

Chapter 2

Obligations and performance of the Commonwealth in relation to the Nauru Regional Processing Centre

2.1 This chapter examines evidence received by the committee in relation to its terms of reference about the obligations and performance of the Commonwealth government in relation to the Regional Processing Centre (RPC) on Nauru in general. The issues covered include questions of legal jurisdiction and Australia's role; arrangements for managing the conduct of staff; the systems of transfer and processing of asylum seekers; and costs.

Responsibilities of the Commonwealth in relation to the Regional Processing Centre on Nauru

Jurisdiction

2.2 Throughout the committee's inquiry, the department was careful to delineate between the Commonwealth's jurisdiction and responsibilities in relation to the RPC, and those of the Government of Nauru. As noted in Chapter 1, the department advised the committee in its submission that Nauru 'owns and administers' the RPC under Nauruan law, while Australia's role is one of funding, capacity building and support to Nauru in that endeavour.¹

2.3 The department reiterated this position repeatedly during the inquiry. At the committee's public hearing on 9 June, the secretary of the Department of Immigration and Border Protection, Mr Michael Pezzullo, reaffirmed the department's position:

The Australian government does not run the Nauru Regional Processing Centre, or RPC. It is managed by the government of Nauru, under Nauruan law, with support from the Australian government. The government of Nauru operates the RPC, assesses asylum claims and, where persons are found to be in need of protection, arranges settlement. The government of Nauru is specifically responsible for security and good order and the care and welfare of persons residing in the centre. On behalf of the Commonwealth, my department provides support services and advice, pursuant to an agreement between our two governments.²

2.4 While at the committee's public hearing on 20 July, the secretary stated that:

It is a matter of law. It would require a treaty level transference of sovereignty, an abrogation on the part of the government of Nauru and an acquisition of sovereignty on the part of the Commonwealth of Australia, for Australia to have sovereignty in relation to, for instance, the

1 Department of Immigration and Border Protection, *Submission 31*, p. 4.

2 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 9 June 2015, p. 43.

administration of criminal justice. It is a factual matter...It is just a matter of fact.³

2.5 A number of legal and human rights bodies made submissions to the inquiry, however, asserting a broader responsibility on Australia's part for conditions and events at the RPC. Professor William Maley from the Asia-Pacific College of Diplomacy at the Australian National University observed that '[m]odern theories of sovereignty...recognise that sovereignty is multidimensional and very rarely absolute'.⁴

Australia's obligations under international law

2.6 A number of submitters, particularly legal and human rights experts and refugee advocacy organisations, contended that Australia retained legal obligations to the asylum seekers in the RPC under international human rights law notwithstanding its location in another country.⁵

2.7 Submitters noted the established principle in international jurisprudence that if a country retained 'effective control' over a person or group of persons, it continued to be responsible for protecting their human rights, regardless of whether the physical location of that person was inside the responsible country's territory. As the Andrew & Renata Kaldor Centre for International Refugee Law explained:

The crucial question is not *where* a person is, but rather which State has (or which States have) sufficient control over a person to affect directly his or her enjoyment of rights.⁶

2.8 Similarly, the Australian Human Rights Commission (AHRC) stated that:

Australia cannot avoid its human rights obligations under international law by transferring asylum seekers to a third country. If Australia has 'effective control' over asylum seekers whom it has transferred to another country, or over a regional processing centre to which they have been transferred, then it is bound to continue to treat them consistently with human rights treaties to which Australia is a party.⁷

2.9 Many submitters cited the terms of the Memorandum of Understanding (MOU), and practical arrangements at the RPC, in support of the argument that

3 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 20 July 2015, p. 93.

4 Professor William Maley, *Submission 10*, p. 4.

5 See ChilOut, *Submission 13*; Immigration Advice & Rights Centre, *Submission 17*; Castan Centre for Human Rights Law, *Submission 18*; UNHCR, *Submission 19*; Australian Human Rights Commission, *Submission 25*; Law Society of South Australia, *Submission 34*; Law Society of New South Wales, *Submission 35*; Law Council of Australia, *Submission 57*; Human Rights Law Centre and UNICEF Australia, *Submission 58*; Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 60*.

6 Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 60*, p. 10.

7 Australian Human Rights Commission, *Submission 25*, p. 1.

Australia retained effective control over asylum seekers in Nauru. The Law Council of Australia, for example, identified the following factors in support of that assessment:

- the RPC was established at Australia's instigation, and Australia has arranged for its establishment and construction;
- Australia funds the operation of the RPC;
- Australia engages the contractors who conduct the day-to-day running of the RPC, and these companies are responsible to the Australian government through their contracts;
- the Australian government, through the department, controls the delivery of services and infrastructure at the RPC through its management of the service-provider contracts;
- Australia maintains a staff presence at the RPC, and the department has the power and capacity to cause or prevent any action or decision being made there;
- Australia is solely responsible for the placement of all asylum seekers at the RPC; and
- the Government of Australia has an extensive knowledge and awareness of the risks and dangers posed by immigration detention.⁸

2.10 The Human Rights Law Centre and UNICEF offered a similar list of considerations, concluding that:

From the moment they are received by Australian authorities and throughout their detention on Nauru, asylum seekers are effectively subject to Australia's jurisdiction and control. That practical reality translates under international law to a legal one, such that Australia retains human rights obligations to asylum seekers it transfers to detention on Nauru.⁹

2.11 The Castan Centre for Human Rights Law and the Law Council of Australia also noted that the Moss Review had highlighted the high degree of Australian control over the centre, to the extent that Nauruan managers told that inquiry that they were not sufficiently informed about day-to-day matters at the RPC because service providers reported directly to the department.¹⁰

2.12 Former Chief Justice of Nauru, the Hon Geoffrey Eames, recounted to the committee that following a visit to the RPC in November 2013, he raised concerns about the 'intolerable' conditions there with the President of Nauru. Mr Eames advised that the President proposed changes to improve accommodation arrangements for children at the RPC, and stated that he would 'ask Tony Abbott' whether these could

8 Law Council of Australia, *Submission 57*, p. 9.

9 Human Rights Law Centre and UNICEF Australia, *Submission 58*, p. 6.

10 Castan Centre for Human Rights Law, *Submission 18*, p. 3; Law Council of Australia, *Submission 25*, p. 14.

be made.¹¹ Mr Eames emphasised the 'symbiotic' relationship between Australia and Nauru in relation to the RPC: '[f]or every statement that this was a domestic matter that Nauru would look at, Nauru always had one eye to the larger country.'¹²

2.13 Making particular reference to Australia's obligations under the Refugees Convention,¹³ the United Nations High Commissioner for Refugees (UNHCR) reminded the committee of the assessment it had previously and publicly offered with respect to Nauru:

Under international law, Australia thus continues to have legal responsibility for the protection of those asylum-seekers, refugees and stateless persons who are transferred to Nauru. The extent of such responsibility can be assessed, inter alia, against the extent to which reception and/or processing of asylum-seekers is effectively under the control or direction of Australia as the transferring State. UNHCR has previously observed a high degree of effective control at the Centre, including Australia's financing and appointing of the service providers at the Centre and the numerous Australian Government officials who are present to assist with the management and day-to-day running of the Centre, as well as Australia's close involvement and mentoring of Nauruan officials in respect of refugee status determination (RSD) processing.

In summary, UNHCR is of the view that the physical transfer of asylum-seekers, refugees and stateless persons from Australia to Nauru does not extinguish the legal responsibility of Australia for their protection.¹⁴

2.14 It was pointed out to the committee that other parliamentary inquiries had similarly examined the question of RPCs and Australia's responsibilities. The AHRC drew attention to the finding of the Parliamentary Joint Committee on Human Rights in 2013, that Australia could be viewed as exercising effective control of the arrangements relating to persons transferred to Manus Island and Nauru, and that Australia retained responsibility under international law in relation to the treatment of asylum seekers in the RPCs, irrespective of whether Papua New Guinea or Nauru might also be jointly responsible.¹⁵

2.15 Examining the Commonwealth's legal responsibilities with respect to the RPC on Manus Island in 2014, the Senate Legal and Constitutional Affairs References Committee received and considered evidence offering the same lines of argument as those submitted to this committee, and concluded that:

...the degree of involvement by the Australian Government in the establishment, use, operation, and provision of total funding for the [Manus

11 Mr Geoffrey Eames, *Committee Hansard*, 20 July 2015, pp 69-70.

12 Mr Geoffrey Eames, *Committee Hansard*, 20 July 2015, p. 72.

13 *Convention relating to the Status of Refugees, 1951, and Protocol relating to the Status of Refugees, 1967.*

14 UNHCR, *Submission 19*, p. 4.

15 Australian Human Rights Commission, *Submission 25*, p. 2.

Island] centre clearly satisfies the test of effective control in international law, and the government's ongoing refusal to concede this point displays a denial of Australia's international obligations.¹⁶

2.16 Several submitters made the secondary point that even if Australia did not exercise effective control, it could still be regarded as holding joint liability with the host government for any breaches of international human rights law which occurred at an RPC. Some further cited the statement of the UN Human Rights Committee that a state may be responsible for extra-territorial violations of the International Covenant on Civil and Political Rights (ICCPR) if it had exposed a person to a reasonably foreseeable 'real risk' that his or her rights would be violated.¹⁷

2.17 In its Explanatory Memorandum on legislation related to regional processing put before parliament in June 2015, the government elaborated its perspective on the application of its international legal obligations in the RPCs:

The Australian Government's long-standing view is that Australia's human rights obligations are essentially territorial. Persons in regional processing countries are outside Australia's territory. Australia has accepted that there may be exceptional circumstances in which the rights and freedoms set out under the ICCPR may apply to persons beyond the territory of a State party, and the extent of the obligations that a State may owe under international human rights law where it is operating extraterritorially will be informed by the degree of control exercised by the State. The Government's position is that Australia does not exercise the degree of control necessary in regional processing countries to enliven Australia's international obligations.

Australia does not restrain the liberty of persons in regional processing countries. To the extent that the liberty of persons taken to regional processing countries is restrained in those countries, this is done under the laws of that country.¹⁸

Obligations under Australian domestic law: duty of care

2.18 Legal experts also argued in a number of submissions that Australian domestic law imposed a non-delegable duty of care upon the Commonwealth in relation to asylum seekers at the RPC. The Law Council of Australia considered 'that there is a compelling argument that domestic case law supports the existence of a duty of care owed by the Commonwealth to detainees in OPCs'.¹⁹

2.19 In this respect, submitters emphasised the provision in the MOU that 'the Commonwealth of Australia will conduct all activities in respect of this MOU in

16 Senate Legal and Constitutional Affairs References Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, December 2014, p. 151.

17 Immigration Advice & Rights Centre, *Submission 17*, p. 7; Law Society of New South Wales, *Submission 35*, p. 3.

18 Migration Amendment (Regional Processing Arrangements) Bill 2015, Explanatory Memorandum, p. 10.

19 Law Council of Australia, *Submission 57*, p. 7.

accordance with its Constitution and all relevant domestic laws'.²⁰ In a detailed submission, the Australian Lawyers Alliance (ALA) argued that under the terms of the MOU between Australia and Nauru, the Commonwealth retained duties of care both at common law and under Australian workplace, health and safety legislation, that were non-delegable in nature.²¹

2.20 Analysing the terms of the MOU, ALA assessed that:

...it appears that while the centre is on Nauruan soil, control is maintained by Australia, who continue to fund, have input into decisions, and the final say about whether a person will be detained inside the Centre. Further, the 2013 MOU establishes a direct line of reporting to the Australian Department of Immigration.²²

2.21 Both ALA and the Castan Centre also noted that the department's immigration detention standards, developed in consultation with the Commonwealth Ombudsman in 1997, included the following provision:

Ultimate responsibility for the detainees remains with [the department] at all times'.²³

2.22 While recognising that the High Court had not yet resolved the question whether the Commonwealth's duty of care to asylum seekers was non-delegable, ALA and the Law Council of Australia cited a number of common law precedents which established that where a legal person has undertaken the care, supervision or control of another, they assume a particular and non-delegable responsibility toward the other person, where that other person is not in control and is dependent on or vulnerable to the control of the first.

2.23 ALA cited cases establishing the legal responsibility of the state, through its prison authorities, to exercise reasonable care for the safety of detainees, and Australian courts' application of that principle to the immigration detention context, as authority that the department held an 'obligation of reasonable care to avoid harm to the detainee whether that harm be inflicted by a third person or by the detainee himself or herself'.²⁴ In the Federal Court, discussing the relevance of the isolated

20 *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia relating to the Transfer to and Assessment of persons in Nauru, and related issues*, 3 August 2013, clause 4; cited in Australian Lawyers Alliance, *Submission 14*, p. 14; Castan Centre for Human Rights Law, *Submission 18*, pp 2-3.

