

Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre

Submission to Senate Standing Committee on
Legal and Constitutional Affairs

7 November 2016





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Who we are

The Australian Lawyers Alliance 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. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and rights.

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

¹ www.lawyersalliance.com.au



Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the issues raised by the terms of reference of Senate Standing Committee on Legal and Constitutional Affairs Inquiry into serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre.
2. This submission makes comments on Terms of Reference a, b, c, e, f, g and i.

The factors that have contributed to the abuse and self-harm alleged to have occurred

3. Abuse and self-harm in Australia's regional processing centres (RPCs) on Nauru and Manus Island are endemic, as has been reported repeatedly since the centres were re-opened in 2012.
4. In the Nauru Files, published by the *Guardian* in August 2016,² a number of the reports revealed what individuals who were self-harming said in relation to their actions. Those explanations included that the person concerned felt that "no one cares, there's no point",³ that they had reached their limit,⁴ and that "I want to die... I have been here too long, I don't want to be here anymore".⁵
5. These statements suggest that a primary factor contributing to self-harm is the length of time people have been in detention. People appear to have lost hope that their situations will improve or that they will ever be permanently resettled in a safe country. The lack of clarity regarding the time that they can expect to be detained on these islands is also a contributing factor.

² All Nauru Files coverage by the *Guardian* can be found here:

<https://www.theguardian.com/news/series/nauru-files>.

³ <https://interactive.guim.co.uk/2016/08/nu-files/pdf/sca150661.pdf>.

⁴ <https://interactive.guim.co.uk/2016/08/nu-files/pdf/sca141152.pdf>.

⁵ <https://interactive.guim.co.uk/2016/08/nu-files/pdf/sca150551.pdf>.

6. Spates of self-harm also reveal some of the factors contributing to self-harm. In September 2014, for example, there was a significant increase in incidents of self-harm on Nauru following an announcement by then-Minister for Immigration, Scott Morrison, that temporary protection visas were to be reintroduced.⁶ A similar spate of self-harm of children occurred that month following the announcement of the Cambodia deal.⁷
7. In January 2015, a spate of self-harm followed some serious health and safety incidents on Manus Island. Some locals had broken into the centre and smashed the kitchen. A couple of days later a tree fell into some accommodation. A few days later, running water had stopped working in the centre. At the same time local security guards went on strike as they had not been paid. Over 100 detainees began a hunger strike in protest at their treatment and the threats they felt from the local population.⁸
8. These incidents suggest that statements by Ministers, health and safety fears, attacks by locals and adequate access to essential services such as running water are contributing factors to the self-harm that is occurring at RPCs.
9. In terms of abuse, the impunity that persists for people perpetrating abuse against refugees and asylum seekers no doubt contributes to further abuse. In Nauru, the first prosecution of an individual for a crime against an asylum seekers took place only last month.⁹ This is despite reports of serious crimes against asylum seekers emerging ever since the centre reopened in 2012. There have also been regular reports of crimes against refugees and asylum seekers on Manus Island which have

⁶ Australian Lawyers Alliance, *Untold Damage: workplace health and safety in immigration detention under the Work, Health and Safety Act 2011 (Cth)*, <http://www.lawyersalliance.com.au/documents/item/583>, 108-110.

⁷ Reports of self harm by asylum seekers on Nauru on hearing Cambodia resettlement plan', ABC PM, 26 September 2014. Accessed 9 January 2016 at <http://www.abc.net.au/pm/content/2014/s4095666.htm>.

⁸ Ibid, 110-113.

⁹ Paul Farrell, "Revealed: Nauru prosecutors under fire from judiciary in asylum-seeker cases", *the Guardian*, 30 October 2016, <https://www.theguardian.com/world/2016/oct/30/revealed-nauru-prosecutors-under-fire-from-judiciary-in-asylum-seeker-cases>.

largely gone unpunished. By failing to prosecute people for crimes against refugees and asylum seekers on RPC islands, both the individual perpetrator and others are given a clear message by government, including the Australian government, that they can continue to commit such crimes and face no repercussions, and that the victims of the crimes are not entitled to justice.

