

Chapter 4

Refugee status determination processing and resettlement arrangements

Introduction

4.1 Term of reference (1) for this inquiry directed the committee to consider refugee status determination (RSD) processing and resettlement arrangements in Papua New Guinea (PNG). Evidence presented to this inquiry and other relevant reports consistently identified that transferees' uncertainty about RSD processes and resettlement arrangements was a significant contributing factor leading to the incident at the Manus Island Regional Processing Centre (RPC) in February 2014.

4.2 This chapter:

- sets out the RSD processes in Australia;
- examines the legal framework for RSD in PNG, noting that the 2013 Regional Resettlement Arrangement (RRA) between Australia and PNG sets out that it is PNG's responsibility to determine refugee status and ultimately resettle refugees;
- examines particular concerns around the establishment of the RSD process in PNG;
- considers issues around the perceived encouragement of asylum seekers at the Manus Island RPC to return to their own country; and
- considers the feasibility of resettlement in PNG.

Refugee status determination processes in Australia

4.3 As set out in chapter 1, on 13 August 2012, the Australian Government re-established offshore processing for asylum seekers who, having arrived in Australia by boat, are defined as 'irregular maritime arrivals' (IMAs). IMAs must be taken from Australia to a regional processing country, unless certain circumstances apply. Asylum seekers who arrive in Australia by plane have continued to have their claims for refugee status determined by the department.

4.4 Accordingly, since August 2012 Australia has maintained a dual-track approach to refugee status determination: offshore processing for those who arrive in Australia by boat (IMAs) and onshore processing for those who otherwise arrive in Australia. The dual-track approach to asylum seeker processing, effectively re-established by the reintroduction of offshore processing, was the subject of some criticism in evidence to the inquiry. For example, the Law Society of New South Wales submitted:

...the Government's policy of treating asylum seekers who arrive by boat differently from asylum seekers who arrive by other means is a contravention of the Refugee Convention at a fundamental level.

Article 31(1) of the Refugee Convention provides that refugees shall not be penalised solely by reason of their unlawful entry to a country. This clause has been interpreted by the [United Nations High Commissioner for Refugees] as not being limited to refugees coming directly from territories where their life is threatened, but also including those who have been unable to obtain effective protection in transit countries. This is significant since the majority of countries in the Asia Pacific region from which irregular maritime arrivals travel to Australia, such as Indonesia and Malaysia - are not parties to the Refugee Convention and offer very poor protection environments, with no durable solutions such as local integration.¹

4.5 The legislative basis for offshore processing is contained in Subdivision B of Division 8 of Part 2 of the *Migration Act 1958* (Migration Act). Under section 198AB, the Minister for Immigration and Border Protection (the minister) may, by legislative instrument, designate a country as a regional processing country. The minister may exercise this power if he or she thinks that the designation is in the national interest.² In considering the national interest, the minister must have regard to whether the country in question has given any assurances that:

- transferred asylum seekers will not be subject to refoulement, within the meaning of article 33(1) of the Refugee Convention; and
- it will make an assessment, or permit an assessment to be made, of whether transferred asylum seekers are refugees.³

4.6 The designation of a country 'need not be determined by reference to the international obligations or domestic law of that country'.⁴ Accordingly, the minister has broad discretion when designating a country as a regional processing country.

Current agreement between Australia and Papua New Guinea

4.7 As outlined in chapter 1, on 19 July 2013, the governments of Australia and PNG entered into a regional resettlement arrangement (RRA).⁵ This agreement provided that Australia would transfer any unauthorised maritime arrival entering Australian waters after 19 July 2013 to PNG for processing of their refugee claims.

4.8 However, unlike the 2012 MOU, PNG agreed to permanently resettle those determined to be refugees in PNG or in any other participating regional state. On

1 Law Society of New South Wales, *Submission 8*, p. 5.

2 *Migration Act 1958*, ss 198AB(2).

3 *Migration Act 1958*, ss 198AB(3).

4 *Migration Act 1958*, para 198AA(d).

5 Government of Papua New Guinea and the Government of Australia, *Regional Resettlement Arrangement between Australia and Papua New Guinea* (Regional Resettlement Arrangement), 19 July 2013.

6 August 2013, a new MOU (the 2013 MOU) between PNG and Australia was signed in support of the RRA.⁶

4.9 Accordingly, the RRA represented a new approach by the Australian Government to processing refugee claims, insofar as it proposed resettlement in PNG. Under the previous 'Pacific Solution', which operated between 2001 and 2008, 61 per cent of asylum seekers were resettled in Australia. Similarly, under the model of offshore processing established in 2012, it was expected that the majority of asylum seekers would ultimately be resettled in Australia.

4.10 The United Nations High Commissioner for Refugees (UNHCR) submitted that it does not generally support offshore processing:

UNHCR's general position is that asylum-seekers and refugees should ordinarily be processed in the territory of the State where they arrive, or which otherwise has jurisdiction over them, which is in line with State practice. The primary responsibility to provide protection rests with the State where asylum is sought.⁷

4.11 The UNHCR noted that, notwithstanding the RRA, it regarded Australia as maintaining responsibility for ensuring that the treatment of asylum seekers is compatible with its international human rights:

UNHCR maintains its longstanding position that the physical transfer of asylum-seekers from Australia to Papua New Guinea, as an arrangement agreed by the two 1951 Convention States, does not extinguish the legal responsibility of the transferring State (Australia) for the protection of asylum-seekers affected by the transfer arrangements. UNHCR's view is that the legality and/or appropriateness of any such arrangement needs to be assessed on a case-by-case basis, subject to its particular modalities and legal provisions.

Both Australia and Papua New Guinea have shared and joint responsibility to ensure that the treatment of all transferred asylum-seekers to Papua New Guinea is fully compatible with their respective obligations under the 1951 Convention and other applicable international instruments.⁸

4.12 Accordingly, the UNHCR, along with a number of witnesses and submitters, were of the view that Australia maintained responsibility under international law for the RSD process and the protection afforded those found to be refugees.

