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The Commonwealth has a duty of care in offshore detention centres

Considering Nauru and the Moss Review

Submission to Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru

27 April 2015

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WHO WE ARE

The Australian Lawyers Alliance ("ALA") is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

OUR STANDING TO COMMENT

The ALA is well placed to provide commentary to the Committee, in particular regarding the duties of the Commonwealth in relation to Nauru.

Members of the ALA regularly advise clients all over the country that have been caused injury or disability by the wrongdoing of another, including people who have been detained in immigration detention.

Our members regularly represent plaintiffs in Australia's leading cases involving the duty of the Commonwealth, contractors and sub-contractors.

We are happy to elaborate upon the issues that we have raised in this submission.

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INTRODUCTION

The Australian Lawyers Alliance welcomes the opportunity to provide a submission to the Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru.

In this submission, we highlight that the Moss Review is likely to be the tip of the iceberg, and that there is likely to be significant under-reporting of allegations of abuse, harassment and psychological injury.

We also outline Departmental inaction regarding reporting of incidents, and allegations raised in the media that staff have been instructed to alter incident reports.

We focus our submission on the potential duties of the Commonwealth at common law, including the potential non-delegable duty of care of the Commonwealth; the duty for prison authorities to exercise reasonable care for the safety of detainees; and the duty to provide reasonable medical care.

We also raise the potential duties of the Commonwealth under the *Work, Health and Safety Act* 2011 (Cth), which the Department of Immigration and Border Protection has previously acknowledged applies in regional processing centres.

This submission reiterates many of the legal principles regarding duty of care that we highlighted previously to the Senate Legal and Constitutional Affairs Committee regarding the incident in February 2014 that led to the tragic and avoidable death of Reza Barati.

We submit that the evidence provided to the Moss Review is still incomplete and the power inequalities are stacked against asylum seekers in Nauru.

Vulnerable people are detained in an unsafe location, and are awaiting determination of their asylum claims which they are afraid to throw into jeopardy. These people have allegedly witnessed or experienced harassment; assault, trading of drugs for sex; unlawful relationships between Australian expatriate sub-contractors and minors; sexualised behaviour among children; and sexual assaults against children, including one which was substantiated, and the child was not removed from detention.

These people have experienced making complaints and little or no action being taken. They are living in a closed environment in which it has been alleged that the security guards and Australian sub-contractors employed to protect the centre, are

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involved in abuse against them.

If allegations of the above occurred on Australian soil, there would be a Royal Commission, criminal charges would be laid, Comcare would appropriately investigate, and a raft of personal injury claims would be pursued.

We submit that the fact that these incidents occur on Nauruan soil does not hold the Commonwealth immune from its responsibilities under the common law and statute. In fact, these duties remain.

We submit it cannot be a discharge of Commonwealth responsibility to place detainees in another country against their will.

It appears that asylum seekers are not provided with reasonable care for their safety, and the Moss Review is the tip of the iceberg. We believe that the Commonwealth will be held liable in months and years to come, at considerable cost.

PART 1 – UNDER-REPORTING AND THE MOSS REVIEW

The Moss Review identified two main aspects for investigation:

- Claims of sexual and other physical assault of transferees; and
- Conduct and behaviour of staff members employed by contract service providers.[2]

The Moss Review 'relied on interviews with transferees, contract service provider staff members, Departmental (Department of Immigration and Border Protection) officers, Australian Federal Police officers and Nauruan officials and perusal of documents and submissions.'[3]

However, we submit that it is highly probable that further allegations of abuse may still remain hidden and uninvestigated.

The conclusions that the Review has reached regarding under-reporting should also be conclusions that are applied to the findings of the Review itself.

We note that the Review travelled twice to Nauru. It is questionable as to whether adequate trust was established between transferees and translators/transferees and review officers in order for individuals to appropriately report what had occurred in full detail.

It is also questionable as to what degree of trust the transferees had that their

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complaints or allegations would be acted upon, given that there appeared to be a lack of action prior to the Review. This was acknowledged by the Review to be an issue at [17]:

> 'In some cases, transferees told the Review that they had not reported particular incidents because they had lost confidence that anything would be done about their complaints.'

We note that the ability of transferees to provide information to the Moss Review may have also been hampered by the fact that they are still detained in the centre and may have feared repercussions if they spoke out against existing or previous staff. This could be potentially implied at [20], where the Review cites that:

> 'The Review became aware of claims that some allegations of abuse have been fabricated or exaggerated by transferees.'

It is likely that such claims of fabrication or exaggeration were not made by transferees themselves. It is likely that such claims could have been made by the people that may have been committing such abuse, whom potentially could have been sub-contractors paid by the Australian government.

For example, in March 2015 a journalist from the *Saturday Paper* interviewed a previous employee from Save the Children, and uncovered further information:

> 'This week I spoke to a former Save the Children staff member who had worked at the Nauru asylum seeker processing centre, and heard that **expatriate security guards – employed by private contractor Wilson – were having relationships with detained teenage girls**. "We saw proof of this," the former officer told me. "**We saw text messages the guards had sent the girls. There were at least four guards I know of, and some of the girls were under-age.**
>
> "**The girls were desperate to keep the relationships secret**. They were extremely frightened of people finding out. They also appeared very reliant upon the affection of these men."

The Review also acknowledged the role of asylum claims in under-reporting at [17]:

> 'Transferees also told the Review that they were concerned that making a complaint could result in a negative impact on the resolution of their asylum claims.'

So too, intense shame and trauma surrounding sexual abuse, including cultural

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taboo, may have impeded people from coming forward to report incidents.

For example, the Review became aware of two allegations of rape – one which had already been reported to the Nauruan Police Force; the other allegation was made only to the Review and involved a contract service provider staff member.[4] We question as to how many more incidents may have in fact actually occurred. The Review acknowledges this, concluding that 'there is a level of under-reporting by transferees of sexual and other physical assault'. However, this conclusion must also be applied to the Review itself. As noted by the Review:

> 'The Review cannot be sure that it has become aware of every incident of sexual and other physical assault.' [at 3.134]

The inability of the Review to obtain specific information to substantiate allegations cannot be viewed as a lack of evidence, but should be viewed through the prism of the fact that individuals may be afraid to provide further details. This can be seen at [10] when 'the Review was unable to obtain any specific information to substantiate this claim [access to cigarettes being traded for sexual favours];' and at [11] 'the Review was unable to obtain many specific details because transferees were not prepared to provide them'.

Further, there may be a personal conflict of interest for sub-contractor staff, some of whom could be implicated in offences. A minor, when making a complaint, withdrew it when Wilson Security came to investigate, responding "nothing happens and we do not trust them" [at 3.133].

We submit that the investigations undertaken by Wilson security staff are grossly inappropriate and should have been undertaken completely by an independent party.

PART 2 - DEPARTMENT INACTION AND AWARENESS OF ALLEGATIONS

It appears that the Department of Immigration and Border Protection was aware of incidents prior to the instigation of, and publication of, the Moss Review.

The Open Letter

On 7 April 2015, a group of 24 current and former employees from the Nauru detention centre, released an Open Letter to the Australian People.

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The letter emphasised:

> 'We would like to be absolutely clear. **The Government of Australia and the Department of Immigration and Border Protection have tolerated the physical and sexual assault of children, and the sexual harassment and assault of vulnerable women in the centre for more than 17 months**.'

The letter also detailed the Department's inaction in response to allegations:

> 'In November 2013, **a boy was sexually assaulted** by a detention centre employee. **The incident was substantiated and the allegations were also found to be credible in the Moss Review. Former Immigation Minister Scott Morrison was notified of this assault**. **Despite this knowledge, the [sic] chose to keep this child in the detention centre** where he was assaulted and remained at risk of further abuse and retaliation. Indeed, **this child was subjected to further incidents of abuse** while he was in detention.
>
> **Following this**, there were **several additional allegations** regarding the sexual assault of children. **The DIBP refused to remove these children from further harm**. They were forced to remain in the Nauru detention facility where they continued to be at risk of further abuse and retaliation.
>
> Furthermore, there were allegations of significant sexualised behaviour amongst children indicative of sexual abuse. Again, despite incident reports from International Health and Medical Services (IHMS) and Save the Children staff, the DIBP failed to act to protect these children from harm.'

These sources strongly suggest that the Department, and the then-Minister for Immigration, were directly aware of assaults and failed to act.

The decision to keep this child within the detention centre in which he had been assaulted, where he remained at future risk of abuse, and subsequently was subjected to further abuse, could be held by the Courts to constitute a breach of duty of care.

So too, despite the notification to the Minister that the assaults had occurred, no action was taken, and as a result, there were further allegations regarding the sexual assault of children. Further, the DIBP refused to remove these children.

Departmental reporting to Comcare

The Department of Immigration and Border Protection liaises with Comcare, as

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required by the *Work, Health and Safety Act* 2011 (Cth).

