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Submission to the Senate Legal and Constitutional
Affairs References Committee

Conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea



UnitingJustice Australia is a
unit of the Uniting Church in
Australia Assembly

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Introduction

The Uniting Church has been concerned for the rights and wellbeing of people seeking asylum on our shores since its inception in 1977. The Uniting Church in Australia believes in the dignity of all people and is committed to work for justice and to oppose all forms of discrimination. In the *Statement to the Nation* made by the Inaugural Assembly in 1977, the Uniting Church promised to “seek the correction of injustices wherever they occur”, to “work for the eradication of poverty and racism within our society and beyond” and “to oppose all forms of discrimination which infringe basic rights and freedoms”.¹

In particular, the Uniting Church has had long-standing concerns about Australia’s increasingly harsh treatment of asylum seekers and refugees who make the journey towards Australia by boat. The introduction in 2013 of the ‘Operation Sovereign Borders’ policy marked a significant departure in Australian policy and programs from Australia’s historical approach to the protection and resettlement of refugees. The militarisation of a humanitarian program has been of grave concern to the Uniting Church. We believe that it undermines the humanitarian intent of the United Nations’ Convention Relating to the Status of Refugees (Refugee Convention) and breaches Australia’s human rights obligations.

Article 31 of the United Nations Refugee Convention comprehends that refugees, by the very nature of their predicament, may arrive in a country without valid travel documents (‘unlawfully’). They should not be punished and they have a right to have their protection claims assessed. For many years, successive Australian governments have justified harsh and punitive policies based on strictly minimalist readings of the Refugee Convention that deny the realities of what happens when people flee dangerous situations of persecution. With the passage of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, the Government legalised long-standing policies of deterrence and further stepped away from any commitment to the spirit and intention of the Refugee Convention.

The Uniting Church believes that Australia has both a moral responsibility and an obligation under international refugee and human rights law to uphold the rights of asylum seekers regardless of how they arrive and where they have come from (including travel through transit countries that are unable to offer safety). The Church has consistently called on the Government to end offshore (‘regional’) processing, work with countries in the region for a genuinely multilateral regional protection solution that ensures people are safe where they are (thereby minimising the need for people to use people smugglers) and offer a generous onshore protection program.

¹ Uniting Church in Australia Assembly (1977) *Statement to the Nation*, <http://www.unitingjustice.org.au/uniting-church-statements/key-assembly-statements/item/511-statement-to-the-nation>

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Australia has an interest in promoting human rights and democracy within the region, and the fairness and integrity of its policies for refugees and asylum seekers are vital in achieving this goal.

The Uniting Church has been providing care and support to asylum seekers and refugees and advocating for their just and humane treatment since its formation in 1977. The Church's chaplains have served in immigration detention centres including those in Woomera, Port Hedland, Curtin, Baxter and Christmas Island. Many clergy and members have been supporting asylum seekers in the community and visiting the centres for years, and others are active advocates for just policies.

The Uniting Church's 2015 statement, *Shelter from the Storm*, sets out a number of important principles that it believes should apply to Australia's policies, legislation, and practices toward asylum seekers, refugees and humanitarian entrants.

- All people should be treated with respect and accorded the dignity they deserve as human beings.
- Australia should do its fair share to ease people's sufferings in the context of what is a global problem and not shift our responsibilities to poor and developing countries.
- Policies should be driven by bipartisan commitments to a humanitarian response focussed on protection needs and to upholding our obligations under international law.
- The Australian Government must be transparent in the implementation of its policies, open to scrutiny by the courts and the media and to critique and advocacy from civil society.²

The Australian Government must uphold the international treaties and conventions that Australia has signed including:

- the *Convention Relating to the Status of Refugees* (the Refugee Convention);
- the *Universal Declaration of Human Rights*;
- the *Convention on the Rights of the Child* (CRC);
- the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT); and
- the *International Covenant on Civil and Political Rights* (ICCPR).

The Australian response towards asylum seekers should be culturally sensitive and take into account the situations from which people have come. People should be able to find hope, shelter and restoration from the despair and persecution from which they have fled.

Australia has an interest in promoting human rights and democracy within the region, and the fairness and integrity of its policies for refugees and asylum seekers are vital in achieving this goal. The lowering of Australia's refugee and asylum seeker policy standards has the potential to impede the progression of human rights standards in the region and globally.

² Uniting Church in Australia Assembly (2015) *Shelter from the Storm: A Uniting Church in Australia Statement on Asylum Seeker and Refugee Policy*, Resolution 15.23.09, Preamble, pp. 4-5, <http://www.unitingjustice.org.au/refugees-and-asylum-seekers/uca-statements/item/1105-shelter-from-the-storm>

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UnitingJustice Australia welcomes the opportunity to contribute to the Senate Legal and Constitutional Affairs Committee's inquiry into the *Conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea*. This submission will be primarily drawing on publicly available reports. The restricted and limited flow of information from the regional processing centres (RPCs) in Nauru and Manus Island, Papua New Guinea (PNG) is a serious concern and so we look forward to a detailed, comprehensive and accurate picture of the situation in these centres being described in the Committee's Report.

