MONASH University
Castan Centre for Human Rights Law

Castan Centre for Human Rights Law

Monash University

Melbourne

Submission to the

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

April 2015

Prepared by Dr Azadeh Dastyari
(with research assistance provided by Ms Alessandra Di Natale, Ms Lena Lettau and Ms Madeleine Lynch)

The Castan Centre for Human Rights Law welcomes the opportunity to make a submission to the Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru. The Castan Centre's mission includes the promotion and protection of human rights. The report on the Regional Processing Facility in Nauru by Philip Moss (Moss report) outlines numerous allegations that are deeply concerning and suggest grave violations of the human rights of asylums seekers. The allegations are also likely to constitute a tort under Australian municipal law and suggest a failure in the duty of care owed by the Commonwealth government to asylum seekers detained in Nauru.

These allegations include sexual assault (including sexual exploitation in exchange for access to showers and other amenities); rape and threats of rape; indecent assault and sexual harassment; indecent exposure; and the physical assault of detainees. Allegations involving children are particularly troubling because of the vulnerability of children at the detention centre. These allegations include sexual assault of children including the alleged rape of a girl by a Nauruan contract service provider staff member; the sexual harassment of children; incidents of sexualised behaviour by children; and the physical assault of children.

This submission seeks to outline some of our concerns with regard to the failure of the Commonwealth Government to meet its responsibilities in connection with the management and operation of the Regional Processing Centre in Nauru. This submission will focus on the following terms of reference:

> c) the Commonwealth Government's duty of care obligations and responsibilities with respect to the Centre;
>
> g) any related matters.

The Commonwealth Government's Non-Delegable Duty of Care under Australian Domestic Law

The Commonwealth government has a non-delegable duty of care to asylum seekers in immigration detention.[1] The Commonwealth has acknowledged that 'ultimate responsibility for [immigration] detainees remains with [the Department of Immigration] at all times'.[2] This non-delegable duty of care means that the Commonwealth cannot discharge its duty to detainees through privatisation or other arrangements. The non-delegable duty of care arises because the 'Commonwealth is in a position of control [and detainees] cannot reasonably be expected to safeguard themselves from danger'.[3]

Extraterritoriality and privatisations

The Commonwealth government's non-delegable duty of care to asylum seekers in immigration detention extends to detainees in Nauru. That is, the Commonwealth cannot be absolved of its non-delegable duty of care to asylum seekers in an immigration detention facility in another sovereign country. This is because the Commonwealth continues to exercise 'a central element of control'[4] over the lives of asylum seekers and their detention in Nauru.

The current Memorandum of Understanding in operation between the governments of Nauru and Australia[5] states under Clause 4 that 'the Commonwealth of Australia will conduct all

---

1 *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 217, [195]-[203], [207]-[213].

2 Department of Immigration and Multicultural Affairs, Immigration Detention Standards, 2002 < http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jfadt/idcvisits/idcapph.pdf>. See also *Shayan Badraie By His Tutor Mohammad Saeed Badraie v Commonwealth of Australia and Ors* [2005] NSWSC 1195, [25].

3 *MZYYR v Secretary, Department of Immigration and Citizenship* (2012) 129 ALD 331, [55].

4 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 551.

5 Republic of Nauru and Commonwealth of Australia, Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru and Related Issues (Intergovernmental Agreement, 3 August 2013).

activities in respect of this MOU in accordance with its Constitution and all relevant domestic laws.'

Australia retains a high degree of control under the MOU. Clause 6 of the MOU provides that 'the Commonwealth of Australia will bear all costs incurred under and incidental to this MOU as agreed between the Participants.' Furthermore, clause 7 of the MOU states that the 'Commonwealth of Australia may Transfer and the Republic of Nauru will accept Transferees from Australia under this MOU.'

