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Senate Legal and Constitutional Affairs Committee
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Incident at the Manus Island Detention Centre from 16 February to 18 February 2014

Introduction

The Immigration Advice and Rights Centre ("IARC") is a community legal centre in New South Wales specialising in the provision of advice, assistance, education, training, and law and policy reform in immigration law. IARC provides free and independent immigration advice. IARC also produces *The Immigration Kit* (a practical guide for immigration advisers), client information sheets (including in relation to protection visa applications, Refugee Review Tribunal ("RRT") appeals and requests for Ministerial intervention) and conducts education/information seminars for members of the public.

IARC was established in 1986 and since that time has developed a high level of specialist expertise in the area of immigration law. Our clients are low or nil income earners, frequently with other disadvantages including low level English language skills, disabilities, past torture and trauma experiences and domestic violence victims. Many of our clients seek or sought protection from those racially or ethnically targeting them in their home countries, and consider Australia to be a safe haven from persecution and discrimination.

As IARC does not have involvement or experience with the Manus Island Detention Centre (MIDC) this submissions focuses on the following:

- the Australian Government's duty of care obligations and responsibilities;
- refugee status determination processing and resettlement arrangements in Papua New Guinea; and
- any other related matters.

As of April 2014 reportedly two thirds of asylum seekers detained at the MIDC had been initially assessed with regard to their protection claims with all those found to be refugees to be resettled in Papua New Guinea[1]. Also in April 2014 following visits by Foreign Minister Julie Bishop and Immigration Minister Scott Morrison to Cambodia it was announced that Cambodia would be involved with resettlement with processing of asylum seekers done still in Nauru.

[1] "Manus: two thirds of asylum seekers have had refugee status interviews", The Guardian, 3.4.2014 http://www.theguardian.com/world/2014/apr/03/manus-two-thirds-of-asylum-seekers-have-had-refugee-status-interviews

The recent focus on the MIDC in the media has been on the conditions within the processing centre and the recent riots and the death of Kurdish Iranian asylum seeker, Mr Barati. The processing centre is managed and administered by Papua New Guinea with "support"[2] from Australia and Australia will also give "support" through a service provider[3] to those (to yet be) resettled in PNG.

IARC is concerned not only about the conditions at MIDC and possible breaches of domestic and international law[4] but also with the larger task of resettlement of refugees in Papua New Guinea and adequate provision to refugees of other fundamental rights that arise under the Refugee Convention such as education and employment[5]. This concern is not abated given Minister Scott Morrison's statement on 10 April 2014 that "resettlement is freedom from persecution; it's not a ticket to a first-class economy"[6].

Whilst the issue of refugee status determination (RSD) and resettlement in third countries may not be necessarily the same, these are related issues and this is due to the fact that the Refugee Convention and other relevant International Human Rights instruments set out a number of basic rights for people. So country A may attend to the RSD process and country B may accept the resettlement of a refugee but both countries may well be subject to a range of international human rights instruments.

In the case of Papua New Guinea and Manus Island, it is contended that Australia has overriding obligations because effectively the RSD process and resettlement process of refugees has been subcontracted by Australia and paid for by Australia.

There would be no RSD process in Papua New Guinea if Australia did not pay for it and for the range of related matters such as housing, medical services and security in the processing centres. It is contended that the obligations of Australia towards asylum seekers who come within Australia's territorial waters cannot be subcontracted to other countries.

This is certainly the view of the UNHCR who stated in their report of 2013:

> *"Overall, UNHCR was deeply troubled to observe that the current policies, operational approaches and harsh physical conditions at the RPC do not comply with international standards and in particular:*
>
> *a) constitute arbitrary and mandatory detention under international law;*
> *b) do not provide a fair, efficient and expeditious system for assessing refugee claims;*
> *c) do not provide safe and humane conditions of treatment in detention; and*
> *d) do not provide for adequate and timely solutions for refugees.*
>
> *Further, the 'return-orientated environment' observed by UNHCR at the RPC is at variance with the primary purpose of the transfer arrangements, which is to identify and protect refugees and other persons in need of international protection.*[7]

[2] http://www.dfat.gov.au/geo/png/regional-resettlement-arrangement-20130719.pdf Regional Resettlement Arrangement between Australia and PNG 19 July2 013
[3] Previously G4S and now Transfield
[4] "The truth about Manus Island: 2013 report", Amnesty International, 11 December 2013 http://www.amnesty.org.au/refugees/comments/33587/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+AIACampaigns+Amnesty+International+Australia+Campaigns
[5] Articles 4, 17(1), 22(1)
[6] http://www.abc.net.au/7.30/content/2014/s3983054.htm

[7] http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Manus%20Island%20PNG%2023-25%20October%202013.pdf

Several matters of particular concern to the UNHCR included:

- the process of RSD
- mental health issues for those in the Centre and in the process, and
- resettlement issues and durable solutions

The Memorandum of Understanding (MOU) between Australia and PNG makes the following statements under the mutual commitments:

> 17. The Participants will treat Transferees with dignity and respect and in accordance with relevant human rights standards.
>
> 18. Special arrangements will be developed and agreed to by the Participants for vulnerable cases, including unaccompanied minors.[8]

Given the remoteness of the location, and the need to bring in all professional medical and legal assistance as well as basic services, it is contended that there remain very serious obligations upon Australia both morally and in international law.