List of Recommendations

1. *The regional detention and processing centres on Nauru and Manus Island should be closed. All people seeking asylum should be transferred to the Australian mainland where they should reside in the community while their claims for protection are assessed.*
2. *If people seeking asylum are to remain in the centres (be they closed or 'open'), then the following conditions and treatment should apply:*
 - a. *People in detention must be treated with dignity and respect at all times.*
 - b. *Detention facilities should be of a standard that ensures people's wellbeing and addresses their psychological, social, educational and health needs.*
 - c. *Healthcare must be provided at a standard commensurate to that available to Australian residents.*
 - d. *Food must be nutritious and suitable for people's age and religious and cultural background. Asylum seekers should be able to prepare their own food wherever possible.*
 - e. *Accommodation and bathroom facilities should be of a standard necessary to uphold people's dignity, health and privacy.*
 - f. *Asylum seekers must have access to means of communication including phones and computers (including internet).*
 - g. *Access to legal support and translation services should be provided immediately upon arrival and be readily available throughout the stay in detention facilities.*
 - h. *Detention centres must provide adequate education and vocational training opportunities, and recreational facilities and programs.*
 - i. *Asylum seekers must be free to practice their religion.*

³ Uniting Church in Australia Assembly (2015), *Shelter from the Storm*, op. cit., Principles for Good Policy, Section 5, pp. 10-11

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The mandatory and indefinite detention of people seeking asylum is a grave abuse of their human rights and damages people's physical, emotional and mental wellbeing.

3. *All detention centre staff must be properly trained, including about matters relating to the right to asylum, sexual and gender-based violence, human rights and human rights standards, cultural awareness and sensitivity, symptoms of trauma and the special needs of people with disabilities.*
4. *Australia must support and uphold the legal rights of all asylum seekers, including fair, transparent and timely processes for assessing people's refugee claims consistent with the spirit and intention of the Refugee Convention.*
5. *People who are detained, whether in closed or 'open' centres, must have access to a non-discriminatory complaints process that includes an independent appeals mechanism, and have the right to make a complaint to external authorities.*
6. *The Australian Government must be transparent in the implementation of its policies in Nauru and Manus Island, PNG, open to scrutiny by the courts and the media and to critique and advocacy from civil society.*
7. *The Australian Government should impose the same accountability mechanisms on sub-contractors as would apply to public servants.*
8. *An independent authority should monitor and report publicly on the conditions under which asylum seekers are held to ensure that they are treated justly and humanely. Such an authority should be afforded full and transparent access to the information requested from key stakeholders.*
9. *All immigration detention facilities must be accessible for monitoring by independent bodies including the UN High Commissioner for Refugees, the Australian Red Cross, the Commonwealth Ombudsman and the Australian Human Rights Commission.*
10. *The Australian Government should immediately implement all the recommendations of the Moss Review.*
11. *Australia should reduce the risk of refoulement by amending the Migration Act to reflect the spirit and intention of the Refugee Convention, including definitions of 'refugee' and 'well-founded fear of persecution' that are consistent with the Refugee Convention.*
12. *While people still reside in the regional detention and offshore processing on Nauru and Manus Island, the Australian Government must work with the Nauruan and PNG Governments to ensure that no-one is at risk of human rights violations under those conventions and treaties to which Australia is a party to, especially CAT, CRC and ICCPR.*
13. *Australia's obligations under the CRC must be incorporated into every level of policy development and implementation where the lives of young asylum seekers are concerned.*
14. *Children of people who have arrived or sought to arrive in Australia by boat should only be detained as a matter of last resort and for the shortest appropriate period of time and after an independent authority has reviewed the decision to detain.⁴*
15. *All transfers of children to Nauru should be immediately suspended.*

⁴ Uniting Church in Australia Assembly (2015) *Shelter from the Storm*, op. cit., Principles for Good Policy, par. 4.1, p. 9

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1. Conditions and Treatment

Conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea

The Uniting Church in Australia has been concerned about the conditions and treatment of asylum seekers and refugees at the offshore (regional) detention centres in Nauru and on Manus Island, PNG since they were first opened in 2001.

In May 2011, in response to reports that the Government was considering re-opening the detention centre on Manus Island, the Church said:

Manus Island is a totally inappropriate location for the provision of adequate and appropriate legal advice and health care to people who are often already physically and mentally traumatised...

People detained on Manus Island during the 'Pacific Solution' were forgotten – it was very much a case of 'out of sight, out of mind'. Very few countries were willing to bail out the Australian Government and resettle refugees from Manus Island and Nauru. This meant people were left languishing in detention for years.⁵

The Uniting Church believes that all people seeking asylum should be treated with respect and dignity and offered protection as is required under international law. Numerous media accounts, personal stories and independent reports have drawn attention to the substandard conditions and treatment of asylum seekers and refugees at the RPCs in Nauru and Manus Island. The mandatory and indefinite detention of people seeking asylum is a grave abuse of their human rights and damages people's physical, emotional and mental wellbeing.

