves to shore, this creates a risk that asylum seekers will fall into danger before reaching land. Therefore, a policy of boat pushbacks risks exacerbating the danger to asylum seekers, rather than operating to 'protect the lives' of asylum seekers.

The Financial Costs of Australia's Policy

The Financial Costs of Offshore Detention

37. Australian Government data indicate that offshore detention cost Australia at least \$1 billion per year to operate, reaching a peak of over \$1.49 billion in 2017-18.⁴⁶
38. It is unclear whether this figure includes a range of other costs associated with offshore processing, including the provision of aid and development assistance to Papua New Guinea and Nauru; transfers of asylum seekers to and from Australia, including for medical treatment; and the cost of entering into resettlement agreements with third

⁴⁴ International Maritime Organisation, *Guidelines on the Treatment of Persons Rescued at Sea*, MSC.167(78), UN Doc MSC78/26/Add.2 (20 May 2004) Article 6.12.

⁴⁵ See Joyce Chia, Jane McAdam and Kate Purcell, 'Asylum in Australia: "Operation Sovereign Borders" and International Law' (2014) 32 *Australian Yearbook of International Law* 33, 60; Daniel Ghezelbash, Violeta Moreno-Lax, Natalie Klein, and Brian Opeskin, 'Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia' (2018) 67(2) *International & Comparative Law Quarterly* 315, 338-39; Violeta Moreno-Lax, 'The Interdiction of Asylum Seekers at Sea: Law and (mal)practice in Europe and Australia' (Policy Brief 4, Kaldor Centre for International Refugee Law, May 2017) <<https://www.kaldorcentre.unsw.edu.au/publication/policy-brief-4-interdiction-asylum-seekers-sea-law-and-malpractice-europe-and-australia>> accessed 20 October 2021, 7-8.

⁴⁶ Madeline Gleeson and Natasha Yacoub, 'Cruel, Costly and Ineffective: The Failure of Offshore Processing in Australia' (Policy Brief 11, Kaldor Centre for International Refugee Law, August 2021) <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf> accessed 20 October 2021, 10.

countries.⁴⁷ Accordingly, Gleeson and Yacoub caution that the real cost of offshore processing could be considerably higher than that reported by the Government.⁴⁸

39. A 2016 report by Save the Children Australia and UNICEF Australia found that offshore detention cost Australia over \$400,000 per asylum seeker per year.⁴⁹ In contrast, Australia would have saved over \$300,000 per person per year if asylum seekers had been permitted to remain in Australia in community detention or on a bridging visa while their refugee status was being determined.⁵⁰
40. Additionally, offshore detention has produced a number of incidental costs, including in responding to litigation brought against various aspects of offshore detention. Australia's policy has been subject to legal challenge in the High Court of Australia,⁵¹ the Federal Court of Australia,⁵² the Supreme Court of Papua New Guinea⁵³ and the International Criminal Court.⁵⁴ In September 2017, the Australian Government paid AUD \$70 million to settle a class action lawsuit brought by asylum seekers detained on Manus Island, alleging they were illegally detained in dangerous and damaging conditions.⁵⁵
41. Australia's offshore detention costs have consistently exceeded government projections.⁵⁶ This suggests difficulties in accurately forecasting and budgeting for offshore detention.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Save the Children Australia and UNICEF, *At What Cost? The Human, Economic and Strategic Cost of Australia's Asylum Seeker Policies and the Alternatives* (report) <<https://www.unicef.org.au/Upload/UNICEF/Media/Documents/At-What-Cost-Report.pdf>> accessed 20 October 2021, 43.

⁵⁰ Ibid.

⁵¹ *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1.

⁵² *Plaintiff S99/2016 v Minister for Immigration and Border Protection* (2016) 243 FCR 17.

⁵³ *Namah v Pato* [2016] PGSC 13.

⁵⁴ Office of the Prosecutor (n 21).

⁵⁵ Slater and Gordon Lawyers, 'Manus Island Class Action' (webpage, 2021) <<https://www.slatergordon.com.au/class-actions/current-class-actions/manus-island>> accessed 20 October 2021.

⁵⁶ Gleeson and Yacoub (n 46) 11. See also Michael Green, 'Budget Blowouts: Offshore Processing Costs \$1.2bn for Fewer than 300 People', *The Guardian* (10 December 2020) <<https://www.theguardian.com/australia-news/2020/dec/11/budget-blowouts-offshore-processing-costs-12bn-for-fewer-than-300-people>> accessed 20 October 2021.

42. **What lessons for the United Kingdom?** The Australian experience suggests that a policy of extraterritorial processing is likely to generate significant financial costs and not all of these costs may be fully predictable in advance.

The Financial Costs of Boat Turnbacks

43. Australian Government data, compiled and analysed by the Asylum Seeker Resource Centre, indicate that boat turnbacks cost Australia AUD \$186.5 million in the four years from 2016-17 to 2019-20.⁵⁷
44. In reaching this figure, the Asylum Seeker Resource Centre noted that ‘this, in all probability, is a serious underestimation of the total cost of the program’ given the ‘patchy nature and lack of transparent reporting on spending.’⁵⁸
45. Australia’s boat turnbacks began in December 2013. These turnbacks have continued to operate as a border policing strategy to the present day (see above para 13). This suggests that asylum seekers will continue to attempt dangerous journeys despite stringent border controls when they are in need of safety. As such, boat pushbacks are likely to be an ongoing, rather than discrete, policy response. This means that boat pushbacks are likely to generate ongoing financial costs, even if or when the number of boat arrivals starts to decrease.
46. **What lessons for the United Kingdom?** The Australian experience demonstrates that a policy of boat pushbacks is likely to generate significant financial costs that will need to be continually sustained, even if the number of asylum seeker boats attempting to travel to the United Kingdom begins to decrease.

