

**UNHCR**

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

Inquiry into the Migration Amendment (Evacuation to Safety) Bill 2023

Senate Legal and Constitutional Affairs Legislation Committee

Submission by the Office of the United Nations High Commissioner for Refugees

24 February 2023

I. INTRODUCTION

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee, in respect of its inquiry into the Migration Amendment (Evacuation to Safety) Bill 2023.
2. The Bill would amend the *Migration Act 1958 (Cth)* (Migration Act) to require the Government of Australia to make an offer of transfer to Australia within one month of the Bill's commencement to eligible persons forcibly taken to Nauru or Papua New Guinea under Australia's offshore processing arrangements and who remain in those countries at the time of the Bill's commencement. Acceptance of an offer remains optional and for the temporary purpose of seeking 'permanent settlement in a third country'. Upon arrival in Australia, the transferred person will be required to reside at a specified place in Australia, rather than being held in a detention centre.¹ They will also be provided with appropriate medical or psychiatric assessment or treatment as soon as practicable after arrival.
3. Without prejudice to UNHCR's broader concerns regarding the lawfulness and human impact of Australia's offshore processing arrangements and Australia's ongoing responsibilities towards those affected by it, UNHCR supports the immediate policy objective of the Bill, that is, to establish a statutory evacuation mechanism to bring persons in Nauru and Papua New Guinea to Australia to enable

¹ Under section 197AB of the Migration Act, the Minister has the power to make a *residence determination*, allowing a person required or permitted by section 189 of the Migration Act to be detained, or who is in detention to reside in the community at a specified place, without being accompanied or restrained by an officer. Subsection 197AB(1) of the Migration Act provides that those covered by a *residence determination* are to reside at a specified place, instead of being detained at a place covered by the definition of 'immigration detention' in subsection 5(1) of the Migration Act. Under the operation of the Bill, a person covered by a '*transferred person determination*' (defined in proposed paragraph 199C(1)(b)) applies as if the transferred person were a person covered by a *residence determination* (see proposed subsection 199C(4)).

them to seek, from Australia, a durable solution to their plight. Through its operationalisation, UNHCR has observed, firsthand, how the physical and psychological health of asylum-seekers and refugees subject to transfer by Australia to Papua New Guinea or Nauru, has deteriorated over the last decade. Such harm has been caused by a range of factors including the absence of critical safeguards needed to ensure adherence to international legal standards and respect for human rights law, and the absence or limited availability of timely durable solutions. The latter has not only caused continued suffering for many, but also led to family separation, and in some cases loss of agency and disengagement.

4. UNHCR has consistently urged an end to Australia's offshore processing arrangements in Nauru and Papua New Guinea due to the significant harm caused to the people subject to transfer. Significantly, UNHCR's concerns have for many years been echoed by the broader United Nations human rights monitoring mechanisms, including at the highest level by the Human Rights Council and most recently by the Committee against Torture, in its examination of Australia's compliance with its obligations under the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.²
5. As of 31 January 2023, 66 persons remain in Nauru, 11 of whom are still awaiting an outcome of their refugee status determination.³ In addition, notwithstanding the official cessation of the Government's transfer arrangement with Papua New Guinea on 31 December 2021,⁴ there were an additional 92 persons remaining in Papua New Guinea as of 31 January 2023⁵ who remain Australia's responsibility. According to the Private Senator's second reading speech, once the bilateral relocation arrangements with the United States of America and New Zealand have completed, "it is estimated that around 500 of the offshore cohort will be left without a durable solution".⁶
6. In this context, it is relevant to recall that in its submission to this Committee's inquiry into the Migration Amendment (Repairing Medical Transfers) Bill 2019, UNHCR observed that the Government of Australia cannot seek to divest itself of responsibility or limit jurisdiction and responsibility under international law for those

² Human Rights Council, *Report of the Working Group on the Universal Periodic Review – Australia*, A/HRC/47/8, 24 March 2021, available at: <https://undocs.org/A/HRC/47/8>; Committee against Torture, *Concluding observations on the sixth periodic report of Australia*, 5 December 2022, CAT/C/AUS/CO/6, p. 9., available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=2587&Lang=en.

³ Department of Home Affairs, *Statistics of transitory persons*, 31 January 2023, available at:

<https://www.homeaffairs.gov.au/about-us-subsite/files/population-number-resettled-31-january-2023.pdf>.

