Refugee Council of Australia

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

SUBMISSION INTO THE INQUIRY ON THE SERIOUS ALLEGATIONS OF ABUSE, SELF-HARM AND NEGLECT OF ASYLUM SEEKERS IN RELATION TO THE NAURU REGIONAL PROCESSING CENTRE, AND ANY LIKE ALLEGATIONS IN RELATION TO THE MANUS REGIONAL PROCESSING CENTRE

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, people seeking asylum 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 several parliamentary inquiries into offshore processing, including:

- the Senate Legal and Constitutional Affairs Committee's lapsed inquiry into Conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea in 2016, and
- 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 submissions to those Inquiries (attached).

1. Negotiation of third country resettlement of those in the centres, and additional measures to expedite resettlement

1.1. The Refugee Council of Australia has consistently opposed the policy of offshore processing. The policy is cruel, inhumane and inconsistent with our moral and legal obligations.

1.2. The Australian Government's commitment never to resettle anyone in Australia was made on 19 July 2013. This promise was hastily made without any clear plan as to where these people might be resettled. More than three years later, the Australian Government still has no plan for the future of these people we have sent to Nauru or Manus Island. The result has been indefinite detention of a highly vulnerable group of people, most of whom have been recognised as needing international protection. The Australian Government has caused tremendous suffering, and wasted many lives and many billions, in the pursuit of this failed policy.

1.3. The terms of reference of this current inquiry appear to suggest that the way out is to expedite negotiations with third countries. The reality is that, after more than three years, we have failed to find another country (other than Cambodia) to take these people. This is not surprising. The world is

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seeing unprecedented levels of forced displacement, and it is therefore not surprising that other countries are reluctant to help Australia with its extremely small, and entirely political, problem.

1.4. This reluctance has been reinforced by the way Australia has behaved towards both Nauru and Papua New Guinea. When it has suited them, the Australian Government has blamed them for the failures of the policy by invoking their sovereignty. Yet, despite the ruling of the Supreme Court of Papua New Guinea that the entry and detention of these people was unconstitutional, the Australian Government has refused to take them back. This attitude has undoubtedly caused great damage to our standing and credibility in the region on these issues, and has only made it less likely that any of our neighbours would be willing to help us now.

1.5. There is a much simpler and cheaper solution that is in our hands. It is well past time to accept that the policy has failed, and that those found to be owed protection should be granted refugee status and resettled in Australia.

1.6. Nevertheless, our primary concern now is that these people need to be taken out of Nauru and Manus Island urgently, as a humanitarian measure. The number of countries in which these people can now be successfully settled, after three years of indefinite detention following on from their original persecution, is shrinking. If they are ever to have a chance to rebuild their lives, these people will need help that can only realistically be achieved in a country with developed settlement services.

1.7. Any proposed resettlement must take into consideration factors specific to individuals, including the principle of family unity, their health (including their mental health), the reasons for their persecution, and the consequences of the harms they have suffered on Nauru and Manus Island.

1.8. In particular, those on Nauru or Manus Island who have family living in Australia should be brought to Australia and reunited with their families. The principle of family unity is of increased significance here, as reunification with families will be critical to restoring mental wellbeing.

1.9. RCOA is aware that there are people both on Nauru and Manus Island who have family in other countries that might be willing to resettle them. In those cases, the Australian government should immediately explore options for facilitating family reunion with those relatives. Such countries are likely to expect that Australia must first recognise its own responsibilities to reunite families within Australia.

1.10. Australia must also not breach the principle of *non-refoulement* by sending people to another country where there remains a real risk of persecution or other serious harm. For example, those who identify as lesbian or gays cannot be sent to a country where they will face a real risk of persecution on the basis of their sexual orientation.

1.11. It will also be necessary for people to be resettled into a country where there is a reasonable prospect of integration. For example, it is not appropriate to resettle people into countries where they cannot live and work legally or access basic services.

1.12. Any such negotiations are unlikely to be quick. In the meantime, we urge that the government send these people to Australia during any resettlement negotiations. This would relieve the immediate cause of their suffering and, by enabling them to get help for their urgent needs, is also likely to expedite any resettlement process.

