

Chapter 7

Committee views and recommendations

7.1 Matters documented in this report were referred to the committee on 12 September 2016, four months after the previous inquiry into these matters lapsed with the dissolution of both houses of Parliament on 9 May 2016.¹ That inquiry was also preceded by two other inquiries into matters related to the Nauru Regional Processing Centre (RPC), and with specific incidents at the Manus RPC.

7.2 Throughout this inquiry, this committee has reflected on the findings made during previous inquiries. Overall, those inquiries found that the RPC environments were unsafe generally—particularly for children—and regarded the mechanisms by which incidents were reported and investigated, to be inadequate.

7.3 In the committee's view, the Department of Immigration and Border Protection (the department) bears the onus of demonstrating that issues of concern identified by previous committees have been addressed. The committee does not believe that the department has done this. Rather, the evidence presented to this inquiry indicates that many of the problems identified during previous inquiries continue today, and that the re-classification of the RPCs as 'open centres' has in fact exposed refugees and asylum seekers to new risks. The evidence has also clearly demonstrated that the department has failed to implement a system of accountability among its contractors and sub-contractors.

The provision of information to this inquiry

7.4 As explained throughout this report, the normal processes by which this committee would conduct its inquiry have been frustrated. The committee has been charged with inquiring into matters which are taking place in foreign nations. The committee does not have the power to meet as a committee outside Australia, and was therefore unable to travel to the RPCs to make an assessment of the conditions, and to meet with the refugees and asylum seekers being directly affected by offshore processing.

7.5 The committee noted, as have previous committees, that individuals located outside Australia do not enjoy the protection of parliamentary privilege in relation to the provision of evidence. The effect of this was that if the committee were to accept and publish information provided by a person outside Australia, that person could be disadvantaged by that evidence, and the Senate would be powerless to assist them.

7.6 These issues were compounded by the fact that other would-be scrutineers including various UN rapporteurs, human rights organisations, journalists, and advocates, likewise face a number of structural barriers to entering either Nauru or PNG, and would then have to obtain permission to enter the RPCs themselves. The

1 Legal and Constitutional Affairs References Committee, *Conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea ('Nauru and Manus RPCs')*, 5 May 2016.

result has been that any recent or current evidence from these other sources, of which the committee could take note, was extremely limited. It also led to criticism by the department of many such accounts by human rights organisations about their failure to verify information, or the use of out of date images.²

7.7 The committee relied heavily on the willingness of the department (in particular) to provide thorough and transparent evidence about the running of Australia's RPCs. Viewed as a whole, this assistance was not provided. The committee is disappointed at the standard of assistance provided by the department through the course of this inquiry. This was particularly the case in relation to responses provided to questions either taken by the department on notice, or put on notice in writing. Many of these responses were obstructive. Examples of such responses were outlined in Chapter 3 of this report.

7.8 The committee also noted that some of the information provided by the department could itself be viewed as a misleading representation of the RPCs. This was particularly evident in the case of images of the Nauru RPC, which the department provided to the committee on 16 February 2017.³ The department stated that it provided these images, taken in August 2016, 'in light of some recent media reporting featuring outdated vision of defunct and superseded facilities'. These included images of the 'Nauru Hard-Walled Accommodation Anujo Settlement Site'. There were no images of any tented accommodation at the Nauru RPC. The committee is aware, however, that when those photographs were taken people were still living in vinyl tents on Nauru. The department's own submission also acknowledges that tents are still being utilised (because they need to be sprayed each month to assist in pest and vermin control).⁴ The department provided the committee with more than 100 images (still shots taken from video footage), including 12 images of Nauru RPC staff accommodation, but no footage showing the state of tent accommodation at that time. The ongoing use of tented accommodation in Nauru has been a source of sustained criticism over many years, particularly in relation to the lack of privacy, and the unsuitability of these facilities in such a humid climate. The department's omission is very concerning.

7.9 The committee noted with particular concern that some of the most instructive evidence in relation to these matters came from other sources, and merely happened to be released publicly during or around the time of this inquiry. This included the

2 Amnesty International, *Submission 6*, Attachment 1, Department of Immigration and Border Protection (DIBP) response; DIBP, correspondence, *Response to the 'Forgotten Children' report by ABC's Four Corners*, March 2017.

3 DIBP, *Supplementary submission 23*.

4 DIBP, *Submission 23*, p. 52.

release of leaked incident reports known as 'the Nauru files',⁵ and two major audits of the department by the Australian National Audit Office (ANAO).⁶

The allegations of abuse, self-harm and neglect

7.10 As the Select Committee into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru (select committee) previously noted when charged with inquiries into these matters,⁷ Senate committees are not in a position to investigate the veracity of individual claims of abuse. A Senate committee is not a judicial or law enforcement body, nor does it have official powers of inquiry which extend outside Australia's jurisdiction.

