Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

The incident at Manus Island

Non-delegable duty of care

Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the incident at Manus Island

2 May 2014

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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]

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | **F** - +61 2 9258 7777 | **E** - enquiries@lawyersalliance.com.au | **W** - www.lawyersalliance.com.au

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INTRODUCTION

The Australian Lawyers Alliance welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee in its inquiry into the incident that took place on Manus Island between 16 to 18 February 2014.

This incident led to the tragic and untimely death of Reza Berati, a 23 year old Iranian man attempting to start a new life in Australia, and the injury of more than 60 asylum seekers. We note that eyewitnesses have reported to the ABC that ten to fifteen G4S staff were involved in the brutal beating of Reza Berati that led to his death: two Australian staff; the rest PNG locals.[2]

We believe that the Australian government has a non-delegable duty of care at common law to those imprisoned in detention centres offshore: both at Manus Island and Nauru.

In our submission, we will address term of reference (k) the Australian government's duty of care obligations and responsibilities; and briefly address (l) refugee status determination processing and resettlement arrangements in Papua New Guinea.

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

SUMMARY

We believe that the Australian government has a non-delegable duty of care existing at common law to those imprisoned in detention centres offshore.

We believe that the powers of the Australian government acknowledged within the original Agreement indicate that Australia is the true authority bound by a common law duty of care owed to prisoners that are detained, and not PNG.

We believe that the Australian government may be held vicariously liable for any failure to take reasonable care, undertaken via the use of services of contractors.

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | **F** - +61 2 9258 7777 | **E** - enquiries@lawyersalliance.com.au | **W** - www.lawyersalliance.com.au

THE AGREEMENTS SIGNED BETWEEN AUSTRALIA AND PAPUA NEW GUINEA

We note that in 2012, the then Minister for Immigration, the Hon. Chris Bowen, designated that Papua New Guinea is a regional processing country under s198AB(1) of the *Migration Act 1958* (Cth).

A number of memoranda have been signed between the Government of Australia and the independent state of Papua New Guinea, including:

- *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the Transfer and Assessment of Persons in Papua New Guinea and Related Issues* (signed 8 September 2012) ('2012 MOU');
- *Regional Resettlement Arrangement between Australia and Papua New Guinea* (signed 19 July 2013) ('the Regional Resettlement Arrangement');[3]
- *Joint Understanding Between Australia and Papua New Guinea on further bilateral cooperation on health, education and law and order* (signed 19 July 2013).[4]
- *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues* (signed 6 August 2013)('2013 MOU'), which supports the Regional Resettlement Arrangement and supercedes the MOU signed in 2012.[5]

We note that significant departures exist between the 2012 MOU and the 2013 MOU, which now supercedes it, include the deletion of the following crucial paragraphs [emphasis added]:

- 'All activities in relation to this MOU will be **conducted in accordance with international law** and the international obligations of the respective Participant.'[6] (deleted from 'Guiding Principles')
- 'The Government of Australia will make all efforts to ensure that all persons entering PNG under this MOU will have **left 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.'[7] (Clause 1 provides that

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | F - +61 2 9258 7777 | E - enquiries@lawyersalliance.com.au | W - www.lawyersalliance.com.au

- **Australia undertakes** for the purpose of this MOU **to arrange for the resettlement or transfer from PNG of all persons** entering PNG under this MOU.'[8]

The Regional Resettlement Agreement signed on 19 July 2013 acknowledged that it is a 'unique agreement'.

