

# Interim Report

## Terms of reference and conduct of the inquiry

1.1 On 12 October 2015 the Senate, 'noting the sovereignty of the Republic of Nauru and Papua New Guinea, and within the limits of Australia's sovereignty', referred the following matter to the Senate Legal and Constitutional Affairs References Committee (the committee) for inquiry and report by 31 December 2016:

- (a) conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea;
- (b) transparency and accountability mechanisms that apply to the regional processing centres in the Republic of Nauru and Papua New Guinea;
- (c) implementation of recommendations of the Moss Review in relation to the regional processing centre in the Republic of Nauru;
- (d) the extent to which the Australian-funded regional processing centres in the Republic of Nauru and Papua New Guinea are operating in compliance with Australian and international legal obligations;
- (e) the extent to which contracts associated with the operation of offshore processing centres are:
  - (i) delivering value for money consistent with the definition contained in the Commonwealth procurement rules,
  - (ii) meeting the terms of their contracts, and
  - (iii) delivering services which meet Australian standards; and
- (f) any other related matter.<sup>1</sup>

1.2 In accordance with usual practice the committee advertised the inquiry on its website, and also wrote to various organisations and individuals inviting written submissions.

1.3 Bearing in mind the long duration of the inquiry, the committee set an initial submission deadline of 31 March 2016, with a view to obtaining a first tranche of evidence, while leaving open the possibility of accepting further submissions at a later stage of the inquiry.

1.4 At the date of this interim report, the committee had accepted 30 submissions. Certain submissions were accepted wholly or partly *in camera*. A list of submissions received is at Appendix 1.

## This interim report

1.5 As of May 2016, the committee has not yet had the opportunity to conduct any public hearings for this inquiry, nor to consider any further investigation of the matters before it. This interim report therefore summarises some of the key issues

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1 *Journals of the Senate*, No. 119, 12 October 2015, pp 3199-3200.

raised in the submissions received to date, but does not seek to draw any conclusions or to offer substantive recommendations.

1.6 The committee intends to continue its inquiry, but recognises that the impending national election may interrupt that effort before the committee is able to conclude. Should this occur, the committee recommends to the new Senate that it refer this matter anew, and hopes that a future committee may find this interim report helpful in moving forward.

## **Background**

1.7 The history of the Australian Government's policy of 'offshore processing' in Nauru and Papua New Guinea (sometimes known as the 'Pacific solution') dates back to 2001, and has been recounted in detail elsewhere, including in various publications by the Parliamentary Library.<sup>2</sup> After a hiatus between 2008 and 2012, the present Regional Processing Centres (RPC) in the Republic of Nauru and on Manus Island in Papua New Guinea (PNG) began operation in September and November 2012, respectively.

1.8 There have been two other significant Senate committee inquiries in the 44<sup>th</sup> Parliament relating to the RPCs on Manus and Nauru. In 2014, this committee conducted an inquiry into the incident at the Manus RPC in February that year which resulted in the death of Mr Reza Barati.<sup>3</sup> In considering that incident, the committee examined and reported on a broad range of issues related to the governance and management, legal obligations, physical conditions, refugee status determination and resettlement arrangements at the Manus RPC.

1.9 In 2015, the Senate established a select committee to inquire into conditions and circumstances at the RPC in Nauru, particularly in response to allegations of sexual and other abuse, including of children, that had emerged in late 2014. That committee's report was also broad in scope, covering a range of issues including questions of legal jurisdiction and Australia's responsibilities; management and governance of the RPC; living conditions, services and facilities; and the protection of detainees at the RPC from abuse and harm.<sup>4</sup>

1.10 At the time of this report, the most recent statistics published by the Department of Immigration and Border Protection (the department) indicated that as

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2 See for example: Janet Phillips and Harriet Spinks, 'Immigration detention in Australia', Parliamentary Library *Background Note*, 20 March 2013, pp 9-20; Elibritt Karlsen, 'Australia's offshore processing of asylum seekers in Nauru and PNG: a quick guide to the statistics', Parliamentary Library *Quick Guide*, 12 October 2015. See also Janet Phillips, 'Asylum seekers and refugees: a quick guide to key Parliamentary Library publications', Parliamentary Library *Quick Guide*, 16 October 2015.

3 Senate Legal and Constitutional Affairs References Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, December 2014.

4 Senate Select Committee on the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, *Taking Responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru*, August 2015.

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at 31 March 2016, there were 468 asylum seekers and refugees (363 men, 55 women and 50 children) in the Nauru RPC, and 905 asylum seekers and refugees (all men) in the Manus RPC.<sup>5</sup>

1.11 The committee notes that in October 2015, the Government of Nauru announced that the RPC had been made a fully 'open centre', with residents able to move to and from the RPC, within Nauru, at will. The position of the governments of Nauru and Australia has been that since that time, those resident in the RPC Nauru are no longer 'detained'. It is noted that many submitters did not accept that proposition, and have continued to use the terminology of 'detention' in describing the Nauru RPC and its residents, sometimes reflected in this report.

### **Key issues raised in submissions**

1.12 A range of issues have been raised in the 29 submissions made to the inquiry so far. With the exception of submissions from the department and Broadspectrum (the primary private contractor which services both RPCs on the government's behalf, formerly named Transfield Services), the submissions were overwhelmingly critical of the government's offshore detention policies and practices.

1.13 The following highlights some of the key issues raised for the committee's consideration.

#### ***The legal issues***

1.14 The committee received a number of submissions from legal experts and organisations, maintaining the view previously placed on record by many, that Australia retained significant legal responsibilities in relation to the asylum seekers held at the RPCs on Manus and Nauru.