In October 2013, the UN High Commissioner for Refugees (UNHCR) visited Nauru and reported that the current policies, conditions and operational approaches at the RPC, the detention centre on Nauru, did not comply with international standards. Specifically they found that the conditions of treatment in detention were not safe or humane. The report warned that the conditions of mandatory and arbitrary detention within a "return-oriented environment", together with the delays in processing and lack of durable solutions, "will have a detrimental impact on the physical and psycho-social health of those seeking asylum".⁶

⁵ Uniting Church in Australia Assembly (6 May 2011) 'Church objects to plans to re-open Manus Island', Press Release, <http://www.unitingjustice.org.au/refugees-and-asylum-seekers/news/item/558-church-objects-to-plans-to-re-open-manus-island>

⁶ UN High Commissioner for Refugees (2013) 'UNHCR Monitoring visit to the Republic of Nauru 7-9 October 2013', p. 2, <http://www.refworld.org/docid/5294a6534.html> accessed 7 March 2016

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The UNHCR also visited the RPC on Manus Island, PNG in 2013 and reported that the centre did not provide safe and humane conditions of treatment in detention and constituted arbitrary and mandatory detention under international law. The report concluded that, despite the introduction of bus excursions which are conducted under close escort and supervision, asylum seekers are living in an environment with no genuine freedom of movement. They also reported cramped conditions, health concerns related to the heat and humidity, and hygiene issues in relation to the food served and the conditions of the ablution blocks.⁷

In December 2013, Amnesty International released a report 'This is breaking people: human rights violations at Australia's asylum seeker processing centre on Manus Island, Papua New Guinea' which outlined the human rights abuses taking place in the regional processing centre. Specifically, the report referred to overcrowded living conditions, cramped sleeping arrangements, exposure to the elements, as well as a lack of sufficient drinking water, sanitation, food and clothing. Furthermore, the report concluded that:

*Aspects of detention on Manus Island violate the obligation to treat all persons in detention humanely. The combined effect of the conditions of detention on Manus Island, the open-ended nature of that detention, and the uncertainty about their fates to which detainees are subjected amounts to cruel, inhuman, and degrading treatment or punishment. Moreover, some conditions of detention, particularly the housing of detainees in P Dorm, on their own violate the prohibition on torture and other ill-treatment.*⁸

This report was followed up with a 2014 report entitled 'This is still breaking people: update on human rights violations at Australia's asylum seeker processing centre on Manus Island, Papua New Guinea' which was completed after the protests of 16 and 17 February 2014, during which Reza Berati was killed. This report asserts that the violence inflicted by security guards and local police on protestors was "brutal and excessive". Amnesty International expressed concern for the health and safety of those injured by or witness to the violence and concluded that very little had changed with respect to living conditions at the centre.⁹

In October 2014, following allegations of sexual abuse at the RPC in Nauru, a review was conducted by Philip Moss which further highlighted systems that failed to protect people against abuse and improper conduct and behaviour by contracted staff. The report mentions allegations of rape, indecent assault,

7 UN High Commissioner for Refugees (2013) 'UNHCR Monitoring visit to Manus island, Papua New Guinea 23 to 25 October 2013', p. 16 http://www.unhcr.org.au/wp-content/uploads/2015/05/23Oct2013_ManusMonitoringVisit.pdf

8 Amnesty International (2013) 'This is breaking people: human rights violations at Australia's asylum seeker processing centre on Manus Island, Papua New Guinea', p. 3 <https://www.amnesty.org/en/documents/ASA12/002/2013/en/>

9 Amnesty International Australia (2014) 'This is still breaking people: human rights violations at Australia's asylum seeker processing centre on Manus Island, Papua New Guinea', p. 2 http://www.amnesty.org.au/resources/activist/This_is_still_breaking_people_update_from_Manus_Island.pdf

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The Uniting Church believes that people seeking asylum should never be subject to harsh and punitive policies and treatment.

sexual harassment, and physical assault occurring in the Centre and stated that it could not find any reason not to believe the allegations. Recommendations included stronger child protection mechanisms, and better systems for reporting, responding to, mitigating and preventing incidents of sexual and other physical assault at the Centre.¹⁰

The *Forgotten Children* report conducted by the Australian Human Rights Commission was also released in 2014. Almost every first-hand account received about conditions on Nauru made reference to the overwhelming heat. The tents on Nauru were described as mouldy, dirty, crowded and subject to flooding when it rains. The facilities were reported as unhygienic with water shortages, blocked toilets, and overflowing bins. The provision of clothing and footwear was inadequate, toys books and play equipment insufficient, and there were concerns that the school environment was not conducive to learning. The conditions were likened to a prison, with both children and adults not having adequate freedom of movement. The inquiry received evidence of bullying, harassment and abuse at the detention centre on Nauru.¹¹ The *Forgotten Children* report recorded 57 serious assaults, 233 assaults involving children, 33 cases of sexual abuse (the vast majority involving children) and 207 cases of people having engaged in self-harm leading up to the time of the report.¹²

The Senate Select Committee on the 'Recent allegations in relation to conditions and circumstances at the Regional Processing Centre in Nauru' was established in March 2015 in order to further investigate the conditions at the detention centre and released its report in August 2015. The report findings were disturbingly similar to the numerous reports of 2013 and 2014, describing, once again, extremely poor conditions. The tents were still hot, humid, mouldy and crowded. There was no running water, a lack of privacy, inadequate provision of footwear and clothing, limited access to food and unhygienic toilet facilities. There were also claims of slow and inadequate provision of medical care. The committee formed the opinion that the present conditions and circumstances were not adequate, appropriate or safe.¹³

