Labor for Refugees

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Committee Secretary
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https://www.aph.gov.au/Parliamentary_Business/Committees/OnlineSubmission

Dear Committee Secretary,

Offshore Processing and resettlement arrangements – referred by Senate on 27 November 2025

Labor for Refugees National Co-ordinating Committee (L4R) thanks the Senate for this public inquiry into offshore processing and resettlement arrangements. We appreciate having the opportunity to make this submission.

The National Co-ordinating Committee has 11 members and office-bearers, who represent all current State and Territory L4R groups: Queensland, Victoria and NSW-ACT. We are an entirely volunteer community of Labor members and trade unionists, who have worked for 25 years to improve policy on refugees and asylum seekers. Many people across the country receive our newsletters. We know from our wide range of community connections that L4R is part of a broad, persistent progressive movement for human rights for all. An example of the work of L4R is NSW-ACT's information leaflet of October 2025.

The Terms of Reference

We have noted that the Terms –

- focus the inquiry's scope by date ('since 2022'); and
- focus on public procurement management[1] of the two 'offshore' arrangements - 'processing' and 'resettlement' - being enquired into, but
- include 'any other related matters'.

The Terms assume a shared understanding of 'Offshore processing' and 'offshore resettlement'. Over the past 25 years[2], there have been different versions of both programs, with different impacts and consequences[3]. Both programs have changed in and since 2022, especially from late 2023. In this submission L4R uses the following understandings of what these programs are, today -

- *'Offshore processing'* means the Australia-funded arrest, detention and transportation, under the Memorandum of Understanding dated October 2021[4], to the Republic of Nauru of non-citizens, who arrive without a visa by boat in Australia, or at the sea border (i.e., not including people who seem to be travelling towards that border or land because they all are turned back to their point of departure).
- '*Offshore resettlement'* means either of the Australia-funded -
    - permanent humanitarian settlement of a non-citizen subject to offshore processing as described above, in a country that is not Australia[5]; and

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[1] https://www.finance.gov.au/government/procurement/commonwealth-**procurement-rules**, which – as far as we know – do not govern international payments between Australia and another country and would not, without the agreement of the other country, govern contracts entered into by that other country, although using money provided by Australia. Even if a term of the payment included compliance with Australia's procurement rules, we understand that would be effectively unenforceable.

[2] The first version of offshore processing and detention commenced in August 2001, under LNP then PM Howard.

[3] A summary of the versions can be found easily online. A good example, valid to mid-2024, is in a Report at the **Externalizing Asylum** website, by Madeline Gleeson and Natasha Yacoub - https://externalizingasylum.info/offshore-processing-in-australia/**.** See under **Description of the Australian policy.**
Other examples of reliable online histories are:
https://www.unsw.edu.au/content/dam/pdfs/law/kaldor/factsheet/offshoreprocessing.pdf (September 2024) and https://www.refugeecouncil.org.au/offshore-processing-facts/2/ (as at 20 May 2020)

[4] *Memorandum of Understanding between the Republic of Nauru and Australia on the Enduring Regional Processing Capability in Republic of Nauru* – dated 20 October 2021 and current https://www.dfat.gov.au/geo/nauru/memorandum-understanding-between-republic-nauru-and-australia-enduring-regional-processing-capability-republic-nauru and https://www.dfat.gov.au/sites/default/files/mou-nauru-enduring-regional-processing-capability-sep-2021.pdf

[5] Over the years main resettlement countries have been New Zealand and the USA, but also Canada under its private sponsorship program using private funds (philanthropy, charitable donations), and other countries which are members of the Refugee Convention, as is Australia.

- new policy of detention in Australia, then deportation and resettlement in the Republic of Nauru of *any* effectively stateless non-citizen who is considered to not meet 'the character test'[6] and who would normally, but cannot, be deported to their country of origin for a range of reasons including (in relation to unknown proportion of the apparently 300 or so people released from detention because of the High Court's decision) because their country of origin is unsafe for them and sending them there would be refoulement (that is, they are refugees or similar).

We consider that the evidence the Committee may receive should provoke, as closely 'related matters', clarifying and stating the real public good purposes of each program and their opportunity costs for Australia and other countries grappling with informal, black-market supplied migration. Migration is inherently international. Informal migration is best addressed with international co-operation and with respected, properly-funded international organisations, before the black market is effective. It is good that Australia has 'regional partners' with which Australia disrupts maritime people smuggling ventures but it seems that disruption occurs towards the end of the ventures, near Australia. L4R encourages the Committee to consider the cost savings of Australia, with international partners, providing safe havens for people needing safety, before the ventures set out.

<u>L4R's position on offshore processing and offshore resettlement</u>

- L4R has opposed 'offshore processing' since the Howard LNP government introduced it in 2001. Offshore processing was an unnecessary, deliberately emotional, highly political, populist response, by a then electorally unpopular LNP government to the Tampa event in late August 2001[7]. Community fear of vulnerable people seeking asylum in Australia, in internationally relatively small numbers, was deliberately stoked in order that 'a solution' was 'needed'. The 11 September 2001 attacks on the USA by Al Qaeda terrorists[8] provided further opportunity for politicisation of un-visa-ed migration of people who looked similar to and/or might come from the same general part of the world as Al Qaeda, even though the people seeking asylum were fleeing those same or very similar terrorists and their violence.

