

# Additional Comments by the Australian Greens

## Referral

1.1 On 12 September 2016, the Senate referred the following matters to the Legal and Constitutional Affairs References Committee for inquiry and report.

## *Terms of Reference*

1.2 The 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, with particular reference to:

- (a) the factors that have contributed to the abuse and self-harm alleged to have occurred;
- (b) how notifications of abuse and self-harm are investigated;
- (c) 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;
- (d) the provision of support services for asylum seekers who have been alleged or been found to have been subject to abuse, neglect or self-harm in the Centres or within the community while residing in Nauru;
- (e) the role an independent children's advocate could play in ensuring the rights and interests of unaccompanied minors are protected;
- (f) the effect of Part 6 of the Australian Border Force Act 2015;
- (g) attempts by the Commonwealth Government to negotiate third country resettlement of asylum seekers and refugees;
- (h) additional measures that could be implemented to expedite third country resettlement of asylum seekers and refugees within the Centres;
- (i) any other related matters; and
- (2) the committee be granted access to all inquiry submissions and documents of the preceding committee relating to its inquiry into the conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea.<sup>1</sup>

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1 *Journals of the Senate*, No. 4, 12 September 2016, p. 129.

## **Executive Summary**

1.3 This report comprises comments and recommendations made in addition to the Committee's majority report.

1.4 The Committee's majority report makes recommendations that would, if implemented, significantly improve conditions for detainees in Australia's offshore RPCs. However the Australian Greens believe that the preponderance of evidence presented to the committee supports a finding to close the detention facilities on Manus Island and Nauru and bring to Australia all detainees, including children born to detainees on Nauru.

1.5 The Committee heard shocking evidence from a range of submitters and witnesses of appalling and unacceptable conditions in Australia's offshore Regional Processing Centres (RPCs), and a systemic failure of the Australian government to adequately respond.

1.6 Evidence presented to the Committee confirms that the conditions in Australia's offshore RPCs amount to torture as defined in the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

1.7 Evidence presented to the Committee confirms significant levels of abuse, including sexual abuse, of detainees including children. Evidence was also presented that incident reports have been systemically downgraded, potentially to avoid financial penalties being levied on contractors.

1.8 Evidence was presented of numerous failures to meet medical recommendations for patient care, particularly regarding patient transfer.

1.9 The establishment and management of Australia's offshore RPCs are a shameful chapter in Australia's national story.

1.10 In order that adequate reparations are made, including a national apology, a Royal Commission should be held into the establishment, management and impact of Australia's offshore RPCs.

1.11 Australia's RPCs on Manus Island and Nauru are inhumane, non-compliant with Australia's international obligations, and should immediately be closed. All people there, including people currently living outside the centres, should be offered the opportunity to come to Australia immediately, provided with refugee status and offered adequate support help them try to repair the harm that has been done to them by Australia, and in Australia's name.

## **Recommendations**

### **Recommendation 1**

**1.12 Regional Processing Centres on Manus Island and Nauru should be closed immediately and all detainees immediately brought to Australia and offered resettlement in Australia as refugees.**

### **Recommendation 2**

**1.13 The policy of mandatory indefinite detention for people seeking asylum who have arrived in Australia by boat should end.**

### **Recommendation 3**

**1.14 A Royal Commission should be held into the establishment and management of the Regional Processing Centres on Manus Island and Nauru, and the associated Australian government policy of boat turnbacks.**

### **Recommendation 4**

**1.15 Children born on Nauru to detainees should be brought to Australia with their families and guaranteed the right to citizenship.**

### **Recommendation 5**

**1.16 Further studies should be urgently conducted regarding the extent of legacy cadmium disposal on Nauru, and the threat to human health and the environment.**

### **Recommendation 6**

**1.17 All detainees on Nauru should immediately be tested for elevated levels of cadmium and other heavy metals present at or near the site of the Nauru Regional Processing Centre, and appropriate medical advice sought and followed.**

### **Recommendation 7**

**1.18 Comcare's investigation into alleged breaches of the *Work Health and Safety Act 2011* (Cth) (WHS Act) by the Minister of Immigration and Border Protection should be expedited.**

### **Recommendation 8**

**1.19 The Senate Legal and Constitutional Affairs References Committee should conduct an inquiry to examine the merits of the government's claims of public interest immunity made during the course of this inquiry.**

### **Recommendation 9**

**1.20 Given the committee's concerns about the level of accountability and transparency that currently applies to the operation of Australia's Regional Processing Centres in the Republic of Nauru and Papua New Guinea, the following matter should be referred to the Legal and Constitutional Affairs References Committee for inquiry and report by 28 March 2019:**

- (a) conditions at the Regional Processing Centres in the Republic of Nauru and Papua New Guinea;**
- (b) the provision of support services for asylum seekers and refugees who have been alleged or been found to have been subject to abuse, neglect or self-harm in the centres or within the community while residing in Nauru and Papua New Guinea;**
- (c) the Department of Immigration and Border Protection's oversight of contractors, sub-contractors, healthcare services, and Regional Processing Centres' operation generally;**
- (d) attempts by the Commonwealth Government to negotiate third country resettlement of asylum seekers and refugees;**
- (e) additional measures that could be implemented to expedite appropriate third country resettlement of asylum seekers and refugees within the centres;**
- (f) the presence of cadmium in the Republic of Nauru, and the health risks associated with prolonged cadmium and phosphate exposure;**
- (g) the implications of Australia's intention to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;**
- (h) transparency and accountability mechanisms that apply to the Regional Processing Centres;**
- (i) measures Australia could take to develop and implement an appropriate and sustainable regional approach to how the arrival and settlement of asylum seekers is managed in the Asia-Pacific region;**
- (j) any other related matters; and**
- (k) the committee be granted access to all inquiry submissions and documents of the committee's previous inquiries relating to the conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea.**

## Conditions

### *Torture*

1.21 The conditions in Australia's Regional Processing Centres (RPCs) on Manus Island and Nauru for refugees and asylum seekers amount to torture.

1.22 Australia became a signatory to the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in 1985, ratifying the Convention in 1989. Torture is defined in article 1 of the Convention against 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 obtaining from him or a third person information or a confession, 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.<sup>2</sup>

1.23 The Convention against Torture places a duty on states to ensure that all acts of torture are criminalised, as well as any attempt to commit torture extending to persons who are complicit or who participate in the torture.

1.24 The Australian Greens agree with Amnesty International's position that the conditions on Nauru amount to torture as defined by the United Nations.