1.15 The Law Council of Australia (LCA) said that Australian responsibility for the health and safety of those in the RPCs stemmed from:

- the Commonwealth's potential duty of care at common law; and
- two principles of international law: that of 'joint and several responsibility' for intentionally wrongful acts, and Australia's 'effective control' over the RPCs.<sup>6</sup>

#### ***The 'Plaintiff M68' judgment***

1.16 A number of legal experts submitted that, while the High Court's February 2016 judgment in the 'Plaintiff M68' case<sup>7</sup> found that detention of asylum seekers at the Nauru RPC was authorised under Australian law, the legality of Australia's role in the RPCs was not fully resolved.

1.17 Some were critical of the Australian Parliament's enactment of retrospective legislation following commencement of the case, and the Government of Nauru's

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5 Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary*, 31 March 2016, p. 4.

6 Law Council of Australia (LCA), *Submission 5*, p. 3.

7 *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors* [2016] HCA 1.

enactment of 'open centre' arrangements just days before the High Court heard the matter—both of which were key elements in the court's ruling of legality. Labor for Refugees NSW said 'it's un-Australian to change the goalposts during the game'.<sup>8</sup>

1.18 As for the judgment itself, LCA assessed that:

While the High Court...upheld the validity of offshore detention on Nauru, the different approaches of the four separate judgments demonstrates there are some unresolved issues in respect of the question of who was detaining the plaintiff, and the question of the scope of the Commonwealth's power in circumstances where there is no statutory authorisation of that power.<sup>9</sup>

1.19 Law Students for Refugees (LSFR) said the court had found that the Commonwealth's involvement in the offshore processing regime was 'indisputable', and believed that 'the legal character of this situation is still unresolved'.<sup>10</sup> Similarly, the Refugee Council of Australia (RCOA) advised that 'a majority of the judges did not accept the proposition that the offshore processing regime in Nauru was solely Nauru's responsibility'.<sup>11</sup>

1.20 SHS Law and RCOA pointed out that the judgment did not give permission for indefinite detention, only for detention for as long as it served the purpose of processing, and that this may lead to future legal action challenging the lengthy periods for which people were detained in the RPCs.<sup>12</sup>

1.21 UNSW Law Society said that 'the question of whether the Commonwealth owes a duty of care to asylum seekers in the regional processing centres on Nauru and Manus Island has not been answered by the High Court', agreeing with LCA that the Commonwealth still owed a non-delegable duty of care to the asylum seekers under Australian common law.<sup>13</sup>

1.22 LCA and others also noted that the High Court decision 'does not affect Australia's obligations under international law'.<sup>14</sup> Some remained of the view that Australia exercised 'effective control' over the RPCs and thereby attracted responsibility for ensuring the rights of the people housed there.<sup>15</sup> More broadly, UnitingJustice Australia and others argued on the basis of various Conventions and

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8 Labor for Refugees NSW, *Submission 9*, p. 11.

9 LCA, *Submission 5*, p. 9.

10 Law Students for Refugees (LSFR), *Submission 10*, p. 7.

11 Refugee Council of Australia (RCOA), *Submission 22*, p. 4.

12 SHS Law, *Submission 6*, p. 2; RCOA, *Submission 22*, pp 4-5.

13 UNSW Law Society, *Submission 21*, p. 44.

14 LCA, *Submission 5*, p. 9; Josephite Justice Office, *Submission 8*, p. 7.

15 LCA, *Submission 5*, p. 3; UnitingJustice Australia, *Submission 7*, p. 11; Labor for Refugees NSW, *Submission 9*, pp 2-3; UNSW Law Society, *Submission 21*, p. 5.

principles, that Australia's transfer of asylum seekers to RPCs, and their treatment there, placed this country in continued breach of international law.<sup>16</sup>

1.23 The department disagreed, rejecting the argument of 'effective control'<sup>17</sup> and reiterating the government's view that Australia's international obligations were limited to, and fulfilled by, its pre-transfer assessment of asylum seekers:

Australia complies with its non-refoulement obligations by conducting pre-transfer assessments in relation to all persons liable for transfer to a regional processing country. This assessment is used to consider whether appropriate support and services are available in the regional processing country and to confirm that there are no barriers to the transfer occurring...

Once a person is transferred to a regional processing country, the assessment of whether or not protection obligations are engaged by the regional processing country is a matter for the Government of that country, having regard to their international legal obligations. Australia's international obligations apply only to those who are subject to its jurisdiction.

...

The security, good order and management of the RPCs, including the care and welfare of persons residing in the centres, remain the responsibility of the respective regional processing countries although Australia supports each country in relation to such matters through the provision of services by contracted service providers.<sup>18</sup>

1.24 Some argued that, whatever the legal situation, Australia remained morally and ethically responsible for its conduct in relation to the RPCs, and the conditions and treatment of the people held there.<sup>19</sup>

### ***Living conditions in the RPCs***

1.25 Building upon the evidence provided in earlier reports of Senate committees and other bodies, as well as media reports, many submitters were damning about the conditions in which people were being held in the RPCs in Nauru and Manus.

1.26 A former Transfield employee, who worked at the Nauru RPC during 2014-15 and had also worked in Australian immigration detention centres, described very poor living conditions at the RPCs and submitted that 'the standard of accommodation and

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16 UnitingJustice Australia, *Submission 7*, pp 15-17. See also ChilOut, *Submission 17*, [pp 16-18]; UNSW Law Society, *Submission 21*, p. iii; Refugee Advice & Casework Service (RACS), *Submission 26*, pp 10-23.

