



The Chair and Members
Legal and Constitutional Affairs References Committee
The Senate
Parliament of Australia
CANBERRA ACT 2000

By email: legcon.sen@aph.gov.au Attention: Sophie Dunstone

Dear Chair and Committee Members,

This submission addresses the following:

- **Inquiry into incident, Manus Island Detention Centre, 16 to 18 February 2014**
- **Death of Reza Berati, Iranian national and asylum seeker in Australian custody, and Australia's failures to respect Mr Berati's human rights and to protect to him**
- **The Australian Government's duty of care obligations and responsibilities (k)**
- **Refugee status determination processing and resettlement arrangements in Papua New Guinea (l)**
- **Any other related matters (m), and**
- **Addendum: Children may be caught up in riots or similar situations**

Civil Liberties Australia thanks the Committee for the opportunity to make the following points relevant to the terms of reference.

The legalities of arrangements between Australia and Papua New Guinea concerning the detention of asylum seekers on Manus Island do not solely delineate Australia's responsibilities to Mr Reza Berati, 23, an architect and an asylum-seeking Kurd from Iran (and other asylum seekers).

Australia cannot through legislation and policy escape its responsibility to apply moral and ethical codes, and international conventions.

Australia has put in place extraordinary physical and legal measures for dealing with asylum seekers: along with them goes the heaviest onus to ensure the safety of people subject to the measures.

From the moment of his being detained by Australia, in substance Mr Berati was at all times, including at the moment of his death, in Australia's effective over-arching custody and control:

- the primary responsibility for his safety and wellbeing at all relevant times rested with Australia;
- the primary responsibility for ensuring that his death in an Australian-derived facility is properly investigated, and that his attackers are brought to justice, rests with Australia.

Mr Berati's right to life and wellbeing

Whatever Mr Berati's reasons for making his way to Australia, whether he was a genuine refugee or not, and whatever the conditions in which he was held while his asylum claims were being considered, it is indisputable that Australia detained him originally, and held the power of detention over him, offshore or onshore, when he met a violent death.

Australia, having also created those conditions of detention on Manus Island into which it delivered and confined him, owed him a duty to ensure his safety, good health and wellbeing. Mr Berati had a right to life that Australia, as his custodian, had a duty to protect.

It is self evident Australia did not protect Mr Berati or ensure adequate measures were in place to safeguard him from attack on the day he died. Australia's failure in this duty led directly to Mr Berati being attacked and murdered by persons unknown but whom media reports and eyewitness accounts suggest included Manus Island locals and detention centre staff¹.

CLA considers Australia has denied Mr Berati his right to life, good health and wellbeing.

CLA views with concern that at the time of writing, no one has been charged with any offence in connection with his death. CLA is particularly concerned that no significant change of policy or practice in managing the detention centres (Manus Island, and others) has apparently been introduced, and that Australia has not instituted any major change in how it conceives, organises, contracts and supervises its offshore detention places. There has been no onshore detention centre review, apparently, as to whether risks have increased due to the numbers now being detained, and the changed circumstances in which they are held.

Mr Berati's right to be kept safe and have his asylum claims properly considered

The conditions in which Mr Berati were held in part led to his death: if Mr Berati had been received into Australian custody five days earlier, before the Manus Island detention centre became an option open to the government, he would not have died. No-one involved in a riot has been killed due to staff or nearby residents of the detention centre on Christmas Island, for example.

The Australian government chose to place Mr Berati in an increased risk of danger to his health and wellbeing by locating him remotely from Australia.

¹ See for example ABC *Lateline* news report 5 April 2014 and Fairfax news reports, 22 April 2014 including video of guards attacking prisoners.

The events of 16 to 18 February 2014 demonstrate that Mr Berati was – and the remaining inmates continue to be – at risk to with regard to their safety, health and well being.

The conditions on Manus Island were also inimical to any proper consideration of Mr Berati's case for asylum. There was no reason to think Mr Berati posed a risk to the Australian community. Indeed as a qualified professional, he represented a considerable potential asset to Australia.

