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Submission by Immigration Advice and Rights Centre
Allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru

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. 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.

IARC was established in 1986 and since that time has developed a high level of specialist expertise in the area of immigration law. We have also gained considerable experience in the administrative and review processes applicable to Australia's immigration law.

IARC welcomes the opportunity to comment on the recent allegations relating to conditions and circumstances at the regional processing centre in Nauru ("centre"). IARC's submissions are limited to addressing terms of reference (b)-(d) and, in particular, focus on the conditions in the regional processing centre in Nauru; the MOU between the Republic of Nauru and the Commonwealth Government ("Government") and consider the Government's responsibility under international law with respect to the centre.

1. The Report by Philip Moss dated 6 February 2015

On 3 October 2015, the then Minister for Immigration and Border Protection, the Hon Scott Morrison, announced a review into allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru.

The report, prepared by Philip Moss and dated 6 February 2015, identified two main aspects for investigation:

- Claims of sexual and other physical assault of transferee; and
- Conduct and behaviour of staff members employed by contract service providers.

Among his many findings, observations and conclusions, Mr Moss:

- identified two specific allegations of rape involving two adult female transferees;
- set out allegations of indecent assault, sexual harassment and physical assault occurring at the centre;
- became aware of sexual exploitation in exchange for access to showers and other amenities;
- became aware of threats of rape;
- concluded that Nauruan guards were possibly trading marijuana with detainees in exchange for sexual favours;
- concluded that many transferees are apprehensive about their personal safety and have concerns about their privacy in the centre;
- concluded that there is a level of underreporting by transferees of sexual and other physical assault and found the underreporting is generally for family and cultural reasons.

2. Open letter from current and former employees at Nauru dated 7 April 2015

On 7 April 2015, a group of current and former employees from the Nauru detention centre who have first-hand knowledge of the conditions in which children and women are detained, wrote an open letter[1] claiming that:

- the Department of Immigration and Border Protection (DIBP) has been aware of the sexual and physical assault of women and children in the centre for at least 17 months;

[1] Available at http://www.abc.net.au/news/2015-04-07/nauru-letter-of-concern-demands-royal-commission/6374680#letter accessed 27 April 2015

- the DIBP and all service providers were informed, in writing, of several of the assaults detailed in the Moss Review in addition to many other assaults not mentioned in the report;
- the DIBP management participated in weekly and daily meetings where the assaults were discussed;
- the sexual assault of a boy was brought to the attention of the former Minister for Immigration and Border Protection. Despite this, DIBP chose to keep the child in the detention centre where he was subjected to further incidents of abuse;
- there have been several allegations regarding the sexual assault of children. The DIBP has refused to remove these children from the unsafe environment;
- incidents of sexual exploitation of vulnerable women by detention centre staff and others were provided to the DIBP and senior managers of all service providers 16 months prior, however, DIBP refused to remove these women from the unsafe environment.

3. Other examples

IARC is currently representing two families who, through their own experiences in Nauru, are able to shed further light into the conditions and circumstances at the regional processing centre. IARC has the permission of the families to discuss their experiences with the Senate Committee.

Family 1

Ms A and her son, Master B, who was 10 years old at the time, were transferred to Nauru in 2013.

Ms A identifies that during her time in Nauru she was threatened with violence; had her personal belongings stolen and had her shoes cut up with a sharp object. She states that she was constantly approached by single men and felt vulnerable.

She identifies that the nature of the relationship between one of the "officers" and the children in Nauru was inappropriate. She states that he would allow young girls to sit on his lap and after they got up he would be "visibly aroused".

She states that on one occasion an adult transferee slapped and kicked her son. Master B was hit with such force that the mark of the man's hand were visible on his face. Despite photographs being taken of the mark and witnesses writing statements about the incident she is not aware of any action being taken.

In 2014 Master B began to self-harm and was speaking about attempting suicide. It became evident to Ms A that Master B had been sexually assaulted (and late became known that he had been sexually assaulted on three occasions). Ms A advised an officer of the incident, however, for fear of retribution, she did not disclose the identity of the offender. She was told that unless she identifies the perpetrator she could not make a complaint and no action would be taken. Despite this, IARC understands that the matter has subsequently been reported to the police.

Ms A and Master B were brought back to Australia for treatment after it was considered that there were no specialist sexual assault counselling services or forensic examination available in Nauru. IARC notes that the perpetrator continues to be in Nauru and the family have been advised that may be transferred back to the centre.

Ms A would welcome the opportunity to give further details of her experience in Nauru should the Senate Committee consider it appropriate.

Family 2

Mrs C and Miss D, who was eight years old at the time, were transferred to Nauru in late 2013.

Mrs C states that on one occasion Miss D was slapped across the face by a Nauruan guard for wanting to use a telephone. This left a red mark on her face.

After a short period of time in Nauru Mrs C noticed Miss D was acting strangely and had become withdrawn. She would not leave the tent except to go to the bathroom, and she would insist on being accompanied. She would cry every time she was told she should go outside and play. Miss D later revealed that she had been assaulted by an adult male who had cornered her in the passage between the toilet blocks, pushed her up against a wall and tried to kiss her. He had touched her breasts underneath her clothing. She also revealed that she been assaulted on at least two other occasions involving other men.

Despite a complaint having been made they were not moved to a safer location in the centre for about one month.

Mrs C states that the conditions in the regional processing centre were entirely inappropriate. She states that both Nauruan and Australian officials were having relationships with detainees.

Miss D began to talk about harming herself and Mrs C did make an attempt on her life. They have both been brought to Australia, however, continue to be detained in a closed detention facility and are subject to being transferred back to Nauru.

