Removal at the edge of life

TCXM, Nauru, and Australia's international human rights standing

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CPD learning outcomes

- Explain the factual and statutory sequence that enabled the proposed transfer to Nauru after the appellant had been released on a Bridging R visa.
- Identify how the 2025 validation provisions affected the procedural-fairness challenge to the Interim Arrangement.
- Analyse the competing approaches to “reasonable practicability” and the significance of the accepted medical evidence.
- Explain the operation of s 197C in separating the s 198 removal duty from non-refoulement considerations.
- Evaluate the Chapter III punishment argument, the differences within the Court, and the reforms proposed in the paper.

1. Opening: the case and the thesis

Thank you, Greg, and good evening. This evening I want to use *TCXM v Minister for Immigration and Citizenship* [2026] HCA 13 as a lens through which to examine a difficult question in Australian public law: what happens when a statutory scheme is legally effective, but the scheme has been designed so that serious human consequences are excluded from the operative legal inquiry?

This evening's CPD is titled "Removal at the edge of life: TCXM, Nauru, and Australia's international human rights standing". My central argument is deliberately narrower than saying that the High Court held Australia had acted unlawfully. It did not. The appeal was dismissed. The Court applied the legislation before it. My argument is that *TCXM* exposes a serious breach in Australia's human-rights architecture because it shows how domestic law can be structured to validate executive action, exclude non-refoulement and right-to-life considerations from the removal duty, and make a grave medical risk legally insufficient to stop removal.

There are three institutional moves at the centre of that argument. First, a third-country reception arrangement with Nauru was treated as legally effective even though procedural fairness had not been afforded to the appellant, because Parliament retrospectively neutralised that defect. Secondly, section 197C of the Migration Act separates the section 198 removal inquiry from Australia's non-refoulement obligations. Thirdly, the accepted medical risk did not prevent removal even though the primary judge found that the medical services available in Nauru were inadequate to manage the appellant's severe asthma on an ongoing basis.

Those three moves matter together. The case is not simply about offshore migration policy, and it is not simply about statutory construction. It is about the capacity of legal categories to separate legality from safety. It is also about the difference between a legal system that says a power exists and a human-rights system that asks what exercise of that power will do to the person who is subject to it.

For this evening's CPD, I will proceed in five stages. I will begin with the facts and statutory setting. I will then examine the Interim Arrangement with Nauru and the retrospective validation provisions. Third, I will focus on medical risk, reasonable practicability and section 197C. Fourth, I will address the Chapter III punishment argument and the important disagreements within the Court. I will finish with the broader human-rights implications and five concrete reforms suggested by the paper.

2. Facts and statutory setting

The appellant was a citizen of Iran who had lived in Australia since 1990. He was granted a protection visa in 1995. He was later convicted of murdering his wife, and in 2015 his protection visa was cancelled under section 501(3A) of the Migration Act. The gravity of that offence is important and should not be minimised. Equally, the human-rights analysis in the paper proceeds on the premise that serious criminality does not extinguish the basic rights questions raised by removal into foreseeable harm.

After serving a long term of imprisonment, the appellant was detained under section 189 pending removal. The constitutional landscape then changed following *NZYQ v Minister for*

Immigration, Citizenship and Multicultural Affairs [2023] HCA 37. Because there was no real prospect of his removal becoming practicable in the reasonably foreseeable future, he was granted a Bridging R, or Removal Pending, visa. So at that point the legal system had moved him from detention into conditional liberty because removal was not then realistically available.

The chronology then changes sharply in early 2025. Between 31 January and 12 February 2025, the Commonwealth entered an Interim Arrangement with Nauru for the reception of an initial cohort of up to three non-citizens. On 4 February 2025, the appellant was proposed to Nauru without notice. On 14 February the Department applied to Nauru for a long-term stay visa for him. On 15 February Nauru notified the Department that the visa had been granted. The appellant was then notified that section 76AAA applied, his bridging visa ceased, and he was re-detained.