Mr Berati's arbitrary and unreasonable treatment

Given he posed no risk to Australia, Mr Berati should have been admitted to Australia and remained at liberty in the community while his claims were considered. Thus his apprehension and detention on Manus Island were both arbitrary and unreasonable, exposed him to greater risk of physical and mental harm and endangered his life.

Since Mr Berati was arrested/captured by Australia, Australia and not PNG was responsible and remained responsible for his wellbeing, and for the consideration and determination of his asylum application. Australia cannot absolve itself of that responsibility for people it has detained at sea no matter to where Australia might decide to transport them.

Having confined him on Manus Island, Australia remained responsible to ensure Mr Berati could apply for protection and have his claims considered and dealt with meaningfully. But on Manus Island, his case for asylum could not be dealt with meaningfully because:

- In the Manus Island detention facility, he did not have access to legal advice and representation, and – demonstrably – he was not being kept safe by Australia. So he could not effectively present a meaningful case; and
- PNG had, at the time of Mr Berati's detention and death, no established apparatus for assessing asylum claims and no realistic prospect of resettling refugees. So any consideration of his case would have been inadequate and any resettlement postulated would have been illusory.

Australia's treatment of asylum seekers more generally

These comments about the conditions in which Mr Berati was detained also apply to every asylum seeker detained offshore by Australia, in the past, now, or in the future. Australia has a moral and ethical duty – as well as a legal duty under the Refugee Convention – to any asylum seeker we apprehend and detain within Australia or externally. If Australia's duties with respect to asylum seekers were delineated solely by legalities, there would be no occasion or reason for this Committee's inquiry, since Mr Berati seems at all times to have been subject to Australian and PNG law and administrative arrangements between the two governments. The fact of the inquiry is acknowledgement by the Senate and political parties that there is a profound moral dimension to the question of how Australia should deal with asylum seekers and refugees. In the past, a bipartisan Australia proudly recognised, post-

World War Two, the need to receive refugees openly and humanely, to advocate in support of the original Refugee Convention and to among the first signatory nation to that document.

Call for reconsideration in the shadow of death

In the shadow of Mr Berati's death, Australia must reconsider current policy for dealing with asylum seekers and review arrangements to ensure the safety and wellbeing of asylum seekers confined on Manus Island and other offshore locations. Australia also has a clear responsibility to ensure Mr Berati's attackers are charged and dealt with and a duty to compensate Mr Berati's family for its failure to protect him.

Australia's professed adherence to the Refugee Convention, while in practice pursuing punitive measures that can fairly be characterised as crude circumvention of its treaty obligations, exposes Australia to international criticism and ridicule. Such a stance is also at odds with Australia's principled reliance on international treaties in its recent successful case against the Japanese whaling program, in the International Court of Justice.

As well as respecting international law, Australians expect their government to show moral leadership in human rights. Successive governments' abrogating the human rights of asylum seekers and refugees, implementing punitive measures that continue to expose asylum seekers to danger, and manipulating the plight of refugees for domestic political advantage fall well short of those expectations.

Mr Berati's death provides the chance to review the conditions under which asylum seekers are detained, and an opportunity to reform Australia's immigration policy so that it truly respects the human rights of refugees which underpin the Refugee Convention. Beyond any legal considerations, the moral and ethical question is: Did Mr Berati receive a fair go from Australia? The answer is 'No'.

Mr Berati's death makes the question easy to answer in his case...but the same answer applies to the situations of all other refugees Australia has placed in detention in offshore places. Australia must adjust refugee policy until we are giving asylum seekers a fair go.

Civil Liberties Australia makes the following comments on specific inquiry headings:

The Australian Government's duty of care obligations and responsibilities (k)

While the Australian Government has established off-shore processing centres for asylum seekers attempting to arrive in Australia by boat, this does not diminish or remove the Australian Government's duty of care obligations and responsibilities to those asylum seekers and refugees.² As a signatory to international covenants and conventions, the Australian Government remains responsible for those who seek asylum in Australia.

