

# Chapter 7

## Australia's human rights obligations and duty of care responsibilities

### Introduction

7.1 The committee's terms of reference included consideration of the Australian Government's duty of care responsibilities in relation to the Manus Island Regional Processing Centre. This chapter addresses both Australia's obligations under international human rights law and duty of care responsibilities under domestic law, including consideration of:

- Australia's obligations under international human rights law including their content and scope both within and outside of Australia;
- whether Australia's obligations under international law apply in respect of asylum seekers detained in the Manus Island RPC;
- Australia's compliance with its human rights obligations in respect to the incident from 16 February to 18 February 2014; and
- Australia's duty of care responsibilities under domestic law and its application.

### Australia's international human rights obligations

7.2 This section sets out the content, scope and application of Australia's obligations under international human rights law in relation to the incident at the Manus Island RPC from 16 to 18 February 2014.

#### *Source of Australia's human rights obligations*

7.3 Australia has voluntarily accepted international obligations under a number of international human rights treaties. These include the:

- Convention on the Status of Refugees (Refugee Convention);
- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- Convention on the Rights of the Child (CRC); and
- Convention on the Rights of Persons with Disabilities (CRPD).

7.4 Under these treaties, states have an obligation to ensure that persons enjoy human rights. Australia's obligations under international human rights law as contained in these treaties are threefold:

- to respect – requiring government not to interfere with or limit human rights;
- to protect – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights; and
- to fulfil – requiring government to take positive measures to fully realise human rights.<sup>1</sup>

### *Content of Australia's human rights obligations*

7.5 Australia has a range of specific obligations under the above human rights treaties, including in relation to the treatment of refugees and asylum seekers. Some of these obligations, such as those contained in the Refugee Convention, are aimed at addressing the specific situation of asylum seekers and refugees, while others are of more general application.

7.6 Obligations that are specifically relevant to the committee's inquiry into events at the Manus Island RPC are as follows.

#### *The Refugee Convention and Refugee Status Determination (RSD)*

7.7 A person who has refugee status or satisfies the definition of 'refugee' is entitled to a range of specific rights under the Refugee Convention. These rights include, for example, the right not to be expelled (article 32), the right to freedom of movement within the territory (article 26), the right to public relief and assistance (article 23), the right to be issued identity and travel documents (articles 27 and 28) and an obligation of non-refoulement (article 33).<sup>2</sup> Further, individuals have a right to seek asylum and a right not to be punished for any illegal entry into Australian territory in order to seek asylum (article 31).<sup>3</sup> Specific obligations in relation to refugee status determination processes have already been noted in chapter 4.

#### *Non-refoulement obligations*

7.8 One of the fundamental obligations under international human rights law is the obligation of non-refoulement. Australia has non-refoulement obligations under the Refugee Convention and under both the ICCPR and the CAT.<sup>4</sup> This means that Australia must not return (refoule) an individual to a country where there is a real risk

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1 Parliamentary Joint Committee on Human Rights, *Guide to Human Rights*, March 2014, p. 5.

2 Convention Relating to the Status of Refugees 1951, as amended by the 1967 Protocol Relating to the Status of Refugees (Refugee Convention), Articles 23, 26-28 and 32-33.

3 Refugee Convention, article 31; Universal Declaration of Human Rights, article 14. See also Law Society of New South Wales, *Submission 8*, p. 5.

4 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), article 3(1); International Covenant on Civil and Political Rights (ICCPR), articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.

that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.<sup>5</sup> Non-refoulement obligations are absolute and may not be subject to any limitations.<sup>6</sup>

7.9 Human rights law requires provision of an independent and effective hearing to evaluate the merits of a particular case of non-refoulement. Equally, the provision of 'independent, effective and impartial' review of non-refoulement decisions is integral to complying with non-refoulement obligations under the ICCPR and CAT.<sup>7</sup>

*Torture, cruel, inhuman or degrading treatment or punishment*

7.10 Article 7 of the CAT provides an absolute prohibition against torture as well as cruel, inhuman or degrading treatment or punishment. This means that torture and cruel, inhuman or degrading treatment or punishment cannot be justified under any circumstances. The aim of the prohibition against torture is to protect the dignity of the person, and in substance it relates not only to acts causing physical pain but also to acts that cause mental suffering. Prolonged indefinite detention without charge has been found to breach the prohibition on torture or cruel, inhuman or degrading treatment.<sup>8</sup>

7.11 The Andrew & Renata Kaldor Centre for International Refugee Law (Kaldor Centre) explained that, with reference to this prohibition, Australia is obliged not only to prohibit such treatment but also to take positive steps to prevent such treatment. This includes obligations:

- to educate and inform persons responsible for detention of the prohibition against torture or other cruel, inhuman or degrading treatment;
- to include the prohibition in any rules or instructions issued to such persons;
- to keep under systematic review arrangements for the custody and treatment of those detained with a view to preventing such treatment;
- to ensure authorities conduct a prompt and impartial investigation whenever there is reasonable ground to believe such treatment has occurred; and
- to ensure that individuals alleging such ill-treatment have the right to complain to, and have the case promptly and impartially examined by,

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5 Refugee Convention, article 33. The non-refoulement obligations under the CAT and ICCPR are known as 'complementary protection' as they are protection obligations in addition to those under the Refugee Convention.