That sequence is important because it shows the functional role of the arrangement. Before the arrangement, the appellant had been released because removal lacked a real prospect of becoming practicable. After the arrangement and Nauru's permission to enter and remain, the statutory machinery could operate in the opposite direction: the bridging visa could cease, detention could resume, and the appellant could be placed on a path to removal.

The case therefore sits at the intersection of several legal structures: detention after *NZYQ*; visa cancellation on character grounds; the power to enter third-country reception arrangements; the cessation of the Bridging R visa under section 76AAA; the duty to remove under section 198; and section 197C, which determines the relevance - or irrelevance - of Australia's non-refoulement obligations to that removal duty.

The High Court dismissed the appeal. The joint reasons of Gageler CJ, Gleeson, Jagot and Beech-Jones JJ held, in substance, that the 2025 validation legislation resolved the challenge to the Interim Arrangement, that the relevant provisions authorised and required removal to Nauru despite the inadequacy of medical services there, and that the statutory scheme did not contravene Chapter III. Gordon J agreed in the result but took a broader view of what may be relevant to reasonable practicability. Edelman J also dismissed the appeal, but his historical analysis of the pre-2014 law is particularly important to the human-rights critique. Steward J agreed with the joint reasons on the central issues.

3. The Nauru Interim Arrangement and retrospective validation

The Interim Arrangement was expressed to be a third-country reception arrangement contemplated by section 198AHB. It entered into force on 12 February 2025. It was non-binding in the sense that it was not intended to create legally binding obligations, and it applied initially to no more than three non-citizens. For a named person, settlement was to commence when Nauru, after receiving a request from the Department, notified the Department that it was willing to settle that person.

Nauru undertook to grant an indefinite stay visa and to accept responsibility to provide support, including access to health services, in accordance with Nauruan standards of living. The arrangement also contemplated payments from Australia to support Nauru. One of the difficult features, from a rights perspective, is the combination of strong practical consequences for the individual and limited enforceability by that individual. The appellant was not a party to the arrangement. He could not insist on care equivalent to that available in Australia. Yet the arrangement was capable of changing his legal status, ending his bridging visa, restoring detention and enabling removal.

The procedural position is equally striking. The Commonwealth selected the appellant as one of an initial cohort, made arrangements with a foreign state, and created the conditions for cessation of his visa without giving him notice or procedural fairness. Before the primary judge, the parties agreed that procedural fairness had not been afforded. The legal controversy therefore became less about whether there had been fairness - there had not - and more about what legal consequence, if any, remained after Parliament intervened.

That intervention came through the *Home Affairs Legislation Amendment (2025 Measures No 1) Act 2025* (Cth). Section 198AHAA retrospectively disapplied the rules of natural justice to the exercise of executive power to enter a third-country reception arrangement. Item 10 of Schedule 1 then validated things done or purportedly done before commencement, including entry into such an arrangement. The plurality held that item 10 attached to the Interim Arrangement all the legal consequences that would have followed if procedural fairness had not been required. It did not leave room for a conclusion that the arrangement was valid but nevertheless unlawful for want of fairness.

Gordon J reached the same practical outcome. Her Honour reasoned that if procedural fairness had been a condition of the Commonwealth's power, non-compliance would ordinarily have produced invalidity. But item 10(4) addressed that very invalidity and attributed the legal consequences that otherwise might not have existed. Those consequences included satisfying the criterion in section 76AAA that enabled cessation of the bridging visa. Steward J described item 10 as a complete answer. Edelman J agreed with the joint reasons on the arrangement issue.

For the paper, the human-rights problem is not that the Court misunderstood the validation statute. The concern is what retrospective validation does as a matter of rights. It changes the legal status of the earlier governmental act, but it does not make the person heard. It does not reduce the medical risk. It does not improve the capacity of the receiving state's health system. It does not recreate the opportunity to provide evidence before the executive machinery was triggered.