4.13 However, the Australian Government has maintained the view that, once individuals are transferred from Australia to PNG under the RRA, the RSD processes and the outcomes of those processes are solely the responsibility of

6 Government of Papua New Guinea and the Government of Australia, *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 of persons in Papua New Guinea, and related issues*, 6 August 2013.

7 *Submission 21*, p. 2 [internal citations omitted].

8 *Submission 21*, p. 3 [internal citations omitted].

the PNG Government. In evidence to the inquiry, a departmental official characterised Australia's involvement as being merely supportive:

Australia, because of the very significant experience we have had in managing immigration matters for a very long period of time, has been assisting them [the PNG Government] by mentoring, training and supporting PNG staff.⁹

4.14 A fuller discussion of Australia's human rights obligations is contained in chapter 7.

Refugee status determination processes in PNG

4.15 The RRA provides for the processing and resettlement of asylum seekers transferred by the Australian Government to PNG. Accordingly, this section considers the processes for RSD in PNG.

Legal and regulatory framework in PNG

Legal framework

4.16 On 17 July 1986, PNG acceded to the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol relating to the Status of Refugees* (together, the Refugee Convention) with reservations.

4.17 The implementation of these treaty obligations is primarily given effect in the Papua New Guinea *Migration Act 1978* (PNG Act). The PNG Act contains provisions relating to the accommodation and processing of asylum seekers in PNG. Under section 15B, the PNG Minister for Immigration may declare a place to be a relocation centre for the accommodation of refugees or non-citizens who claim to be refugees. The minister may direct refugees or asylum seekers to reside in a designated relocation centre.¹⁰

4.18 Section 15D of the PNG Act provides that the minister may appoint an officer to be the administrator of a relocation centre, with authority for the control and management of the centre. In the case of the Manus Island RPC, the PNG Chief Migration Officer, who is the head of the PNG Immigration and Citizenship Service Authority (ICSA), has been appointed as the administrator of the centre.¹¹

4.19 The PNG Act also contains a regulation-making power, which permits the making of regulations governing, among other things, rules and procedures for the proper management and operation of relocation centres, and granting authority to an Administrator to issue written instructions concerning procedures in a relocation centre.¹²

9 Mr Mark Cormack, Deputy Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 11 July 2014, p. 26.

10 Papua New Guinea *Migration Act 1978* (PNG Act), section 15C.

11 Mr Kenneth Douglas, First Assistant Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 11 July 2014, p. 45.

12 PNG Act, section 23.

4.20 In relation to these arrangements, Mr Mark Cormack from the department explained:

PNG's own legal framework reflects its responsibilities [under the RRA]. Under the PNG migration act, the responsible PNG minister has directed that transferees who enter PNG under the terms of the RRA must reside at the Manus centre. Further under that same act, control and management of the Manus centre resides with an administrator who is appointed by the responsible PNG minister. Policing activities, for example, including those at the [offshore processing centre], are the responsibility of the PNG police.¹³

4.21 Under section 15A of the PNG Act, refugee status may be granted to individuals by ministerial determination. Under section 19, these determinations cannot be appealed.

Concerns expressed regarding legal framework in PNG

4.22 A number of witnesses and submitters raised concerns that PNG had attached seven reservations to its accession to the Refugee Convention.¹⁴ However, under the RRA, PNG agreed to 'immediately take steps to withdraw its reservations to the Refugee Convention, with respect to persons transferred by Australia to [PNG]'.¹⁵

4.23 On 18 September 2013, the PNG Minister for Foreign Affairs and Immigration confirmed that this requirement had been met.¹⁶ However, the committee notes that the UNHCR subsequently reported, on 26 November 2013, that PNG was '[still] in the process of arranging to lift the seven reservations in relation to all refugees in its jurisdiction'.¹⁷

4.24 A significant number of submitters and witnesses also expressed concern that there were serious deficiencies in the domestic legal and regulatory framework underpinning RSD processing in PNG.¹⁸ The Andrew & Renata Kaldor Centre for International Refugee Law (Kaldor Centre), for example, highlighted that '[t]he

13 Mr Mark Cormack, Department of Immigration and Border Protection, *Committee Hansard*, 11 July 2014, p. 26.

14 These reservations stipulated that PNG did not accept the obligations in articles 17(1) (work rights); 21 (housing); 22(1) (education); 26 (freedom of movement); 31 (non-penalisation for illegal entry or presence); 32 (expulsion); and 34 (facilitating assimilation and naturalisation).

15 Regional Resettlement Arrangement, para [7].

16 Ministry of Foreign Affairs and Immigration (PNG), Office of the Minister, *Statement to Parliament by Hon. Rimbink Pato, OBE, LLB, MP, Minister for Foreign Affairs and Immigration, on the Regional Resettlement Arrangements (RRA) for asylum seekers transferred to Papua New Guinea*, 18 September 2013, p. 8.

17 See *UNHCR monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013*, November 2013, p. 7.

18 UNHCR, *Submission 21*, p. 5; Human Rights Law Centre, *Submission 17*, p. 5; Federation of Ethnic Communities, *Submission 16*, p. 3; Asylum Seeker Resource Centre, *Submission 23*, p. 6; Mr Daniel Webb, Director of Legal Advocacy, Human Rights Law Centre, *Committee Hansard*, 12 June 2014, p. 60.

absence of a legal framework makes it very difficult to assess the quality and accuracy of RSD, and to challenge any determinations wrongfully made'.¹⁹

4.25 Similarly, UNHCR submitted that (as at 7 May 2014):

Section 15A of [PNG's *Migration Act 1978*] empowers the Minister of Foreign Affairs and Immigration (the Minister) to determine whether a non-citizen is a refugee, but provides no procedural or substantive guidance as to how a RSD should be made by the Minister.

In January 2013, [PNG] incorporated provisions into the Migration Regulation 1979 (Regulation), which provide the Minister with guidance in respect of determining the refugee status of non-citizens transferred under the 2012 MOU. These provisions are now redundant as the 2012 MOU has been superseded by the New MOU.

UNHCR understands that [PNG] officials conducting RSD of asylum-seekers transferred under the New MOU are authorized to act under s 15A of the Act and are guided, but not bound, by the Regulation (which refers to the 2012 MOU).