The Department of Immigration and Border Protection notes in its *Annual Report 2013-2014* that:

> 'The Department regularly liaises with Comcare on all regulatory and cooperative compliance matters, particularly in relation to the management of WHS at IDFs and OPCs. This includes the provision and monitoring of incident reports and information as required under the WHS Act, or as Comcare requests.
>
> From 1 July 2013 to 30 June 2014, Comcare conducted regulatory inspections at Villawood, Christmas Island, Yongah Hill, Pontville, and Melbourne immigration transit accommodation (MITA) IDFs. **Comcare also carried out inspections on Manus and Nauru**.'[5]

In 2013 – 14, the Department notified Comcare of 449 incidents under s35, 36 and 37 of the *Work, Health and Safety Act* 2011 (Cth). Of these 449 incidents, there were 8 deaths, 338 incidents of serious injury or illness and 103 dangerous incidents. [6]

83 per cent (374 out of 449) of incidents the department notified to Comcare in 2013-14, including deaths, involved detainees and transferees in immigration detention facilities and offshore processing centres, and did not directly involve workers.[7] Therefore, **it is likely that 83 per cent of these incidents involved asylum seekers.**

The statistics do not currently reflect the breakdown of how many of the deaths/serious injury or illness or dangerous incidents, occurred in immigration detention facilities or offshore processing centres, or at which locations.

It is questionable to what extent these incidents occurred on Nauru, and to what degree the Department has relevantly acted following these incidents.

This is of importance in considering the Commonwealth's duty of care – as failure to respond to known situations of risk could be accepted by the Courts in establishing that harm was reasonably foreseeable, and that failure to act constituted a breach of duty of care.

Other sources

The Australian Human Rights Commission (AHRC)'s 2014 report, *The Forgotten Children,* which was provided to the federal government on 11 November 2014 and

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tabled on 11 February 2015,[8] strongly recommended that:

> 'A royal commission be set up to examine the continued use of the 1992 policy of mandatory detention, the use of force by the Commonwealth against children in detention and allegations of sexual assault against these children and to consider remedies for breach of the Commonwealth's duty of care to detained children.'[9]

Allegations of altered incident reports

A journalist from the *Saturday Paper* interviewed a previous employee from Save the Children, and uncovered further information:

The former employee was also interviewed regarding the treatment of Save the Children employees:

> '"They [Save the Children employees] were treated like criminals," the former Save the Children officer told me. "They were taken to the hotel, banished from the centre, and told they were being taken back to Australia. It seemed so random – there was nothing connecting these people. It's also crazy that anyone here would have confected claims of abuse because we had personally witnessed so much of it. There is literally no reason to invent anything.
>
> "As for coaching refugees to harm, it was frustrating because Save the Children were the only ones there who cared. It was a low blow. **And this from the <u>department that told us not to include certain incriminating things in our reports. They asked us to change our reports</u>.**"
>
> I was stunned. The staff member was saying it was common for the Australian Immigration Department to ask that incident reports be altered to appear less damning. I asked the former officer to clarify the allegation.
>
> "**<u>They simply wouldn't accept them if they contained information they didn't want in there</u>**."' [10]

While these claims have not yet been substantiated or investigated, this is a very serious allegation, which we will cover in Part 5 of this submission.

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PART 3 – DUTIES OF THE COMMONWEALTH AT COMMON LAW

We submit that the Commonwealth retains duties at both common law and under workplace, health and safety legislation that are non-delegable in nature.

THE MEMORANDA OF UNDERSTANDING

Two memoranda of understanding were signed between the Commonwealth of Australia and the Republic of Nauru, both titled *Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to an assessment of persons in Nauru and related issues.* The first was signed on 29 August 2012, ("the 2012 MOU"); the second was signed on 3 August 2013 ("the 2013 MOU"), superseding the previous agreement.

We will provide analysis of both, as both memoranda are of assistance when considering the obligations and duties of the Commonwealth, as both indicate the level of control exercised by the Commonwealth regarding the regional processing centre in Nauru.

MOU between Nauru and Australia, 29 August 2012

The 2012 MOU indicates that the Commonwealth initiated the concept of the regional processing centre:

> 'The Commonwealth of Australia made a request to the Republic of Nauru to host a regional processing centre, a request which was accepted.'[11]

The location of the site of the regional processing centre, despite being in Nauruan territory determination was also to be 'jointly determined and agreed' [between Australia and Nauru].[12]

The Commonwealth was identified as the funder of the regional processing centre on an indefinite basis:

> 'The Commonwealth of Australia will bear all costs incurred under and incidental to this MOU as agreed between the Participants.'[13]

The Commonwealth maintains discretion regarding decisions to transfer 'transferees', while the Republic of Nauru has a mandatory requirement to accept transferees: 'the Republic of Nauru will accept transferees'.[14]

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The Commonwealth also appears to have control regarding the departure, and timing of departure of transferees from Nauru:

> 'The Commonwealth of Australia will make all efforts to ensure that all persons entering Nauru under this MOU will depart within as short a time as is reasonably necessary for the implementation of this MOU, bearing in mind the objectives set out in the *Preamble* and *Clause 1*.'[15]

The Commonwealth also expects to be kept up to date with the operation of activities at the centre:

> 'Communications concerning the day-to-day operation of activities undertaken in accordance with this MOUS will be between the Department of Foreign Affairs and Trade of Nauru and the Australian High Commission Nauru.'[16]

The 2012 MOU also outlined commitments made by Australia and Nauru that:

- 'the Participants will ensure that transferees will be treated with dignity and respect and that relevant human rights standards are met'; and
- 'special arrangements will be developed and agreed to by the participants for vulnerable cases including unaccompanied minors'.[17]

The UNHCR, when providing commentary on the 2012 MOU, noted that:

> '…both Australia and Nauru accept that they have shared and joint legal responsibility for the protection of refugees identified in the processing arrangements under discussion'.[18]

Clause 4 of the 2012 MOU also recognises that the 'Commonwealth of Australia will conduct all activities in respect of this MOU in accordance with its Constitution and **all relevant domestic laws'** (emphasis added).[19]

MOU between Nauru and Australia, 3 August 2013

The 2013 MOU reiterates many of the provisions of the 2012 MOU, including regarding funding, the discretion of the Commonwealth and mandatory acceptance of transferees by Nauru:

- 'The Commonwealth of Australia will bear all costs incurred under and incidental to this MOU as agreed between the Participants'.[20]
- The Commonwealth of Australia may transfer and the Republic of Nauru will accept Transferees from Australia under this MOU'.[21]

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Since the Commonwealth provides all funding under MOUs any problem consequent on inadequate resources or slow decision making is a direct Commonwealth responsibility. (For example, the delay in providing needed security fencing at Manus Island is directly a Commonwealth responsibility.)

Further, administrative measures giving effect to the MOU 'will be settled by the Participants', and 'any further specific arrangements may be made, **as jointly determined** to be necessary by the Participants, on more particular aspects of this MOU for the purpose of giving effect to its objectives.'[22] (emphasis added)

The 2013 MOU also notes that:

> 'Communications concerning the **day-to-day operation of activities undertaken in accordance** with this MOU will be between the Secretary for Justice and Border Control and **the Australian Department of Immigration and Citizenship'** (emphasis added).[23]

The 2013 MOU also notes that 'the Commonwealth of Australia will conduct all activities in respect of this MOU in accordance with its Constitution and all relevant domestic laws'.[24]

Therefore, it appears that while the centre is on Nauruan soil, control is maintained by Australia, who continue to fund, have input into decisions, and the final say about whether a person will be detained inside the Centre. Further, the 2013 MOU establishes a direct line of reporting to the Australian Department of Immigration.

THE INDICATIONS OF THE MOSS REVIEW

The Commonwealth's responsibility as the 'head' appears to have been recognised on a factual basis by the Moss Review in terms of the Review's response to incidents and the recommendations made. This can be seen across the Review, in its provision of information to the Department and also recommendations, not limited to but including the following:

- Provided details about transferees who allegedly dealt in marijuana and provided details to the Department for referral to the 'relevant authorities' (at [11]);
- Encouraged the Government of Nauru and the Department 'to ensure that [personal safety and privacy of the transferees] are factors considered in any decision-making' [at 15];
- 'Provided information about some reported incidents to the Department for referral to the relevant authorities and for further investigation' (at [20]);

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- 'provided information [that would assist relevant authorities to investigate allegations of sexual and other physical assault of minors] (at [21]);
- Provided information to the Department for referral to the relevant authorities regarding allegations from transferees about misconduct by staff members of contract service providers (at [22]).

Further, the Review recommended (at [31]) that:

> 'The Department needs to **provide effective coordination and adopt a lead role** in ensuring that contract service providers work effectively together. This role needs to be played not only at the Centre in Nauru, but **also at a head office level**.'

This appears to recognise the lack of coordination regarding sub-contractors on a factual level, and that no one is exerting a level of oversight and responsibility – a role which we submit, should at law, be occupied by the Commonwealth; and that this duty is furthermore, not able to be delegated to sub-contractors. However, it appears that no one is currently exerting this responsibility.

This can be seen further in the Review's recommendation (at [32] – [33]) that:

> 'By appointing in September 2014, a Senior Executive Service Officer in Nauru, the Department has the basis to ensure that contract service providers achieve a more joined up approach in the Centre. **The Department <u>needs to develop its function beyond mere contract management.</u> This enhanced coordination role needs to be performed jointly with the Nauruan operations managers.**
>
> Inherent in a more integrated approach would be **improved training and supervision of all contract service provider staff members**… the supervision provided to the Transfield Services and Wilson Security staff members, particularly locally engaged Nauruans, needs to be enhanced.'

AUSTRALIA'S IMMIGRATION DETENTION STANDARDS

We note that Australia's *Immigration detention standards* are relevant to consider. The standards acknowledge the role of the Commonwealth as having 'ultimate responsibility':

- **Ultimate responsibility for the detainees remains with DIMA at all times**.

- The service provider is to efficiently manage the operations related to the

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detention function as a **contracted agent of the Department of Immigration and Multicultural Affairs** (DIMA).