1.25 The Committee heard from Dr Neistat, a Senior Director of Research with Amnesty International that:

Essentially torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted to obtain information from, punish or coerce the person being subjected to the suffering of a third person.

One is that, as I described earlier, refugees on Nauru do experience severe mental and, in many cases, physical suffering. The second factor is that the suffering is being intentionally inflicted. The whole system is designed to inflict suffering, and the system is essentially set up, paid and fully provided for and designed by the government of Australia. It is done with a very clear purpose: to punish the individuals who are attempting to arrive in Australia, but, even more importantly—and, in some of the comments following our report, the government officials who did speak to the media did not even hide the fact—to deter others from seeking asylum in Australia.

So suffering is being inflicted. It is being inflicted systematically and it is being inflicted with a very specific purpose. These elements described in

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2 *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, art 1.

quite a lot of detail in our report, allowed us to come to a conclusion that this amounts to torture.<sup>3</sup>

### ***General Conditions***

1.26 The Australian Greens share the deep concerns of the Australian College of Mental Health Nurses (ACMHN) who stated that:

While they may have left held detention, these individuals remain severely restricted in their movement - they cannot leave the Island, they cannot be re-united with their family and have little or no prospect of economic and/or social participation. Many have given up hope and openly talk of killing themselves as a way of bringing an end to their suffering and excruciating distress and despair.<sup>4</sup>

### ***Violence and Sexual Assault***

1.27 The Committee heard from multiple sources that refugees and asylum seekers living on Nauru are routinely exposed to violence, harassment and intimidation from local Nauruan communities and have limited recourse to justice through the Nauruan justice system.

1.28 The Committee heard evidence that refugees were being subject to the following forms of violence (this list is not exhaustive):

- throwing of bottles or stones;
- swerving vehicles in the path of refugees and asylum seekers as the walk or ride on motorbikes;
- breaking accommodation windows and destroying other property;
- sexual assault (including groping, touching, explicit threats, demands for sex);
- attempted rape;
- beaten with sticks;
- rape; and
- machete attack.

1.29 Ms Lamoin, head of Policy and Advocacy at UNICEF Australia highlighted serious concerns over the capacity for the Nauruan police to investigate incidents, especially in relation to '...gender-based violence claims and sexual assault'.<sup>5</sup>

1.30 Human Rights Watch told the Committee that refugees and asylum seekers have reported that '...local police make little or no effort to investigate attacks against them, even in cases where the victims were able to clearly identify the perpetrators'.<sup>6</sup>

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3 Dr Anna Neistat, Senior Director for Research, Amnesty International, *Committee Hansard*, Wednesday 15 March 2017, pp. 5-6.

4 Australian College of Mental Health Nurses (ACMHN), *Submission 41*, p. 5.

5 Ms Amy Lamoin, Head of Policy and Advocacy, UNICEF Australia, *Committee Hansard*, Tuesday 15 November 2016, p. 29.

1.31 Refugees informed Human Rights Watch that '...settling in Papua New Guinea was unthinkable...even terrifying'.<sup>7</sup>

1.32 Human Rights Watch met men haunted by the deadly violence they experienced in February 2014 when security personal and local men armed with guns and machetes stormed the centre, threatening and beating the residents.<sup>8</sup>

1.33 Gay men and men who are perceived to be gay on Manus Island face greater discrimination and harm. Asylum seekers have informed Human Rights Watch that gay men are either shunned or sexually abused or assaulted and used by other men.<sup>9</sup>

1.34 Refugees and asylum seekers who have been brought to Australia for physical, surgical or mental health treatment or after rape or assault are required to return to Manus and Nauru to be considered for resettlement. This is creating severe fear and anxiety among these people.

## **Health and the Lack of Adequate Medical Care**

### ***Dengue fever outbreak***

1.35 On 15 March 2017 the Committee heard evidence detailing an active outbreak of dengue fever on Nauru. At this time, 34 cases of dengue fever were reported as follows:

- five diagnosed cases of staff members of support organisations
- 16 diagnosed cases of refugees
- 13 diagnosed cases of asylum seekers.<sup>10</sup>

1.36 Figures may not represent refugees living in the Nauruan community who did not have access to International Health and Medical Services (IHMS) clinics.<sup>11</sup>

1.37 The Committee heard evidence from Dr Rudolph, the Area Medical Director for IHMS, that dengue fever can lead to serious health complications and death. He stated:

It can be very serious. It can kill people. It is a febrile illness; it has fevers. It can affect the major organs, causing inflammation in major organs such as the brain, liver and so on. One of the serious things that happen is that it depletes the platelets in the blood, which are involved in clotting. It can deplete them so low that people can bleed spontaneously. They can either

6 Human Rights Watch, *Submission 22*, p. 6.

7 Human Rights Watch, *Submission 22*, p. 8.

8 Human Rights Watch, *Submission 22*, p. 8.

9 Human Rights Watch, *Submission 22*, p. 8.

10 Department of Immigration and Border Protection (DIBP), answer to question on notice, 29 March 2017 (received 7 April 2017).

11 Dr Peter Rudolph, Area Medical Director, International Health and Medical Services (IHMS), *Committee Hansard*, Wednesday 15 March 2017, p. 40.

bleed into the bowel or bleed into organs, and that can be a very serious situation.<sup>12</sup>

### ***Cadmium contamination***

1.38 The Australian Greens are highly concerned about the potential impact of elevated cadmium levels on the health of refugees and asylum seekers as well as on RPC staff.

1.39 It is clear the Australian Government was aware of the risk of elevated cadmium levels before the establishment of the Nauru RPC, yet they still chose to send asylum seekers and refugees to that site.

1.40 The 2012 Sinclair Knight Merz (SKM) Environmental Due Diligence Report for the then-Department of Immigration and Citizenship (DIAC) outlined the potential risks of establishing a Regional Processing Centre in Nauru. These risks included:

- the presence of a cadmium "slime" dump near Buada Lagoon which was identified by Nauru in their National Environmental Management Strategy (1996);
- phosphate dust containing cadmium being deposited into clean water storages or storm water drains;
- inhalation of phosphate dust particle containing cadmium and potentially other heavy metals by construction workers, operational staff and clients of the project; and
- a long term threat to ground water as a result of possible cadmium contamination.<sup>13</sup>

1.41 The SKM report further notes that the Nauruan National Environmental Management Strategy (1996) states 'further studies need to be carried out regarding the extent of the threat of cadmium disposal to human health and the environment'.

1.42 The Australian Greens are concerned that the studies recommended in Nauru's National Environmental Management Strategy (1996) and highlighted in SKM report were never undertaken.