Recommendation 1

a) *Abolish offshore processing of asylum claims and close the detention centres on Nauru and Manus Island;*

b) *All people currently still awaiting the processing of claims should be returned to Australia for processing of their claims; and*

c) *All people who have been found to be refugees on Nauru and Manus Island should be resettled in Australia.*

Recommendation 2

If Recommendation 1 is not accepted, then negotiations with third countries for resettlement must proceed urgently and those subject to offshore processing returned to Australia pending those negotiations. Any negotiations must include as fundamental principles:

a) *Refugees cannot be sent to a third country where there remains a real risk of persecution or other serious harm;*

b) *Any proposed countries of resettlement must have adequate and appropriate services and assistance to help in light of the extreme harm caused by the policy of offshore processing;*

c) *People should be resettled where they can be reunited with family, including family in Australia; and*

d) *Resettlement countries must be able to guarantee, as a minimum, a legal right to residence and work, and access to basic services.*

2. Factors that have contributed to the abuse and self-harm alleged to have occurred, the investigation of abuse and self-harm, and the effect of Part 6 of the Australian Border Force Act 2015

2.1. Since our previous submission to this inquiry, there have been significant further revelations of abuse and self-harm, including through the reporting of the *Guardian* on the Nauru files. There has also been a significant escalation of incidents of self-harm, including the devastating decisions by some to set themselves alight. As well, reporting of these incidents and of offshore processing has had real and negative effects on the mental health and wellbeing of people seeking asylum in the community, including those who have family or friends on Nauru and Manus Island.

2.2. These are the tragic and inevitable outcomes of the policy of offshore processing. It is the policy of offshore processing itself that is the root cause of the abuse and self-harm. It is a policy designed to deter people from claiming asylum by punishing them. It is a policy that is meant to coerce highly vulnerable people into returning to countries from which they fled, by making their lives more unbearable than they were before. It is a policy designed to limit the scrutiny and accountability, and the legal and moral responsibilities, of the Australian Government.

2.3. The policy itself creates ideal conditions for abuse and self-harm. First, these people are already highly vulnerable. Secondly, the hasty commitment never to resettle these people has resulted in indefinite detention, which inevitably results in abuse and self-harm.

2.4. Thirdly, sending these people offshore makes it hard for the Australian public to know what is happening there. However, the most important factor is that the political and high-profile commitment of both major political parties to the policy creates every incentive for the Australian Government to ignore, and indeed to suppress or deny, complaints of abuse and self-harm.

2.5. 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, in our view, ending the policy of offshore processing is the only effective way of addressing the abuse and self-harm on Nauru and Manus Island.

2.6. Alternatives to the policy of offshore processing do exist. The Australian Human Rights Commission has recently published a report that canvasses such alternatives,[1] a report that is consistent with RCOA's own recommendations.[2]

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[1] Australian Human Rights Commission (2016). *Pathways to Protection: A human rights-based response to the flight of asylum seekers by sea.* https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/pathways-protection-human-rights-based-response.

[2] Refugee Council of Australia (2016). *Thinking Beyond Offshore Processing: Key recommendations from the Refugee Council of Australia*. http://www.refugeecouncil.org.au/getfacts/seekingsafety/asylum/offshore-processing/thinking-beyond-offshore-processing-key-recommendations-refugee-council-australia/.

2.7. Any modest recommendations to improve the transparency and accountability of offshore processing will not ultimately address the causes of abuse and self-harm. Nevertheless, we do endorse previous recommendations made by this Committee, in its recent report on Nauru, to improve transparency and accountability. These include recommendations to:

- facilitate complaints to the Ombudsman relating to conduct of staff or contractors, and reporting thereof (Recommendation 3)
- brief asylum seekers on their rights to complain to independent bodies (Recommendation 4)
- increase the transparency of conditions and operations at the Regional Processing Centre, including by ensuring the provision of reasonable access, in negotiation with the Government of Nauru as necessary, by the Australian Human Rights Commission and by the media (Recommendation 5)
- report fully to Parliament on the costs relating to the offshore processing centres (Recommendations 7 and 8)
- ensure that a non-government welfare service provider is contracted (Recommendation 10)
- audit, and report to Parliament, allegations of sexual abuse (Recommendation 13)
- legislate to require mandatory reporting of sexual abuse (Recommendation 14).