...UNHCR has been advised by [PNG] officials that steps are under way to amend the Regulation, so that it applies to asylum-seekers transferred to [PNG] under the New MOU and that a new *Migration Act* is being drafted to introduce comprehensive RSD procedures that will apply to all asylum-seekers.²⁰

4.26 A recent discussion paper by Diana Glazebrook, an academic whose work has focused on refugee resettlement, provides an instructive background on the development of refugee law in PNG:

The UNHCR began work with the PNG Government in 2002 to develop refugee legislation, drafting a refugee law Act which was subsequently abandoned in favour of a simplified model developed by the Pacific Immigration Directors Conference as an annex to the amended *Migration Act 2005*. At a 2010 roundtable on legal and practical challenges faced in addressing the protection of non-Melanesian asylum seekers and refugees in PNG, a working group was formed to review PNG domestic legislation and consider how the [Refugee Convention] can be implemented. At the time of the 2013 Arrangement, while much of the groundwork for developing refugee legislation for PNG had been done, codification had yet to take place.

Under the 2013 Arrangement, PNG is responsible for carrying out refugee status determination to be managed and administered by PNG, under domestic law, with support from Australia. Several provisions of the PNG Migration Act and Regulation are inconsistent with PNG's commitments under the 1951 Convention. The UNHCR advised amending the PNG Migration Act and Regulation governing the status determination of asylum

19 *Submission 9*, p. 14.

20 *Submission 21*, p. 4.

seekers; specifically, the detailing of asylum processes and procedures in PNG. For example, asylum seekers should be informed about their legal rights and entitlements, as well as the procedures to be followed to assess their claims for refugee status including the legal basis, the decision-making authority, and the indicative time frames for these various steps, as well as an independent merit review process.²¹

4.27 The committee received some evidence suggesting that processes should have been put in place to ensure effective RSD in PNG before asylum seekers were transferred to Manus Island RPC. Mr Daniel Webb, Director of Legal Advocacy at the Human Rights Law Centre, stated:

[O]ne thing that is clear is that, when it comes to transferring asylum seekers to Manus, the cart has been put a very long way before the horse in that over a 19-month period you have had more than 1,300 people sent to a processing centre without clear arrangements in place for their processing, under a resettlement agreement without clear arrangements in place for their resettlement. ...For that reason there is great ambiguity about what the real purpose of sending them there is.²²

4.28 In contrast, the department submitted that the legal framework for refugee determinations in PNG was well advanced and that the PNG government was taking the necessary steps to build capacity for effective RSD processing:

[T]he PNG government has developed and implemented legislation that governs [RSD]. It has developed guidelines and is now finalising settlement regulations.

...In March 2013 the PNG cabinet or national executive committee approved amendments to the migration act. In April 2013 [the department] attended a roundtable workshop...in Port Moresby to discuss the development of the RSD process. On 26 April 2013 the amendments were passed and became law.²³

Detailed assessment of RSD processes in PNG

4.29 The report of the Cornall Review set out the RSD process at the Manus RPC as at 23 May 2014, stating that the process for determining eligibility for the grant of a refugee entry permit consists of:

- an initial transferee interview;
- the provision of protection claims assistance to articulate and lodge a protection application;

21 Diana Glazebrook, *Papua New Guinea's Refugee Track Record and Its Obligations under the 2013 Regional Resettlement Arrangement with Australia*, SSGM Discussion Paper 2014/3, pp 5-6 [internal citations omitted].

22 *Committee Hansard*, 12 June 2014, p. 60.

23 Mr Mark Cormack, Department of Immigration and Border Protection, *Committee Hansard*, 11 July 2014, p. 26.

- a refugee status determination interview to assess protection claims followed by an initial assessment of the claim;
- an initial assessment notification to the transferee by a PNG immigration officer;
- if the initial assessment is positive, it is referred to the PNG Minister for Foreign Affairs and Immigration for final determination; and
- if the initial assessment is negative, the transferee can seek merits review which is also referred to the PNG Minister for Foreign Affairs and Immigration for final determination.²⁴

4.30 This summary of the process is consistent with evidence from other submitters and witnesses, including the department.²⁵

Initial transferee interviews

4.31 The UNHCR has reported that initial transferee interviews at the Manus Island RPC 'are designed to elicit details about the asylum-seekers, their families, the route they took to Australia and some basic information about why they came to Australia'.²⁶ Following a monitoring visit to the Manus Island RPC in June 2013, the UNHCR reported:

Initially transfer interviews were undertaken by experienced DIAC officers with PNG ICSA [PNG Immigration & Citizenship Service Authority] officers observing. As at the time of the visit, the interviews were being undertaken independently by PNGICSA officers.

...UNHCR observed that the interviews were undertaken with professionalism, consistency and attention to detail. The interviews, however, were rigidly directed by use of a detailed template and script, leaving little scope for capture of information relating to individual circumstances of the applicant in his country of origin, or protection problems experienced in transit countries. In some instances, the observer noted that the nature of the interview template forced the interviewer to record information at variance from that being communicated by the applicant. A heavy focus on collection of information relating to routes, methods and persons involved in irregular migration was evident. In light of this focus, it was of concern that applicants were informed that details may

24 Mr Robert Cornall AO, *Review of the events of 16-18 February 2014 at the Manus Regional Processing Centre*, 23 May 2014, pp 88-89.

25 Mr Mark Cormack, Deputy Secretary, Immigration Status Resolution Group, Department of Immigration and Border Protection, *Committee Hansard*, 11 July 2014, p. 20; Ms Elizabeth Thompson, *Committee Hansard*, 12 June 2014, p. 21.