1.43 The Australian Greens are highly concerned that the levels of cadmium remain unknown and refugees and asylum seekers on Manus are yet to be tested for elevated levels of cadmium in their bodies.

1.44 Dr McLisky the Secretary of Doctors for Refugees (DFR) gave told Committee that it is possible that cadmium could enter the bodies of refugees and asylum seekers living on Manus and Nauru. Dr McLisky stated:

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12 Dr Peter Rudolph, Area Medical Director, IHMS, *Committee Hansard*, Wednesday 15 March 2017, p. 40.

13 Department of Immigration and Citizenship (DIAC), *Nauru Regional Processing Centre: Environmental Due Diligence Report*, 15 November 2012, <https://www.border.gov.au/AccessandAccountability/Documents/FOI/FA140401092.PDF>.



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We do know that cadmium is a substance which can become toxic in humans and we do know that it can enter the body through the alimentary tract—through food—and also through inhalation of particles. So this is an area of concern.<sup>14</sup>

1.45 Dr McLisky also provided evidence that cadmium can adversely effect those exposed including kidney damage and bone problems. He stated:

Cadmium does deposit within the body and stay there for a very long time. It is excreted by a number of methods but, once you accumulate a lot of it, it is relatively difficult to get out of your body.<sup>15</sup>

1.46 The Australian Greens are extremely concerned that IHMS remain unwilling to test refugees and asylum seekers on Nauru for elevated cadmium levels:

Senator McKIM: Isn't it the case that the cadmium contamination on Nauru is because it was a phosphate mine and therefore the dust in the RPC may be a way which is leading to elevated cadmium levels in detainees?

Dr Seevnarain: Just to make it known, our recommendation has been for there to be extensive environmental studies to study the level of dust contamination in that setting. It is a very specific scientific process by which you go about determining the constituents of dust and stuff like that.

Senator McKIM: Have you recommended that every detainee be tested for their cadmium levels?

Dr Seevnarain: Not at this point.

Senator McKIM: Why not?

Dr Seevnarain: The aim of health surveillance is to try and understand the end organ disease or what the levels are at that point.

Senator McKIM: Isn't it just to keep people healthy?

Dr Seevnarain: Not if it has been the exposure but, yes, that maybe.

Senator McKIM: I will just be very clear here. If people are getting contaminated with cadmium simply because they are on Nauru, would that be concerning to IHMS?

Dr Seevnarain: As responsible medical providers, it is of concern but to jump to the assumption that everybody there is currently being exposed to cadmium and at a level—<sup>16</sup>

1.47 The Australian Greens have heard evidence that many refugees and asylum seekers are on Nauru are anxious about their potential exposure to high levels of cadmium.<sup>17</sup>

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14 Dr Paddy McLisky, Secretary, Doctors for Refugees (DFR), *Committee Hansard*, Tuesday 14 March 2017, p. 7.

15 Dr Paddy McLisky, Secretary, DFR, *Committee Hansard*, Tuesday 14 March 2017, pp. 7–8.

16 Dr Kalesh Seevnarain, Senior Health Adviser, IHMS, *Committee Hansard*, Wednesday 15 March 2017, p. 55.

1.48 The Australian Greens believe that all refugees and asylum seekers on Nauru should be immediately tested for elevated cadmium levels and receive appropriate health care.

***Delayed testing and treatment***

1.49 Delayed medical testing and treatment is causing the unnecessary pain, suffering and anxiety among refugees and asylum seekers. Lives are being put at greater risk.

1.50 The Australian Medical Association (AMA) submitted a case study of a man who was hit on the back of the head with a machete and had to wait nearly a month to receive a scan as his condition worsened:

The AMA was told he has a background of torture in Iran but was functioning well on Nauru. Since arriving on Nauru he had married another asylum seeker. On Saturday, 5 March 2016 [name redacted], was apparently attacked by two locals and was hit on the back of his head with a machete, a wound that required stitching. The AMA was told [name redacted] suffers from worsening headaches, repeated vomiting, nausea, confusion, dizziness, tired eyes and weakness; that he does not sleep or eat properly and was urine incontinent. The AMA was later told remains in a foetal position on his bed, unable to be left alone.

On 9 April 2016 [name redacted] had a CT scan, and was told that there was a broken bone in the centre of his skull. The AMA was advised that this diagnosis was later revised to suffering from a mental illness. The AMA had been told [name redacted]'s condition continues to deteriorate and that his wife was advised by a mental health doctor that they could not help [name redacted] anymore and would recommend electric shock treatment.<sup>18</sup>

1.51 The AMA provided the Committee with case studies of other delayed treatment including the case of a refugee or asylum seeker who had been experiencing ever worsening pain and bleeding for two years before receiving medical testing. A polyp was found in his large intestine and there were indications it may have been carcinoma.<sup>19</sup>

1.52 The Committee heard that delays in medical transfer to Australia often occurred as a result the transfers needing to be 'facilitated by the Department of Immigration'.<sup>20</sup>

1.53 Dr Rudolph the Area Medical Director for IHMS told the committee that four out of eight refugees and asylum seekers waiting for medical transfer from Manus Island to Australia waited for longer than medically recommended. Dr Rudolph also

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17 Dr Paddy McLisky, Secretary, DFR, *Committee Hansard*, Tuesday 14 March 2017, p. 8.

18 Australian Medical Association (AMA), *Submission 1*, p. 6.

19 AMA, *Submission 1*, p. 7.

20 Dr Peter Rudolph, Area Medical Director, IHMS, *Committee Hansard*, Wednesday 15 March 2017, p. 47.

told the committee that 12 out of 20 asylum seekers and refugees from Nauru waited longer than medically recommended for medical transfer to Australia.<sup>21</sup>

1.54 The Australian Greens are concerned the Department of Immigration and Border Protection (the department) does facilitate transfers within a medically recommend timeframe and often has to be prompted or reminded to IHMS to transfer refugees and asylum seekers in need of medical treatment in Australia. Dr Rudolph told the committee:

What we tend to do is that after a particular time we resubmit the request as a sort of reminder to the department, and with some cases we discuss it at particular complex case meetings with the department's clinical team.<sup>22</sup>

1.55 Confidential submissions to the committee also detailed wait times beyond form transfer to Australia beyond what was medically recommended. This often caused the asylum seeker or refugee seeking medical attention increased pain and anxiety.