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[6] For character test, see section 501 of the *Migration Act 1958* - https://classic.austlii.edu.au/au/legis/cth/consol_act/ma1958118/s501.html - and then be aware that the Minister has several powers in that Act to intervene in the public interest, and to issue a visa.

[7] For details see, for example, https://www.nma.gov.au/defining-moments/resources/tampa-affair and, for an account from a child refugee., see Hazari, Abbas 'After the Tampa', Allen & Unwin 2021, revised ed 2023. Mr Hazari was settled in New Zealand. He has been an NZ Fulbright Scholar.

[8] Examples of publicly available readable summaries of that event - https://www.britannica.com/event/September-11-attacks and https://en.wikipedia.org/wiki/September_11_attacks

Consistent with the context of the birth of the offshore processing program, it has become politically unviable for any party aspiring to government to not agree with offshore processing. Offshore processing therefore has become entrenched and 'mainstream', though its public policy aims are variable[9] and achievement of those aims is politicised and measured against very narrow and contested criteria.

- L4R's opposition to offshore processing continues and includes strong opposition to the new Labor[10] program of detention, deportation and offshore resettlement, from Australia which we see as a leveraging of Australia's fear of non-citizens and Nauru's ability to leverage that. Deportation of non-citizens is founded on failure of 'the character test' under section 501 of the MA. Many parts of section 501 depend on the conviction of the non-citizen of a crime. Citizens are convicted of crimes every day, gaoled, serve their time – and are released into the community afterwards, every day. There are social systems to manage citizens, albeit flawed. In our view Australia has a clear choice: it can deal with un-visa-ed arrivals by boat and stateless people with 'character issues' in a low-key, objective, fair, non-divisive, straightforward and low cost way in accordance with law; or it can do so in a populist, convoluted, complex, legally-suspect, accountability-avoiding, damaging and expensive way. For 25 years Australia has chosen the latter. L4R is committed to persuading Australia's leaders to chose the former. L4R is encouraged by Parliamentary debates and many submissions to and reports by Committees, in which concerns have been expressed about (amongst other aspects) anti-humanitarian over-reach and disproportionate aspects of various Bills since 2023 enabling offshore processing and offshore resettlement[11]. We thank all members of Parliament involved.
- L4R opposes Australia using payments for offshore processing and offshore resettlement programs as a form of international aid to any country, as seems to be

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[9] a stated key aim of the current MoU with Nauru is to build an enduring 'processing capability' in Nauru.

[10] L4R notes that, in relation to sea border management and non-citizens convicted of criminal offences who have completed their sentences, Labor has been faced for decades with populist, arguably extremist LNP policy positions, with leadership - such as Peter Dutton, always ready to 'go low', make unsubstantiated accusations and stir community anxiety. The LNP has been backed by right wing media organisations. Australia's Migration Act reflects that kind of divisive politics.

[11] L4R is aware of the following recent Senate and Joint Committee Reports which seem relevant – March 2024 - https://www.aph.gov.au/-/media/Committees/Senate/committee/scrutiny/scrutiny_digest/2024/d5_24.pdf?la=en&hash=843EA9A61A5B061D3DDCDFF5758F64333FEB81CF and April 2024 https://www.aph.gov.au/-/media/Committees/Senate/committee/humanrights_ctte/reports/2024/Report_3/Report_3_of_2024.pdf and May 2024, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/MigrationAmendment24/Report and September 2024 https://www.aph.gov.au/-/media/Committees/scrb_ctte/reports/2025/Scrutiny_Digest_5_of_2025/section/Chapter_1__Initial_scrutiny.pdf and November 2024, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/MigrationAmendment47/Report.

a purpose of the current MoU with Nauru; and opposes the use of these programs as some kind of counter to other countries seeking greater influence in the Pacific, through Nauru[12]. Payments by Australia to any country should be publicly accountable and audited but especially where the payments are in the nature of contracting out Australia's human rights and refugee treaty obligations to another country.

- L4R opposes any offshore processing and offshore resettlement programs as a *de facto* executive 'criminal justice' system for non-citizens, which is a real risk of being a breach of the Constitution.
- L4R submits that the public procurement administration issues at the heart of Terms of Reference 1 (i) to (iv) were foreseeable and have arisen because of obvious and apparently unmitigated risks of offshore processing and offshore resettlement in a small, under-resourced, separate nation[13].
- L4R submits that, properly assessed, the full costs of the programs - including all compensation payments for the personal injury suffered adversely from being off-shored, and related legal costs - far outweigh and will continue to outweigh the stated benefits, that Australia can do better than these two arrangements to address the risks they currently seem to be intended to deal with, and that Australia needs now to develop modern, fit for purpose arrangements which address Labor's current stated goals of the current arrangements, are consistent with at least Labor's[14] stated commitments to human rights and which (unlike the current arrangements) do not cause their own avoidable problems.
- To counter any future temptation to use fear of non-citizens in boats or otherwise, to drive divisive political aims, L4R urges enactment of a Commonwealth Human Rights Law which applies to all, including non-citizens. This would be consistent with Labor's stated commitment to social inclusion and against demonising minorities. It would also be better for Australia than the current situation.
- L4R strongly recommends that the Committee accept that –
    - The payments referred to in the Terms of Reference are just one element of the overall costs of the two arrangements, with full costs including –
        - Costs – direct and indirect - borne by all of the Commonwealth agencies involved in and contributing to each arrangement;
        - Costs in the form of pain and suffering borne by the targets of