26 *UNHCR Monitoring Visit to Manus Island, Papua New Guinea 11-13 June 2013*, July 2013, p. 7.

be shared with law enforcement agencies as appropriate, but were not offered access to legal advice or counselling.²⁷

4.32 In an answer to a question on notice, the department advised that people transferred to PNG were told that the information they provided may be used in the future by PNG authorities, but not disclosed to foreign governments unless the transferee was found not to be a refugee and the disclosure was necessary for the purposes of removal from PNG.²⁸

4.33 Following a monitoring visit to the Manus Island RPC in October 2013, the UNHCR reported that these 'initial transferee interviews' had 'ceased as a matter of practice'. It recommended that PNG reinstate these interviews as they enabled 'RSD officers to identify and assist persons with special needs and vulnerabilities'.²⁹ More recent evidence suggests that these interviews later recommenced.³⁰

Claims assistance

4.34 The Claims Assistance Provider Scheme (CAPS) was intended to assist transferees to compile evidence to support their claim for protection. Playfair Visa and Migration Services (Playfair) were contracted by the Australian Government to provide claims assistance at the Manus RPC. Mrs Petra Playfair, the Managing Partner of Playfair, described its role at the centre in the following way:

In 2013 Playfair was one of two independent firms contracted to provide protection claims assistance to asylum seekers held and transferred to regional processing countries. As with those previous task forces in detention centres I described, Playfair deployed its team to Manus Island at the request of the department of immigration. Our role is limited to providing assistance in the refugee status determination process—I will call it RSD.

We assist clients in preparing and submitting RSD applications. We represent clients at the government interviews that follow. We prepare applications for merits review and we represent clients through the review process and will do at their hearings if instructed to do so. We make detailed written legal submissions to support their applications where appropriate. We provide group information sessions to explain the RSD process. We also provide a shopfront service which allows clients to make an appointment for a face-to-face meeting with us to discuss any aspect of

27 *UNHCR Monitoring Visit to Manus Island, Papua New Guinea 11-13 June 2013*, July 2013, pp 7-8.

28 Department of Immigration and Border Protection, *Answers to questions taken on notice at a public hearing on 10 June 2014* (received 9 July 2014), p. [14].

29 *UNHCR monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013*, November 2013, p. 9.

30 See Mr Mark Cormack, Department of Immigration and Border Protection, *Committee Hansard*, 11 July 2014, p. 37; Diana Glazebrook, *Papua New Guinea's Refugee Track Record and Its Obligations under the 2013 Regional Resettlement Arrangement with Australia*, SSGM Discussion Paper 2014/3, p. 6.

their claim for protection. By providing these independent services to our clients, we lay the foundations for their claims to be documented and assessed.³¹

4.35 Mrs Playfair provided the following information in relation to Playfair's schedule at the Manus Island RPC:

Playfair was first requested to send staff to Manus on 8 July 2013 and following on from the Prime Minister's announcement on 19 July 2013 those clients left Manus Island and returned to Australia. Then Playfair was requested to send a team of eight to Manus Island on 1 August 2013. On 23 August two staff were requested for a deployment and the last person on this deployment left Manus Island on 19 September 2013. The next team to be requested arrived as a team on 6 February 2014 to assist preparing applications and to provide information sessions, and we were present during the incident of 16 and 17 February. During that deployment about 173 interviews were completed and lodged. That deployment ran over about a month...We were requested to provide one staff person to undertake shopfront duties and carry out group sessions on Manus between 19 December and 13 January and then from 22 January up to when the team arrived on 6 February. Since about March 2014 we have been requested to provide personnel on an ongoing basis, which we have done.³²

4.36 Playfair also noted that it had several planned deployments to the Manus Island RPC cancelled by the department at short notice in the second half of 2013:

Interestingly, we were requested to deploy staff on 14 August 2013, 28 August 2013 and 12 September. Two of these deployments were cancelled en route and the third was cancelled just prior to departure.³³

4.37 When questioned about these aborted deployments the department stated:

The department cancelled the Claims Assistance Provider (CAP) deployment of 14 and 28 August 2013 and postponed the deployment of 12 September 2013. These decisions were made for logistical reasons consistent with the PNG Government's advice.³⁴

4.38 The committee heard evidence that CAPS officials each aimed to complete two to three CAPS interviews a day when deployed to the Manus Island RPC, though

31 Mrs Petra Madge Playfair, Managing Partner, Playfair Visa and Migration Services, *Committee Hansard*, 11 June 2014, p. 43.

32 Mrs Petra Playfair, Managing Partner, Playfair Visa and Migration Services, *Committee Hansard*, 11 June 2014, p. 43.

33 Mrs Petra Playfair, Managing Partner, Playfair Visa and Migration Services, *Committee Hansard*, 11 June 2014, p. 43.

34 Department of Immigration and Border Protection, *Responses to questions taken on notice at a public hearing on 11 July 2014, and written questions* (received 10 October 2014), [p. 2].

this was not always possible.³⁵ These officials did not provide advice to transferees about resettlement options or timeframes for the RSD process following the completion of a CAPS interview, primarily because this was outside the knowledge and control of CAPS providers.³⁶ Accordingly, the Asylum Seeker Resource Centre submitted that:

While there is a contracted agency, Playfair, that has intermittently assisted asylum seekers compile evidence of their claims...[T]his is a futile exercise given the inability of these workers to act as lawyers or provide any legal advice or advocacy assistance to asylum seekers.³⁷

4.39 Miss Elizabeth Thompson, a former subcontractor engaged by Playfair, was deployed to the Manus Island centre for two weeks in August 2013 and again in February 2014, before resigning on 19 February 2014. Miss Thompson provided a significant volume of evidence to the committee on the role and experience of the CAPS officials. Importantly, she alluded to interference by the department in the CAPS process, suggesting that the department exercised 'very firm control'.³⁸ Miss Thompson indicated that she and other CAPS officials had been instructed by the department and Playfair officials to avoid conversations with clients about resettlement, and that leaflets provided to transferees contained misinformation about this issue. She submitted that misinformation or lack of information about the RSD process made it very difficult to advise her clients. Finally, her evidence indicated that the number of CAPS officials was insufficient given the number of transferees, placing great strain on resources.³⁹

4.40 Playfair strongly rejected the allegations made by Miss Thompson,⁴⁰ reiterating that it was independent of the Australian and PNG governments and that it alone made the decision not to discuss resettlement issues with clients, due to conflicting information on the matter. Further, while the department provided Playfair with talking points on some occasions, Playfair indicated that these points were already going to be covered, and inferences that the department was influencing Playfair were incorrect.⁴¹

35 Miss Elizabeth Thompson, *Committee Hansard*, 12 June 2014, p. 22; Mr John McCaffery, Deputy General Manager, Manus Island Detention Centre, *Committee Hansard*, 10 June 2014, p. 59; Mr Nicholas Adler, Registered Migration Agent, Playfair Visa and Migration Services, *Committee Hansard*, 11 June 2014, p. 45.