### ***Mental health***

1.56 Depression and Post Traumatic Stress Disorder (PTSD) have 'reached epidemic proportions' among refugees and asylum seekers on Manus Island and Nauru.<sup>23</sup>

1.57 The Royal Australian and New Zealand College of Psychiatrists (RANZCP) stated that, 'self-harm and suicidal behaviour have subsequently become endemic in immigration detention facilities'.<sup>24</sup>

1.58 The Castan Centre for Human Rights Law submitted the following:

The death of Omid Masoumali and horrific injuries suffered by Hodan Yasin demonstrate the extremes of suffering borne of hopelessness and desperation in these environments.<sup>25</sup>

1.59 The Committee heard extensive evidence proving that mental health outcomes worsen the longer a person is held in detention and that the longer a person is in detention the more likely they are to develop a mental illness.<sup>26</sup>

1.60 The RANZCP highlighted that the 'prolonged uncertainty created by a system of indefinite detention is a major factor in increasing hopelessness and mental deterioration'.<sup>27</sup>

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21 Dr Peter Rudolph, Area Medical Director, IHMS, *Committee Hansard*, Wednesday 15 March 2017, pp. 47–48.

22 Dr Peter Rudolph, Area Medical Director, IHMS, *Committee Hansard*, Wednesday 15 March 2017, p. 48

23 Human Rights Watch, *Submission 22*, p. 1.

24 Royal Australian and New Zealand College of Psychiatrists (RANZCP), *Submission 8*, p. 5.

25 Castan Centre for Human Rights Law, *Submission 42*, p. 1.

26 RANZCP, *Submission 8*, p. 5.

1.61 The Australian Greens are deeply concerned that the involuntary separation of families increases the risk of, or exacerbates mental illness.

1.62 The Australian Psychological Society submitted that:

Family separation (involuntary) between the mainland and offshore detention facilities and in other countries further contributes to poor psychological outcomes in both parents and children, including risk of self-harm.<sup>28</sup>

### ***Trauma***

1.63 Adults and children seeking asylum are likely to be recovering from significant instances of trauma before they enter a RPC. Past trauma and mental illness is a known risk of detention.

1.64 The Australian Greens hold grave concerns that refugees and asylum seekers are being forced to remain in locations where they experienced traumatic events. Traumatic events include rapes, assaults and witnessing traumatic incidents.

1.65 The AMA provided evidence of a case study of a man who had witnessed the murder of Reza Barati. His symptoms included the following:

- increasing chest pain;
- excruciating headaches;
- weakness and numbness in left arm and leg;
- inability to sleep; and
- a constant fear of being murdered.<sup>29</sup>

1.66 The Australian Greens are deeply concerned that the trauma being experienced by refugees and asylum seekers on Manus and Nauru will continue to affect their health even decades after their experience in an Australian RPC.

1.67 The ACMHN submitted the complex trauma experienced by asylum seekers on Manus Island and Nauru is likely to have long-term impacts, they stated:

The term 'complex trauma' describes multiple kinds of adversity and overwhelming life experiences. The cumulative effects of this type of trauma are pervasive and represent major risk for lifelong physical and mental illness, poor quality of life and even premature death (MHPOD 2011)xi.<sup>30</sup>

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27 RANZCP, *Submission 8*, p. 4.

28 Australian Psychological Society, *Submission 49*, p. 3.

29 AMA, *Submission 1*, p. 5.

30 ACMHN, *Submission 41*, p. 6.

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***Treatment of and response to poor mental health***

1.68 Refugees and asylum seekers commonly receive inadequate treatment and inappropriate responses when presenting with for mental health problems. This puts their lives and wellbeing at greater risk.

1.69 The Australian Greens are deeply concerned that the mental health of refugees and asylum seekers is not being accounted when they first arrive at the RPCs on Manus Island and Nauru. The RANZCP submit that:

The initial health assessments conducted in the 48 hours after boat arrival do not include assessment of mental health or developmental status.<sup>31</sup>

1.70 IHMS, who provide health services to Australia's RPCs have responded to the submission of the Royal Australian College of General Practitioners (RACGP) as follows:

We appreciate the care with which this statement has been made, and the difficulties drawing conclusions without firm data. However we would comment that we are not aware of any suicides in Nauru or Manus Island over the last three years. One death (which was reported as possible suicide in the media) was from unknown causes. The other was a man who set himself on fire as a form of political protest, with what appears to be an accidental death ensuing.<sup>32</sup>

1.71 The Committee heard concerns as to whether incidents were being systematically downgraded to avoid fine or action. The Committee heard from Mr Paul Stevenson, a psychologist on Manus and Nauru from July 2014 to July 2015 as an employee of PsyCare that he:

...witnessed via email, transcripts of incident reports and personal experience a 30 per cent systematic downgrading of incidents categorised as critical to incidents categorised as major and minor.<sup>33</sup>

1.72 The RANZCP's submission included a case example of an incidence being downgraded. They submitted the following:

On 29 January 2015, an asylum seeker on Nauru repeatedly expressed a desire to die to a case manager, who responded by encouraging the individual 'to think of something positive that she enjoyed prior to detention and to do this everyday to improve her well-being' (Guardian, 2016). The case was subsequently downgraded from a 'minor incident' to 'information' only. Reminding an individual of 'positive' things in their past is not an appropriate way of managing someone's current risk of suicide. Furthermore, the downgrading of an incident of suicidal ideation to 'information' only raises some questions about the capacity for regional

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31 RANZCP, *Submission 8*, p. 3.

32 Royal Australian College of General Practitioners (RACGP), *Submission 17*, IHMS Response, p. 3.

33 Mr Paul Stevenson, Psychological, Brisbane Refugee and Asylum Seeker Support Network (BRASSN), *Committee Hansard*, Tuesday 14 March 2017, p. 11.

processing centres to appropriately recognise and respond to mental health issues.<sup>34</sup>

1.73 While the Mr Grant Hehir, the Auditor-General, told the committee that they had not seen evidence of reports being systematically down graded, he did comment the department had poor record keeping methods, saying:

Poor record keeping was a feature of this audit. Record-keeping standards are set under the Archives Act as well as by the department's own policies. The department's performance in this regard was substantially below requirements. Quality records are essential for effective management, not only to ensure day-to-day operations are effective but also to allow lessons to be learnt and accountability frameworks to operate.<sup>35</sup>

1.74 The Australian Greens are concerned with the inconsistency between the number of incident reports provided by the department, and Transfield. Dr Ioannou, Group Executive Director at the Australian National Audit Office told the committee 'Overall, DIBP held 8,009 records as incidents and Transfield held 12,104'.<sup>36</sup>

1.75 Dr Ioannou also told the Committee that:

...we did document in a factual way in appendix 2 of the report the various performance reporting measures around those various categories of critical, major and minor. Again, as we explained a moment ago, we documented what we observed on the basis of the departmental record and the relevant records that we acquired from the contractors. We did not do a further investigation to look behind the record, if I could put it that way.<sup>37</sup>

## **Children**

### ***Introduction***

1.76 Nauru has never been an appropriate or safe place for refugee and asylum seeker children. By placing refugee and asylum seeker children on Nauru the Australian government knowingly exposed and continues to expose children extremely elevated risk of assault, sexual assault, neglect, disease and injury.