17 Department of Immigration and Border Protection (DIBP), *Submission 18*, p. 5.

18 DIBP, *Submission 18*, pp 10-11.

19 SHS Law, *Submission 6*; UnitingJustice Australia, *Submission 7*; Josephite Justice Office, *Submission 8*; Labor for Refugees NSW, *Submission 9*, pp 8-9.

health facilities at the RPC in Nauru do not meet the same standard of those provided in Australian immigration detention facilities'.<sup>20</sup>

1.27 The Royal Children's Hospital (RCH) Melbourne, which provides health services to children and families sent for treatment from the Nauru RPC, said that families described the facilities at the RPC as hot, humid, dirty, lacking privacy and 'prison-like', as well as posing a number of specific hardships for children including lack of easy access to toilets and laundry facilities, inadequate eating arrangements for toddlers and children, and insufficient clothing, footwear and baby supplies.<sup>21</sup>

1.28 Australian Lawyers for Human Rights (ALHR) believed that the harm to asylum seekers and refugees in the RPCs had worsened.<sup>22</sup> The Refugee Advice & Casework Service (RACS) said that its clients' accounts of the conditions at the RPCs, including their fears about safety and security, were sometimes 'akin to the fears of persecution experienced in their home country'.<sup>23</sup>

1.29 On the other hand, Broadspectrum described the services it provided in the two RPCs as a 'fully integrated, welfare led model' and said that it had made recent improvements to services including new and improved educational vocational and other programs and activities.<sup>24</sup> In its submission to the inquiry, the department provided detailed information relating to the infrastructure and services provided at the RPCs, and highlighted recent improvements made to the accommodations and other services.<sup>25</sup>

### ***Danger, abuse and harm***

1.30 LSFR made a large submission to the inquiry, drawing upon a project under which it had sought information about incidents of assault, self-harm, use of force and other significant disturbances at the RPCs under the *Freedom of Information Act 1982* (FOI Act). LSFR provided the committee with 'summaries of incident report logs' provided by the department in response in January 2016, recording incidents between June 2014 and July 2015.<sup>26</sup>

1.31 LSFR summarised that information, revealing that during the 13-month period reported, the department had recorded:

- 134 incidents of actual self-harm, many amounting to attempted suicide and including some by children;<sup>27</sup>

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20 *Submission 1.*

21 Royal Children's Hospital (RCH) Melbourne, *Submission 29*, p. 2.

22 Australian Lawyers for Human Rights (ALHR), *Submission 12*, p. ii.

23 RACS, *Submission 26*, p. 2.

24 Broadspectrum, *Submission 20*, p. 5.

25 DIBP, *Submission 18*, pp 17-30.

26 LSFR, *Submission 10*, pp 15-121 ('Annex 1').

27 LSFR, *Submission 10*, pp 3-4.

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- 75 instances of the use of force against asylum seekers, by other asylum seekers and by RPC Staff—LSFR described a 'seemingly customary' use of force by Wilson Security and other contracted staff, demanding greater oversight;<sup>28</sup>
  - 26 'major disturbances' of various kinds, all serious in nature and posing risks to the safety of asylum seekers and staff;<sup>29</sup>
  - 34 instances of serious assault requiring medical treatment;<sup>30</sup>
  - 16 serious accidents or injuries and 23 public health risks. These included reports of electrocution and the outbreak of contagious diseases including malaria and hand, foot and mouth disease. LSFR also believed that some incidents classified as 'accidents' may have been misreported, and in fact involved deliberate infliction of harm.<sup>31</sup>

1.32 Responding to reported incidents involving its staff and subcontractors at the Manus RPC, Broadspectrum submitted that:

We acknowledge that the environment at the Manus RPC can be complex and challenging and that despite our commitment and our best efforts, some incidents and allegations of misconduct have arisen. Where this has occurred we have worked hard to respond promptly, sensitively and transparently and have worked closely with the Department, [the PNG Immigration and Citizenship Service Authority], and (where relevant) other service providers and the Provincial Police Force on Manus Island (Manus Police) to report, investigate and resolve incidents, allegations and concerns. In a small number of instances where our staff or contractor's staff have acted inappropriately, we have acted firmly and decisively to eliminate any risk and to ensure that it is understood that misconduct will not be tolerated.<sup>32</sup>

1.33 The department outlined the mechanisms and procedures in place for management of complaints and incidents in the RPCs, and that while responding to criminal matters remained the responsibility of the host countries, the department received and maintained records of all incidents reported by service providers, and reported them to local authorities where required. The department said it 'will continue to closely monitor incidents in RPCs to implement continuous improvements to minimise reported incidents, where possible'.<sup>33</sup>

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28 LSFR, *Submission 10*, pp 4-5.

29 LSFR, *Submission 10*, pp 5-6.

30 LSFR, *Submission 10*, p. 6

31 LSFR, *Submission 10*, pp. 6-7.

32 Broadspectrum, *Submission 20*, p. 4.

33 DIBP, *Submission 18*, p. 32.

### *Timeframes and uncertainty*

1.34 A number of submitters referred to the long and indefinite timeline of detention for people in the RPCs, left in a state of long-term uncertainty about their future, as a key factor in both the abuse of their rights, and the damage to their physical and mental health.<sup>34</sup> ALHR noted the department's own figures stating that the average time in detention in early 2016 was over 450 days, and steadily increasing.<sup>35</sup> Labor for Refugees NSW said that '[m]any asylum seekers fleeing torture or trauma are subjected to a second injury in the form of apparently indefinite detention in dangerous and unsafe places'.<sup>36</sup>

1.35 ALHR noted that a number of other countries in the world placed mandatory time limits on detention, and was one of several submitters who argued that Australia should similarly implement such standards.<sup>37</sup>

1.36 The department advised that it continued to provide support to the refugee status determination processes for those at the RPCs, noting progress in this regard and the commitments of the governments of both Nauru and PNG to complete remaining determinations as soon as possible.<sup>38</sup>

### *Deterrence as policy*

1.37 Some submitters expressed the belief that the harsh and indefinite conditions of detention at the RPCs represented a deliberate policy on the part of the Australian Government to deter others from the attempt to come to Australia by boat.<sup>39</sup>

1.38 The Edmund Rice Centre referred to Australia's policies as a form of 'backdoor refoulement', making the conditions and choices facing refugees so intolerable that they were effectively forced to return to their countries of origin.<sup>40</sup>

1.39 RCOA submitted that:

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34 Labor for Refugees NSW, *Submission 9*, p. 6; ALHR, *Submission 12*, p. 14; Royal Australian College of General Practitioners (RACGP) and Australian College for Emergency Medicine (ACEM), *Submission 19*, p. 2; APS, *Submission 23*, p. 2; RACS, *Submission 26*, pp 2-3; Royal Australasian College of Physicians (RACP), *Submission 28*, p. 3.