2.8. We note that, in its actions, the Australian Government has clearly rejected some of these recommendations. We note in particular the following developments since the Committee reported in August 2015 in relation to Nauru:

- changes to the rules applying to visits to Nauru, meaning that Australian and New Zealand citizens must be sponsored by Nauru
- 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 departure
- the failure by government to apologise or compensate Save the Children workers unfairly dismissed after an independent inquiry cleared them of allegations
- 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 reprisals
- the refusal by Nauru of a visit by members of a Danish delegation who were critical of Australia's policy, as well as of independent MP Andrew Wilkie
- the failure by Parliament to pass amendments supporting independent oversight of offshore processing and imposing mandatory obligations to report sexual abuse
- the hiring of a private investigator by Wilson Security to determine the sources of media reports
- the vicious attack by the Australian Government on ABC's Four Corners program on offshore processing
- the withdrawal by Connect Settlement Services of the provision of settlement services on Nauru, and
- the continuing implications of the secrecy provisions in the *Australian Border Force Act 2015,* despite the government's decision to exclude doctors from those provisions after a court challenge.

2.9. With respect to the proposed establishment of an independent children's advocate, we consider that any move that would facilitate independent scrutiny would be welcome. We do not, however, think that this is likely to be an adequate response.

2.10. First, it is clear that abuse, neglect and self-harm afflicts people on Nauru and Manus Island regardless of age. Secondly, it is clear that the Australian Government has rejected more recommendations from independent agencies than it has accepted. Thirdly, we consider that a better proposal would be to extend the remit of the existing National Children's Commissioner to children in Nauru, and to extend the remit of the existing Royal Commission on the Institutional Responses to Sexual Abuse. These extensions would be more consistent with

existing work done to protect children in Australia, and ensure better resourcing and less political interference than is likely with the role of an independent children's advocate.

2.11. We also recommend that the Australian Government ratify the *Optional Protocol on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. Ratification would ensure regular monitoring, both at a national and international level, of places of detention with the aim of preventing torture or other cruel, inhuman or degrading treatment. This would also help improve the transparency and accountability of immigration detention in Australia, another area of significant concern.

2.12. We also recommend the abolition of the secrecy provisions of the *Australian Border Force Act 2015.* The concerted effort to suppress information coming out of Nauru and Papua New Guinea has had very 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. RCOA has observed that the restrictions under the *Border Force Act* has reduced the capacity and willingness of people to share information, both across the sector and within the Department.

2.13. While we welcome the recent decision to exclude doctors from those secrecy provisions, we note that this occurred only after a court challenge was begun and that this change in policy is limited in scope. We note that many others, including those contracted to provide services on Nauru and Manus Island such as teachers and lawyers, could be prosecuted under these provisions.

2.14. We welcome the opportunity provided by this Senate inquiry for those people who know what is happening to put their concerns on the record, under the protection of parliamentary privilege. We would also encourage this Inquiry to consider compelling such people to provide evidence to this Inquiry, as many may be unwilling to put themselves in jeopardy otherwise.

2.15. Consistently with our view above, we also encourage this Parliamentary committee to recommend that the terms of reference of the Royal Commission into Institutional Responses to Child Sexual Abuse should be expressly extended to reports of child sexual abuse on Nauru. The partisan political context of offshore processing, and the inherent incentives to minimise such reports, makes it impossible for the public to trust that such reports are being adequately investigated and prosecuted.

2.16. We would also urge this parliamentary committee to consider the impact of this deepening secrecy and increasing hostility on the rule of law and accountability to Parliament. Public attacks on the integrity of the Australian Human Rights Commission, non-governmental organisations such as Save the Children, and journalists threaten key pillars of our democracy.