How notifications of abuse and self-harm are investigated

10. Due to the status of RPCs as Commonwealth workplaces, notifications of abuse and self-harm must be made to Comcare, which in turn can investigate the incidents and make recommendations to improve safety and prosecute offences against the *Work Health and Safety Act 2011* (Cth) (WHS Act).
11. The ALA refers the Committee to our submission to the Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru.¹⁰ In that submission we provided extensive analysis of the Australian government's responsibility for refugees and asylum seekers on Nauru. While that inquiry focused on Nauru, the legal analysis provided would also apply to refugees and asylum seekers on Manus Island in Papua New Guinea.
12. Since that submission was made, the ALA has published a report, *Untold Damage*, which details the responsibilities of the Department of Immigration and Border Protection (DIBP), Comcare and contractors in Australia's offshore detention facilities.¹¹
13. The DIBP is the "person" conducting the business or undertaking (PCBU) in relation to immigration detention facilities, giving rise to obligations under the WHS Act. The DIBP has acknowledged its status as PCBU in numerous reports to Comcare regarding conditions in RPCs.
14. Under the WHS Act, the DIBP as the PCBU has a duty of care toward all refugees and asylum seekers. That duty extends to ensuring that the health and safety of refugees

¹⁰ <http://www.lawyersalliance.com.au/documents/item/372>.

¹¹ A summary of the report can be found here:

<http://www.lawyersalliance.com.au/ourwork/untold-damage/untold-damage>. The report itself is available here: <http://www.lawyersalliance.com.au/documents/item/583>.

and asylum seekers, as “other persons” affected by the workplace, “is not put at risk from work carried out as part of the conduct of the business or undertaking”: s19(2). According to the DIBP 2014-15 annual report, the objectives of the Department in relation to “Illegal Maritime Arrival Offshore Management” are to:

- “manage IMAs transferred to a RPC
- determine the refugee status of transferees
- return and remove transferees
- settle refugees.”¹²

15. These objectives make it clear that the conduct of the business or undertaking extends both to those living in the detention facilities and those living in the community.
16. The WHS Act also requires the DIBP to report all notifiable incidents, as defined in ss36 and 37, to Comcare to ensure it can monitor and remedy any threats to health and safety in immigration detention.
17. The ALA has received lists of all incidents reported by the DIBP to Comcare between 1 July 2013 and 30 June 2016, pursuant to freedom of information requests.¹³ These documents reveal that reporting has been conducted haphazardly over this period, with apparently similar incidents on Nauru and Manus Island being reported differently by the DIBP to Comcare. Comcare has also been assessing the incidents haphazardly, with some incidents of self-harm, for example, being assessed as notifiable, and other similar incidents being assessed as not notifiable.¹⁴

¹² DIBP, *Annual Report 2014-15*, <https://www.border.gov.au/ReportsandPublications/Documents/annual-reports/DIBP-Annual-Report-2014-15.pdf>, 191.

¹³ The documents released to us pursuant to the freedom of information requests can be found here: <https://www.lawyersalliance.com.au/ourwork/2016>.

¹⁴ See ALA *Untold Damage: workplace health and safety in immigration detention under the Work Health and Safety Act 2011 (Cth)*, <http://www.lawyersalliance.com.au/documents/item/583>, 107-113 for analysis of spates of self-harm incidents.

18. Perhaps most disturbingly, however, is the clear reduction in the number of reports made in the most recent list of incidents reported, between July 2015 and June 2016.
19. In 2013-14, there were 449 incidents reported by the DIBP to Comcare across the immigration detention network, including in relation to RPCs. Of these, 60 related to self-harm, including refusal of food and drink, lacerations and attempted hangings. Nine of the 60 were assessed by Comcare as notifiable, 51 as not notifiable.¹⁵
20. In 2014-15, there was a total of 643 incidents notified by the DIBP to Comcare under the WHS Act, of which 140 related to self-harm. Of these, 66 were assessed as notifiable, and 74 as not notifiable.¹⁶
21. Reports during 2015-16, however, paint a dramatically different picture. Just 144 incidents were notified to Comcare by the DIBP, of which 10 related to self-harm and just two were assessed as notifiable.¹⁷ Incredibly, incidents such as the two self-immolations of refugees on Nauru in April and May 2016 and the numerous self-harm incidents there which have been reported in the media,¹⁸ have not been reported by the DIBP to Comcare, in breach of the DIBP's obligations under the WHS Act.
22. The Nauru Files also reveal large numbers of incidents that should have been reported to Comcare but were not reported. The ALA has brought these incidents to the attention of Comcare and the relevant Ministers. We attach those incidents to this submission as **Appendix 1**.
23. It is unambiguously clear that the DIBP is seriously failing in its obligations to report incidents of abuse and self-harm, and other incidents relevant to the health and

¹⁵ <http://www.lawyersalliance.com.au/documents/item/604>.

¹⁶ <http://www.lawyersalliance.com.au/documents/item/605>.