21 Australian Lawyers Alliance, *Submission 14*, p. 12.

22 Australian Lawyers Alliance, *Submission 14*, p. 14.

23 See Joint Standing Committee on Foreign Affairs, Defence and Trade, *A report on visits to immigration detention centres*, June 2001, pp 94-95 and Appendix H. Cited in Castan Centre for Human Rights Law, *Submission 18*, p. 3 and footnote 2; Australian Lawyers Alliance, *Submission 14*, p. 15.

24 *SBEG v Commonwealth of Australia* [2012] FCAFC 189, cited in Australian Lawyers' Alliance, *Submission 14*, p. 30.

location of the Baxter detention centre and its impact on the standard of health care services able to be provided, Finn J stated that:

Having made the choice of location, the Commonwealth, not the detainees, should bear the consequences of it insofar as that choice has affected or compromised the medical services that could be made available to meet the known needs of detainees.²⁵

2.24 In the area of legislative responsibility, two submissions drew particular attention to Australia's obligations under the Commonwealth *Work, Health and Safety Act 2011* (WHS Act) and their applicability to the RPC.²⁶ ALA noted that Comcare had carried out inspections and reporting in relation to the Nauru and Manus Island RPCs,²⁷ and the government's acceptance that for the purposes of the WHS Act, responsibility for providing a safe workplace at the RPCs rested with the department.²⁸

2.25 ALA and other submitters noted that the provisions of the WHS Act extended obligations to protect health and safety beyond employees to include 'other persons' and 'all persons' at a location of work, arguing that this imposed obligations on the Commonwealth to protect the health and safety of asylum seekers at the RPC.²⁹

2.26 ALA noted that although the WHS Act required the reporting to Comcare of all critical incidents, including sexual assault, no incidents had been reported in relation to Nauru since September 2013, and queried why this was the case.³⁰ Employment law experts Mr Max Costello and Ms Paddy McCorry believed this was because the department and Comcare had adopted a narrower interpretation of the application of the WHS Act at the RPCs, but they disputed this approach, arguing that the broad, extraterritorial and non-delegable nature of the provisions of the WHS Act created obligations from which the Commonwealth could not legally resile.³¹

2.27 Overall, ALA concluded that:

If allegations of [the kind cited in the Moss Review] occurred on Australian soil, there would be a Royal Commission, criminal charges would be laid, Comcare would appropriately investigate, and a raft of personal injury claims would be pursued.

25 *S v Secretary, Department of Immigration Multicultural and Indigenous Affairs* [2005] FCA 549, at 213; cited in Australian Lawyers' Alliance, *Submission 14*, p. 34.

26 Australian Lawyers' Alliance, *Submission 14*; Mr Max Costello & Ms Paddy McCorry, *Submission 26*.

27 Department of Immigration and Border Protection, *Annual Report 2013-14*, September 2014, p. 280.

28 Australian Lawyers' Alliance, *Submission 14*, p. 39 and attachment ('Document 1').

29 Australian Lawyers' Alliance, *Submission 14*, pp 40-41; Mr Max Costello and Ms Paddy McCorry, *Submission 26*, p. 11.

30 Australian Lawyers' Alliance, *Submission 14*, pp 43-44 and attachment ('Document 2').

31 Mr Max Costello and Ms Paddy McCorry, *Submission 26*, p. 35.

We submit that the fact that these incidents occur on Nauruan soil does not hold the Commonwealth immune from its responsibilities under the common law and statute. In fact, these duties remain.

We submit it cannot be a discharge of Commonwealth responsibility to place detainees in another country against their will.³²

2.28 ALA urged 'a greater role for Comcare to investigate the safety of workers and other persons in relation to Nauru regional processing centre', including their risks of both physical and psychological injury.³³

Australia's responsibilities under the MOU

2.29 Memoranda of Understanding are not legally binding and as such, the terms of the MOU between the governments of Australia and Nauru do not create legally enforceable obligations on Australia. However, many submitters pointed out that, in addition to the contribution the terms of the MOU may make to demonstrating Australia's effective control and therefore its legal obligations in respect of the RPC, the MOU itself created, at a minimum, moral obligations upon its signatories to fulfil its provisions in good faith.

2.30 In this respect, submitters drew attention in particular to two clauses of the MOU:

- Clause 4: The Commonwealth of Australia will conduct all activities in respect of this MOU in accordance with its Constitution and all relevant domestic laws;

and

- Clause 17: The Participants will treat Transferees with dignity and respect and in accordance with relevant human rights standards.³⁴

Capacity of Nauru's police and legal system

2.31 Challenges to the Republic of Nauru's ability to fulfil its responsibilities under the MOU and more generally in relation to the RPC were the subject of comment by many submitters, these challenges were seen to reinforce both the legal and ethical responsibility placed on Australia, as the instigator and effective controller of the Centre, to ensure that appropriate standards and processes were observed for the protection, safety and wellbeing of asylum seekers.

2.32 Law Students for Refugees argued that:

The Australian government has chosen to delegate its obligations to transferees under the *Refugees Convention* (as amended by the *Refugees Protocol*), to the Nauruan police and government as a designated alternative

32 Australian Lawyers' Alliance, *Submission 14*, p. 6.

33 Australian Lawyers' Alliance, *Submission 14*, p. 42.

34 *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia relating to the Transfer to and Assessment of persons in Nauru, and related issues*, 3 August 2013.

authority. However, if that alternative authority is incapable of properly ensuring that transferees are receiving sufficient protection, it is the responsibility of the Australian Government to either meet these obligations itself or ensure that structures in Nauru are capable of doing so.³⁵

2.33 The Law Council of Australia and the Victorian Bar went further, citing principles of international law relating to the responsibility of states for intentionally wrongful acts:

...when one State places its organs or assets at the disposal of another State, the conduct of the organ of the former State (such as Papua New Guinea (PNG) or Nauruan police or security forces) shall be considered to be the conduct of the latter State (such as Australia) if acting in the exercise of elements of governmental authority of the latter State...³⁶

Capacity of the Nauru Police Force

2.34 The committee received specific evidence regarding the capacity of the Nauru Police Force to investigate allegations made about incidents at the RPC which have been put to this inquiry.

2.35 Mr Peter Law, a former Chief Magistrate on Nauru, expressed his concerns about the capacity of the Nauru police, particularly following the removal of the Australian-seconded police commissioner in July 2014:

It is regrettable that the Nauru police force has limited resources and capacity to investigate serious allegations. There is very limited forensic evidence available to the police force. They were very reliant on support from the Australian Federal Police. During my tenure there, I found that the role of the Australian Federal Police was extremely positive. I could not speak more highly of them in terms of the logistical support and training that was provided. Most importantly, they provided the commissioner through an officer of the AFP. They filled the position of commissioner of the Nauru police force. It was more than just symbolic in filling that position by the AFP. It provided a sense of independence and integrity. The subsequent departure or termination of the contract of Richard Britten, the then commissioner, on 19 July, was a very regrettable fact. I say that because, through him and his predecessor, Commissioner Ced Netto, they were able to offer their expertise and their assurances of independence and proper investigation. It was my observation that after their departure those factors were missing from the Nauru police force.³⁷

2.36 Similarly, former Chief Justice Eames expressed the view in relation to the police that 'there is a serious question about their independence and about their willingness to investigate allegations against Nauruans who are charged with assaults of non-Nauruans'.³⁸

35 Law Students for Refugees, *Submission 23*, p. 2.

36 Law Council of Australia, *Submission 25*, p. 10.

37 Mr Peter Law, *Committee Hansard*, 9 June 2015, p. 15.

38 Mr Geoffrey Eames, *Committee Hansard*, 20 July 2015, p. 73.

2.37 When queried by the committee, a senior Wilson Security officer with 16 months experience as a security manager on Nauru declined to offer an assessment as to the level of competence of the Nauru Police Force.³⁹ Save the Children Australia's head of Nauru programs assessed that the small size and limited training level of the Nauruan police, particularly in relation to working with trauma issues and sexual assault, gave rise to questions about the appropriateness of relying on the Nauru Police Force to investigate alleged crimes at the RPC.⁴⁰

2.38 The department advised the committee in June 2015 that since September 2012, a total of 50 matters had been referred to the Nauru Police Force for investigation, in relation to alleged incidents at the RPC. Of these, five had resulted in charges being laid, two convictions had been recorded and two sentences handed down.⁴¹

2.39 The department also advised the committee that in response to the recommendations of the Moss Review, it had deployed four Australian Federal Police (AFP) officers to Nauru on 6 May 2015 for a period of four to six weeks. Two of these would assist the Nauru Police Force in reviewing and strengthening its processes and investigations in relation to sexual assault, child abuse and associated crimes, while the other two were to advise and mentor the Nauruan Police Force in relation to the investigation and prosecution of public disorder incidents. These officers were in addition to two AFP officers deployed to Nauru on a long term basis to provide general mentoring and advice to the Nauru Police Force. Relevant training courses and assistance were also being offered to the Nauru Police Force and the Government of Nauru by the AFP and Attorney-General's Department.⁴²

Nauru's judicial system and the rule of law

2.40 Former Chief Justice Eames expressed related concerns about the ability of Nauru's judiciary to cope with the workload generated by incidents at the RPC:

Following two major incidents of riotous behaviour by some detainees it was apparent that the resources of the judiciary would be severely stretched by the more than 120 prosecution cases that had to be heard. The courthouse itself is tiny and not secure; it could not easily cope with trials involving multiple defendants.⁴³

2.41 The observance of the rule of law more generally in Nauru was an issue of serious concern to a number of expert submitters. Mr Law described a 'history of failure by the Nauruan prosecuting authorities to act independently of the

39 See *Committee Hansard*, 19 May 2015, p. 24.

40 Mr Lee Gordon, Head of Nauru Programs, Save the Children Australia, *Committee Hansard*, 19 May 2015, p. 53.

41 Mr Michael Pezzullo and Ms Cindy Briscoe, Department of Immigration and Border Protection, *Committee Hansard*, 9 June 2015, p. 45.

42 Department of Immigration and Border Protection, answer to question on notice of 18 May 2015 (received 9 June 2015).

43 The Hon Geoffrey Eames AM QC, *Submission 70*, p. 6.

government'.⁴⁴ Mr Law's evidence cited concerns about the independence from political influence of the police, the office of public prosecutions and even the judiciary, following the removal of himself and the Chief Justice by the Government of Nauru in 2014. In his submission, Mr Law observed that '[t]he issue of capacity is overshadowed by motivation. The lack of action suggests the Nauruan Government is less than interested to see these incidents [at the RPC] investigated and prosecuted because such action may reflect adversely on Nauru as a place to process and settle asylum seekers'.⁴⁵

2.42 Mr Eames stated that from his experience 'the concept of separation of powers was not well understood or accepted by some members of the government'. In relation to police investigations, Mr Eames observed that:

If Australia is to take responsibility for the welfare of people transferred by the government to Nauru then the Nauru and Australian public must be assured that allegations of assault and other criminal conduct will be genuinely and thoroughly investigated. Where such thorough investigations might be seen by Nauru police to be unwelcome, so far as the Nauru government is concerned, it is unlikely that they will be undertaken.⁴⁶

2.43 In relation to the operation of the judiciary, Mr Eames discussed the refusal of the police to implement orders of the judiciary, and ministers overriding laws protecting the independence of the judiciary, on the basis of government's 'right' to decide who would hold judicial posts.⁴⁷ Mr Eames expressed the view that following the events surrounding his removal, 'no one appearing in the Nauru courts can be confident that the system is fair and open'.⁴⁸

2.44 A number of submitters also highlighted broader political developments in Nauru as evidence of the breakdown of respect for human rights and the rule of law in the country. These include the parliament of Nauru's suspension of five opposition members for criticising the government, and the subsequent arrest of three members of parliament who participated in a protest, as well as the passage of laws limiting court review of immigration decisions, and restricting media freedom and freedom of speech, including a ban on Facebook. Mr Law offered the committee his perspective that 'there is a lack of accountability of the government on all fronts'.⁴⁹

2.45 Professor Maley offered a similar assessment of the rule of law and governance problems in Nauru, stating that '[i]n practice, only the shell of a Westminster system of accountable government and the rule of law is left in Nauru'.

44 Mr Peter Law, *Submission 28*, p. 2.

45 Mr Peter Law, *Submission 28*, pp 1-2.

46 The Hon Geoffrey Eames AM QC, *Submission 70*, p. 8.

47 The Hon Geoffrey Eames AM QC, *Submission 70*, p. 1, 2, 3-4.

48 The Hon Geoffrey Eames AM QC, *Submission 70*, p. 6.

49 Mr Peter Law, *Committee Hansard*, 9 June 2015, p. 18.

2.46 Professor Maley's view was that:

The location of a refugee processing centre on Nauru has...allowed the Australian government to benefit from the weaknesses in accountability associated with poor governance and the collapse of the rule of law on Nauru.⁵⁰

2.47 On 2 July 2015, the parliament of New Zealand unanimously passed a motion:

That this House express its concern regarding the Government of Nauru's alleged interference with the judiciary, the suspension of Opposition members of Parliament, the cancelling of passports of Opposition members of Parliament, and the removal of civil and political rights.⁵¹

2.48 On 10 July 2015, New Zealand's Foreign Minister the Hon Murray McCully and the Australian Foreign Minister the Hon Julie Bishop both stated publicly that they had raised concerns about the rule of law in Nauru with the President of Nauru, the Hon Baron Waqa, who was visiting Sydney for a meeting of the Pacific Islands Forum. Ms Bishop told the media that:

I have raised our concerns directly with the president...We want an update on the prosecution of the opposition members of parliament and we want to ensure that this is all done openly and transparently and in a way that is accountable to the international community.