That distinction - between curing invalidity and curing the underlying rights injury - is one of the key themes of the paper. Procedural fairness in a case of this kind is not ornamental. It can be the mechanism through which a person contests selection, health risk, the adequacy of care, and the practical assumptions underlying transfer. When Parliament retrospectively says that the absence of fairness no longer affects legal validity, it can produce a formally coherent legal result while leaving the substantive vulnerability entirely untouched.

A useful question for practitioners is therefore: what is the content of a procedural right if the legal system can remove the consequence of its breach after the critical executive steps have already occurred? *TCXM* gives us a very stark example because the validation was not peripheral. It restored the legal chain that moved the appellant from conditional liberty back to detention and toward removal.

4. Medical risk and the meaning of reasonable practicability

The accepted medical evidence should, in my view, be placed at the centre of the case. The appellant was in his early sixties and had a long history of severe and uncontrolled asthma. The evidence recorded multiple admissions to intensive care, ongoing asthma attacks and a risk of poor outcomes, including death. He required ongoing specialist assistance and regular specialist follow-up, ideally through a specialist asthma service of the kind available in major teaching hospitals in Australia but not available in Nauru.

The primary judge made a critical factual finding: the medical services available in Nauru were inadequate to manage the appellant's severe asthma on an ongoing basis. That is the factual hinge of the human-rights critique. The issue is not that the appellant claimed an entitlement to the best health system in the world, nor that Nauru had to replicate Australian tertiary care. The issue is that Australia proposed to move a person from a place where the required specialist treatment was available to a place whose available services had been found inadequate for a serious and life-threatening condition.

The statutory question, however, was framed through section 198 and the concept of whether removal was reasonably practicable. The joint reasons accepted that a medical condition that makes a person unfit to travel may make removal not reasonably practicable. They also accepted that events in the receiving country - for example a disease outbreak, natural disaster or civil unrest - can matter insofar as they affect the practical and legal capacity to transport the person and have that person received.

But the joint reasons drew an important line. The inquiry does not extend generally to what might happen to the non-citizen after the person has been received into the destination country. Earlier authority, particularly *NATB*, had treated the prospect of death, torture or persecution after removal as irrelevant to reasonable practicability. The joint reasons regarded that approach as settled, particularly after *MZAPC* and in light of the statutory scheme.

Put more simply, if the person is too sick to fly, that may bear on practicability. If the airport is closed because of a natural disaster, that may bear on practicability. But if the person can be put on the aircraft, flown to Nauru and admitted there, and the serious medical danger arises because the health system after arrival cannot manage the condition, the plurality's approach places that danger outside the operative section 198 inquiry.

That is what I describe in the paper as the 'reception line'. It is analytically clear. It is also, from a human-rights perspective, deeply artificial. Human vulnerability does not stop at immigration reception. Severe asthma does not become less dangerous at the point when legal custody or immigration processing changes hands. The primary judge's finding about inadequate services was specifically about the period after arrival, because that was when the appellant would need ongoing care.

Gordon J's reasons are important because they resist making the reception line absolute. Her Honour described reasonable practicability as an evaluative concept to be assessed by reference to all the circumstances, not merely physical possibility. Removal requires a receiving country, willingness to admit the person, and an appropriate right or authorisation to enter and remain. Her Honour also considered that authorities dealing with disaster, civil anarchy or plague were not confined solely to the mechanics of the journey. What is likely to happen at the destination may, in an appropriate case, be relevant.

Gordon J nevertheless rejected the appellant's proposed construction. A significant concern was the uncertainty of the proposed standard. Her Honour asked, in effect, how an officer was to distinguish a real risk, or real and substantial risk, of premature death from a merely potential risk. The appellant already faced a potentially fatal asthma attack in Australia, and the proposed formulation raised difficult questions about comparative mortality risk. Her Honour also noted that such a construction might prevent removal to a country with adequate services if those services were inaccessible to the person for reasons such as personal resources. On the case as framed, the appellant did not establish that removal was not reasonably practicable.

