Law Council
OF AUSTRALIA

13 February 2026

Senator Jana Stewart
Chair
Senate Legal and Constitutional Affairs Legislation Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

By email: Senator.Stewart@aph.gov.au and legcon.sen@aph.gov.au

Dear Senator Stewart

Inquiry into Offshore Processing and Resettlement Arrangements

Thank you for the opportunity to make a submission to the Senate Legal and Constitutional Affairs References Committee's Inquiry into Offshore Processing and Resettlement Arrangements. The Senate referred this inquiry to the Committee for report by 1 June 2026.

The Law Council does not wish to make any submissions on the financial matters relating to offshore processing, which are covered by subparagraphs (a)(i)–(iv) of the Terms of Reference. Instead, this submission will focus on the issue of potential *refoulement* of people to whom Australia owes protection obligations, by countries (including Nauru) with which Australia has offshore processing and resettlement arrangements. This matter falls within paragraph (b) of the Terms of Reference.

Offshore processing arrangements

The Law Council acknowledges that the High Court of Australia has upheld the constitutional validity of Australia's domestic statutory provisions supporting the regime for detention of asylum seekers in Nauru.[1] However, the High Court's decision does not mean that Australia's offshore detention regime is free of any legal constraints or is consistent with Australia's international legal obligations.

Offshore processing must accord, in particular, with Australia's international human rights obligations, and its obligations under the 1951 *Convention relating to the Status of Refugees* and the 1967 *Protocol relating to the Status of Refugees* (together the **Refugee Convention**).[2]

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1 Plaintiff M68/2015 v Minister for Immigration and Border Protection and Ors (2016) 327 ALR 369; [2016] HCA 1.

2 Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954); Protocol Relating to the Status of Refugees, opened for signature 31

Non-refoulement obligations under the Refugee Convention and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**CAT**) prohibit Australia from returning a person to a State where they are a refugee whose "life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion",[3] or where there are substantial grounds for believing that individual would be in danger of being subjected to torture.[4] Non-refoulement obligations also arise by implication under the *International Covenant on Civil and Political Rights* (**ICCPR**) and the *Convention on the Rights of the Child* (**CRC**).[5]

These obligations are reflected in section 36 of the *Migration Act 1958*, which provides criteria for the grant of a protection visa. This includes where the applicant is a refugee (paragraph 36(2)(a)),[6] or owed complementary protection under the CAT, ICCPR (including its Second Optional Protocol, *Aiming at the Abolition of the Death Penalty*)[7] and CRC (paragraph 36(2)(aa)).[8]

Non-refoulement obligations cannot be claimed under the Refugee Convention where there are reasonable grounds for regarding the person as a danger to the security of the receiving state, or the person has been convicted by a final judgment of a particularly serious crime and constitutes a danger to the community of that country.[9] However, those grounds do not apply in respect of non-refoulement obligations under the CAT, ICCPR or CRC.

The system of international refugee protection envisaged by the Refugee Convention assumes that Australia, as a State party, will take responsibility for assessing the claims of those seeking asylum in Australia, and provide protection for those found to engage Australia's protection obligations. Where arrangements are entered into between Australia and other States for the purpose of processing protection claims and providing resettlement, Australia remains responsible for ensuring that international human rights and refugee law obligations are adhered to under any such arrangements. The UN

January 1967, 606 UNTS 267 (entered into force 4 October 1967). The principle of non-refoulement appears at art 33.

3 Refugees Convention, Article 33(1).

4 Article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

5 See Articles 2, 6 and 7 of the International Covenant on Civil and Political Rights (opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976)) and articles 6 and 37(a) of the Convention on the Rights of the Child (opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)). See also United Nations Human Rights Committee, General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 80th session, UN Doc CCPR/C/21/Rev.1/Add. 13 (29 March 2004) [12]; United Nations Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 39th session, UN Doc CRC/GC/2005/6 [27].

6 The term "refugee" is defined in section 5H of the Migration Act, and the associated term "well-founded fear of persecution" is defined in section 5J.

7 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).

8 Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2025 (Cth) 1.