6 ICCPR, article 2.

7 See, for example, *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005), para 13.7.

8 Parliamentary Joint Committee on Human Rights, *Guide to Human Rights*, March 2014, pp 13-14.

competent authorities, including protection of the complainant and witnesses from ill-treatment or intimidation as a consequence of any evidence given.<sup>9</sup>

7.12 In addition, as noted above, Australia is under an obligation to ensure that it does not send a person who is in Australia to a country where there is a real risk of torture or cruel, inhuman, degrading treatment or punishment (non-refoulement obligations). Additionally, article 10 of the ICCPR provides that all persons in detention must be treated humanely.

#### *Prohibition against arbitrary detention*

7.13 Article 9 of the ICCPR provides that no-one may be subjected to arbitrary arrest or detention, or deprived of liberty except on such grounds and in accordance with such procedures as are established by law. Article 9 of the ICCPR applies to all deprivations of liberty and is not limited to criminal cases. Detention must not only be lawful but also be reasonable and necessary in all the circumstances. The principle of arbitrariness includes elements of inappropriateness, injustice and lack of predictability.<sup>10</sup>

7.14 The only permissible limitations on the right to security of the person and freedom from arbitrary detention are those in accordance with procedures established by law, provided that the law itself and the enforcement of it are not arbitrary.<sup>11</sup> The UN Human Rights Committee has held in a number of cases, including cases brought against Australia, that prolonged mandatory detention of asylum seekers may violate the prohibition against arbitrary detention.<sup>12</sup>

#### *Right to security of the person*

7.15 The right to security of the person is protected under article 9(1) of the ICCPR, and requires Australia to take steps to protect people against interference with personal integrity by others. This includes protecting people who are subject to death threats, assassination attempts and harassment and intimidation.<sup>13</sup>

#### *Right to life and the duty to investigate*

7.16 The right to life is protected by article 6(1) of the ICCPR and article 1 of the Second Optional Protocol to the ICCPR. The right to life has the following three core elements:

- it prohibits the state from arbitrarily killing a person;

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9 Andrew & Renata Kaldor Centre for International Refugee Law (Kaldor Centre), *Submission 9*, p. 9 [citations omitted], referring to UN Human Rights Committee, 'General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' UN Doc HRI/GEN/1/Rev.9 (Vol. I) 200 [2].

10 Parliamentary Joint Committee on Human Rights, *Guide to Human Rights*, March 2014, p. 16.

11 Parliamentary Joint Committee on Human Rights, *Guide to Human Rights*, March 2014, p. 7.

12 See, for example: UN Human Rights Committee, *A v Australia*, Communication No 560/1993 (3 April 1997); *D and E v Australia*, Communication No 1050/2002 (9 August 2006).

13 Parliamentary Joint Committee on Human Rights, *Guide to Human Rights*, March 2014, pp 11-12.

- it imposes an obligation on the state to protect people from being killed by others or by identified risks; and
- it requires the state to undertake an effective and proper investigation into all deaths where the state is involved (duty to investigate).

### *The right to health*

7.17 Article 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR) recognises 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health', and requires steps to be taken to achieve the full realisation of this right.

### *Right to an effective remedy*

7.18 Article 2 of the ICCPR requires states to ensure access to an effective remedy for violations of human rights. States are required to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. This includes the establishment of mechanisms to ensure the prompt, thorough and effective investigation of alleged violations by independent and impartial bodies.

7.19 Article 2 also requires that states are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations. The right also involves a duty to prevent recurrences of violations, which may require measures effecting changes to institutions, laws or practices.

### *Scope of Australia's human rights obligations in and outside of Australia*

7.20 Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia over whom Australia is exercising 'effective control', or who are otherwise under Australia's jurisdiction.<sup>14</sup>

7.21 The 'effective control' test in international law is essentially one of sufficient control. Therefore, whether Australia is exercising sufficient control and authority to amount to 'effective control' is a question of fact and degree in the particular circumstances.<sup>15</sup> The Australian Government has accepted that it has human rights

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14 Amnesty International, 'This is breaking people: human rights violations at Australia's asylum seeker processing centre on Manus Island, Papua New Guinea', December 2013, (included as *Submission 22*, Attachment 1), p. 83.