- In its operation of detention facilities the **service provider will be under a duty of care** in relation to the detainees.

- **All actions** relating to the detention and care of detainees **are to be consistent with relevant Commonwealth and State/Territory law**.[25]

- A clear set of operational orders in accordance with relevant DIMA policies and guidelines, and **Commonwealth and State/Territory legislation govern the operation of each detention facility and the management of detainees**. These operational orders include detailed emergency plans.[26]

- DIMA has access to and ultimate ownership of all detainee records.[27]

- Commonwealth Government occupational health and safety standards set out in the Occupational Health and Safety (Commonwealth Employment) Act and its supporting framework of regulations and codes of practice apply to all detention facilities.[28]

Regarding reporting of incidents, the Standards provide that:

- DIMA has **full access to all relevant data to ensure that monitoring against these standards can take place**. The Contractor ensures that adequate **reporting against the standards is provided on a regular and agreed basis**.

- Any incident or occurrence which threatens or disrupts security and good order, or the health, safety or welfare of detainees is **reported fully**, in writing, to the DIMA Facility Manager **immediately and in writing within 24 hours.**

  The Contractor ensures that it responds within agreed time frames to requests for information **so as to enable DIMA** to meet Departmental and Government briefing requirements.[29]

A 'major incident' would constitute sexual assault. The Standards provide that 'major incidents/disturbance would usually be covered by Emergency Procedures in Operational Orders.[30] Therefore, it may be expected that there is further evidence available that has been provided to the Department on a regular and agreed basis.

Regarding taking action regarding issues in detention facilities, the Standards provide that:

> Staff monitor tensions within detention facilities and take action to manage

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behaviour to forestall the development of disturbances or personal disputes between detainees. **If these occur, they are dealt with swiftly and fairly** to restore security to all in the facility.[31]

Relevant to consider regarding the Moss Review include the following provisions in the *Immigration detention standards:*

- Each detainee is able to undertake personal activities, including bathing, toileting and dressing in private.[32]

- Detainees, staff and visitors **are safe and feel secure** in the facility.[33]

- **All staff do their utmost to maintain the security of the detention facility, the security of detainees**, the security of those employed at the facility and any visitors to the facility.[34]

Regarding the requisite level of training required by staff, the Standards provide that:

- Staff are trained to recognise and deal with the symptoms of depression and psychiatric disorders and to minimise the potential for detainees to do self harm.

The following form part of the **minimum set of competencies required <u>of all staff</u>**:

- an ability to supervise detainees, and to interview and counsel where required;
- an ability to **set and maintain limits;**
- good oral and written communication skills;
- an ability to effectively communicate and work with detainees of a diversity of backgrounds, including an ability to assess detainee needs.

The following elements form part of **the required knowledge base** of all staff:

- the legislative base for immigration detention;
- detention policies, **procedures** and rules;
- obligations and responsibilities to protect the privacy of personal information and the consequences of failure to comply.[35]

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NON-DELEGABLE DUTY OF CARE

We believe that the responsibility of the Australian government of asylum seekers currently detained at Nauru may constitute a non-delegable duty of care at common law.

We note that the question whether the Commonwealth's duty to detainees is non-delegable has not yet been resolved at High Court level.[36]

As described in the South Australian Government Report of the Auditor-General for the year ended 30 June 1998:

> 'A 'non-delegable duty of care' is the category of tort liability **to not only take care but ensure that care is taken**. This area of liability 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, for example an independent contractor. Non-delegable duties of care have been described as a kind of vicarious liability. Non-delegable duties of care are significant in that they form an exception to the normal rule that a person will not be liable for the acts of independent contractors.'[37]

The effect of a non-delegable duty of care would be that the acts or omissions of sub-contractors, such as Wilson Security, IHMS and Save the Children would be ascribed as vicariously liable to the Commonwealth.

CASE LAW

There have been a number leading cases that have considered a non-delegable duty of care. Here, we briefly refer to and cite key passages from:

- *AS v Minister for Immigration and Border Protection & Anor* [2014] VSC 593;
- *Anastasios Kondis v State Transport Authority* (1984) CLR 672*;*
- *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520;
- *Northern Sandblasting v Harris* (1997) 188 CLR 313;
- the UK case of Woodland v Essex County Council [2013] UKSC 66.

The 'common element of control' and 'special vulnerability' can be seen in the powers of the Australian government evidenced within MOU between Australia and Nauru; and in the vulnerability of asylum seekers detained within the Nauru detention centre, where they have experienced the types of conduct described in the Moss Review. Asylum seekers are vulnerable to danger in the failure of reasonable care taken regarding not only the centre's conditions, but the workers

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employed within them.

***Anastasios Kondis v State Transport Authority* (1984) CLR 672**

In *Kondis*, Mason J acknowledged [at 32] that:

> 'However, [where] a non-delegable duty has been recognized, it appears that **there is some element in the relationship between the parties that makes it appropriate to impose on the defendant a duty to ensure that reasonable care and skill is taken for the safety of the persons to whom the duty is owed**. As I said in Introvigne:
>
> > "... the law has, for various reasons imposed a special duty on persons in certain situations to take particular precautions for the safety of others ...". That statement should be expanded by adding a reference to safeguarding or protecting the property of other persons.'

Mason J went further, outlining examples in which this special duty may be seen [at 33] [emphasis added]:

> The element in the relationship between the parties which generates a special responsibility or duty to see that care is taken **may be found in one or more of several circumstances**. The hospital undertakes the care, supervision and control of patients who are in special need of care. The school authority undertakes like special responsibilities in relation to the children whom it accepts into its care. If the invitor be subject to a special duty, it is because **he assumes a particular responsibility in relation to the safety of his premises and the safety of his invitee by inviting him to enter them.** And in Meyers v. Easton the undertaking of the landlord to renew the roof of the house was seen as impliedly carrying with it an undertaking to exercise reasonable care to prevent damage to the tenant's property. In these situations **the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might**

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reasonably expect that due care will be exercised.'

***Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520**

The Court discussed the concept of non-delegable duty at paragraphs [36] – [40].[38] A brief citation here is useful:

> 'In *Kondis v. State Transport Authority* ((134) (1984) 154 CLR at 679-687; and see, also, *Stevens v. Brodribb Sawmilling Co. Pty. Ltd*. (1986) 160 CLR at 44 per Wilson and Dawson JJ), in a judgment with which Deane J and Dawson J agreed, **Mason J identified some of the principal categories of case in which the duty to take reasonable care under the ordinary law of negligence is non-delegable in that sense**: adjoining owners of land in relation to work threatening support or common walls; master and servant in relation to a safe system of work; hospital and patient; school authority and pupil; and (arguably), occupier and invitee. **In most, though conceivably not all, of such categories of case, the common "element in the relationship between the parties which generates (the) special responsibility or duty to see that care is taken" is that "the person on whom (the duty) is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised"** ((135*) Kondis v. State Transport Authority* (1984) 154 CLR at 687; see, also, *Stevens v. Brodribb Sawmilling Co. Pty. Ltd*. (1986) 160 CLR at 31, 44-46**.). It will be convenient to refer to that common element as "the central element of control".** Viewed from the perspective of the person to whom the duty is owed, the relationship of proximity giving rise to the non-delegable duty of care in such cases is marked by **special dependence or vulnerability on the part of that person** ((136) *The Commonwealth v. Introvigne* (1982) 150 CLR 258 at 271 per Mason J).
>
> [37] The relationship of proximity which exists, for the purposes of ordinary negligence, between a plaintiff and a defendant in circumstances which would prima facie attract the rule in Rylands v. Fletcher is characterized by **such a central element of control and by such special dependence and vulnerability**. **One party to that**

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> **relationship is a person who is in control of premises** and **who has taken advantage of that control to introduce thereon** or to retain therein a dangerous substance or to **undertake thereon a dangerous activity** or **to allow another person to do one of those things.** The **other party** to that relationship **is a person, outside the premises and without control over what occurs therein, whose person or property is thereby exposed to a foreseeable risk of danger** ((137) "which he knows to be mischievous if it gets on his neighbour's (property)": *Fletcher v. Rylands* (1866) LR 1 Ex at 280; see above, fn.(120).). In such a case, the person outside the premises is obviously in a position of special vulnerability and dependence. **He or she is specially vulnerable to danger if reasonable precautions are not taken in relation to what is done on the premises. He or she is specially dependent upon the person in control of the premises** to ensure that such reasonable precautions are in fact taken. Commonly, **he or she will have neither the right nor the opportunity to exercise control over, or even to have foreknowledge of, what is done or allowed by the other party within the premises**. Conversely, the person who introduces (or allows another to introduce) the dangerous substance or undertakes (or allows another to undertake) the dangerous activity on premises which he or she controls is "so placed in relation to (the other) person or his property as to assume a particular responsibility for his or its safety".'

***Northern Sandblasting v Harris* (1997) 188 CLR 313**

In this case, Brennan CJ noted that:

> 'In most cases in which a tort is committed in the course of the performance of work for the benefit of another person, he cannot be vicariously responsible if the actual tortfeasor is not his servant and he has not directly authorized the doing of the act which amounts to a tort…
>
> However, if the defendant is under a personal duty of care owed to the plaintiff and **engages an independent contractor to discharge it, a negligent failure by the independent contractor to discharge the duty leaves the defendant liable for its breach**. The defendant's liability is not a vicarious liability for the independent contractor's negligence but **liability for the defendant's failure to discharge his own duty**. The duty in such a case is often called a "non-delegable duty".'