9 Refugees Convention, Article 33(2).

Human Rights Committee has confirmed this is the case in circumstances including where Australia:

- establishes policies to transfer unauthorised maritime arrivals to be taken to a Regional Processing Centre (**RPC**);
- funds detention operations at that RPC;
- participates in jointly managing or monitoring the detention operations; and
- selects companies that would be responsible (directly or through subcontractors) for construction, security, garrison, health and other services at the detention centre.[10]

It also cited the findings of this Committee in 2017 that "the Australian Government clearly has a duty of care in relation to the asylum seekers who have been transferred to Nauru or Papua New Guinea. To suggest otherwise is fiction."[11]

In relation to bilateral agreements for the transfer of asylum seekers between States, such as those that exist between Australia and RPCs, the United Nations High Commissioner for Refugees takes the view that the arrangement must guarantee protection against refoulement, and that the transferring state may retain responsibility for other obligations under international human rights law and refugee law.[12]

The Law Council's view is that regional offshore processing arrangements are permissible provided that they meet Australia's international obligations.[13] However, in practice, these obligations have not been met.[14] The Law Council's concerns have included the

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[10] Human Rights Committee, Views: Communication No. 2749/2016, 142nd session, UN Doc CCPR/C/142/D/2749/2016 (31 October 2024) (M.I. et al v Australia) [9.9]; Human Rights Committee, Views: Communication No. 3663/2019, 142nd session, UN Doc CCPR/C/142/D/3663/2019 (25 October 2024) (Nabhari v Australia) [7.15].

[11] Nabhari v Australia [7.12]; citing Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, Serious Allegations of Abuse, Self-harm and Neglect of Asylum Seekers in Relation to the Nauru Regional Processing Centre, and Any Like Allegations in Relation to the Manus Regional Processing Centre (Report, 21 April 2017) vi.

[12] United Nations High Commissioner for Refugees, 'Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum Seekers' (May 2013) [3][vi] <https://www.refworld.org/policy/legalguidance/unhcr/2013/en/16943>.

[13] See Law Council of Australia, 'Proposal for Australia's role in a regional cooperative approach to the flow of asylum seekers into and within the Asia-Pacific Region' (October 2017) <https://lawcouncil.au/publicassets/89e951f2-44b9-e711-93fb-005056be13b5/Policy%20Statement%20Proposal%20for%20Australia%E2%80%99s%20role%20in%20a%20regional%20cooperative%20approach%20to%20the%20flow%20of%20asylum%20seekers%20into%20and%20within%20the%20Asia%20Pacific%20region.pdf>; Law Council of Australia, 'Asylum Seeker Policy' (2018) <https://lawcouncil.au/publicassets/406c7bd7-e1d6-e611-80d2-005056be66b1/Policy-Statement-Asylum-Seeker-Policy.pdf>.

[14] See, eg, Law Council of Australia, Submission to the Fourth Cycle Universal Periodic Review of Australia, United Nations Human Rights Council, Universal Periodic Review – Australia, (16 July 2025), [29] <https://lawcouncil.au/publicassets/6bba6d3e-ef68-f011-94b7-005056be13b5/4693%20-%20S%20-%20AUS%20Universal%20Periodic%20Review%20-%204th%20Cycle.pdf>; Law Council of Australia, '2025 Federal Election Call to Parties' (March 2025) <https://lawcouncil.au/publicassets/2ee42ba0-b70d-f011-94b2-005056be13b5/Law%20Councils%20Call%20To%20Parties%202025.pdf>; Law Council of Australia, Submission no 20 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 [Provisions], (16 August 2019) 6 [11] – [14], <https://lawcouncil.au/publicassets/aa75fe8b-1ccd-e911-9400-005056be13b5/3664%20-%20Regional%20Processing%20Cohort%20Bill%202019.pdf>; Law Council of Australia, Submission no 39 to Senate Legal and Constitutional Affairs References Committee,

conditions faced in RPCs by non-citizens removed from Australia, whether or not they are formally detained.[15]

The UN Human Rights Committee has recently found that Australia arbitrarily detained individuals in breach of Article 9(1) and (4) of the *International Covenant on Civil and Political Rights* through such arrangements with Nauru.[16]

The United Nations Committee Against Torture has also recently issued its views in *AA v Australia*,[17] in which it found that Australia was responsible for breaches of the CAT with respect to asylum seekers forcibly transferred by Australia to offshore processing countries, despite the breaches physically taking place in those countries (principally, in that matter, the Manus Island RPC in Papua New Guinea). In its views, the Committee reiterated its concerns regarding:

> *… [Australia's] policy of transferring asylum-seekers to the regional processing centres located in Papua New Guinea (Manus Island) and Nauru for the processing of their claims, despite reports on the harsh conditions prevailing in those centres, such as mandatory detention, overcrowding, inadequate healthcare and allegations of sexual abuse and ill-treatment. The combination of the harsh conditions, the protracted periods of closed detention and the uncertainty about the future reportedly creates serious physical and mental pain and suffering amounting to ill-treatment. It further notes that these conditions have allegedly compelled some asylum-seekers to return to their country of origin, despite the risks that they may face there.*[18]

The Asylum Seeker Resource Centre has also observed that:

> *During the past 11 years, Australia's policy of offshore processing has caused at least 14 deaths and significant physical and mental harm to the thousands of refugees and people seeking asylum subjected to unimaginable cruelty in detention centres in Nauru and Manus Island (PNG). The policy has proven to*

Parliament of Australia, Inquiry into 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, 10 November 2016, 8-9 [13] – [14], <https://lawcouncil.au/publicassets/f65c0561-20b5-e611-80d2-005056be66b1/3129_-__Nauru_PNG_Inquiry_2016.pdf>.

15 See for example Law Council of Australia, Submission no 57 to Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, Inquiry into Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, (12 May 2015), 3 [5] and 4 [7], <https://lawcouncil.au/publicassets/2798ce67-e1d6-e611-80d2-005056be66b1/150512-Submission-2988-select-committee-recent-allegations-relating-conditions-circumstances-at-regional-processing-centre-nauru.pdf>; Law Council of Australia, "Law Council backs parliamentary efforts to get sick asylum seekers off Nauru" (Media Release, 6 December 2018), <https://lawcouncil.au/media/media-releases/law-council-backs-parliamentary-efforts-to-get-sick-asylum-seekers-off-nauru>; Law Council of Australia, Submission no 62 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Inquiry into the Migration Amendment (Repairing Medical Transfers) Bill 2019, 5 [2], <https://lawcouncil.au/resources/submissions/migration-amendment-repairing-medical-transfers-bill-2019>.

16 M.I. et al v Australia [11]; Nabhari v Australia [9].

17 United Nations Committee Against Torture, Views: Communication No 1079/2021, 83rd session UN Doc CAT/C/83/D/1079/2021, 27 November 2025 ('AA v Australia') <tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2F83%2FD%2F1079%2F2021&Lang=en>.

18 Ibid at [8.5].

> *be a cruel failure, not only due to the significant costs to operate the contentious detention regime—over $12 billion from July 2012 to June 2024—but due to the widely-documented cases of medical neglect, sexual violence, suicide attempts, mental and physical abuse and countless other human rights violations that have occurred offshore.*[19]

We acknowledge that the Australian Government ended its offshore detention arrangement with Papua New Guinea on 31 December 2021.[20]

Chain refoulement

The Law Council's primary concern in this inquiry is the possibility that non-citizens removed from Australia to RPCs may be returned by those countries to their home countries, regardless of whether or not Australia has been found to owe them protection obligations under section 36 of the Migration Act.

Just as Australia must not send non-citizens to whom it owes protection obligations to a country where they would be in danger, Australia also cannot send asylum seekers indirectly to a place where they may be caused harm, for example by sending them to a third country when Australia knows or reasonably suspects that they will be returned to their home country by the third country. This is the concept of "chain refoulement".[21]

To protect against chain refoulement, the Law Council advocates that any third country reception arrangements require, at a minimum, that both countries are parties to the Refugees Convention and/or the ICCPR.[22] This was an issue that was highlighted by the High Court in relation to the so-called "Malaysia solution" in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*.[23]

Evidence of potential chain refoulement from Nauru

A Memorandum of Understanding between the Australian Government and the Republic of Nauru to allow the removal of members of the so-called "*NZYQ* cohort" to Nauru was signed on 29 August 2025 (the **Nauru MOU**).[24] The Nauru MOU does not appear to have been published.

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19 Asylum Seeker Resource Centre, 'Cruelty by Design: The Health Crisis in Offshore Detention' (July 2024) 2 <https://asrc.org.au/wp-content/uploads/2024/07/ASRCreport_Healthcrisisinoffshoredetention_July2024.pdf>. See also Jamal Barnes, "Suffering to Save Lives: Torture, Cruelty, and Moral Disengagement in Australia's Offshore Detention Centres", (2022) 35 Journal of Refugee Studies 1508, 1508.