Other reports provide further evidence that detention is harmful to mental and physical health, particularly for children. In 2013, a report was published by the Commonwealth Ombudsman detailing instances of self-harm and suicide in Australian immigration detention centres. Out of 11 deaths between July 2010 and April 2013, four were confirmed suicides. The report makes a link between the prison-like confined and controlling conditions in detention and the numerous instances of self-harm.¹⁴ In addition, there is overwhelming

¹⁰ P. Moss (2014) 'Review into recent allegations relating to conditions and circumstances at the regional processing centre on Nauru', p. 5 <https://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-conditions-circumstances-nauru.pdf>

¹¹ Australian Human Rights Commission (2014) *The Forgotten Children: National Inquiry into Children in Immigration Detention*, p. 188 <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children>

¹² *ibid.*, p. 62

¹³ The Senate (August 2015), 'Taking responsibility: conditions and circumstances at the Australia's Regional Processing Centre in Nauru', p. 120 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Final_Report, accessed 7 January 2015

¹⁴ Commonwealth and Immigration Ombudsman (May 2013), 'Suicide and self-harm in the immigration detention network', REport 02/2013, http://www.ombudsman.gov.au/_data/assets/pdf_file/0022/30298/December-2013-Suicide-and-self-harm-in-the-Immigration-Detention-Network.pdf, accessed January 2016

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evidence from medical sources confirming that indefinite and mandatory detention damages the mental and physical health of children, and impairs their development.¹⁵

There are numerous guidelines available outlining appropriate conditions for detention. The UNHCR's 'Guidelines on applicable criteria and standards relating to the detention of asylum seekers' states that the detention of asylum seekers is inherently undesirable. The Guidelines also state that conditions of detention for asylum seekers should be humane with respect shown for the inherent dignity of the person. Asylum seekers should, for example, be able to receive appropriate medical treatment and psychological counselling, have the opportunity to continue further education or vocational training, practice their religion and have a diet in keeping with their religion, and have access to a complaints mechanism.¹⁶

The Uniting Church believes that people seeking asylum should never be subject to harsh and punitive policies and treatment. They should be treated with dignity and respect at all times. Mandatory and indefinite detention (such as exists on Manus Island) is a grave breach of human rights that contravenes Article 9(1) of the ICCPR. The Church believes that all people who arrive seeking asylum (regardless of their mode of arrival) should, once health, identity and security checks have been carried out, live in the community while their claims are processed. If government policy is to continue with mandatory detention, then detention facilities should be of a standard that ensures people's wellbeing and that their psychological, social and health needs are addressed. Accommodation and bathroom facilities should ensure privacy, health and dignity. All people should feel safe. Communication and legal support should be readily available throughout the stay in detention. Healthcare must be provided at a standard commensurate to that available to Australian residents.

Despite numerous reports all highlighting the inadequate conditions and treatment in offshore immigration detention centres and making recommendations for improvements to living conditions, to the length of time spent in detention and to the fairness of the assessment process, very little has changed. On Nauru, while the RPC has now become an 'open centre' and people are free to come and go, the Centre remains, for all intents and purposes their 'home', and the fact of being 'open' does not materially change the conditions in which people are forced to live. The Uniting Church believes that it is not possible to achieve adequate conditions and treatment at the offshore detention centres, and that they should be closed.

¹⁵ The Australian literature on this issue is extensive. See, for instance: Newman, L. & Steel, Z. (2008). "The Child Asylum Seeker: Psychological and Developmental Impact of Immigration Detention," *Child and Adolescent Psychiatric Clinics of North America* 17, 665-683; Hodes, M. (2010). "The mental health of detained asylum seeking children," *European Child & Adolescent Psychiatry*, 19, 7, 621-3; Newman, L. (2011). "Children seeking asylum: the psychological and developmental impact of the refugee experience," in *International Perspectives on Children and Mental Health: Volume 1 Development and Context*, eds Hiram E Fitzgerald, Kaija Puura, Mark Tomlinson and Campbell Paul, Praeger, USA, pp. 217-224; Dudley, M., Steel, Z., Mares, S. & Newman, L. (2012). "Children and young people in immigration detention," *Current Opinion Psychiatry*, 25(4), 285-92; Newman, L.K. (2012). "Seeking asylum in Australia: Mental health and human rights of children and families," *AIFS seminar series presentation*, Australian Institute of Family Studies, Melbourne Australia; Proctor, N., De Leo, D. & Newman, L.K. (2013). "Suicide and self-harm prevention for people in immigration detention," *Medical Journal Of Australia*, 199: 11, 730-732; Newman, L.K. (2013). "Seeking asylum - trauma, mental health, and human rights: an Australian perspective," *Journal of Trauma & Dissociation*, 14: 2, 213-223; and, Newman, L.K. (2014) "Back to the Future: revisiting the treatment of child asylum seekers," *The Conversation*, 5 February.

¹⁶ UN High Commissioner for Refugees (February 1999) *UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers*, p. 10 <http://www.unhcr.org/4aa7646d9.pdf>

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All people seeking asylum should be transferred to the Australian mainland where they should reside in the community while their claims for protection are assessed.