7.11 This committee has, however, had the benefit of reference to the findings of previous inquiries, as well as all the evidence presented to this committee during previous inquiries, and all evidence published by other committees inquiring into these and related matters. In this way, the committee's inquiry into the actual allegations of abuse, self-harm and neglect has examined both historical allegations, and current circumstances at the RPCs and the local PNG and Nauruan communities.

7.12 Some of the evidence to which the committee had regard (including from secondary sources, and the Nauru files), are historical in nature. The incident reports included in the Nauru files, numbering more than 2000, date only to October 2015. The committee has taken into account the department's assertion that many of these incident reports were 'allegations', and not statements of fact. The committee also identified, however, that many of these reports were records made by a staff member who had witnessed an event first hand. In the committee's view, these are first-hand accounts, and represent the closest insight into day-to-day events at the Nauru RPC that this committee has had. As this report has demonstrated, many of the incident reports reflect and build on the evidence presented by secondary sources, including former RPC workers. Taken together, these incident reports paint a grim picture of life within the Nauru RPC.

7.13 Unfortunately, the committee did not have access to such detailed information in relation to the PNG RPC.

7.14 This committee agrees with the findings of previous committees in relation to the allegations of abuse, self-harm and neglect among refugees and asylum seekers in Nauru and PNG. The allegations of abuse and neglect (which have been made

5 The Guardian Australia, *the Nauru files*, <https://www.theguardian.com/news/series/nauru-files> (accessed 3 April 2017).

6 Australian National Audit Office (ANAO), *Offshore Processing Centres in Nauru and Papua New Guinea: procurement of garrison support and welfare services ('Procurement of garrison support and welfare services')*, Audit Report No. 16 2016-17; ANAO, *Offshore processing centres in Nauru and Papua New Guinea – contact management of garrison support and welfare services ('Contract management')*, ANAO Report No. 32 2016-17.

7 Select Committee into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, *Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru*, August 2015, p. 119.

publicly available) are prevalent and sustained. They indicate that refugees and asylum seekers in RPCs are living in an unsafe environment. The causal nexus between this unsafe living environment, including instances of abuse and neglect, and corresponding widespread mental health problems and self-harm, is indisputable. Furthermore, the allegations of which this and previous committees are aware are unlikely to represent the true prevalence of incidents of abuse, self-harm and neglect. This is deeply concerning.

7.15 There is also strong evidence indicating that when the RPCs became open centres, the damaging living environment has not improved, and that refugees and asylum seekers became exposed to new risks. Refugees and asylum seekers in Nauru now make up a substantial percentage of the island population. Their presence, and that of the RPC, has altered the character of Nauru. It is clear that many refugees and asylum seekers feel unwelcome and unsafe, and do not want to remain on Nauru. The committee noted in particular the extremely disturbing allegations of women being raped in Nauru, and of children being bullied and ostracised after being required to attend local schools. There are also similar accounts of abuse and bullying in the PNG community, including the well-known case of Mr Longham Sawari who was settled in Lae (PNG's second largest city) at just 21 years old, and eventually tried to break back into the RPC because of his inability to live in the community.

7.16 The committee also noted concerns about the risks of exposure to phosphate mining and cadmium in Nauru. The committee recognises that prolonged exposure to phosphate mining, and to cadmium, can harm human health. The department was alerted to the need to conduct further studies about cadmium on Nauru in 2012,⁸ as well as the need to maximise separation between sources of phosphate dust, and habitable areas.⁹ The department was also alerted to concerns about cadmium exposure on Nauru by its health services provider, International Health and Medical Services (IHMS).¹⁰ The department told the committee that the management of cadmium risks on Nauru is a matter for the Government of Nauru.¹¹ The committee disagrees. Asylum seekers and refugees are detained on Nauru because of the Government's policy and as such, the management of cadmium risks to these refugees and asylum seekers is the responsibility of the department. Given that Nauru is very small, any further research commissioned by the department into cadmium levels and phosphate exposure on Nauru would undoubtedly be relevant to the entire island population.

8 Department of Immigration and Citizenship (DIAC), *Nauru Regional Processing Centre: Environmental Due Diligence Report*, 15 November 2012, p. 49.

9 DIAC, *Nauru Regional Processing Centre: Environmental Due Diligence Report*, 15 November 2012, p. 52.

10 Dr Kalesh Seevarnain, Senior Health Adviser, International Health and Medical Services (IHMS), *Committee Hansard*, Wednesday 15 March 2017, p. 50.