Recommendation 3

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 4

e) The role of the National Children's Commissioner should be extended to include consideration of the rights of children on Nauru;

f) The terms of reference of the Royal Commission on Institutional Responses to Child Sexual Abuse should be expressly extended to reports of child sexual abuse in offshore processing centres; and

g) The Australian Government should ratify the Optional Protocol on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

Recommendation 5

a) The secrecy provisions of the Australian Border Act 2015 relating to disclosures by those working in offshore processing centres should be abolished; or

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

Recommendation 6

This Committee should compel evidence from people employed and formerly employed under service contracts in Nauru and Manus Island.

Recommendation 7

This Committee should condemn the attacks of the Australian Government on organisations seeking to report on the abuses and self-harm occurring on Nauru and Manus Island.

3. Obligations of the Commonwealth Government and contractors relating to the treatment of asylum seekers, including the provision of support, capability and capacity building to local Nauruan authorities

3.1. Australia has both clear legal and moral responsibilities in relation to those sent to Nauru and Manus Island. Our moral obligations are extremely clear. These people are only on Nauru and Manus Island due to the Australian Government's policy and its financial and practical commitment to the policy. What happens to these people is clearly a consequence of the Australian Government's decisions, and one for which the Australian Government is morally responsible.

3.2. The Australian Government also has legal obligations with respect to those people. Those legal obligations exist under international law and the bilateral agreements with Nauru and Manus Island, under our Constitution, as well as under domestic law and contracts with service providers.

International legal obligations

3.3. This Committee has previously considered 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.*

3.4. 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.*

Bilateral agreements

3.5. The memoranda of understanding and other bilateral agreements governing the arrangements of offshore processing also clearly spell out Australia's obligations in respect of those sent to Nauru or Manus Island.[3]

3.6. Both memoranda of understanding clearly spell out a relationship of 'joint cooperation' and 'regional cooperation'. Both agreements expressly require joint decisions on practical arrangements,

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[3] *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues* (3 August 2013 http://dfat.gov.au/geo/nauru/pages/memorandum-of-understanding-between-the-republic-of-nauru-and-the-commonwealth-of-australia-relating-to-the-transfer-to-and.aspx ; *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues* (6 August 2013) http://dfat.gov.au/geo/papua-new-guinea/pages/memorandum-of-understanding-between-the-government-of-the-independent-state-of-papua-new-guinea-and-the-government-of-austr.aspx; *Regional resettlement arrangement between Australia and Papua New Guinea* (19 July 2013) http://dfat.gov.au/geo/papua-new-guinea/Pages/regional-resettlement-arrangement-between-australia-and-papua-new-guinea.aspx.

and spell out that Australia is exclusively responsible for all costs incurred as a result of the arrangements.

3.7. The agreements also spell out joint commitments including to treat those subject to the arrangements 'with dignity and respect and in accordance with relevant human rights standards.' The Regional Resettlement Arrangement between PNG and Australia also expressly states that:

> *Australia and Papua New Guinea take seriously their obligations for the welfare and safety of any persons transferred to Papua New Guinea under this Arrangement [and]*
>
> *Australia will provide support, through a service provider, to any refugees who are resettled in Papua New Guinea or in any other participating regional, including Pacific Island, state.*

Constitutional responsibility

3.8. Since this Committee made its report on Nauru, the High Court has handed down its decision in *Plaintiff M68-2015 v Minister for Immigration and Border Protection*.[4] Although the High Court found that the offshore processing regime in Australia was lawful, it is clear that a majority of the judges did not accept the proposition that the offshore processing regime in Nauru was solely Nauru's responsibility.

3.9. In that case, French CJ, Kiefel and Nettle J found that Australia's participation "in the offshore processing was "indisputable".[5] Bell J found that "detention in Nauru was, as a matter of substance, caused and effectively controlled by the Commonwealth".[6] 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",[7] and Gordon J accepted that detention in the Nauru RPC was "facilitated, organised, caused, imposed [or] procured" by the Commonwealth.[8]

3.10. It is therefore 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".

Domestic laws and contracts

3.11. In addition to its international and constitutional obligations, the Australian Government also has obligations under domestic laws and its contracts with service providers. For example, it would appear that the *Workplace Health and Safety Act 2011* (Cth) would apply to these detention centres.[9]

3.12. Further, the Australian Government has contracted directly with organisations to provide services to these centres. This means that service providers in both Nauru and Manus Island are directly accountable to the Department of Immigration and Border Protection.