So Gordon J provides an important qualification, but not a different result. Her Honour leaves open the proposition that destination circumstances may be relevant in some cases, while declining the particular standard advanced here. For human-rights analysis, that matters because it shows that the statutory phrase 'reasonably practicable' is not self-evidently confined to the mechanics of transport. There was room for a more evaluative conception; the decisive limits came from the way the scheme had been legislatively constructed and argued.

At this point in the presentation, I would invite you to hold onto one practical question: if an officer knows that the receiving state's services are inadequate to manage a life-threatening condition, should the legal inquiry be capable of treating that fact as more than a post-arrival consequence? The paper's answer is yes. The present statutory architecture largely answers no.

5. Section 197C, non-refoulement and the architecture of exclusion

Section 197C is the provision that makes the human-rights critique more than a complaint about the interpretation of one phrase. It reveals a deliberate statutory separation between removal and international protection obligations. Section 197C(1) provides, for the purposes of section 198, that it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. Section 197C(2) provides that the officer's duty to remove arises irrespective of whether there has been a lawful assessment of those obligations.

The statutory definition of non-refoulement obligations is broad enough to include obligations arising under the ICCPR and customary international law of a similar kind. There is an important qualification in section 197C(3): section 198 does not require or authorise removal to a country if there is an extant protection finding with respect to that country arising from a valid protection visa application. A protection finding can involve the refugee criterion or the complementary protection criterion.

The difficulty is that, absent an extant protection finding, an assertion that the person fears serious harm in the proposed country of removal is not itself enough to stop the duty. The joint reasons explained that a claim may be genuine and may even prove well founded if investigated, but without the statutory status of an extant protection finding, it does not necessarily preclude removal under section 198.

This means protection can turn on prior administrative status rather than present danger. The question becomes not simply, 'Is there now a serious risk?' but, 'Has the statutory machinery already produced the kind of protection finding that section 197C(3) recognises?' That is a very different model from one in which the removal officer must confront the current risk to life or safety as part of the operative duty.

The joint reasons and Steward J pointed to personal, non-compellable ministerial powers such as sections 48B and 195A as mechanisms through which grave last-minute risks may be addressed. That is the so-called safety valve. Gordon J was more cautious. Her Honour observed that such powers are personal, limited and non-compellable, and that they are not a sufficient or conclusive response given the gravity of the possible consequences.

The paper strongly prefers Gordon J's caution as a matter of human-rights principle. A right to life, or protection from serious harm, is not robustly protected if the individual has no enforceable entitlement to have the relevant risk considered before removal, no ability to compel an exercise of power, and no assurance that the evidence will be assessed. Executive discretion may supplement rights protection. It is a poor substitute for an enforceable legal duty when the consequence may be death, torture or serious preventable harm.

Edelman J's historical analysis makes the statutory design particularly clear. His Honour considered *NATB* to have been wrong as an interpretation of reasonable practicability before the 2014 amendments, at least to the extent that it excluded serious protection-related consequences after reception. His Honour regarded the pre-2014 line culminating in *SZQRB* as correctly allowing attention to some consequences after arrival.

Edelman J also made a powerful point about the principle of legality. As the paper explains it, *NATB* appeared to assume that Parliament intended removal even to near-certain death, torture or persecution unless Parliament expressly said otherwise. In his Honour's view, that reversed the usual logic of legality. But the crucial point is that Parliament then legislated in 2014. The insertion of sections 197C(1) and (2) was intended to alter the position and to make the removal power separate from, unrelated to and independent of provisions implementing Australia's non-refoulement obligations.

On Edelman J's analysis, after those amendments the officer need not take into account what is likely - even what may be virtually certain - to occur after admission where the excluded consideration is Australia's international protection obligations. This is why the paper describes section 197C as a 'rights rupture'. The exclusion is not an accidental gap. It is the product of legislative choice.