11 DIBP, response to question on notice, 20 March 2017 (received 4 April 2017).

Factors contributing to this abuse, self-harm and neglect

7.17 The evidence indicates that a combination of factors have contributed to the allegation of abuse, self-harm and neglect among refugees and asylum seekers in the Nauru and Manus RPCs (and the respective local communities).

A damaging living environment and a lack of autonomy

7.18 As set out above, asylum seekers and refugees still living in the Nauru and PNG RPCs live in an unsafe environment, whether due to physical harm or health (including mental health) concerns. There is also very strong evidence to indicate that although the RPCs are now 'open', and residents may leave the facilities, they continue to live in a detention-like environment. RPC residents live behind high fences, under the authority of security guards, and in overcrowded shared accommodation. RPC residents have little autonomy over their lives. They are prohibited from possessing certain items, must pass through security to re-enter the RPC; they are restricted in their access to the internet and computer facilities; and are restricted in when and what they can eat and drink. Furthermore, due to the lack of fresh water on Nauru, and the reliance on desalinated water, Nauru RPC residents have very restricted use of showers. Parents have evidently faced serious challenges in maintaining a semblance of normal family life and parental authority, as well as the daily challenge of trying to keep their children safe.

7.19 As set out above, the people who choose to leave the RPCs, or who have been housed in the local communities, also live in a challenging environment, and have limited control over their lives. This is starkly apparent in Nauru. The Nauru atoll is tiny, at just 21 square kilometres. It is an isolated island surrounded by ocean. The only way a refugee or asylum seeker can leave the island is by agreeing to be resettled in Cambodia, indicating their interest in being resettled in the USA (and then being found eligible to do so), or by agreeing to return to their country of origin. Refugees may also live in Nauru on a 20 year visa. Employment opportunities on Nauru are extremely limited (with the RPC itself being the biggest source of employment); and the health, education and child protection systems are still developing. The presence of refugees and asylum seekers in the Nauruan community has clearly not been well-received. Refugee and asylum seekers have alleged that they have been the victims of assaults, sexual assaults, theft, and property damage. Children at local Nauruan schools have likewise reported bullying, and it has been suggested that few refugee and asylum seeker children have remained at school. It has also been alleged that local authorities (especially the police), despite capacity-building efforts by Australian authorities, have not demonstrated either the capacity or propensity to investigate allegations of abuse made by refugees and asylum seekers. The evidence considered by the committee strongly indicates that refugees and asylum seekers in Nauru feel unwelcome, and live in fear of their personal safety. On such a small island, and with limited confidence in local authorities to protect them, this is an unacceptable situation.

7.20 In the case of PNG, refugees who have left the RPC can only settle in PNG, express interest in the US resettlement arrangement, or agree to return to their country of origin. Very few refugees have agreed to settle in PNG, and the committee notes that some of those few have been reported to have faced serious challenges, with some becoming homeless.

A complicated and inadequate health care delivery system

7.21 The mechanisms by which health care services are provided to refugees and asylum seekers in the Nauru RPC, the Nauru community, the PNG RPC, and the PNG community, are extremely complicated. The manner in which an individual can access medical services will depend on their location and their status as either a refugee or asylum seeker. The health care services which are immediately available to refugees and asylum seekers in Nauru and PNG are limited: IHMS is contracted to provide only a particular range of medical services; and both Nauru and PNG have developing health care systems and limited health care infrastructure.

Complex medical transfer approvals process

7.22 The process by which an individual may be transferred for medical treatment is complex and confusing. The department's evidence in relation to the numbers of medical transfers, while limited, indicates that medical transfers are not uncommon. The department explained that from 1 July 2015 to 30 September 2016, 171 medical transfers from Nauru to Port Moresby had taken place.¹² It advised that from 1 January to 30 September 2016, five children had been transferred to Australia, and four to PNG, for health reasons.¹³ At 28 March 2017, the department advised that four people had been evacuated to Australia as a result of contracting Dengue Fever.¹⁴

7.23 The department stated that the decision to transfer asylum seekers or refugees settled in the community of either Nauru or PNG for medical reasons is undertaken in consultation with either the Government of Nauru or PNG.¹⁵ The department explained that in the case of asylum seekers IHMS will also be consulted. In the case of refugees settled in a local community the relevant local hospital or health services provider will be consulted.