20 Refugee Council of Australia, "Offshore Processing Statistics", (Media Release, 3 November 2025). https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/
See also the Hon Karen Andrews 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>

21 Kaldor Centre with Jane McAdam and Joyce Chia, Submission no 9 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, Inquiry into the Incident at the Manus Island Detention Centre from 16 to 18 February 2014, (2 May 2014) 13.

22 See, eg, Law Council of Australia, Submission no 71 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Inquiry into the Migration Amendment Bill 2024 (21 November 2024) [62]-[63], <https://lawcouncil.au/publicassets/add2a0c3-58a8-ef11-94ac-005056be13b5/4621%20-%20S%20-%20Migration%20Amendment%20Bill%202024.pdf>.

23 [2011] HCA 32.

24 The Hon Tony Burke MP, 'Statement on Nauru MOU' (Statement, 29 August 2025) <https://minister.homeaffairs.gov.au/TonyBurke/Pages/statement-on-nauru-mou.aspx>.

As at 30 September 2025, there were 356 people in the "*NZYQ* cohort".[25] The number of members of that cohort with criminal records is not known, but it appears that Australia owes protection obligations to around 83% of members of the *NZYQ* cohort.[26]

Nauru ratified the Refugee Convention on 17 June 2011.[27] While this fact distinguishes its situation from that of Malaysia in *Plaintiff M70*, there is evidence that Nauru may *refoule* such people regardless.

On 24 November 2025, Senators Pocock and Shoebridge read into Hansard a transcript of an interview between President Adeang of Nauru and Joanna Olsson of the Nauru Government Information Office. According to this transcript, in this interview, President Adeang stated that any members of the "*NZYQ* cohort" who are removed to Nauru under section 198AHA of the Migration Act would not be refugees and suggested they could therefore be eventually returned to their own countries. Some of the most significant excerpts from the interview are as follows (emphases added):

> President Adeang
>
> *The particular group Australia is asking us to take are not people of Australia. They are in Australia, they have committed a crime, served their time in jail and are now out and living within the communities of Australia. Now leading their lives not unlike any other person living in Australia.*
>
> *Now, Australia has been trying to return them to their home countries and have been unable to for multiple reasons. Because they are unable to, Nauru and Australia have joined into a partnership, due to our history where we have been able to home people on our land; like people who sought asylum or those that are refugees.* ***To clarify, these people are not refugees****. They are regular people but their background or their history is that they have been to jail.*[28]
>
> *…*
>
> President Adeang
>
> *The problem now is, Australia cannot return them home, these people are what you would refer to as stateless. Their homelands do not want them and they do not have a way to go home.*
>
> *And* ***if over time we find a way to return them home then of course they will not reach the 30 years****. But the Visa we are providing them to start is 30 years.*

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[25] Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 2 December 2025, 92 (Michael Thomas). <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Festimate%2F29010%2F0000;query=Id%3A%22committees%2Festimate%2F29010%2F0000%22>

[26] Department of Home Affairs, 'Freedom of Information Request FA 25/05/00775' (12 May 2025) <https://www.homeaffairs.gov.au/foi/files/2025/fa-250500775-document-released.PDF>.

[27] Republic of Nauru, "Nauru Honours World Refugee Day", (Media Release, 20 June 2014). <https://www.nauru.gov.nr/government-information-office/media-release/nauru-honours-world-refugee-day.aspx#:~:text=Nauru%20ratified%20the%20UN%20Convention,conventions%20on%20human%20rights%20issues>

[28] Commonwealth, Parliamentary Debates, Senate, 24 November 2025, 102 (Senator David Pocock) <https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/28882/toc_pdf/Senate_2025_11_24.pdf;fileType=application%2Fpdf>.