¹⁷ <http://www.lawyersalliance.com.au/documents/item/700>.

¹⁸ Ben Doherty and Helen Davidson, "Self-immolation: desperate protests against Australia's detention regime", *the Guardian*, 3 May 2016, <https://www.theguardian.com/australia-news/2016/may/03/asylum-seekers-set-themselves-alight-nauru>.

safety of refugees and asylum seekers in RPCs, to Comcare. The ALA believes that offences have been committed and the DIBP has failed to discharge its duty of care toward asylum seekers under the WHS Act or report notifiable incidents as required under the Act. Comcare, in turn, has failed to adequately investigate workplace health and safety incidents and ensure the safety of these workplaces, therefore failing to comply with its obligations under the WHS Act.

The obligations of the Commonwealth Government and contractors relating to the treatment of asylum seekers, including the provision of support, capability and capacity building to local Nauruan authorities

24. The Commonwealth government has obligations relating to the treatment of refugees and asylum seekers in both Nauru and Manus Island stemming from both international and domestic law. It also has obligations of due diligence, requiring the government to ensure that legal protections on RPCs are adequate and that contractors comply with Australia's obligations in their running of the centres.

INTERNATIONAL LAW

25. Australia has agreed to be bound by a number of human rights treaties, including the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). The obligations contained in the CAT have been incorporated into Australian law in Division 274 of the *Criminal Code Act 1995* (Cth), discussed in more detail below.

26. The CAT defines torture as follows:

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as ... punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not

include pain or suffering arising only from, inherent in or incidental to lawful sanctions".¹⁹

27. The ALA believes that the treatment of refugees and asylum seekers in RPCs amounts to torture under international law, putting the Australian government in direct conflict with its international obligations.
28. It is clear that severe mental, and often physical, pain is inflicted on refugees and asylum seekers on Nauru and Manus Island. Evidence from numerous reliable sources, including the Australian Human Rights Commission,²⁰ Amnesty International,²¹ the *Guardian*²² and the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,²³ is cogent and clear regarding the level of harm being inflicted.
29. In full knowledge of this harm, refugees and asylum seekers continue to be kept on these islands. The government is clear that the reason for sending refugees and asylum seekers there is to dissuade others from attempting to reach Australia by boat. Minister Dutton recently stated that "Regional processing has been critical to removing any incentive for people smugglers to undertake dangerous voyages in an attempt to reach Australian soil".²⁴ As such, it is clear that the treatment of refugees and asylum seekers on Nauru and Manus Island is intentional, with the

¹⁹ Article 1.

²⁰ The Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014), <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children>.

²¹ Amnesty International, *Island of Despair: Australia's "processing" of refugees on Nauru*, (2016) <https://www.amnesty.org.au/island-of-despair-nauru-refugee-report-2016/>.

²² The Guardian, *the Nauru Files*, (2016), <https://www.theguardian.com/news/series/nauru-files>.

²³ Juan Mendez, UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report to the Human Rights Council Addendum: observations on communications transmitted to Governments and replies received*, (2015), 7-9.

²⁴ The Hon Peter Dutton MP, *Address to the Australian Strategic Policy Institute, Canberra*, 15 September 2016, <http://www.minister.border.gov.au/peterdutton/2016/Pages/address-australian-strategic-policy-institute-15092016.aspx>.

purpose of coercing third persons, being those who might consider trying to reach Australia by boat, to refrain from making the attempt.

30. Australia's obligations toward these people survives international borders. Under the CAT, Australia cannot expel people to countries where there are substantial grounds for believing they will be subjected to torture.²⁵

DOMESTIC LAW

31. The domestic obligations of the Commonwealth government and contractors stem from common law, the WHS Act and the *Criminal Code Act 1995* (Cth).
32. A duty of care has been recognised at common law in *S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483. In that case, the Federal Court recognised that a duty of care was owed to a woman who required a pregnancy termination, following being raped in Nauru. The woman was a refugee living independently in the community, meaning that the duty of care extends to all refugees and asylum seekers in RPCs, regardless of whether they are living in the detention centre or in the community.
33. The WHS Act also makes it clear that the DIBP has a duty of care toward all persons affected by its conduct in Nauru and Papua New Guinea, as outlined above.
34. Breaching that duty of care is an offence under the WHS Act, and can give rise to a prison sentence of up to five years for an individual or a fine of up to \$3 million for a body corporate.²⁶
35. Officers of PCBU's can be directly liable for offences under the WHS Act. Officers have due diligence obligations to ensure that the PCBU complies with duties and

²⁵ Article 3.