Of primary concern is the mandatory arbitrary detention of asylum seekers who arrive by boat. The Australian Government has obligations and responsibilities toward asylum seekers which include the right not to be arbitrarily detained. These rights are articulated in international documents to which Australia is a signatory and include the International Covenant on Civil and Political Rights (ICCPR); the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and the Convention on the Rights of the Child (CRC). Arbitrary detention is prohibited for well-founded reasons.

The practice of mandatory, arbitrary detention has been shown to be a direct cause of mental health problems such as depression, anxiety and post traumatic stress disorder among asylum seekers. Many of them have undergone torture and trauma which has caused them to seek asylum.

Putting them in indefinite detention within remote off-shore detention centres such as Manus Island exacerbates existing mental health problems and directly contributes to their development according to medical professionals such as the Australian Medical Association (AMA) and the Royal Australian and New Zealand College of Psychiatrists (RANZCP).³

Furthermore, the United Nations Human Rights Committee (UNHCR) has found that mandatory detention subjects asylum seekers to cruel, inhumane or degrading treatment by continuing to place them in circumstances which are known to contribute to mental illness.⁴

The current government's decision to disband the Immigration Health Advisory Group (IHAG) has worsened the situation further. This decision has ensured there is little or no access to medical professionals such as general practitioners, psychiatrists and psychologists and a lack of truly independent monitoring of asylum seekers' mental health.⁵ This clearly contravenes the duty of care the Australian Government has to vulnerable people who have sought our help and puts us in breach of our obligations and responsibilities.

²The United Nations High Commissioner for Refugees (UNHCR) and the President of the Australian Human Rights Commission, Gillian Triggs, have confirmed that Australia and Papua New Guinea have shared responsibility.

³ <https://ama.com.au/ausmed/depression-anxiety-soars-among-asylum-seekers>, https://www.ranzcp.org/Files/Resources/College_Statements/Position_Statements/ps46-pdf.aspx, retrieved 20 April 2014.

⁴ Australian Human Rights Commission, Asylum seekers, refugees and human rights Snapshot report 2013.

⁵ <https://ama.com.au/ausmed/govt-drops-shutters-asylum-seekers-health>, retrieved 20 April 2014.

The indefinite nature of arbitrary detention also contributes to mental health problems among asylum seekers and, according to the Australian Human Rights Commission, places Australia in breach of its obligations and responsibilities.⁶ Currently asylum seekers in remote locations such as Manus Island exist with uncertainty over the length of their detention, uncertainty over their future and that of their families and uncertainty regarding the processing of their request for asylum and there does not appear to be established processing procedures.

The lack of independent monitoring and restricted access to journalists, the Australian Human Rights Commissioner and the judiciary mean that asylum seekers in Manus Island have no recourse if their human rights are abused which has happened in the death of Reza Barati and the other asylum seekers who were injured.

Mandatory, arbitrary detention is also discriminatory as it depends on how asylum seekers arrive. Those who arrive by boat are treated differently to those who arrive by plane. This again places Australia in breach of human rights as it is signatory to international conventions, including the United Nations Refugee Convention, which require the protection of human rights of asylum seekers and refugees irrespective of how they arrive and whether or not they come with valid visas or identity documents.

Rather than being individually assessed, asylum seekers who arrive by boat are automatically placed in mandatory detention with little or no likelihood that they will ever be resettled in Australia. This is despite the Department of Immigration's own figures showing that 90% of asylum seekers who came by boat in the March quarter 2013 were found to be genuine refugees.⁷ Mandatory, arbitrary detention is inconsistent with individual assessment. Assessing asylum seekers individually would help to ensure that their human rights were upheld.⁸

Human rights organizations and committees, refugee advocacy organizations, religious organizations and multiple inquiries have repeatedly found that the Australian Government's mandatory, arbitrary and indefinite detention of asylum seekers and refugees in remote locations such as Manus Island is in breach of their human rights as mandated in multiple international documents to which Australia is a signatory. The tragedy in which one life was lost and many people were injured, some critically, clearly shows that Australia has failed in its duty of care. As has been revealed by the Sydney Morning Herald in an article and video, personnel for whom the Australian Government is responsible played a major role in the tragedy.⁹ The lack of judicial oversight, independent monitoring and public transparency suggests that such incidents are likely to recur.