7.24 The department explained that, upon receipt of a request for the transfer of an individual for medical treatment, the department would need to establish where the required treatment could occur, whether this be in Port Moresby, another third country or Australia.¹⁶ The department stated that the Government of Nauru does not provide

12 DIBP, *Submission 23*, p. 53.

13 DIBP, response to question on notice, 11 November 2016 (received 25 November 2016).

14 DIBP, response to written question on notice, 28 March 2017 (received 7 April 2017).

15 DIBP, response to question on notice, 8 February 2017 (received 3 March 2017).

16 Ms Cheryl-Anne Moy, Acting Deputy Commissioner Support, DIBP, *Committee Hansard*, Wednesday 8 February 2017, p. 16.

it with clinical timeframes for the treatment of refugees, but that it would advise the department of 'urgent cases'.¹⁷

7.25 The department explained that where IHMS has requested that an asylum seeker be transferred to Australia for medical treatment it will, in consultation with the local government,¹⁸ put this request to the department, which will then review the request to check whether the advice from IHMS is supported by 'appropriate specialist opinion', and that the relevant medical services would not be available offshore.¹⁹ The department explained that if it did decide to transfer an individual to Australia it would also have to locate an Australian hospital to accept them.²⁰

7.26 The department's evidence in relation to the decision to permit a patient to travel to Australia was confusing. The department advised the committee that a department staff member would never override a clinician's recommendation, and characterised the medical transfer process as one in which the clinician makes a 'decision' about medical treatment, and the department would merely 'effect that transfer'.²¹ However, the department also characterised a request for medical transfer of a patient to Australia as a request which would be considered by the department in a 'committee-style format'; and the committee would put a recommendation to the Assistant Commissioner of Detention, Compliance and Removals, who would decide whether that person could come to Australia.²² The committee noted the serious concerns from medical organisations in Australia about this non-medical interference in medical decision-making about refugees and asylum seekers.

7.27 While the department did not provide the committee with information about individual cases, the committee is very concerned that some clinical recommendations for medical transfer have not been actioned within a clinically recommended timeframe. This frustrates the work of health care providers in PNG and Nauru, which cannot override or bypass that departmental approval process. In some instances it may even compromise their professional medical ethics.

7.28 The death of Mr Hamid Khazaei in 2014 is a clear example of the department's medical approval process failing patients. The publicly available evidence presented to the Queensland Coroner in the investigation of this death, to date, suggests that the department did not respond to the request for medical transfer of Mr Khazaei fast enough, and that the department's five-layer internal bureaucratic

17 DIBP, response to question on notice, 20 March 2017 (received 4 April 2017).

18 Mr Kingsley Woodford-Smith, Assistant Commissioner, Detention, Compliance and Removals Division, DIBP, *Committee Hansard*, Wednesday 8 February 2017, p. 11.

19 DIBP, response to question on notice, 11 November 2016 (received 25 November 2016).

20 Ms Cheryl-Anne Moy, Acting Deputy Commissioner Support, DIBP, *Committee Hansard*, Wednesday 8 February 2017, p. 17.

21 Ms Cheryl-Anne Moy, Acting Deputy Commissioner Support, DIBP, *Committee Hansard*, Wednesday 8 February 2017, p. 16.

22 Mr Kingsley Woodford-Smith, Assistant Commissioner, Detention, Compliance and Removals Division, DIBP, *Committee Hansard*, Wednesday 8 February 2017, p. 11.

approvals process (of staff members with no medical training) exacerbated the delay in evacuating Mr Khazaei to a hospital. The evidence presented to the coroner also indicates that the hospital in Port Moresby was not prepared for Mr Khazaei's arrival, and did not provide him with sufficient care.

7.29 More recently, the death of Mr Faysal Ishak Ahmed, of the Manus RPC, indicates that the provision of health care services within RPCs is also problematic. While the department advised that Mr Ishak Ahmed was evacuated from Manus Island swiftly, the fall which appears to have contributed to his death took place after Mr Ishak Ahmed had attended the Manus RPC IHMS clinic multiple times over the previous weeks. The committee is not in a position to form any specific conclusions in relation to Mr Ishak Ahmed's death, and notes that his death is currently a matter before the Queensland Coroner. What is readily apparent is that Mr Ishak Ahmed died following ongoing health concerns, in relation to which he repeatedly sought assistance from IHMS.

7.30 While it appears that the department has, following the death of Mr Khazaei in 2014, made some improvements in speeding up the medical transfer process for refugees and asylum seekers, the processes around determining the provision of health care services to refugees and asylum seekers in Nauru and PNG, and whether medical transfer is required, remain inordinately complex.

Recommendation 1

7.31 The committee recommends that the Department of Immigration and Border Protection, as a matter of urgency, commission an external review of its medical transfer procedures in offshore processing centres.

Inadequate health care services

7.32 The committee was very concerned by the evidence of serious concerns from Australian medical organisations about the provision of health care services to refugees and asylum seekers in Nauru and PNG. A number of medical organisations suggested that the capacity of medical personnel to provide appropriate care in Nauru and PNG is severely affected by the remote locations of the RPCs, the limited health infrastructure, the delays in transferring people for medical treatment, and the requirement to seek departmental approval to transfer a patient.