These are domestic matters, but we urge there to be an adherence to the rule of law, that the justice system operates properly, that people are not denied natural justice, that they're given an opportunity to present their case...

If it were purely a domestic issue and Australia had no interest in it, I wouldn't have raised it with him, but we do have a concern.⁵²

2.49 Ms Bishop stated that other Pacific leaders had also raised concerns with the President, and that she and President Waqa had agreed 'to remain closely engaged on this matter'.⁵³

Absence of a child protection framework in Nauru

2.50 A number of submitters drew attention to the lack of a child protection framework in Nauru as a key lacuna rendering it untenable for Australia to rely on Nauru's legal and judicial arrangements in transferring responsibility for asylum seekers. The department advised the committee that in response to the recommendations of the Moss Review, it was working with the Government of Nauru

50 Professor William Maley, *Submission 10*, p. 4.

51 New Zealand House of Representatives, *Parliamentary Debates (Hansard)*, Uncorrected Daily, Volume 706, Week 21, 2 July 2015, p. 5059.

52 'Australia seeks update on prosecution of Nauru opposition MPs from visiting president, Julie Bishop says', *ABC Online*, 10 July 2015.

53 'Foreign minister Julie Bishop "seeks assurances" from president Baron Waqa that Nauru adhering to rule of law', *ABC Online*, 11 July 2015.

to progress inclusion of child protection elements in relevant Nauruan legislation, as well as developing a child protection framework.⁵⁴

2.51 This issue is discussed further in Chapter 4.⁵⁵

Managing the conduct and behaviour of staff of the Regional Processing Centre

2.52 A large number of the allegations made to the *Forgotten Children* and Moss Review inquiries, and to this inquiry, have related to inadequate conduct and improper behaviour on the part of staff employed by contractors to the Commonwealth to provide services at the RPC. Evidence received by this committee on the matter of contractor staff has ranged from suggestions of poor training and understanding on the part of staff, inadequate provision of services and lack of responsiveness to the needs of asylum seekers, through to serious allegations of physical and sexual abuse. The latter are discussed further in Chapter 4.⁵⁶

2.53 At the most serious end of the spectrum, in response to queries from the committee, principal contracted service provider Transfield Services reported that 30 formal allegations of child abuse had been made against RPC staff, 15 allegations of sexual assault or rape, and four allegations relating to the exchange of sexual favours for contraband.⁵⁷ Of the 30 child abuse allegations, 24 involved alleged physical contact, two related to sexual assault, and single allegations were made of sexual harassment, inappropriate relationship with a minor, excessive use of force, and verbal abuse. As a result of these, six employees had been dismissed, two removed from the RPC site and one employee was suspended.⁵⁸

2.54 Wilson Security provided details of eleven cases in which staff were terminated for misconduct including inappropriate relationships, alleged sexual assault, sexual harassment, excessive use of force toward an asylum seeker, trading in contraband including for sexual favours, and throwing a rock at an asylum seeker.⁵⁹

Examples of allegations regarding conduct and behaviour of Transfield Services and Wilson Security staff

2.55 The specific allegations and incidents reported to this committee about the conduct and behaviour of contractor staff are too numerous to set out in detail in this report. Some reflect matters already raised elsewhere, including in the Moss Review

54 Department of Immigration and Border Protection, *Submission 31*, p. 26; Department of Immigration and Border Protection, answer to question on notice, 18 May 2015 (received 9 June 2015).

55 This issue is discussed at paragraph 4.85.

56 This issue is discussed at paragraph 4.52.

57 Transfield Services, answer to question on notice, 19 May 2015 (received 16 June 2015).

58 Ms Angela Williams, Commercial, Strategy and Systems Director, Transfield Services, *Committee Hansard*, 20 July 2015, pp 5-6.

59 Wilson Security, answer to question on notice, 19 May 2015 (received 2 June 2015).

and in the media, while some were acknowledged by contractors as matters not previously reported. The following paragraphs provide a few examples of the behaviours reported in submissions and evidence to this committee.

2.56 A former employee of Wilson Security alleged that incident reports relating to the use of unreasonable force had been 'shredded' by Wilson Security management, and that he had witnessed a range of misconduct by locally-employed security staff including trading in contraband, threatening and sexually harassing asylum seekers and refugees.⁶⁰ Wilson Security stated that action had been taken with the Nauru Police Force to investigate allegations of staff trading contraband for sexual favours, as a result of which one employee was terminated.⁶¹

2.57 Allegations of documents being shredded by Wilson Security were made by former employees, who told the committee that documents were frequently destroyed by placing them into 'File 13', a codename for the shredder.⁶² Mr Jon Nichols, a former employee of Wilson Security, told the committee that incident reports filed by third parties such as Save the Children Australia and Transfield Services were shredded before being electronically logged.⁶³

2.58 However, Wilson Security advised that the electronic logging system is tamper-proof, and that the incident reporting process has two strands:

...even if an incident comes from another service provider, there are still two parts to our requirements under the department guidelines. The first one is a verbal notification, and the second one is the written report. Even before we receive the written report, there would have been verbal notification to each of the stakeholder service leads or managers notifying them of that incident, and then the written report is subsequent to that. The concept that a written report is shredded would have to be explained in some way, because we would have made a verbal notification.⁶⁴

2.59 A former employee of The Salvation Army, Save the Children Australia and International Health and Medical Services (IHMS) on Nauru submitted that staff were verbally abusive to asylum seekers at RPC 3, and despite reporting, no staff were disciplined or dismissed for such behaviour.⁶⁵ Another former RPC worker described clients reporting to him several cases of sexual and verbal harassment.⁶⁶ Ms Charlotte Wilson, a former Save the Children Australia employee, stated her 'belief that both Australian and Nauruan security guards frequently abused their positions of power

60 *Submission 62*, pp 2-4.

61 Wilson Security, response to *Submission 62*, p. 5.

62 *Submission 62*, p. 3; Mr Jon Nichols, *Submission 95*, p. 1.

63 Mr Jon Nichols, *Committee Hansard*, 20 August 2015, p. 2.

64 Mr Brett McDonald, Security Contract Manager, Wilson Security, *Committee Hansard*, 20 August 2015, p. 18.

65 *Submission 69*, p. 3.

66 *Submission 82*, p. 6.

within RPC3', citing verbal abuse, and 'common knowledge' of such misconduct as bartering of sexual favours for contraband items such as cigarettes.⁶⁷ Another former Save the Children Australia employee cited 'multiple allegations' of excessive force and assault by security personnel against minor asylum seekers in RPC3, describing it as the use of 'undue force' to subdue 'normal childhood behaviour'.⁶⁸

2.60 Ms Alanna Maycock, a nurse visiting the RPC as a consultant for IHMS, described the RPC as a place where a cycle of human rights abuse existed and was 'continuing and intensifying'. She reported the assault of the father of a sick child by a security guard in her presence, which was 'accepted by all that witnessed it'.⁶⁹ Transfield Services stated that it 'denies that this is a fair representation of the environment at the centre',⁷⁰ and that neither Transfield Services nor its subcontractor Wilson Security held any record of the specific incident alleged by Ms Maycock.⁷¹

2.61 A former employee of The Salvation Army, Mr Mark Isaacs, described a 'culture of silence and cover up and a lack of accountability in the Nauru RPC', describing as one example an incident where a Nauruan security guard aggressively confronted an asylum seeker in the presence of himself along with a number of other security guards, but the other security guards did not endorse his reporting of the incident, in what he described as 'a collaborative attempt to blame the asylum seeker rather than the Nauruan guard'.⁷²

2.62 Former Save the Children Australia worker Ms Samantha Betts submitted that '[f]requent staff reports of sexual, physical and emotional abuse' were made to the department and Wilson Security, but these 'became known as "paperwork"...with little investigation or consequences'.⁷³ Transfield Services rejected this characterisation, maintaining that all reports of assault or abuse were treated seriously and investigated promptly.⁷⁴

2.63 More than one submission provided the example of an incident reported in April 2014 in which two adolescent female asylum seekers had been subjected to sexual innuendo and harassment from male security guards, including attempts to hug and kiss them and inviting them to a 'sexy party'.⁷⁵ Wilson Security responded that the

67 Ms Charlotte Wilson, *Submission 79*, p. 7.

68 *Submission 81*, pp [12, 14].

69 Ms Alanna Maycock, *Submission 66*, p. 1.

70 Transfield Services, response to *Submission 66*, p. 3.

71 Transfield Services, response to *Submission 66*, pp 7-8.

72 Mr Mark Isaacs, *Submission 67*, p. 4.

73 Ms Samantha Betts, *Submission 85*, p. 2.

74 Transfield Services, response to *Submission 85*, p. 10.

75 See Ms Viktoria Vibhakar, *Submission 63*, p. 21; *Submission 84*, pp 2-3.

incident was 'thoroughly investigated', but the matter was closed in the absence of further evidence when the asylum seekers declined to make a formal complaint.⁷⁶

2.64 In her submission and in oral evidence to the committee, Ms Viktoria Vibhakar, a former senior child protection worker with Save the Children Australia, raised a large number of cases of alleged misconduct by staff of Commonwealth contractors, including the example of a 16 year old female asylum seeker who experienced 'multiple episodes of sexual harassment over several weeks from several Commonwealth contracted employees'.⁷⁷

2.65 A number of former employees commented on a generally intimidating appearance and demeanour among security staff, and that asylum seekers were 'scared and intimidated' by them.⁷⁸ The use of asylum seekers' boat identification numbers in place of their names was raised by submitters with concerns about the dehumanising impact of this, and the unwillingness of security guards in particular to learn and use asylum seekers' names.⁷⁹ Wilson Security and other service providers repeatedly assured the committee that their policies did not endorse the primary reference to asylum seekers by boat numbers.

2.66 One Save the Children Australia employee submitted to the committee that she herself had been subject to sexual harassment by contractor staff during screening at security checkpoints.⁸⁰ Wilson Security responded that it was unaware of such incidents.⁸¹

Recording of events of 19 July 2013

2.67 In a submission to the inquiry, a former employee of Wilson Security on Nauru stated that he had seen video footage showing security guards preparing for the July 2013 disturbance at the RPC, 'planning to use unreasonable force and assault the asylum seekers even before the riot started'.⁸² Wilson Security responded that it was 'concerned' about the reported video footage—of which it was unaware—and that any officer engaged in excessive use of force was subject to 'a strict disciplinary process, and may be subject to criminal charges'.⁸³

76 Wilson Security, response to *Submission 84*, p. 1.

77 Ms Viktoria Vibhakar, *Committee Hansard*, 9 June 2015, p. 27. See also *Submission 63*.

78 *Submission 83*, p. 4.

79 See *Submission 83*, p. 5; Mr James Harris, *Submission 93*, p. 7; *Submission 94*, p. 12.

80 *Submission 94*, p. 7.

81 Wilson Security, response to *Submission 94*, p. 2.

82 *Submission 62*, p. 2.

83 Wilson Security, response to *Submission 62*, p. 4.

2.68 Mr John Rogers, Executive General Manager from Wilson Security, told the committee at the public hearing on 20 July 2015 that body-worn cameras were not used at that time:

I do not believe that we had any kind of individual video cameras in place at the time of the July 2013 riot. I believe there was one video camera that was there for the purposes of recording the events that occurred and it was destroyed during the [riot]. That was the only matter that I am aware of...There is none held by the company that I have been able to obtain.⁸⁴

2.69 On 13 August 2015, the ABC's 7.30 program aired a report which included the footage referred to in the submission received by the committee.⁸⁵ The footage bears a date mark of 3.00pm, 19 July 2013, and shows individuals who appear to be security staff making the comments referred to in Submission 62. Wilson Security and the department advised the committee that the staff visible in the footage were employed by Wilson Security.⁸⁶

2.70 At the committee's public hearing on 20 August 2015, Mr Rogers acknowledged that information previously provided to the committee had been incorrect: 'Clearly, I was mistaken in what I described to you. What I was describing to you was my reading of the post-incident reporting...'⁸⁷

2.71 Mr Brett McDonald, Security Contract Manager, Wilson Security, further clarified that although he was aware of the existence of body-worn cameras during the public hearing of 20 July, he did not hear Mr Rogers' evidence:

I did not pick it up at the time to think to correct it...but I can confirm that there were numerous officers wearing body cameras and also a Handycam during the incident on 19 July.⁸⁸

2.72 Wilson Security advised that:

All footage obtained by us during the incident on 19th July 2013 was saved to a network storage device. A copy of all footage was provided to the Department and the Nauru Police Force.⁸⁹

84 Mr John Rogers, Executive General Manager, Southern Pacific, Wilson Security, *Committee Hansard*, 20 July 2015, p. 42.