[12] https://www.nauru.gov.nr/ - see '12 August 2025 Nauru secures $1bn socio-economic development project with China company'.
[13] see, for example, Dennis Richardson's *Review of Integrity Concerns and Governance Arrangements for the Management of Regional Processing Administration by the Department of Home Affairs* commissioned by the then MHA in July 2023, resulting in a declassified published report on DHA website: https://www.homeaffairs.gov.au/reports-and-pubs/files/richardson-review/richardson-review-report.pdf
[14] And, of course, commitments of other progressive other parties and independents in the Parliament

arrangements, namely the people Australia sends to Nauru;

- Costs borne by the families and communities of those people, in Australia and in their home countries (such as Afghanistan) or other closely neighbouring countries to which they have fled, over the very long periods of time that they wait whilst the targets are 'processed' or 'settled' in Nauru;
- Costs borne by members of the Nauru community of having the arrangements in Nauru, less benefits received;
- Costs borne by the numerous services, charities, volunteers and donors in Australia who support the many people damaged by the Commonwealth's arrangements.

- The arrangements are not inevitable or immutable; they are not the only way that Australia could respond effectively to the 2 main social challenges we assume these arrangements are intended to address, namely –
  - informal, black-market-supplied travel by boat to Australia by people seeking a safe country to live in (the apparent purpose of offshore processing[15]); and
  - poor character of relatively few non-citizens who cannot be deported.
- A more enduring, less costly and more effective arrangement than the current offshore processing, would include a strong positive commitment and plan of action to increase international co-operation, increase places of safety and to properly fund international organisations to do this very important work.
- A more enduring, less costly and more effective arrangement than the new offshore resettlement program would be to better support and manage the mental and other health and related issues of the proposed small cohort of deportees. A well-established system of management of citizens of poor characters exists, into which this small cohort of non-citizens released because of NZYQ could be placed. Australia does not deport citizens with characters of concern to a Minister. The system is that a citizen is free unless they become subject to the criminal justice system. A court can order that a citizen spend time deprived of freedom (on remand, imprisoned etc). This is the gist of the rule of *habeas corpus* which has been part of the common law for hundreds of years. When they have completed their sentences the great majority of citizens are released, though there are court-ordered exceptions. The result is that each of Australia's States and Territories has well developed systems for post-release management of people who have

[15] And the related practice of turn-backs, which are not mentioned in the Terms other than being a 'related' matter.

completed their punishment for crime.

- If the management systems are insufficient, surely a great deal that is positive could be done in Australia, with States and Territories, for far less than the money being spent in payments to Nauru to do this social work for Australia.
- To the extent that this would be seen by some to disrespect the visa system, which applies to those of bad character who *can* be deported, there are likely to be conditions that can be added to visas which would help to manage conduct, as well as strong countering facts and realities that could be stated in relation to at least stateless individual as well as strong arguments that a program of deportation to Nauru for being a person of bad character risks being a breach of the limits of executive power under the Constitution.

BACKGROUND - Summary of offshore processing and offshore resettlement as at **1 January 2022**.

Political

On 1 January 2022 Australia still had a Liberal-National Coalition Commonwealth Government. Australia's arrangements with Papua New Guinea had ceased in October 2021[16], though a number of the men transported to Manus Island on and after 19 July 2013 remain in PNG[17]. Also, in October 2021 Australia had executed a new Memorandum of Understanding with the Republic of Nauru for an 'enduring **regional processing capability** in the Republic of Nauru'[18], with an unknown number of '**confidential** subsidiary arrangements to support the effective implementation of this MOU, **including funding'**[19].

As at 1 January 2022 Labor had in place the ALP 2021 National Platform, adopted at the ALP National Conference in March 2021. The 2021 Platform, which remains unchanged in the latest 2023 Platform, allowed for 'non-statutory processing …. under bilateral and regional arrangements' of 'persons who arrive unauthorised at an excised place…' such as Christmas Island [20]. As at 1 January 2022, the only bilateral and regional arrangement

[16] https://minister.homeaffairs.gov.au/KarenAndrews/Pages/finalisation-of-the-regional-resettlement-arrangement.aspx

[17] A number still remain in PNG, many unwell but currently banned for the rest of their lives from coming to Australia, because of the terms of Labor's Rudd Doctrine dated 19 July 2013. For details see the attachment to this submission.

[18] https://www.dfat.gov.au/sites/default/files/mou-nauru-enduring-regional-processing-capability-sep-2021.pdf

[19] See footnote 8. Emphasis added.

[20] https://alp.org.au/media/2594/**2021**-alp-national-platform-final-endorsed-platform.pdf

which provided for processing was with Nauru.

In addition to the arrangements concerning processing, as at 1 January 2022 there existed Australian Government international arrangements with the UNHCR, the USA and New Zealand[21] to resettle 'Unauthorised Maritime Arrivals' (UMAs)[22] banned from Australia under the Rudd rule and found to be entitled to permanent protection through humanitarian visas by the processes carried out in Manus and in Nauru. In addition there was and still are privately organised and financed program of resettlement under Canadian migration sponsorship laws called Operation Not Forgotten[23] and other private sponsorship arrangements.