The Regional Resettlement Agreement indicates the Australian government's significant management power in the establishment and conduct of the Manus Island detention centre. This includes the power to transfer individuals (where Australia 'may transfer' and PNG 'will accept'); contracts with service providers; return of individuals who seek voluntary return; all financial costs of the project without cessation; strategic direction and vision, as evidenced by the following provisions:

> *The regional processing centre will be managed and administered by Papua New Guinea under Papua New Guinea law, with support from Australia.*[9]
>
> *Australia will provide support, through a service provider, to any refugees who are resettled in Papua New Guinea or in any other participating regional, including Pacific island, state. Australia will also assist Papua New Guinea in effecting the transfer of those transferees who seek return to their home country or country where they have right of residence.*[10]
>
> *Australia will bear the full cost of implementing the Arrangement in Papua New Guinea for the life of the Arrangement. If this requires additional development of infrastructure or services, it is envisaged that there will be a broader benefit for communities in which transferees are initially placed.*[11]
>
> *Australia will work with Papua New Guinea to expand the Manus Island Regional Processing Centre and will also explore with Papua New Guinea the possible construction of other Regional Processing Centres and other options.*[12]

The powers of the Australian government in this instance do not appear to be of two equally positioned parties entering into a contract, but one of dire inequality.

The Australian aid program had a proposed expenditure in 2013/14 of $527.7 million. Australia has also invested $1.372 billion in PNG's development over the previous three years.[13]

The Regional Resettlement Arrangement was also signed on the same day (19 July 2013) as the Joint Standing on Further Bilateral Cooperation, which ensured Australian support for PNG in the areas of health, law and order, education and

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | F - +61 2 9258 7777 | E - enquiries@lawyersalliance.com.au | W - www.lawyersalliance.com.au

infrastructure.

Furthermore, any financial gains that the PNG government could have made via the agreements were waived via the exemption of all equipment from PNG import and excise duties.[14]

We question as to how the PNG government could reasonably have rejected Australia's request to establish a detention centre at Manus Island for asylum seekers, given the large quantities of development assistance that were offered in tandem with the agreement.

NON-DELEGABLE DUTY OF CARE

We believe that the responsibility of the Australian government of asylum seekers currently detained at Manus Island and Nauru is a non-delegable duty of care.

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.'[15]

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 *Anastasios Kondis v State Transport Authority* (1984) CLR 672*; Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 and *Northern Sandblasting v Harris* (1997) 188 CLR 313. We will also refer to the UK case of Woodland v Essex County Council [2013] UKSC 66.

***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

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | F - +61 2 9258 7777 | E - enquiries@lawyersalliance.com.au | W - www.lawyersalliance.com.au

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 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].[16] 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*.

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | F - +61 2 9258 7777 | E - enquiries@lawyersalliance.com.au | W - www.lawyersalliance.com.au

(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 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

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | F - +61 2 9258 7777 | E - enquiries@lawyersalliance.com.au | W - www.lawyersalliance.com.au

> 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".'

The 'common element of control' and 'special vulnerability' can be seen in both the powers of the Australian government evidenced within the Agreements with Papua New Guinea; and in the vulnerability of asylum seekers detained within the Manus Island detention centre, where they have been and are vulnerable to danger in the failure of reasonable caution taken over the premises.

***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".'[17]

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

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | F - +61 2 9258 7777 | E - enquiries@lawyersalliance.com.au | W - www.lawyersalliance.com.au

in bold by the Australian Lawyers Alliance:

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

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | F - +61 2 9258 7777 | E - enquiries@lawyersalliance.com.au | W - www.lawyersalliance.com.au

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 contractor whom he employs to perform that task. Moreover, if the task

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | F - +61 2 9258 7777 | E - enquiries@lawyersalliance.com.au | W - www.lawyersalliance.com.au

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."

***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.

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*

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | F - +61 2 9258 7777 | E - enquiries@lawyersalliance.com.au | W - www.lawyersalliance.com.au

Lepore (2003) 212 CLR 511.

OBLIGATIONS AT COMMON LAW TO PRISON AUTHORITIES TO EXERCISE REASONABLE CARE

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 events at Manus Island that led to the death of Reza Berati, and the physical and psychological injury of others detained.