35 ALHR, *Submission 12*, p. 14. ALHR quoted the average length of time in immigration detention published by the department at 29 February 2016, at 464 days. It is noted that the figure published by the department at 31 March 2016 is 454 days, although the department continues to report that the time 'has increased steadily, exceeding the peak of January 2015'. Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary*, 31 March 2016, p. 11.

36 Labor for Refugees NSW, *Submission 9*, p. 6.

37 ALHR, *Submission 12*, p. 15.

38 DIBP, *Submission 18*, pp 33, 37.

39 SHS Law, *Submission 6*, p. 3; Labor for Refugees NSW, *Submission 9*, p. 6; ALHR, *Submission 12*, p. 13; Edmund Rice Centre, *Submission 16*, pp 6-7; RCOA, *Submission 22*, p. 5.

40 Edmund Rice Centre, *Submission 16*, pp 1, 6-7.



The threat of being sent to an offshore processing centre can only "work" as a deterrent if people seeking asylum believe that what they are seeking in Australia—safety, humane treatment, a fair hearing, an opportunity to rebuild their lives and a secure future—will not be available to them in Nauru and Papua New Guinea. In RCOA's view, this creates a perverse incentive to maintain inhumane conditions. Efforts to limit detention, expedite processing of claims, improve physical conditions and provide durable solutions would in fact work against the policy's intention, as offshore processing operates most effectively as a deterrent when detention is prolonged, processing is slow, physical conditions are harsh and the future is uncertain. In essence, the success of offshore processing depends on human suffering.<sup>41</sup>

1.40 The department argued, on the other hand, that:

Regional processing under the current legislative framework (from August 2012) has had a significant impact on the flow of illegal maritime arrivals to Australia. It has been instrumental in stopping unnecessary deaths at sea and provides persons in need of international protection with durable settlement solutions.<sup>42</sup>

### ***Offshore processing and health: the medical perspective***

1.41 The committee received seven submissions from eight medical organisations, providing evidence of growing concern within the medical community about the health impacts of prolonged offshore detention.

1.42 The Australian Medical Association (AMA) and the Royal Australian & New Zealand College of Psychiatrists (RANZCP) both expressed the strong view that prolonged and indefinite detention of asylum seekers in immigration detention centres violated their basic human rights and contributed adversely to their health.<sup>43</sup> The AMA referred the committee to its position statement on 'Health Care of Asylum Seekers and Refugees', updated in 2015, which outlined particular physical and mental health risks faced by asylum seekers and refugees.

1.43 The medical organisations were consistently of the view that the health risks of detention were likely to be heightened in offshore processing centres due to their remoteness, limited facilities and services.<sup>44</sup> The Australian Psychological Society (APS) expressed its particular concern about the 'history of escalating mental health issues resulting from offshore detention', including suicide attempts and serious self-harm, and the lack of community resources and services in Nauru and PNG to support

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41 RCOA, *Submission 22*, p. 5.

42 DIBP, *Submission 18*, p. 4.

43 Australian Medical Association (AMA), *Submission 2*, p. 1; Royal Australian & New Zealand College of Psychiatrists (RANZCP), *Submission 25*, p. 1.

44 RACGP & ACEM, *Submission 19*, [p. 2]; RACP, *Submission 28*, p. 3.

these people, particularly vulnerable groups such as children and those with a history of torture and trauma.<sup>45</sup>

1.44 Occupational Therapy Australia (OTA) provided the committee with a detailed submission about 'occupational deprivation', arising from the inability of those in the RPCs to engage in meaningful occupations for an extended period of time, and the resulting serious impact on their mental health.<sup>46</sup>

1.45 While the quality of support and services at the RPCs was a point of concern, the Royal Australian College of General Practitioners (RACGP) and the Australian College for Emergency Medicine (ACEM), supported by the APS, argued that 'the health issues caused by detention cannot be addressed while people remain in detention, regardless of the extent or quality of the services available'.<sup>47</sup>

1.46 ALHR agreed, noting the documented medical view that 'it is often the detention environment itself that causes mental illness', as well as the 'contagion effect' of bringing together groups of people in similar mental health situations, leading to increased risk of problems including self-harm.<sup>48</sup> RANZCP added that:

There is clear evidence that the risk and severity of mental illness increases the longer a person is in detention. Prolonged immigration detention has been shown to worsen mental illness in those already suffering when detained and to result in the development of completely new conditions in those without mental illness on arrival.<sup>49</sup>

1.47 The AMA argued that 'solutions to prolonged and indeterminate detention must be sought as a matter of urgency', with detention used 'only as a last resort, and for the shortest practical time'.<sup>50</sup> The AMA's position statement proposes that:

In order that asylum seekers do not spend a prolonged, indeterminate period of time in detention, the Government must set in law an absolute maximum duration that an asylum seeker can spend in detention. After such time, the asylum seeker should be allowed to live in the community while their visa application continues to be assessed.<sup>51</sup>

1.48 The Royal Australasian College of Physicians (RACP) and APS went further, calling for the complete cessation of offshore immigration detention.<sup>52</sup>

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45 Australian Psychological Society (APS), *Submission 23*, pp 1-2.

46 Occupational Therapy Australia (OTA), *Submission 24*, [pp 4-11].

47 RACGP & ACEM, *Submission 19*, [p. 1].

48 ALHR, *Submission 12*, pp 5-6.

49 RANZCP, *Submission 25*, p. 1.

50 AMA, *Submission 2*, p. 1.

51 AMA, *Submission 2*, p. 5.

52 APS, *Submission 23*, p. 2; RACP, *Submission 28*, p. 2.

## **Children**

1.49 The impact of the government's policies of offshore processing on children was a particular focus of concern for many submitters to the inquiry.