On 9 April 2022 the then Prime Minister called a federal election for 21 May 2022, which Labor won convincingly. Arrivals of non-citizens by boat or attempts to do so were not a salient election issue[24], because Labor stated it supported turn-backs and offshore processing[25], though the then LNP government did attempt to revive the Howard fear-driven successes of 2001 by breaking the government policy of silence in relation to such matters with an announcement on election day of a boat interception[26].

Legislation and litigation

As at 1 January 2022 the *Migration Act 1958* (MA), the visa system and the administrative arrangements and instruments under the MA, were very large, very complex and notably punitive and discriminatory in relation to -

- non-citizens who are UMAs under the MA[27]; and
- non-citizens, no matter their visa status, who fall within section 501 of the MA, which sets out the character test for visas[28].

The volume and complexity referred to is in part due to legislated responses to court decisions government did not like, sometimes made before a decision was handed down,

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page 127, paragraph 4 second 'dot' point. An 'excised place' is a place which would be part of the Australian migration zone (however named) but it has, by legislation been 'excised' from Australia. A familiar example is the Territory of Christmas Island.

[21] Usually called 'third country' resettlement, rather than 'offshore resettlement'

[22] https://www5.austlii.edu.au/au/legis/cth/consol_act/ma1958118/s5aa.html

[23] The Refugee Council of Australia manages this program with Canada's Mosaic - https://www.refugeecouncil.org.au/operation-not-forgotten/

[24] https://www.abc.net.au/news/2022-05-22/labor-won-federal-election-albanese-policies/101088720

[25] https://www.abc.net.au/news/2022-04-14/why-anthony-albanese-clarifying-offshore-detention-policy/100992152

[26] https://www.abc.net.au/news/2022-05-21/scott-morrison-confirms-unauthorised-vessel-intercept/101087492

[27] See f-n 21

[28] https://classic.austlii.edu.au/au/legis/cth/consol_act/ma1958118/**s501**.html

typically retrospective where legally and constitutionally possible, (removing the risk that past actions could be unenforceable or be a cause for compensation), and often involving language that even experienced lawyers found difficult. The result is a migration legal system that is highly specialised, opaque, costly, inefficient and an encouragement to poor system governance. Bi-partisan commitment to offshore processing and resettlement, has particularly driven a governance modus operandi of government avoidance of Constitutional, common law and financial accountability and, for refugees, international accountability[29]. This is easier when stakeholders are not citizens and, when social circumstances permit, can be readily demonised. People seeking and needing safe settlement are inherently vulnerable.

On 1 January 2022, indefinite administrative immigration detention in Australia of non-citizens had been considered lawful for almost 18 years, due to a bare majority (4:3) decision of the High Court in 2004[30].

In reliance on the High Court, in May 2021 the Parliament had enacted the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021*[31] . This Act amended the MA to clearly state that effectively stateless non-citizens who did not have visas because they failed the character test would be indefinitely detained if they could not be deported because they have 'well-founded fears of persecution from being returned to places where they would be at risk of serious harm'[32]. The great majority of people who have such 'well-founded fears of persecution…' are, of course, refugees who are entitled to protection from a member country of the Refugee Convention, including Australia. However, Australia's policy is to deport non-citizens who fail the character test, which clashes with Australia's obligations under the Refugee Convention.

Therefore, where a non-citizen could not be deported but will not be granted a visa of any kind, the only place for that person would be immigration detention until –

- their home country changed and became safe for them[33],
- the person died, or

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[29] https://www.ohchr.org/en/press-releases/2025/01/australia-responsible-arbitrary-detention-asylum-seekers-offshore-facilities

[30] *Al-Kateb v Godwin* [2004] HCA 37 . The High Court, November 2023, overruled the constitutional holding in *Al-Kateb*. *A - NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.

[31] https://classic.austlii.edu.au/au/legis/cth/num_act/maiofra2021658/

[32] Sangeetha Pillai, 'The Migration Amendment (Clarifying International Obligations for Removal) Act 2021: A case study in the importance of proper legislative process' on AUSPUBLAW (10 June 2021) https://www.auspublaw.org/blog/2021/06/the-migration-amendment-clarifying-international-obligations-for-removal-act-2021

[33] The countries from which people have fled in the last 25 years include: Afghanistan, Iran, Myanmar, Sri Lanka, Sudan

- the High Court decided indefinite immigration detention of that person was unlawful,

whichever happened first.

Human and financial cost

As at 1 January 2022 offshore processing, detention, confinement and controls in Papua New Guinea and the Republic of Nauru for around 15 of the previous 21 years had already caused great mental and physical harm to the people offshored[34] and to people who worked with them[35]. Causing harm to those who seek asylum by boat and who are offshored is an unavoidable consequence of offshoring.

In addition, it is not clear that the communities which received Australia's offshored people have benefitted economically and socially as they might have, had Australia provided international aid relevant to the communities' needs, rather than Australian detention centres[36].