Recommendations

1. *The regional detention and processing centres on Nauru and Manus Island should be closed. All people seeking asylum should be transferred to the Australian mainland where they should reside in the community while their claims for protection are assessed.*
2. *If people seeking asylum are to remain in the centres (be they closed or 'open'), then the following conditions and treatment should apply:¹⁷*
 - a. *People in detention must be treated with dignity and respect at all times.*
 - b. *Detention facilities should be of a standard that ensures people's wellbeing and addresses their psychological, social, educational and health needs.*
 - c. *Healthcare must be provided at a standard commensurate to that available to Australian residents.*
 - d. *Food must be nutritious and suitable for people's age and religious and cultural background. Asylum seekers should be able to prepare their own food wherever possible.*
 - e. *Accommodation and bathroom facilities should be of a standard necessary to uphold people's dignity, health and privacy.*
 - f. *Asylum seekers must have access to means of communication including phones and computers (including internet).*
 - g. *Access to legal support and translation services should be provided immediately upon arrival and be readily available throughout the stay in detention facilities.*
 - h. *Detention centres must provide adequate education and vocational training opportunities, and recreational facilities and programs.*
 - i. *Asylum seekers must be free to practice their religion.*
3. *All detention centre staff must be properly trained, including about matters relating to the right to asylum, sexual and gender-based violence, human rights and human rights standards, cultural awareness and sensitivity, symptoms of trauma and the special needs of people with disabilities.*

¹⁷ Uniting Church in Australia Assembly (2015), *Shelter from the Storm*, op. cit., Principles for Good Policy, Section 5, pp. 10-11

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2. Transparency and Accountability

Transparency and accountability mechanisms that apply to the regional processing centres in the Republic of Nauru and Papua New Guinea

UnitingJustice believes that transparency and accountability mechanisms in relation to the management of regional processing centres in Nauru and PNG are woefully inadequate.

One indicator of accountability is the manner in which incidents of inappropriate behaviour by contractors and staff are reported, and the mechanisms for complaints and redress. The Select Committee report on the 'Recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru' expressed particular concern about an incident in which Wilson Security personnel were seen on video footage planning to use unreasonable force against asylum seekers during a riot on 19 July 2013. Evidence provided by Wilson Security to the Senate inquiry relating to the video footage was later shown to be intentionally misleading.¹⁸ General lack of transparency and poor performance of the Department of Immigration and Border Protection was noted in relation to their knowledge of serious incidents such as this.¹⁹

The *Forgotten Children* report details complaints made by children that unreasonable force was used by Serco officers to move them from one place to another on 24 March 2014. The AHRC concluded that appropriate alternatives to use of force were not adequately considered and that the use of force to transfer unaccompanied children was in violation of Article 37(c) of the CRC.²⁰

It is important that the process for refugee status determination (RSD) be transparent and timely. The UNHCR's report on its visit to Manus Island in 2013 raised concerns about the transparency of this process. They noted that staff lacked experience and training and that "at present, there is no clear and adequate legal or regulatory framework for conducting RSD in PNG."²¹

Another indicator of accountability is a willingness to take responsibility for those actions that take place within a state's jurisdiction. As a matter of international law, Australia's jurisdiction over people in offshore processing centres in Nauru and Papua New Guinea arises from its effective control over their circumstances. This is based, amongst other things, on the fact that Australia entered into agreements with Nauru and PNG for the establishment of the centres, pays for their operation, contracts service providers for

the centres, and has significant governance responsibilities and control at the

¹⁸ J. Dale (2 October 2015), 'Australia's opaque offshore asylum policy on Nauru', Australian Lawyers Alliance, , <https://www.lawyersalliance.com.au/opinion/australias-opaque-offshore-asylum-policy-on-nauru>, accessed 17 December 2015

¹⁹ The Senate (August 2015), 'Taking responsibility: conditions and circumstances at the Regional Processing Centre in Nauru', op. cit., p. 125

²⁰ Australian Human Rights Commission (2014) *The Forgotten Children*, op. cit., p. 14

²¹ UN High Commissioner for Refugees (2013) 'UNHCR Monitoring visit to Manus Island, Papua New Guinea', op. cit., p. 1

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centres.²² The AHRC has indicated that Australia has ‘effective control’ over the asylum seekers transferred to and detained in Nauru, which binds the Australian Government to treat those people according to the human rights treaties to which Australia is a party.²³

The AHRC’s guidelines for human rights standards in immigration detention state that:

Where detention or aspects of detention are contracted out to private companies, the Australian Government retains responsibility for human rights protection and a non-delegable duty of care. The government must exercise adequate oversight in order to meet its international human rights obligations.²⁴

The Australian Government outsources its offshore detention centre management to contractors like Wilson Security, Serco and Broadspectrum (formerly Transfield). It has been found that these contractors are not properly accountable to the Commonwealth despite the significant financial investment of the Australian Government in their services.²⁵ Discussions in Senate Estimates have clarified that the Australian Border Force has ultimate accountability for operations at regional detention centres.²⁶

A significant consequence of Government outsourcing these functions is that it reduces the accountability of both the Australian Government and the subcontractors. Privately contracted companies, for example, are beyond the scope of Australia’s freedom of information laws. Contractors can decline to be questioned in Senate Estimates where government employees are required to appear. Also, while public servants are subject to an APS Code of Conduct, private contractors face no such requirements.²⁷ We believe that the Australian Government should impose the same accountability mechanisms on subcontractors as it would apply to public servants.