²⁶ WHS Act, s31. These are the penalties that arise where a person has a health and safety duty, and engages in conduct that "exposes an individual to whom that duty is owed to a risk of death or serious injury or illness" recklessly. Under ss32 and 33, lesser penalties apply for failing to comply with a health and safety duty where no recklessness has been present or no risk of serious injury or death resulted from the failure.

obligations under the Act. Due diligence obligations in this context include obligations to ensure that:

- the officer is up to date regarding health and safety matters;²⁷
- appropriate resources and processes are used to eliminate or minimise risks to health and safety arising from the work of the PCBU;²⁸
- the PCBU has appropriate processes for receiving and considering information regarding risks, and responds in a timely way to that information;²⁹ and
- the PCBU has and implements processes for complying with its duties and obligations under the WHS Act.³⁰

36. There is also a duty on workers to “take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons”.³¹ The same penalties of a maximum of five years in prison or \$3 million fine apply to all of these offences.

37. It is clear from the evidence available that many of these offences have been committed. It has been reported that the DIBP itself has requested incident reports be altered to appear less damning.³² The Nauru Files included numerous examples of contractors downgrading assessments of incidents. These practices indicate that,

²⁷ WHS Act s27(5)(a).

²⁸ WHS Act s27(5)(c).

²⁹ WHS Act s27(5)(d).

³⁰ WHS Act s27(5)(e).

³¹ WHS Act s28.

³² Martin McKenzie-Murray, ‘Nauru abuse goes further than the Moss review,’ The Saturday Paper, 28 March 2015, <https://www.thesaturdaypaper.com.au/news/politics/2015/03/28/nauru-abuse-goes-further-than-the-moss-review/14274612001684>.

rather than ensuring that processes for receiving and considering information regarding risks, these risks are in fact actively concealed.³³

38. Offences relating to the treatment of workers who have advocated on behalf of refugees and asylum seekers and concealment also appear to have been committed.
39. Under the WHS Act, it is an offence to take “discriminatory conduct” against a worker for prohibited reasons.³⁴ Discriminatory conduct includes dismissing a worker, detrimentally altering a worker’s position, ending a commercial relationship or refusing to enter a commercial relationship.³⁵ Penalties include fines of up to \$500,000.³⁶
40. It appears that the treatment of the Save the Children workers outlined below falls within the category of discriminatory conduct. Following the investigation of the Save the Children workers, Save the Children’s offices were raided and computers and other items seized by Nauruan Police, accompanied by Australian Border Force officers, in October 2015. Save the Children’s contract was not renewed when it expired.³⁷ While it is not known why the contract was not renewed, if it was related to Save the Children workers revealing infringements of the WHS Act, this appears to amount to discriminatory conduct.

³³ For further concerns regarding due diligence obligations under the WHS Act, see Australian Lawyers Alliance, *Untold Damage: workplace health and safety in immigration detention under the Work, Health and Safety Act 2011 (Cth)*, <http://www.lawyersalliance.com.au/documents/item/583>, sections 1.4, 5.1.1, 5.2.1 and 8.4.1.

³⁴ Section 107.

³⁵ Section 105.

³⁶ Section 104.

³⁷ Sarah Whyte and Jeanavive McGregor, “Timeline: Why Save the Children workers want almost \$1 million compensation from the Federal Government”, *ABC News*, 22 February 2016, <http://www.abc.net.au/news/2016-02-22/timeline-save-the-children-workers-on-nauru/7180992>.

41. The ALA has also queried whether offences relating to coercion and concealment may have been committed under s44 of the *Crimes Act 1914* (Cth).³⁸
42. Torture provisions under the *Criminal Code Act 1995* (Cth) may also have been infringed. Section 274.2 of the Code establishes the offence of torture, whereby a perpetrator engages in conduct that inflicts severe physical or mental pain or suffering on the victim, and the conduct is engaged in for purposes including intimidating or coercing the victim or a third person, if the perpetrator is a public official, acting in an official capacity or acting with the consent or acquiescence of a public official, or other person acting in an official capacity. The maximum penalty is 20 years in prison.
43. As outlined above under “International Law” these elements appear to be satisfied in relation to RPCs. While public official is not defined in the Act, it can be assumed that persons acting in an official capacity either as DIBP workers or contractors would fit the definition.
44. The conduct engaged in by these people that inflicts severe mental or physical pain would include instances of physical assault or sexual abuse of refugees and asylum seekers by guards, in the context of being forced to live in RPC countries indefinitely. Where the assault or abuse is perpetrated by people other than DIBP workers or contractors, that conduct can be seen as occurring with the consent or acquiescence of public officials or others acting in an official capacity. The fact that so many reports of such conduct have been made, with no effective mechanisms introduced to protect refugees and asylum seekers from it, can be seen as consent or acquiescence. The Committee against Torture has made similar findings, see below at [48] for more detail in this regard. Some examples of this conduct are provided in **Appendix 2**, attached.
45. The purpose element is clearly met by the purpose of the policy of offshore processing, discussed above at [28].