There were, up to 1 January 2022, enormous direct costs to the Australian budget, assessed to be in the billions[37], and indirect costs such as compensation payments and legal damages settlement costs and related legal costs, all without any official Australian Government opportunity cost or cost benefit analysis up to 1 January 2022 (or since). It is clear that keeping a non-citizen in a third country under an MoU and related confidential subsidiary arrangements, is far more expensive per non-citizen than would be keeping the person in legal limited-time detention in Australia, or on a visa with reporting conditions and close management in Australia.

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[34] These harms are well documented, as noted for example here - https://www.sciencedirect.com/science/article/pii/S132602002305272X and https://academic.oup.com/jrs/article/35/4/1508/6646968 and https://msf.org.au/article/statements-opinion/indefinite-despair-mental-health-consequences-nauru. Minors are not currently sent to offshore processing reflecting the acceptance of the extreme harm suffered in Nauru.

[35] See the Attachment and other reports, for example, a report from 2016 - https://www.smh.com.au/politics/federal/detention-centre-workers--suffering-their-own-trauma-in-dealing-with-asylum-seekers-20160225-gn3buk.html

[36] For example https://devpolicy.org/the-manus-asylum-centre-temporary-boom-20260126/ (Manus) and https://reliefweb.int/report/australia/nauru-shows-asylum-outsourcing-has-unexpected-impacts-host-communities (Nauru, 2023)

[37] https://www.unsw.edu.au/content/dam/pdfs/law/kaldor/resources/2024-05-factsheet/2024-05-cost-of-australias-refugee-and-aslyum-policy.pdf May 2024. https://www.refugeecouncil.org.au/federal-budget-summary/ 2023-24 Budget. https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/8/ scroll to bar graph covering each F/Yr 2012 - 2025

NOW - 2022 to date

Political

When Labor became the Australian Government there were large hopes for significant reforms in refugee and asylum seeker policy and practices. As set out L4RNSW-ACT Information leaflet referred to earlier in this submission, many good things have been done. Offshore processing and offshore settlement stand out as exceptions to the generally reasonable and humane approach by Labor to refugees and others without safe home countries. Labor has consistently stated that a main reason for offshore processing and related confinement in PNG and Nauru has been to 'stop the drownings' at sea. However, it is also argued that it is 'turn-backs' – i.e. turning back people smuggling boats to their ports of departure - that saves people from drowning at sea, not the threat of confinement in a third country such as PNG or Nauru.

Labor leaders today may consider that Labor must constantly demonstrate that –

- Labor are as tough as or tougher than alternative right-wing governments on arrivals by sea without valid visas, to discourage departures for Australia by boats, as boat arrivals always get emotionally charged populist news coverage out of all proportion to any threat to Australia's security; and
- Labor are as tough or tougher on crime by non-citizens than alternative right-wing governments as it seems that, according to the popular press and some politicians, non-citizen criminals can never be punished too much.

Ironically, in fact since 2001 the right in Australian politics – the LNPON[38] parties - have wanted Australia to be targeted by people seeking to arrive by boat without a visa – the more the better. From the desperation of the asylum seekers these political parties have sought and shamefully gained, political advantage, with the harm and costs described earlier. A former PM goes around the world advising right of centre parties on how they can turn the asylum seeker crisis near their country into electoral success.

Since 2001 some parliamentarians left of Labor have sometimes joined forces with the LNPPH to deny practical solutions in honour of perfect solutions, thereby causing in 2013 the offshore processing policy which would seem to be the opposite of the perfect they sought. There is a direct line between that uncompromising political approach at that time, and the suffering caused to innocent people by offshore processing, especially after the Abbott LNP election win in late 2013.

[38] Liberal, National, Queensland LNP and One Nation

Litigation, legislation and more litigation

The MA has been amended several times since 2022. The purpose of amendments has again been to respond to court decisions which found migration administrative decisions to be unlawful/invalid because the law was incorrectly administered[39] or because decisions made were unconstitutional.

Probably the most publicised decision has been the High Court's decision in November 2023, *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37[40], which overruled the constitutional holding in *Al-Kateb v Godwin* [2004] HCA 37 [41] in which a narrow majority of the High Court had found that indefinite immigration detention of non-citizens was lawful. *Al Kateb* is the decision on which Home Affairs ministers and departments had relied whilst keeping people locked up indefinitely, even though no court had ordered their indefinite imprisonment.

The Home Affairs/Immigration approach has continued to be to try to 'get around' the work of the judiciary, rather than to implement the law. Legal decisions seem sometimes to be viewed by the portfolio as inconvenient to and interfering in the presumed higher calling work of the immigration and border functions of the executive. The legislation which has followed *NZYQ* has been intended to circumvent the impact of the decision, to permit Home Affairs to control as closely as possible people released from immigration detention following the High Court's decision, and to set up the legislation which, together with confidential agreements with the Republic of Nauru, enable the offshore settlement of non-citizens which is the subject of this Committee Inquiry. Assumed commitments to core principles of lawful government administration have been set aside to make this scheme happen[42]. L4R has made submissions and written letters objecting to Labor's approach of continuing the habits of the previous (2014-22) LNP government and to Treasury, in January 2023, as part of their Budget consultations. If the Committee would like copies of those submissions we are happy to provide them.