Another indicator of transparency relates to the flow of information or lack thereof. It is concerning that a number of attempts to independently monitor the conditions and circumstances at the detention centres have been met with resistance. The Select Committee of 2015 inquiring into the RPC in Nauru, noted

22 Andrew & Renata Kaldor Centre for International Refugee Law (2015) ‘Offshore processing: Australia’s responsibility for asylum seekers and refugees in Nauru and Papua New Guinea’, Fact Sheet, <http://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-australia-s-responsibility-asylum-seekers-and-refugees-nauru-and>, accessed 18 March 2016

23 This argument was also accepted by some of the judges in the M68 case: “Australian participation was ‘indisputable’, according to Chief Justice French and justices Kiefel and Nettle. Justice Gageler found that Australia had ‘procured’ the detention of asylum seekers on Nauru through its contractors who exercised physical control over them. Justice Bell also held that Australia had ‘exercised effective control’”. See more at <http://www.kaldorcentre.unsw.edu.au/publication/glimmers-hope-detained-asylum-seekers-high-court%E2%80%99s-nauru-decision#sthash.ORfmZWro.dpuf>

24 Australian Human Rights Commission (2013) *Human rights standards for immigration detention*, p. 18 <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/human-rights-standards-immigration-detention>

25 The Senate (August 2015), ‘Taking responsibility: conditions and circumstances at the Regional Processing Centre in Nauru’, op. cit., p. 125

26 Senate Estimates (19 October 2015), Official Hansard of the Legal and Constitutional Affairs Legislation Committee, p. 81 http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/c952e672-02co-4a05-9274-643291cd067d/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2015_10_19_3916_Official.pdf;fileType=application%2Fpdf#search=%222010s%202015%2010%2019%20legal%20and%20constitutional%20affairs%20legislation%20committee%22 accessed 15 January 2016

27 B. Keane (18 November 2015) ‘Outsourcing the key weapon in the war against transparency’, Crikey, <http://www.crikey.com.au/2015/11/18/outsourcing-the-key-weapon-in-the-war-against-transparency/> accessed 15 January 2016

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Attempts to silence dissent and restrict the release of information about conditions and events in offshore detention centres are evidence of limited accountability and transparency.

in its report that the inquiry was not afforded full and transparent access to the information it requested from key stakeholders in relation to the management of the centre.²⁸ The Committee made a number of recommendations regarding improvements to transparency and accountability in management of the centre and improved access to the centre for the AHRC and for the media.²⁹ These recommendations have not been implemented.

The introduction of the *Australian Border Force Bill (2015)* saw the passage of laws that threaten contractors, including medical professionals, with two years in prison if they speak out about abuse discovered while working for the Department of Immigration and Border Protection. In September 2015, the UN Special Rapporteur on the Human Rights of Migrants cancelled a visit to Australia because of the risk this legislation would pose to service providers who chose to disclose information of that nature to the rapporteur. These attempts to silence dissent and restrict the release of information about conditions and events in offshore detention centres are further evidence of limited accountability and transparency.

Lack of transparency and accountability in relation to the centre in Nauru is not, however, a recent phenomenon. The Joint Advisory Committee for Regional Processing Arrangements in Nauru was established in December 2012, as part of an initiative to ensure transparency and accountability for processing arrangements. The Committee's Physical and Mental Health Subcommittee produced a 56 page report in May 2014, outlining serious mental and physical health concerns regarding the detention centre, but the Committee never made this report publicly available. *The Guardian* newspaper obtained a copy of the report and published it on their website.³⁰ A truly transparent and accountable system would see monitoring reports publicly available. Such a system would also ensure that recommendations made by independent monitoring bodies are acted upon.

Recommendations

4. *Australia must support and uphold the legal rights of all asylum seekers, including fair, transparent and timely processes for assessing people's refugee claims consistent with the spirit and intention of the Refugee Convention.*
5. *People who are detained, whether in closed or 'open' centres, must have access to a non-discriminatory complaints process that includes an independent appeals mechanism, and have the right to make a complaint to external authorities.*
6. *The Australian Government must be transparent in the implementation of its policies in Nauru and Manus Island, PNG, open to scrutiny by the courts and the media and to critique and advocacy from civil society.*
7. *The Australian Government should impose the same accountability mechanisms on sub-contractors as would apply to public servants.*

²⁸ The Senate (August 2015), 'Taking responsibility: conditions and circumstances at the Australia's Regional Processing Centre in Nauru', op. cit., p. 120

²⁹ *ibid.*

³⁰ O. Laughland (30 May 2014), 'Nauru detention: serious health risks to children revealed in confidential report', *The Guardian*, <http://www.theguardian.com/world/2014/may/30/nauru-detention-serious-health-risks-to-children-revealed-in-confidential-report>, and N. Procter et al (16-19 February 2014) 'Physical and Mental Health Subcommittee of the Joint Advisory Committee for Nauru Regional Processing Arrangements, Nauru Site Visit Report', <https://assets.documentcloud.org/documents/1175048/hmhsc-jac-site-visit-report-final-1.txt>, accessed 7 March 2016

