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## Contents

|   |    |
|---|----|
| What policies has Australia had on turning back boats?.....                     | 2  |
| 1976-2001: Before Operation Relex .....   | 2  |
| Operation Relex .....   | 2  |
| Rudd and Gillard government policy .....  | 2  |
| Operation Sovereign Borders .....   | 3  |
| How much information is available about Operation Sovereign Borders?.....       | 3  |
| What happens when boats are turned back under Operation Sovereign Borders?..... | 4  |
| What operational challenges are posed by turning back boats? .....              | 4  |
| What happens to people after they have been turned back? .....                  | 5  |
| Does Australia check if people need protection before turning them back? .....  | 5  |
| Is turning back boats consistent with international law? .....                  | 7  |
| Obligations under law of the sea.....   | 7  |
| Obligations under human rights and refugee law .....                            | 7  |
| Are turnbacks permissible under Australian law? .....                           | 8  |
| Do other countries turn back boats?.....  | 8  |
| United States.....  | 8  |
| European Union .....  | 9  |
| Southeast Asia .....  | 10 |
| What are the alternatives to turning back boats? .....                          | 10 |



In 2012, the Gillard Government commissioned an expert advisory panel to make  
<sup>14</sup> The panel recommended that a policy of turning back boats to Indonesia should only be reintroduced where certain conditions were present, including consent from the country to which boats were being returned, compliance with domestic and international law, and respect for obligations under the *Safety of Life at Sea Convention*.<sup>15</sup> The p  
the report was released.<sup>16</sup>

### Operation Sovereign Borders

In September 2013, the Abbott

Operation Sovereign Borders



## What happens when boats are turned back under Operation Sovereign Borders?

The G <sup>24</sup> In most cases, turnbacks are where a vessel is removed from Australian waters and returned to just outside the territorial seas of the country from which it departed. Boats are known to have been turned back(s) -4(o)i791.77 ede



process at sea.<sup>54</sup> In one case, enhanced screening interviews were reported to take place by teleconference, over a poor line and in noisy conditions.<sup>55</sup> In other cases, the Australian Government indicates that interviews were undertaken in person by Australian officials on board the vessel, with the support of interpreters.<sup>56</sup> However, reports from returned asylum seekers and their lawyers suggest that the enhanced screening process did not afford a sufficient opportunity to articulate a need for protection.<sup>57</sup>

UNHCR has expressed concern sea, and its possible non-compliance with international law.<sup>58</sup> Legal experts have noted that these procedures raise a real risk of *refoulement*, and do not comply with the relevant international minimum standards.<sup>59</sup>

As a general rule, screening asylum seekers at sea is inappropriate and must not replace a full refugee status determination (RSD) process, with all its procedural and substantive safeguards.<sup>60</sup> Where it replaces a full RSD process, on-water screening creates a risk that

sent back to places where they fear persecution or other forms of significant harm. If this occurred, it would be a violation of *non-refoulement* obligations under international law.

UNHCR indicates that in exceptional circumstances, initial screening at sea may be undertaken to proactively identify people with protection needs and expedite their access to a full RSD process.<sup>61</sup> However, UNHCR also states that this should not be used as a routine policy measure and is not appropriate for processing the claims of vulnerable people or those with specific needs, such as children.<sup>62</sup>

According to UNHCR, if a country implements pre-screening procedures prior to a full RSD, it must ensure ~~that~~



Indonesia, Sri Lanka and Vietnam are not parties to the *Refugee Convention*. Refugees in Indonesia have limited legal protections and are liable to detention.<sup>80</sup> In Sri Lanka there are reports of torture by Sri Lankan security forces,<sup>81</sup> and in Vietnam a range of serious human rights concerns have been raised, including state violence against detainees.<sup>82</sup> Due to these turning boats back to Indonesia, Sri Lanka and Vietnam, Australia is at risk of breaching its *non-refoulement* obligations. Given the inadequacies of the enhanced screening process noted above, the likelihood of *refoulement* is significant.