7.33 Doctors for Refugees (DFR) provided the committee with a number of medical case studies for patients in Nauru and PNG, which identified serious shortcomings in the medical care provided to them. The case studies involving children are extremely concerning. DFR highlighted the examples of a child who was identified as potentially having a sexually transmitted disease and recommended for medical transfer, but was not transferred;²³ a young boy who was not transferred for inpatient mental health care for three months after a psychiatrist had identified a risk of suicide and the need for such treatment;²⁴ a child with a possible developmental

23 Doctors for Refugees (DFR), *Submission 56*, p. 13.

24 DFR, *Submission 56*, pp. 10-11.

delay who was identified by a doctor as needing specialist services but who was never transferred;²⁵ and a child who broke their arm and, despite a medical officer having recommended that the child be seen by a physiotherapist, was never referred and suffered from impaired function of his dominant hand.²⁶ DFR also explained that an Australian neurosurgeon had advised that a man being held in PNG, who suffered from chronic back pain, required surgery in Australia but the man did not receive this surgery.²⁷ In a further example, a former Nauru RPC worker alleged that a woman in the RPC, having suffered from tooth aches for more than a year, was referred to a dentist who extracted the wrong tooth.²⁸

7.34 The Australian Medical Association (AMA) also provided extremely concerning examples of inadequate medical treatment among refugees and asylum seekers on Manus Island. It highlighted the case of an elderly Rohingya asylum seeker who was in the Port Moresby Hospital for seven months being treated for a condition which prevented him from standing or walking for more than a few minutes, and who subsequently had to wait 20 days for a medical appointment upon being returned to the Manus RPC.²⁹

7.35 The committee is extremely concerned by allegations that refugees and asylum seekers who had been transferred for medical treatment had been transferred back to either Nauru or PNG too quickly. The committee noted, in particular, the allegation by Amnesty International that a man who had suffered a heart attack in Nauru and was sent to Australia for treatment, was sent back to Nauru after four months and advised by on-site medical staff that he should not have been returned because he required specialist treatment which they could not provide.³⁰ Amnesty International alleged that the man suffered a further heart attack on Nauru.

7.36 The committee noted concerns about mental health treatment in Nauru and PNG. The committee recognised that mental health concerns among refugees and asylum seekers in Nauru and PNG are widespread, and that effective treatment options are critical. The committee noted concerns from Australian medical organisations about the provision of medication to treat mental health concerns,³¹ as well as concerns about the capacity of local medical services to address the levels of poor mental health among refugees and asylum seekers when the health care needs of local residents differ so significantly.³²

25 DFR, *Submission 56*, p. 15.

26 DFR, *Submission 56*, p. 15.

27 DFR, *Submission 56*, pp. 16-17.

28 Ms Gabriella Sutherland, *Submission 59*, p. 3.

29 Australian Medical Association (AMA), *Submission 1*, pp. 3-4.

30 Amnesty International, *Submission 6*, Attachment 1, p. 6.

31 Australian College of Mental Health Nurses (ACMHN), *Submission 41*, p. 9.

32 Royal Australian College of General Practitioners (RACGP), *Submission 17*, p. 5.

7.37 The evidence outlined above indicates clearly that the health care services being provided to refugees and asylum seekers in Nauru and PNG, including within the RPCs, need to be reviewed.

Recommendation 2

7.38 The committee recommends that the Australian Government undertake to seek advice in relation to whether improvements are required to the medical treatment options available to asylum seekers and refugees in the Republic of Nauru and Papua New Guinea, particularly mental health services.

7.39 A number of medical organisations submitted that mental health conditions would be unlikely to improve while patients were continually exposed and re-exposed to stress and uncertainty, and that ongoing detention is a significant causal factor in poor mental health. Dr Kym Jenkins of the Royal Australian and New Zealand College of Psychiatrists (RANZCP) explained that trying to treat mental illness while somebody is in this situation, 'is like trying to fill the bath with the plug out'.³³ She explained that health care practitioners cannot provide effective mental health care in a setting where people are continuously being re-traumatised and exposed to things which have poor mental health outcomes.³⁴

7.40 The committee finds long term immigration detention can be seen to have a negative impact on both physical and mental health. This situation underscores the urgency of finding suitable long term resettlement arrangements for asylum seekers. The committee believes that there needs to be a greater recognition of the long term effects of immigration detention in Manus Island and Nauru.

Recommendation 3

7.41 The committee recommends that the Australian Government recognise the impacts of long-term immigration detention, including by commissioning an independent assessment of its impacts on physical and mental health.