> *It's the same as everyone we brought in during RPC, they can work, we also encourage them to work, so they can feel like they contribute to our community, nothing will be stopping them. But they will have a 30 year Visa rather than the shorter visas and that's the only difference …* ***So we will take them for the time being****.*[29]
>
> …
>
> Interviewer
>
> *If the 30 years ends and we have not resettled them in another country, what is Nauru and Australia's Plan?*
>
> President Adeang
>
> *Well I guess in 30 years time, there will have to be meetings between the Government of Nauru and the Government of Australia and what we're going to do about these people. But there's a long way into the future. I do trust however, that maybe before then,* ***we will little by little be able to return these people home*** *if they want that.*[30]

It appears from the above transcript of this interview that President Adeang is under the misapprehension that members of the *NZYQ* cohort have not been found to be refugees. This is not the case.[31] Given this misapprehension, he indicates that non-citizens removed from Australia to Nauru can be returned to their home countries at some time in the future, without (or regardless of) any assessment by Nauru of whether they face persecution in their home countries. If the transcript is accurate, this is deeply concerning.

The Law Council acknowledges reports that the Australian Government has raised questions about the accuracy of the interview transcript.[32] Nevertheless, the current version of the transcript, which is now before Parliament, raises real questions about the likelihood of refoulement which must be addressed. This information suggests that chain refoulement is likely to occur and should be further scrutinised by this Committee. In the Law Council's view, there has never been a more important time for Australia to be seen to fully adhere to international law.

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29 Ibid at 103.

30 Commonwealth of Australia, Parliamentary Debates, Senate, 24 November 2025, 104 (Senator David Shoebridge) <https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/28882/toc_pdf/Senate_2025_11_24.pdf;fileType=application%2Fpdf>.

31 A recent response to a Freedom of Information request states that as of 12 May 2025, there were 303 clients released from immigration detention in the NZYQ cohort, and that only 51 of these were not owed protection obligations under paragraphs 36(2)(a) or 36(2)(aa) of the Migration Act: Department of Home Affairs, 'Freedom of Information Request - FA 25/05/00775' (12 May 2025) <https://www.homeaffairs.gov.au/foi/files/2025/fa-250500775-document-released.PDF>. It is not necessarily the case that all members of the NZYQ cohort to whom Australia owes protection obligations have been found to be refugees within the meaning of section 5H of the Migration Act. Some may have been found to be owed complementary protection in accordance with paragraph 36(2)(aa) of the Migration Act.

32 Maani Truu, 'Nauru President Says NZYQ Members Could Go Home In Interview About Secretive Deal', Australian Broadcasting Corporation (25 November 2025) <https://www.abc.net.au/news/2025-11-25/nauru-president-says-nzyq-could-go-home-/105982474>.

The Law Council also acknowledges the point made by Australian Government officials before the Senate Legal and Constitutional Affairs Legislation Committee, that the Nauru MOU includes a clause on non-refoulement that "very actively reflects and requires that various international law obligations are upheld, and those are also reflected in the Nauruan regulations".[33] However, we are concerned that the Nauru MOU has not been made available to the public, which compromises the transparency of the arrangements.

The fact that Nauru has ratified the Refugee Convention does not mean that Australia would meet its obligations under Article 33 of that Convention by removing members of the *NZYQ* cohort to whom it owes protection obligations to that country. Australia would breach that obligation were it to remove a non-citizen to whom Australia has been found to owe protection obligations to Nauru, where it knows or reasonably suspects that they will be returned by Nauru to their home country. In this case, there is a clear risk that Nauru may remove non-citizens sent by Australia to their home country.

Recommendations

The Law Council recommends that:

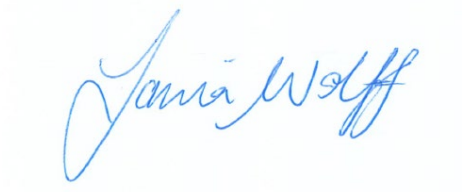
- **the Committee recommend publication of the Nauru MOU, as the current lack of transparency impedes proper parliamentary scrutiny;**
- **Australia does not remove persons to whom it owes protection obligations in the absence of clear, enforceable guarantees against refoulement; and**
- **Independent monitoring and safeguards be mandated in relation to any such arrangements.**

Contact

Thank you once again for the opportunity to make a submission to this inquiry.

If the Law Council can be of any further assistance, please contact Alan Freckelton (Senior Policy Lawyer) [redacted]

Yours sincerely



Tania Wolff
President

[33] Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, 8 October 2025, 109 (Clare Sharp PSM, Department of Home Affairs). <https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=committees/estimate/28994/&sid=0001> . See also Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, 2 December 2025, 93 (Clare Sharp PSM, Department of Home Affairs).