1.50 The AMA drew the committee's attention to its position on children in detention, describing detention facilities as 'unacceptable for children' because of the particular risks to their development, physical and mental health.<sup>53</sup> Other organisations also expressed strong concerns about the physical and mental health of children at the RPCs, as well as child protection concerns created by the duration and environment of detention.<sup>54</sup>

1.51 The Royal Children's Hospital Melbourne offered a damning analysis of the mental health situation for the children it had treated from the Nauru RPC:

We have seen evidence of mental health pathology in **all** of our patients who have been on Nauru. Symptoms include features of post-traumatic stress disorder (PTSD), depression, anxiety, learning difficulties, bedwetting in previously continent children, nightmares, behavioural regression, memory loss, separation issues, and/or somatization in the form of stomach aches and/or headaches. We have seen suicidal ideation and thoughts of self-harm expressed by young children, which is extremely rare clinically. Infants are dysthymic and withdrawn, with severely disordered attachment, and we have seen developmental delay and multifactorial learning problems in older children. Our patients, who are often young children, report witnessing adults express suicidal thoughts and selfharming, sometimes through violent means such as attempted hanging or through lacerations with significant blood spill. These accounts, and other descriptions by children and families suggest the Nauru RPC is an environment characterised by insecurity and fear. These children are the most traumatised cohort of patients with whom we have worked.<sup>55</sup>

1.52 In addition, citing continued reports of physical and sexual abuse at the Nauru RPC, ChilOut submitted that 'there is a direct and ongoing threat to the safety of children detained there'.<sup>56</sup> ChilOut added that the harm to children 'has not been alleviated by the recent "open" nature of the centre', and believed that the open centre terminology was misleading, with substantive restrictions still in place.<sup>57</sup>

1.53 RCH Melbourne and ChilOut also expressed concern about inadequate basic health care being provided to children at the Nauru RPC.<sup>58</sup> RCH Melbourne said that

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53 AMA, *Submission 2*, p. 5.

54 Labor for Refugees NSW, *Submission 9*, pp 5-7 (citing RACP); ALHR, *Submission 12*, pp. 3-4, 10-12; Edmund Rice Centre, *Submission 16*, pp 7-8; ChilOut, *Submission 17*; RACGP & ACEM, *Submission 19*, [p. 2]; RANZCP, *Submission 25*, p. 2; RACS, *Submission 26*, pp 3-4; RACP, *Submission 28*, p. 3; RCH Melbourne, *Submission 29*.

55 RCH Melbourne, *Submission 29*, pp 2-3.

56 ChilOut, *Submission 17*, [p. 4].

57 ChilOut, *Submission 17*, [pp 3, 18].

58 ChilOut, *Submission 17*, [pp 9-10]; RCH Melbourne, *Submission 29*, p. 5.

in its experience children at the RPC had received limited health screening, incomplete immunisations, and minimal or no monitoring of their development. RCH Melbourne also expressed particular concern for children and adolescents with disabilities on Nauru, where limited support services were available to them.<sup>59</sup>

1.54 ChilOut and RACS further detailed concerns about the standard of education provided to children on Nauru, including refugee children, and a lack of play and recreational opportunities.<sup>60</sup> RACS was particularly concerned about the safety and welfare of unaccompanied child refugees now living in the Nauru community.<sup>61</sup>

1.55 ChilOut believed that detention of children should only be 'a measure of absolute last resort', and then, only within Australia.<sup>62</sup> The AMA advocated that unaccompanied children should never be placed in immigration detention facilities, and accompanied children should only be detained for the shortest possible time, and no longer than one month, after which 'a suitable placement for the child with at least one adult family member must be identified'.<sup>63</sup> Others agreed that statutory time limits on detention of children should be established.<sup>64</sup>

1.56 ChilOut also recommended the establishment of 'an independent body of medical and legal experts' specifically to assess the welfare of children and respond to allegations of harm.<sup>65</sup> The department noted in its submission the establishment in May 2015 and ongoing work of a 'child protection panel', which provided independent advice to the government on child protection issues including in relation to the RPCs, and was presently reviewing the responses of the department and its service providers to reported incidents at the RPCs between 2008 and 2015.<sup>66</sup>

### ***LGBTI asylum seekers***

1.57 The committee received some evidence focused on the situation of lesbian, gay, bisexual, transgender and intersex (LGBTI) people held in the RPCs. Mr Alastair Lawrie noted that male homosexual conduct remained a criminal offence in both Nauru and PNG, and expressed the view that 'the Australian Government inflicts serious harm on LGBTI people seeking asylum by detaining, processing and resettling them in countries that continue to criminalise homosexuality'.<sup>67</sup> Mr Lawrie cited reports of abuse, assault and marginalisation of homosexual asylum seekers in

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59 RCH Melbourne, *Submission 29*, p. 5.

60 ChilOut, *Submission 17*, [pp. 10-12]; RACS, *Submission 26*, p. 8.

61 RACS, *Submission 26*, pp 6-8.

62 ChilOut, *Submission 17*, [p. 19].

63 AMA, *Submission 2*, p. 5.

64 LCA, *Submission 5*, p. 13; Edmund Rice Centre, *Submission 16*, pp 4-5; ChilOut, *Submission 17* [p. 19].

65 ChilOut, *Submission 17*, [p. 19].

66 DIBP, *Submission 18*, p. 6.

67 Mr Alastair Lawrie, *Submission 11*, p. 1.

the RPCs, and the lack of appropriate health and community services in the two countries.<sup>68</sup> ALHR shared these concerns, citing Amnesty International's reporting about gay refugees and resettlement in PNG.<sup>69</sup>

1.58 The NSW Gay & Lesbian Rights Lobby highlighted that 'LGBTI refugees are some of the most vulnerable individuals held in detention around the world',<sup>70</sup> and submitted that they were subject to 'severe discrimination' in the RPCs and their host countries, as well as in refugee status determination processes.<sup>71</sup>

