



Refugee Council
of Australia

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

CONDITIONS AND TREATMENT OF ASYLUM SEEKERS AND REFUGEES AT REGIONAL PROCESSING CENTRES

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing over 200 organisations and around 1,000 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

This inquiry follows from the inquiry of the Joint Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru (the Nauru report), which reported on 31 August 2015. This submission should be read together with our earlier submission to that Inquiry (attached).

1 Conditions and treatment of asylum seekers and refugees in regional centres

1.1 RCOA welcomes this inquiry as an opportunity for the Australian public to learn more about the conditions and treatment of asylum seekers and refugees in Nauru and Papua New Guinea, especially in the current climate of secrecy as discussed below.

1.2 RCOA remains extremely concerned at the continued reports of abuse and deteriorating mental health in Nauru and Papua New Guinea. Since this Committee reported in August 2015, RCOA notes the following media reports detailing concerns about the treatment of asylum seekers and refugees in Nauru and Papua New Guinea:

- **10 March 2016:** Reports of an attack by two Nauruan men with a machete leaving an Iranian refugee with a head wound requiring eight stitches¹
- **9 March 2016:** IHMS health report reveals that asylum seekers in offshore detention are being placed under surveillance for suicide and self-harm at a rate of two every three days, and growing more seriously mentally ill the longer they are detained²
- **26 February 2016:** an allegation is made that a 10-year-old child was raped on Nauru³
- **19 February 2016:** one of the first men to be 'resettled' in Papua New Guinea is left destitute and homeless⁴

¹ Doherty, B. (2016). "Nauru Refugee Left with Horrific Head Wound in Attack Dismissed by Police." *The Guardian*, 10 March <http://www.theguardian.com/world/2016/mar/10/nauru-refugee-left-with-horrific-head-wound-after-attack-dismissed-by-police>

² Doherty, B. (2016). "Two offshore asylum seekers placed under suicide or self-harm watch every three days." *The Guardian*, 9 March <http://www.theguardian.com/australia-news/2016/mar/09/two-offshore-asylum-seekers-placed-under-suicide-or-self-harm-watch-every-three-days>

³ (2016). "ABC acknowledges error in reporting of Nauru child sexual assault story, paediatrician says she provided correct information". *ABC News*, 26 February <http://www.abc.net.au/news/2016-02-08/abc-acknowledges-error-in-reporting-nauru-child-sexual-assault/7150320>

⁴ Doherty, B. (2016). "Refugee left homeless in Papua New Guinea after being resettled from Australian-run detention". *The Guardian*, 19 February <http://www.theguardian.com/world/2016/feb/19/refugee-left-homeless-in-papua-new-guinea-after-being-resettled-from-australian-run-detention>

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- **16 January 2016:** a key witness to the death of Reza Barati on Manus Island is reported to be stalked by guards in the compound⁵
- **6 Jan 2016:** allegations that a six-year-old was sexually assaulted were reported⁶
- **6 November 2015:** it was reported that a pregnant woman on Nauru was not being transferred despite requiring specialist care⁷
- **5 November 2015:** allegations were made (although denied by Broadspectrum) that teeth were found in meals on Manus Island⁸
- **30 October 2015:** Up to 100 people on Manus Island are struck down by food poisoning⁹
- **October 2015:** a pregnant woman seeking an abortion after an alleged rape is transferred back to Nauru without an abortion; Save the Children staff offices are raided¹⁰
- **18 October 2015:** a man in Manus Island is reported to be near death after a hunger strike of more than 6 months¹¹
- **16 October 2015:** a woman who made an allegation of rape on Nauru is threatened with prosecution¹²
- **14 September 2015:** a young man is reported to have been assaulted by a guard and forced to borrow his own medication¹³
- **4 September 2015:** the brother of an Iranian woman allegedly raped on Nauru, who twice tried to take her own life, says she has been kept isolated from her family and legal advice.¹⁴

1.3 These deeply troubling reports add to the extensive list of concerns that Parliament has already considered in other inquiries. Yet, as we discuss further below, the ever-increasing climate of secrecy concerning these centres make it highly likely that there remains much else that we do not yet know.