The habit of pushing legislation to the legal and constitutional limits advised by (presumably) the Solicitor-General bearing in mind court decisions, then anticipating litigation testing the legislation, then losing cases and re-legislating to re-push must be very costly to the Commonwealth Treasury and to Attorney-General's, in terms of annual

[39] Notably the decision of the Full Federal Court on 22 December 2022, in *Pearson v Minister for Home Affairs* [2022] FCAFC 203, followed by the *Migration Amendment (Aggregate Sentences) Act 2023* which allowed Home Affairs to re-detain people previously released. The Act is probably irrelevant now, having been overtaken by later case law and legislation in response.
[40] https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/37.html
[41] https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2004/37.html
[42] The so-called 'Anti-Fairness' legislation

appropriations for staff and for fees and disbursements for court cases. The legislation and litigation functions of Home Affairs are so large as to deserve their own Deputy Secretary.

We think it is *assumed* that this cost is less than would be the cost to the broader community – to Australia - of any alternative to this ingrained administrative habit. The habit has resulted in the scheme for offshore resettlement that is the subject of this Committee's inquiry.

For example, did Home Affairs ever consider, after the High Court's decision in *NZYQ*, legislation establishing immigration detention or other community management in Australia by a court, within the scope of the High Court's decision? Would that not be less expensive to the Treasury than the offshore resettlement scheme which is the subject of this inquiry?

L4R recommends that the Committee seek expert evidence on -

- The likely costs of alternatives to offshore resettlement by Home Affairs under the current legislation, such as a constitutionally valid court processes to address government concerns with non-citizens who fail the section 501 MA character tests but who have completed their punishments in the criminal justice system and/or who are not subject to the criminal justice system;
- How similar countries, such as Canada deal with non-citizens of concern who cannot be deported to their country of origin. So far as we know, Canada does not use any equivalent to the Republic of Nauru to transport to and 'settle' on, such non-citizens.

Costs including payments to contractors and sub-contractors and 'other third parties', and 'the outcomes and effect of' such payments

We have already referred the Committee to sources with reliable costs of offshore processing[43].

L4R has no way of knowing the costs of arrangements since 2022, including payments to contractors, sub-contractors and other third parties other than publicly available reports in media or elsewhere. It is likely that the full costs are borne by a number of different portfolios (not only Home Affairs/Immigration) in a number of different lines of expenditure.

[43] See f-n 36

Our understanding is that, in relation to arrangements on **Nauru**, government considers none of the payments to contractors and sub-contractors is made by the Commonwealth, and that they are all made by Nauru, using money paid by the Commonwealth. For that reason, the payments in relation to the Nauru arrangements are considered, we gather, to not be subject to the Commonwealth's own procurement rules.

Again, this looks like the Commonwealth making administrative and international arrangements to avoid the Commonwealth's own financial accountability laws, just as the legislation which enables the arrangements is intended to avoid the Commonwealth's Constitution, as interpreted by the Commonwealth's High Court.

It seems likely that off-shoring of Australia's responsibilities under international law and/or the MA does not avoid Australia having responsibility, in law or as a matter of practical reality.

The *Parliament's* oversight of bulk payments by Australia to Nauru under undisclosed terms with that country, is therefore very important for public accountability. L4R recommends that the Committee ask DHA, DFAT, Defence, Treasury, Finance, Attorney-General's Department and any other Commonwealth and/or State agency with any responsibility for any aspect of the arrangements the Committee is enquiring into, to provide financial and other costs data from their records since 2022.

Our understanding in relation to people still in **Papua New Guinea** is that – for the next couple of months at least - the Commonwealth continues to carry some costs and to make payments to respond humanely now to the very difficult but avoidable circumstances of most of the remaining men detained on Manus after 19 July 2013, and families. The situation remains that the men and families are banned from Australia for the rest of their lives. We assume this is because banning for nearly 13 years is not regarded by Australia as long enough and/or because banning and suffering are believed to be part of the deterrent to people smuggling by boat. We know from personal contacts that a few of these men are extremely ill – see the Attachment to this submission. It may be that the Committee will receive a separate submission from people working with the former 'Manus men' and with Home Affairs in their constrained efforts to assist.

We urge the Committee to accept that offshore processing in the past and in the future will always harm people Australia offshored, and that Australia will always be responsible for that harm, whether as a matter of legal liability[44] or – after careful steps to avoid liability -

[44] for example - https://www.ohchr.org/en/press-releases/2025/01/australia-responsible-arbitrary-detention-asylum-seekers-offshore-

as a matter of practical reality and, importantly, as a matter of acceptable proportionate response to the problem of informal, un-visa-ed migration.

We recommend that the Committee ask all agencies involved to provide a total cost to each agency, to date, of offshore processing and related refusal by Australia to receive any of the men offshored or their families, highlighting costs since 2022.

Integrity of arrangements for delivery of services and value for money for Australian taxpayers

L4R refers the Committee to comments we have already made about the structure of the arrangements and what they avoid.

We recommend that the Committee seek evidence from a public procurement expert to compare and contrast the standard and content of public accountability of the current arrangements with accountability of alternatives such as –

- Accountability for payments to a contractor (and by it to a sub-contractor) to the Commonwealth working internationally;
- payments to a Commonwealth contractor (and its sub-contractors) working in Australia
- payments to and other costs of Australian Commonwealth employees engaged in, for example, assessment of applications for visas.