The Reputational Costs of Australia’s Policy

47. Australia has faced significant criticism for its policies of offshore detention and boat turnbacks, both domestically and on the international stage.

⁵⁷ Asylum Seeker Resource Centre, Save the Children and Get Up, *At What Cost? The Human and Economic Cost of Australia’s Offshore Detention Policies 2019* (report) <<https://asrc.org.au/wp-content/uploads/2013/04/1912-At-What-Cost-report.pdf>> accessed 20 October 2021, 15.

⁵⁸ Ibid.

48. Domestically, offshore detention has been an unpopular policy with the Australian public, as demonstrated by significant community advocacy and resistance.⁵⁹ For example, in 2016, widespread protest action occurred following an announcement that the Australian Government planned to return 267 asylum seekers to offshore detention who had been brought to Australia for medical treatment. Thousands of Australians attended “Let them Stay” marches across the country.⁶⁰ Over 100 churches across the country announced their intention to invoke the right of sanctuary to prevent asylum seekers from being removed to offshore detention.⁶¹ Although the Government won a High Court case allowing the asylum seekers to be returned to offshore detention, the protests ultimately resulted in the Government deciding instead to permit the asylum seekers to remain in Australia in community detention.⁶²
49. Internationally, Australia’s asylum seeker policies have been criticised by UNHCR,⁶³ the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁶⁴ and the UN Special Rapporteur on the Human Rights of Migrants.⁶⁵

⁵⁹ See Ryan Essex, ‘Contentious Politics, Human Rights and Australian Immigration Detention’ (2019) 25(3) *Australian Journal of Human Rights* 376.

⁶⁰ ‘Asylum Seekers: Let Them Stay Protests Draw Thousands in Cities Across Australia’, *Guardian Australia* (8 February 2016) <<https://www.theguardian.com/australia-news/2016/feb/09/asylum-seekers-let-them-stay-protests-draw-thousands-in-cities-across-australia>> accessed 20 October 2021.

⁶¹ Michael Edwards, ‘Sanctuary Offered to Asylum Seekers Facing Removal to Offshore Detention by Churches Across Australia’, *ABC News* (3 February 2016) <<https://www.abc.net.au/news/2016-02-04/churches-offer-sanctuary-to-asylum-seekers/7138484>> accessed 20 October 2021.

⁶² Thomas Oriti, ‘Let Them Stay Labelled a Success, More than Half of 267 Asylum Seekers in Community Detention’, *ABC News* (1 April 2016) <<https://www.abc.net.au/news/2016-04-02/let-them-stay-labelled-success-asylum-seeker-community-detention/7294456>> accessed 20 October 2021.

⁶³ See, United Nations High Commissioner for Refugees, *UNHCR Monitoring Visit to the Republic of Nauru, 7 to 9 October 2013* (Report, 26 November 2013) <<https://www.refworld.org/docid/5294a6534.html>>; United Nations High Commissioner for Refugees, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea 23 to 25 October 2013* (Report, 26 November 2013) <<https://www.unhcr.org/en-au/publications/legal/58117aff7/unhcr-monitoring-visit-to-manus-island-papua-new-guinea-23-to-25-october.html>>; United Nations High Commissioner for Refugees, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea 11-13 June 2013* (Report, 12 July 2013) <<https://www.refworld.org/pdfid/51f61ed54.pdf>>.

⁶⁴ Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E Méndez (n 20).

⁶⁵ Human Rights Council, Report of the Special Rapporteur on the Human Rights of Migrants on his mission to Australia and the Regional Processing Centres in Nauru (n 20).

Australia's asylum seeker policies have also been criticised by countries such as China and Iran.⁶⁶

50. **What lessons for the United Kingdom?** Australia's migration policies have damaged Australia's reputation and international standing. Australia now experiences diminished credibility when it speaks out on human rights issues. Given that the United Kingdom plays a leading role in advocating for human rights on the global stage, it should carefully consider whether its reputation will be damaged by implementing similar policies.

Conclusion: How to 'Protect the Lives' of Asylum Seekers?

51. One of the key objectives of the Nationality and Borders Bill is 'to deter illegal entry into the United Kingdom, thereby breaking the business model of people smuggling networks and protecting the lives of those they endanger.'⁶⁷ It is suggested that this could be achieved through extraterritorial processing and boat pushbacks, among other measures.
52. This submission has shown that a policy of offshore detention and boat turnbacks in Australia resulted in significant human, financial and reputational costs. Ultimately, rather than 'protecting the lives' of asylum seekers, Australia's offshore detention and boat turnback policies increased the risk of harm to asylum seekers.
53. When people are in a precarious situation, there will rarely be a sufficient deterrent to prevent them from risking their lives for the chance at safety and security. Extraterritorial processing and boat pushbacks are unlikely to deter asylum seekers from travelling to the United Kingdom by boat if they feel that such a journey is their only chance for safety.
54. The best way to prevent people from undertaking risky sea voyages is by increasing the opportunities for asylum seekers to travel to the United Kingdom safely through recognised routes. If people are provided with safe and lawful ways to seek asylum in England, they will no longer need to rely on people smugglers to undertake dangerous boat journeys.

⁶⁶ Thea Cowie, 'China joins criticism of Australian asylum policy' *SBS News* (21 February 2014) <<https://www.sbs.com.au/news/china-joins-criticism-of-australian-asylum-policy>> accessed 20 October 2021.

⁶⁷ Explanatory Notes to the Nationality and Borders Bill, para 1.