There was an additional complication in *TCXM* because the appellant sought to characterise his medical risk as distinct from classic non-refoulement. His case concerned the risk of premature death arising from inadequate medical services rather than persecution or deliberate harm by Nauru. Gordon J accepted that section 197C did not necessarily exclude every conceivable form of harm unrelated to non-refoulement, but her Honour rejected the construction advanced on the facts and for the reasons I have just described. Edelman J took a more categorical route, reasoning that the statutory purpose could not be avoided by changing the vocabulary used to describe the constraint on removal.

Whichever doctrinal route one takes, the practical outcome is stark. Either the risk falls inside a field that section 197C has deliberately excluded from the operative inquiry, or it is treated as insufficiently defined to prevent removal under reasonable practicability. The human-rights concern is that the categories become more important than the person's actual exposure to harm.

6. Procedural fairness as human dignity

The paper then returns to procedural fairness, but reframes it as an aspect of dignity. Administrative lawyers often describe fairness in familiar terms: notice, disclosure of adverse material, an opportunity to respond, and an unbiased decision-maker. Those are essential doctrinal requirements. In a case like *TCXM* they also serve a deeper function. They recognise that a person affected by executive power should remain a participant in the process rather than become merely an object of governmental logistics.

The appellant was one of an initial cohort of up to three people. He was proposed to Nauru without notice. The arrangement was negotiated between governments. The legal consequences reached him after essential steps had already been taken. That matters because his medical circumstances were not peripheral. Fairness could have allowed him to contest the proposed selection, the adequacy of medical care, the assumptions being made about Nauru, and the practical consequences of transfer before the machinery became operational against him.

Instead, by the time the case reached the High Court, the question was dominated by retrospective validation. Item 10 treated the relevant thing as valid and always to have been valid notwithstanding a failure to observe natural justice. The plurality rejected a distinction between validity and some residual unlawfulness. Gordon J explained how the validation restored the legal consequences needed for the cessation of the bridging visa. The result was that the legal system did not have to assess whether the executive conduct met a fairness standard; the standard's consequences had been removed.

The rights cost is not merely symbolic. The Commonwealth's entry into the arrangement was part of the causal chain leading from conditional liberty to re-detention and removal. The absence of fairness therefore affected the stage at which the appellant could have sought to prevent that chain from being set in motion. Retrospective legislation cannot recreate that lost opportunity.

That is why the paper characterises *TCXM* as a model of rights avoidance rather than rights balancing. Parliament did not require a decision-maker to weigh fairness against an urgent competing state interest on the facts of this appellant. It enacted a rule that retrospectively made the fairness defect legally harmless for the relevant purpose.

This also helps explain why the case has significance beyond migration law. Validation legislation is a legitimate feature of parliamentary systems, but *TCXM* shows the human cost when validation concerns an executive arrangement that directly changes an individual's liberty and exposure to physical risk. The doctrinal question may be whether Parliament has effectively cured invalidity. The rights question remains whether the person received a meaningful opportunity to be heard before the consequences attached.

For practitioners, the practical lesson is to separate those questions rigorously. A successful validation provision may dispose of a public-law remedy without answering the underlying rights criticism. Conversely, a rights criticism should not be presented as though it were itself a holding of invalidity. The paper's argument depends on maintaining that distinction.

7. Punishment, banishment and Chapter III

The appellant also advanced a constitutional argument under Chapter III. In broad terms, the argument was that if section 198(2B) authorised and required removal to Nauru despite a real risk of premature death, the scheme operated as punishment imposed by the executive rather than by a court. The submissions relied on a cluster of features: Australia's protection obligations, Australia's continuing involvement in the Nauru arrangement, the lack of procedural fairness and executive discretion, the appellant's absence of connection with Nauru, the constraints that would follow removal, the cancellation of his visa after criminal offending, and an asserted resemblance to banishment.