6

https://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2011/201108_immigration.pdf, retrieved 20 April 2014.

⁷ http://www.immi.gov.au/media/publications/statistics/asylum/_files/asylum-stats-march-quarter-2013.pdf, retrieved 20 April, 2014.

⁸ Australian Human Rights Commission, Asylum seekers, refugees and human rights Snapshot report 2013.

⁹ <http://www.smh.com.au/federal-politics/political-news/reza-barati-death-papua-new-guinea-nationals-attacked-asylum-seekers-on-manus-island-20140421-zqxai.html>, retrieved 25 April 2014.

In order to prevent future tragedies, restore human rights and commit to the duty of care obligations and responsibilities inherent in our international obligations, it is imperative that the practice of off-shore mandatory detention be reviewed. As a proud multi-cultural country we owe it to ourselves and asylum seekers to treat them with dignity, respect and compassion.

Refugee status determination processing and resettlement arrangements in PNG (I)

As of 21 February 2014 there were over 1300 asylum seekers being held on Manus Island.¹⁰ The current policy is that no asylum seeker who arrives by boat will be resettled in Australia and that many of those who are transferred to Manus Island will be resettled in Papua New Guinea, a poor country which struggles to look after its citizens. According to the United Nations Development Index which measures availability of education, average life expectancy and national per capita income, Papua New Guinea ranks 156th in the Asia Pacific; Australia ranks second.¹¹

Thus it is not surprising that the UNHCR raised serious issues regarding the processing and resettlement arrangements for asylum seekers on Manus Island during their visit in January 2013. These include:

- The lack of a national legal framework in Papua New Guinea under which asylum seekers claims can be assessed;
- The lack of capacity, experience and expertise to process these claims;
- The delays and uncertainty about the process which contributes to the mental and physical health problems among asylum seekers.¹²

The issue of whether the process of refugee status determination in Papua New Guinea is consistent with international human rights standards has recently been raised by Amnesty International.

Amnesty International Australia's refugee spokesperson has called upon both Australia and Papua New Guinea to confirm that human rights standards are being adhered to. In addition, he has expressed concern regarding the safety of refugees that might be resettled in Papua New Guinea, given the violence that occurred from 16-18 February 2014, the subject of this inquiry.¹³

With few details from both the Australian and Papua New Guinea government, it is not possible to accurately assess the refugee status determination processing and resettlement

¹⁰ <http://newsroom.customs.gov.au/channels/operational-updates/releases/operational-update-21-february> accessed 18 April 2014.

¹¹ <http://www.amnesty.org.au/refugees/comments/32355/>, retrieved 23 April.

¹² UNHCR Mission to Manus Island, Papua New Guinea 15-17 January 2013.

¹³ <http://www.amnesty.org.au/news/comments/34284/>

arrangements in Papua New Guinea. There have been conflicting and mixed messages from both countries. However, as the UNHCR continues to oppose the agreement between Australia and Papua New Guinea to resettle asylum seekers it seems certain that the human rights of asylum seekers and refugees are of little concern to either government.¹⁴

Any other related matters (m)

The language used by the Australian Government:

Language construes the way we view the world as it both reflects and constructs our reality. The Australian Government's use of demonizing and denigrating language towards asylum seekers who arrive by boat is deliberate. It is a contributing factor towards how asylum seekers are viewed and treated by those who are responsible for them and how many Australians view them.

The following are just a few examples of the Australian Government's vilification of asylum seekers who attempt to arrive by boat:

- Describing asylum seekers who arrive by boat as, 'illegal';
- Denigration of asylum seekers as, 'people who are attempting to break Australian law';¹⁵
- Minister Morrison's directive to his department and detention centre staff to refer to asylum seekers as, 'illegal maritime arrivals', clients as 'detainees' if they are on shore and 'transferees' if they are offshore;¹⁶
- The use of military language such as Operation Sovereign Borders in relation to asylum seekers.