36 Mr Nicholas Adler, Playfair Visa and Migration Services, *Committee Hansard*, 11 June 2014, pp 45-46.

37 Submission 23, p. 2.

38 *Committee Hansard*, 12 June 2014, p. 21.

39 Miss Elizabeth Thompson, *Submission 19*; Miss Elizabeth Maree Thompson, *Committee Hansard*, 12 June 2014, pp 21-30.

40 See Playfair Visa and Migration Services, *Answers to questions on notice* (received 1 July 2014), [p. 1]; Mr Nicholas Adler, *Submission 32*, pp 1-2.

41 See *Committee Hansard*, 11 June 2014, pp 45-47.

RSD interviews and assessments

4.41 Several submissions indicated that guidelines on the RSD process were never complete or available, that PNG officials lacked the capacity and capability to undertake the RSD process, and that transferees had little opportunity to prepare their cases given the lack of resources and the unavailability of clear guidelines on the RSD process in their language.⁴²

4.42 The department stated that RSD guidelines are now in place,⁴³ although their content does not appear to be publically accessible. To this extent, it has not been possible for the committee to thoroughly examine the actual RSD interview and assessment process.

4.43 Miss Thompson gave the following evidence on the conduct of the RSD interviews:

My understanding of the RSD process is that a person who is an employee of the Department of Immigration and Border Protection in Australia sits and conducts the interview while a PNG counterpart sits quietly, listening in. That is how the process has been described to me.⁴⁴

4.44 In response to a question about whether it is the PNG government official that ultimately makes the decision on refugee status, Miss Thompson responded:

My understanding is that it is probably their name on the decision record, but in terms of who conducts the interview, controls the interview and asks the questions, it has been made very clear to me by both interpreters and transferees that that person is an Australian DIBP employee.⁴⁵

4.45 The department maintained that RSD interviews and decisions are a matter for the Government of PNG. It stated that, '[i]n practical terms, this has meant mentoring, training and assisting PNG staff in the development and operation of the PNG RSD process'.⁴⁶

4.46 As to the final decision about a transferee's refugee status, the department stated that transferees would receive either a positive or negative 'interim assessment notification', before a final determination being made by the PNG Minister for Foreign

42 See, for example, Miss Elizabeth Thompson, *Submission 19*; UNHCR, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea 11-13 June 2013*, July 2013, pp 6-7; Asylum Seeker Resource Centre, *Submission 23*, p. 6; Andrew & Renata Kaldor Centre for International Refugee Law (Kaldor Centre), *Submission 9*, p. 10.

43 Mr Mark Cormack, Department of Immigration and Border Protection, *Committee Hansard*, 11 July 2014, p. 26.

44 *Committee Hansard*, 12 June 2014, p. 29.

45 *Committee Hansard*, 12 June 2014, p. 29.

46 Mr Mark Cormack, Department of Immigration and Border Protection, *Committee Hansard*, 11 July 2014, p. 20.

Affairs and Immigration.⁴⁷ It has been noted that there is currently no avenue for appeal or judicial recourse once the PNG Minister has made a determination.⁴⁸

RSD processing framework in PNG and delays in determinations

4.47 The Refugee Convention does not prescribe a particular procedural framework for determining a person's refugee status. However, there are various minimum standards that have been recommended by states and the UNHCR. Importantly, the UNHCR has stated that '[f]air and efficient procedures are an essential element in the full and inclusive application of the Convention'.⁴⁹

4.48 A significant number of submitters discussed Australia's obligations in relation to the RSD process.⁵⁰ The submission of the Kaldor Centre outlined the minimum standards for RSD processes, stating that fair procedures should be based on the following principles of procedural fairness:

- the right to be informed about the procedure;
- the right to a reasonable opportunity to prepare your case;
- the right to be heard;
- the right to an unbiased decision-maker;
- the right to know the case against you, answer it, and for your answer to be considered a decision is made; and
- the right to have the decision made by the person who heard the evidence.⁵¹

4.49 The Kaldor Centre stated that other core elements of RSD processes that are of special relevance to asylum seekers include:

- officials should have clear instructions on handling claims, be required to observe the principle of non-refoulement...and refer cases to a higher authority;
- the primary decision should be made by a clearly identified and (wherever possible) single central authority;

47 Mr Mark Cormack, Department of Immigration and Border Protection, *Committee Hansard*, 11 July 2014, pp 37-38.

48 See: Paul Farrell, 'PNG grants refugee status to Manus asylum seekers for the first time', *The Guardian Australia*, 12 November 2014, at: <http://www.theguardian.com/australia-news/2014/nov/12/png-grants-refugee-status-to-manus-asylum-seekers-for-first-time> (accessed 14 November 2014).

49 UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001, paras. [4]-[5].

50 See, for example: United Nations High Commissioner for Refugees, *Submission 21*, pp 4-5; The Law Society of New South Wales, *Submission 8*, p. 9; Kaldor Centre, *Submission 9*, p. 11; Immigration Advice and Rights Centre, *Submission 14*, p. 2; Civil Liberties Australia, *Submission 5*, p. 7; Amnesty International, *Submission 22*, p. 2; Asylum Seeker Resource Centre, *Submission 23*, p. 6.

51 *Submission 9*, p. 12.

- asylum seekers should have access to UNHCR representatives;
- asylum seekers should have access to interpreters;
- asylum seekers should have access to advice and assistance from organizations providing advice or counselling; and
- there should be procedures to identify and assist vulnerable asylum seekers.⁵²

4.50 The Kaldor Centre submission highlighted the difficulty of establishing a RSD process at the Manus Island RPC:

RSD is a complex fact-finding exercise, which requires training, expertise and judgement. Decision-makers need to be able to identify and assess relevant country information, be familiar with the use of interpreters, and be able to reason logically and apply the appropriate procedural and substantive principles.