85 'Spying and abuse described by Nauru detention centre's former staff', 7.30, <http://www.abc.net.au/7.30/content/2015/s4293119.htm> (accessed 14 August 2015).

86 Wilson Security, answer to question on notice, 20 August 2015 (received 25 August 2015); Department of Immigration and Border Protection, answer to question on notice, 20 August 2015 (received 25 August 2015).

87 Mr John Rogers, Executive General Manager, Southern Pacific, Wilson Security, *Committee Hansard*, 20 August 2015, p. 33.

88 Mr Brett McDonald, Security Contract Manager, Wilson Security, *Committee Hansard*, 20 August 2015, p. 34.

89 Wilson Security, answer to question on notice, 20 August 2015 (received 25 August 2015).

2.73 However, the department advised that the footage has not been available to them, and that an investigation was underway:

An investigation has commenced in regards to the footage aired on the 7:30 report and is currently ongoing. This investigation will include the identification of persons featured in the footage and a review of all comments made.⁹⁰

2.74 The committee's view on this matter is outlined in Chapter 5.⁹¹

Incident of August 2014

2.75 It was put to the committee that an employee of Wilson Security had admitted fabricating an allegation of assault by an asylum seeker, with evidence existing to confirm the fabrication.⁹²

2.76 Wilson Security responded to this allegation, saying that conflicting allegations were made in August 2014:

This submission contains very serious and deeply concerning allegations that could be criminal in nature. If the allegation was substantiated, it would constitute serious misconduct and result in the termination of the employee...

Wilson Security investigated both allegations, and referred the matter to the Nauruan Police Force for review.

There was insufficient evidence to make a finding against either party involved.⁹³

2.77 Wilson Security subsequently advised the committee that the matter was heard in the Nauru District Court on 13 November 2014. Four witness statements were provided at the time which provided conflicting accounts of the incident:

Two of those witness statements outlined the fall to the ground and also where one of the staff members was struck to the head. The staff member who had the strike to the head also went to the medical clinic and submitted an injury report following that. The other two witness statements observed the fall but did not observe the actual strike to the head. All that information was provided or reported to the department at the time in the normal incident reporting process. It was then referred to the police. The matter was subsequently dealt with in then Nauru District Court in November 2014 where each of those four people gave evidence.⁹⁴

90 Department of Immigration and Border Protection, answer to question on notice, 21 August 2015 (received 25 August 2015).

91 This issue is discussed at paragraph 5.32.

92 *Submission 71*, p. 1.

93 Wilson Security, response to *Submission 71*, p. 1.

94 Mr Brett McDonald, Security Contract Manager, Wilson Security, *Committee Hansard*, 20 August 2015, p. 19.

2.78 Wilson Security told the committee that they received information on 31 December 2014 which alleged that the incident had not occurred as reported, and an internal investigation was initiated. It appears that the recording of the employee admitting to having fabricated the allegation of assault was made during that internal investigation, with Wilson Security advising that the audio recording was made in January 2015. At the conclusion of the internal investigation, there was 'insufficient evidence to make a finding against the individual involved'.⁹⁵ Wilson Security advised the committee that the employee has been suspended during an independent review commissioned by Wilson Security to 'review all investigations involving staff misconduct at the Regional Processing Centre'.⁹⁶ It is not known to the committee who is undertaking the review or when it will conclude.

2.79 It is unclear to the committee whether the audio recording was made before or after the decision of the Nauru District Court, and whether any investigation has been undertaken into the employee who provided a witness statement which corroborated the initial allegation of assault.

2.80 The committee heard that the asylum seeker against whom the allegation was made attempted suicide three times and spent time in custody, before the Nauru District Court handed down a verdict finding the asylum seeker not guilty.

2.81 In April 2015, the asylum seeker was brought to Australia and is currently at the Melbourne Immigration Transit Accommodation site.⁹⁷

2.82 Although the audio file has been in Wilson Security's possession since January 2015, the department was only made aware of the fabrication of an assault allegation on 20 August 2015, after it was reported in the media. Mr Neil Skill, First Assistant Secretary, Department of Immigration and Border Protection, told the committee that neither Wilson Security nor Transfield Services had made the department aware of the incident:

...the first time that we were formally notified by Transfield of the range of actions that have come to light today in relation to Wilsons and the detail that they put on the record today was this morning. We have formally requested advice from Transfield as to what occurred and why that was not referred to us in a more formal and more timely manner. We have also referred it to our internal detention assurance team for investigation, because, quite frankly, it is not satisfactory, and I have made those views quite clear to Transfield. We expect there to be a full investigation as to what actually occurred and where the fall-down was in the reporting regime so that we were not made aware of these allegations and subsequent actions

95 Wilson Security, response to *Supplementary Submission 71*, p. 2.

96 Wilson Security, answer to question on notice, 20 August 2015 (received 25 August 2015)

97 Mr Neil Skill, First Assistant Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 20 August 2015, p. 39.

by Wilsons and, even later, in May, by Transfield. We should have known about them.⁹⁸

2.83 The Secretary of the department, Mr Michael Pezzullo, echoed that the department was unsatisfied with the lack of reporting:

...it is not satisfactory, and we have made our views known—we would have then immediately, given the operation of the jurisdiction, ensured that the Nauruan prosecutorial authorities...were seized with this...the principle is that their contractor [Wilson Security] should more diligently acquit its responsibilities.⁹⁹

2.84 Contracting arrangements mean that the department is unable to deal directly with Wilson Security. Wilson Security advised that Transfield Services had been 'verbally notified' of the potential fabrication of an allegation in January 2015, and that Wilson Security had notified Transfield Services of the outcome of the internal investigation in March 2015.¹⁰⁰

2.85 The committee's view on this matter is detailed in Chapter 5.¹⁰¹

Concerns regarding conduct and behaviour of other contractors and their staff

2.86 While the vast majority of concerns about the conduct and behaviour of contractors raised with this committee related to the principal providers of staff and services at the RPC, Transfield Services and its security subcontractor Wilson Security, there was also criticism raised by some submitters about the conduct of other service providers.

2.87 Some submissions were critical of the level and character of health and medical services provided by IHMS. One former Save the Children Australia employee, for example, stated that her experiences with IHMS were 'not very positive', and recounted an incident in which she was upbraided by IHMS staff at an interagency meeting for raising concerns about a traumatised asylum seeker on suicide watch.¹⁰² Citing his interaction with IHMS staff on Nauru in relation to an asylum seeker who alleged that she had been raped, former IHMS consultant Professor David Isaacs said that 'I felt that the staff at times acted as if the detainees deserved to be treated with less respect than they would have for someone from their own country'.¹⁰³

2.88 Former employees of The Salvation Army, which provided welfare services at the RPC from its opening in 2012 until February 2014, generally painted a picture of an organisation with positive intentions but which struggled to meet the challenges

98 Mr Neil Skill, First Assistant Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 20 August 2015, p. 38.

99 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 20 August 2015, p. 38.

100 Wilson Security, answer to question on notice, 20 August 2015 (received 25 August 2015).

101 This issue is discussed at paragraph 5.33.

102 *Submission 94*, pp 7-8.

103 Professor David Isaacs, *Committee Hansard*, 9 June 2015, p. 39.

before it, and was insufficiently supportive of its staff. Mr Mark Isaacs, employed as a 'mission worker' at the commencement of the RPC in 2012, stated that he was given no orientation or introduction and he and colleagues were unable to address the concerns and demands of highly distressed asylum seekers.¹⁰⁴ Another former employee similarly described 'sub-par recruitment and employment' procedures followed by The Salvation Army. He believed that this reflected the rushed reopening of the RPC in 2012, which 'meant that The Salvation Army had no room to follow best practice for recruitment and employment'.¹⁰⁵

2.89 Mr Isaacs described a 'culture of fear' among his colleagues about disclosing anything that happened at the RPC, increasing the pressure and trauma on staff.¹⁰⁶ Another former employee stated that management of The Salvation Army 'specifically directed staff not to show empathy to "transferees" in either a written or verbal capacity'.¹⁰⁷ The same employee submitted that during her employment, The Salvation Army, Transfield Services and Save the Children Australia all instructed staff to censor negative information about asylum seekers' mental or psychosocial health in official reporting, at the department's request.¹⁰⁸ These claims were denied by the contractors involved.¹⁰⁹

2.90 The work of current welfare provider Save the Children Australia was generally described in positive terms but Save the Children Australia also attracted some criticism from its former employees. Mr Tobias Gunn submitted that he received no formal or informal training in cultural issues when deployed to Nauru, and that he was also concerned about the lack of policies regarding teamwork and coordination.¹¹⁰ Another former child protection worker reported that a Save the Children Australia Operations Manager had admitted to having little knowledge about child protection.¹¹¹

2.91 Former manager for The Salvation Army on Nauru, Ms Caz Coleman, offered the assessment that both organisations engaged to provide welfare services had been consistently 'underprepared and undereducated' in issues of asylum seeker care and protection which, along with shortages of time and resources and the department's frequent policy changes, led to inevitable failures to fulfil the necessary roles.¹¹²

104 Mr Mark Isaacs, *Submission 67*, p. 1.

105 Mr James Harris, *Submission 93*, p. 3.

106 Mr Mark Isaacs, *Submission 67*, p. 3.

107 *Submission 69*, p. 1.

108 *Submission 69*, pp 2-3. See also Dr Peter Young, *Committee Hansard*, 9 June 2015, p. 4.

109 Transfield Services, response to *Submission 69*, pp 2-3; The Salvation Army, response to *Submission 69*, p. 1; Save the Children Australia, response to *Submission 69*, p. 2.

110 Mr Tobias Gunn, *Submission 68*, p. 1.

111 *Submission 84*, p. 5.

112 Ms Caz Coleman, *Submission 56*, pp 14-16.

2.92 Describing her own resignation in May 2013, Ms Coleman stated that:

It was my conclusion that the ongoing mismanagement of the centre was likely to be tested in one or more critical incidents that would damage clients and staff and the relationship with Nauru itself. Within a few months the entire structure of the Nauru centre was burnt down as a result of client frustration and anger. Whilst saddened, I was not surprised when these events occurred.¹¹³

Alcohol and drug testing

2.93 In light of the allegations made to the committee about misconduct by intoxicated staff at the RPC, use of drugs including marijuana and steroids by RPC staff, and trading of contraband for sex, the committee queried key contractors Transfield Services and Wilson Security about drug and alcohol testing of employees at the RPC.

2.94 The committee was advised that while random alcohol testing was conducted on staff on a daily basis at the RPC,¹¹⁴ similar testing for drug use was not undertaken. Transfield Services and Wilson said that while pre-deployment drug testing was done on expatriate staff, drug testing could not be undertaken on Nauru because laboratory facilities were not available on the island to conduct follow-up urine testing.