15 See, for example: *Al-Jedda v United Kingdom* [2011] ECHR 1092; and *Al-Skeini v United Kingdom* [2011] ECHR 1093.

obligations to persons outside its territory in circumstances where it exercises effective control over those persons.<sup>16</sup>

7.22 'Effective control' by Australia does not preclude the possibility of the joint or concurrent responsibility of another state in relation to conduct that occurs on the latter's territory.<sup>17</sup> Under the international law of state responsibility, Australia will be liable for internationally wrongful acts which are attributable to it, or where it aids or coerces another state to commit an internationally wrongful act.<sup>18</sup>

7.23 As noted above, under international human rights law Australia also has specific obligations with respect to the transfer of persons to another country where there is a real risk of them suffering particular human rights violations (non-refoulement obligations). It should be noted that, while this obligation is not extraterritorial, it may involve conduct that becomes extraterritorial in the course of the transfer. For instance, if a person is present in Australian territory and then is removed from Australian territory by Australian authorities and transferred to a third state. The conduct that occurs outside of Australian territory is the extraterritorial element. The non-refoulement obligation requires Australia not to send a person who is in Australia to a country where there is a real risk that the person would face persecution, torture or other serious forms of harm (such as the death penalty or arbitrary deprivation of life) or cruel, inhuman or degrading treatment or punishment.<sup>19</sup>

## **Scope of Australia's human rights obligations in relation to individuals detained at Manus Island**

### ***Factual background***

7.24 The factual background to the incident at the Manus Island RPC from 16 to 18 February 2014 has been described in detail in previous chapters. However, the following issues are of particular significance in assessing Australia's obligations in respect of asylum seekers held at Manus Island:

- asylum seekers arrived in Australia and were held in immigration detention in Australia;<sup>20</sup>

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16 Replies to the List of Issues (CCPR/C/AUS/Q/5) To Be Taken Up in Connection with the Consideration of the Fifth Periodic Report of the Government of Australia (CCPR/C/AUS/5), paras 16-17, UN Doc CCPR/C/AUS/Q/5/Add.1 (5 February 2009), referred to in Amnesty International, *Submission 22*, Attachment 1, p. 83.

17 *Issa v Turkey* [2004] ECHR 629. See also Dr Azadeh Dastyari, Castan Centre for Human Rights Law, *Committee Hansard*, 13 June 2014, pp 16 and 19.

18 International Law Commission, 'Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) articles 16–18; *Hirsi Jamaa v Italy* (2012) 55 EHRR 21, para 129, referred to in Kaldor Centre, *Submission 9*, p. 6.

19 CAT, article 3(1); ICCPR, articles 6(1) and 7; and Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty.

20 Amnesty International, *Submission 22*, Attachment 1, p. 30.

- Australian authorities transferred asylum seekers from immigration detention in Australia to immigration detention in Papua New Guinea (PNG),<sup>21</sup> where they were detained at the RPC;<sup>22</sup>
- the establishment of the RPC and the transfer and detention of asylum seekers in that facility was pursuant to agreements between Australia and PNG;<sup>23</sup>
- the RPC is entirely funded by the Australian Government;<sup>24</sup>
- only asylum seekers transferred from immigration detention in Australia are held at the RPC;<sup>25</sup>
- operational, maintenance, security and welfare support services are provided by service providers at the RPC under contracts with the Australian Government;<sup>26</sup>
- Australian (departmental) officials managed or had significant involvement in the RSD processes in respect of individuals held at the RPC;<sup>27</sup> and
- no asylum seeker had received a final decision on their refugee status at the time of the incident from 16 February to 18 February 2014.<sup>28</sup>

### ***'Effective control'***

7.25 A significant issue in this inquiry has been the extent to which Australia's obligations under international law apply in respect of asylum seekers detained in the Manus Island RPC, given its location outside of Australia.

7.26 As noted above, under international human rights law, a state has an obligation to respect, protect and fulfil its human rights obligations within its territory or in relation to persons or situations subject to its jurisdiction. A state has

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21 Amnesty International, *Submission 22*, Attachment 1, p. 31.

22 Human Rights Law Centre, *Submission 17*, p. 13; Castan Centre for Human Rights Law, *Submission 7*, p. 3.

23 Australian Human Rights Commission, *Submission 30*, p. 5; G4S, *Submission 29*, p. 10.

24 Australian Human Rights Commission, *Submission 30*, p. 5; Human Rights Law Centre, *Submission 17*, p. 13.

25 *Additional Information provided by the Department of Immigration and Border Protection – population at Manus Island Detention Centre* (received 6 June 2014), p.1; Dr Dastyari, Castan Centre for Human Rights Law, *Committee Hansard*, 13 June 2014, pp 16 and 19.

26 *Additional Information provided by the Department of Immigration and Border Protection – contracts* (received 30 May 2014); The Salvation Army, *Submission 34*, p.3; G4S, *Submission 29*, p. 10.

27 Miss Elizabeth Thompson, *Committee Hansard*, 12 June 2014, p. 21; Amnesty International, *Submission 22*, Attachment 1, p. 62.