The Court rejected that argument. The joint reasons held that neither visa cancellation making a person unlawful nor removal under section 198 is inherently penal or punitive. The fact that the appellant would face an increased risk of premature death because of inadequate medical services in Nauru did not give the statutory scheme a punitive character. Their Honours also emphasised that involuntary hardship or detriment is not, without more, an exclusively judicial function.

Edelman J reached the same result on the facts. His Honour found no basis to infer a punitive purpose such as retribution, deterrence or denunciation. The available inference was that removal followed from the appellant's status as an alien subject to the statutory removal power and duty. Steward J treated authority concerning deportation of aliens as substantially foreclosing the argument and relied on the breadth of the aliens power.

The paper's concern is not that this conclusion was doctrinally inexplicable. The concern is the gap between the constitutional question and the human-rights question. Chapter III asks whether a measure is punitive in character and whether punishment is being imposed by the executive. It does not directly ask whether the receiving state can provide essential medical treatment, whether removal exposes the person to foreseeable suffering, or whether the decision is consistent with human dignity. A measure may therefore be non-punitive in the constitutional sense and still cause profound harm.

Gordon J's reasons preserve some important limits for future cases. Her Honour noted that an alien physically present in Australia has the protection of Australian law and identified unresolved questions about whether removal, or steps leading to removal, might in other circumstances be prima facie punitive. Those possibilities can include the process of selection, removal to a third country and detention-like conditions in the third country. Her Honour also observed that the possibility of deportation amounting to punishment is not completely foreclosed, and referred to the historical use of banishment as punishment.

Edelman J similarly qualified broad propositions about deportation. His Honour explained that the statement that deportation is not punishment is properly understood as an ordinary, not universal, proposition. Harsh involuntary removal may be capable of being characterised as punishment if, for example, it is imposed for a punitive purpose following an offence. The obstacle in *TCXM* was evidentiary: no case had been run at trial on facts concerning selection that could establish such a purpose, and the necessary material could not simply be introduced for the first time in the High Court.

For future litigation, those observations matter. But for the paper's human-rights argument, the deeper difficulty remains. Constitutional law may respond where punitive purpose is shown, while foreseeable suffering may remain outside the constitutional category if the statute describes the act as removal and the executive can point to immigration status rather than punishment as its purpose.

8. The disagreement within the Court and the path not taken

It would be wrong to present *TCXM* as a case of simple judicial indifference. The reasons reveal meaningful differences about reasonable practicability and about how far destination consequences can enter the statutory inquiry. Those differences help identify what the paper calls the 'path not taken'.

The plurality, together with Steward J on the central point, adopted the narrower position. Once a receiving country is identified, the Act authorises removal, and the practical and legal conditions for transport and reception are met, what happens after reception is generally outside the inquiry. On that approach, the accepted medical risk after arrival could not defeat the section 198 duty.

Gordon J's approach is more contextual. Her Honour treated reasonable practicability as evaluative. It is not simply a synonym for physical possibility. A removal must be capable of being put into practice in all relevant circumstances. Her Honour rejected the proposition that High Court authority had already established an absolute rule forbidding any consideration of post-arrival consequences. That is an important doctrinal opening even though the appellant's formulation was ultimately rejected.

Edelman J went further in historical and conceptual terms. His Honour regarded *NATB* as wrong before 2014 insofar as it confined reasonable practicability to the mechanics of removal and ignored what would happen after arrival. The ordinary-language examples used in his reasons are illuminating: one would not ordinarily regard it as reasonable or practicable to require a business trip to a place where a major earthquake was nearly certain, or to send an athlete to a place where an endemic plague was nearly certain. The evaluative concept asks more than whether the aircraft can take off and land.

The key point, however, is that Edelman J regarded the 2014 amendments as decisive. Whatever the better interpretation may have been before then, sections 197C(1) and (2) changed the statutory landscape. They deliberately separated the removal duty from Australia's international protection obligations. In other words, the path to a broader, more rights-sensitive understanding was closed by legislation, not by the inherent meaning of 'reasonably practicable'.