2.95 Mr Brett McDonald from Wilson Security explained that:

We have the capability to do saliva drug testing on the island; we have the tests on the island and the training and the policy, and we rolled that out. Where we came unstuck was simply that in the event that somebody was detected, the union objected to us being able to then take any disciplinary action with that person because we could not get a secondary blood test to a laboratory within a certain period of time...This is where we are stuck and we have not been able to resolve this.¹¹⁵

Relations between contracted service providers

2.96 Some former staff of the RPC highlighted poor relations and communication between service providers as exacerbating many of the problems at the RPC. Ms Coleman described relationships between stakeholders during her time there in 2013 as 'very poor. The result was a lack of trust, poor communication, poor collaboration' and even 'hostility and non-cooperation', leading to a heightened risk to asylum seekers and staff.¹¹⁶

2.97 Former Save the Children Australia worker Ms Natasha Blucher believed that a key problem with the operation of the RPC was what she described as a 'conflict that

113 Ms Caz Coleman, *Submission 56*, p. 16.

114 Wilson Security, answer to question on notice, 20 August 2015 (received 25 August 2015).

115 Mr Brett McDonald, Security Contract Manager, Wilson Security, *Committee Hansard*, 20 July 2015, p. 34.

116 Ms Caz Coleman, *Submission 56*, p. (5).

exists between service providers...in their basic objectives'.¹¹⁷ Ms Blucher submitted that:

I believe that the prevailing focus of the RPC is on maintaining order of the RPC, through a security framework. This exclusive focus undermined the operational framework that SCA operated within – a welfare framework.¹¹⁸

2.98 At a public hearing, Ms Blucher further explained her view that:

There is an emphasis on behaviour and compliance from a security framework as opposed to an understanding of the trauma impacts and deterioration of mental health that...is the primary presenting issue and must be addressed through a specialised trauma informed welfare framework. There is overall mistreatment and lack of respect and dignity afforded to asylum seekers by stakeholder staff due to the toxic workplace culture in the Nauru RPC and a lack of accountability for all of these issues due to the excessive secrecy and lack of external oversight and complaints mechanisms in the regional processing system.¹¹⁹

2.99 Save the Children Australia's Chief Executive Officer Mr Paul Ronalds acknowledged that such tensions existed, although his view was that these were generally resolved by being 'escalated until we come to a compromise' that satisfied Save the Children Australia in relation to the interests of asylum seekers.¹²⁰ Wilson Security rejected the suggestion that welfare services were subservient to security at the RPC, stating that '[b]oth service types are essential to ensure the health and safety of asylum seekers'.¹²¹

2.100 Ms Coleman observed that:

The security role and the welfare role are not inimical to each other when understood properly and performed with trust and respect. Furthermore, this can be achieved if management embody such collaboration, model it to staff and constructively work through the occasions where it falls down to learn from and improve future operations.¹²²

Response from contracted service providers

2.101 Transfield Services and Wilson Security both assured the committee that they had rigorous processes in place for the recruitment, training and management of both Australian and Nauruan staff employed at the RPC.¹²³ Both organisations expressed confidence that their systems and processes were robust enough to ensure competent

117 Ms Natasha Blucher, *Submission 83*, p. 1.

118 Ms Natasha Blucher, *Submission 83*, p. 15.

119 Ms Natasha Blucher, *Committee Hansard*, 20 July 2015, p. 55.

120 Mr Paul Ronalds, Chief Executive Officer, Save the Children Australia, *Committee Hansard*, 19 May 2015, p. 47.

121 Wilson Security, response to *Submission 83*, p. 10.

122 Ms Caz Coleman, *Submission 56*, p. 6.

123 See Wilson Security, *Submission 21*, pp 5-8; Transfield Services, *Submission 29*, pp 9-15.

and appropriate behaviour among their staff, and to respond to incidents of misconduct when they arose.

2.102 Transfield Services advised the committee that since it commenced services in September 2012, it had 'terminated' 289 staff from the RPC Nauru, although these figures included transfers and resignations.¹²⁴ Transfield Services observed that abandonment of duty was one of the most frequent reasons for termination of staff.¹²⁵ The department had separately advised the Senate's Legal and Constitutional Affairs Legislation Committee that across the Nauru and Manus Island RPCs, Transfield Services had dismissed 179 staff in the first six months of 2015, 13 of those for misconduct.¹²⁶

2.103 Wilson Security reported to the committee that since it commenced services in Nauru, 25 of its expatriate employees had been terminated for misconduct, while 15 disciplinary warnings had been issued to expatriate staff. Wilson Security stated that only two of the terminations arose from matters involving asylum seekers, while the remainder were 'internal disciplinary matters'. Wilson Security's two local subcontractors had terminated 18 staff for misconduct.¹²⁷ Transfield Services advised that three staff of Wilson Security had been dismissed at the request of Transfield Services, one for inappropriate behaviour at the Nauru airport, and two for breaches of relevant codes of conduct and policies.¹²⁸ It was not clear whether this was additional to, or a subset of, those reported by Wilson Security.

2.104 At the committee's public hearing, Mrs Kate Munnings from Transfield Services defended the professionalism and integrity of contractor staff:

I highlight the Moss Review and his comments about the staff being dedicated and professional. That has been my experience on the island every time I have visited. I have been taken aback by the commitment that our staff have to the wellbeing and care of the asylum seekers.¹²⁹

2.105 Mrs Munnings further commented that:

Moss identified that on every occasion we had been willing to take disciplinary action in relation to allegations [against staff], and we do not expect things to be proved beyond a reasonable doubt. If we feel that the risk warrants it we have always taken disciplinary action and removed

124 Ms Erin O'Sullivan, Commercial and Strategy Manager, Transfield Services, *Committee Hansard*, 20 July 2015, p. 31.

125 Ms Angela Williams, Commercial, Strategy and Systems Director, Transfield Services, *Committee Hansard*, 20 July 2015, p. 7.

126 Department of Immigration and Border Protection, answer to question on notice (BE15/023) from Senate Legal and Constitutional Affairs Legislation Committee Budget Estimates, 25 May 2015 (received 16 July 2015).

127 Wilson Security, answer to question on notice, 19 May 2015 (received 2 June 2015).

128 Transfield Services, answer to question on notice, 19 May 2015 (received 16 June 2015).

129 Mrs Kate Munnings, Chief Executive Operations, Logistics, Construction and Consulting, Transfield Services, *Committee Hansard*, 19 May 2015, p. 14.

anyone from our employment who we believe is not acting in accordance with our values, not acting in accordance with our expectations and not working with the best interests of the asylum seekers at heart.¹³⁰

2.106 Mr John Rogers, Executive General Manager of Wilson Security, said that:

I can assure the committee of this: where an allegation is made with conclusive supporting evidence, the company has taken entirely appropriate action regarding the safeguarding of those in our care, and this is well documented. Allegations in this category are a minority. Far more common are allegations where, after thorough investigation, insufficient evidence is found to enable us to take decisive action against an individual. To characterise such unsubstantiated or unproven allegations as a systemic problem is inaccurate and unhelpful, particularly given the range of motivations that may be behind them. It is particularly harmful to the reputations of the many staff who have performed exceptionally in complex and demanding conditions and whose efforts to fulfil their responsibilities under our contract should be commended. We have no tolerance for individuals who are unable to uphold our exacting standards of conduct, and we do not hesitate to remove such individuals from our organisation. I can assure the committee that all allegations are taken extremely seriously and investigated with rigour to attempt to determine the full facts, in order to take appropriate action where necessary.¹³¹

2.107 Transfield Services advised that following the recommendations of the Moss Review, it had reviewed its corporate policies and practices both independently and in collaboration with the department, and was 'confident that our existing policies and guidelines appropriately inform staff about expected behaviours'.¹³² Similarly, Wilson Security told the committee that it had reviewed its corporate policies and '[w]e are absolutely confident that our code of conduct reflects the values of the company and meets the requirements that Mr Moss was looking for'.¹³³

2.108 In response to recommendations made in the Moss Review that the supervision and training provided to Transfield Services and Wilson Security staff needed to be enhanced, particularly in relation to Nauruan staff, Transfield Services advised the committee that:

Transfield Services takes these comments very seriously. We have invested considerable time and effort in ensuring that training programs in place within the RPC in respect of all employees are of the highest quality and demonstrate our commitment to ensuring the competency and continuous

130 Mrs Kate Munnings, Chief Executive Operations, Logistics, Construction and Consulting, Transfield Services, *Committee Hansard*, 19 May 2015, p. 15.

131 Mr John Rogers, Executive General Manager, Southern Pacific, *Committee Hansard*, 20 July 2015, p. 32.

132 Transfield Services, answer to question on notice, 19 May 2015 (received 16 June 2015), Annexure 1.

133 Mr John Rogers, Executive General Manager Southern Pacific, Wilson Security, *Committee Hansard*, 19 May 2015, p. 29.

improvement of our and our subcontractor's staff. However, we are committed to continuous improvement and we are building on the existing programs so as to ensure the training and support offered to our staff is enhanced in response to the concerns raised by the Moss Review. Specifically, in combination with the Department we have revisited the relevant training programs and materials and made a number of enhancements in direct response to those concerns.¹³⁴

2.109 In relation to the Moss Review's recommendation that cooperation between contract service providers needed to be improved, Transfield Services advised that while it considered it already had an appropriate understanding of the responsibilities of respective service providers at the RPC, steps had been taken to enhance the effectiveness of meeting processes between the department, the (Nauruan) Operations Managers and service providers.¹³⁵

Complaints procedures and management

2.110 In relation to the efficacy of Commonwealth contractors' processes for reporting and handling complaints about staff misconduct, Transfield Services drew the committee's attention to its internal investigations policies, including its 'whistleblower hotline', operated by an external service provider, under which

...employees can confidentially and anonymously raise serious concerns without fear of reprisal, dismissal or discriminatory treatment. Prompt and appropriate action is taken to investigate each report received to ensure inappropriate conduct is detected and addressed appropriately.¹³⁶

2.111 At the committee's public hearing on 19 May 2015, Transfield Services explained that 'we actually encourage people to raise any concerns through the line [of management] before going to the hotline', and that raising complaints to any persons or bodies other than the 'whistleblower hotline' would constitute a breach of employees' contractual obligations.¹³⁷

2.112 Transfield Services advised the committee in June 2015 that between September 2012 and April 2015, no person identified as presently or formerly engaged at the RPC (by Transfield Services or otherwise) had made use of the hotline, and therefore no investigations in relation to the RPC had resulted from the operation of the hotline.¹³⁸ At the committee's public hearing on 20 July, Transfield Services advised that since the provision of that advice, the hotline had been used twice by staff

134 Transfield Services, answer to question on notice, 19 May 2015 (received 16 June 2015), Annexure 1.

135 Transfield Services, answer to question on notice, 19 May 2015 (received 16 June 2015), Annexure 1.

136 Transfield Services, *Submission 29*, p. 4.

137 Mrs Kate Munnings, Chief Executive Operations, Logistics, Construction and Consulting, Transfield Services, *Committee Hansard*, 19 May 2015, p. 5.

138 Transfield Services, answer to question on notice, 19 May 2015 (received 16 June 2015).

members from the RPC Nauru, while one further complaint had been raised directly with management.¹³⁹

2.113 Transfield Services advised the committee that it assumed management of the complaints process for asylum seekers in February 2014.¹⁴⁰ Between 21 February 2014 and 30 April 2015, a total of 834 written complaints were received by Transfield Services from asylum seekers. Thirty-one of these related to accommodation and 78 to amenities and facilities, while 725 complaints were received in relation to staff. Transfield Services advised that most of these related to provision of services, alleged inappropriate conduct (non-physical), alleged unfair treatment (non-physical), or alleged verbal abuse or threat. Of these:

- 96 complaints were received against Transfield Services employees or relating to Transfield Services's provision of services. This group comprised 17 Nauruan staff and 79 expatriate staff;
- 403 complaints were received against Wilson Security employees or relating to Wilson Security's services. Seventy-five of these were against Nauruan staff, 276 against expatriate staff and 2 against both local and expatriate staff. The remaining 50 were unclear as to the nationality of the staff member complained about;
- 75 complaints were received against IHMS staff, all expatriate;
- 136 complaints were received against staff of Save the Children Australia, while one complaint was made against both Wilson Security and Save the Children Australia;
- 11 complaints were received against employees of the department; and
- 3 complaints were made against employees of another organisation; two Nauruan and one expatriate.¹⁴¹

2.114 Transfield Services advised the committee that all of these complaints were notified to the department. Eighteen complaints were also notified to the Nauru Police Force, 15 involving Nauruan staff and three against expatriates. Seven of these had been finalised, and eleven remained under investigation. No other complaints reported to the department had been escalated to any further form of review.¹⁴² Transfield Services was unable to inform the committee how many of the 11 staff involved in complaints under investigation by the police remained working at the RPC.¹⁴³

139 Mrs Kate Munnings, Chief Executive Operations, Logistics, Construction and Consulting, Transfield Services, *Committee Hansard*, 20 July 2015, p. 4, 23.

140 Prior to 21 February 2014, the complaints management framework was managed by the Salvation Army. Transfield Services, answer to question on notice, 20 May 2015 (received 16 June 2015).

141 Transfield Services, answer to question on notice, 20 May 2015 (received 16 June 2015).

142 Transfield Services, answer to question on notice, 20 May 2015 (received 16 June 2015).

143 Ms Angela Williams, Commercial, Strategy and Systems Director, Transfield Services, *Committee Hansard*, 20 July 2015, pp 18-19.

2.115 Many submitters believed that the complaints procedures in relation to RPC staff were fundamentally flawed, particularly because they amounted to contractors investigating their own behaviour. Former Save the Children Australia employee Ms Charlotte Wilson stated her view on the inefficacy of the internal reporting mechanisms:

It is my belief that information was withheld by asylum seekers who were fearful of retribution from security staff over any complaints. Any incident report or information report that was submitted went through the Wilson's chain of management to investigate. This was also the case if the matter involved inappropriate behaviour by Wilson's staff...