³⁸ See Australian Lawyers Alliance, *Untold Damage: workplace health and safety in immigration detention under the Work, Health and Safety Act 2011* (Cth), <http://www.lawyersalliance.com.au/documents/item/583>, section 8.4.3 for more detail on this issue, and Chapter 8 generally.

46. While prosecutions for torture and ill-treatment that occurs wholly outside of Australia requires the consent of the Attorney-General, people can be charged and remanded in custody in the absence of that consent. It would be inappropriate for the Attorney-General to withhold consent for these prosecutions: to provide a shield for crimes of this gravity would be particularly egregious, and would give rise to breaches of international law. It could also be seen as further consent or acquiescence, potentially giving rise to personal liability.
47. See also the ALA submission to the Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru for further detail on domestic obligations.³⁹

IMPLEMENTATION OF LAW AND THE ROLE OF CONTRACTORS IN RPCS

48. The Australian government has repeatedly argued that law and order issues for refugees and asylum seekers on Nauru and Manus Island are matters for the host countries. However, simply sending refugees and asylum seekers to another country does not absolve Australia of responsibility toward these people.
49. It is incumbent on Australia to ensure that the legal systems in place in Nauru and Papua New Guinea are capable of ensuring that refugees and asylum seekers rights are protected, as a part of its due diligence obligations under international human rights law. Australia also has obligations to ensure that the companies that it pays to run detention centres and other services for refugees and asylum seekers in RPCs do not violate human rights. As acknowledged by the UN Committee against Torture:

“Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the

³⁹ <http://www.lawyersalliance.com.au/documents/item/372>.

Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission."⁴⁰

50. If the legal systems do not meet the standards that are available to prevent and punish abuses in Australia, it is not appropriate to be sending people to those islands. Further, if contractors, as agents of the Australian government, are preventing refugees and asylum seekers from taking action to protect their own safety, Australia is responsible for that. Evidence exists to suggest that refugees and asylum seekers are not adequately protected on Manus Island or Nauru, either by the operation of legal systems or the actions of companies.
51. Following the murder of Reza Barati on Manus Island in February 2014, two men were charged and ultimately given 10 year prison sentences, with five years being suspended. With time served they will be eligible for release in approximately three years. The sentence was reduced as the judge acknowledged that others were involved in the murder who had not been investigated or prosecuted. Following sentencing, the men themselves alleged that there were Australians and New Zealanders who were also involved in the murder but had escaped charge.⁴¹
52. There have been numerous reports of assaults against refugees and asylum seekers on Manus Island that have not resulted in prosecutions as far as the ALA is aware. One man having a mental health episode was detained and beaten, rather than being provided appropriate medical assistance. During the riots in which Barati was murdered, police were reported to have stormed the compound and shot at detainees. While some guards have lost their jobs

⁴⁰ UN Committee against Torture, *General Comment 2: implementation of article 2 by States Parties*, CAT/C/GC/2, [18].

⁴¹ Ben Doherty and Helen Davidson, "Reza Barati: men convicted of asylum seeker's murder to be free in less than four years", *the Guardian*, 19 April 2016, <https://www.theguardian.com/australia-news/2016/apr/19/reza-barati-men-convicted-of-asylum-seekers-to-be-free-in-less-than-four-years>.

following beating asylum seekers or refugees, the ALA is not aware that any criminal investigation for assault occurred.⁴²

53. An asylum seeker has also reported that contractors would not accept notifications regarding health and safety concerns on Manus, and that those concerns needed to be reported to the police. His attempts to report his concerns to the police, however, were thwarted by the same contractors.⁴³

54. In Nauru, despite the volume of evidence of crimes being committed against refugees and asylum seekers, only one person has been charged with assaulting an asylum seeker, in October 2016.⁴⁴ Despite inactivity in response to these crimes, however, there are reports that Nauru has sought to prosecute those who have talked about or attempted self-harm. Judges have been scathing in their criticisms of prosecutors in Nauru.⁴⁵

55. The Nauru Files also revealed disturbing practices of contractors downgrading very serious incidents of abuse and self-harm, in what could be seen as attempts to hide the true level of despair on the island.