3.13. While these contracts are not publicly available, it is expected that such contracts would be broadly similar to those that apply in the Australian context and, relevantly, include performance measures.

3.14. For example, the contracts for the provision of detention health services in Australia include 17 performance measures. However, in its recent audit, the Australian National Audit Office (ANAO) found that as at March 2016, only nine of these measures were being effectively monitored.[10] The ANAO also found that the Department was not effectively monitoring whether key aspects of health

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[4] [2016] HCA 1.
[5] Ibid ¶ 41.
[6] Ibid ¶ 93.
[7] Ibid ¶ 173.
[8] Ibid ¶ 354.
[9] See Australian Lawyers Alliance (2016). *Untold Damage: Workplace Health and Safety in Immigration Detention*. https://www.lawyersalliance.com.au/ourwork/untold-damage.
[10] Australian National Audit Office (2016). *Delivery of Health Services in Immigration Detention*. https://www.anao.gov.au/work/performance-audit/health-care-services-delivery-onshore-immigration-detention, ¶ 2.20.

services were being delivered in accordance with the contractual requirements. Of particular concern was the fact that the Department was not following the clinically recommended approach for those at risk of suicide 'for a large number of detainees'.[11]

3.15. These ANAO reports clearly form a reasonable basis for suggesting that service providers, are likely to be failing legal obligations under these existing contracts. Yet, in the absence of any public accountability or scrutiny, it is impossible to determine the extent to which service providers are in breach of its legal obligations. Indeed, it is impossible to ascertain what are the legal obligations that Australia has accepted in relation to those sent to Nauru or Manus Island under these contracts.

4. Provision of support services for asylum seekers who have been alleged or been found to have been subject to abuse, neglect or self-harm in the Centres or within the community while residing in Nauru

4.1. As already noted, the only effective way of addressing the culture of abuse and desperation is to end the policy of offshore processing. The political incentives to punish people, the vulnerability of those involved, and the restrictions on and incentives for service providers all foster a culture of impunity.

4.2. Predictably, both the Australian Government and its partners have sought to discredit and diminish the reports of abuse and self-harm. They have sought to displace blame for these abuses and self-harm on to those Australians who are supporting these people, and on to the media and NGOs such as Save the Children and Amnesty International.

4.3. In this highly charged context, providing support services for those suffering abuse or self-harm is a very inadequate measure for a much larger problem. As the Royal Commission on Institutional Responses to Sexual Abuse has evidenced only too clearly, institutions complicit in abuse are motivated to deny, excuse and protect their own, a response that makes it very difficult to recover from the initial trauma. The response of the Australian Government so far follows that pattern.

4.4. Indeed, the Australian Government has further punished those subject to abuse, neglect or self-harm, especially when people advocate on their behalf. The treatment of the pregnant Somali woman known as 'Abyan' and the widow of Omid Masoumali, the man who burnt himself to death, has been especially brutal. In both cases, it would appear that the Australian Government deliberately restricted their access to support services while in Australia.

4.5. We also express deep concern at the lack of information so far provided about the plans following the withdrawal of Connect Settlement Services from its contract to provide settlement services on Nauru. Their withdrawal, following the ending of Save the Children's contract, is likely to mean that there will be no non-governmental organisation involved in offshore processing. Rather, their fate will be in the hands of multinational security providers who have no real interest in the wellbeing and support of these people.

4.6. Ultimately, while there might be ways to make life on Nauru or Manus Island marginally more bearable, none of these measures will ever truly be effective to combat abuse, neglect or self-harm. These are people who have been deliberately deprived of hope, of dignity, and of control over their own lives. That is the logical consequence of offshore processing, and the only effective remedy is to end it.

[11] Ibid ¶ 3.23.