1.59 Mr Lawrie argued that LGBTI asylum seekers (whether or not their claims for refugee status were based on their sexuality) should be housed and processed in Australia.<sup>72</sup> The NSW Gay & Lesbian Rights Lobby agreed, and also offered a number of recommendations for specific training and education of relevant officials and service providers, as well as improved services, to better address the specific needs and vulnerabilities of LGBTI asylum seekers.<sup>73</sup>

***Transparency and accountability: management and contracting at the RPCs***

1.60 Certain submitters were concerned about the accountability of private contractors providing services at the RPCs. UNSW Law Society argued that 'the outsourcing of the exercise of public power to private corporations significantly distorts the transparency and accountability mechanisms that would apply if asylum seekers were processed within Australian borders'.<sup>74</sup> UnitingJustice described the transparency and accountability mechanisms in relation to the management of the RPCs as 'woefully inadequate', observing that:

A significant consequence of Government outsourcing these functions is that it reduces the accountability of both the Australian Government and the subcontractors. Privately contracted companies, for example, are beyond the scope of Australia's freedom of information laws. Contractors can decline to be questioned in Senate Estimates...while public servants are subject to an APS Code of Conduct, private contractors face no such requirements. We believe that the Australian Government should impose the same accountability mechanisms on subcontractors as it would apply to public servants.<sup>75</sup>

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68 Mr Alastair Lawrie, *Submission 11*, pp 7-8.

69 ALHR, *Submission 12*, pp 8-9.

70 NSW Gay & Lesbian Rights Lobby, *Submission 14*, p. 3.

71 NSW Gay & Lesbian Rights Lobby, *Submission 14*, pp 4-5, 8.

72 Mr Alastair Lawrie, *Submission 11*, p. 11.

73 NSW Gay & Lesbian Rights Lobby, *Submission 14*, p. 9.

74 UNSW Law Society, *Submission 21*, p. 1.

75 UnitingJustice Australia, *Submission 7*, p. 12. See also LFR, *Submission 10*, p. 11.

1.61 The Edmund Rice Centre queried whether Australian-funded contractors' works and products at and related to the RPCs needed to comply with Australian standards.<sup>76</sup>

1.62 One former contractor on Nauru submitted serious allegations to the inquiry about procurement and contracting practices in relation to the RPC and related Australian-funded projects on Nauru. The submitter claimed to have witnessed widespread price-gouging, corruption and fraudulent procurement processes, as well as substandard construction at the RPC including inadequate fire protection. The submitter urged an independent audit of the construction works and procurement and supply practices related to Australian-funded projects on Nauru.<sup>77</sup>

1.63 Broadspectrum submitted that it had 'extensive reporting obligations' to the department, and that it had 'been involved and provided assistance in various independent inquiries and investigations into matters relating to the RPCs',<sup>78</sup> adding that 'almost without exception Broadspectrum meets or exceeds our contractual obligations'.<sup>79</sup>

1.64 In relation to the standards applied to its work at the RPCs, Broadspectrum advised that 'in some cases the Contract specifically requires that we comply with Australian Standards and in other cases it acknowledges that we are not required to comply'.<sup>80</sup> The department and Broadspectrum advised that the company's contract required it to provide services that were the 'best available in the circumstances' and where possible, 'broadly comparable with services available within the Australian community'.<sup>81</sup>

1.65 The department noted that the Australian National Audit Office (ANAO) was presently completing an audit of contracting and procurement in the RPCs, expected to report to Parliament in June 2016.<sup>82</sup>

### ***Secrecy***

1.66 The intense secrecy surrounding the operation of the RPCs was raised for comment by many submitters.

1.67 RCOA expressed the view that since publication of the Senate Select Committee report on the Nauru RPC in 2015, which made a number of recommendations about greater transparency, 'the climate of secrecy has only deepened',<sup>83</sup> and believed that 'the ever increasing climate of secrecy concerning these

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76 Edmund Rice Centre, *Submission 16*, p. 10.

77 *Submission 3*, pp 1-3, 4-5.

78 Broadspectrum, *Submission 20*, p. 8.

79 Broadspectrum, *Submission 20*, p. 12.

80 Broadspectrum, *Submission 20*, p. 12.

81 DIBP, *Submission 18*, p. 13; Broadspectrum, *Submission 20*, p. 12.

82 DIBP, *Submission 18*, p. 8.

83 RCOA, *Submission 22*, p. 3.

centres makes it highly likely that there remains much else that we do not yet know.<sup>84</sup> Liberty Victoria agreed, decrying the 'abject lack of any accountability or transparency' in relation to the RPCs and that 'without access to any independent, third party information, Liberty Victoria's ability to contribute to this issue is extremely limited'.<sup>85</sup>

1.68 Although it was able to provide over 100 pages of summary information obtained through its use of the FOI Act, LSFR described in its submission how the department had refused subsequent attempts to gain more detail about the most serious incidents uncovered. LSFR assessed the department's justifications for the refusal as 'demonstrably contrary to the objectives of the [FOI Act]' and demonstrating 'a concerning trend toward opacity'.<sup>86</sup> RACS also expressed concerns about the government's refusal to disclose documents needed to provide accountable legal redress for its clients, when requested under the FOI Act.<sup>87</sup>

1.69 The Josephite Justice Office submitted that:

...political leaders in Australia refuse to disclose what is happening in these detention centres...the Australian community is left in ignorance regarding the realities being experienced by asylum seekers. Secrecy and lack of transparency, as a consequence, cloud the views of ordinary Australians about what is being done in our name to some of the most vulnerable people in the world today—people fleeing violence, torture and death from places such as Iraq and Syria.

...

*The fact is that most Australians do not like to see vulnerable people being wilfully mistreated. The oppressive secrecy surrounding the detention system suggests that the government understands this.*<sup>88</sup>

1.70 Mrs Louise Edwards believed that through lack of transparency and restrictions on reporting, '[t]he current government has taken away the rights of citizens to make informed opinions'.<sup>89</sup> LSFR similarly argued that:

Lacking clear facts, organised policy debate is hampered and the risk of misinformation increases. Without adequate information about the operation of the offshore detention policy, neither its opponents nor its advocates are able to have a free and informed debate about its merits. This fundamentally detracts from the validity of the democratic process in Australia.<sup>90</sup>

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84 RCOA, *Submission 22*, p. 2.