## **Are turnbacks permissible under Australian law?**

residency.<sup>87</sup> The number of Cuban asylum seekers travelling to the US by sea has since dropped considerably.<sup>88</sup>

Under the Trump Administration, information on the number of asylum seekers arriving by sea and intercepted by the US Coast Guard has reportedly become difficult to obtain.<sup>89</sup> Coast Guard media releases have confirmed that interdictions and turnbacks are continuing under President Trump.<sup>90</sup>

Although UNHCR has periodically monitored US on-board screening, it has never formally endorsed the practice. Similarly, some refugee law experts consider the US on-board



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<sup>8</sup> Evidence to Senate Budget Estimates Hearing, Parliament of Australia, Canberra, 31 May-1 June 2006 (Department of Immigration and Multicultural Affairs).

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup>

*International Journal of Refugee Law* 27(4), 536, 546.

<sup>12</sup> See Inquest into the death of Mohammed Hassan Ayubi, Muzafar Ali Sefarali, Mohammed Amen Zamen, Awar Nadar, Baquer Husani [2010] NTMC 014 [1], [11].

<sup>13</sup> Ibid.

<sup>14</sup> Expert Panel on Asylum Seekers, *Report of the Expert Panel on Asylum Seekers*, Australian Government, August 2012.

<sup>15</sup> Ibid, [3.77]-[3.80].

<sup>16</sup> Ibid, 17.

<sup>17</sup>

*Australian Border Force*

<https://osb.homeaffairs.gov.au/en/Operation-Sovereign-Borders>.

<sup>18</sup> Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 20 October 2014, 160 (Angus Campbell, Lieutenant General).

<sup>19</sup> Ibid, 161 (Angus Campbell, Commander Joint Agency Task Force).

<sup>20</sup>

*Newsroom*

<https://newsroom.abf.gov.au/channels/Operation-Sovereign-Borders/releases>.

<sup>21</sup> Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *A Claim of Public Interest Immunity Raised Over Documents*, March 2014 13.

<sup>22</sup> Ibid, 15.

<sup>23</sup> See evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 24 March 2017, 53 (Michael Pezzullo, Secretary).

<sup>24</sup> Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 23 February 2015, 137 (Angus Campbell, Lieutenant General).

<sup>25</sup>

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2014).

<sup>26</sup>

Australian Government returns Sri Lankan People smuggling venture

2014)

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F3265710%22>

People smuggling venture returned to Sri Lanka

<http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm219651.htm>;

People smuggling venture returned to Sri Lanka

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<http://www.minister.border.gov.au/peterdutton/2015/Pages/People-smuggling-venture-returned-to-Sri-Lanka.aspx>; Department

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[http://newsroom.border.gov.au/channels/media-](http://newsroom.border.gov.au/channels/media-releases/releases/operation-sovereign-borders-monthly-update-february-2)

[releases/releases/operation-sovereign-borders-monthly-update-february-2](http://newsroom.border.gov.au/channels/media-releases/releases/operation-sovereign-borders-monthly-update-february-2)

People smuggling boat

returned to Sri Lanka

<http://www.minister.border.gov.au/peterdutton/Pages/people-smuggling-sri-lanka.aspx>; Evidence to Senate Legal and Constitutional Affairs Legislation Committee, above n 20, 72 (Stephen Osborne, Air Vice-Marshal).

<sup>27</sup> Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, 25 May Operation Sovereign

Borders Monthly update: June 2016 (Media Release, 28 July 2016)

<http://newsroom.border.gov.au/channels/Operation-Sovereign-Borders/releases/operation-sovereign-borders-monthly-update-june-3>.

<sup>28</sup>

ABC News (online), 25 March 2014 <http://www.abc.net.au/news/2014-03-24/asylum-seekers-describe-boat-turn-back/5342210>

Sydney



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*Morning Herald* (online), 20 January 2014 <http://www.smh.com.au/federal-politics/political-news/witness-reveals-asylum-seeker-suicide-attempts-on-high-seas-20140119-312s1.html>.

<sup>29</sup> Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, 20 October 2014, 159-160 (AnBT/F1 9 Tf1 0 0 1 115.1 688.66 Tm0 g0 G[(1)-3(6)-3(0)-3( (AnBT/F1 9 Tf1 0 0 1 115.1 688.66 Tm0 g0 G[(1)-3(6)-