It is not illegal to seek asylum as the Australian Government knows. Prime Minister Abbott was incorrect when he attributed law breaking to asylum seekers. If the Australian Government's ostensible aim of saving lives through its off-shore processing approach was genuine, it would use language that respects asylum seekers and their situation. Why not call asylum seekers asylum seekers?

The aim of the Australian Government's language is to dehumanize desperate and vulnerable people for whom we should rightly feel sympathy. This approach reduces the Australian public's humanity, compassion and empathy. The language used creates an

¹⁴ <http://www.smh.com.au/federal-politics/asylum-seeker-resettlement-deals-not-just-about-safety-unhcr-20140425-zqz1v.html>, retrieved 25 April 2014.


¹⁵ <http://www.abc.net.au/news/2014-01-24/tony-abbott-incorrect-on-asylum-seekers-breaking-australian-law/5214802>, retrieved 25 April 2014.

¹⁶ <http://theconversation.com/calling-a-boat-person-a-spade-australias-asylum-seeker-rhetoric-19367>, retrieved 25 April 2015.

artificial threat of more asylum seekers than can be resettled here which is contradicted by the number of asylum seekers seeking to come to Australia. Australia is a nation that has thrived through welcoming asylum seekers and immigrants. The deliberate use of language to demonize asylum seekers is immoral, unprincipled and shameful. Australians deserve better.

Yours sincerely

Dr Kristine Klugman OAM
President

 Civil Liberties Australia A04043
Box 7438 Fisher ACT Australia
Email: [secretary \[at\] cla.asn.au](mailto:secretary[at]cla.asn.au)
Web: www.cla.asn.au
30 April 2014

Lead authors: Joan Greig, Umberto Torresi; associate author: Bill Rowlings

See Addendum over page...

Addendum – from Civil Liberties Australia:

Children:

A similar tragedy to that of the Manus riot, involving children, is inevitable if Australia continues to detain children of refugee claimants and the child crew members of Indonesian vessels.

There is no Australian law or international convention which approves the jailing of children innocent of crime in prisons or prison-like facilities. Australia clearly breaches our desired standards of morality when we imprison innocent children, including toddlers and babies. It is irrelevant whether they are held “onshore” or “offshore”: morality is not location-specific.

There is also no justification for treating under-age Indonesian boat crew members as adult criminals. It is scientifically and legally unacceptable to imprison child-like Indonesian boat crew based on the imprecise measure of a wrist x-ray. Of the more than 100 Indonesian boat crew currently being imprisoned, it is possible that most are children under Australian law. If in doubt, the default should be to treat such individuals as children rather than as adults.

Recent media comments accurately portray the depths to which Australia’s immigration policy has sunk since it stopped being bipartisanly humane and became a political point-scoring pendulum:

...the inescapable conclusion is that this (the Manus riot) was the consequence of the decisions of both the major parties in Australia to send asylum seekers to a remote island, detain them indefinitely in harsh conditions, give them no certainty about how and when their claims for refugee status would be determined and insist they would never be able to leave PNG unless they returned to the countries they had fled.

– Michael Gordon, political editor, *The Age*

<http://www.smh.com.au/federal-politics/political-news/the-manus-island-escape-plan-that-went-badly-wrong-20140421-zqxaj.html>

Nauru is breaching its international obligations by failing to establish an independent body to investigate torture and human rights abuses in the detention centre. The Nauruan government has also refused access to several United Nations groups wanting to inspect the centre. Questions have been raised about Australia's "disintegrating" (sic) relationship with the small island nation, which houses 1179 asylum seekers, and whether it is also breaching international standards by continuing to send people there.

– Lisa Cox and Sarah Whyte, *Sydney Morning Herald*

<http://www.smh.com.au/federal-politics/political-news/nauru-breaching-international-law-says-un-20140421-zqxe8.html>

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