85 Liberty Victoria, *Submission 27*.

86 LSFR, *Submission 10*, pp 11-13.

87 RACS, *Submission 26*, p. 10.

88 Josephite Justice Office, *Submission 8*, pp 4-5 (emphasis in original).

89 Mrs Louise Edwards, *Submission 15*, p. 1.

90 LSFR, *Submission 10*, p. 9.

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*The Border Force Act*

1.71 A number of submitters raised specific concerns in relation to the secrecy and disclosure provisions enacted in the *Australian Border Force Act 2015* (ABF Act).<sup>91</sup>

1.72 LCA submitted that in preventing consultants and contractors of the department from making public interest disclosures about conditions in immigration detention facilities, 'these provisions threaten the rule of law', and that the exceptions within the Act were insufficient to redress that concern.<sup>92</sup> RCOA said that within its work, it had observed that the ABF Act 'has already had a "chilling effect" on the capacity and willingness of people to share information'.<sup>93</sup>

1.73 LCA argued that there should be a specific public interest exception to the prohibitions on disclosure, and an express requirement that, for an offence to be committed, there must be harm or intention to cause harm to 'an identified essential public interest'.<sup>94</sup>

1.74 RACGP and ACEM said that the ABF Act was 'deeply concerning to our profession', and argued for specific exclusion of health care providers from the disclosure offences.<sup>95</sup>

***Governance and oversight***

1.75 A number of submitters offered recommendations for strengthening accountability through independent oversight of immigration detention centres, including the RPCs. Based on the mechanisms in existence to provide oversight on national security issues, LCA proposed the creation of an independent 'visitor' or 'inspector' of Australian and offshore detention centres, and also the establishment of an 'Independent Monitor for Migration Laws' to review migration legislation.<sup>96</sup>

1.76 UnitingJustice Australia and ALHR also called for the establishment of an independent authority to 'monitor and report publicly on the conditions under which asylum seekers are held' as well as assured access for independent monitoring by existing independent bodies such as the UN High Commissioner for Refugees (UNHCR), Australian Human Rights Commission (AHRC) and Red Cross.<sup>97</sup> The

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91 LCA, *Submission 5*, pp 4-5, UnitingJustice Australia, *Submission 7*, pp 12-13; Labor for Refugees NSW, *Submission 9*, p. 8; LSFR, *Submission 10*, p. 9; ALHR, *Submission 12*, pp 17-18; ChilOut, *Submission 17*, [pp 12-14]; RACGP & ACEM, *Submission 19*, [p. 5]; UNSW Law Society, *Submission 21*, pp 12-16; RCOA, *Submission 22*, p 3.

92 LCA, *Submission 5*, pp 4-6.

93 RCOA, *Submission 22*, p. 3.

94 LCA, *Submission 5*, p. 6.

95 RACGP & ACEM, *Submission 19*, [p. 5].

96 LCA, *Submission 5*, pp 11-13.

97 UnitingJustice Australia, *Submission 7*, p. 14; ALHR, *Submission 12*, p. 17.



Edmund Rice Centre argued for 'an independent investigation, possibly a Royal Commission' into allegations about conditions and treatment at the RPCs.<sup>98</sup>

1.77 The department stated that 'Australia welcomes independent scrutiny of regional processing centres', but maintained that access to the RPCs was a matter for their host governments.<sup>99</sup>

*Transparency and oversight of asylum seekers' health*

1.78 In addition, medical bodies argued for restored or improved independent oversight of health and welfare services provided to asylum seekers and refugees. Some referred specifically to the government's abolition of the Immigration Health Advisory Group (IHAG) in December 2013, leaving a lacuna in independent monitoring and oversight of the health care conditions and treatment of asylum seekers and refugees in the immigration detention network.<sup>100</sup>

1.79 The AMA argued that '[a] national statutory body of clinical experts independent of government should be established with the power to investigate and advise on the health and welfare of asylum seekers and refugees'.<sup>101</sup> RANZCP similarly advocated the establishment of an independent health advisory body to oversee health service provision to asylum seekers, including in RPCs.<sup>102</sup>

1.80 RACGP and ACEM joined the call for an independent health oversight body, expressing particular concerns about the lack of monitoring of long-term health outcomes for refugees, and unclear reporting and complaints mechanisms for health providers working at the RPCs.<sup>103</sup>

*The government's progress on implementing the Moss Review*

1.81 A number of submitters were critical of what was regarded as a lack of action by the government to implement the recommendations of the 2015 review by Mr Philp Moss into allegations relating to conditions and circumstances at the RPC in Nauru (the Moss Review). Some observed that the status of implementation was not clear: RCH Melbourne advised that families in its care who had contributed information to the Moss Review 'remain unaware of the progress of investigations in relation to their allegations'.<sup>104</sup> Submitters called on the government to work

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98 Edmund Rice Centre, *Submission 16*, p. 3.

99 DIBP, *Submission 18*, p. 5.

100 APS, *Submission 23*, p. 2; OTA, *Submission 24*, [p. 4].

101 AMA, *Submission 2*, [p. 3].

102 RANZCP, *Submission 25*, p. 3.

103 RACGP & ACEM, *Submission 19*, [p. 3].

104 RCH Melbourne, *Submission 29*, p. 4.

immediately, as a priority, on fully implementing all of the recommendations of the Moss review.<sup>105</sup>

1.82 The department advised that as of 15 March 2016, 16 of the Moss Review's 19 recommendations and 35 of its 38 action items had been implemented, noting work undertaken to improve physical accommodations and privacy, fencing and lighting, as well as supporting the Government of Nauru to develop a child protection framework and to progress refugee status determinations.<sup>106</sup> Broadspectrum also provided the committee with a summary of action taken toward implementation of various of the recommendations of the Moss Review.<sup>107</sup>

1.83 The department further advised that it was preparing for a visit to Nauru to examine and report on the progress of implementation of all the Moss Review's recommendations.<sup>108</sup>

### *Alternatives to detention*

1.84 Some submissions sought to counter the government's claims that offshore processing was necessary to maintain border security and effectively deal with the problem of boat arrivals, by proposing alternatives to the RPC regime.