28 *Additional Information provided by the Department of Immigration and Border Protection – population at Manus Island detention centre* (received 6 June 2014), p. 1; Mr Robert Cornall AO, *Committee Hansard*, 12 July 2014, p. 11; Asylum Seeker Resource Centre, *Submission 23*, p. 6.

extraterritorial obligations (that is, obligations outside its territory) where it has 'effective control' over territory, persons or the situation.<sup>29</sup>

7.27 Australia's obligations under international human rights law will therefore apply to circumstances where asylum seekers or the situation are outside Australian territory yet under the 'effective control' of Australian authorities. The committee heard evidence that if Australia had 'effective control' of the Manus Island RPC and/or the people detained there then this would mean that Australia has responsibility under international human rights law.<sup>30</sup> This question of whether Australia exercises 'effective control' over the Manus RPC was one of the central issues in dispute in the evidence of witnesses and submitters to the inquiry.

7.28 In evidence to the committee, a departmental officer rejected the argument that Australia has effective control of the Manus Island centre, stating:

[T]here has been a lot of focus and significant claims made that Australia runs this centre and has 'effective control'. It is a legal context; it is a legal term. We are very clear that we do not have 'effective control': we do not run the centre, we do not set the legal framework, we do not own the buildings, we do not employ the staff, we do not set the policy framework, we do not outline the labour laws under which people are employed, we do not have control over the occupational health and safety legislation, and we do not have control over the environmental legislation. What we do have is a contracting arrangement for service delivery consistent with the regional resettlement agreement...[It] needed to be clarified that the Australian government, through its arrangements there, does not exercise effective control. It manages contracts consistent with an agreement struck between the government of PNG and the government of Australia in July and August of 2013.<sup>31</sup>

7.29 This accords with other statements made by the Australian Government in relation to the operation of offshore processing centres and provided to the committee:

The consistent position taken by Australia is that while we are assisting PNG and Nauru in the management of the centres, this assistance does not constitute the level of control required under international law to engage Australia's international human rights obligations extraterritorially in relation to the persons concerned.<sup>32</sup>

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29 UN Human Rights Committee General Comment No 31, (2004), para 10; UN Committee against Torture, General Comment No 2 (2007) para 16.

30 Dr Dastyari, Castan Centre for Human Rights Law, *Committee Hansard*, 13 June 2014, pp 16 and 19.

31 Mr Mark Cormack, Deputy Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 11 July 2014, p. 28.

32 'Australian Government's Response to Amnesty International reports arising from visits to Manus Offshore Processing Centre', *Additional Information provided by Amnesty International* (received 23 July 2014), p. 2.

7.30 The view that Australia does not have effective control over asylum seekers held at the RPC (and consequently does not have concomitant obligations under international law) was strongly contested in the evidence of a number of legal and human rights organisations and academics to the inquiry.<sup>33</sup> For example, the United Nations High Commissioner for Refugees (UNHCR) stated in its submission:

As a matter of international law, 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 Australia's legal responsibility for the protection of asylum-seekers affected by the transfer arrangements.<sup>34</sup>

7.31 A number of submitters and witnesses submitted that Australia has satisfied the test of 'effective control', and pointed particularly to the degree of Australia's involvement in the operation of the Manus Island RPC.<sup>35</sup> Specific factors identified as evidence of effective control included those outlined in the factual background at paragraph 7.24 above, such as Australia's integral involvement in the establishment, arrangements, maintenance, funding and operation of the centre.<sup>36</sup> For example, Mr Daniel Webb, Director of Legal Advocacy at the Human Rights Law Centre, concluded that Australia possessed the requisite degree of control to attract international human rights obligations:

...Australia's human rights obligations do not end at its borders. It would defeat significantly the purpose of international human rights law if states could just do offshore things that it could not legally do onshore. So for that reason international law is concerned with what states actually do, not just where they do it. Australia will be responsible for events on Manus if it can be shown that the arrangements are within Australia's effective control. The test has been described as being met where a state is a link in the causal chain that allows human rights violations to take place. In the context of Manus, Australia designed the arrangements, Australia built and funds the detention centre, Australia contracts service providers to provide services at the centre and Australia is involved in the processing of claims within the centre. So not only is Australia a link in the causal chain, Australia built the chain and underwrites the chain and is involved very closely in every link of that chain. So quite clearly Australia has sufficient control to be regarded

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33 Human Rights Law Centre, *Submission 17*, pp 12-13; Australian Human Rights Commission, *Submission 30*, pp 4-5; Law Society of New South Wales, *Submission 8*, p. 3; Kaldor Centre, *Submission 9*, p. 4; UNHCR, *Submission 21*, p. 1; Castan Centre for Human Rights Law, *Submission 7*, p. 3; Immigration Advice and Rights Centre, *Submission 14*, p. 4; Civil Liberties Australia, *Submission 5*, p. 1; Kate Schuetze, Amnesty International, *Committee Hansard*, 12 July 2014, p. 51; Asylum Seeker Resource Centre, *Submission 23*, p. 5.

34 *Submission 21*, p. 1.