This is reinforced by what was said in the High Court in cases such as *Plaintiff M61/2010E v The Commonwealth (The Offshore Processing Case)* [2010] HCA 41 and in *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 *(the M70 case).*

In *the M70 case*, the majority of the Court stated:

> 90 The ambit of the duty and power to remove unlawful non-citizens from Australia under s 198, when it is read with, and in the light of, s 198A, must be understood in a context provided by two considerations. First, as this Court said in *Plaintiff M61/2010E v The Commonwealth* ("the *Offshore Processing Case*"):
>
> "[R]ead as a whole, the Migration Act contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol."
>
> As the Court pointed out in the *Offshore Processing Case*, it may be that at times the Act goes beyond what is necessary to respond to Australia's international obligations. But whether or not that is so, the Act:
>
> "proceeds, in important respects, from the assumption that Australia has protection obligations to individuals. Consistent with that assumption, the text and structure of the Act proceed on the footing that the Act provides power to respond to Australia's international obligations by granting a protection visa in an appropriate case and *by not returning that person, directly or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason*." (emphasis added)

It is contended that whilst s.198A Migration Act was repealed and s.198AA inserted since the M70 Case, these principles remain. The legitimate concerns raised by UNHCR in several reports in 2013 are highly relevant because whilst it may be possible to transfer the responsibility for RSD, it is contended that where a country such as Australia cannot simply transfer all its human right obligations by agreeing to pay for the process.

[8] https://www.dfat.gov.au/geo/png/joint-mou-20130806.html

Australia has undertaken responsibilities in relation to protection of human rights by signing a number of human rights instruments and the signing of these instruments creates not only an expectation that they will be adhere to in practice, but that countries signing up to the treaties will ensure that those who they pay to carry out their responsibilities will also adhere to the obligations under the treaties.

Otherwise, countries could avoid their international responsibilities by simply sub-contracting obligations under the treaties to third parties and thereby avoid the adherence to serious human rights obligations. Given the MOU with PNG states specifically a need to adhere to relevant human rights treaties, this must be done not only by PNG but also by Australia.

It is the concern of IARC that the risks of breaching human rights obligations identified in reports such as by UNHCR, are major risks. There are not adequate means of ensuring obligations are met when the bodies who supervise such responsibilities in Australia such as the Human Rights Commission, has been unable to visit PNG and Nauru to make an independent assessment of Australia's compliance with its international obligations. Without such unrestricted assessment it is not really possible for Australia to categorically state that it has adhered to its international obligations and ensured the protection of rights and treatment of people with dignity.

It would not be acceptable in modern Australia to have the Government just say 'trust us, it is all ok' without independent and transparent assessment of the compliance with legal obligations domestically. Therefor the obligations are as great and possibly even greater when Australia seeks to transfer these responsibilities to third parties or other countries. It is not enough to be satisfied simply because Australia is paying all the costs of the process.

The rights and obligations just under the Refugee Convention and related human rights treaties and conventions have been discussed in great detail internationally by not just the UNHCR but also by accepted imitational law experts such as Professor James Hathaway[9] and Professors Goodwin-Gill and Jane McAdam.[10]

Goodwin Gill and McAdam note in the preface:

> "At a time when national governments seem focused on preventing asylum seekers from ever reaching their territories, devising creative, if questionable, 'non-arrival' policies and legal fictions to deny 'legal' presence in spite of 'physical' presence, the structure and content of the international protection regime have a heightened importance. State need to recall the legal obligations which they have voluntarily accepted in treaties and through their practice. In this respect, refugee law, human rights law, humanitarian law, international criminal law, and the law of the sea are all elements of an overarching protection framework."

The level of control, direction and influence that the Australian government exercises in relation to its outsourcing arrangements with detention centre management, RSD and resettlement is expected to come under increasing scrutiny for years to come. This is because the nature of resettlement of those found to be refugees who are living in countries such as Papua New Guinea, Nauru and Cambodia will necessitate this.

It is better policy to ensure compliance with these obligations now, rather than be continually trying to justify failing policies when problems and breaches occur in the years to come.

[9] James C Hathaway; 'The Rights of Refugees Under International Law'(CUP 2005)
[10] Guy S Goodwin-Gill and Jane McAdam; 'The Refugee in International Law', Third Edition 2007 (OUP)