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Further comments pertinent to non-delegable duty were considered by Brennan CJ, and we repeat them for the Committee's convenience below, with emphasis added:

> 'In principle, no *duty* owed by A to B can be delegated to C. If it were otherwise, the mere delegation would discharge A's duty to B. The difference between a duty and its discharge appears clearly in the speech of Lord Blackburn in *Hughes v Percival* where, in reference to the duty owed by the defendant to his neighbour in making use of the party-wall between them, his Lordship said:
>
> > "But **I think the law cast upon the defendant, when exercising this right, a duty towards the plaintiff**. **I do not think that duty went so far as to require him absolutely to provide that no damage should come to the plaintiff**'s wall from the use he thus made of it, but I think that the duty went as far as to require him to see that **reasonable skill and care were exercised in those operations** which involved a use of the party-wall, exposing it to this risk**. If such a duty was cast upon the defendant he could not get rid of responsibility by delegating the performance of it to a third person**. He was at liberty to employ such a third person to fulfil the duty which the law cast on himself, and, if they so agreed together, to take an indemnity to himself in case mischief came from that person not fulfilling the duty which the law cast upon the defendant; **but the defendant still remained subject to that duty, and liable for the consequences if it was not fulfilled**."
>
> Although the duty is personal to the defendant, the term "non-delegable" does not mean that the defendant cannot get another to discharge the duty. As Lord Hailsham of St Marylebone said in *McDermid v Nash Dredging Ltd* in reference to an employer's duty to his employee, "non-delegable" means "only that the employer cannot escape liability if the duty has been delegated and then not properly performed". **The problem is not so much to classify a duty as delegable or non-delegable as to identify the content of the duty.** However, there are some categories of relationship that give rise to a duty to perform certain tasks that cannot be discharged merely by employing an independent contractor to perform

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them. As the majority judgment in *Burnie Port Authority v General Jones Pty Ltd* observed:

> **"It has long been recognized that there are certain categories of case in which a duty to take reasonable care to avoid a foreseeable risk of injury to another will not be discharged merely by the employment of a qualified and ostensibly competent independent contractor**."

The **question whether a defendant who employs an independent contractor to perform a given task is liable** as for a breach of the defendant's own duty in the event of negligence on the part of the independent contractor in performing the task **is not answered by pointing to the independent contractor's negligence**. The independent contractor's negligence is material only in showing the non-discharge of any duty that may have been imposed on the defendant. **The basic question is whether any and what personal duty was imposed upon the defendant in the circumstances of the case. Apart from well-established relationships that give rise to non-delegable duties**, it is not easy to distinguish between the circumstances which give rise to a duty that is discharged by the selection of a competent independent contractor to undertake a particular task and the circumstances which give rise to a duty that can be discharged only by the non-negligent performance of the task. Mason J essayed a definition of the material relationships that would give rise to a non-delegable duty in *Kondis v State Transport Authority*:

> **"[T]he special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised."**

In cases where this special duty is imposed on a person in relation to a particular task, that person is under a duty not only to use reasonable care but to ensure that reasonable care is used by any independent

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contractor whom he employs to perform that task. Moreover, if the task which an independent contractor is employed to perform **carries an inherent risk of damage to the person or property of another and the risk eventuates and causes such damage, the employer may be liable even though the independent contractor exercised reasonable care in doing what he was employed to do**, because the employer authorised the running of the risk and the employer may be in breach of his own duty for failing to take the necessary steps to avoid the risk which he authorised. In *Burnie Port Authority v General Jones Pty Ltd*, following Stephen J in *Stoneman v Lyons*, I noted that the employer of an independent contractor would be personally liable:

> **"if the risk of damage arises from the way in which the work will necessarily be done** or from the way **in which the employer expects that it will be done**, for in each of those situations the incurring of the risk is authorized by the employer. But the employer is not liable merely because it is foreseeable that the independent contractor might, on his own initiative, adopt a careless way of doing the work. If liability were imposed on an employer in that situation, the employer would become a virtual guarantor of the independent contractor's carefulness."

New South Wales v Lepore **[2003] HCA 4**

The majority in the High Court, without overturning Kondis seem to suggest the non-delegable duty is delegable. That would be at odds with the other authorities, but does not relate to the duty owed to detainees in any event.

Woodland v Essex County Council **[2013] UKSC 66**

The UK Supreme Court unanimously overturned the decision of the English Court of Appeal, which had held that a school did not owe a non-delegable duty of care. The question for the court was whether the duty was merely to take reasonable care in the performance of the functions entrusted to it only if it performed those functions itself through its own employees or whether it was a duty or procure that reasonable care was taken in the performance by whomsoever it might get to perform them, i.e. a non-delegable duty.

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The court held that the latter was the case, consistent with the longstanding approach in Australia. The duty is non-delegable only when it falls within the scope of the education authority's duty to pupils within its care but **in entrusting that duty to someone else in respect of those who are inherently vulnerable, it cannot escape liability because it could not control the negligence of the party it chose to delegate those responsibilities to.** It is clear from this decision that whilst a non-delegable duty does not amount to strict liability, it goes significantly further than the way in which a non-delegable duty was interpreted in the High Court in 2003 in *NSW v Lepore* (2003) 212 CLR 511.

OBLIGATIONS AT COMMON LAW FOR PRISON AUTHORITIES TO EXERCISE REASONABLE CARE FOR SAFETY OF PRISONERS

It is a well-established common law duty that prison authorities must exercise reasonable care for the safety of prisoners during their detention in custody.

The cases we outline below are relevant in considering the recent allegations at Nauru and the findings of the Moss Review.

We outline, for the Committee's reference, just three of the leading cases that demonstrate this duty:

- *L v Commonwealth* (1976) 10 ALR 269;
- *New South Wales v Bujdoso* [2005] HCA 76; and
- *Price v State of NSW* [2011] NSWCA 341.

L v Commonwealth (1976) 10 ALR 269[39]

This case is especially relevant to consider regarding the findings of the Moss Review, as it involves the vulnerability of a plaintiff to sexual abuse in prison.

In this case, the plaintiff was imprisoned in Fannie Bay gaol in a cell with two convicted prisoners, Smith and Maloney. The plaintiff alleged that one evening, these two other prisoners in his cell sexually attacked, assaulted and sodomized him. The Court found for the plaintiff.

Ward J, in his judgment, referred to the English Court of Appeal case of *Ellis v Home Office* [1953] 2 All ER 149, as clearly recognising the common law duty of care. His comments about the case are relevant to this discussion, in that:

> 'In Ellis v Home Office, a prisoner was injured by an attack on him by

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another prisoner when the doors of some of the cells in the hospital wing of a prison were left open to allow the prisoners to empty their slops, during the absence of a prison officer who was working short-handed. It was said by Singleton LJ at p 154: "The ***duty on those responsible for one of Her Majesty's prisons is to take reasonable care for the safety of those who are within, and that includes those who are within against their wish or will, of whom the plaintiff was one. If it is proved that supervision is lacking, and that accused persons have access to instruments, and that an incident occurs of a kind such as might be anticipated, I think it might well be said that those who are responsible for the good government of the prison have failed to take reasonable care for the safety of those under their care***."

Jenkins LJ said of the learned trial judge in that case, at p 160: "He held (and, indeed, it was not in dispute) that **the common law duty owed by the prison authorities to the plaintiff** as an inmate of Winchester Prison **was to take reasonable care for the safety of the plaintiff as a person in the custody of the prison authorities**." And Morris LJ said at p 161: "It appears to me that, **if there had been in the vicinity of the plaintiff in this prison someone who was likely, unless prevented or unless supervised, to offer violence to someone else, then it would be the duty of the prison authorities to see that such a potentially dangerous person did not have opportunity to do harm**." [emphasis added]

In his judgment, Ward J stated his opinion that 'one of the main defects of the gaol was that, apart from two single cells intended for other purposes, there was no single cell accommodation. There was none for maximum security prisoners, who ordinarily would not be required to share cells.'

Furthermore, he noted that 'all in all Fannie Bay Gaol was obsolete, over-crowded and grossly inadequate for the functions it should have fulfilled,' a fact which was also admitted by the Gaoler and other prison officers.

Ward J continued, finding that:

'Smith and to some extent Maloney were prisoners who were **prone to violence and that this was known or should have been known to the authorities**. It was **therefore negligent on the part of the authorities to have put the plaintiff in their cell.** I also find that **the authorities took insufficient care for the safety of prisoners whilst they were in their cells.** The system in force at the gaol seems to have been directed primarily towards the prevention of escape by prisoners. The main security blocks

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were checked only at about 5.30 pm, midnight, and 7.30 am.'

In determining as to whether sexual abuse was foreseeable, Ward J commented that:

> 'It is sufficient to rely on Lord Jenkins in *Hughes v Lord Advocate* [1963] AC 837 at 850 ; [1963] 1 All ER 705 at 710, for the proposition that **"it was not necessary that the danger which actually occurred should be identical with the danger which was reasonably foreseeable**"; or on Lord Pearce ([1963] AC at 858) for the statement that what happened "was **but a variant of the foreseeable".'** [emphasis added]

In Nauru, given that there had been reports of sexualised behaviour among children, and a reported sexual assault of a child provided to the Department, the failure of the Department to appropriately act, and the subsequent re-assault of the child, may be found by the Courts to constitute reasonably foreseeable harm: the test is 'but a variant of the foreseeable'.