That leads directly to the reform argument. A rights-consistent version of the statute could treat serious, imminent and foreseeable post-arrival risks as relevant where they arise directly from the removal decision and the receiving state cannot adequately address them. That would not mean every hardship defeats removal. A workable legal threshold could be confined to extreme risks - for example near-certain death, torture, persecution, or medically preventable death caused by the absence of essential care.

Gordon J's concern about uncertainty has to be taken seriously. A rights-sensitive rule needs a threshold, an identified decision-maker, evidence, reasons and a reviewable process. But uncertainty is a design problem to solve; it does not establish that serious danger must be legally irrelevant. The difference between the judgments shows that the statutory outcome was not inevitable. It was a choice about what the law would permit decision-makers to consider.

For me, that is one of the most important points in the case. When we say 'the law requires removal', we should ask a second question: which legislative choices made that requirement operate in this way? *TCXM* shows that the exclusion of risk was built, historically and deliberately, into the statutory architecture.

9. The human-rights synthesis: five failures in substance

I can now bring the argument together. Read narrowly, *TCXM* resolves questions of statutory construction, retrospective validation and constitutional characterisation. Read through a human-rights lens, it asks what the legal architecture actually did to the person. The paper identifies five interrelated failures in substance.

First is procedural dignity. The appellant was selected for a bespoke third-country arrangement without being heard, notwithstanding that he had serious medical circumstances directly relevant to the consequences of transfer. The fact that the initial cohort was so small intensifies the individualised nature of the executive action. The later legislative response validated the absence of fairness rather than providing it.

Secondly is the right to life and protection from serious harm. The evidence showed severe uncontrolled asthma, a risk of death and inadequate ongoing medical services in Nauru. Yet the structure of the removal duty treated that danger as incapable of doing the work the appellant needed it to do. Either it fell beyond the reception line or within a field excluded by section 197C.

Third is the substitution of executive grace for enforceable rights. Personal ministerial powers may be capable of preventing catastrophe in an individual case, but they are non-compellable. The person has no right to require their exercise. That is why Gordon J's caution about treating those powers as a sufficient answer is so important. A safety valve that nobody can compel the executive to open is a precarious form of rights protection.

Fourth is offshore responsibility. The risk did not become unrelated to Australia merely because it would materialise after admission into Nauru. Australia negotiated the arrangement, selected the person, applied for the visa, triggered cessation of the bridging visa, detained the appellant and proposed to enforce removal. From a human-rights perspective, the chain of responsibility cannot be reduced to the territorial location at which the medical consequences become acute.

Fifth is the reduction of bodily vulnerability to administrative sequence. The distinction between transport and reception, on the one hand, and post-reception consequences on the other, has legal clarity. For a person with severe asthma it is physically continuous. Moving from one healthcare environment to another is itself what creates or magnifies the risk. The law's line does not make the body obey the same line.

None of this denies the gravity of the appellant's criminal offending. He had been convicted of murdering his wife, and his protection visa was cancelled on character grounds. The point is that human rights are most revealing when tested against unpopular or unsympathetic persons. If rights protect only those whom the community regards as deserving, they have become discretionary privileges rather than rights.

So the paper's claim is not that migration control is illegitimate or that non-citizens can never be removed after serious offending. It is that removal power should remain answerable to minimum standards of fairness, life, safety and enforceable protection.

10. Five reforms suggested by *TCXM*

The paper proposes five reforms. They are intended to preserve a functioning removal system while making extreme harm legally visible rather than legally irrelevant.

First, procedural fairness should be required before a third-country reception arrangement is operationalised against a named person. At minimum, the person should be told that transfer is being considered, informed of the substance of the proposed arrangement, permitted to provide medical and other evidence, and given an opportunity to contest whether the receiving state can provide the necessary protection and care. Retrospective validation should not be used to erase the legal consequence of denying that opportunity in an individualised removal process.