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**[18]

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 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

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | F - +61 2 9258 7777 | E - enquiries@lawyersalliance.com.au | W - www.lawyersalliance.com.au

> (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 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]

***New South Wales v Bujdoso* [2005] HCA 76**

In this case, Mr Budjoso had been convicted of sex offences against minors. After

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | F - +61 2 9258 7777 | E - enquiries@lawyersalliance.com.au | W - www.lawyersalliance.com.au

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 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**."

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
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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 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.**

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
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> 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 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.**

***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

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> direction. These considerations often assume their importance in the responsibility to control the violence of third parties, 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."

The same principles would appear to apply to those in immigration detention.

WAS REASONABLE CARE TAKEN LEADING UP TO THE INCIDENT?

We note that Lieutenant General Angus Campbell, commander of the government's Operation Sovereign Borders, told the government that the security at the detention centre was not appropriate, and recommendations for change were issued in November 2013. These included major upgrades to security; the installation of CCTV cameras; lighting and better fencing. Not one of these changes had been implemented.

Fairfax Media reported that:

> 'Witnesses to the brutal attack, who have spoken to Fairfax Media, say the fencing was so unstable it was pushed over by PNG nationals, including those employed as security guards; and there were major power outages just before the violence causing confusion and panic among asylum seekers.
>
> There is also no suggestion that any of the violence was captured on CCTV footage during February 16 and 17.'[19]

While the government has undertaken a number of reviews, there has also been a clear lack of action to take reasonable care regarding recommendations made.

Fairfax Media reports that:

> 'When Scott Morrison came into power as Immigration Minister in September, he ordered a "full force protection assessment to be undertaken at all offshore processing centres and at Christmas Island." The order, he said at the time, was based on his own "concerns about the status of security arrangements and adequacy of security infrastructure put in place by the former government."
>
> The review was to be undertaken by Lieutenant Campbell, who was to look at any "weaknesses that could be exploited or whether there are potential threats against the centre from within and outside in particular".

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> Now, nearly six months since that final assessment was handed down, an order has reportedly been placed for prison-grade perimeter fencing.
>
> In a statement on Tuesday night, Mr Morrison's office said: "The need for such an immediate assessment was necessitated by the clearly unsuitable state of infrastructure and security arrangements on Manus Island put in place by the previous government.
>
> "In November, following completion of the review the minister authorised implementation of all recommendations and secured funding to enable their implementation."' [20]

We note that whistleblowers have commented[21] upon inadequate conditions at the Manus Island detention centre including:

- **Inappropriate fencing**: 'a chain mesh fence about six foot high held up by steel posts was the only thing separating detainees from the local population who lived some 200 metres away. It didn't have razor wire, it didn't have barbed wire, it was basically there. If they wanted to stay there they stayed there, if they didn't it wouldn't have been hard to get over. It provided a visual barricade, a physical barricade it probably wouldn't last very long if some angry people got hold of it and wanted to push it over."
- **Inadequately trained staff: "**the vast majority of [locals from the island] had no security experience,";
- **Understaffing**: "If there was any sort of incident then basically you're talking you know hundreds and hundreds against probably ten or twenty [security staff],";
- **Inadequate monitoring**, with expectation that there was a person that was rostered on to be the cameraman for any 'incident';
- **Inadequate preparation in the event of an emergency**: 'The only problem is that your inner area [of the detention centre] really isn't contained, because you've got very low level fences, so to do a room clearance drill was all fantastic but where do you take detainees to? Because there was nowhere to take them, there was no secure compound within the compound.' .

There have also been allegations of:

- Sexual harassment;

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- A culture of steroid use;
- Defence force officials who have fought in the Middle Eastern theatre then being deployed as staff in the detention centre, dealing with individuals of similar origins.[22]
- 'Rampant' disease, poor hygiene, lack of access to appropriate quantities of water; inadequate mental health and medical care services.[23]

Indefinite detention

Individuals at Manus Island and Nauru have not been processed, and are waiting indefinitely for resettlement. Former Salvation Army worker, Mark Isaacs, has written of the deleterious impact of indefinite detention on asylum seekers in Nauru, describing daily self harm attempts, individuals' descent into psychotic mental health episodes, and describes the centre as a 'death factory'.[24]

We note that the UN Human Rights Committee recently found that Australia was guilty of more than 150 violations of international law over the indefinite detention of 46 refugees that had been the subject of negative assessments by ASIO.[25]

The High Court has previously held that the Federal government can detain rejected asylum seekers indefinitely under the 'aliens power' of s51 (xix) of the Constitution, in the cases of *Al Kateb v Godwin* [2004] HCA 37; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] HCA 38; and *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous* [2004] HCA 36.