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8. *An independent authority should monitor and report publicly on the conditions under which asylum seekers are held to ensure that they are treated justly and humanely. Such an authority should be afforded full and transparent access to the information requested from key stakeholders.*
9. *All immigration detention facilities must be accessible for monitoring by independent bodies including the United Nations High Commissioner for Refugees, the Australian Red Cross, the Commonwealth Ombudsman and the Australian Human Rights Commission.*

3. The Moss Review

Implementation of recommendations of the Moss Review in relation to the regional processing centre in the Republic of Nauru

The Moss Review, given the brief of investigating allegations of sexual abuse and misconduct on Nauru, released its report in March 2015. The report makes 19 recommendations for changes to policy and procedures at the offshore processing centre relating to addressing and dealing with sexual harassment and sexual relationships, and proper investigation and prosecution of incidents of sexual and other physical assault. The report also recommended that the Department of Immigration and Border Protection review the decision to require the removal of ten Save the Children staff.³¹

The Select Committee inquiry into Nauru in 2015 found that only some of the recommendations from the Moss report had been adequately implemented. The Committee expressed ongoing concern for the safety of women and children in Nauru, saying that conditions in the centre were "not adequate, appropriate or safe for the asylum seekers detained there".³²

The Refugee Council of Australia, in a submission to the Select Committee's inquiry, expressed its belief that the failures and lack of safeguards at the detention centres on Nauru make the offshore processing centre untenable.³³ Amnesty International, in their submission to the same inquiry, noted that direct reports from asylum seekers about conditions at the detention centre were consistent with those in the Moss Review regarding the incidence and seriousness of sexual abuse and sexual harassment.³⁴

³¹ P. Moss (2015), 'Review into Recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru', op. cit., pp. 6

³² The Senate (August 2015), 'Taking responsibility: conditions and circumstances at the Australia's Regional Processing Centre in Nauru', op. cit., p. 120

³³ Refugee Council of Australia (April 2015) Submission to the Select Committee on the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, p. 2 <http://www.refugeecouncil.org.au/wp-content/uploads/2015/06/1504-Nauru.pdf>

³⁴ Amnesty International Australia (April 2015) Submission to the Select Committee on the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, p. 3 <http://www.amnesty.org.au/refugees/comments/37220/>

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Media reports indicate that the circumstances on Nauru are still unsafe and that the recommendations have not been adequately implemented. A video, posted on Facebook on 8 January 2016, depicts a Nauru hospital in a state of disrepair despite claims by the Australian Government that funding of \$26 million was injected into the hospital. UnitingJustice is extremely concerned that health care has not improved on the island since the Moss report.³⁵

Recommendation

10. *The Australian Government should immediately implement all the recommendations of the Moss Review.*

4. Legal Compliance

The extent to which the Australian-funded regional processing centres in the Republic of Nauru and Papua New Guinea are operating in compliance with Australian and international legal obligations

Australia's practice of placing asylum seekers who arrive by boat in regional detention centres, and the manner in which those centres are run, breaches a number of our international obligations and Australia's own domestic laws.

One of Australia's obligations under the Refugee Convention is non-refoulement (Article 33), the obligation to not send a person back to a situation of persecution. Further, international human rights treaties, such as the CAT and the ICCPR, prohibit people being returned to countries where they face a real risk of torture, cruel, inhuman and degrading treatment, or arbitrary deprivation of life. By transferring adults and children seeking asylum to offshore detention centres without being able to ensure that those people will not face persecution or a real risk of significant harm (torture or cruel, inhuman or degrading treatment or punishment), Australia risks breaching its obligations under international law.³⁶ In particular, UnitingJustice is concerned that Australia could risk breaching its international obligations by sending people to Nauru or Manus Island, knowing that these countries do not have all the appropriate human rights safeguards in place. For example, Nauru has not yet signed the ICCPR and PNG has not yet signed the CAT. In addition, legislation in these countries does not codify protection of important human rights, specifically those that would protect lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) people. For example, same-sex acts between men are illegal under Section 210 of the Papua New Guinea *Criminal Code (1974)*³⁷ and culturally there is still

³⁵ Free the Children Nauru, Facebook post, viewed 25 January 2016, <https://www.facebook.com/839867502797443/videos/874621615988698/>

³⁶ Andrew & Renata Kaldor Centre for International Refugee Law (30 April 2015) Submission to the Select Committee on the recent allegations relating to conditions and circumstances at the regional processing centre in Nauru, p. 6 <http://www.kaldorcentre.unsw.edu.au/publication/submission-senate-select-committee-recent-allegations-relating-conditions-and>

³⁷ Amnesty International (2013) 'This is breaking people', op. cit., p. 73

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UnitingJustice believes that the Migration Act as amended by the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014, significantly undermines Australia's commitment to meeting its international legal obligations to protect victims of persecution.

significant discrimination against LGBTQI people.³⁸ Women and child refugees living in the community in Nauru do not feel safe, with at least 10 cases of abuse and harassment being reported between May 2014 and September 2015, with authorities being slow to act.³⁹

There are guidelines within international law that govern the welfare of non-citizen children. The CRC states that all actions concerning children should be based on the primary consideration of the best interests of the child. The Convention details a child's right to the highest attainable standard of health and medical care, an adequate standard of living, access to quality education, and protection from violence. These rights must be incorporated into every level of policy development and implementation where the lives of young asylum seekers are concerned. By detaining children and failing to adequately protect them from harm, Australia risks breaching its obligations under the CRC.⁴⁰ In response to the evidence detailed in this submission, all transfers of children to Nauru should be immediately suspended.