1.77 The Royal Australasian College of Physicians (RACP) highlighted that despite the increased risk to children in detention there is no clear or consistent framework in place to protect them.<sup>38</sup>

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34 RANZCP, *Submission 8*, p. 5.

35 Mr Grant Hehir, Auditor-General, Australian National Audit Office (ANAO), *Committee Hansard*, Wednesday 15 March 2017, p. 27.

36 Dr Tom Ioannou, Group Executive Director, ANAO, *Committee Hansard*, Wednesday 15 March 2017, p. 32.

37 Dr Tom Ioannou, Group Executive Director, ANAO, *Committee Hansard*, Wednesday 15 March 2017, p. 32.

38 Royal Australasian College of Physicians (RACP), *Submission 5*, p. 3.

1.78 The Australian Greens are concerned that the conditions on Nauru limit the access of refugee and asylum seeker children to education and do not address the specific and complex needs of refugee and asylum seeker children.

1.79 The Committee heard that when the Regional Processing Centre ('RPC') at Nauru was first established there were no formalised or complete child protection frameworks on the island.

1.80 When the Nauru RPC was first established, the situation at the time was described by Ms Amy Lamoin, Head of Policy and Advocacy, UNICEF Australia as completely inadequate for the protection of both Nauruan and refugee and asylum seeker children.<sup>39</sup>

1.81 The Australian Greens are concerned that asylum seeker children have been put at risk due to the Government's harmful actions and that the ability for child advocates such as Save the Children to operate on Nauru has been greatly restricted.

Senator McKIM: Okay, thanks. When your contract expired, were there changes in eligibility requirements that prevented you from reapplying?

Mr Tinkler: Yes, there were two things done. The first thing was the government grouped what was called 'garrison and welfare services', so that effectively meant that the contract for services to establish security and infrastructure run by Transfield Services and Wilson Security was grouped with child protection and education welfare support. In practice, that made Save the Children ineligible to apply because we do not run security.

Senator McKIM: Because you did not have capacity in that area?

Mr Tinkler: Right. The second thing, more substantively, was the tender requirements were changed so that only a company limited by shares could tender for the work. An NGO, by definition, is not limited by shares and therefore could not tender directly. So we could bid for contracts, and we did, with a private sector partner, but only as a subcontractor in that arrangement, which was far from ideal because we lost our direct reporting line to the government.

Senator McKIM: Are you able to inform the committee whether you were successful?

Mr Tinkler: We were unsuccessful.<sup>40</sup>

### ***Increased risk of assault, sexual assault and neglect***

1.82 The Committee heard evidence that the conditions on Nauru placed children at higher risk of sexual assault. The RACP submitted:

In held detention, children cannot be protected from and are exposed to physical violence and mental distress in adults, including their parents.

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39 Ms Amy Lamoin, Head of Policy and Advocacy, UNICEF Australia, *Committee Hansard*, Tuesday 15 November 2016, p. 27.

40 Mr Mat Tinkler, Director, Policy and Public Affairs, Save the Children, *Committee Hansard*, Tuesday 15 November 2016, pp. 27–28.

They are likely to be at significant risk of physical and sexual abuse and maltreatment, including neglect. These risks arise primarily as a result of the detention environment, yet despite the risk, there remains no clear or consistent child protection framework for children in Australian held detention.<sup>41</sup>

1.83 Human Rights Watch conducted interviews with refugees and asylum seekers and received information about multiple incidents of guards and other service providers committing acts of violence against children.<sup>42</sup>

1.84 Ms McDonald, a volunteer at Love Makes a Way, told the Committee that a father in detention in Nauru expressed anxiety about the safety of his child as follows:

We always followed our toddler like a shadow to protect the child from being sexually abused. This is the thing we were always worried about. We heard that sexual abuse was happening in the compounds by guards. We did not leave our child alone.<sup>43</sup>

1.85 The Committee heard evidence that complaints of abuse and neglect of refugee and asylum seeker children have been mismanaged or ignored by responsible authorities:

CHAIR: This touches on your characterisation of the child protection framework or lack of it. More broadly, how would either Save the Children or UNICEF characterise the complaints handling processes in relation to criminal allegations on Nauru

Mr Tinkler: Our experience is that it is very poor. It has been on the public record at numerous forums that there were a high number of allegations of abuse and sexual assault. Ultimately, allegations of that nature were referred to the Nauruan police. But our experience was that there was a very low capability and expertise to effectively prosecute those kinds of allegations. Indeed, there have been no successful prosecutions to date.

CHAIR: Is there any responsibility for the Department of Immigration and Border Protection in those processes at all? You are contracted to provide those services by Nauru who is in turn contracted to provide them by the Department of Immigration and Border Protection; is that correct?

Mr Tinkler: Yes, there are responsibilities. For example, the condition of detention—the living conditions and settings—lends itself to a high preponderance of these kinds of acts. There are steps that can be taken to prevent or mitigate these actions—for example, separation of offenders or potential offenders from children. So the department had a responsibility to follow up recommendations from child protection advisers inside the centre, for example.

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41 RACP, *Submission 5*, Attachment 1, p. 3.

42 Human Rights Watch, *Submission 22*, pp. 4–5.

43 Ms Michelle McDonald, Volunteer, Love Makes a Way, BRASSN, *Committee Hansard*, Tuesday 14 March 2017, p. 13.



CHAIR: Did they follow those up?

Mr Tinkler: It varied. On occasion our recommendations were accepted and on occasion they were not.<sup>44</sup>

1.86 The Australian Greens argue that given the evidence brought to the Committee the Australian Government has failed to follow its obligations when it comes to preventing child sexual abuse on Nauru.

