



President
Professor Gillian Triggs

27 April 2015

Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru
PO Box 6100
Parliament House
Canberra ACT 2600

By email: regionalprocessingnauru.sen@aph.gov.au

Dear Chair,

Inquiry into the responsibilities of the Commonwealth Government in connection with the management and operation of the Regional Processing Centre in Nauru

The Commission has held long-standing concerns regarding the transfer to and detention of asylum seekers in Nauru. The conditions in which asylum seekers are detained in the Regional Processing Centre (RPC) and the indefinite nature of their detention are inconsistent with fundamental human rights. The Commission refers the Committee to the concerns set out in:

- Chapter 12 of the Commission's report *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014*¹
- The Commission's submission to the Parliamentary Joint Committee on Human Rights in relation to the regional processing legislation²
- Chapter 3 of the Commission's report *Asylum seekers, refugees and human rights: snapshot report 2013*³
- The Commission's paper *Human rights issues raised by the third country processing regime*.⁴

These concerns highlight the serious risks to the rights, health and safety of asylum seekers detained in the RPC. Unless these risks are addressed immediately, the Commission recommends that the Australian Government transfer all asylum seekers detained in the RPC to Australia.

Australia's responsibility under international law

Australia cannot avoid its human rights obligations under international law by transferring asylum seekers to a third country.⁵ If Australia has 'effective control' over asylum seekers whom it has transferred to another country, or over a regional processing centre to which they have been transferred, then it is bound to continue to treat them consistently with human rights treaties to which Australia is a party.⁶ For further discussion on this point please see section 5 of the Commission's submission to the Parliamentary Joint Committee on Human Rights.⁷

The Commission considers that there are a number of factors which would support the conclusion that Australia is exercising effective control over the asylum seekers transferred to and detained in Nauru, including the facts that:

- In August 2012 the Australian Government reinstated a system of third country processing for asylum seekers who arrived by boat without authorisation.
- On 29 August 2012 the Australian Government signed a Memorandum of Understanding with the Republic of Nauru 'relating to the transfer to and assessment of persons in Nauru and related issues' (the 2012 MOU).⁸
- On 3 August 2013 the Australian Government entered into a new Memorandum of Understanding with Nauru which provides that the Nauruan Government will enable individuals whom it has determined are in need of international protection to settle in Nauru (the 2013 MOU).⁹ The 2013 MOU replaced the 2012 MOU.
- Both the 2012 MOU and the 2013 MOU:
 - provided that the Australian Government would bear all costs incurred under those MOUs
 - contained a 'commitment' that both governments would 'treat Transferees' or 'ensure that Transferees are treated' 'with dignity and respect' and in accordance with 'relevant human rights standards'
 - provided for the establishment of a Joint Committee, jointly chaired by Australian and Nauruan officials, which would have 'responsibility for the oversight of practical arrangements required to implement this MOU'.
- It appears that the RPC in Nauru is being operated by contractors pursuant to arrangements with Australia, and that those contractors report to Australia about the performance of those contracts.

In 2013 the Parliamentary Joint Committee on Human Rights (PJCHR) considered detailed evidence regarding Australia's responsibility for the treatment of asylum seekers detained in Nauru during its examination of Australia's regional processing regime. The PJCHR concluded that 'the evidence demonstrates that Australia could be viewed as exercising "effective control" of the arrangements relating to the treatment of persons transferred to Manus Island or Nauru'.¹⁰

The PJCHR further concluded that:

Whether or not Australia's involvement is sufficient to reach the level of 'effective control', the committee considers that the level of Australia's involvement gives rise to Australia's responsibility under international law in relation to internationally wrongful acts that may be involved in the treatment of asylum seekers in those countries. Such responsibility arises irrespective of whether Papua New Guinea or Nauru might also be jointly responsible in relation to the same acts.¹¹

The United Nations High Commissioner for Refugees (UNHCR) has come to a similar conclusion to the PJCHR regarding Australia's responsibility under international law for the treatment of asylum seekers in the RPC in Nauru. In its report following its mission to Nauru in October 2013, UNCHR stated that:

both Australia and Nauru have shared and joint responsibility to ensure that the treatment of all transferred asylum-seekers is fully compatible with their respective obligations under the 1951 Convention and other applicable international instruments.¹²

In 2014 the United Nations Committee Against Torture viewed Australia to have effective control over asylum seekers transferred to Papua New Guinea and Nauru because the centres are run with financial aid and the involvement of private contractors of its choice.¹³

Detention of children in the Regional Processing Centre

In 2014 the Commission conducted a National Inquiry into Children in Immigration Detention. The scope of the Inquiry included children held in the RPC in Nauru.

The Inquiry team did not visit Nauru, but accepted evidence from people with first-hand experience of the situation in the RPC in Nauru. This included:

- evidence at the Commission's public hearings from doctors who had worked in Nauru¹⁴
- written submissions from teachers and child protection support workers who had worked on Nauru, including a detailed submission accompanied by supporting documentation from employees of Save the Children who had experience as welfare officers within the RPC in Nauru¹⁵
- 34 written submissions from children and adults detained in the RPC in Nauru.¹⁶

Based on this evidence the Commission found that children in the RPC in Nauru are suffering from extreme levels of physical, emotional, psychological and developmental distress. During the Inquiry the Commission also received evidence of incidents of harassment, bullying and abuse.

The recent report into allegations relating to conditions in the RPC in Nauru by Philip Moss confirmed the Commission's concerns about the welfare and protection of children. The Moss Review found that in relation to children there were both reported and unreported allegations of sexual and other physical assault.