The Moss report highlights the high degree of control exercised by the Commonwealth in the detention facility in Nauru. The report demonstrates that it is Australia and not Nauru that is in charge of the day to day operation of the detention facility. For example, according to the report:

> The Nauruan operations managers play a key role as a link between the Centre and the Nauruan Government and Community. Yet they told the Review that they are not receiving enough information about the day-to-day working of the Centre, [n]or do they feel as if they are being sufficiently engaged.[6]

Nauruan operation managers, interviewed for the Moss report, believe that the reason for their lack of information and control at the centre is that 'service providers are contracted to [the Australian Department of Immigration and Border Protection (DIBP)], so they report to DIBP all the time.'[7] Nauruan operation managers believe that the information they receive from Australia is limited and not comprehensive.

The report also highlights the inadequacy and lack of control exercised by the Nauruan police force in the centre. Whilst, in theory, the Nauruan police force should have primacy in investigations of criminal matters at the centre, the report suggests that much of the 'policing' at the centre is in fact done by Transfield Services/Wilson Security, which are contracted by the Australian government and report to the Australian government. The Australian Federal

---

6 Philip Moss, 'Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru' (2015), 73 [5.3].

7 Philip Moss, 'Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru' (2015), 74 [5.8].

Police (AFP) have stated that they believe the Nauruan police force is not adequately equipped to take on primary responsibility for the investigation of criminal matters and may find it 'a bit overwhelming' were they put in a situation to get a lot of referrals.[8] The AFP also reports that the Nauruan police force 'is dealing with things it never had to deal with before'.[9] The Moss report recommends greater clarity between the roles of organisations contracted to the Australian government and the Nauruan police force.

As Finn J states in *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*, 'having made its choice of location, the Commonwealth, not the detainees, should bear the consequences of it'.[10] Finn J was referring to the provision of medical care in remote detention facilities in the Australian mainland. The same could also be said of the detention of asylum seekers in the remote detention facility in Nauru.

Furthermore, the Commonwealth cannot deny its duty of care to asylum seekers in Nauru by claiming that it has contracted Transfield Services to provide Garrison and Welfare Services at the detention centre in Nauru. Nor can it rely on any other agreements it has with its contractors in the detention facility. As was found by the High Court in *Burnie Port Authority v General Jones Pty Ltd*:

> It has long been recognised 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. [11]

---

8 Philip Moss, 'Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru' (2015), 77 [5.27].

9 Philip Moss, 'Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru' (2015), 78 [5.31].

10 *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 217, [213].

11 (1994) 179 CLR 520 at 550

In *Kondis v State Transport Authority*,[12] a majority of the High Court found that a special duty of care 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 would be exercised.[13]

The Commonwealth government has clearly undertaken the control of asylum seekers in Nauru, in circumstances where asylum seekers might reasonably expect that due care would be exercised. Asylum seekers are selected by the Commonwealth to be transferred to Nauru without their consent, and in the words of the United Nations High Commissioner for Refugees:

> it is clear that Australia has retained a high degree of control and direction in almost all aspects of the bilateral transfer arrangements. The Government of Australia funds the refugee status determination process which takes place in Nauru, seconds Australian immigration officials to undertake the processing and effectively controls most operational management issues. [14]

The Commonwealth's Duty to Care for Asylum Seekers under International Human Rights Law

In addition to owing a duty of care to asylum seekers detained in Nauru under Australian domestic law, Australia also owes asylum seekers detained in Nauru certain obligations under international human rights law.

Rights of Child Asylum Seekers under the International Convention on the Rights of the Child

---

12 (1984) 154 CLR 672.

13 Kondis v State Transport Authority (1984) 154 CLR 672, 68.

14 UNHCR, Monitoring Visit to the Republic of Nauru 7-9 October 2013 (26 November 2013) 23 [128].

The *Convention on the Rights of the Child* (CRC),[15] requires the Commonwealth to offer certain protections to children, who are defined by Article 1 of the Convention as 'human beings below the age of 18'. Australia's exercise of jurisdiction at the detention facility in Nauru triggers extraterritorial obligations under the CRC to asylum seeker children. Article 2(1) of the CRC provides:

> States Parties shall respect and ensure the rights set forth in the present *Convention* to each child *within their jurisdiction* without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.[16]

That is, in accordance with article 2(1) of the CRC, a State is obliged to 'respect and ensure' the rights enumerated by the CRC of all children in its 'jurisdiction' rather than simply in its territory. Furthermore, Australia is responsible for asylum seeker children in Nauru despite the fact that they are not Australian citizens, because article 2(1) of the CRC applies regardless of nationality or other status.