New South Wales v Bujdoso [2005] HCA 76

In this case, Mr Budjoso had been convicted of sex offences against minors. After imprisonment at a range of other prisons, he applied for a transfer and was subsequently imprisoned in Silverwater Prison. There, he was exposed to threats of which prison authorities were aware. One night, two men attacked him with iron bars. Mr Bujdoso suffered serious injuries. At issue on appeal was whether the State was in breach of its duty of care to Mr Bujdoso when he was assaulted during his imprisonment. The Court held that Mr Bujdoso did not need to prove that the State should have guaranteed his safety, but that there was a duty to exercise reasonable care, which was missing. The appeal was dismissed.

The Court, in its judgment, acknowledged that [emphasis added]:

> 'It is true that a prison authority, as with any other authority, is under no greater duty than to take reasonable care. But the content of the duty in relation to a prison and its inmates is obviously different from what it is in the general law-abiding community. A prison may immediately be contrasted with, for example, a shopping centre to which people lawfully resort, and at which they generally lawfully conduct themselves. **In a prison, the prison authority is charged with the custody and care of persons involuntarily held there.** Violence is, to a lesser or a greater degree, often on the cards. No one except the authority can protect a target from the violence of other inmates. Many of the people in prisons are there precisely because they present a danger, often a physical danger, to the community. **It is also notorious that without close supervision some of the prisoners would**

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> **do grave physical injury to other prisoners**. The respondent here did not simply rely upon the notorious fact that prisoners convicted of sexual offences against minors are at greater risk than other offenders: he proved that **the appellant knew that he had been threatened and taunted by other prisoners**, on that account, albeit to a somewhat lesser extent at Silverwater Prison than he might have been in the other institutions in which he had been imprisoned.
>
> In the United States, the common law, federal constitutional considerations apart, has **long recognized the special situation of prisoners and the obligations of those having their custody**. In a leading text on the law of torts it is said, with ample citation of authority:
>
> "An affirmative obligation to use care to control the conduct of others may also be raised by a special relationship between the actor and the person injured. **Thus where one stands in loco parentis, or is put in charge of persons under circumstances that deprive them of normal means of self-protection (eg, prisoners), he must use care to restrain the foreseeable dangerous conduct of third persons that unreasonably threatens his wards**."

While Mr Budjoso had been 'individuals had been 'threatened and taunted' by other prisoners; the facts can be distinguished in Nauru, in which the Moss Review alleged that were a range of not only threats made against a range of individuals, but direct assaults including but not limited to:

- Prisoners (transferees) had threatened to rape a mother and/or child [at 3.29];
- Specific incidents of assault [3.84 – 3.88];
- Allegations of inappropriate touching of children [3.106]; rape of minor [3.103]; and alleged sexual harassment and assault of minors by contract service providers [3.110];
- Physical assault of minors [3.121 – 3.122]; [3.126]; [3.127]; [3.129];
- Three allegations of rape [3.135];
- Allegations of indecent assault, sexual harassment and physical assault [3.136].

In *Budjoso,* Mr Budjoso proved that appellant was aware of the threats. We explored in Part 2 of our submission regarding the Department's knowledge and inaction regarding serious incidents in the Nauru regional processing centre.

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***Price v State of NSW* [2011] NSWCA 411**

It is well established that those held in custody by prison authorities or the police are owed a duty of care, which may include the duty to take reasonable steps to protect them from others. In *Price v State of NSW* [2011] NSWCA 341, it was said:

> '[35] The custody of Mr Price involved detention and **an assumption of control of his person resulting in a duty to exercise reasonable care for his safety during his detention**: *Howard v Jarvis* [1958] HCA 19; 98 CLR 177 at 183 (Dixon CJ, Fullagar and Taylor JJ). The **relationship is a special one sufficient to include a responsibility to exercise care to prevent harm deliberately and unlawfully inflicted by others**: *State of NSW v Napier* [2002] NSWCA 402 at [14]-[21] and cases there cited (Spigelman CJ) and [66-83] (Mason P); and see *New South Wales v Bujduso* [2005] HCA 76; 227 CLR 1 at 9 to 10 [32] at 15 to 15 [45]-[46] (the Court). **Critical to the special character for relevant purposes here is the control by the respondent of the appellant and its assumption of responsibility over the appellant**. These matters no doubt purvey the whole life and existence of those in prison: most aspects of life, and autonomous existence, are subject to control and direction. These **considerations often assume their importance in the responsibility to control the violence of third partie**s, such as other inmates. These considerations are relevant, however, in recognising the duty no doubt extends to the taking of reasonable care in the exercise of powers of control and direction that exist in order to avoid injury to an inmate."

DUTY RECOGNISED AS APPLICABLE TO IMMIGRATION DETENTION

These duties have been recognised as extending to people in immigration detention.

***Behrooz v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* (2004) 208 ALR 271**

In this case, Gleeson CJ noted at [21] that:

> 'Harsh conditions of detention may violate the civil rights of an alien. An alien does not stand outside the protection of the civil and criminal law. **If an officer in a detention centre assaults a detainee, the officer will be liable to prosecution, or damages. If those who manage a detention**

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centre fail to comply with their duty of care, they may be liable in tort.'

Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour [2004] FCAFC 93

In *Mastipour*, Lander J noted that the Secretary of the Department accepted a duty at [127]:

> 'The primary judge found that there was a clearly arguable case that the Secretary owed Mr Mastipour **a duty to take reasonable care for his safety whilst he was in immigration detention**. He noted that the Secretary did not contend to the contrary. On this appeal, **the Secretary has accepted that there is a duty of that kind imposed upon the Secretary**.'

SBEG v Commonwealth of Australia [2012] FCAFC 189

In *SBEG v Commonwealth of Australia* [2012] FCAFC 189, which involved an asylum seeker in immigration detention in Australia, Keane CJ, Lander and Siopis JJ, held that:

> 'It is well-established that a gaoler owes a duty of care under the common law to exercise reasonable care for the safety of a person held in custody: *Howard v Jarvis* [1958] HCA 19; (1958) 98 CLR 177 at 183; *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36; (2004) 219 CLR 486 at [174] (*Behrooz*).
>
> **But that obligation is not a guarantee of the safety of the detainee; it is an <u>obligation of reasonable care to avoid harm to the detainee whether that harm be inflicted by a third person or by the detainee</u> himself or herself**. The risk of harm to the detainee is not the only matter to be considered in assessing whether reasonable care has been exercised: a consideration which must be addressed is the need to ensure effective detention in accordance with the law.'[40]

S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs [2005] FCA 549

In this case, Finn J noted at [33] that in its Detention Services Contract with GSL Australia Pty Ltd regarding Baxter:

> 'The Commonwealth acknowledged in Sch 2 that it retains ultimate

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responsibility for detainees in Baxter: cl 4.1.3; that it owes a duty of care for each and every person in immigration detention and to ensure the safety and welfare of all detainees: cl 4.1.2. Part 16 of Sch 2 deals with the information gathering, record keeping and reporting obligations of GSL and the monitoring to be engaged in by DIMIA. The "context" for these functions is set out in cl 16.1.1 in these terms:

> The Department's **duty of care in the detention environment is underpinned by the availability of timely, comprehensive and accurate information from the Services Provider about day to day activities**. This **duty of care extends not only to detainees, but also to staff, visitors and others who may have dealings with detention activities**. **Timely provision of information is required to enable the Department to assess whether this duty of care is being maintained by the actions of the Services Provider**, and to facilitate monitoring and performance assessment of the Services Provider.'

In regards to the Nauru regional processing centre, it appears that the MOU between Australia and Nauru indicates that the Department of Immigration and Border Protection will be receiving communications concerning the day-to-day operation of activities undertaken in accordance with the MOU. [41]

In *S,* Finn J also noted at [199] that:

> 'While the scheme of the Migration Act levels the processes of detaining and holding in detention to detaining or holding by "an officer", **the context and structure of the Act in my view makes plain that, whosoever the officer in a given case, the detaining and holding is both on behalf of the Commonwealth and by the Commonwealth**. "Officers" provide the Commonwealth's medium for the purposes of the Act. It is for this reason **I consider that the Commonwealth has <u>correctly conceded in this matter that it owes a non-delegable duty of care to the applicants because of its particular "relationship" with detainees</u>**: see *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687.'

Finn J also assessed the Commonwealth duty to detainees, which is particularly relevant to the terms of reference for this inquiry:

> '[207] **The Commonwealth's concession that it is under a non-delegable duty to ensure that reasonable care is taken of the detainees in question is properly made**. **It rightly is conceded that it does not discharge its duty to detainees by the employment of " ... qualified and**

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ostensibly competent independent contractor[s]": cf *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550. Nonetheless **the concession does little to illuminate what, in the context of immigration detention under the Migration Act, is the scope and content of the Commonwealth's duty**. **To ascertain these it is necessary to have regard to those characteristics in the Commonwealth-detainee relationship which make it appropriate to impose upon it a non-delegable duty "to see that care is taken"**: cf *Burnie Port Authority* at 550.