2 Transparency and accountability mechanisms

2.1 The earlier Nauru report included a number of recommendations to improve transparency and accountability, including:

- Facilitating complaints to the Ombudsman relating to conduct of staff or contractors, and reporting thereof (Recommendation 3)
- Briefing asylum seekers on their rights to complain to independent bodies (Recommendation 4)
- Increasing the transparency of conditions and operations at the Regional Processing Centre, including by ensuring the provision of reasonable access, in negotiation with the Government

⁵ Doherty, B. (2016). "Key witness in Reza Barati murder trial fears he will be killed on Manus Island". *The Guardian*, 16 January <http://www.theguardian.com/australia-news/2016/jan/16/key-witness-in-reza-barati-trial-fears-he-will-be-killed-on-manus-island>

⁶ Davidson, H. (2016). "Six-year-old refugee allegedly sexually assaulted on Nauru". *The Guardian*, 6 January <http://www.theguardian.com/world/2016/jan/06/six-year-old-refugee-allegedly-sexually-assaulted-on-nauru>

⁷ Doherty, B. (2015). "Doctors plead for pregnant refugee to be sent from Nauru to Australia for birth". *The Guardian*, 6 November <http://www.theguardian.com/australia-news/2015/nov/06/doctors-plead-for-pregnant-refugee-to-be-sent-from-nauru-to-australia-for-caesarean>

⁸ Doherty, B. (2015). "No teeth found in food on Manus Island detention centre, says operator". *The Guardian*, 5 November <http://www.theguardian.com/australia-news/2015/nov/05/no-teeth-found-in-food-on-manus-island-detention-centre-says-operator>

⁹ Doherty, B. (2015). "Up to 100 asylum seekers on Manus Island struck by food poisoning". *The Guardian*, 30 October. <http://www.theguardian.com/australia-news/2015/oct/30/up-to-100-asylum-seekers-on-manus-island-struck-by-food-poisoning>

¹⁰ See, for example, Doherty, B. (2015). "United Nations calls on Nauru and Australia to resolve Abyan case urgently". *The Guardian*, 28 October. <http://www.theguardian.com/australia-news/2015/oct/28/united-nations-calls-nauru-australia-resolve-abyan-case-urgently>; Farrell, P. (2015). "Police carry out more raids on Save the Children staff at Nauru detention centre". *The Guardian*, 22 October

<http://www.theguardian.com/world/2015/oct/22/police-carry-out-more-raids-on-save-the-children-staff-at-nauru-detention-centre>

¹¹ Australian Associated Press. (2015). "Manus Island asylum seeker on hunger strike says he is close to death". *The Guardian*, 18 October

<http://www.theguardian.com/australia-news/2015/oct/18/manus-island-asylum-seeker-on-hunger-strike-says-he-is-close-to-death>

¹² Conifer, D. (2015). "Nauru threatens to charge rape-claim refugee". *ABC News*, 16 October. <http://www.abc.net.au/news/2015-10-16/woman-could-face-charges-for-making-false-rape-claim-in-nauru/6858944>

¹³ Doherty, B. (2015). "Manus Island: refugee assaulted by guard and told to find his own medicine". *The Guardian*, 14 September <http://www.theguardian.com/australia-news/2015/sep/14/manus-island-refugee-assaulted-by-guard-and-told-to-find-his-own-medicine>

¹⁴ Lavoipierre, B. (2015). "'Raped, suicidal' asylum seeker given no direct contact with family: brother". *ABC News*, 4 September

<http://www.abc.net.au/news/2015-09-04/raped-suicidal-asylum-seeker-has-no-direct-contact-with-family/6748848>

of Nauru as necessary, by the Australian Human Rights Commission and by the media (Recommendation 5)

- Reporting fully to Parliament on the costs relating to the offshore processing centres (Recommendations 7 and 8)
- Ensuring that a non-government welfare service provider is contracted (Recommendation 10)
- Auditing, and reporting to Parliament, allegations of sexual abuse (Recommendation 13)
- Legislating to require mandatory reporting of sexual abuse (Recommendation 14).