The allegations of sexual and physical abuse of children, recounted in the Moss report, suggest violations of a number of obligations under the CRC. For example Article 19(1) of the CRC provides:

> States Parties shall take all appropriate legislative, administrative, social and educational measures *to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse,* while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.[17]

Article 34 of the CRC also provides:

> States Parties undertake to protect the child from *all forms of sexual exploitation and sexual abuse.*
>
> For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

---

15 Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

16 CRC art 2(1) (emphasis added).

17 Emphasis added.

> (a) The inducement or coercion of a child to engage in any unlawful sexual activity...[18]

Claims that the Commonwealth was aware of sexual abuse allegations for 17 months but failed to act,[19] suggest a violation of Article 19(2) of the CRC which provides:

> Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

If the Commonwealth was aware of sexual abuse allegations but did not provide assistance to abused children, this would constitute a violation of Article 39 of the CRC which states:

> States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

The continuing transfer of asylum seeker children to Nauru by the Commonwealth, in the face of reports of abuse in the detention facility is a violation of Article 3 of the CRC which provides:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration.*[20]

It is also a violation of Article 6 of the CRC which provides:

---

18 Emphasis added.

19 Jason Om, 'Immigration Department aware of sexual abuse allegations against children for 17 months but failed to act, say former Nauru workers' ABC News (online), 8 April 2013 <http://www.abc.net.au/news/2015-04-07/nauru-letter-of-concern-demands-royal-commission/6374680>.

20 Emphasis added.

> States Parties shall ensure to the maximum extent possible the survival and development of the child.

The Moss report also states that many detainees 'have concerns about their privacy at the Centre'.[21] Lack of privacy was also an issue highlighted by the UNHCR in its inspection of the detention facility in 2013.[22] Lack of privacy at the detention centre in Nauru is a violation of Article 16(1) of the CRC which states:

> No child shall be subjected to… unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

The sexual and physical abuse of children is also likely to constitute cruel, inhuman or degrading treatment. Article 37(a) of the CRC requires State parties to ensure that no child is 'subjected to torture or other cruel, inhuman or degrading treatment or punishment.' Article 37(c) also provides that every 'child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.' Abuse of children is clearly inhumane and does not respect the inherent dignity of children. The failure of Australia to protect children from such abuse may therefore constitute a violation of Article 37(a) and Article 37(c) of the CRC.

Rights of Asylum Seekers under the Covenant on Civil and Political Rights

In addition to the CRC, Australia also owes obligations to all asylum seekers in Nauru (including adults) under the *International Covenant on Civil and Political Rights* (ICCPR).[23] Australia is, therefore, bound by provisions within the ICCPR.

Australia is bound by the ICCPR everywhere it exercises jurisdiction. That is, Australia must abide by its obligations under the ICCPR where it exercises power or effective control including in a third country such as Nauru. Australia is also bound by its obligations to

---

21 Philip Moss, 'Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru' (2015), 43 [3.141].

22 UNHCR, Monitoring Visit to the Republic of Nauru 7-9 October 2013 (26 November 2013).

23 Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

persons in its jurisdiction regardless of their status. This means that 'unauthorised maritime arrivals',[24] asylum seekers and refugees have rights under the ICCPR. In the words of the United Nations Human Rights Committee:

> The enjoyment of Covenant rights is not limited to citizens of State Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.[25]

The view that the ICCPR applies wherever a State party exercises jurisdiction is also shared by the United Nations' principal judicial organ, the International Court of Justice.[26]

It is furthermore established in international jurisprudence that a State's obligation to respect and ensure key human rights extends to taking reasonable steps to prevent situations which could result in a violation of the right.[27] This obligation extends beyond the conduct of state officials to private actors. As the Inter-American Court of Human Rights has explained:

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required.[28]

---

24 Migration Act 1958, s 5AA.

25 Human Rights Committee, General Comment No 31 Nature of the General Legal Obligation Imposed on State Parties to the Covenant: UN Doc CCPR/C/21/Rev1/Add.13 (26 May 2004), [10].