[208] The most influential modern analysis of non-delegable duties of care is that of Mason J in *Kondis v State Transport Authority* at 679-687. That analysis was in turn adopted and enlarged upon in the majority judgment in *Burnie Port Authority* (at 550-551) where it was said:

> Mason J [in Kondis] **identified some of the principal categories of case in which the duty to take reasonable care under the ordinary law of negligence is non-delegable in that sense**: adjoining owners of land in relation to work threatening support or common walls; master and servant in relation to a safe system of work; **hospital and patient; school authority and pupil**; and (arguably), occupier and invitee. In most, though conceivably not all, of such categories of case, the **common 'element in the relationship between the parties which generates [the] special responsibility or duty to see that care is taken' is that 'the person on whom [the duty] is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised**' *[Kondis v State Transport Authority* (1984) 154 CLR at 687; see also *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR at 31 , 44-46]. It will be convenient to refer to that common element as 'the central element of control'. Viewed from the perspective of the person to whom the duty is owed, **the relationship of proximity giving rise to the non-delegable duty of care in such cases is marked by special dependence or vulnerability on the part of that person** [*The Commonwealth v Introvigne* (1982) 150 CLR 258 at 271,

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per Mason J].

[209] It is unnecessary for present purposes to undertake a review of the widening categories of case in common law countries in which a duty to care for or to protect is being imposed: see eg Balkin & Davis, *Law of Torts*, [7.20] ff (3rd ed, 2004); Trindade & Cain, *The Law of Torts in Australia*, 405 ff (3rd ed, 1999); Todd (ed), *The Law of Torts in New Zealand*, 4.7.7 (3rd ed, 2004). **The relationship of the Commonwealth to persons in immigration detention who are known to belong to a class suffering from mental illness is closely analogous to, and draws on elements of, two classes of relationship which attract non-delegable duties. These are hospital and patient** [*Kondis*, at 685; *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542 at 561-562; see also *Wellesley Hospital v Lawson* (1978) 76 DLR (3d) 688 at 692] **and gaoler and prisoner** [*Howard v Jarvis* (1958) 98 CLR 177 at 183; *Morgan v Attorney-General* [1965] NZLR 134; *R v Deputy Governor of Parkhurst Prison; ex parte Hague* [1992] 1 AC 58 at 166; *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360]. The **characteristics the present relationship shares with that of hospital and patient are not only the element of control and the assumed responsibility for the health care of the detainees, there is as well the exaggerated vulnerability of the class of detainees at significant risk of mental illnesses**. I speak of this class of detainees to foreshadow my later conclusion that **indefinite detainees in Baxter were known to the Commonwealth to be susceptible to serious mental illness**.

[210] The further characteristic shared with the gaoler-prisoner relationship grows out of the **nature of the control exercised over detainees**. They are without freedom and without capacity to provide for their own needs, special or otherwise. **Their's is a special dependence but particularly so if they suffer from mental illness**.

[211] The duty imposed on the Commonwealth must accommodate that special dependence and the peculiar vulnerability to which detainees known to suffer mental illness are exposed. The duty must also take account of the very distinctive outsourcing arrangements the Commonwealth has been prepared to accept for the provision of health care services.

[212] This case is one of first impression and for that reason it is necessary

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to approach the standard required of the Commonwealth with some caution. This said, I am nonetheless satisfied that **the minimum properly to be expected of the Commonwealth in virtue of its relationship with detainees in an immigration detention centre such as Baxter is that it ensure that reasonable care is taken of the detainees who, by reason of their detention cannot care for themselves**: cf *Spicer v Williamson* 132 SE 291 (1926) at 293. This **necessitates that the Commonwealth ensures that a level of medical care is made available which is reasonably designed to meet their health care needs including psychiatric care**: see eg *Brooks v Home Office* (1999) 48 BMLR 109 at 114; cf also, although in a setting affected by constitutional considerations, *Bowring v Goodwin* 551 F 2d 44 (1977) at 47. **Where, as here, the Commonwealth contracts out the provision of services to detainees it is obliged to see that "care is taken"**: cf *Kondis*, at 686**; and that the requisite level of medical care is provided and with reasonable care and skill.**

[213] There is one aspect of the Commonwealth's duty to which I should refer. It was a decision of the Commonwealth (under s 273 of the Act) to establish and maintain Baxter in a **relatively isolated part of Australia**. The issue this raises, potentially, is **whether its so choosing can itself affect the standard of health care services the Commonwealth is obliged to provide**. Dr Frukacz, for example, described the psychiatric services he provided at Baxter as being at the level available to "remote communities". In the distinctive circumstances of this matter, I do not consider I need express a concluded view on this issue given the medical opinions available to, and what was otherwise known by, the Commonwealth in the relevant period: see *Brooks* at 113-114; but cf *Knight v Home Office* [1990] 3 All ER 237 which is doubted in *Brooks*. However, **I should say that it is my view that, having made its choice of location, the Commonwealth, not the detainees, should bear the consequences of it insofar as that choice has affected or compromised the medical services that could be made available to meet the known needs of detainees.'**

So too, Finn J found that:

[232] 'I have already found that **the failure to provide psychiatric care to both applicants after the roof top protest was, in the circumstances, a breach of the Commonwealth's duty to take reasonable care for the detainees**. I am further satisfied that the long delay the applicants were forced to endure betrayed an inadequate level of provision of psychiatric

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services at Baxter in any event…

[234] I have already indicated that the **failure to provide appropriate psychiatric assessment in January 2005 consequent upon the roof top protest and hunger strike involved a continuing breach of duty by the Commonwealth**. No less so than in the case of S, it was **accompanied by neglect of M** notwithstanding that from late December, the **Commonwealth had reasonable grounds to believe he may have been suffering from major depression. He could not take care of himself. Those who should have did not**….

[257] In each of these matters the facts speak for themselves. **It was the Commonwealth's duty to ensure that reasonable care was taken of S and M who, by reason of their detention, could not care for themselves. That duty required the Commonwealth to ensure that a level of medical care was made available to them which was reasonably designed to meet their health care needs including psychiatric care. They did not have to settle for a lesser standard of mental health care because they were in immigration detention**.'

This case is especially relevant to consider regarding Nauru, in that the Commonwealth has contracted out the provision of services to detainees, and has failed to see that care was taken – as evidenced by the Moss Review's recommendation that the Department needed to develop its function beyond mere contract management.

It appears that the Commonwealth has failed to ensure that care is taken, in relation to safety from sexual harassment and assault.

Other legal sources

In §320 of the *Restatement of Torts*, the reporter for which was Professor Prosser, it is said, with reference to a range of persons, including gaolers:

"One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is **under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him**, if the actor

(a) **knows or has reason to know** that he has the ability to control

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the conduct of the third persons, and

(b) **knows or should know** of the necessity and opportunity for exercising such control."

The position in England is well summarized in *Halsbury's Laws of England*:

"The duty on those responsible for one of Her Majesty's prisons is to take **reasonable care for the safety of those who are within**, including the prisoners. Actions will lie, for example, **where a prisoner sustains injury as a result of the negligence of prison staff**; or at the hands of another prisoner in consequence of the negligent supervision of the prison authorities, with greater care and supervision, to the extent that is reasonable and practicable, being required of a prisoner known to be potentially at greater risk than other prisoners; or if negligently put to work in conditions damaging to health; or if inadequately instructed in the use of machinery; or **if injured as a result of defective premises**.

What measures did the appellant in fact adopt? Towards or for the protection of the respondent, the answer is, effectively, none…

This was not a case in which it was proved, or even contended that measures to ensure closer supervision of prisoners, were costly or so much more costly as not reasonably to be affordable. Nor was it suggested that secure doors and locks could not have been provided… And again, the appellant did not say how it was that the assailants were able to obtain, conceal and use the iron bars that they used to injure the respondent. **It is clear that the appellant did truly place almost all of its trust in the system of classification**, and **what it hoped would flow from that.**

The Court of Appeal was right to hold that **the appellant failed in its duty to the respondent. There was more than a mere foreseeable risk of injury to the respondent. There was a risk that had actually been expressly threatened.** The risk, if it were to be, as it was, realized, was of considerable physical injury to the respondent. **Such a risk, once known, called for the adoption of measures to prevent it. All of this is well established. No *effective* measures were adopted.**

The respondent did actually point to measures which could reasonably have been undertaken but were not: **closer and more frequent checking of prisoners; better and stronger locks and doors; checking for weapons**; and, relocation of the respondent within the Units. The case was not one therefore of the kind which the appellant submitted it to be, of the recognition, but only retrospectively, of dangers not reasonably foreseeable

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and not capable of avoidance at the time. Nor was it a case in which the Court of Appeal failed to identify the measures which could and should have been taken to minimize the risk to the respondent. Indeed, **one of the appellant's witnesses had effectively identified one of the measures available**, the one which had stopped the visits to the Silverwater Speedboat Club, that is, of better surveillance. That and the other measures identified by the Court of Appeal would have been likely in fact to obviate the risk to the respondent. **There was no obligation upon the respondent to prove, as the appellant contended he should, that they would have *guaranteed* his safety. Reasonable care was enough. And that was missing, as the Court of Appeal rightly found.**

DUTY TO PROVIDE REASONABLE MEDICAL CARE

We note that the Moss Review did not investigate extensively into the conditions of the centre, given that this did not fit within the terms of reference. However, we outline duties of care in relation to medical treatment.

AS v Minister for Immigration and Border Protection & Anor [2014] VSC 593

In *AS v Minister for Immigration and Border Protection & Anor* [2014] VSC 593, the defendants **accepted that the second defendant, the Commonwealth of** Australia**, owed a non-delegable duty of care to provide reasonable health care to persons who were held in detention on Christmas Island pursuant to the Migration Act.** The defendants did not concede that the first defendant, the Minister for Immigration and Border Protection, was subject to a similar duty of care, but accepted that it was arguable.