This exercise is even more difficult given the circumstances in PNG, where asylum seekers are not assisted by legal representatives, may not have access to interpreters, and are likely to have complex health needs that impact upon their ability to participate fully in the RSD process. This is not helped by the fact that the PNG government is essentially building an RSD system from scratch and in haste.⁵³

4.51 A number of submitters questioned the appropriateness of sending asylum seekers from Australia to PNG in the absence of an established RSD process. For example, the Asylum Seekers Resource Centre submitted:

Asylum seekers should never have been transferred to Manus Island DC without a legislative...RSD process in place. It was completely foreseeable that asylum seekers were to be detained for extended periods given the lack of a legal framework or trained people to undertake a proper assessment of refugee applications.⁵⁴

4.52 Evidence before the committee was that there were two key elements of concern regarding the procedures for RSD in PNG: a lack of timeliness (particularly where individuals are detained whilst their applications are determined) and a lack of clarity around the RSD process.⁵⁵ These are discussed below.

Timeliness of RSD processing

4.53 The UNHCR submitted that '[s]ince 19 July 2013, following the transfer of asylum-seekers under the New MOU...asylum-seekers have been scheduled for processing in order of their arrival at [Manus Island]'.⁵⁶ The committee heard that

52 *Submission 9*, p. 12.

53 *Submission 9*, pp 15-16.

44 *Submission 23*, p. 2.

55 UNHCR, *UNHCR Revised Guidelines On Applicable Criteria And Standards Relating To The Detention Of Asylum Seekers* (February 1999).

56 UNHCR, *Submission 21*, p. 5.

there were no completed RSD processes prior to the incident of 16 to 18 February 2014.⁵⁷

4.54 A departmental officer gave the following chronology in relation to the commencement and progress of RSD processing in PNG:

- 8 July 2013 – the PNG RSD process commenced.
- July to late November 2013 – departmental mentors assisted the PNG Immigration and Citizenship Service Authority (ICSA).
- July to September 2013 – departmental officers conducted RSD interviews on behalf of the government of PNG. And CAPS delivered group and individual advice and assistance.
- November to December 2013 and February 2014 – PNG ICSA conducted transferee interviews.
- From December 2013 – CAPS personnel delivered group and individual protection claim advice.
- Early December 2013 to February 2014 – an Australian human resources expert assisted ICSA to build recruitment panel and recruitment processes.
- 6 February 2014 – six CAPS personnel delivered group advice sessions and individual advice and assistance to transferees.
- Late March 2014 – two further departmental officers observed the overall ICSA processing that was in place.
- 30 April 2014 – ICSA delivered the first initial assessment notice to an Iranian transferee.
- From 30 April to 5 June 2014 – 45 assessment notices were delivered to transferees.
- As at 5 June 2014 – 829 transferees had their initial entry interview. A further 385 had individual protection claim advice and assistance.⁵⁸

4.55 While the department acknowledged 'pauses in face-to-face activity' in processing,⁵⁹ it would not comment on claims by the security company G4S that, as at 30 January 2014, there was no RSD processing in place because all interviews had

57 Mrs Petra Playfair, Managing Partner, Playfair Visa and Migration Services, *Committee Hansard*, 11 June 2014, p. 43.

58 Mr Mark Cormack, Department of Immigration and Border Protection, *Committee Hansard*, 10 June 2014, p. 13.

59 Mr Mark Cormack, Department of Immigration and Border Protection, *Committee Hansard*, 10 June 2014, p. 13.

ceased 'due to lack of resources in PNG ICSA'.⁶⁰ However, it indicated that there was a mechanism in place 'for funding to flow for activities in PNG'.⁶¹

4.56 On 10 September 2014, the Minister for Immigration and Border Protection commented that '78 assessments have been undertaken in PNG, and more than 600 have commenced the formal assessment process'.⁶² Media reports in November 2014 stated that as of the end of October 2014, 104 Refugee Status Interim Determination assessments had been completed with 56 found to be positive and 48 negative'.⁶³

4.57 On 12 November 2014, the PNG Minister for Foreign Affairs and Immigration, the Hon Rimbink Pato MP, announced that he had made positive final refugee status determinations for ten transferees at the Manus Island RPC, who would be issued with initial 12-month visas to stay in PNG.⁶⁴ Minister Pato also stated that he expected to continue finalising refugee decisions for about 10 asylum seekers per week.

Lack of clarity of the RSD process

4.58 The committee heard concerns regarding a lack of clarity or knowledge generally about RSD processes among asylum seekers at the Manus Island RPC.

4.59 The importance of clear information about the RSD processes was emphasised by the UNHCR in a report following its October 2013 monitoring visit to the RPC:

[A]sylum-seekers have the right to be informed orally and [in] writing, in a language which they understand, of the processes and procedures to be followed, of their rights and obligations during the procedure and to consult in an effective manner with a legal adviser. The communication of these rights is essential in order for asylum-seekers to be able to exercise their rights, as rights are rendered ineffective if an asylum-seeker is unable to act on them due to a failure of being informed of what those rights are.⁶⁵

60 G4S, *Submission 29, Attachment 5*, p. 3.

61 Mr Martin Bowles PSM, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 10 June 2014, p. 12.

62 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Restoring integrity and public confidence in Immigration and Border Protection' *Address to the National Press Club*, Canberra, 10 September 2014, at: <http://www.minister.immi.gov.au/media/sm/2014/sm217736.htm> (accessed 4 November 2014).

63 Liam Cochrane, 'PNG prepares to give training, visas, job assistance to refugees detained on Manus Island', *ABC News Online*, 5 November 2014, at: <http://www.abc.net.au/news/2014-11-05/png-to-give-training-visas-jobs-to-refugees/5867764> (accessed 5 November 2014).

64 The Hon Rimbink Pato, LLB, OBE, MP, Papua New Guinea Minister for Foreign Affairs and Immigration, 'Refugees to start new lives in PNG', *Media Release*, 12 November 2014.

65 *UNHCR monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013*, November 2013, p. 48.