The above systems created an environment where both asylum seekers and SCA staff were intimidated to not take action against security services. Asylum seekers held the valid fear that if they received refugee status and entered the community there would be retribution from Nauruan security officers. Asylum seekers were aware that it was possible that any complaint they made against a security officer could be seen by that person.¹⁴⁴

2.116 Mr Ronalds of Save the Children Australia expressed the view that underreporting of incidents and complaints, as noted in the Moss Review, was to be expected 'where highly vulnerable people are coming from the sorts of contexts that they are', with little confidence in institutions of authority and justice:

The asylum seekers on Nauru are already coming to Nauru with a concern about whether, if they reported things like sexual assault, they would be taken seriously and properly investigated. I think that the environment only exacerbates that.¹⁴⁵

2.117 However, Wilson Security did not believe that these views were generally held by asylum seekers at the RPC, emphasising the integrity of its complaint management processes, and that all complaints involving allegations against service providers were monitored by the department.¹⁴⁶

Commonwealth and external oversight of contractors

2.118 In relation to the level of Commonwealth oversight of its contractors' work at the centre, both the department and Transfield Services confirmed that recruiting, screening and contracting of staff were not directly supervised by the department. Transfield Services noted that while the contract enabled the Commonwealth to veto the deployment of staff at the RPC, in terms of general recruitment and training 'the Commonwealth allows us to run that process'.¹⁴⁷

144 Ms Charlotte Wilson, *Submission 79*, p. 6.

145 Mr Paul Ronalds, Chief Executive Officer, Save the Children Australia, *Committee Hansard*, 19 May 2015, p. 53.

146 Wilson Security, response to *Submission 79*, pp 2-3.

147 Mrs Kate Munnings, Chief Executive Operations, Transfield Services, *Committee Hansard*, 19 May 2015, p. 2.

2.119 Transfield Services advised the committee that in addition to its own internal audit processes, it was subject to audit by the department, and it also mentioned visits by other authorities such as the Commonwealth Ombudsman, and various reviews conducted including the Moss Review, which examined contractors' policies and performance.¹⁴⁸ For its part, Wilson Security advised that it was audited both internally and by Transfield Services as its contracting authority, and that in certain areas such as emergency management it also commissioned independent external auditing.¹⁴⁹

2.120 By contrast, Ms Natasha Blucher told the committee that in her experience 'there appears to be a significant disconnect between the understanding of management who are located in Australia and the actual implementation of policy on the island', wherein the policies and guidelines put in place by contractors were not observed in practice.¹⁵⁰

2.121 At the committee's public hearing on 19 May, Mr Ronalds of Save the Children Australia advised that initial responses to incidents and concerns were discussed between stakeholders on Nauru, including the department, but at times Save the Children Australia had found it necessary to directly escalate matters because they were not receiving sufficient attention:

...in some cases, it would be escalated by me directly either to the secretary or to the minister...

There have been situations that we have wanted to bring to the notice of the secretary or the minister that we did not feel were getting sufficient attention or sufficient traction, yes.¹⁵¹

2.122 Reflecting on the allegations against contractor staff brought to light through the Moss Review, Mr Pezzullo stated that:

Whether this reflects a systemic issue, whether it is chronic or whether it is an acute set of episodes that have now been dissipated through stronger management attention, I do not offer an analytical opinion about. You have heard the department talk about strengthening protocols post Moss and you have heard, I think, some evidence from Transfield and Wilson to that effect.¹⁵²

2.123 In its submission, the department drew attention to the establishment of its Detention Assurance Team (DAT) on 1 December 2014, stating that the DAT

148 Mr Derek Osborn, Executive General Manager Logistics and Facilities Management, Transfield Services, *Committee Hansard*, 19 May 2015, p. 15.

149 Mr John Rogers, Executive General Manager Southern Pacific, Wilson Security, *Committee Hansard*, 19 May 2015, pp 28-29.

150 Ms Natasha Blucher, *Committee Hansard*, 20 July 2015, p. 55.

151 Mr Paul Ronalds, Chief Executive Officer, Save the Children Australia, *Committee Hansard*, 19 May 2015, p. 46.

152 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 9 June 2015, p. 68.

'provides strengthened assurance of the integrity and management of immigration detention services and the management of contracts in regional processing centres' through such functions as reviewing detention practices and generating recommendations to the Secretary, managing contracts, reviewing incidents and allegations, and leading the department's work to implement the recommendations of the Moss Review.¹⁵³

Allegations of contractor staff 'spying' on a senator

2.124 One issue that arose during the committee's inquiry was the allegation, made in a submission from a former employee of Wilson Security, that staff of Wilson Security had conducted surveillance of a senator and member of the committee during her visit to Nauru in December 2013.¹⁵⁴

2.125 The submission alleged that:

When Senator Sarah Hanson-Young visited Nauru, Wilson Security organised a team from [its Emergency Response Team] ERT to spy on her while she was on Nauru. This included following her around the island while she was outside of the OPCs and setting up an observation post to watch her room at the Menen hotel. The briefing was given by ERT supervisor [*name redacted*] in which he gave orders to spy on the senator. This briefing included her room number, vehicle registration and even using code name "Raven" over the radio to make reference to her.¹⁵⁵

2.126 In its written response to the submission, Wilson Security stated that it 'strongly rejects' the allegation that it authorised this action, and offered the following explanation:

Wilson Security is aware of individuals who attended the Menen Hotel at the same time as Senator Hansen-Young [*sic*]. We understand that their primary motivation was the security of the Senator.

This activity was not authorised by Wilson Security, and is not a part of our scope of works...The matter was immediately investigated by Wilson Security and the individuals involved were subject to disciplinary action for acting beyond their brief.¹⁵⁶

2.127 Transfield Services (as Wilson Security's contracting principal) later advised the department that Wilson Security did not regard it as necessary to inform Senator Hanson-Young about the incident at any stage, because she 'was not personally observed at any time during the unauthorized monitoring of [her] parked vehicle'.

153 Department of Immigration and Border Protection, *Submission 31*, p. 29.

154 *Submission 62*.

155 *Submission 62*, p. 1.

156 Wilson Security, response to *Submission 62*, pp 1-2.

2.128 Wilson Security also reported that no notes, sound, video or other records were made during the monitoring.¹⁵⁷

2.129 The submission and Wilson Security's response to it were published simultaneously on the committee's website on 4 June 2015, and the matter was reported in the media the same day. In response to queries from reporters over the following 24 hours, the Prime Minister, the Hon Tony Abbott MP rejected the allegation of spying, stating that 'she was being, in fact, looked after while she was there', while the Minister for Immigration and Border Protection, the Hon Peter Dutton MP described the allegations as 'completely unfounded'.¹⁵⁸

2.130 On 5 June Senator Hanson-Young told the media that she had been contacted by an employee of another contractor on Nauru, who told her that staff of other service providers had been briefed in advance on the surveillance to be conducted on her, suggesting that this had not been the unauthorised conduct of a few 'rogue' Wilson Security employees.¹⁵⁹

2.131 The department informed the committee that it first became aware of the accusations of spying on Senator Hanson-Young on 4 June 2015,¹⁶⁰ that is, the day that it was made public by the committee and the media. The department stated that it had no incident reports or records of being notified about the incident, and that it had conducted no internal investigation into the matter.¹⁶¹

2.132 In evidence to the committee, the department advised the committee that it had 'received assurances from Transfield and Wilson that the activities that were undertaken were not authorised' and that 'the officer involved' had been subject to disciplinary action the day after the incident.¹⁶² Wilson Security subsequently advised the committee that the ERT supervisor who had directed the surveillance was demoted from his supervisory role, and remained in a more junior role within the organisation

157 Department of Immigration and Border Protection, answer to question on notice, 9 June 2015 (received 26 June 2015).

158 'Hanson-Young wasn't spied on, Dutton says', *Sky News*, 5 June 2015, <http://www.skynews.com.au/news/politics/national/2015/06/05/hanson-young-wasn-t-spied-on-dutton-says.html> (accessed 12 July 2015).

159 'Abbott Response 'Creepy' As More Evidence Emerges Nauru Contractors Spied on Sarah Hanson-Young', *New Matilda*, 5 June 2015, <https://newmatilda.com/2015/06/05/abbott-response-creepy-more-evidence-emerges-nauru-contractors-spied-sarah-hanson-young#sthash.0pRBt2RI.dpuf> (accessed 12 July 2015).

160 Department of Immigration and Border Protection, answer to question on notice, 9 June 2015 (received 26 June 2015).

161 Department of Immigration and Border Protection, answer to question on notice, 9 June 2015 (received 26 June 2015).

162 Mr Neil Skill, First Assistant Secretary, Infrastructure and Services Division, Department of Immigration and Border Protection, *Committee Hansard*, 9 June 2015, p. 52.

for nine months, after which he was re-appointed as ERT supervisor due to his 'excellent record' over that period.¹⁶³

2.133 Mr Pezzullo emphasised that there was 'absolutely no policy implied or otherwise that visiting Australian parliamentarians will be put under any form of scrutiny or surveillance or be monitored otherwise',¹⁶⁴ and that he would expect that any such incident involving a contractor should have been reported to the department and 'escalated to various senior levels of management'.¹⁶⁵ While Mr Pezzullo was not secretary of the department in December 2013, he expressed confidence that any suggestion of surveillance such as occurred would have been instantly quashed if it had been raised with the department: 'It would have taken no more than a nanosecond to think about it'.¹⁶⁶

2.134 At the committee's public hearing on 20 July 2015, the department advised that following the public release of the allegations on 4 June, it had conducted a 'fairly comprehensive review' of the circumstances of the incident.¹⁶⁷ While it was satisfied that the incident was a one-off unauthorised action and that Wilson responded appropriately to it, the department had held 'robust discussions' with its contractors about the reporting of such incidents, and had also made 'significant improvement' to its documentation and policies in relation to visits to the RPC. First Assistant Secretary Mr Skill expressed his confidence that it was now 'very clear to people on the ground as to what is and what is not acceptable. I am confident it cannot happen again'.¹⁶⁸

2.135 The committee received several submissions from former employees of Wilson Security which alleged that the surveillance was more extensive and had been planned to a greater extent than previously advised. For example, Mr Jon Nichols, a former Wilson Security employee, told the committee that members of the ERT had been instructed by 'Wilson Security Management' to monitor the movements of Senator Hanson-Young throughout her visit.¹⁶⁹ Mr Nichols told the committee that he had seen footage recorded on a mobile device which appeared to show the senator:

He [an ERT member] was quite open about the fact that they had filmed Senator Hanson-Young, and was more than happy to show people the

163 Wilson Security, answer to questions on notice, 10 July 2015 (received 17 July 2015).

164 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 9 June 2015, p. 54.

165 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 9 June 2015, p. 63.

166 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 9 June 2015, p. 64.

167 Mr Neil Skill, First Assistant Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 20 July 2015, p. 84.

168 Mr Neil Skill, First Assistant Secretary, Infrastructure and Services Division, Department of Immigration and Border Protection, *Committee Hansard*, 20 July 2015, p. 86.

169 Mr Jon Nichols, *Submission 95*, p. 2.

footage that he had on his phone. I viewed that footage and firmly believe that it was Senator Hanson-Young walking across the car park at the Menen Hotel and in the front door.¹⁷⁰

2.136 Another submitter told the committee that the operation was extensive and that footage was recorded:

This operation involved approximately 6-8 ERT members and consisted of recording her every movement both in and out of the camps, they were also to report on whom she spoke with and if possible they were to ascertain what was said. Staff were requested to compile reports on her movements, contact with employees or Stakeholders. These reports and video surveillance footage were to be handed to the Intelligence unit for collation and dissemination... A considerable amount of video surveillance footage was taken of Sarah Hanson Young, both inside and out of the processing centres by tasked Emergency Response Team members. This was then provided to the Wilson Security Intelligence unit for dissemination.¹⁷¹

Committee view

2.137 While the committee notes the department's evidence in relation to this matter, it is difficult to entirely reconcile this evidence with the public statements of the Prime Minister and the Minister for Immigration and Border Protection on 5 June 2015. It is also of serious concern to the committee that Commonwealth funded contractors did not view it as their primary obligation to support transparency and openness in relation to the visit of an Australian Senator to the Nauru RPC and instead viewed her presence as a potential security threat to be managed. The committee considers that this incident is a striking example of gaps in the discipline and professionalism of contractor staff and their management, indicative of a culture of secrecy, and demonstrates inadequate Commonwealth oversight of the relevant contractors.

Transfer, assessment and resettlement of asylum seekers

2.138 This section will outline aspects relating to the transfer, assessment and eventual resettlement of asylum seekers with regard to the RPC on Nauru.

2.139 Evidence from submitters focussed on:

- the arbitrary nature of selection for transfer;
- slow and inadequate refugee status determination procedures; and
- unsafe conditions for resettlement in the Nauruan community.

Transfer

2.140 The Memorandum of Understanding between the republic of Nauru and the commonwealth of Australia, which sets out the arrangement for the operation of the RPC, states with regard to transfer:

170 Mr Jon Nichols, *Committee Hansard*, 20 August 2015, p. 6.

171 *Submission 99*, p. 1.