Secondly, section 197C should be amended so that section 198 does not require or authorise removal where there are substantial grounds for believing that removal would expose a person to death, torture, cruel, inhuman or degrading treatment, or serious and preventable medical deterioration caused by the receiving state's inability to provide essential care. A rule of that kind does not require every allegation to suspend removal indefinitely. It requires a threshold, evidence, a decision-maker and reasons.

Thirdly, 'reasonably practicable' should be restored to a genuinely evaluative role. Removal should not be considered reasonably practicable merely because a person can physically be transported and legally admitted. The inquiry should be capable, at least in extreme cases, of asking whether the receiving state is willing and able to receive the person in circumstances consistent with basic dignity and essential safety. Gordon J's reasoning and Edelman J's account of the pre-2014 authorities provide doctrinal foundations for such a model, even though the current statutory scheme prevented that approach from deciding this case.

Fourthly, personal and non-compellable ministerial powers should not be the principal human-rights safeguard in cases involving death or serious harm. Those powers may remain valuable as an additional discretion, but they should supplement an enforceable legal protection rather than replace it. A person facing a potentially fatal consequence should not depend entirely on a power that no court can require the Minister even to exercise.

Fifthly, third-country arrangements involving serious medical needs should be subject to independent monitoring and enforceable medical safeguards. It is not enough for an arrangement to refer generally to access to the receiving state's health services or standards of living. The relevant questions include actual clinical capacity, continuity of care, emergency response, specialist access, medication availability and a mechanism for return to Australia if the receiving arrangement cannot protect life or health.

Taken together, these reforms are modest in one important sense. They do not eliminate the removal power. They require that the state confront extreme risks rather than design the operative legal inquiry so that those risks disappear from view. The point is not to constitutionalise a universal entitlement to Australian healthcare. It is to create an enforceable threshold below which a removal decision cannot proceed without a serious, reviewable assessment of the consequences.

For practitioners and policy lawyers, I would frame the reform question this way: should the legal system treat a proven inability of the receiving state to manage a life-threatening condition as relevant evidence, or as information that the statute has deliberately instructed the removal process to ignore? *TCXM* demonstrates the consequences of choosing the latter model.

11. Conclusion and CPD takeaways

I will finish with four propositions. First, *TCXM* confirms the legal effectiveness of a statutory architecture that can retrospectively validate a third-country arrangement and allow the consequences of that arrangement to operate despite the absence of procedural fairness. Secondly, the current interaction of sections 197C and 198 confines the role that non-refoulement and serious post-arrival harm can play in the removal inquiry. Thirdly, Chapter III does not provide a general answer to foreseeable harm where removal is not characterised as punitive. Fourthly, the separate reasons show that a broader conception of reasonable practicability was doctrinally imaginable, but legislative design - particularly the 2014 amendments - was decisive.

The human-rights warning is therefore not that the High Court failed to apply the law. It is that the law can be made formally complete while leaving crucial questions of safety outside the operative legal test. In *TCXM*, the appellant could be removed despite an accepted finding that Nauru's services were inadequate to manage his severe asthma on an ongoing basis. The absence of procedural fairness was retrospectively neutralised. Serious risk was displaced from the removal inquiry. Ministerial intervention remained discretionary rather than enforceable.

A humane migration system must be capable of removing non-citizens in appropriate cases, including people whose visas have been cancelled for serious criminal offending. But the existence of that power does not answer the question of limits. My argument is that removal should remain answerable to basic human rights: a meaningful opportunity to be heard, enforceable consideration of grave risks to life and safety, and safeguards that follow the person beyond the administrative moment of reception.

If there is one sentence I would leave with you, it is this: *TCXM* shows how a legal system can make removal valid while making the human consequences legally peripheral. The challenge for public law is to ensure that legality and safety are not permitted to drift so far apart. Thank you. Greg, I will hand back to you for questions and closing remarks.