The department's responsibility in the provision of health care services

7.42 The department's evidence indicates that it has the final say in any decision to arrange for all medical transfers, including urgent medical evacuations. The department's repeated assertions that it merely facilitates the provision of medical services to refugees and asylum seekers is untrue. Pursuant to the Memoranda of Understanding between the Australian Government and the Governments of Nauru and PNG, Australia has agreed to bear all costs associated with the presence of the RPCs. The department makes the final decisions in relation to the provision of critical medical services. The department contracts the health care service providers at both the Manus and Nauru RPC (although the ongoing provision of services by IHMS at the Manus RPC is currently uncertain). If health care workers believe that a patient

33 Dr Kym Jenkins, President-elect, Royal Australian and New Zealand College of Psychiatrists (RANZCP), *Committee Hansard*, Tuesday 15 November 2016, p. 23.

34 Dr Kym Jenkins, President-elect, RANZCP, *Committee Hansard*, Tuesday 15 November 2016, p. 23; RANZCP, *Submission 8*, p. 10.

needs to be medically evacuated for treatment elsewhere, that request must be put to the department for approval. It is the department which arranges the provision of an Air Ambulance, and covers the costs. If health care workers assess that a patient requires specialist treatment (either on or off-site), that request has to go to the department for approval. It is the department which would facilitate the procurement of specialist services, and pay for the cost of providing any specialist services on-site. As a result, the department bears the ultimate responsibility for the provision of health care services to refugees and asylum seekers in Nauru and PNG.

7.43 The department owes all refugees and asylum seekers within the Nauru and PNG RPCs (and living in the Nauru and PNG communities) a duty of care in relation to the provision of medical services.

Inadequate investigation of notifications of abuse and self-harm

7.44 Assessing the adequacy of investigations relating to notifications of abuse and self-harm is difficult. Many of the individual allegations to which the committee had regard (particularly those contained within 'the Nauru files') are historical. The department's only advice to the committee in relation to the allegations contained within those leaked incident reports was a vague assurance that it had reviewed more than 2000 incidents reported between May 2013 and March 2016, and that 'immediate and appropriate' action had been taken in the majority of cases.³⁵

7.45 Given the many shortcomings identified by the Australian National Audit Office in relation to the department's management of contracts, its own record-keeping, and its oversight of RPC incident reports,³⁶ it would not be prudent for the committee to accept this assurance. The committee believes that an external audit and investigation specifically in relation to incident reporting at the PNG and Nauru RPCs, should be undertaken.

Recommendation 4

7.46 The committee recommends that an external audit and investigation be conducted into all incident reports over the life of the Transfield Pty Ltd and Broadspectrum Australia Pty Ltd contracts at the Manus Island and Nauru Regional Processing Centres, including an analysis of:

- (a) incidents which were downgraded in severity; and**
- (b) any inconsistencies in relation to incidents being downgraded in severity; and**
- (c) evidence of follow-up activities in relation to reported incidents.**

35 DIBP, *Submission 23*, pp. 30-31.

36 Australian National Audit Office, *Offshore processing centres in Nauru and Papua New Guinea – contact management of garrison support and welfare services*, ANAO Report No. 32 2016-17.

Barriers to scrutiny

7.47 The committee recognises that there are a number of significant barriers to the scrutiny of RPC operations. In light of the concerns which have been raised in relation to the running of the RPCs themselves, and in relation to the resettlement of refugees in Nauru and PNG, external and independent scrutiny of policies and procedures is critical.

7.48 External scrutiny, including from non-government organisations (NGOs) and the media helps to bring problems to light, as well as better enable those with the responsibility for the health and welfare of refugees and asylum seekers to meet those responsibilities.

7.49 The department should, together with the Governments of Nauru and PNG, facilitate greater access to the RPCs for media and NGOs to generate greater public confidence in the operation of the RPCs.

7.50 The committee is very troubled by the evidence of inadequate medical treatment in relation to children, as well as concerns about the safety of children within the Nauru RPC and the wider community. The committee believes that an independent children's advocate would be well placed to advocate for the rights of those children, and advise the Government in relation to improving their care and protection. The committee recognises the difficulties in relation to jurisdiction and authority, as the relevant children are being held in a foreign jurisdiction. However, the committee believes that the Australian Government should work with the Government of Nauru to establish such an advocate, and ensure that any such advocate would have the requisite independence, jurisdiction and authority to be effective in that position.

Recommendation 5

7.51 The committee recommends that the Australian Government undertake to work with the Government of the Republic of Nauru to establish an independent children's advocate who would have both the jurisdiction and authority to advocate for the rights of children being held in the Republic of Nauru.