35 Human Rights Law Centre, *Submission 17*, pp. 12-13; Castan Centre for Human Rights Law, *Submission 7*, p.3; Ms Kate Schuetze, Amnesty International, *Committee Hansard*, 12 July 2014, p. 5; and Dr Azadeh Dastyari, Castan Centre for Human Rights Law, *Committee Hansard*, 13 June 2014, pp16 and 19.

36 Human Rights Law Centre, *Submission 17*, p. 12; Ms Kate Schuetze, Amnesty International, *Committee Hansard*, 12 July 2014, p. 51.

as having effective control, and for that reason Australia is responsible for any human rights violations that take place.<sup>37</sup>

7.32 Dr Azadeh Dastyari, associate at the Castan Centre for Human Rights Law, similarly gave evidence that Australia is clearly exercising effective control. Dr Dastyari stated:

There is an incredibly strong case that Australia exercises effective control. You mentioned that PNG has not done this before. PNG would not be doing this, this time, were it not for the Australian government. Everything rests on decisions made the Australian government. All the transferees are chosen by the Australian government...[and] the centre is being paid for by the Australian government. But for the Australian government we would not have detention and we would not have the asylum seekers in the detention centre on Manus Island. So I think that Australian government's claims that it is not exercising control over the centre are very weak.<sup>38</sup>

7.33 Amnesty International, in its December 2013 report into the conditions at Manus Island RPC, also stated that there is 'little question' that persons detained at the centre are under the effective control of Australia.<sup>39</sup>

*Obligations flowing from effective control*

7.34 The committee heard that Australia has a range of human rights obligations in relation to the asylum seekers detained in the Manus Island RPC, arising from the conclusion that Australia exercises effective control of the centre and/or the individuals detained in it. As set out above, this includes obligations to respect, protect and fulfil the human rights of asylum seekers held at Manus Island, including but not limited to:

- the rights of refugees and asylum seekers as well as in relation to RSD;
- the prohibition against refoulement;
- the right not to be subject to torture or cruel, inhuman and degrading treatment or punishment;
- the right to humane treatment in detention;
- the right not to be arbitrarily detained;
- the right to security of person;
- the right to health;
- the right to life and the duty to investigate; and
- the right to an effective remedy.

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37 *Committee Hansard*, 12 July 2014, p. 59.

38 *Committee Hansard*, 13 June 2014, pp 16, 19.

39 *Submission 22*, Attachment 1, p. 83. See also Ms Kate Schuetze, Amnesty International, *Committee Hansard*, 12 July 2014, p. 51.

7.35 The committee notes that a finding that Australia had 'effective control' of the Manus Island RPC at the relevant time would mean that Australia is liable for internationally wrongful acts, including breaches of its obligations under international human rights law, in respect of the incident at the centre from 16 February to 18 February 2014.<sup>40</sup>

### **Joint liability**

7.36 A number of submitters and witnesses argued that, whether or not Australia's involvement is sufficient to reach the level of effective control, Australia is liable for human rights breaches at the Manus Island RPC under international law, based on the concept of joint and several liability with PNG.<sup>41</sup> The Amnesty International report on Manus Island RPC noted:

Even if there were some question as to whether Australia's involvement meets the test of effective power and control, its engagement certainly establishes that it has at least joint responsibility, together with Papua New Guinea, for human rights violations committed in the handling of asylum claims and the detention of asylum seekers in Papua New Guinea.<sup>42</sup>

7.37 Similarly, Dr Joyce Chia, Senior Research Associate at the Kaldor Centre, gave evidence that:

We would certainly agree with the UNHCR that at any event there is clearly shared and joint responsibility. In that respect I think the exact details of who funds what is less relevant. Clearly there is sufficient [connection] to trigger our international obligations under the state responsibility doctrine.<sup>43</sup>

7.38 Submitters noted that the concept of joint responsibility provides that, if Australia 'aids or assists, directs or controls, or coerces' PNG to commit a breach of PNG's human rights obligations, Australia will also be responsible if it has knowledge of the circumstances of the breach, and the conduct would have been in breach of Australia's human rights obligations if Australia had committed the breach itself.<sup>44</sup>

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40 International Law Commission, 'Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) articles 16–18; *Hirsi Jamaa v Italy* (2012) 55 EHRR 21, para 129, referred to in Kaldor Centre, *Submission 9*, p. 6.

41 Dr Joyce Chia, Kaldor Centre, *Committee Hansard*, 13 June 2014, p.19; Kaldor Centre, *Submission 9*, p. 4; Law Society of New South Wales, *Submission 8*, p. 3; Amnesty International, *Submission 22*, Attachment 1, p. 85. See also: International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001; *Hirsi Jamaa v Italy* (App No 27765/09, European Court of Human Rights, Grand Chamber, 23 February 2012) para 129.

42 *Submission 22*, Attachment 1, p. 83. See also Ms Kate Schuetze, Amnesty International, *Committee Hansard*, 12 July 2014, p. 51.