4.60 Similarly, Dr Claire Higgins of the Kaldor Centre noted:

One of the components of that kind of [RSD] is to be conducted along principles of procedural fairness, which means that detainees have a sense of the time frame to be expected in the resolution of their claims, along with having a reasonable chance to prepare their case and other elements of procedural fairness in the sense that they would have an unbiased decision maker and a fair and transparent process...⁶⁶

Impact of RSD processes on detainees

4.61 The committee heard that the lack of timeliness and clarity around the RSD process caused detainees considerable distress. A number of submitters claimed that these were the central causes of the events of 16 to 18 February 2014. The UNHCR submitted that:

A specific concern widely voiced by asylum-seekers was that in addition to not being kept informed about the applicable RSD processes and procedures, they had not received any approximate timeframes in relation to the process, causing distress and a deep sense of helplessness. Some asylum-seekers advised that they had been told that the RSD process could take anywhere between two to five years and expressed despair at this prospect.⁶⁷

4.62 The department acknowledged that processes for the establishing of a RSD process in PNG began after the RRA was signed and asylum seekers were first transferred under this arrangement in July 2013. In addition, the department acknowledged that establishing a RSD process in PNG was a 'lengthy process' and a work in progress:

Preparation for processing transferees' refugee claims was also a lengthy process. It could not be done until PNG legislation and procedural guidelines were in place. PNG officers needed to be trained to consider claims. On-the-ground processes needed to be developed. Both PNG and Australian agencies worked closely on their development but, by necessity, they required considered time to execute, particularly as people's futures were at stake.

A status determination process is a staged process undertaken by a series of interviews with officers and claims-assistance providers. It is not a simple process, nor should it be. Though there have not been finalised claims, that is not indicative of a lack of work being undertaken.⁶⁸

4.63 Evidence presented by G4S also suggested that the delay and lack of information with regard to RSD caused unrest at the Manus Island RPC immediately before the incident. This is discussed further in chapter 5.

66 *Committee Hansard*, 13 June 2014, p. 26.

67 UNHCR, *Submission 21*, p. 5.

68 Mr Mark Cormack, Department of Immigration and Border Protection, *Committee Hansard*, 11 July 2014, p. 20.

Encouragement of asylum seekers to return their country of origin

4.64 A number of witnesses and submitters raised concerns that the conditions at the Manus Island RPC were such that they were designed to encourage asylum seekers to return home.⁶⁹ The committee also heard evidence that any such encouragement may be a breach of Australia's non-refoulement obligations under international law.⁷⁰

4.65 Following its October 2013 visit to the centre, the UNHCR expressed the view that the Manus Island RPC was a 'return oriented environment'. It suggested that:

The challenge of determining true 'voluntariness' in the current conditions of the [Manus Island RPC] is likely to be increasingly difficult for those involved in assisted voluntary returns.

Pressure exerted by persons in authority to return, coupled with poor conditions, and/or the failure to correctly identify the 'voluntariness' of the asylum-seekers return, raises concerns about 'constructive *refoulement*' under Article 33 of the 1951 Refugee Convention.⁷¹

4.66 In similar evidence, Amnesty International submitted that:

The inadequate conditions and prolonged and arbitrary detention experienced by asylum seekers on Manus Island may compel them to return to their country of origin or to another country where their rights as refugees will not be respected, resulting in constructive refoulement.⁷²

4.67 Further, Mr Daniel Webb of the Human Rights Law Centre suggested:

It may just be that we are forcing them to choose between where they would like to suffer their human rights violations, and some say they can no longer take the uncertainty of Manus anymore and so return home. But it is a mistake in my opinion to call that return voluntary.⁷³

4.68 In evidence before the committee, Mr Kerry Murphy of the Immigration Advice and Rights Centre went further:

...the UNHCR refers to a 'return oriented environment'. We think that, whilst there may be an issue about constructive non-refoulement, there is a concern that the conditions on the ground could amount to inhumane treatment, which would be a more direct breach of the relevant international obligations that we have. That is one of the major concerns as well.⁷⁴

69 See Amnesty International Australia, *This is Still Breaking People*, May 2014, pp 8-9; UNHCR, *UNHCR monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013*, November 2013, p. 24; Human Rights Law Centre, *Submission 17*, p. 8.

70 Australia's non-refoulement obligations are discussed in detail in chapter 7.

71 *UNHCR monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013*, November 2013, p. 24.

72 *Submission 22*, Attachment 1, p. 86.

73 *Committee Hansard*, 12 June 2014, p. 54.

74 *Committee Hansard*, 13 June 2014, p. 27.

4.69 Amnesty International explained the factors that suggest direct or constructive refoulement in the following terms:

Numerous aspects of the Regional Resettlement Arrangement combine to create a serious risk of direct or constructive refoulement. Chief among these factors are the following:

- The deeply humiliating treatment most asylum seekers were subjected to upon their transfer to Papua New Guinea, which has coloured their further experiences of detention on Manus Island.
- For some detained asylum seekers, the lack of humane conditions of detention conditions that, for those housed in P Dorm, amount to prohibited ill-treatment.
- The profound uncertainty detained asylum seekers are left in about the nature and timing of the Refugee Status Determination process, coupled with the pressures of living in a closed detention centre with limited opportunity to contact family and friends or otherwise lead an ordinary life.
- Limited opportunities for employment and for continuing their education for those whose claims to refugee status are accepted.
- More generally, the unlikelihood of real integration into Papua New Guinean society for those whose claims are accepted.
- Fears about the dangers of life in Papua New Guinea, reinforced on a daily basis by detention centre practices.
- Actual or apparent pressure to accept return to home countries.
- Because Papua New Guinea criminalises same-sex sexual conduct between consenting adults, gay, bisexual, and transgender asylum seekers held on Manus Island may be deterred from pursuing their refugee claims or may face persecution in Papua New Guinea if they are eventually resettled there.⁷⁵

4.70 In specific evidence about actual incidents of encouragement to return home, a former employee of Playfair suggested that staff from the International Organization for Migration (IOM) were 'speaking to transferees, trying to convince them of the benefits of returning home'.⁷⁶

4.71 In contrast, government representatives re-confirmed their view that any returns from Manus Island RPC were strictly voluntary. For example Lieutenant General Campbell stated that '[i]t is really important to note these are voluntary returns'.⁷⁷

75 *Submission 22*, Attachment 1, p. 87.