MZYYR v Secretary, Department of Immigration and Citizenship [2012] FCA 694

In the case of *MZYYR v Secretary, Department of Immigration and Citizenship* [2012] FCA 694 involved a 29 year old Kurdish man was detained at the Melbourne Immigration Transit Accommodation. MZYYR suffered from a neuro-developmental disorder with associated intellectual impairment. During the course of his detention, specialist psychiatric services were not made available to deal with his intellectual disability. Gordon J noted at [20]:

> ‘what then are the obligations of the Commonwealth to the applicant? It was not disputed that:
>
> The **Commonwealth owes a duty of care to a person held in**

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> **immigration detention to provide the person with the level of medical care which is *reasonably* designed to meet their health care needs, including psychiatric care**: *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2005] FCA 549; (2005) 143 FCR 217 at [218].'[42]

Gordon J also noted at [55] that:

> 'The Commonwealth is in a position of control. Detainees cannot reasonably be expected to safeguard themselves from danger especially detainees with mental health needs which are known to the Commonwealth.' [43]

The lack of appropriate medical care in Nauru, while not a focus of the Moss Review, has been highlighted in other sources.

PART 4 – DUTY OF THE COMMONWEALTH UNDER THE *WORK, HEALTH AND SAFETY ACT* 2011 (CTH)

We believe that there may be a greater role for Comcare to investigate the Nauru regional processing centre.

However, we also believe that there may be a role for Comcare to prosecute officers of the Commonwealth for breaches of the *Work, Health and Safety Act* 2011 (Cth).

The *Work, Health and Safety Act* 2011 (Cth) came into effect on 1 January 2012.

COMCARE'S RECOGNITION OF APPLICATION BEYOND AUSTRALIAN SOIL

Comcare notes in its Freedom of Information Disclosure Log that two documents were recently released:

- Comcare's reports on inspections carried out on Nauru, Christmas and Manus Islands detention centres between 1/7/13 and 30/6/14 as described on p280 of the DIBP annual report; and
- A list of all critical incidents reported to Comcare from both mainland and offshore immigration detention facilities since September 2013.

We sought a copy of these documents, which we attach to this submission.

The first document, (at p1 of 40), Comcare recognises that DIAC/DIBP has the responsibility to provide a safe workplace for workers, contractors and transferees

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in Manus Island. We submit that this same responsibility would extend to Nauru.

A Comcare Inspector report dated July 2013 noted that the *Work, Health and Safety Act* 2011 (Cth) applied in Manus Island:

> 'I discussed the basic contractual agreement and where each party to the contract was placed in regard to the commonwealth jurisdiction. I advised… that **for the purposes of the *Work, Health and Safety Act* 2011, both Decmil and Aurecon are considered to be workers of DIAC and as such the responsibility for providing a safe workplace lies with DIAC**. I also advised…**the responsibility for notification of any incidents that may occur, lies with DIAC** however, I recommended that they may want to consider notifying their own state based regulator.'

A Comcare Inspector report dated March 2013, at Manus Island noted (at page 10 of 40) that:

> 'Based on the information gathered and the observations noted below, I am of the view that there are a number of reasonably practicable steps available to DIBP, **who are in control of the workplace, to protect the health and safety of their workers, contractors and the transferees in their care** in relation to the **daily activities** involved in the operation of the Manus Island Regional Processing Centre.'

Following the incident at Manus Island RPC that left Mr Reza Barati tragically killed, A Comcare Inspector report noted (at page 37 of 40) that:

> '**DIBP's position is that the WHS Act applies in full in the context of MIRPC and that MIOPC satisfies the definition of 'workplace' for the purposes of the WHS Act.'**

BINDING THE COMMONWEALTH

Section 10 of the *Work, Health and Safety Act* 2011 (Cth) binds the Commonwealth, who is liable for an offence against the Act and liable for a contravention of a WHS civil penalty provision.[44]

Under s14, a duty cannot be transferred to another person. Further, s242 provides that:

> 'A term of any agreement or contract that purports to exclude, limit or modify the operation of this Act or any duty owed under this Act or to transfer to another person any duty owed under this Act is void.'

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Under s12A, strict liability applies to each physical element of each offence under the Act unless otherwise stated in the section containing the offence.

RELEVANCE TO ASYLUM SEEKERS

Section 19 makes provision regarding the primary duty of care. It is crucial to note that s19(2) provides regarding the 'health and safety of other persons' and s19(3)(f) provides regarding **the provision of any information, training, instruction or supervision that is necessary <u>to protect all persons</u> from risks** to their health and safety'. This is not limited to workers only, and asylum seekers would fall into the category of 'other persons'.

Section 4 of the Act defines 'health' to mean physical and psychological health.

Section 19 provides:

> (1) A person conducting a business or undertaking **must ensure, so far as is reasonably practicable, the health and safety** of:
>
> > (a) **workers engaged, or caused to be engaged by the person**, and
> >
> > (b) workers whose activities in carrying out work are influenced or directed by the person,
> >
> > while the workers are at work in the business or undertaking.
>
> (2) A person conducting a business or undertaking **must ensure, so far as is reasonably practicable**, that the **<u>health and safety of other persons</u>** is not put at risk from work carried out as part of the conduct of the business or undertaking.
>
> (3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable:
>
> > (a) the provision and maintenance of a work environment without risks to health and safety, and
> >
> > (b) the provision and maintenance of safe plant and structures, and
> >
> > (c) the provision and maintenance of safe systems of work, and
> >
> > (d) the safe use, handling, and storage of plant, structures and substances, and

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(e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities, and

(f) **the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks** to their health and safety arising from work carried out as part of the conduct of the business or undertaking, and

(g) that the health of workers and the conditions at the workplace are monitored for the **purpose of preventing illness or injury of workers** arising from the conduct of the business or undertaking.'

RELEVANCE TO CONDUCT

Under s245, if the Crown is guilty of an offence, the penalty imposed is the penalty applicable to a body corporate. Any conduct that has been engaged in on behalf of the Crown by an employee, agent or officer of the Crown acting within the actual or apparent scope of his/her employment, or within his/her actual/apparent authority, is conduct also engaged in by the Crown. If an offence requires proof of knowledge, intention or recklessness, it is sufficient in proceedings against the Crown for that offence to prove that the person referred to in s245(2) had the relevant knowledge, intention or recklessness.

As highlighted earlier, frequent incident reports were provided to the Department, meaning that there was relevant knowledge of the incidents.

DUTY TO REPORT NOTIFIABLE INCIDENTS

Under s38 of the *Work, Health and Safety Act* 2011 (Cth), a regulator must be notified immediately after becoming aware that a notifiable incident (ss35, 36, 37 of the Act) has occurred.

As we highlighted earlier, in 2013-14, 83 per cent (374 out of 449) of incidents the department notified to Comcare, including deaths, involved detainees and transferees in immigration detention facilities and offshore processing centres, and did not directly involve workers.[45] Therefore, **it is likely that 83 per cent of these incidents involved asylum seekers.**

However, since 2011-12, it does not appear that Comcare has carried out more comprehensive investigations (as opposed to visits or inspections) of immigration detention facilities or regional processing centres.

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We question why this has not happened.

For example, in 2012 - 2013, Comcare's visit to Nauru appeared to be a 'liaison visit… to gain a better understanding of the operations of the centre and **the issues faced by workers**'; in 2013 – 2014, inspections were conducted at Manus and Nauru.

We believe that there is a greater role for Comcare to investigate the safety of workers and other persons in relation to the Nauru regional processing centre. We believe that this role encompasses assessing the risk relating to both physical and psychological injury.

Below is a summary of incidents notified in 2011 – 12 and 2012-13, and subsequent investigations:

2011-12

In 2011 – 12, 1,521 incidents were notified to Comcare under s35, 36 and 37 of the *Work, Health and Safety Act* 2011 (Cth). Four investigations were carried out by Comcare:

- allegations of key safety issues at Western Australian IDFs—no breach of the Occupational Health and Safety Act 1991
- incorrect emergency signage at the Pontville IDF—no breach of the WHS Act
- client found unconscious at Scherger IDF—no breach of the Occupational Health and Safety Act
- serious injury sustained by client while taking a shower at Scherger IDF in Queensland— breach of section 17 of the *Occupational Health and Safety Act* and section 1.05(1) of the *Occupational Health and Safety (Safety Standards) Regulations* 1994.[46]

Inspections were carried out at 15 detention locations and section 191 improvement notices were issued to the department in three cases: Phosphate Hill and Construction Camp sites on Christmas Island on 13 January 2012, and Pontville, Tasmania on 20 January 2012.'[47] The department subsequently complied with the improvement notices.

2012-13

In 2012 – 2013, 298 incidents were notified under s35, 36 and 37 of the *Work, Health and Safety Act* 2011 (Cth).

In the period 1 July 2012 to 30 June 2013, Comcare conducted regulatory

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inspections at Villawood, Christmas Island, Yongah Hill, Perth, Scherger, Pontville and Inverbrackie immigration detention facilities, as well as a visit to the Darwin Airport Lodge.

In February 2013, Comcare conducted a liaison visit to the Torres Strait to gain a better understanding of the operations of Commonwealth agencies in the region and the associated WHS issues faced by federal workers, including the department's movement monitoring officers.