43 *Committee Hansard*, 13 June 2014, p. 16.

44 Kaldor Centre, *Submission 9*, p. 4; Law Society of New South Wales, *Submission 8*, p. 3. See also International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001.

*Obligations under doctrine of joint responsibility*

7.39 If Australia does not have effective control of the Manus Island RPC, its specific obligations under the doctrine of joint responsibility are likely to be different in scope to the obligations that would flow from a finding that Australia possessed 'effective control'. This is because the scope of Australia's potential liability under the concept of joint responsibility would largely be in reference to PNG's obligations under international human rights law.<sup>45</sup> Australia's liability in these circumstances would be based on the extent of contribution to any violation of these obligations under international human rights law.<sup>46</sup>

**Human rights assessment of the incident at the MIDC between 16 February and 18 February 2014***Breaches of human rights contributing to the incident*

7.40 As highlighted in chapters 3 and 4, the committee received evidence from organisations which had undertaken monitoring visits to the centre in the lead up to the incident expressing concern about the harsh physical conditions in the centre, the mandatory detention of asylum seekers, the return oriented environment at the centre, poor health care services and lack of certainty around RSD processes and resettlement.<sup>47</sup>

7.41 The evidence of a number of legal and human rights organisations echoed such concerns, and suggested that breaches of Australia's obligation to respect, protect and fulfil human rights at the Manus Island RPC contributed to the distress of asylum seekers and, ultimately, to the unrest between 16 February and 18 February 2014.<sup>48</sup> The alleged breaches included:

- lack of progress and uncertainty with respect to RSD in breach of Australia's obligations;<sup>49</sup>
- mandatory detention for long periods amounting to arbitrary detention in breach of Australia's obligations (article 9, ICCPR);<sup>50</sup>

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45 International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001, article 16 and 17.

46 International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001, article 16 and 17.

47 UNHCR, *Submission 21*, p. 3; Amnesty International, *Submission 22*, Attachment 1.

48 See, for example: Castan Centre for Human Rights Law, *Submission 7*, p. 7; Mr Daniel Webb, Human Rights Law Centre, *Committee Hansard*, 12 July 2014, p. 51; Amnesty International, *Submission 22*, p. 4; and Ms Sophie Kay Nicolle, Amnesty International, *Committee Hansard*, 12 July 2014, p. 50.

49 See, for example, Amnesty International, *Submission 22*, Attachment 1, p. 4.

50 Dr Joyce Chia, Kaldor Centre, *Committee Hansard*, 13 June 2014, p. 15; and Ms Natalie Young, Law Society of New South Wales, *Committee Hansard*, 13 July 2014, p. 9.

- harsh and dehumanising conditions at the Manus Island RPC which amounted to cruel, inhuman and degrading treatment or punishment and violations of the right to be treated humanely in detention in breach of Australia's obligations (article 7, CAT, articles 7 and 10, ICCPR);<sup>51</sup> and
- inadequate access to health services in breach of Australia's obligations (article 12, ICESR).<sup>52</sup>

### ***Breaches of human rights in relation to the incident***

7.42 Some submitters and witnesses argued that, in relation to the incident between 16 February and 18 February itself, a number of specific breaches of Australia's obligations under the ICCPR occurred, specifically: the right to life, the right to security of person, and the right to an effective remedy.

#### *Right to life – duty to protect*

7.43 A number of submitters and witnesses argued that the death of Mr Reza Barati involved a breach of the right to life by Australia, due to Australia's failure to protect him.<sup>53</sup> The Kaldor Centre explained that Australia's duty to protect Mr Barati may have been engaged in respect of acts done by employees or contractors at the Manus Island RPC:

If Reza Barati was killed by people acting on behalf of the State (whether by employees of G4S or PNG authorities), the State's obligations would be engaged under article 6 of the ICCPR. Under international law, the State remains responsible for the acts of persons acting on governmental authority, whether or not these are State officials as such, and whether or not the acts exceeded authority or contravened instructions...Furthermore, States have an obligation to take appropriate steps to safeguard the lives of those within their territory and/or jurisdiction. The same facts that may suggest negligence on the part of G4S suggest that there may have been a violation of this obligation.<sup>54</sup>

7.44 Dr Dastyari, from the Castan Centre for Human Rights Law expressed the view that, in addition to breaching its obligation to protect life in respect of Mr Barati, Australia was in continuing breach of this obligation due to the continuing detention of people in the Manus Island RPC.<sup>55</sup>

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51 Ms Sophie Nicolle, Amnesty International, *Committee Hansard*, 12 July 2014, p. 49; UNHCR, *Submission 21*, p. 3.

52 Amnesty International, *Submission 22*, pp 3-4; Kaldor Centre, *Submission 9*, Attachment 1, pp 2-3.

53 Dr Azadeh Dastyari, Castan Centre for Human Rights Law, *Committee Hansard*, 13 June 2014, p. 14; Civil Liberties Australia, *Submission 5*, p. 2; Dr Joyce Chia, Kaldor Centre, *Committee Hansard*, 13 June 2014, p. 15; Amnesty International, *Submission 22*, p. 9.