Clarifying the public policy purpose(s) of offshore processing and offshore resettlement programs

L4R considers that a reason that offshore processing has endured and, now, offshore settlement from Australia, has been adopted, is the lack of clarity of the purpose of each. We suspect that both programs may exist today not only – or, perhaps, not even - to address the two problems of black-market-supplied boat journeys to Australia and not being able to deport to home countries a relatively small number of unwanted non-citizens.

Rather, we fear that the programs exists mainly to provide money to the under-resourced small island nation of Nauru: offshore processing and settlement provide an Australia-funded international footprint of activity, a counter to offers of investment from other

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facilities#:~:text=GENEVA%20%2D%20In%20two%20landmark%20decisions%2C%20the,to%20the%20Pacific%20Island%20nation%20for%20processing. and https://www.supremecourt.vic.gov.au/news/manus-island-detention-centre-class-action

nations which raise international security and influence concerns[45]

Very worryingly, the words of the October 2021 MoU between Australia and Nauru may carry a more sinister and cynical potential: a commitment to development of a long term offshore processing industry in Nauru, which can be used by any country offshoring any of their migration (or other) responsibilities, providing an 'enduring regional processing capability' and cashflow from the paying country to Nauru which, in turn pays contractors (for example the US prison company reported in mainstream media) and others. Under this hopefully hypothetical scenario Nauru becomes, in substance, a commercial prison island, with start-up money in large amounts provided by Australia.

Measuring success of offshore processing and offshore resettlement programs against clear public purposes

If the Committee accesses the monthly Home Affairs reports called 'The Administration of the Immigration and Citizenship Programs'[46], they can read, 'People Smuggling'[47] data and two public purposes of offshore processing. The report, not surprisingly, describes regional (i.e. offshore) processing as one of the two main activities by which the sea border is protected (Operation Sovereign Borders) by countering or disruption maritime people smuggling ventures. The other main means is turn-backs.

In this framework, a disrupted venture is a success as the sea border is protected. The program implies that each successful disruption within a program and capability of multiple and reliable disruption (including through offshore processing) provide strong disincentives to maritime people smugglers. The data usually pointed to are the increases in ventures when offshore processing did not exist. The data on ventures to Australia in any given year need to be seen in the context of international factors in that year pushing people to migrate informally and the total numbers involved. We would be very surprised if overall numbers of informal migration around the world have declined because of the disruption activity reported.

The report also not surprisingly states that the other key purpose of disrupting maritime people smuggling ventures is to prevent 'avoidable deaths at sea'. We assume that, in the periods covered by these reports there have been no deaths in the part of the sea for which Australia is responsible, as deaths are part of deterrence messaging and, unfortunately, also part of clickable media reporting.

[45] https://www.nauru.gov.nr/
[46] https://immi.homeaffairs.gov.au/what-we-do/the-administration-of-the-immigration-program
[47] In the report for October, go to pages 44 and 45

It does not follow that avoidable deaths at sea have been prevented in other parts of the world's seas because of Australia's offshore processing arrangements. In fact it is likely that people smugglers, the black market, have simply adjusted by selling sea and other dangerous passages to countries other than Australia, and that people die. The risks of unsafe travel to hoped-for safety always need to be seen in the context of the even more unsafe circumstances that forced migrants flee.

Unlike the offshore processing arrangement with Nauru, there are no official reports so far on the offshore resettlement in Nauru of unwanted non-citizens. The reason for the program is, officially, that a visa has to mean something and that visa cancellation is meaningful and not meaningless for anyone just because they cannot be deported to their country of origin or other unsafe country[48] such as deporting a gay person to a country where being gay is criminalised. In that framework, each deportation to Nauru of each person without a visa is a success. Implied is that other people in the community have had the risk removed of something happening to them by the deported person, which is also a success. The Committee should seek the cost per person deported to Nauru under this resettlement program and compare it with the cost of managing the non-citizen in the same way that citizens are managed, under a visa with strong and appropriately funded conditions intended to manage and change behaviour.

<u>Alternatives to current offshore processing and offshore resettlement programs</u>

Migration of all kinds is of course an international activity requiring international management. It seems logical that an Australian program that operated with international partners so as to prevent – to disrupt - departures (or ventures) ideally before they occurred would meet the existing goals of countering the black market and diminish risks of death at sea around Australia. This is how refugee migration from Vietnam was carried out in the 20th century. It is also how countries neighbouring the countries people flee have been supported to host 'processing centres' in the past. Given the cost and risks involved in offshore processing, including the lack of program and spending accountability, alternatives which have been used in the past should be explored and costed.

In relation to offshore resettlement to Nauru, there are likely to be strong countering facts and realities that could be stated in relation to each of the relatively few stateless individuals currently affected by this new program, as well as strong arguments that the program risks being a breach of the limits of executive power under the Constitution. The achievement of every deportation of a non-citizen under this new arrangement needs to be

[48] Minister Burke, House of Representatives 29 November 2025

weighed against the financial and other costs of the program overall, as well as the poor governance impacts of a lack of accountability for public funds, as outlined in this submission.

Yours sincerely,

Nizza Siano
National Secretary

Attachment – The situation in PNG with remaining men formerly detained on Manus from July 2013, and families.

ATTACHMENT

The situation in PNG with remaining men formerly detained on Manus from July 2013, and families[49].