Persons to be transferred to Nauru for processing

9. Persons to be transferred to Nauru are those persons who:

- a. have travelled irregularly by sea to Australia; or
- b. have been intercepted by Australian authorities in the course of trying to reach Australia by irregular maritime means; and
- c. are authorised by Australian law to be transferred to Nauru; and
- d. have undergone short health, security and identity checks in Australia.¹⁷²

2.141 The first transfers of asylum seekers from Christmas Island occurred on 14 September 2012.¹⁷³

2.142 Information on the selection of asylum seekers for transfer to the RPC on Nauru is not readily available. The Castan Centre for Human Rights Law noted that asylum seekers are selected for transfer without their consent.¹⁷⁴ The committee heard from submitters that the selection of asylum seekers is arbitrary, with the Darwin Asylum Seeker Support and Advocacy Network (DASSAN) writing that asylum seekers 'see others who arrived in Australia on the same boat transferred into the community while they await return to Manus or Nauru'.¹⁷⁵

2.143 The Australian Human Rights Commission (AHRC) told the committee that the pre-transfer assessments which are undertaken by the department before asylum seekers are transferred were 'inadequate':

The Commission reviewed a number of the pre-transfer assessments conducted in relation to children as part of the Inquiry. The Commission concluded that Departmental officers do not assess the care and welfare needs of an individual child and consider whether those needs can be met in the RPC in Nauru before recommending the child's transfer. The Commission found that Australia transferred children to Nauru regardless of whether the transfer was in those children's best interests, in breach of Australia's obligations under international law.¹⁷⁶

2.144 The AHRC reiterated to the committee its finding in the *Forgotten Children* report that in the case of children, transfers were approved regardless of whether this

172 *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia relating to the Transfer to and Assessment of persons in Nauru, and related issues*, 3 August 2013, clause 9.

173 Department of Immigration and Border Protection, *Submission 31*, p. 6. The first asylum seekers to be transferred to the Regional Processing Centre were single adult males, with families and single adult females transferred from 21 August 2013.

174 Castan Centre for Human Rights Law, *Submission 18*, p. 6.

175 DASSAN, *Submission 61*, p. 4. See also: Australian Churches Refugee Taskforce, *Submission 32, Attachment 1*, p. 11.

176 Australian Human Rights Commission, *Submission 25*, p. 3.

was in the children's best interests, in breach of Australia's obligations under international law.¹⁷⁷

2.145 The department advised the committee that in conducting individual best interest assessments for all children before they were transferred to Nauru, 'the Department considers the best interests of the child as a primary consideration'.¹⁷⁸

2.146 DASSAN told the committee that asylum seekers they had been in contact with in Wickham Point in Darwin had relayed concerns about transfer:

...it is important to note that most (if not all) asylum seekers who have been in offshore processing centres have the same central complaint: that their placement in an offshore centre is arbitrary.¹⁷⁹

2.147 DASSAN told the committee that the process for transfer from Wickham Point in Darwin to the RPC on Nauru is highly stressful to the asylum seekers undergoing transfer:

When people are to be returned offshore, they are taken to the property office or summoned to a meeting with immigration, detained incommunicado in a confined area and have their possessions collected by Serco. They are offered no opportunity to communicate with legal or community representatives, and no opportunity to rebut the presumption that they are fit for return offshore. They are returned offshore within a matter of hours, usually on a flight leaving Darwin at approximately 3am on a Friday morning.

2.148 DASSAN continued that there is a clear lack of communication between the department and asylum seekers selected for transfer, and that there is no appeals mechanism:

Asylum seekers are not told they will be sent offshore before the removal takes place. There is no system in place to counsel them about the move, or give them the opportunity to rebut the presumption that they are fit to travel or reside in Nauru or PNG. Those decisions are made for them by DIBP, Serco and IHMS. Asylum seekers often report that people are transferred back to Nauru while they have outstanding medical appointments in Darwin.

Asylum seekers are instead issued with a slip to see immigration staff, to pick up an item at Property, or to visit IHMS on a Thursday afternoon. If they attend the appointment (sometimes they hide around the centre), they never return to the compound. Their personal belongings are packed by Serco staff and they are held incommunicado in the Property area until they leave the centre under guard after midnight.¹⁸⁰

177 Australian Human Rights Commission, *Submission 25*, p. 3.

178 Department of Immigration and Border Protection, answer to question on notice, 29 June 2015 (received 17 July 2015).

179 DASSAN, *Submission 61*, p. 4.

180 DASSAN, *Submission 61, Attachment 1*, p. 4.

2.149 The Refugee Action Collective Queensland (RAC-Q) echoed that asylum seekers had told them of the distressing nature of transfer:

This distress is compounded by the fact that they can be sent back at a moment's notice; they cannot pack their own belongings, they have no right to appeal the decision or seek help, and there is no explanation given. Many detainees comment that they don't understand why the decision is made to return one detainee and not another.¹⁸¹

Assessment and processing

2.150 The department advised that the processing of asylum seekers within the RPC is conducted by the Nauruan Government:

While the operation of the Nauru Regional Processing Centre is fully funded by the Australian Government, the legislation requires for the processing of the transferees to be conducted by the Government of Nauru.¹⁸²

2.151 The committee sought clarification from the department as to the steps involved in a refugee status determination. The department responded that '[t]he refugee status determination (RSD) process in Nauru is managed and implemented by the Government of Nauru'.¹⁸³ The department did note, however, that '[s]pecific expertise has been provided to mentor staff across the range of administration functions including refugee status determination'.¹⁸⁴

2.152 The department advised that Nauru has legislation in place which requires a refugee status determination to be carried out whenever a person enters Nauru and seeks protection:

On 28 June 2011, Nauru acceded to the 1951 Convention relating to the Status of Refugees and has incorporated its international obligations under this Convention into Nauruan legislation, through the Refugees Convention Act 2012 (Nr). This means that Nauru has binding domestic legal obligations to make a refugee status determination when a person in Nauru makes an application for asylum. Determining whether an asylum seeker is a refugee therefore, is not only an obligation that Nauru has undertaken through its agreement with Australia, it is a statutory obligation that arises in relation to any person who enters Nauru and seeks protection.¹⁸⁵

181 RAC-Q, *Submission 73*, p. 10.

182 Department of Immigration and Border Protection, *Submission 31*, p. 9.

183 Department of Immigration and Border Protection, answer to question on notice, 21 May 2015 (received 9 June 2015).

184 Department of Immigration and Border Protection, *Submission 31*, p.12.

185 Department of Immigration and Border Protection, *Submission 31*, p.52.

2.153 According to the department, the Nauruan Government delivered its first refugee status determinations on 20 May 2014.¹⁸⁶ The Nauruan Secretary for Justice is empowered to make such determinations.¹⁸⁷

2.154 The department advised that the average length of time for asylum seekers to be in the RPC on Nauru was 402 days.¹⁸⁸ The committee sought clarification as to why such a lengthy period was required to process claims. The department noted that there may be various factors:

There are a range of variables that impact the time it may take to process a refugee claim, including:

- complexity of cases;
- documentation and evidence to support a claim such as proof of nationality or statelessness;
- willingness to engage in RSD process;
- medical fitness to engage in RSD process; and
- the number of active cases at any one time.¹⁸⁹

2.155 As at 30 June 2015, 595 refugee status determinations had been made, with 506 positive and 89 negative determinations delivered.¹⁹⁰ Where a negative refugee status determination has been made, a judicial review may be requested through the Nauruan Supreme Court within 28 days of the decision being made. The department advised that:

Claims assistance extends to a review of whether a prospective judicial review application has merit and, where it is considered that it does, to lodgement of the judicial review application in compliance with the Supreme Court of Nauru application lodgement requirements. Claims assistance does not extend to support for the transferee to argue their case to the court, and any associated judicial review legal costs are at the transferee's own expense unless the Government of Nauru provides legal aid free of charge.¹⁹¹

186 Department of Immigration and Border Protection, *Submission 31*, p. 7.

187 Department of Immigration and Border Protection, *Submission 31*, p. 52.

188 Department of Immigration and Border Protection, answer to question on notice, 7 May 2015 (received 13 May 2015).

189 Department of Immigration and Border Protection, answer to question on notice, 21 May 2015 (received 9 June 2015).

190 Department of Immigration and Border Protection, *Operation Sovereign Borders monthly update: June 2015*, 10 July 2015, <http://newsroom.border.gov.au/releases/operation-sovereign-borders-monthly-update-june> (accessed 15 July 2015).

191 Department of Immigration and Border Protection, *Submission 31*, p.53.

2.156 Amnesty International wrote that the slow processing times have created uncertainty and stress for asylum seekers:

While a number of asylum seekers have had their refugee status determined, long-term plans for their settlement remain unclear. The combination of lengthy delays and uncertainty combine to create a serious risk of individuals returning to places where their lives or freedom is likely to be threatened or where they are at risk of torture and other ill-treatment.

In addition, the prolonged periods of detention violate the right to freedom from arbitrary detention, prohibited by customary international law and by treaties to which both Australia and Nauru are party.¹⁹²

Fears around reporting incidents

2.157 Ms Vibhakar told the committee that asylum seekers were afraid that reporting incidents of abuse or making complaints would adversely affect their refugee status determination:

They expressed fear that if they complained about Commonwealth contracted employees or about DIBP in particular, it would negatively affect their ability to receive asylum, or delay the processing of their claim forcing them to remain in detention for longer. At times, this view was reinforced by some Commonwealth contracted employees.¹⁹³

Resettlement

2.158 The resettlement of asylum seekers is set out in the MOU:

Outcomes for persons Transferred to Nauru

12. The Republic of Nauru undertakes to enable Transferees who it determines are in need of international protection to settle in Nauru, subject to agreement between Participants on arrangements and numbers. This agreement between Participants on arrangements and numbers will be subject to review on a 12 monthly basis through the Australia-Nauru Ministerial Forum.
13. The Commonwealth of Australia will assist the Republic of Nauru to settle in a third safe country all Transferees who the Republic of Nauru determines are in need of international protection, other than those who are permitted to settle in Nauru pursuant to Clause 12.
14. The Commonwealth of Australia will assist the Republic of Nauru to remove Transferees who are found not to be in need of international protection to their countries of origin or to third countries in respect of which they have a right to enter and reside.¹⁹⁴

192 Amnesty International, *Submission 33*, p. 7.

193 Ms Viktoria Vibhakar, *Submission 63*, pp 28-29.

194 *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia relating to the Transfer to and Assessment of persons in Nauru, and related issues*, 3 August 2013, clauses 12-14.

2.159 Submitters told the committee that the resettlement procedures in place for asylum seekers granted refugee status and resettled in the Nauruan community were chaotic and confusing.¹⁹⁵ Submitters argued that the confusing practices contributed to stress and anxiety for asylum seekers.

2.160 One submitter told the committee that there was minimal information and communication between the department and asylum seekers being resettled in the Nauruan community:

It became clear early that, only very limited planning from DIBP and the Nauruan Government had gone into the 'settlement' of Asylum Seekers found to be refugees on Nauru. Refugees were released from the [RPCs] with very limited information on what to expect in the Nauruan community. Some Asylum Seekers, especially the SAFs [single adult females], were very scared about leaving the [RPC] to go into the Nauruan community, as there were many rumours on how refugees in the community would be treated particularly around being raped or being attacked by dogs.¹⁹⁶

2.161 Further, the submitter told the committee that asylum seekers were initially informed that they would be granted visas valid for five years, but were in reality granted visas with a validity of six months.¹⁹⁷

2.162 Submitters told the committee that they held concerns that the Nauruan community was not safe for the resettlement of refugees, particularly unaccompanied minors. ChilOut told the committee that unaccompanied minors had been released into the Nauruan community into an unsafe situation:

On 1st October 2014, 29 unaccompanied children (UACs) were released into the community on Nauru following fears for their safety while held in the family compound within the RPC.

In the following weeks, the teenage boys were subjected to a series of physical and verbal attacks by a group of locals, with several of the boys requiring hospitalisation as a result of their injuries.¹⁹⁸

2.163 The committee heard that the Nauruan community is not a safe place for resettlement to occur, in addition to the allegation made that minors have been assaulted, it was also argued that there is a culture of resentment towards asylum seekers and refugees in the community:

Children were attacked by local citizens at an alarming rate. There was no mitigation or community development initiated by DIBP or the GoN [Government of Nauru] Police were not supportive and no effective investigation was conducted. There was a growing resentment in the community of refugees, with threats of violence made via an anonymous letter and verbal threats on various occasions.

195 *Submission 82*, p. 8.

196 *Submission 82*, pp 7-8.

197 *Submission 82*, p. 8.

198 ChilOut, *Submission 13*, p. 6.

UAMs [unaccompanied minors] were assaulted and went to hospital as a result. This was a serious assault yet no action was taken in prevention or education in the community. There was growing resentment as refugees were released and transitioned into the community yet no community action taken for this process to succeed.¹⁹⁹

2.164 The committee received evidence on a confidential basis which supported the view that asylum seekers and refugees continue to face challenges once resettled in the community.

Costs and prioritisation of resources

2.165 This section will address the cost of the RPC on Nauru, with particular attention drawn to the significant investment of Australian taxpayers' money which has been made with little detail reported to the Australian Parliament.

2.166 The cost of detention on Nauru is high, with minimal evidence of value for money in the operation of the RPC. The committee heard that there is a lack of transparency on the spending of significant amounts of Australian taxpayers' money, and an inefficient prioritisation of resourcing.