54 *Submission 9*, p. 7.

55 *Committee Hansard*, 13 June 2014, p. 14. See also Dr Joyce Chia, Kaldor Centre, *Committee Hansard*, 13 June 2014, p. 15.

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*Right to life – duty to investigate*

7.45 Some submitters further argued that Australia had not met its specific right to life obligation in respect of the requirement to initiate and conduct an effective and proper investigation of Mr Barati's death (duty to investigate).<sup>56</sup>

7.46 Amnesty International, for example, called on the Australian Government to 'conduct an independent inquiry into the violence with the joint co-operation of the Australian and PNG governments'; and stated that '[p]erpetrators of the violence must face criminal prosecution in accordance with international laws and standards, without recourse to the death penalty'.<sup>57</sup>

7.47 Under international human rights law, there are certain standards that an investigation needs to meet in order to be compliant with the duty to investigate. These standards include that the investigation be:

- brought by the state in good faith and on its own initiative;
- independent and impartial (including practically and institutionally);
- adequate and effective;
- carried out promptly; and
- open to public scrutiny and inclusive of the family of the deceased, with the family given access to all information relevant to the investigation.<sup>58</sup>

7.48 The Kaldor Centre argued that investigations to date by the Australian authorities, including this committee's inquiry, may not be sufficient to fulfil these standards.<sup>59</sup> It noted that identifying and punishing those responsible for the breaches is a critical aspect of ensuring an investigation is adequate.<sup>60</sup>

*Right to security of person*

7.49 As discussed in chapter 5, evidence to the inquiry is clear that a large number of asylum seekers were assaulted at the Manus Island RPC during the incident between 16 February and 18 February.

7.50 Some submitters claimed that these assaults represent a breach of Australia's obligations with respect to the right to security of person, to the extent that assaults

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56 Human Rights Law Centre, *Submission 17*, p. 14.

57 *Submission 22*, p. 10.

58 See, for example: *McCann v United Kingdom* (1996) 21 EHRR 97, [3], [188], [194]; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182; *Paul and Audrey Edwards v United Kingdom* (2002) 35 EHRR 19, [69]–[73]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC, 653, [19]–[20], [23]; *Osman v United Kingdom* (1998) 29 EHRR 245, [115]. The duty to investigate was referred to in a number of submissions, for example the Kaldor Centre, *Submission 9*, p. 7.

59 *Submission 9*, p. 8.

60 *Submission 9*, p. 8.

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were committed by agents of Australia or that Australia failed to prevent the assaults or provide redress.<sup>61</sup>

*Right to an effective remedy and preventing recurrences of violations*

7.51 The right to an effective remedy requires not only holding perpetrators to account but also making reparation to individuals whose rights have been violated and preventing recurrences of human rights violations.

7.52 In relation to the type of remedies to be regarded as effective to address the violations of human rights at the Manus Island RPC, the Kaldor Centre suggested that:

Remedies that may be required in relation to the incident on Manus Island...are likely to include compensation for those injured, changes to procedures and practices, public acknowledgment of violations, and the institution of an effective complaints mechanism for those on Manus Island.<sup>62</sup>

7.53 A number of submitters and witnesses from human rights organisations identified the necessity of preventing recurrences of violations, including continuing violations related to the death of Mr Barati and the injuries to other asylum seekers at the Manus Island RPC.<sup>63</sup>

7.54 Ms Sophie Nicolle, Government Relations Advisor of Amnesty International, submitted that the most effective way to prevent further violence and ensure the rights of asylum seekers was to 'end offshore processing at Manus Island in order to guarantee the right to life and safety of the person for asylum seekers there'.<sup>64</sup>

7.55 Similarly, Mr Daniel Webb of the Human Rights Law Centre stated:

Leaving people languishing indefinitely in harsh conditions with no certainty about their future will inevitably cause harm and lead to unrest. It [has] done so with tragic consequences...The Human Rights Law Centre's position is that the Manus detention centre should be closed: conditions remain inhumane; mandatory and indefinite detention and penalising asylum seekers on account of their unauthorised arrival continue to be breaches of international law; and, perhaps most importantly, asylum seekers remain at risk of harm.<sup>65</sup>

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61 Kaldor Centre, *Submission 9*, p. 8; Ms Sophie Nicolle, Amnesty International, *Committee Hansard*, 12 June 2014, p. 49.

62 *Submission 9*, p. 8. See also Amnesty International, *Submission 22*, p. 10.

63 See, for example: Australian Human Rights Commission, *Submission 30*, pp 10-11; Kaldor Centre, *Submission 9*, p. 10.

64 *Committee Hansard*, 12 July 2014, p. 50.

65 *Committee Hansard*, 12 July 2014, p. 51.