76 Miss Elizabeth Thompson, *Submission 19*, p. 6.

77 *Committee Hansard*, 11 July 2014, p. 52.

4.72 In terms of the number of returns from the Manus Island RPC, the department provided information that:

As at 1 August 2014, 203 transferees have been voluntarily returned from an Offshore Processing Centre (OPC) and 174 transferees from the Manus OPC since 18 February 2014 with the assistance of the International Organization for Migration (IOM).⁷⁸

4.73 In relation to returns to Iraq and Syria, the department noted that:

There have been no returns to Syria in the period 22 December 2008 to 1 August 2014...The department is currently facilitating the return of transferees whom IOM are unable to assist, including Iraqis. There has been one Iraqi returned home from an OPC during the period 11 June 2014 to 1 August 2014.⁷⁹

Resettlement arrangements for refugees

4.74 As previously outlined, the 2013 MOU and RRA set out that asylum seekers determined to be refugees would be resettled permanently in PNG or a participating regional state. As at the date of this report, only 10 individuals at the Manus Island RPC had been confirmed to have received final refugee status determinations, and none have been granted permanent resettlement in PNG or a third state. Nevertheless, the committee heard that the prospect of resettlement in PNG rather than Australia was clearly a central concern of many asylum seekers at the centre before the incidents of 16 to 18 February 2014.

4.75 UNHCR noted that 'resettlement' is an established international process for the transfer of refugees whose safety or fundamental rights cannot be met in the country where they have sought asylum, to a third state which has agreed to admit them with permanent legal status'.⁸⁰ It submitted that 'integration support' had to be capable of 'giving refugees the opportunity to rebuild their lives in safety and dignity'. This, it was argued, required:

- a solid legislative and/or policy foundation;
- a shared commitment from key government and other support agencies (including civil society);
- an adequately resourced integration programme which will provide the services and support needed by refugees to adjust to a new society; and
- a welcoming and supportive host community.⁸¹

78 *Answers to questions taken on notice at public hearing on 11 July 2014, and written questions* (received 15 August 2014), [p. 13].

79 *Answers to questions taken on notice at public hearing on 11 July 2014, and written questions* (received 15 August 2014), [p. 13].

80 UNHCR, *Submission 21*, p. 6.

81 UNHCR, *Submission 21*, p. 7.

4.76 A great deal of evidence received by the committee highlighted that transferees were often misinformed about the exact nature of the resettlement arrangements. In relation to integration support and resettlement policy in PNG, the Cornall Review found that:

Settlement services in Papua New Guinea will provide early needs-based practical support to refugees to help them develop the knowledge and skills needed to settle successfully and become active and independent participants in PNG society.

The timing of the implementation of these initiatives is a matter for the PNG Government.

The PNG Government has decided that refugee settlement will proceed after a national refugee settlement policy has been finalised. That policy is being developed by an Expert Panel comprising PNG social policy experts.

Any significant settlement activity in PNG will be dependent on the findings reported by the Expert Panel and the PNG Government's finalisation of the national refugee settlement policy.⁸²

4.77 The UNHCR, drawing on its own experience in PNG, highlighted significant concerns pertaining to the resettlement arrangements in PNG:

From UNHCR's first-hand experience in supporting Melanesian and non-Melanesian refugees in Papua New Guinea over approximately 30 years, it is clear that sustainable integration of non-Melanesian refugees in the socio-economic and cultural life of Papua New Guinea will raise formidable challenges and protection questions. Indeed, UNHCR has consistently referred 'non-Melanesian' refugees who have arrived spontaneously in Papua New Guinea for resettlement to third countries, including to Australia, over a number of years and as recently as 2013, precisely because of severe limitations and significant challenges of finding safe and effective durable solutions in Papua New Guinea itself.

Particular concern is expressed in relation to refugees who may be lesbian, gay, bisexual, transgender or intersex individuals, as Papua New Guinea's *Criminal Code Act 1974* criminalises homosexuality, with penalties of between three and 14 years imprisonment. For such refugees, integration in a society which criminalises homosexuality may give rise to serious protection issues.

...The majority of asylum-seekers that UNHCR met during its October 2013 visit expressed serious concern and anxiety about the prospect of being settled in Papua New Guinea, with many expressing that they had fled conflict and insecurity to seek peace and safety in Australia and did not believe that Papua New Guinea was able to provide adequate protection and cultural acceptance.⁸³

82 Mr Robert Cornall AO, *Review of the events of 16-18 February 2014 at the Manus Regional Processing Centre*, p. 90.

83 *Submission 21*, pp 7-8 [internal citations omitted].

4.78 Following its October 2013 visit to the Manus Island RPC, the UNHCR also noted:

Another concern is that the vast majority of PNG citizens are Christians, meaning that there is likely to be little community understanding of Islam and few places of worship available to Muslims. UNHCR also notes that currently, non-Melanesian refugees in PNG are unable to access State education and employment. Even if these barriers are overcome, in relation to finding employment, the PNG 'wantok' system of kinship and affiliation is not likely to provide any real measure of security for non-Melanesian refugees from outside the region. In PNG society, challenging economic conditions and a lack of support for the recognition of overseas qualifications is expected to make attainment of meaningful employment extremely difficult for refugees in PNG.⁸⁴

4.79 The Kaldor Centre echoed the concerns of UNHCR, and highlighted that 'there may be other groups at risk of persecution in PNG'. It noted that:

For example, PNG has very high rates of domestic violence, and Australia has accepted refugee claims from PNG women who have suffered such abuse. Transferring asylum seekers to PNG without assessing such risks means that Australia may directly breach its *non-refoulement* obligations.⁸⁵

4.80 Amnesty International stated that on both occasions it has visited the Manus Island RPC (in November 2013 and March 2014), it observed that many asylum seekers were concerned about security for themselves and their families if they were to be resettled in PNG, particularly given incidents with local police and the military in and outside the centre.⁸⁶

84 *UNHCR monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013*, November 2013, pp 25-26.

85 *Submission 9*, p. 20.

86 *Submission 22*, Attachment 1, pp 67-72; Amnesty International, *This is Still Breaking People*, May 2014, pp 8-9.