56. It is clear that these legal systems do not adequately protect the safety of refugees and asylum seekers. Contractors, in turn, operate in a manner that would appear to conflict with Australian obligations and increase risks, including

⁴² Ben Doherty, "Manus refugee having breakdown was beaten and jailed, say detainees", *the Guardian*, 15 June 2016, <https://www.theguardian.com/australia-news/2016/jun/15/manus-refugee-having-breakdown-was-beaten-and-jailed-say-reports>.

⁴³ Behrouz Boochani, "Malcolm Turnbull, why didn't you answer my question on Q&A about Manus Island?", *The Guardian*, 21 June 2016, <https://www.theguardian.com/commentisfree/2016/jun/21/malcolm-turnbull-why-didnt-you-answer-my-question-on-qa-about-manus-island>.

⁴⁴ Paul Farrell, "Nauru police charge person with indecent assault of six-year-old asylum seeker", *the Guardian*, 31 October 2016, <https://www.theguardian.com/world/2016/oct/31/nauru-police-charge-person-indecent-assault-six-year-old-asylum-seeker>.

⁴⁵ Paul Farrell, "Revealed: Nauru prosecutors under fire from judiciary in asylum-seeker cases", *the Guardian*, 30 October 2016, <https://www.theguardian.com/world/2016/oct/30/revealed-nauru-prosecutors-under-fire-from-judiciary-in-asylum-seeker-cases>.

reportedly assaulting and threatening refugees and asylum seekers. There is an urgent need for effective capacity building and reform to remedy these deficiencies. It is not appropriate to be sending people to these islands in the absence of robust legal systems that are able to investigate and prosecute crimes against those people. Where the legal systems target people who have discussed or attempted self-harm, this can be seen as persecution: the cruel irony is of course this is very thing that refugees seek our protection from.

57. It is also essential that contractors operate and are held to a standard that would be appropriate in Australia. This must include a strict refusal to tolerate any abuse against refugees and asylum seekers, prosecuting those who commit crimes against them, and accepting complaints regarding health and safety concerns and registering the seriousness of incidents accurately.

The role an independent children's advocate could play in ensuring the rights and interests of unaccompanied minors are protected

58. The ALA supports the establishment of an independent children's advocate for all children in immigration detention.
59. If such an office is established, it is essential that the advocate be able to visit places of detention and speak directly and privately with the children on whose behalf they will be advocating. The advocate should also be able to bring cases to court to protect or advance children's interests where appropriate. It would be appropriate for the position to be established outside of the DIBP to ensure independence.

The effect of Part 6 of the Australian Border Force Act 2015

60. In July this year, Doctors for Refugees lodged a constitutional challenge to the secrecy provisions of the *Australian Border Force Act 2015* (Cth) (ABF Act) in the High Court, arguing that the provisions conflict with the right to freedom of political

communication. Subsequently, in October, the DIBP exempted health professionals from these provisions, meaning they are no longer liable for prosecution.⁴⁶

61. The restrictions remain in place for others working in immigration detention facilities. The question as to the constitutional validity of the law has not been resolved.
62. It has been widely acknowledged that that the secrecy provisions of the ABF Act have a chilling effect on legitimate speech about conditions in offshore detention facilities. The UN Special Rapporteur on the situation of human rights defenders (SR HRDs), Michel Forst, has expressed serious concerns regarding the provisions, noting that “the Act’s existence and government action aimed at censoring and intimidating advocates has had a chilling effect on the disclosure of information about violations in off-shore processing”. He urged the government “to urgently review the Border Force Act’s provisions that seem to be in contravention with human rights principles, including those related to the freedom of expression”.⁴⁷
63. The ALA believes that Part 6 of the ABF Act must be immediately repealed. This secrecy can only allow abuse and self-harm to continue unchecked.

Attempts by the Commonwealth Government to negotiate third country resettlement of refugees and asylum seekers

64. The ALA believes that turning back asylum seekers boats is hampering efforts to come to a regional solution for refugees and asylum seekers. It also puts Australia in

⁴⁶ Fitzroy Legal Service, *Government concession sees gag removed from doctors working in detention*, 20 October 2016, http://www.fitzroy-legal.org.au/government_concession_sees_gag_removed_from_doctors_working_in_detention.