7.56 While expressing the view that the Manus Island RPC should be closed as the best way of preventing further human rights violations, the Human Rights Law Centre also made specific recommendations in the event that the centre remains open, submitting that the Australian Government should 'take urgent steps' to:

- ensure individuals responsible for acts of violence are held to account;
- ensure the safety of asylum seekers within the Manus RPC;
- address the inhumane conditions inside the RPC; and
- address the inordinate delays in processing and resettlement which underpinned the unrest.<sup>66</sup>

7.57 Amnesty International also made a number of specific recommendations for ensuring the human rights of asylum seekers in relation to the incident at the Manus RPC. These recommendations included for the Australian Government to:

- immediately remove to Australia all asylum seekers who witnessed or were injured in the violence, for their safety and protection;
- ensure that all asylum seekers injured in the violence receive adequate professional assistance, including medical treatment, full rehabilitation and mental health services, as well as independent legal advice;
- ensure that asylum seekers have the right to access lawyers; and
- ensure access to the detention centre by lawyers and human rights organizations.<sup>67</sup>

7.58 In response to concerns about possible human rights breaches in relation to the incident, the department maintained its position that Australia's obligations under international human rights treaties including the ICCPR do not extend to individuals held at the Manus Island RPC,<sup>68</sup> and that any such obligations rest with PNG. Mr Mark Cormack, a Deputy Secretary at the department, stated:

The responsibility for the operation and running of the Manus centre lies with the PNG government. Our responsibility is to provide support through the contracting arrangements that we have with service providers, but these centres operate under PNG law...

The PNG government is signatory to a range of conventions and that is where the accountability lies.<sup>69</sup>

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66 *Submission 17*, p. 15.

67 *Submission 22*, pp 9-10.

68 Department of Immigration and Border Protection, *Answers to questions taken on notice at a public hearing on 11 July 2014* (received 17 September 2014), [p. 3].

69 *Committee Hansard*, 11 July 2014, pp 38 and 40.

## Duty of care responsibilities under domestic law

7.59 In addition to Australia's obligations under international law, the committee also received evidence in relation to Australia's duty of care responsibilities under Australian domestic law in respect to those held in the Manus Island RPC. A number of submitters argued that Australia has a non-delegable duty of care under common law to ensure the safety of asylum seekers at held at the centre.<sup>70</sup>

7.60 The Australian Lawyers Alliance (ALA) stated that a non-delegable duty of care has the effect of fixing liability for negligent acts to a particular person, even if that person has delegated responsibility for performance of those acts to a third party, and that non-delegable duties of care typically arise where there is particular responsibility for a person due to issues of control or vulnerability.<sup>71</sup>

7.61 Dr Andrew Morrison QC of the ALA stated in evidence to the committee that the non-delegable duty of care means that the Australian Government, 'by employing an organisation such as G4S, does not cease to be responsible'.<sup>72</sup> The Kaldor Centre similarly noted that in respect of responsibilities under a non-delegable duty of care:

...the Australian Government could not rely upon its employment of a qualified independent contractor to discharge its duty of care to the detainees. Rather, the Australian Government itself was required to ensure that care would be taken and is liable for any breach of that duty of care.<sup>73</sup>

7.62 These submitters noted that the Australian Government may be in breach of this duty of care obligation due to the severe conditions in the Manus Island RPC leading up to the incident.<sup>74</sup> The Kaldor Centre noted that to assess whether there had been a breach of duty of care by the Australian Government it would be necessary to examine the 'foreseeability' of the risks and the 'reasonableness of care taken'.<sup>75</sup> The ALA submitted that factors indicating a breach included inappropriate fencing, inadequately trained staff, understaffing, inadequate monitoring, inadequate preparation in the event of emergency, allegations of sexual harassment, disease, poor hygiene, lack of access to appropriate quantities of water and inadequate mental health and medical care services.<sup>76</sup>

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70 See, for example: Kaldor Centre, *Submission 9*, p. 3; Australian Lawyers Alliance, *Submission 13*, pp 19-20.

71 *Submission 13*, p. 6.

72 *Committee Hansard*, 13 June 2014, p. 2.

73 *Submission 9*, p. 3.

74 See, Australian Lawyers Alliance, *Submission 13*, pp 19-20; Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 9*, p. 3.

75 *Submission 9*, p. 3.

76 Australian Lawyers Alliance, *Submission 13*, pp 19-20.

7.63 The department noted the following in relation to any duty of care owed by Australia to transferees held at the Manus Island RPC:

The existence and nature or scope of a duty of care in the regional processing context is a complex question involving consideration of foreign laws and the roles played by a range of parties including foreign and Australian governments and their officers as well as non-government service providers and their employees. Such a question normally entails judicial evaluation of the relevant factors involved. As such issues are the subject of current litigation, it would not be appropriate to comment.<sup>77</sup>

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<sup>77</sup> Department of Immigration and Border Protection, *Answers to questions taken on notice at a public hearing on 11 July 2014* (received 17 September 2014), [p. 3].