Article 9 of the ICCPR relates to the right to liberty. During its visit to Manus Island, the UNHCR reported on a number of restrictions placed on detainees that breach international law such as the deprivation of liberty, particularly due to the arbitrary nature of the detention.⁴¹

Australia's international legal obligations for immigration detention are summarised by the AHRC in *Human rights standards for immigration detention*. These standards include ensuring that no person in immigration detention is subjected to torture or to cruel, inhuman or degrading treatment or punishment, ensuring the safety of detainees, and people's right to make complaints and have those complaints acted upon.⁴² The Guidelines also describe standards for enabling monitoring by independent bodies at the centre.⁴³ Yet, as stated above, restrictions have been placed on journalists and on service providers who would report to the AHRC, the UNHCR or other monitoring bodies.

In 2014, UnitingJustice expressed grave concerns about changes to the *Migration Act 1958* enacted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.⁴⁴ UnitingJustice believes that the Migration Act as amended by this legislation significantly

38 *ibid.*, p. 73 and p. 80

39 S. Anderson (2016) 'Nauru police launch investigation after claims 6-year old refugee sexually assaulted', ABC News, <http://www.abc.net.au/news/2016-01-07/refugee-child-allegedly-sexually-abused-on-nauru/7073452>

40 *UN Convention on the Rights of the Child*, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

41 UN High Commissioner for Refugees (2013) 'UNHCR Monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013', *op. cit.*

42 Australian Human Rights Commission (2013) *Human rights standards for immigration detention*, *op. cit.*, p.17

43 *ibid.*

44 UnitingJustice Australia (October 2014) Submission, Senate Legal and Constitutional Affairs Legislation Committee inquiry in to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, <http://www.unitingjustice.org.au/refugees-and-asylum-seekers/submissions/item/980-inquiry-into-the-migration-and-maritime-powers-legislation-amendment-resolving-the-asylum-legacy-caseload-bill-2014>

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undermines Australia's commitment to meeting its international legal obligations to protect victims of persecution. The amendments saw the removal of most references to the Refugee Convention, and the reinterpretation of the definitions of 'refugee' and 'well-founded fear of persecution' places Australia at increased risk of breaching international law, serves to undermine the international protection regime and increase the risk of refoulement. The Migration Act now also allows for the Minister for Immigration and Border Protection to make (unreviewable) decisions that disregard our international obligations and renders newborn children of people who came by boat to seek asylum effectively stateless, as they are defined as 'Unauthorised Maritime Arrivals (UMAs)':

...newborn children have the right to acquire a nationality as contained in article 24(3) of the ICCPR and article 7(1) of the CRC. The right to a grant of nationality for individuals who would otherwise be stateless is contained in Articles 1 and 2 of the 1961 Statelessness Convention. There is a risk that the newborn child of non-citizen parents would be rendered stateless under this new legislation, given that it is unlikely they will be offered citizenship by their parents' country of origin. The Convention on the Reduction of Statelessness that Australia has signed, obliges states parties to "grant its nationality to a person born in its territory who would otherwise be stateless". Australia's Citizenship Act 2007 affirms this obligation, stating that any child who was born in Australia, and who is not and has never been a citizen of another country and is not entitled to apply for citizenship elsewhere, is eligible for Australian citizenship.⁴⁵

Recommendations

11. *Australia should reduce the risk of refoulement by amending the Migration Act to reflect the spirit and intention of the Refugee Convention, including definitions of 'refugee' and 'well-founded fear of persecution' that are consistent with the Refugee Convention.*
12. *While people still reside in the regional detention and offshore processing on Nauru and Manus Island, the Australian Government must work with the Nauruan and PNG Governments to ensure that no-one is at risk of human rights violations under those conventions and treaties to which Australia is a party to, especially CAT, CRC and ICCPR.*
13. *Australia's obligations under the CRC must be incorporated into every level of policy development and implementation where the lives of young asylum seekers are concerned.*
14. *Children of people who have arrived or sought to arrive in Australia by boat should only be detained as a matter of last resort and for the shortest appropriate period of time and after an independent authority has reviewed the decision to detain.⁴⁶*
15. *All transfers of children to Nauru should be immediately suspended.*

⁴⁵ *ibid.*, p. 7

⁴⁶ *Uniting Church in Australia Assembly (2015) Shelter from the Storm*, op. cit., Principles for Good Policy, par. 4.1, p. 9

Australia's obligations under the CRC must be incorporated into every level of policy development and implementation where the lives of young asylum seekers are concerned.



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