There are men still held in Papua New Guinea after nearly 13 years since PM Rudd announced on 19 July 2013 the 'never ever settle in Australia' ban for people arriving by boat without visas. There are 27 men, 9 partners and 15 children – i.e., a total of 51 people living in Port Moresby who would not be there but for Australia sending the men to Manus in 2013-14. Australian community volunteers (known as Manus Lives Matter) and donors have been supporting the men (and their families) in PNG, having visited them there five times in the period 2017-19.

From January 2022, Australia provided ongoing funding directly *to PNG* for housing, allowances and services to the men still left in PNG. Unfortunately, that funding ran out and the men ceased to receive financial support (mainly small allowances to meet costs).

As may be standard in relation to direct payments made by Australia to a nation-state, there seems to have been no written agreement between Australia and PNG that PNG would provide to the Australian government accountability for the moneys given, so that Australia could be assured that the money was spent on the purposes for which it was given. This has caused reputational problems for PNG and for Australia, unfortunately. It also meant that the men were left to fend for themselves, mostly in Port Moresby.

After the Australian government money ran out, MLM - *supported by Australian donors (i.e., private philanthropy)* - provided the most basic living allowance to the men at a total cost of $140,000 of donations, until in December 2024. At that date, Australian Government funds became available, and the men received allowances again but paid directly to them and making them responsible for their own housing, food and healthcare. In the longer run – from end April – the men will have to have jobs. However not all yet have PNG work rights.

MLM says – 'For most of 2025, this new situation was an improvement on the men's enforced destitution in the previous year. But by November it was clear further difficult changes were being planned' and MLM founders Sr Jane Keogh and Dr Tim McKenna visited again.

They tell us that they interviewed 18 men, some parters and met several children. They visited their three living areas. They say that, since the new arrangements started in December 2024, PNG Immigration has been encouraging the men and their families to become more independent. However, progress has been slow, with only two having fully transitioned. MLM tell us there are several reasons for this, including that

- 'PNG Immigration has designated eight men as incapable of independent living (principally due to their poor mental health) and so they continue be fully supported in motel accommodation with access to free private health care.' and

[49] The information in this Attachment is provided by volunteers of Manus Lives Matter. Direct quotes not otherwise attributed are from information MLM have provided to L4R.

- ‘Eleven men still live at [a location called] Lodge 10, where some have lived for at least 5 years. They receive an allowance but,’ in an act of great generosity from a private landlord, ‘get free accommodation and limited free food from the landlord, despite him apparently receiving no money from the PNG Government and being in legal dispute with it.’

MLM say that ‘the principal challenge to independent living is the difficulty of finding safe accommodation in Port Moresby, one of the most dangerous capital cities in the world, which is affordable on their current modest allowance or on the low paid jobs that they might find, noting the high unemployment rate in the city and the reluctance of many employers to hire these foreigners with under developed work skills after thirteen years of detention followed by assisted living with little ability to become job-ready, still suffering the traumatic impact of their past and the uncertainty and hopelessness of their current settlement situation.’ Also, not all yet have PNG work rights.

Six men and their families live in an area called Koki, where the PNG Government currently subsidises their rent, because they were not able to find other safe affordable accommodation after an extensive search in early 2025. Their lease ends on 28 February.

MLM tells us –

Key Issues

The most urgent and important issue is the critical health situation for the 8 people PNG Immigration says can’t live independently.

PNG does not have the necessary medical capabilities to treat such complex mental illness.

- If the person were a PNG national in need of medical attention not available in PNG, whether provided with aid from Australia or otherwise, that PNG national would be medi-vacced to Australia.
- Australia sent these men to PNG. This is a very good reason for Australia to be financially responsible for their health care, rather than imposing further on PNG.
- Prior to 2022 Australia and PNG evacuated the former Manus detainees to Australia for treatment not available in PNG.

‘Secondly, for these serious cases, effective treatment can only begin, when the patients are removed from the trauma, with which they are inflicted, namely indefinite exile in PNG.

So, continuing their exile in PNG only continues their agony, with an inevitable, continuing decline in their health, no matter how good any support is.’

> *MLM and L4R call on the Australian and PNG Governments to restore their pre-2022 policy of evacuation of people needing treatment not available in PNG, to Australia for that treatment.*
>
> **We note that ‘this approach for the PNG men was **not** a risk to Operation Sovereign Borders, while the policy operated for eight years and is available to people sent to Nauru in the last two years.’**

‘The second most important issue is that the situation for the other 17 men changes dramatically for the worse after 30 April.

From that date these 17 men and their families will have to become fully independent, with their current allowances and support ending on that date.
A lump sum payment will help for 3-12 months, depending on their situation. But half can't deal with this change. While, the other half might survive, they can do so only with support from Australian donors, which can't last indefinitely.
Seven might re-settle in New Zealand or Canada, but only one before 30 April. The others will spend months or even years struggling with these changes., while they await the frustratingly slow resettlement processes for these two countries.
So, without some more fundamental change to Australian policy after 30 April, the situation for most of these 17 men and the eight sick men unable to ever settle in PNG and whose health will just continue to decline.'

Just as L4R has always opposed offshore processing and detention, so MLM calls on the Australian Government to end offshore detention, and resettle in Australia, all people subject to Australia's offshore detention regime (including those already evacuated to Australia).

END OF ATTACHMENT