However, the findings of the United Nations in relation to the indefinite detention of 46 refugees appear to highlight that the extensive powers of the Executive are at severe odds with Australia's international obligations. As warned by Kirby J in the minority in *Al-Kateb* [at 148]: this raises 'grave implications for the liberty of the individual in this country which this court should not endorse'.

However, the High Court is yet to consider the issue from a perspective of a non-delegable duty of care.

REFUGEE STATUS DETERMINATION PROCESSING AND RESETTLEMENT ARRANGEMENTS

We note that it has been announced that individuals in detention on Manus Island may be resettled in PNG, with resettlement to commence potentially in June 2014.[26]

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Resettlement arrangements are still being looked into by an expert panel in PNG, which is due to report back this week with recommendations.[27]

While announcements have been made that individuals will receive visas with work rights and freedom of movement[28], it has not yet been revealed as to the time period of such visas.

We note that recently, arrangements surrounding the resettlement of people imprisoned in Nauru were leaked to the media.[29]

These arrangements were grossly unsatisfactory, for a number of reasons:

- Prejudice against people who have committed a 'protest activity' where participating in protests will cause the Government of Nauru to not consider a person to be of good character. Even if people are assessed to be a refugee, if they have participated in 'protest activity', they will not be resettled in Nauru.
- Individuals are given 'a few days' to consider whether they would like to appeal a negative refugee assessment made to the relevant Tribunal.
- Lack of access to genuine review in the Supreme Court of Nauru, with no access to legal representation and with all costs to be self-supported;
- Five years settlement in Nauru only, ensuring temporary protection of individuals only.
- No provision for the protection of families of persons currently detained in Nauru.

It is possible that similar arrangements may be recommended for individuals currently detained in PNG.

At their core, these arrangements are inappropriate as they shirk Australia's responsibility to assist refugees seeking protection. No one will be resettled in Australia.

REASONABLE CARE FOLLOWING THE INCIDENT

We acknowledge that lawyers have lodged a writ, alleging crimes against humanity by both the Australian and Papua New Guinean governments, and that individuals were forcibly deported in violation of article seven of the Rome Statute of the International Criminal Court.

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It has also been alleged that people are 'being involuntarily detained in torturous, inhumane and degrading conditions including being exposed to possible murder, attempted murder, threats to kill, threats of cannibalism, grievous bodily harm and obviously the very unfit living conditions and that people are being detained without access to any legal representation or to the right to judicial review or a fair hearing.'[30]

We note also that it is alleged that local guards at the centre have made death threats against the five witnesses, with lawyers appealing that the individuals concerned should urgently be placed in protective custody in Australia.[31]

The fact that such action has had to be taken indicates strong concern that a duty to take reasonable care is not being undertaken in a period of heightened threat following the incident. This appears to follow the factual situation in the case of *New South Wales v Bujdoso* [2005] HCA 76.

CONCLUSION

Under the Refugee Convention, the Australian government has a clear obligation to uphold the rights of those seeking asylum.

We are disappointed at the government's attempts to shirk its responsibility and circumvent its obligations via building an outsourced detention network set up with rudimentary and sub-standard accommodation, facilities and access to review, throughout the underdeveloped nations in the Asia-Pacific.

The incident at Manus Island was an unfortunate tragedy. It didn't need to happen.

We believe that the Australian government will ultimately be held liable for its action and inaction in this area.

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