2.2 RCOA endorses those recommendations, which have not yet been accepted by the government. Indeed, since the Nauru report, the climate of secrecy has only deepened. We note in particular the following developments since the Committee reported in August 2015:

- Changes to the rules applying to visits to Nauru, meaning that Australian and New Zealand citizens must be sponsored by Nauru¹⁵
- The departure of Save the Children from Nauru, with the effect that no independent organisation committed to human rights is present in either centre
- Raids by police on the Save the Children offices on the eve of their departure¹⁶
- The failure by government to apologise or compensate Save the Children workers unfairly dismissed after an independent inquiry cleared them of allegations¹⁷
- The cancellation of a visit by the UN Special Rapporteur on the human rights of migrants in September 2015 because of the risk that those speaking with him might face reprisals¹⁸
- The failure by Parliament to pass amendments supporting independent oversight of offshore processing and imposing mandatory obligations to report sexual abuse¹⁹
- The continuing implications of the secrecy provisions in the *Australian Border Force Act 2015*.

2.3 The concerted effort to suppress information coming out of Nauru and Papua New Guinea has had real effects on people advocating on behalf of those on Nauru and Papua New Guinea, as well as those on Nauru and Papua New Guinea. Within our own work, RCOA has observed that the new restrictions under the *Border Force Act* has already had a ‘chilling effect’ on the capacity and willingness of people to share information.

Recommendation 1

RCOA recommends that this Committee should adopt the recommendations of the Joint Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru.

Recommendation 2

RCOA recommends that:

- a) Provisions of the Australian Border Act 2015 relating to termination of employment for “serious misconduct” without access to a remedy and the disclosure of “protected information” be removed.*

¹⁵ Walsh, M. (2016). “Sponsor required for Nauru’s Australian, NZ visitors say new immigration laws”. *ABC News*, 7 March <http://www.abc.net.au/news/2016-03-07/sponsor-required-for-nauru-s-australian-nz/7227788>

¹⁶ Farrell, P. (2015). “Police carry out more raids on Save the Children staff at Nauru detention centre”. *The Guardian*, 22 October <http://www.theguardian.com/world/2015/oct/22/police-carry-out-more-raids-on-save-the-children-staff-at-nauru-detention-centre>

¹⁷ Australian Associated Press. (2016). “Coalition must apologise to Save the Children staff after report, Labor says”. *The Guardian*, 16 January <http://www.theguardian.com/world/2016/jan/16/coalition-must-apologise-to-save-the-children-staff-after-report-labor-says>

¹⁸ Lee, J. (2015). “UN cancels Australia visit over Border Force laws”. *Sydney Morning Herald*, 26 September <http://www.smh.com.au/federal-politics/political-news/un-postpones-australian-visit-over-failure-to-guarantee-protection-of-detention-centre-whistleblowers-from-re-20150926-gjvqm2.html>

¹⁹ Anderson, S. (2015). “Senate passes bill to remove children from onshore detention”. *ABC News*, 23 November <http://www.abc.net.au/news/2015-11-23/bill-to-remove-children-from-detention-centres-passes-senate/6966484>

- b) *If the above recommendation is not adopted, the Bill be amended to include specific exemptions for whistleblowers seeking to expose wrongdoing.*

3 The extent to which Australian-funded centres comply with Australia's legal obligations

- 3.1 This Committee has recently considered the issue of Australia's domestic and international legal obligations in relation to the regional processing centres in Nauru and Papua New Guinea. RCOA endorses the conclusions of this Committee (and the submissions in support of that view in that inquiry) that:

the level of control exercised by the Government of Australia over the RPC supports a strong argument that the primary obligation rests with Australia under international law for protecting the human rights of the asylum seekers, and for compliance with the Refugees Convention. At a minimum, the committee is convinced that Australia holds joint obligations with the Government of Nauru in that regard.²⁰

- 3.2 RCOA also endorses the following conclusion of this Committee:

In the committee's view, the Government of Australia's purported reliance on the sovereignty and legal system of Nauru in the face of allegations of human rights abuses and serious crimes at the RPC is a cynical and unjustifiable attempt to avoid accountability for a situation created by this country.²¹

- 3.3 Since this Committee made its report, the High Court has handed down its decision in *Plaintiff M68-2015 v Minister for Immigration and Border Protection*.²² Although the High Court found that the offshore processing regime in Australia was lawful, a majority of the judges did not accept the proposition that the offshore processing regime in Nauru was solely Nauru's responsibility.