1.85 The Edmund Rice Centre proposed a 'six-point alternative' to offshore processing, consisting of:

- ending Operation Sovereign Borders and offshore detention;
- reforming the onshore processing regime, with imposition of time limits and use of a risk-based approach;
- increasing and improving Australia's humanitarian refugee intake to at least 30,000 people per year, with a focus on expediting family reunion;
- building a 'genuine regional cooperation framework';
- increasing transparency; and
- improving public debate and discourse.<sup>109</sup>

1.86 ALHR argued that 'there are many alternatives to detention' including community-based and supervised release programs, submitting that these were 'clearly more in line with Australia's human rights obligations than the current system of mandatory detention'.<sup>110</sup>

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105 UnitingJustice Australia, *Submission 7*, pp 14-15; Josephite Justice Office, *Submission 8*, pp 6-7; ALHR, *Submission 12*, pp 12-13; RACGP & ACEM, ChilOut, *Submission 17*, [pp 14-16]; *Submission 19*, [pp 3-4]; UNSW Law Society, *Submission 21*, p. ii; OTA, *Submission 24*, [pp 18-19]; RACS, *Submission 26*, pp 4-8.

106 DIBP, *Submission 18*, p. 6.

107 Broadspectrum, *Submission 20*, pp 9-11.

108 DIBP, *Submission 18*, p. 6.

109 Edmund Rice Centre, *Submission 16*, pp 11-16.

110 ALHR, *Submission 12*, p. 16.

1.87 Several submitters also drew attention to the extremely high costs of the offshore detention program, as reported elsewhere. RACGP and ACEM observed, for example, that the daily cost of detaining a person in an RPC 'is more than the average daily cost of an acute hospital admission'.<sup>111</sup> The Josephite Justice Office cited reported costs of some \$400,000 per year to detain each asylum seeker at an RPC, compared to \$239,000 for detention in Australia and just \$12,000 per year for community arrangements, saying that '[t]his enormous sum could be more valuably allocated to reverse government cuts and boost spending on critical areas such as health and education'.<sup>112</sup>

### **A note on recent developments relating to the Manus RPC**

1.88 Just days prior to the committee's finalisation of this report, on 26 April 2016, the Supreme Court of Papua New Guinea, PNG's highest court, held that the detention of the asylum seekers at the Manus RPC was 'unconstitutional and illegal', and ordered that the Australian and PNG governments 'forthwith take all steps necessary to cease and prevent' their continued detention there.<sup>113</sup>

1.89 The following day, PNG Prime Minister the Hon Peter O'Neill announced that the Manus RPC would be closed, and that the PNG Government would 'immediately ask the Australian Government to make alternative arrangements for the asylum seekers currently held' there. The Prime Minister said that those in the RPC who had been determined to be refugees were invited to remain in PNG, but 'that is their decision'.<sup>114</sup>

1.90 At the time of this report discussions between the governments of Australia and PNG were ongoing, and there was not yet any resolution as to when the Manus RPC would close and where the asylum seekers and refugees housed there would be sent.

### **Committee view**

1.91 The committee regards this inquiry as an important mechanism in the Senate's ongoing attempts to scrutinise the situation at the RPCs in Nauru and Papua New Guinea—established, funded and serviced by the Australian Government—and to ensure that appropriate responsibility is taken for the welfare and human rights of the people sent to them.

1.92 The committee is cognisant of the evidence provided to the inquiry so far, as summarised above, and the many unresolved and ongoing issues which remain to be investigated. The committee regards the policies and practices of the Commonwealth

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111 RACGP & ACEM, *Submission 19*, [p. 4].

112 Josephite Justice Office, *Submission 8*, p. 5.

113 *Belden Norman Namah MP v Hon Rimbink Pato, National Executive Council and the Independent State of Papua New Guinea*, SCA No. 84 of 2013, Supreme Court of Justice (Papua New Guinea), 26 April 2016, p. 28.

114 Office of the Prime Minister, Papua New Guinea, 'PM O'Neill: Manus Regional Processing Centre will Close', News Release, 27 April 2016.

Government in relation to offshore processing as issues of major national importance, worthy of continued vigilant scrutiny by the Senate.

1.93 The committee notes that an important element of this inquiry was to provide a forum in which persons involved with the RPCs could provide evidence of conditions and treatment there under the protection of parliamentary privilege. Given the policy of offshore processing will continue after the upcoming election, and legislation such as the Australian Border Force Act will remain in effect, there will continue to be pressing reasons to restore the inquiry.

1.94 The committee intends to continue its inquiry, but recognises that this year's election is likely to cut that work short. The committee therefore recommends that the Senate refer this matter again for committee inquiry in the next parliament.

1.95 Finally, the committee notes the relevance of developments in recent days with regard to the Manus RPC. The committee was not in a position to consider these matters prior to issuing this report, but recognises that the potential closure of the Manus RPC, and the decisions taken by PNG and Australia about what happens to the people detained there, will have implications for its inquiry going forward. The committee is of the view that whether or not there is still a Manus RPC as envisaged in the original terms of reference, matters relating to it, including the fate of the former detainees, should form part of any further Senate inquiry.

### **Recommendation 1**

**1.96 The committee recommends that, should it be unable to complete its inquiry prior to the 2016 national election, the Senate refer this matter for committee consideration, in similar terms as appropriate, in the 45<sup>th</sup> Parliament.**

**Senator Glenn Lazarus  
Chair**