26 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment, Merits) [2005] ICJ Rep 168, [216].

27 See for example Herrera Rubio v. Colombia, Communication No. 161/1983, P 12 , U.N. Doc. CCPR/C/OP/2 (1987) ; Kurt v Turkey (24276/94) [1998] ECHR 44 (25 May 1998).

28 Inter-American Court of Human Rights, Case of Velásquez-Rodríguez v. Honduras , Judgment of July 29, 1988 (Merits) [172].

In order to respect and ensure compliance with its obligations under the ICCPR, Australia is required to take reasonable steps to prevent asylum seekers from being the subject of violations in the detention facility in Nauru.

The alleged sexual and other abuse of asylum seekers in Nauru violates a number of provisions under the ICCPR. For example, as stated above, the abuse of asylum seekers in Nauru is likely to constitute 'cruel, inhuman or degrading treatment or punishment'. This is a violation of Article 7 of the ICCPR.

The Human Rights Committee has been very clear in its position that the transfer of individuals to a place where they may face cruel, inhuman or degrading treatment is also a breach of Article 7 of the ICCPR.[29] In General Comment No. 20, the HR Committee states that:

> In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.[30]

Australia must cease the continued transfer of asylum seekers to Nauru in the face of recent revelations of abuse at the detention facility, where they continue to be at risk of further cruel, inhuman, degrading treatment or punishment.

Article 10 of the ICCPR also requires States to treat detainees with 'humanity and with respect for the inherent dignity of the human person'. The Human Rights Committee has stated that 'States parties should ensure that the principle stipulated [under Article 10 of the ICCPR] is observed in all institutions and establishments within their jurisdiction where

---

29 *Kaba v Canada*, CCPR/C/98/D/1465/2006 (2010), [10.2]- [10.3].

30 Human Rights Committee, International Covenant on Civil and Political Rights, General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment, P 5, UN Doc HRI/GEN/1/Rev6, 151 (2003), [9] <http://www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5?Opendocument>

persons are being held'.[31] Allegations of abuse recounted in the Moss report make it clear that certain detainees have not been treated with humanity as required by article 10 of the ICCPR.

The ICCPR is also clear that children are to be protected from abuse, stating in Article 24:

> Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

The alleged sexual and other physical abuse of children under the jurisdiction and control of Australia, in the detention facility in Nauru would therefore constitute a violation of Article 24 of the ICCPR.

In addition, Article 17 of the ICCPR protects the privacy of individuals in the jurisdiction and control of State parties. Article 17 states:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> Everyone has the right to the protection of the law against such interference or attacks.

The reported lack of privacy afforded to asylum seekers in Nauru may therefore constitute a violation of Article 17 of the ICCPR.

Conclusion

Australia has a duty to care for asylum seekers detained in Nauru under Australian municipal law and under international human rights law. The allegations outlined in the Moss report suggest grave violations of Australia's obligations which extend to detainees in Nauru.

As the Moss report states, many detainees 'are apprehensive about their personal safety' in Nauru.[32] It is not only inappropriate, but unlawful, for Australia to continue the transfer of

---

31 Human Rights Committee, General Comment No 21 Humane Treatment of People Deprived of Liberty: UN Doc HRI/GEN/1/Rev.1 (10 April 1992), [1].

32 Philip Moss, 'Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru' (2015), 43 [3.141].

asylum seekers to the detention facility in Nauru under such circumstances. Australia should therefore cease the transfer of asylum seekers to Nauru until such time that it can ensure it is able to meet its duty of care obligations to this vulnerable group. Australia should also cease the detention of asylum seekers currently detained in Nauru under conditions where they are vulnerable to physical and sexual abuse. To do otherwise would be to continue to violate its duty of care to asylum seekers under international and municipal law.