- 3.4 In that case, French CJ, Kiefel and Nettle J found that Australia's participation "in the offshore processing was "indisputable".²³ Bell J found that "detention in Nauru was, as a matter of substance, caused and effectively controlled by the Commonwealth".²⁴ Gageler J found that Wilson Security had acted as "de facto agents of the Executive Government of the Commonwealth in physically detaining the plaintiff in custody",²⁵ and Gordon J accepted that detention in the Nauru RPC was "facilitated, organised, caused, imposed [or] procured" by the Commonwealth.²⁶

- 3.5 However, a majority of the judges accepted that Australia's participation or procurement of detention was authorised by section 198AHA of the *Migration Act 1958*. This section was inserted into the legislation through the *Migration Amendment (Regional Processing Arrangements) Act 2015*, which was introduced into Parliament on 25 June 2015 and passed the following day. This Act retrospectively authorised offshore processing arrangements in extremely broad terms. In Gageler J's view, the offshore processing regime was unconstitutional prior to the passage of this Act.²⁷

- 3.6 A number of members of the High Court also observed in *Plaintiff M68* that the Australian Government's powers were not "unconstrained" ([101]), and were limited to "action that can reasonably be seen to be related to Nauru's regional processing functions". Detention exceeding the length of time that could reasonably be seen to be related to regional processing could still

²⁰ Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru. (2015). *Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru*, 31 August, ¶5.16.

²¹ Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru 2015, ¶5.19.

²² [2016] HCA 1.

²³ ¶41.

²⁴ ¶93.

²⁵ ¶173.

²⁶ ¶354.

²⁷ ¶175.

be unconstitutional. Given the years that have now been spent by those on Nauru and, in particular, on Manus Island, it is certainly arguable that detention has now exceeded any reasonable length of time required to determine if they are refugees.

- 3.7 In any event, it is now clear that it is no longer tenable for the Australian Government to continue to shield itself behind the sovereignty of Nauru and PNG in disclaiming responsibility for a system that would not exist without our “indisputable participation”.

4 The policy of offshore processing

- 4.1 Australia’s revived offshore processing regime has now been in operation for over three years. During this time, RCOA has heard extensive feedback on the policy.²⁸ During this time, there have been few significant improvements in either the physical conditions of detention or efficiency of refugee status determination in Nauru and Papua New Guinea. Indeed, conditions appear to have deteriorated in some cases and the mental health impacts of prolonged indefinite detention under harsh conditions have become ever more pronounced.
- 4.2 There are a number of measures the Australian Government could implement to mitigate some of the harm caused by offshore processing. These include exploring alternatives to detention, expediting the processing of asylum claims, addressing shortcomings in physical conditions and enhancing independent oversight. So long as offshore processing is intended to act as a deterrent, however, RCOA is concerned that even these modest improvements will be difficult to achieve.
- 4.3 The threat of being sent to an offshore processing centre can only “work” as a deterrent if people seeking asylum believe that what they are seeking in Australia – safety, humane treatment, a fair hearing, an opportunity to rebuild their lives and a secure future – will not be available to them in Nauru and Papua New Guinea. In RCOA’s view, this creates a perverse incentive to maintain inhumane conditions. Efforts to limit detention, expedite processing of claims, improve physical conditions and provide durable solutions would in fact work against the policy’s intention, as offshore processing operates most effectively as a deterrent when detention is prolonged, processing is slow, physical conditions are harsh and the future is uncertain. In essence, the success of offshore processing depends on human suffering.
- 4.4 While RCOA would certainly welcome any efforts to alleviate the suffering of the people currently subject to offshore processing in Nauru and Papua New Guinea, we believe that objective of deterring asylum seekers is irreconcilable with the objective of protecting asylum seekers. As such, we see no viable way forward for offshore processing and strongly recommend that it be abolished entirely.

Recommendation 3

RCOA recommends that:

- a) Offshore processing of asylum claims be abolished and the detention centres in Nauru and Manus Island be closed;*
- b) All people currently subject to offshore processing be returned to Australia for processing of their claims; and*
- c) All people who have been found to be refugees after having their claims processed offshore be returned to Australia and granted permanent Protection Visas.*

²⁸ See, for example, Refugee Council of Australia. (2015). *Eroding Our Identity as A Generous Nation: Community Views On Australia’s Treatment of People Seeking Asylum*. <http://www.refugeecouncil.org.au/wp-content/uploads/2015/12/1512-Asylum.pdf>