⁴ K Andrews (former Minister for Home Affairs), *Joint media release with the Hon. Westly Nukundj MP -*

Finalisation of the Regional Resettlement Arrangement, 6 October 2021, available at:

<https://minister.homeaffairs.gov.au/KarenAndrews/Pages/finalisation-of-the-regional-resettlement-arrangement.aspx#:~:text=Under%20the%20timeline%20announced%20today,responsibility%20for%20those%20who%20remain>.

⁵ Senator N McKim, *Second Reading Speech: Migration Amendment (Evacuation to Safety) Bill 2023*, 7 February 2023, available at:

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F26438%2F0152%22>.

⁶ Ibid.

taken to Nauru or Papua New Guinea. Statutory safeguards were needed for the protection of those subject to offshore transfer arrangements, and the deterioration of the health of refugees and asylum-seekers throughout the life of the offshore transfer policy, could be expected to continue until long-term solutions were achieved.

II. UNHCR'S AUTHORITY

7. UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions for refugees.⁷ As set forth in the *Statute of the Office of the United Nations High Commissioner for Refugees*, UNHCR fulfils its international protection mandate by, *inter alia*, '[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto'.⁸ UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the *1951 Convention relating to the Status of Refugees*,⁹ according to which State Parties undertake to "co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention." The same commitment is included in Article II of the *1967 Protocol relating to the Status of Refugees* (1967 Protocol).¹⁰
8. In accordance with UN General Assembly resolutions 3274 XXIX¹¹ and 31/36,¹² UNHCR has been designated, pursuant to Articles 11 and 20 of the *1961 Convention on the Reduction of Statelessness* (the 1961 Statelessness Convention),¹³ as the body to which a person claiming the benefits of this Convention may apply for the examination of his or her claim and for assistance in presenting it to the appropriate authorities. In resolutions adopted in 1994 and 1995, the UN General Assembly entrusted UNHCR with a global mandate for the identification, prevention and reduction of statelessness and for the international protection of stateless persons.¹⁴ UNHCR's statelessness

⁷ See *Statute of the Office of the United Nations High Commissioner for Refugees*, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, para. 1 (Statute).

⁸ Statute, para. 8(a).

⁹ UN General Assembly, *Convention relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

¹⁰ UN General Assembly, *Protocol relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

¹¹ UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 10 December 1974, A/RES/3274 (XXIX).

¹² UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 30 November 1976, A/RES/31/36.

¹³ UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175.

¹⁴ UN General Assembly resolutions A/RES/49/169 of 23 December 1994 and A/RES/50/152 of 21 December 1995. The latter endorses UNHCR's Executive Committee Conclusion No. 78 (XLVI), *Prevention and Reduction of Statelessness and the Protection of Stateless Persons*, 20 October 1995.

mandate has continued to evolve as the UN General Assembly has endorsed the Conclusions of UNHCR's Executive Committee.¹⁵

9. Australia is a Contracting Party to the *1951 Convention relating to the Status of Refugees* and its 1967 Protocol (together, the Refugee Convention), as well as the *1954 Convention relating to the Status of Stateless Persons* (the 1954 Statelessness Convention), and the 1961 Statelessness Convention. Through accession to these instruments, Australia has assumed international legal obligations in relation to refugees, asylum-seekers and stateless persons in accordance with their provisions.
10. On a practical level, UNHCR has been required to become operationalized on a one-off good-offices basis due to the humanitarian imperative of this highly problematic situation. UNHCR has therefore established a dedicated team for case management in the context of the New Zealand-Australia bilateral arrangement. This builds on UNHCR's targeted casework since mid-2019 on direct referrals to the United States (outside of the bilateral agreement with Australia) and to European countries, as well as case adjudications to facilitate referrals under Canada's private sponsorship programme. This work continues. The concerns raised herein reflect the close engagement with those under UNHCR's mandate who have been impacted by Australia's offshore transfer policy.

III. CONSIDERATION OF THE PROPOSED LEGISLATION

11. The Bill seeks to amend the Migration Act to require the Government within one month of the commencement of the Bill, to offer transfer to Australia to all persons subject to offshore processing still in Papua New Guinea or Nauru who are not subject to an adverse security assessment by the Australian Security Intelligence Organisation (ASIO) under the *Australian Security Intelligence Organisation Act 1979*. UNHCR considers that in the absence of procedural safeguards and processes that adhere to international refugee law,¹⁶ such assessments should not alone operate as grounds to

¹⁵ Executive Committee Conclusion No. 90 (LII), Conclusion on International Protection, 5 October 2001, para. (q); Executive Committee Conclusion No. 95 (LIV), General Conclusion on International Protection, 10 October 2003, para. (y); Executive Committee Conclusion No. 99 (LV), General Conclusion on International Protection, 8 October 2004, para. (aa); Executive Committee Conclusion No. 102 (LVI), General Conclusion on International Protection, 7 October 2005, para. (y); Executive Committee Conclusion No. 106 (LVII), Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, 6 October 2006, paras. (f), (h), (i), (j) and (t); all of which are available in: [Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 \(Conclusion No. 1 – 114\)](#), October 2017.