2.167 This section will discuss:

- the costs associated with the operation of the RPC on Nauru; and
- concerns that parliamentary approval for public works on Nauru was not sought or gained.

Costs associated with operation of the Regional Processing Centre

2.168 Costs including establishment and ongoing maintenance of infrastructure, contracts, visa and processing costs have contributed to the very high overall cost of operating the RPC on Nauru.

2.169 The MOU sets out that all costs for the operation of the RPC will be met by the Australian Government:

6. The Commonwealth of Australia will bear all costs incurred under and incidental to this MOU as agreed between the Participants.²⁰⁰

2.170 The department provided the following table of operational costs for the RPC and settlement on Nauru for three financial years:

199 *Submission 80*, p. 4.

200 *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia relating to the Transfer to and Assessment of persons in Nauru, and related issues*, 3 August 2013, clause 6.

Costs of Regional and Processing and Settlement in Nauru	2012/13 \$	2013/14 \$	2014/15 \$
RPC Operational Costs	143,196,000	387,662,000	380,419,000
DIBP Staff Costs	7,064,000	11,013,000	7,999,000
Capital	132,648,000	207,060,000	56,582,000

Source: Department of Immigration and Border Protection, answer to question on notice, 18 May 2015 (received 5 June 2015).²⁰¹

2.171 The department advised the committee of the following contract values for the financial year 2013-14:

- IHMS - \$20,922,459;
- Save the Children Australia - \$6,142,596; and
- Transfield Services - \$259,182,780.²⁰²

2.172 Information available on published spending on Nauru via the AusTender website sets out that during the 2013-14 financial year \$2.97 billion was spent on contracts associated with the RPC on Nauru.²⁰³ The contracts generally relate to accommodation for staff, construction, legal and audit services, and provision of services.

2.173 The department advised that various projects were planned for completion in 2015 and 2016 on Nauru which directly or indirectly related to the RPC:

Project	Estimated cost	Target completion
Republic of Nauru Hospital upgrade works	\$23,307,000	June 2016
Nauru Primary School development	\$17,350,000	January 2016
Teachers' accommodation	\$27,979,000	June 2016
Community Resource Centre	\$9,245,000	May 2016

²⁰¹ Reporting period is Year to Date to 30 April 2015.

²⁰² Department of Immigration and Border Protection, answer to question on notice, 18 May 2015 (received 9 June 2015).

²⁰³ AusTender, *Senate Order on Confidentiality in Procurement Contracts by Agency*, <https://www.tenders.gov.au/?event=public.senateOrder.list> (accessed 27 May 2015).

Repurpose RPC 3 – Settlement Accommodation Project 1	\$15,944,000	December 2015
Repurpose RPC 3 – Settlement Accommodation Project 2 (includes warehouse - \$3,861,084)	\$16,066,848	February 2016
Repurpose RPC 3 – Settlement Accommodation Project 1	\$8,212,000	July 2016
Courthouse	\$168,640	July 2015
Correctional Centre	\$17,006,803	February 2016
TOTAL	\$135,279,291	

Source: Department of Immigration and Border Protection, answer to question on notice, 18 May 2015 (received 9 June 2015).

2.174 Detailed information regarding the purpose and outcomes anticipated on the above projects was not readily available.

2.175 An answer provided by the department to a question on notice from Additional Estimates sets out additional costs for visas for asylum seekers in the RPC, which are paid by the Australian Government:

The current cost for visas for transferees and refugees in Nauru is \$1,000 per month per person. An amount of \$27,893,633 has been paid to 30 March for transferee visas (paid quarterly) and an amount of \$1,008,000 to 23 February 2015 for refugee visas.

There are no visa charges imposed for department staff travelling on official business.²⁰⁴

Open centre model

2.176 Evidence provided to the committee relating to costs associated with the RPC on Nauru highlights the very high cost of offshore detention where security is a priority.

2.177 With a significant amount of money dedicated to security arrangements, the committee believes that an open centre model could provide an alternative pathway for offshore detention.

204 Department of Immigration and Border Protection, answer to question on notice, 23 February 2015 (received 21 April 2015).

2.178 Ms Caz Coleman, former Transitional Contract Manager for The Salvation Army, told the committee that she had proposed and advocated for an open centre model as a means to ease potential tensions between the refugee and local populations:

In 2013 it was blatantly clear that any pathway for economic or educational advancement for refugees or centre clients must involve opportunities for local Nauru community members also. To establish no pathways would lead to idleness and resentment on both sides and to establish refugee only pathways would lead to conflict and potential violence due to perceived favouritism.²⁰⁵

2.179 In February 2015, the Hon Peter Dutton MP, Minister for Immigration and Border Protection, announced that the RPC would move toward an open centre model:

An open centre will give transferees more opportunities to engage with the Nauruan community before their refugee processing has been completed, allowing genuine refugees to ultimately integrate seamlessly into the community.

I expect open centre arrangements to be finalised very soon.²⁰⁶

2.180 The Nauruan Government announced the operation of a partial open centre model from 25 February 2015:

The Government of Nauru has commenced its Open Centre arrangement today...which allows a select number of asylum seekers from the Regional Processing Centre (RPC) access across the community for certain hours of the day.

Initially this access will be for three days a week, from 9am to 5pm.

Twenty asylum seekers will be involved with the new program today and another 40 on Saturday and 60 on Monday. The number of asylum seekers participating each week will be determined as the weeks progress.²⁰⁷

2.181 The Nauruan Government said that the move toward an open centre model had resulted from 'discussions about the effects of extended time spent in the camps':

...the Government of Nauru will trial the Open Centre in the hopes it will ease some of the tension and frustration and prepare the asylum seekers for a future in the Nauru community if they are to be deemed genuine refugees through the status determination process.²⁰⁸

205 Ms Caz Coleman, *Submission 56*, p. 13.

206 The Hon Peter Dutton, MP, Minister for Immigration and Border Protection, 'Nauru visit reaffirms regional processing partnership', Media release, 19 February 2015.

207 Government of Nauru, 'Nauru commences open centre arrangements', Media release, 25 February 2015.

208 Government of Nauru, 'Nauru commences open centre arrangements', Media release, 25 February 2015.

Public Works on Nauru

2.182 During the course of the inquiry, the committee became concerned that public works projects on Nauru had not gained Parliamentary approval through the Parliamentary Standing Committee on Public Works (the Public Works Committee). The Public Works Committee calls to account the planning decisions and capital expenditure of the Executive through Commonwealth departments and agencies.²⁰⁹

2.183 Under the *Public Works Committee Act 1969* (the Act), the Public Works Committee is required to consider the need, scope, cost, purpose and value-for money of proposed works, and report to Parliament on whether or not it is advisable that works proceed.²¹⁰

2.184 Section 5 of the Act prescribes the definition of a public work. A work can be architectural or engineering work and includes:

- the construction, alteration, repair, refurbishment or fitting-out of buildings and other structures (including demountable buildings);
- the installation, alteration or repair of plant and equipment designed to be used in, or in relation to, the provision of services for buildings and other structures;
- the undertaking, construction, alteration or repair of landscaping and earthworks (whether or not in relation to buildings and other structures);
- the demolition, destruction, dismantling or removal of:
 - buildings and other structures;
 - plant and equipment; and
 - earthworks;
- the clearing of land and the development of land for use as urban land or otherwise; and
- any other matter declared by the regulations to be a work.²¹¹

2.185 A public work can be located in Australia or its external territories, or outside Australia, as in the case of a diplomatic mission.²¹² If work is not being undertaken for the Commonwealth, it is not considered a public work but a 'private' work.²¹³

209 Parliamentary Standing Committee on Public Works, *Procedure Manual-Edition 8*, March 2010, p.1.

210 Parliamentary Standing Committee on Public Works, *Procedure Manual-Edition 8*, March 2010, p.v.

211 Parliamentary Standing Committee on Public Works, *Procedure Manual-Edition 8*, March 2010, p.4.

212 Parliamentary Standing Committee on Public Works, *Procedure Manual-Edition 8*, March 2010, p.4.

213 Parliamentary Standing Committee on Public Works, *Procedure Manual-Edition 8*, March 2010, p.4.

2.186 All public works proposed to be undertaken by or on behalf of the Commonwealth with an estimated cost of in excess of a threshold amount must not commence until the work has been referred to the Public Works Committee.²¹⁴ Under Section 18(9)(a) of the Act, the current threshold amount is \$15 million.²¹⁵

2.187 Further, the Public Works Committee must be advised of all works with an estimated cost between \$2 million and \$15 million, known as medium works, and they may be referred for inquiry by either House of Parliament.²¹⁶

2.188 Under Subsections 18(8) and 18(8A) of the Act, a work or an organisation may be exempted from committee scrutiny on the grounds of:

- urgency;
- defence purposes where scrutiny could be contrary to the public interest; or
- if the work is of a repetitive nature.²¹⁷

2.189 Exemption on the ground that work is of an urgent nature requires a resolution by the House of Representatives.²¹⁸

2.190 On 2 June 2015, the committee wrote to the Chair of the Public Works Committee, Senator Dean Smith, seeking advice in relation to works conducted in the Republic of Nauru.

2.191 The Public Works Committee advised the committee that:

The secretariat has advised DIBP representatives on several occasions to write to the Committee documenting any works that have been undertaken in Nauru, providing reasons why these would not have been referred to the Committee for inquiry... To date no correspondence has been received.²¹⁹

2.192 On 9 June 2015, the committee asked the department how many referrals had been made to the Public Works Committee in relation to works conducted in the Republic of Nauru from 2012 to present. The committee also asked the department how they are meeting their obligations under the Act in relation to works conducted in the Republic of Nauru.

214 Parliamentary Standing Committee on Public Works, *Procedure Manual-Edition 8*, March 2010, pp 4-5.

215 *Public Works Committee Act 1969*, s18(9)(a).

216 Parliamentary Standing Committee on Public Works, *Procedure Manual-Edition 8*, March 2010, p.6.

217 Parliamentary Standing Committee on Public Works, *Procedure Manual-Edition 8*, March 2010, p.8.

218 Parliamentary Standing Committee on Public Works, *Procedure Manual-Edition 8*, March 2010, p.8.

219 Senator Dean Smith, Chair, Parliamentary Standing Committee on Public Works, letter to Senator Alex Gallacher, Chair, Select Committee on Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, 11 June 2015.

2.193 The department responded by saying that while an initial exemption from the requirements of the Act was sought, subsequent funding was considered to be aid to a foreign government:

The initial builds for the RPCs were provided with an exemption, I understand, from the PWC process due to the urgency associated with the works. We have also received further legal advice quite recently with regard to some of the additional works that we are doing on Nauru now that they can be considered to be aid to a foreign government, and therefore they are not captured by the PWC process. Notwithstanding that, however, we have been engaging with the PWC secretariat and the Department of Finance on an ongoing basis since December 2013—providing briefings to PWC about what is going on.²²⁰

2.194 In an answer to a question on notice, the department advised that formal and informal briefings have been given to the Public Works Committee, but did not refer to the classification of any public works in Nauru as aid:

In addition to the initial regular reporting on the Works, the department has maintained regular contact with the PWC Secretariat on various aspects of the Nauru Programme of Works, with the last formal communication to the PWC being a Private Brief to the Committee on Manus Island and Nauru Works on 27 March 2014.²²¹

2.195 At the additional estimates hearings held by the Senate Standing Committee on Foreign Affairs, Defence and Trade, Mr Daniel Sloper, First Assistant Secretary, Pacific Division, Department of Foreign Affairs and Trade, told the committee that 'there is no ODA [official development assistance] being used for public works in Nauru'.²²²

2.196 The committee notes that the budget handed down for the 2015-16 financial year did not include a separate statement on international development assistance, as has been provided in previous budgets. The lack of availability of this information makes it difficult to clarify whether the works on Nauru are being consistently treated as aid to a foreign government by the Commonwealth.

2.197 In its interim report of 12 June 2015, the committee recommended further examination of Commonwealth expenditure on Nauru:

The committee draws the attention of the Standing Committee on Public Works to Commonwealth expenditure on public works in the Republic of Nauru, not confined to the Department of Immigration and Border Protection but across the Commonwealth, and recommends that the Department of Immigration and Border Protection ensures that all future

220 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 9 June 2015, p. 65.

221 Department of Immigration and Border Protection, answer to question on notice, 9 June 2015 (received 26 June 2015).

222 Mr Daniel Sloper, First Assistant Secretary, Pacific Division, Department of Foreign Affairs and Trade, *Committee Hansard*, 3 June 2015, p. 52.

public works in the Republic of Nauru are referred to the Standing Committee on Public Works in accordance with the Public Works Committee Act 1969 (Cth).²²³

2.198 Given the apparent inconsistency in the evidence available on this issue, the committee again draws the department's attention to the requirements of the *Public Works Committee Act 1969*.

223 Select Committee on Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, *Interim Report*, 12 June 2015.