⁴⁷ Michel Forst, UN Special Rapporteur on the situation of human rights defenders, *End of mission statement*, 18 October 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E>.

direct conflict with its international obligations, including the obligation of *non-refoulement* and the obligation to allow people to seek asylum.⁴⁸

65. We are particularly concerned about recent proposals for a lifetime ban on people who have sought asylum in Australia by boat ever seeking a visa to come to Australia. The Prime Minister of New Zealand has said in this regard that New Zealand has “no intention of having separate classes of New Zealand citizens”, and he could not envisage a situation where someone who gained New Zealand citizenship might not have travel rights to Australia.⁴⁹ While the government has suggested that this move may help to find lasting solutions to the situation of refugees and asylum seekers in RPC countries, statements such as those from New Zealand’s Prime Minister indicate that this move may in fact make it more difficult to resettle refugees and asylum seekers in RPCs.

Any other related matters

TARGETING OF WORKERS AND WHISTLEBLOWERS

66. The ALA is concerned about the treatment of advocates who speak out against the mistreatment of refugees and asylum seekers in RPCs. Advocates have been investigated by the AFP and personally attacked following revelations that they have made about the level of harm being caused in Australia’s immigration detention facilities.
67. There was a concerted campaign against the President of the Australian Human Rights Commission, Emeritus Professor Gillian Triggs, following the publication of the Commission’s report into children on Nauru in November 2014. Following the release of the report, it was revealed that the Attorney-General, George Brandis,

⁴⁸ *Convention relating to the Status of Refugees* (1951), article 33; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984), article 3; *Universal Declaration on Human Rights* (1948) (UDHR), article 14. It is widely accepted that the UDHR has gained the status of *jus cogens* under international law.

⁴⁹ Sky News, “NZ says Australia won’t accept refugee deal”, 31 October 2016, <http://www.skynews.com.au/news/top-stories/2016/10/31/nz-says-australia-won-t-accept-refugee-deal.html>.

had asked Professor Triggs to resign. Then-Prime Minister Tony Abbott later told Parliament that the government had lost confidence in Professor Triggs, accusing her of political bias in publishing the report.⁵⁰ Government officials spent much more time criticising Professor Triggs than they did engaging with a ground-breaking report which revealed widespread trauma and damage being caused to children on Nauru.

68. The SR HRDs has raised serious concerns about the treatment of Triggs, and by extension the Australian Human Rights Commission. He noted the absence of any investigations undertaken against people perpetrating the attacks against her.⁵¹ He was further “astounded to observe what has become frequent **public vilification of rights defenders** by senior government officials, in a seeming attempt to discredit, intimidate and discourage them from their legitimate work... individuals like doctors, teachers, and lawyers protecting the rights of refugees have borne the brunt of the verbal attacks”.⁵²

69. Others who have revealed harmful practices have been investigated by the Australian Federal Police (AFP). Following the ABC’s 4 Corners April 2016 investigation of the death of asylum seeker Hamid Khazaei from an infection on Manus Island, the AFP confirmed to the Sydney Morning Herald that it had received a referral to investigate an information leak from the DIBP.⁵³ Following a freedom of

⁵⁰ Eliza Borrello and James Glenday, “Gillian Triggs: Tony Abbott says Government has lost confidence in Human Rights Commission president”, *ABC News*, 24 February 2015, <http://www.abc.net.au/news/2015-02-24/gillian-triggs-says-brandis-wants-her-to-quit-rights-commission/6247520?pfmredir=sm>.

⁵¹ Michel Forst, UN Special Rapporteur on the situation of human rights defenders, *End of mission statement*, 18 October 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E>.

⁵² Michel Forst, UN Special Rapporteur on the situation of human rights defenders, *End of mission statement*, 18 October 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E> (emphasis in original).

⁵³ Nicole Hasham, “Peter Young spoke out about a man’s death. Suddenly, the AFP was looking at his phone records”, *Sydney Morning Herald*, 24 May 2016, <http://www.smh.com.au/federal-politics/political-news/peter-young-spoke-out-about-a-mans-death-suddenly-the-afp-was-looking-at-his-phone-records-20160524-gp2fs6.html>.

information request by the *Guardian*, it became clear that Dr Peter Young, a psychiatrist who oversaw mental health across Australia's immigration detention network between 2011 and 2014, had been investigated by the AFP following this referral.⁵⁴

70. People have also lost their jobs. Psychologist and trauma expert, Paul Stevenson, revealed that the incarceration in RPCs is causing the worst trauma he has seen in his 43 year professional history. This history includes counselling survivors of the Port Arthur massacre, the Bali bombing of 2002 and 2005, the Boxing Day Indian Ocean tsunami and the Thredbo landslide.⁵⁵ When he went public with his concerns, his employment contract was summarily cancelled.⁵⁶