¹⁶ UNHCR notes that national security considerations and international refugee protection are not mutually exclusive. For example, under Article 1F of the 1951 Convention, those who are deemed as undeserving of recognition as refugees, owing to serious reasons for considering that they have committed the specified (serious) crimes would not be recognised as refugees. In addition, article 33(2) of the 1951 Convention addresses the situation where a refugee constitutes a 'danger to the security of the country' or 'danger to the community of that country' and provides a very limited exception to the *non-refoulement* obligation. Article 32 requires that States must not expel a refugee except on grounds of national security or public order and 'shall only be in pursuance of a decision reached in accordance with due process of law.' See further: UN High Commissioner for Refugees, *Addressing Security Concerns Without Undermining Refugee Protection - UNHCR's Perspective*, 17 December 2015, Rev.2, available at: <https://www.refworld.org/docid/5672aed34.html>.

deny a person international protection nor relieve Australia of responsibility for those transferred to Nauru or Papua New Guinea who are ineligible for transfer under the proposed amendments.

12. Any person who receives an offer of transfer to Australia can decline to accept an offer. Persons accepting an offer will be transferred to Australia where they will remain until they are provided with a durable third-country solution in a State party to the 1951 Convention or the 1967 Protocol. All persons accepting the Government's offer will be required to reside freely in the community at a specified place, rather than being held in a detention centre and provided with appropriate medical or psychiatric assessment or treatment as soon as practicable after arrival. While liberty should be the default position and decisions relating to any restrictions on movement or liberty, or continued restrictions, should be considered on an individual basis and subject to statutory safeguards to prevent arbitrariness,¹⁷ UNHCR notes that this particularly vulnerable group will require additional support and accommodation upon arrival in Australia.
13. The Bill also contains important mechanisms to strengthen transparency and accountability using parliamentary processes to inform when an offer is not made, when the Minister makes a 'transferred person determination', and when there are delays in the transfer of persons to Australia.

IV. EXTERNALIZATION: AUSTRALIA'S TRANSFER ARRANGEMENTS WITH NAURU AND PAPUA NEW GUINEA

14. The international refugee protection system depends on international cooperation. As 'the grant of asylum may place unduly heavy burdens on certain countries,' the Refugee Convention recognizes that international cooperation is essential. This key principle is also central to the Global Compact on Refugees. States need to act, within and beyond their borders and regions, to share responsibilities with States and communities hosting the large majority of the world's refugees. States may make arrangements with other States to ensure international protection, as long as these arrangements enhance responsibility sharing and are consistent with the 'widest possible exercise of ... fundamental rights and freedoms' of refugees.
15. The externalization of international protection refers to measures taken by States—unilaterally or in cooperation with other States—which are implemented or have effects outside their own territories, and which directly or indirectly prevent asylum-seekers and refugees from reaching a particular 'destination' country or region,

¹⁷ Consideration of the availability, effectiveness and appropriateness of alternatives to detention in each individual case needs to be undertaken. Further, like detention, alternatives to detention equally need to be governed by laws and regulations in order to avoid the arbitrary imposition of restrictions on liberty or freedom of movement. Alternatives to detention that restrict the liberty of asylum-seekers may impact on their human rights and are subject to human rights standards, including periodic review in individual cases by an independent body. See further: UN High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <https://www.refworld.org/docid/503489533b8.html>.

and/or from being able to claim or enjoy protection there. Such measures constitute externalization where they involve inadequate safeguards to guarantee international protection as well as shifting responsibility for identifying or meeting international protection needs to another State or leaving such needs unmet; making such measures unlawful.¹⁸