1.87 The Castan Centre for Human Rights Law submitted that during the Royal Commission into Institutional responses to Child Sexual Abuse:

Counsel assisting the Royal Commission acknowledged that Australia is obliged to take all appropriate legislative, administrative, social and educational measures to protect children from sexual and other forms of abuse including measures for the prevention, identification, reporting, referral, investigation, treatment and follow up of incidents of child abuse.<sup>45</sup>

### ***Child health and development***

1.88 The Committee heard evidence from multiple parties that holding children in detention results in ‘unacceptable and extreme’ negative outcomes for their health, mental health and development.<sup>46</sup>

1.89 The RANZCP submitted:

Detention is particularly detrimental to children’s physical and mental health and has been shown to result in developmental regression and delays, with the potential to cause long-term damage to their physical, cognitive, social and emotional functioning.<sup>47</sup>

1.90 The RANZCP also explained that:

More than a third of children in detention centres have serious mental health disorders compared with 2% in the Australian population.<sup>48</sup>

1.91 Short periods of detention can create risk to children’s functioning. Long periods of detention create a ‘high risk of suffering mental illness and post-traumatic symptoms’.<sup>49</sup>

1.92 Dr Anna Neistat, Senior Director for Research at Amnesty International, told the Committee that:

In some of our interviews with professionals we heard very clearly that so much damage has already been done that for many of these children it will

44 Mr Mat Tinkler, Director, Policy and Public Affairs, Save the Children, *Committee Hansard*, Tuesday 15 November 2016, p. 29.

45 Castan Centre for Human Rights law, *Submission 42*, p. 5.

46 RACP, *Submission 5*, p. 3.

47 RANZCP, *Submission 8*, p. 4.

48 RANZCP, *Submission 8*, p. 5.

49 RANZCP, *Submission 8*, p. 4.

take years to repair this damage, and that every further month—let alone every year—that is spent on the island adds to this trauma, and probably to the years that it will take to repair this trauma.<sup>50</sup>

1.93 Ten refugee and asylum seeker children on Nauru tested positive to latent tuberculosis when given the Mantoux test for tuberculosis.<sup>51</sup>

1.94 The Committee heard that conditions on Nauru compound the risk of a public health crisis. This would have a significant impact on children's health. Dr McLisky, of DFR, detailed this as follows:

Tuberculosis spreads in close, cramped, living conditions. Children play together in close proximity, compounding the risk of a public health crisis. The parasitic infestation schistosomiasis and the viral illness dengue fever have also been diagnosed on Nauru. Transmission of these diseases is increased by substandard accommodation, including a lack of reliable plumbing on the island. There is a depth of literature detailing the long-term psychiatric harm seen in children in prolonged detention.<sup>52</sup>

1.95 The Australian Greens agree with the proposition by the Commissioner for Children and Young People Western Australia, that the appointment of an Independent Legal Guardian ('ILG') for all children, including unaccompanied minors, in detention should be progressed with immediately.

### ***Schooling***

1.96 Severe bullying, violence and harassment prevent many students from attending local school in Nauru. Nauruan students commonly put students who do attend school in physical and sexual danger.<sup>53</sup>

1.97 The Committee heard that transition of refugee and asylum seeker children from a school run by Save the Children within the RPC to a school in the Nauruan community was mismanaged.

1.98 Save the Children's school reported a 90% attendance rate.<sup>54</sup>

1.99 Human Rights Watch estimate that, '85% of refugee and asylum seeker children on Nauru are not enrolled in school'.<sup>55</sup>

1.100 Mr Tinkler, Director of Policy and Public Affairs at Save the Children has stated:

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50 Dr Anna Neistat, Senior Director for Research, Amnesty International, *Committee Hansard*, Wednesday 15 March 2017, p. 6.

51 Dr Peter Rudolph, Area Medical Director, IHMS, *Committee Hansard*, Wednesday 15 March 2017, p. 52.

52 Dr Paddy McLisky, Secretary, DFR, *Committee Hansard*, Tuesday 14 March 2017, p. 1.

53 Commissioner for Children and Young People Western Australia, *Submission 9*, p. 5.

54 Mr Mat Tinkler, Director, Policy and Public Affairs, Save the Children, *Committee Hansard*, Tuesday 15 November 2016, p. 28.

55 Human Rights Watch, *Submission 22*, p. 6.

We support that ambition because it is good to have kids educated in the local community, but it is only useful if the appropriate support is provided.<sup>56</sup>

1.101 Mr Tinkler argued that appropriate support for refugee and asylum seeker children attending school in the Nauruan community was lacking. He suggested the support that was missing to include:

- english as a second language, tuition and instruction;
- integration programs for students; and
- teachers and the community around people from different cultural backgrounds.<sup>57</sup>

### ***Unaccompanied minors***

1.102 As of 15 November 2016 there were 19 unaccompanied minors on Nauru. All unaccompanied minors have been given an arbitrary date of birth of 31st of December and the immigration determines when they are no longer classified unaccompanied minors.<sup>58</sup>

1.103 The Australian Greens are concerned that 'under the Immigration (Guardianship of Children) Act 1946 (Cth) the Minister for Immigration and Border Protection is appointed the guardian of "non-citizen" unaccompanied minors'.<sup>59</sup>

1.104 The Australian Greens take the view that the Minister for Immigration and Border Protection is an inappropriate guardian for unaccompanied refugees and asylum seekers.

1.105 The Australian Greens agree with Australian Lawyers for Human Rights that:

- (a) the Minister has a conflict of interest in his role as a visa decision-maker and as the person responsible for administering the detention regime; and
- (b) it is concerning that neither the Minister, nor those to whom powers are delegated, are required to be equipped with specialist knowledge or experience in relation to children.<sup>60</sup>

1.106 Australia is failing its duty to unaccompanied minors. The Commissioner for Children and Young People Western Australia submitted that:

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56 Mr Mat Tinkler, Director, Policy and Public Affairs, Save the Children, *Committee Hansard*, Tuesday 15 November 2016, pp. 27–28.

57 Mr Mat Tinkler, Director, Policy and Public Affairs, Save the Children, *Committee Hansard*, Tuesday 15 November 2016, p. 28.

58 Ms Pamela Curr, Australian Women in Support of Women on Nauru (AWSWN), *Committee Hansard*, Tuesday 15 November 2016, pp. 11–12.