Third country resettlement

7.52 The committee recognises that third country resettlement negotiations involve sensitive diplomatic discussions, and that the evidence provided to the committee in relation to this has necessarily been limited.

7.53 The department advised the committee that 'resettlement will always be between the relevant jurisdiction—either Nauru or PNG—and the receiving country'.³⁷ The committee disagrees with this assessment. The responsibility lies with Australia. The only third country resettlement agreement which has (to date) resulted in the resettlement of Nauru-determined refugees, is an agreement between the Australian

37 Mr Michael Pezzullo, Secretary, DIBP, *Committee Hansard*, Tuesday 11 November 2016, p. 29.

Government and the Government of the Kingdom of Cambodia. It is an agreement under which the Government of Australia agrees to 'bear the direct costs of the settlement agreements as mutually determined between the Participants'.³⁸ The Government of Nauru is not a party to the agreement. Similarly, the United States (US) refugee resettlement arrangement is also between the governments of the US and Australia. The Australian Government must acknowledge that it has the responsibility for resettling refugees located in Nauru and PNG.

7.54 It is vital that any asylum seeker or refugee who has been transferred to Australia for medical or other reasons, or who remains in Australia pursuant to domestic legal action, be able to apply to participate in the US refugee resettlement arrangement. If individuals have been transferred for medical treatment their health could be put at risk by being transferred back to a location with less or no capacity to treat them.

Recommendation 6

7.55 The committee recommends that the Department of Immigration and Border Protection confirm publicly that any asylum seeker or refugee who has been transferred to Australia for medical or other reasons, or who remains in Australia pursuant to domestic legal action, can apply to participate in the US refugee resettlement arrangement, and that they will not need to return to either the Republic of Nauru or Papua New Guinea to do so.

7.56 The Government of New Zealand has indicated that it is prepared to resettle refugees from Manus Island and Nauru. While the Australian Government is currently negotiating a resettlement deal with the US Government, it is unclear whether this arrangement will result in the successful resettlement of any refugees. The Australian Government has a clear offer from the Government of New Zealand to facilitate resettlement. The Australian Government should give consideration to all resettlement offers. If the Government considers particular resettlement options unsuitable, it should clearly outline why this is the case.

Recommendation 7

7.57 The committee recommends that the Australian Government give serious consideration to all resettlement offers it receives, including the Government of New Zealand's offer to resettle refugees from Papua New Guinea and the Republic of Nauru. Further, if particular resettlement offers are considered unsuitable, the Government should clearly outline the reasons.

38 Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, relating to the settlement of refugees in Cambodia, <https://dfat.gov.au/international-relations/themes/people-smuggling-trafficking/Documents/cambodia-australia-mou-and-operational-guidelines.pdf> (accessed 21 February 2017).

7.58 It is important that family members are able to pursue resettlement together. Not only is the preservation of family life critical to successful resettlement, it is a basic right.³⁹ This exact scenario of family separation is one currently facing refugees and asylum seekers in Nauru and PNG. These individuals deserve to have certainty about their future together. The Australian Government needs to assure refugees and asylum seekers in this situation that they will be supported to pursue options to reunite with family members.

Recommendation 8

7.59 The committee recommends that the Australian Government give consideration to supporting refugee and asylum seeker family members to pursue options to resettle together.

Recommendation 9

7.60 The committee recommends that the Australian Government increase Australian funding to the United Nations High Commissioner for Refugees.

Recommendation 10

7.61 The committee recommends that the Australian Government commit to increasing Australia's annual refugee intake.

7.62 The committee believes that Australia must address its role in the current refugee crisis from a regional perspective. The Australian Government should undertake to work further with countries in the Asia-Pacific region to establish a regional framework for processing claims for asylum. The Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime, set down in March 2016, while related, is focused primarily on addressing the criminal element of people smuggling. It is not directed towards the needs of asylum seekers, and the question of where and how their claims for asylum can be processed.

7.63 A regional framework which does focus on assisting asylum seekers could help to address both the needs of asylum seekers in the region and beyond. An effective framework could also consequently reduce the business of people smuggling by ensuring that asylum seekers do not need to attempt to reach Australia in order to have their claim for asylum processed in a safe location.

Recommendation 11

7.64 The committee recommends that the Australian Government undertake to work with Australia's Asia-Pacific neighbours to establish a regional framework for the processing of claims for asylum.