16. Externalization practices often result in the transfer of people from one country to another, without adequate protection safeguards or standards of treatment. Externalization can lead to indefinite 'warehousing' of asylum-seekers in isolated places, exposing them to indirect refoulement and other dangers. Externalization may also de-humanize asylum-seekers and label people in need of international protection as unwanted.¹⁹
17. UNHCR recalls the observations made in the context of the Committee's inquiry into the Migration Amendment (Repairing Medical Transfers) Bill 2019 wherein it was noted that the physical relocation of asylum-seekers from Australia to Papua New Guinea and Nauru does not extinguish Australia's legal responsibility for their protection. Australia is jointly responsible (with Nauru and Papua New Guinea, respectively) for ensuring that the treatment of all asylum-seekers and refugees transferred to those countries is compatible with each State's respective obligations under the Refugee Convention and other applicable international human rights instruments.²⁰
18. Extraterritorial processing is unlawful where it represents an attempt to avoid jurisdiction or international responsibilities, or to shift burdens, for example by no longer processing any asylum application on the State's territory; if compliance with international and national standards cannot be guaranteed; if durable solutions are not available for refugees, as well as other outcomes consistent with human rights for those without international protection needs; or if it has a negative impact on the quality of protection provided by the territorial State.²¹
19. As recently observed by the United Nations High Commissioner for Refugees, Filippo Grandi, in the context of the Government of Australia's statutory consultation with UNHCR in respect of the re-designation of Nauru as a 'regional processing country', Australia's offshore processing arrangements amount to externalization of international protection responsibilities and are contrary to Australia's obligations under the Refugee Convention, as well as to the principles of the Global Compact on Refugees. UNHCR has consistently urged that governments avoid arrangements

¹⁸ UN High Commissioner for Refugees, *UNHCR Note on the "Externalization" of International Protection*, 28 May 2021, p. 1., available at: <https://www.refworld.org/docid/60b115604.html>.

¹⁹ Ibid. p. 2.

²⁰ UN High Commissioner for Refugees, Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Amendment (Repairing Medical Transfers) Bill 2019, August 2019, p. 2., available at: <https://www.unhcr.org/en-au/publications/legal/5d5b87637/submission-to-the-legal-and-constitutional-affairs-legislation-committee.html>.

²¹ UN High Commissioner for Refugees, *Annex to UNHCR Note on the "Externalization" of International Protection: Policies and practices related to the externalization of international protection*, 28 May 2021, available at: <https://www.refworld.org/docid/60b115b64.html>.

seeking to transfer refugees and asylum-seekers to third countries with inadequate safeguards. Such arrangements are not only detrimental to the well-being of those transferred but they shift asylum responsibilities, evade international obligations, are contrary to the letter and spirit of the Refugee Convention and negatively influence refugee approaches elsewhere.²²

20. As previously mentioned, it is noteworthy that other United Nations human rights treaty and charter monitoring mechanisms have consistently echoed the concerns raised by the Office of the United Nations High Commissioner for Refugees since offshore processing arrangements began in Nauru and Papua New Guinea.²³ Most recently, the Concluding Observations from the examination of Australia's compliance with its obligations under the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, during the 75th Session of the Committee against Torture, held from 31 October – 25 November 2022 recommended (amongst other things) that Australia “end its policy of offshore processing of asylum claims, transfer all migrants, asylum-seekers and refugees to mainland Australia and process any remaining asylum claims while guaranteeing all procedural safeguards”.²⁴

V. CONCLUSION

21. Australia's offshore transfer policy contains inadequate safeguards for the protection of the people to whom it applies. In the absence of such safeguards and comprehensive access to timely durable solutions, the health of the refugees and asylum-seekers in Nauru and Papua New Guinea will continue to deteriorate. Australia retains responsibility for those transferred under its offshore transfer arrangements, therefore UNHCR supports the immediate policy objective of the Bill, that is, to establish a statutory evacuation mechanism to bring eligible persons in Nauru and Papua New Guinea to Australia to avoid further suffering.
22. Further, UNHCR continues to urge the Government of Australia to repeal the statutory basis for its offshore transfer arrangements and to regularize the status of all those brought to Australia living in continued uncertainty and without access to the international human rights and refugee law rights to which they are entitled by virtue of their status.

²² Filippo Grandi (United Nations High Commissioner for Refugees), *'Letter to Minister O'Neil on the re-designation of Nauru as a regional processing country under s 198AB Migration Act of 1958'*, 4 February 2023, available at:

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22publications%2Ftabledpapers%2F2ed26bb1-813e-45c9-9b25-33a56a991145%22>.

²³ See: United Nations observations on Australia's transfer arrangements with Nauru and Papua New Guinea (2012-present), summary compiled by UNHCR Multi-Country Office in Canberra, 11 October 2021, available at: <https://www.unhcr.org/en-au/publications/legal/6163e2984/united-nations-observations-on-australias-transfer-arrangements-with-nauru.html>.

²⁴ Committee against Torture, *Concluding observations on the sixth periodic report of Australia*, 5 December 2022, CAT/C/AUS/CO/6, p. 9., available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=2587&Lang=en.

23. UNHCR recommends that the Bill be passed.

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