4. Responsibility of the Government under international law

The question of the Government's international responsibility with respect to the centre requires consideration of the provisions that allow for regional processing and the arrangements that are in place in Nauru under the Memorandum of Understanding ("MOU").

The regional processing provisions under the Migration Act 1958 (Cth) ("Act")

The regional processing provisions are found in Part 2, Division 8, Subdivision B of the *Act*. Section 198AA of the *Act*, which sets out the reason for the subdivision, provides that unauthorised maritime arrivals (including those in respect of whom Australia has protection obligations under the Refugee Convention as amended by the Refugee Protocol), should be able to be taken to any country designated to be a regional processing country. The section further states that it is a matter for the Minister and Parliament to decide which countries should be designated as a regional processing country and that such designation need not be determined by reference to the international obligations or domestic laws of that country.

Section 198AB(2) of the Act identifies that the only condition for the designation of a country as a regional processing country is that the Minister thinks that the designation is in the national interest.

The term "national interest" is not defined; however, s 198AB(3) of the Act provides that in considering the "national interest" the Minister:

> *(a) must have regard to whether or not the country has given Australia any assurances to the effect that:*
>
> > *(i) the country will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and*
> >
> > *(ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the*

*definition of **refugee** in Article 1A of the Refugees Convention as amended by the Refugees Protocol; and*

(b) may have regard to any other matter which, in the opinion of the Minister, relates to the national interest.

Notable, the conditions and circumstances in the country are not mandatory considerations for the Minister.

Further, s. 198B gives an officer the power to bring a transitory person[2] to Australia from a country or place outside Australia for a temporary purpose. It may thus be observed that it is Australian domestic law that establishes regional processing and gives the Government on-going control over the transfer (and return) of asylum seekers.

The MOU

IARC notes that under the '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', ("MOU") the Commonwealth bears responsibility for the following issues:

- the Commonwealth of Australia bears all costs incurred under and incidental to the MOU[3];
- the Commonwealth of Australia will assist the Republic of Nauru to settle transferees found to be owed protection in safe third countries;[4]
- the Commonwealth of Australia will assist Nauru remove transferees found not to be owed protection to their country of origin or to third countries[5];
- the Commonwealth of Australia is required under the MOU to agree to the development of special arrangements for vulnerable cases, including unaccompanied minors;[6]
- both participants have agreed to treat Transferees with dignity and respect and in accordance with relevant human rights standards[7].

Furthermore, information provided to IARC by its clients indicate that the Government has on-going involvement with the welfare of transferees in Nauru.

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[2] A transitory person is defined under section 5 of the Act to include a person who was taken to a regional processing country under s198AD
[3] See item 6 under 'Guiding Principles' in the MOU
[4] See item 13 under Outcomes for persons Transferred to Nauru in the MOU
[5] See item 14 under Outcomes for persons Transferred to Nauru in the MOU
[6] See item 18 under 'Commitments' in the MOU
[7] See item 17 under 'Commitments' in the MOU

Responsibility under international law

Under international law Australia does not avoid responsibility for refugees simply by transferring them to another county.[8] Further, if Australia is found to have "*effective control*" over the treatment of the asylum seekers it has transferred to Nauru then it may continue to be held responsible for ensuring their treatment is consistent with its international human rights obligations[9]. In *Al-Skeini v the United Kingdom*, the European Court of Human Rights observed that the question of whether a State exercises effective control over an area outside its own territory is a question of fact that may be determined by reference to factors such as its presence in the area; its military, economic and political support for the local administration and its influence and control over the region.[10]

In *Roger Judge v Canada*[11] the UN Human Rights Committee found that a State may be considered responsible if it is *a* crucial link in the causal chain that would make possible violations in another jurisdiction. Further, the UN Human Rights Committee has also stated that a State Party may be responsible for extra-territorial violations of the ICCPR if its actions expose a person to a "*real risk*" that his or her rights will be violated, and this risk could reasonably have been anticipated by the State[12].

That is to say, if it can be established that the DIBP had been made aware of the sexual and physical assault of women and children on Nauru for at least 17 months prior to the open letter of 7 April 2015; that the Government continued to transfer people despite this knowledge; that the DIBP has a level of control over the day to day care of transferees in the centre; and that in circumstance where allegation of abuse and exploitation were brought to the attention of the DIBP no action was taken to remove the victim from further harm, then it may readily be accepted that the Government is responsible under international law and may have breached its international obligations under the ICCPR; the CAT and the CROC.

We thank the Committee and would welcome the opportunity to appear before it and expand on our written submissions.

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[8] G Goodwin-Gill and J McAdam, The Refugee in International Law (3rd ed, 2007), pp 408-4011
[9] See the decision of the European Court of Human Rights in Bankovic v Belgium and others (dec.) [GC] [2001] ECHR 890 and Al-Skeini v United Kingdom [GC] [2011] ECHR 1093
[10] [GC] [2011] ECHR 1093 at [139]
[11] Roger Judge v Canada, CCPR/C/78/D/829/1998, UN Human Rights Committee (HRC), 13 August 2003, available at: http://www.refworld.org/docid/404887ef3.html [accessed 26 April 2015].
[12] Muhammad Munaf v Romania, CCPR/C/96/D/1539/2006, UN Human Rights Committee (HRC), 21 August 2009, available at: www.refworld.org/docid/4acf500d2.html [accessed 26 April 2015] para 14.2.

Immigration Advice & Rights Centre Inc.

Kind regards,

Ali Mojtahedi

Principal Solicitor