In April 2013, **Comcare conducted a liaison visit to the regional processing centre in Nauru**. The purpose of this visit was for Comcare to gain a better understanding of the operations of the centre and the associated WHS issues faced by workers. No formal improvement notices have been issued nor have there been any identified breaches of the WHS Act arising from any of these inspections or visits.[48]

FOI DISCLOSURE

Two documents released under freedom of information laws are also important to consider:

- Comcare's reports on inspections carried out on Nauru, Christmas and Manus Islands detention centres between 1/7/13 and 30/6/14 as described on p280 of the DIBP annual report; ("Document 1") and
- A list of all critical incidents reported to Comcare from both mainland and offshore immigration detention facilities since September 2013 ("Document 2").

Document 2 provides a 'list of **all critical incidents** reported to Comcare from both mainland and offshore immigration detention facilities since September 2013'.

However, this document suggests that there were only two 'critical incidents' reported to Comcare from the Department of Immigration and Border Protection, and neither of these were in relation to Nauru.

'Critical incidents' are noted in the document to define 'an incident or event which critically affects the good order and security of the facility or incurs a serious injury or a threat to life. Critical incidents that are reportable to Comcare are assault occasioning grievous bodily harm and sexual assault.'

The document notes that two fatalities were reported to Comcare:

- 10 February 2014, at 'Immi' - a detainee incurred head injuries resulting in

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death; and

- 13 February 2014, at Maribyrnong, a detainee committed suicide.

While the first incident, inconclusively logged, may appear to allude to the death of Reza Barati, he died following head injuries on 17 February 2014, and therefore the dates would appear to be incongruent.

It is deeply concerning that no sexual assaults appear to have been reported as critical incidents to Comcare, despite the fact that the sexual abuse of a child occurred in November 2013 in Nauru RPC, the incident was substantiated, and reported to the Minister. However, **it appears from this document that this incident was not reported to Comcare.**

Document 1 notes that inspections were conducted at Nauru on the following occasions:

- November 2013: an accident involving a vending machine on a removalist style trolley. Comcare did not propose any enforcement action (at page 5 of 40);
- February 2014: a fire broke out in an unattended lodge room. Comcare did not propose any enforcement action (at page 22 of 40);
- February 2014: an incident involving a phone charger. Comcare did not propose any enforcement action (at page 26 of 40);
- February 2014: inspection of the Nauru centre 'managed by the DIBP'. Comcare recommended that DIBP implement, so far as possible, similar arranagements at the Manus Island RPC in conjunction with Transfield Services, as the garrison support contractor (at page 30 of 40);

The Comcare Inspector report (concluded April 2014) noted: 'there were no significant WHS issues identified in these visits' (at page 32 of 40).

However, the inspector report notes physical elements of the centre that may be relevant to consider regarding physical injury. The threat of psychological injury, for workers or 'other persons' does not appear to have been assessed at all.

THE RELEVANCE OF CONTROL

By way of contrast, the Comcare Inspector report regarding the incident at Manus Island found (at page 36 of 40) that:

> 'After a thorough review of available evidence, Inspector Briggs did not identify any breaches of the *Work, Health and Safety Act* 2011 by DIBP. One the evidence reviewed, it appears DIBP provided a safe workpace as

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far as reasonably practicable. **It is apparent that the injuries and death that occurred were the direct result of criminal actions, not as a result of inadequate WHS practices, processes or systems**.'

The report elaborated (at page 37 of 40) that:

> 'DIBP appeared to have done what is reasonably practicable to provide a safe workplace at MIOPC. **DIBP exhibited no control** over the events that transpired between 16-18 February that led to the death of Mr Barati.

RELEVANCE TO THE MOSS REVIEW

The allegations raised within the Moss Review could certainly appear to be a failure to ensure the health and safety of both workers and 'other persons' under s19(2).

So too, Recommendations 2 and 4 of the Moss Review are especially relevant to s19(3)(f) in relation to the lack of adequate information or training.

The Moss Review notes that 'there is nothing explicit in the service provider contracts or guidelines relating to sexual harassment.' [3.153]

Recommendation 2 recommends that:

> 'Contract service providers review their guidelines relating to sexual harassment and sexual relationships to ensure that staff members understand what behaviour is acceptable in the context of a Centre with a diversity of cultures.'

Recommendation 4 recommends that:

> 'Nauruan government officials and the Department review and enhance the existing policy framework for identifying, reporting, responding to, mitigating and preventing incidents of sexual and other physical assault at the Centre. All staff members working at the Centre (Nauruan, Departmental and contract service provider) must understand the framework and their responsibilities under it.'

The Review appears to indicate that there has not been the provision of adequate information or training necessary to protect all persons, (including children and women detained at the centre) from risks to their health and safety. Guidelines relating to sexual relationships and assault in the workplace should be so basic to employment, that the lack thereof may indicate the deficit of appropriate protection at the centre.

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PART 5 - RESPONSIBILITY OF THE COMMONWEALTH FOR STAFF – CRIMINAL AND CIVIL ACTION

The terms of reference for the Inquiry state that the Committee will consider 'the performance of the Commonwealth Government in connection with the Centre, including the conduct and behaviour of the staff employed at the Centre, to the extent that the Commonwealth Government is responsible.'

We have already outlined the Commonwealth's duty of care obligations regarding a non-delegable duty of care, which we believe would hold the Commonwealth liable for the acts and omissions of third parties.

We also wish to raise that there is the potential that people employed at the regional processing centre, and Department officials, could face criminal or civil action for their involvement in Nauru, and thus the Commonwealth is opening up staff to civil and criminal action.

Allegation regarding changed incident reports

If the allegation raised in *The Saturday Paper* that the Department asked people to doctor incident reports was found to be substantiated, these individuals and the Department could face civil and criminal penalties.

Civil

Any person who has provided misleading information in an incident report that was prepared purportedly to be used in providing incident reports to Comcare, could be found liable under s268 of the *Work, Health and Safety Act* 2011 (Cth):

> '(1) A person must not give information in complying or purportedly complying with this Act that the person knows:
>
> (a) to be false or misleading in a material particular, or
>
> (b) omits any matter or thing without which the information is misleading.
>
> Maximum penalty:
>
> (a) in the case of an individual-$10,000, or
>
> (b) in the case of a body corporate-$50,000.'

A Commonwealth official could also be found liable under s268(2) for knowing

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production of misleading reports to Comcare:

> '(2) A person must not produce a document in complying or purportedly complying with this Act that the person knows to be false or misleading in a material particular without:
>
> (a) indicating the respect in which it is false or misleading and, if practicable, providing correct information, or
>
> (b) accompanying the document with a written statement signed by the person or, in the case of a body corporate, by a competent officer of the body corporate:
>
> (i) stating that the document is, to the knowledge of the firstmentioned person, false or misleading in a material particular, and
>
> (ii) setting out, or referring to, the material particular in which the document is, to the knowledge of the firstmentioned person, false or misleading.
>
> Maximum penalty:
>
> (a) in the case of an individual-$10,000, or
>
> (b) in the case of a body corporate-$50,000.'

Criminal

Given that the alleged offences in the Moss Review constitute in many instances, indictable offences, individuals could also be charged with concealing an indictable offence under s44 of the *Crimes Act* 1914 (Cth). In relation to this section, maintaining their employment due to complying with requests to change incident reports could be seen as receiving a 'benefit'. Section 44 relevantly provides that:

> (1) A person (the *first person*) commits an offence if:
>
> (a) the first person:
>
> (i) **asks for, receives or obtains any property, or benefit, of any kind for himself or herself or another person**; or
>
> (ii) agrees to receive or to obtain any property, or benefit, of any kind for himself or herself or another person; and

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(b) the first person does so upon an agreement or understanding that the first person will:

(i) compound or conceal an offence; or

(ii) abstain from, discontinue or delay a prosecution for an offence; or

(iii) withhold evidence of an offence; and

(c) the offence referred to in paragraph (b) is an indictable offence against a law of:

(i) the Commonwealth; or

(ii) a Territory.

Penalty: Imprisonment for 3 years.

(2) Absolute liability applies to the paragraph (1)(c) element of the offence.

In this instance, the 'benefit' for workers may be perceived as retaining their employment.

The 'agreement or understanding' reached would be the alleged request made by the Department for workers to change their incident reports, thus 'withholding evidence of an offence'.

The types of sexual offences which have been described in the Moss Review are likely to constitute an indictable offence.

We submit that if these allegations are substantiated, that they are very serious indeed. If substantiated, the Department is compromising not only its own integrity (and liability), but is also encouraging the criminal liability of workers who fail to comply with statutory obligations to report abuse.

So too, s90B of the *Crimes Act* 1914 (Cth) may also be relevant:

'A person who:

(a) in a document that, under a law of a Territory, is, or is required to be, **produced or furnished to**, or filed or lodged with, a **Commonwealth officer**; or

(b) in a document that is required to be registered under, or to

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be **prepared for the purposes of, a law of a Territory;**

intentionally makes a statement that the person knows is false shall be guilty of an offence.

Penalty: Imprisonment for 2 years.'

CONCLUSION

We submit that the Commonwealth has a duty of care that is non-delegable to ensure that reasonable care is taken regarding asylum seekers' safety in Nauru.

The Commonwealth's own *Immigration Detention Standards* make provision that the Department has 'ultimate responsibility' for detainees.

The extent of allegations revealed within the Moss Review are shocking and abhorrent. Breach of duty is a factual issue. The Moss Review, and the Open Letter to the Australian People, we anticipate, will be utilised in litigation to come.

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