71. Save the Children workers were also targeted by former Immigration Minister, Scott Morrison, after revelations of sexual abuse of women and children on Nauru emerged in 2014. The Moss Review was instituted to investigate:

“issues relating to the conduct and behaviour of staff employed by contracted service providers, claims of sexual and other physical assault of transferees, the orchestration and facilitation of transferees to engage in non-compliant or harmful behaviour and protest actions potentially endangering the safety and security of all persons at the centre, and the misuse and unauthorised disclosure of sensitive and confidential information, including to undermine the proper management of the centre.”⁵⁷

⁵⁴ Paul Farrell, “Australian police accessed phone records of asylum whistleblower”, the *Guardian*, 24 May 2016, <https://www.theguardian.com/australia-news/2016/may/24/australian-police-accessed-phone-records-of-asylum-whistleblower>.

⁵⁵ Ben Doherty and David Marr, “The worst I’ve seen – trauma expert lifts lid on ‘atrocities’ of Australia’s detention regime”, the *Guardian*, 20 June 2016, <https://www.theguardian.com/australia-news/2016/jun/20/the-worst-ive-seen-trauma-expert-lifts-lid-on-atrocities-of-australias-detention-regime>.

⁵⁶ Ben Doherty, “Offshore detention whistleblower loses job after condemning ‘atrocities’ of camps”, the *Guardian*, 21 June 2016, <https://www.theguardian.com/australia-news/2016/jun/21/offshore-detention-whistleblower-loses-job-after-condemning-atrocities-of-camps>.

⁵⁷ *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru: Final Report*

72. Nine Save the Children workers were issued a removal letter and the six who were on Nauru at the time were deported in the days following the revelations.⁵⁸
73. These are just a selection of examples of the targeting of whistleblowers, advocates and workers who have spoken out about the harm that refugees and asylum seekers are suffering in RPCs.
74. The SR HRDs raised serious concerns regarding the treatment of “doctors, teachers, lawyers and journalists, who have either spoken out or covered conditions in offshore detention places and who have been under heavy surveillance” following his recent visit to Australia.⁵⁹ He noted that the absence of prosecutions under the *Australian Border Force Act* does not reduce the chilling effect of that legislation, particularly in view of the serious consequences that have ensued for those who have revealed mistreatment.
75. The ALA is concerned that this approach in itself is perpetuating abuse, self-harm and neglect. It makes it clear to people who want to speak out about harm that is being caused in RPCs that they should be prepared to suffer similar fates to those outlined above, and may indeed be prosecuted. Such a fear means that risk factors relating to abuse, self-harm and neglect are not exposed and the risks persist unnecessarily, often in contravention with legal obligations.

Recommendations

The ALA believes that it would be appropriate for the Senate Committee to make the following recommendations:

<https://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-conditions-circumstances-nauru.pdf>, 12.

⁵⁸ Sarah Whyte and Jeanavive McGregor, “Timeline: Why Save the Children workers want almost \$1 million compensation from the Federal Government”, *ABC News*, 22 February 2016, <http://www.abc.net.au/news/2016-02-22/timeline-save-the-children-workers-on-nauru/7180992>.

⁵⁹ Michel Forst, UN Special Rapporteur on the situation of human rights defenders, *End of mission statement*, 18 October 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E>.



- All refugees and asylum seekers should be brought to Australia for permanent resettlement, or pending third country settlement. It is clear that Nauru and Manus Island are not safe places for these people and that the Australian government is not able to ensure their safety on these islands, and thus is not able to meet its domestic and international obligations toward them.
- Ensure that all health and safety incidents are reported by the DIBP to Comcare and that Comcare investigate, and where appropriate prosecute, offences against the WHS Act.
- An independent agency should conduct an urgent review of all domestic and international obligations that are relevant to the situation of refugees and asylum seekers on RPCs and make recommendations to ensure that those obligations are met. Prosecutions may be appropriate where offences under the WHS Act, the *Criminal Code Act 1995* (Cth) or other legislation are revealed.
- An independent children's advocate should be established with the power to meet with the child refugees and asylum seekers that they represent confidentially and bring cases to court to advance or protect those children.
- The secrecy provisions of the ABF Act should be repealed immediately.
- If refugees and asylum seekers are not to be permanently resettled in Australia, all policy must support finding permanent third countries to host refugees. Policies such as boat turn backs and permanent visa bans, which appear to be hampering efforts to find lasting solutions, should be reassessed to ensure permanent solutions can be found as quickly as possible.