The Commission is deeply concerned that Australia has transferred children to Nauru where there is no child protection framework or mandatory reporting requirements for reporting allegations of child abuse. Furthermore, it is problematic that even where abuse is reported children detained in the RPC cannot be removed from situations of harm except in extreme circumstances, and then only for a limited period.

The Moss Review also reported that between October 2013 and October 2014, 17 children in the RPC engaged in self-harm (including one attempted hanging). The youngest child involved in self-harm was an 11 year old.

The Moss report and the Forgotten Children report provide ample evidence of the inappropriate conditions and harm that is being done to children detained in Nauru.

Inadequacy of pre-transfer assessments

The Commission considers the assessments conducted by Department of Immigration and Border Protection officials prior to transferring asylum seekers to Nauru to be inadequate. The Commission reviewed a number of the pre-transfer assessments conducted in relation to children as part of the Inquiry. The Commission concluded that Departmental officers do not assess the care and welfare needs of an individual child and consider whether those needs can be met in the RPC in Nauru before recommending the child's transfer. The Commission found that Australia transferred children to Nauru regardless of whether the transfer was in those children's best interests, in breach of Australia's obligations under international law.¹⁷

The Commission also found that some asylum seekers, including children, were sent to Nauru despite having physical and mental health problems. An example was the transfer of a father of five and his eight year old son. The father had a hernia which caused him pain when he walked, and was advised by the doctor to limit his walking as it could exacerbate his condition.

In December 2013 the father had fainted due to dehydration. Despite his condition, he was transferred to Nauru where he was required to walk excessively in the heat three times per day to receive food and accompany his young sons to the bathroom.

His eight year old son was also transferred to Nauru despite seeing the mental health team on Christmas Island fortnightly for bed-wetting. In Nauru he remained without medication for bed-wetting for many months because the health provider had run out. He commenced taking anti-depressants and started to suffer faecal incontinence.

Conclusion

The Commission has consistently and repeatedly raised concerns that the transfer and detention of asylum seekers in the RPC in Nauru may lead to breaches of Australia's obligations under international law. The conditions and circumstances at the RPC pose serious risks to the health and well-being of those detained. The Commission's Inquiry and the Moss Review have highlighted the particular risk of harm to children in the RPC.

Unless these very serious risks to the rights, health and safety of asylum seekers detained in the RPC are addressed immediately, the Commission recommends that the Australian Government transfer all asylum seekers detained in the RPC to Australia.

The Commission would be willing to expand upon the points raised in this letter at any public hearing of the Committee.

Yours sincerely,

Gillian Triggs
President

¹ The *Forgotten Children* report is available to read online at <http://www.humanrights.gov.au/publications/forgotten-children-national-inquiry-children-immigration-detention-2014/12-children> (viewed 13 April 2015).

² Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Human Rights' Examination of the Migration (Regional Processing) package of legislation* (January 2013). At <http://www.humanrights.gov.au/submissions/examination-migration-regional-processing-package-legislation#Heading273> (viewed 13 April 2015).

³ Australian Human Rights Commission, *Asylum seekers, refugees and human rights: snapshot report 2013* (October 2013), section 3. At <http://www.humanrights.gov.au/publications/asylum-seekers-refugees-and-human-rights-snapshot-report> (viewed 13 April 2015).

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- ⁴ Australian Human Rights Commission, *Human rights issues raised by the third country processing regime* (March 2013). At <http://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/human-rights-issues-raised-third-country-processing-regime> (viewed 13 April 2015).
- ⁵ See Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (May 2014), section 3. At <http://www.humanrights.gov.au/submissions/inquiry-incident-manus-island-detention-centre-16-february-18-february-2014> (viewed 13 April 2015). See further Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Human Rights*, note 2, section 5.
- ⁶ See the decision of the European Court of Human Rights in *Al-Skeini v United Kingdom* [GC] [2011] ECHR 1093.
- ⁷ Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Human Rights*, note 2, section 5.
- ⁸ A copy of the Memorandum of Understanding was included in the group of documents tabled with the designation of Nauru as a 'regional processing country' on 10 September 2012. A copy of this set of documents is available at <http://www.humanrights.gov.au/transfer-asylum-seekers-third-countries> (viewed 16 April 2015).
- ⁹ A copy of the 2013 Memorandum of Understanding with Nauru is available at <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> (viewed 16 April 2015).
- ¹⁰ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation* (2013), para 2.55. At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/2013/92013/index (viewed 13 April 2015).
- ¹¹ Parliamentary Joint Committee on Human Rights, above, para 2.56.
- ¹² United Nations High Commissioner for Refugees, *UNHCR monitoring visit to the Republic of Nauru: 7 to 9 October 2013* (2013), para 22. At <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf> (viewed 16 April 2015).
- ¹³ Committee Against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, UN Doc CAT/C/AUS/CO/4-5 (2014), para 17. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fAUS%2fCO%2f4-5&Lang=en (viewed 13 April 2015).
- ¹⁴ See the transcripts of the evidence given by Dr Peter Young and Dr Ai-Lene Chan at the third public hearing of the Inquiry in Sydney on 31 July 2014, available at <http://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/national-inquiry-children-immigration-detention-2014-1> (viewed 13 April 2015).
- ¹⁵ See Submission Nos 40, 67, 134, 156 and 183, all of which are available online at <http://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/national-inquiry-children-immigration-detention-2014-0> (viewed 13 April 2015).
- ¹⁶ All of these public submissions are available online at <http://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/national-inquiry-children-immigration-detention-2014-0>.
- ¹⁷ See *Convention on the Rights of the Child*, 1989, art 3(1). At <http://www.austlii.edu.au/au/other/dfat/treaties/1991/4.html> (viewed 13 April 2015).