39 International Covenant on Civil and Political Rights (ICCPR), article 23.

Obligations of the Australian Government

7.65 The web of services provided to asylum seekers and refugees is extremely complex and confusing. The evidence presented to this inquiry indicates to the committee that:

- the Australian Government has an agreement with the Government of Nauru in relation to the establishment and management of the Nauru RPC;
- the Australian Government has a separate agreement with the Government of Papua New Guinea in relation to the management of the Manus Island RPC;
- pursuant to these agreements, the Australian Government is responsible for all costs associated with the running of these RPCs;
- the department has established contractual relationships with the major service providers charged with the running of the PNG and Nauru RPCs (including Broadspectrum and IHMS);
- Broadspectrum has subsequently engaged Wilson Security as a sub-contractor, to provide security services at both the Nauru and Manus RPCs;
- Wilson Security subsequently subcontracted three local security companies in each location;
- the department provides a number of 'capacity building' services to the Government of Nauru and PNG in relation to security, health care and Refugee Status Determination;
- the department is the final decision maker in any decisions to medically transfer a refugee or asylum seeker patient from either Nauru or PNG. Such a transfer cannot take place without departmental approval, noting that the Australian Government has agreed to bear all costs associated with the running of the RPCs;
- the Australian Government has broader aid commitments to the Government of Nauru and PNG, which involve the provision of both financial support and capacity-building and development measures; and
- the Australian Government is responsible for the negotiation of third country resettlement agreements.

7.66 The committee rejects the department's assertion that it does not bear ultimate responsibility for all aspects of the operation of RPCs (and the health and welfare of the asylum seeker and refugees in PNG and Nauru) and merely funds their operation. The department has ultimate decision making power as the contracting agency, makes final decisions in relation to the provision of specialist and emergency medical treatment, and (largely as a result of its capacity building measures) is the primary source of guidance and expertise to the Governments of Nauru and PNG in relation to the management of all matters associated with the presence of refugees and asylum seekers.

7.67 The committee is concerned that the department's failure to acknowledge this control (and the duty of care flowing therefrom), and failure to implement adequate controls over the provision of services, may have exposed the department to the risk of legal action for breach of this duty of care.

7.68 It is also clear that by having located RPCs outside Australia, the Australian laws relevant to regulation of those facilities are very complicated to apply. This was most starkly apparent in the case of the *Work Health and Safety Act 2011* (WHS Act). Comcare explained clearly that, although the WHS Act does apply to the department's undertakings in Nauru and PNG (to run the RPCs), Comcare is unable to exercise its regulatory responsibilities in the manner in which it does in Australia. While offences under the Act include offences outside Australia, Comcare inspectors who could actually investigate those alleged offences cannot exercise their powers outside Australia in the absence of the consent of the department. The department has previously given this consent to Comcare, and Comcare inspectors have attended the RPCs a number of times, however it is not appropriate that a regulator should have to rely on the goodwill of the department.

7.69 The committee believes that the WHS Act should be reviewed to examine whether extraterritorial application may be applied to further sections of the Act, particularly the powers of Comcare inspectors. Comcare has explained that it is currently required to devote significant time and resources to simply establishing whether or not it has the requisite jurisdiction to investigate particular incidents. Comcare has the capacity to investigate very serious incidents, which could include suicides and serious assaults. It is vital that the WHS Act can be applied in a straightforward manner in relation to incidents within the Nauru and Manus RPCs. The lack of clarity, to date, has led to significant time delays in Comcare's investigation of such incidents. This is highly undesirable for a Commonwealth regulator.

Recommendation 12

7.70 The committee recommends that the Australian Government review the *Work Health and Safety Act 2011* to ensure that Comcare can exercise its regulatory powers in relation to Australian workplaces outside Australia's geographical jurisdiction, in a timely and straightforward manner.

Concluding comments

7.71 As this report has found, the current policy of offshore processing has proven to be deeply affected by structural complexity and shortcomings in how the centres have been managed and operated. The department, its contractors and subcontractors, and other related stakeholders, have not been able to administer the policy in a safe and transparent manner. The structure of the policy is too complex, and it relies too heavily on the private sector to administer the day-to-day management of the scheme. This structural complexity has led to an unacceptable lack of accountability and transparency, and a failure to clearly acknowledge where the duty of care in relation to those asylum seekers and refugees lies. It has also contributed to the many allegations of abuse, self-harm and neglect among refugees and asylum seekers in Nauru and PNG. The culture of secrecy surrounding Australia's RPCs has also contributed to this

lack of accountability and scrutiny. For a policy which represents such a significant investment of Australian public funds, this lack of accountability is unacceptable. The Committee notes that the centres were never intended to become long term centres of detention, but this has been the result of the Government's inability to negotiate viable third country resettlement options.

7.72 For Australia to continue facilitating the processing of claims for asylum offshore, the major faults in the policy of offshore processing must be acknowledged and rectified as a matter of urgency.

Senator Louise Pratt
Chair