59 Australian Lawyers for Human Rights (ALHR), *Submission 25*, p. 9.

60 ALHR, *Submission 25*, p. 9.

Australia has an obligation under the UN convention to 'ensure alternative care' for children who arrive unaccompanied, especially to those seeking asylum. Australia must ensure children receive special protection and assistance.<sup>61</sup>

1.107 Australian Lawyers for Human Rights have emphasised that the UNHCR dictates that unaccompanied children should not be detained and their detention cannot be justified on the basis of their migration status.<sup>62</sup>

### ***Effect on families***

1.108 Conditions on Nauru curtail the normal functioning of family life. The RANZCP submitted that:

There are reports that RPCs have oppressive levels of security that limit the freedom of detainees, undermine parenting and family life, and are not natural environments. Families are subjected to intrusive surveillance and monitoring limiting privacy.<sup>63</sup>

### ***Children and international law***

1.109 Australia has specific obligations to under international law as signatories to UN Convention on the Rights of the Child ('UNCRC'). By failing to adequately protect the welfare of refugee and asylum seeker children on Nauru Australia is failing to meet its obligations under this convention.

1.110 Article 7 of the UNCRC states all children have 'the right to acquire a nationality'. And further that, 'parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless'.<sup>64</sup>

1.111 As many as 12 children born on Nauru are stateless.<sup>65</sup> The Australian Greens are greatly concerned that these children are being denied their right to a nationality. Such a denial would contravene Australia's obligations under the UNCRC.

1.112 Australian Lawyers for Human Rights argue that Australia is failing to meet its obligations under the UNCRC regarding:

- the right to be free from abuse, neglect and violence by their parents or anyone else looking after them;
- the right to be free from torture or cruel, inhuman or degrading treatment or punishment;

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61 Commissioner for Children and Young People Western Australia, *Submission 9*, p. 3.

62 ALHR, *Submission 25*, p. 7.

63 RANZCP, *Submission 8*, p. 4.

64 Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.

65 Commissioner for Children and Young People Western Australia, *Submission 9*, p. 2.

- the right to special help and protection as refugees;
- the right to adequate health care, clean water, food and a healthy environment; and
- the right to be protected from activities that would harm their development.<sup>66</sup>

### **International Law**

1.113 Australia is obliged to protect the human rights of refugees and asylum seekers under international law.<sup>67</sup>

1.114 The Australian Greens firmly believe that Minister Dutton should be answerable for Australia's ongoing breaches of international law.

1.115 In November 2013, the UNHCR held that Australia was acting inconsistently with international law. Their findings were summarised in their submission to the Inquiry as follows:

The 'policy and practice of detaining all asylum-seekers at the detention centre referred to as the 'Regional Processing Centre', on a mandatory and open-ended basis, without an individualised assessment as to the necessity, reasonableness and proportionality of the purpose of such detention amounts to arbitrary detention that is inconsistent with international law'.<sup>68</sup>

1.116 The Australia Council for International Development's (ACFID) stated in their submission to the Inquiry that:

The current policies of maintaining offshore detention policies that have been shown to be in breach of international human rights law. These policies present a significant risk to Australia's international reputation and strategic interests by impairing Australia's ability to influence global human rights issues, to influence regional respect for human rights and for international law. Of timely importance, is the adverse impact of these policies on Australia's candidacy for a seat on the UN Human Rights Council.<sup>69</sup>

1.117 The Australian Greens take seriously the international obligations owing to refugees and asylum seekers and agree with the Australian Lawyers for Human Rights submission that Australia 'cannot absolve itself of its responsibilities towards asylum seekers and refugees by contracting out services to a third party, nor can it absolve itself of responsibility by merely transferring asylum seekers to Manus Island and Nauru'.<sup>70</sup>

1.118 The Australian Greens share the concerns of the UNHCR who submitted that:

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66 ALHR, *Submission 25*, p. 7.

67 ALHR, *Submission 25*, p. 5.

68 United Nations High Commissioner for Refugees (UNHCR), *Submission 43*, p. 6.

69 Australia Council for International Development (ACFID), *Submission 45*, p. 3.

70 ALHR, *Submission 25*, pp. 3-4.

Since the Government of Australia's announcement in 2012 that it would recommence 'offshore processing', UNHCR has raised its concerns about the offshore arrangements and the detrimental impact for those individuals who would be affected by these arrangements, among other elements.<sup>71</sup>

1.119 Australia's approach to refugees and asylum seekers is uniquely cruel. The Australian Lawyers for Human Rights submission stated the following.

Australia is the only country to detain asylum seekers indefinitely in jail-like conditions, including adults and children with severe psychiatric impairment as well as those with identified developmental and cognitive disabilities.

This represents a clear breach of Australia's human rights obligations and of the rights of these individuals (Newman et al., 2013). Furthermore, the detention of children is in contravention of responsibilities under the UN Convention on the rights of the child (1989), ratified by Australia in 1990.<sup>72</sup>

1.120 The Australian Greens are particularly concerned about the detention of minors on Nauru. The RANZCP submitted to the Inquiry that:

The Migration Act 1958 (Cth) contains a principle that a minor shall only be detained as a measure of last resort. It has, however, been a source of significant concern that children and their families and unaccompanied minors continue to be subject to routine, prolonged and indefinite detention, despite this legislation.<sup>73</sup>

## **Work health and safety**

### ***Commonwealth workplaces***

1.121 RPCs in Nauru and Manus Island are Commonwealth workplaces. Comcare has regulated RPCs for many years.

1.122 Section 8 of the Work Health and Safety Act 2011 (Cth) ('WHS Act') defines a Commonwealth workplace broadly to be:

A place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.

1.123 Submission 48 authored by Mr Max Costello and Ms Paddy McCorry states that the WHS Act applies to RPCs.<sup>74</sup> Application arises because:

- (a) all 'detention centres' (and other workplaces) of the department are Commonwealth workplaces; and
- (b) via section 12F(3), the Act has 'extended geographical jurisdiction' in counties such as PNG and Nauru, that don't have a law equivalent to the WHS Act.

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71 UNHCR, *Submission 43*, p. 4.

72 ALHR, *Submission 25*, pp. 3-4.

73 RANZCP, *Submission 8*, p. 9.

74 Mr Max Costello, *Submission 48*, p. 1.

1.124 Comcare are notified of incidents that take place at RPCs. Submission 24 authored by the Australian Lawyers Alliance outlined that:

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).<sup>75</sup>

1.125 The Australian Greens agree with the submission of Mr Costello and Ms McCorry that the WHS Act should be amended to make certain the applicability of the Act to offshore Commonwealth workplaces. This would provide certainty and remove doubt.

1.126 Mr Costello and Ms McCorry suggest the adoption of a provision similar to that prescribed by section 7 of the *Border Force Act 2015* (Cth) which reads as follows:

This Act extends to acts, omissions, matters and things outside Australia.<sup>76</sup>

### ***Primary duty of care***

1.127 All Commonwealth workplaces owe duties of care that are prescribed by the WHS Act.

1.128 The duties of care owed by the Commonwealth cannot be transferred or contracted out.<sup>77</sup> The Committee heard from Mr Costello, former prosecutor in health and safety law and a former university lecturer in employment law that:

This statement we often hear that the duty to look after the health and safety of the asylum seekers on Manus and Nauru belongs to the governments of Papua New Guinea and Nauru is legal falsehood, demonstrably so, prohibited by the act.<sup>78</sup>

1.129 The Committee heard from Mr Costello that pursuant to section 19 of the WHS ACT the department has:

A primary duty of care to safeguard, so far as is reasonably practicable, the health and safety—and health includes psychological health—of both workers, that is section 19(1), and other persons, section 19(2). Those other persons, at detention centres onshore and offshore, are the asylum seekers.<sup>79</sup>

1.130 Mr. Costello argued the department has a proactive and preventative duty to:

Look at all possible hazards and assess the risks, that is, how likely they are to occur and, if so, how harmful they might be, and then, if practicable,

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75 ALHR, *Submission 24*, p. 8.

76 Mr Max Costello, *Submission 48*, p. 8.

77 Mr Max Costello, *Submission 48*, p. 16.

78 Mr Max Costello, *Committee Hansard*, Tuesday 15 November 2016, p. 38.

79 Mr Max Costello, *Committee Hansard*, Tuesday 15 November 2016, p. 38.

eliminate those risks or at least minimise them unless with a particular risk the cost is grossly disproportionate.<sup>80</sup>

### ***The scope of notifiable incidents***

1.131 The Australian Greens have serious concerns that the current scope of notifiable incidents under the WHS Act is both out-dated and too restrictive.

1.132 Section 38 of the WHS Act provides a duty to notify the regulator of a defined number of 'notifiable incidents'. The section provides that:

A person who conducts a business or undertaking must ensure that the regulator is notified immediately after becoming aware that a notifiable incident arising out of the conduct of the business or undertaking has occurred.

#### Penalty

In the case of an individual--\$10 000.

In the case of a body corporate--\$50 000.

1.133 The Australian Greens agree with the submission of Mr Costello and Ms McCorry that the phrase 'incident arising out of the conduct of the business or undertaking' in section 38(1) of the WHA Act is too restrictive to adequately respond to the harmful incidence occurring to people on the RPCs' in Nauru and Manus Island.<sup>81</sup>

1.134 The submission of Mr Costello and Ms McCorry noted:

Section 38 restrictively limits what's notifiable.

For example, incident types... would presumably arise out of the conduct of intruders.<sup>82</sup>

1.135 The Australian Greens agree with the position of the Australian Lawyers Alliance regarding widening the scope of matters relevant to health and safety reporting requirements.<sup>83</sup>

1.136 The 'notifiable incidents' that must be reported are defined in section 35 of the WHS Act to include:

- (a) the death of a person;
- (b) a serious injury or illness of a person; and
- (c) a dangerous incident.

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80 Mr Max Costello, *Committee Hansard*, Tuesday 15 November 2016, p. 38.

81 Mr Max Costello, *Submission 48*, p. 12.

82 Mr Max Costello, *Submission 48*, p. 3.

83 Australian Lawyers Alliance (ALA), *Untold Damage Workplace health and safety in immigration detention under the Work, Health and Safety Act 2011 (Cth.)*, 16, [www.lawyersalliance.com.au/documents/item/583](http://www.lawyersalliance.com.au/documents/item/583)



1.137 Mr Costello and Ms McCorry submitted to the Inquiry that the definition of notifiable incident is both narrow and industrial, stating:

The definition is relevant to (the shrinking proportion of) manufacturing/primary and secondary industry/blue collar workplaces, but much less so to (the steadily expanding proportion of) tertiary/service industry/white collar workplaces.<sup>84</sup>

1.138 For example a 'dangerous incident' is defined by section 37 of the WHA ACT to include:

- an uncontrolled escape, spillage or leakage of a substance;
- electric shock;
- an uncontrolled escape of gas or steam; and
- the interruption of the main system of ventilation in an underground excavation or tunnel.

1.139 For example a 'serious injury or illness' is defined by section 36 of the WHA ACT to include:

- immediate treatment as an in-patient in hospital;
- immediate treatment for a serious head, eye or spinal injury etc; and
- medical treatment within 48 hours of exposure to a substance.

1.140 The Australian Greens are greatly concerned that psychological injuries, rapes or serious sexual assaults, or even deaths that take place in certain circumstances are not automatically or immediately notifiable.

1.141 The Australian Lawyers Alliance report *Untold Damage* argues that the WHS Act should be amended to ensure a wider scope of matters are recognised as relevant to health and safety reporting requirements.<sup>85</sup> Suggested matters include:

- all deaths, regardless of the circumstances in which the death occurred;
- serious sexual assault, sexual abuse and serious sexual harassment;
- all assaults of children;
- bullying giving rise to a fear for safety;
- psychological injury;
- self-harm incidents;
- series of serious injuries or illnesses that could be related;
- any failure to identify, mitigate and eliminate risks to health and safety posed by contractors, including failure to report incidents to the DIBP or Comcare; and

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84 Mr Max Costello and Ms Paddy McCorry, *Submission 47*, p. 2.

85 ALA, *Untold Damage Workplace health and safety in immigration detention under the Work, Health and Safety Act 2011 (Cth)*, 16, [www.lawyersalliance.com.au/documents/item/583](http://www.lawyersalliance.com.au/documents/item/583)

- the individual's age, sex and any other characteristics giving rise to vulnerability, with reporting requiring that these factors be identified.

### ***Reporting***

1.142 The Committee heard that reporting of incidents to Comcare was often haphazard, with incidents such as the self-immolation of two individuals not being reported to Comcare.<sup>86</sup>

1.143 The Australian Greens share the concerns submitted to the inquiry by Mr Costello and Ms Paddy that, 'reporting assaults and sexual assaults to police is not required'.<sup>87</sup> The Australian Greens agree that certain incidents warrant the notification of police as well as the regulator.

1.144 The Australian Greens believe that amendments to the WHS Act are necessary and that a broad interpretation of the types of injuries, illnesses and incidents subject to investigation should be adopted.

## **Senator Nick McKim**

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86 Ms Anna Talbot, Legal and Policy Adviser, ALA, *Committee Hansard*, Tuesday 15 November 2016, p. 41.

87 Mr Max Costello and Ms Paddy McCorry, *Submission 47*, p. 2.