

## Chapter 6

### Obligations of the Commonwealth Government, and contractors, towards asylum seekers and refugees

6.1 The committee considered a significant amount of evidence about the adequacy of services made available to refugees and asylum seekers in the Republic of Nauru (Nauru) and Papua New Guinea (PNG), and addressed the work undertaken by the Australian Government to build capacity with local authorities. However, few submitters provided detailed information about the legal obligations which the Commonwealth Government (and its contractors) may owe to asylum seekers and refugees in Nauru and PNG. This may be because previous inquiries into matters associated with Australia's Regional Processing Centres (RPCs) have made a number of findings in relation to the obligations of the Commonwealth Government.

6.2 This Chapter will:

- summarise the evidence put to previous Senate inquiries about Australia's obligations to refugees and asylum seekers in Australia's RPCs, pursuant to international and domestic law;
- summarise the findings of those inquiries;
- set out the evidence provided by the Department of Immigration and Border Protection (the department) to this inquiry in relation to the duty of care owed to those asylum seekers and refugees;
- outline recent developments and alternative perspectives about Australia's obligations in these matters; and
- discuss the obligations of the department, and its contractors, pursuant to the operation of the *Work Health and Safety Act 2011*.

#### Evidence put to previous inquiries

##### *Obligations of the Commonwealth pursuant to international law*

6.3 In December 2014, this committee found that Australia has a range of general and specific human rights obligations which relate to the treatment of asylum seekers and refugees.<sup>1</sup> Broadly, these considerations include:

- obligations pursuant to the Refugee Convention, noting the right to seek asylum and a right not to be punished for any illegal entry into territory in order to seek asylum under article 31;<sup>2</sup>

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1 Legal and Constitutional Affairs References Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014 ('Incident at Manus')*, December 2014, pp. 128-131.

2 Convention Relating to the Status of Refugees 1951, as amended by the 1967 Protocol Relating to the Status of Refugees (Refugee Convention).

- the obligation to not return (refoule) any person to a country where there is a risk that they would face persecution, torture or other serious forms of harm,<sup>3</sup> noting that non-refoulement obligations are absolute and cannot be subject to any limitation;<sup>4</sup>
- the prohibition of torture, including cruel, inhuman or degrading treatment or punishment,<sup>5</sup> noting that prolonged indefinite detention has been found to breach this prohibition;<sup>6</sup>
- the prohibition of arbitrary detention;<sup>7</sup>
- the right to security of the person,<sup>8</sup> requiring Australia to take steps to protect people against interference with personal integrity by others (including protecting people who have been threatened with death, harassed or intimidated);
- the right to life, and a duty to investigate all deaths where the state is involved;<sup>9</sup>
- the right of every person to the enjoyment of the highest attainable standard of physical and mental health, and the requirement that steps be taken to help achieve this to the fullest possible realisation;<sup>10</sup> and
- the obligation on states to ensure access to an effective remedy for the violation of human rights, and the requirement to make repatriation to individuals whose rights have been violated.<sup>11</sup>

6.4 The committee stated that Australia owes human rights obligations to persons outside Australia over whom Australia exercises 'effective control', or who are otherwise under Australia's jurisdiction.<sup>12</sup> The committee also noted that, aside from exercising 'effective control', Australia could also have 'joint or concurrent

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3 Refugee Convention, article 33; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), article 3.

4 International Covenant on Civil and Political Rights (ICCPR), articles 2, 6(1), and 7.

5 CAT, article 7.

6 Parliamentary Joint Committee on Human Rights (PJCHR), *Guide to Human Rights*, March 2014, pp. 13-14.

7 ICCPR, article 9.

8 ICCPR, article 9(1).

9 ICCPR, article 6(1); Second Optional Protocol to the [ICCPR] Aiming at the Abolition of the Death Penalty, article 1.

10 International Covenant on Economic Social and Cultural Rights (ICESCR), article 12.

11 ICCPR, article 2.

12 Legal and Constitutional Affairs References Committee, *Incident at Manus*, December 2014, p. 131.

responsibility' with another state 'in relation to conduct that occurs on the latter's territory'.<sup>13</sup> It stated that, in relation to Australia's non-refoulement obligations:

[W]hile this obligation is not extraterritorial, it may involve conduct that becomes extraterritorial in the course of the transfer. For instance, if a person is present in Australian territory and then is removed from Australian territory by Australian authorities and transferred to a third state. The conduct that occurs outside of Australian territory is the extraterritorial element. The non-refoulement obligation requires Australia not to send a person who is in Australia to a country where there is a real risk that the person would face persecution...<sup>14</sup>

6.5 The committee noted that departmental officers, and human rights organisations and academics strongly disagreed as to whether or not Australia retained 'effective control' over the RPCs.<sup>15</sup> The Office of the UN High Commissioner on Human Rights (UNHCR) submitted that the physical transfer of asylum seekers from Australia to PNG did not extinguish Australia's legal responsibility to protect them.<sup>16</sup> Mr Daniel Webb, Director of Advocacy at the Human Rights Law Centre (HRLC), argued that 'It would defeat significantly the purpose of international human rights law if states could just do offshore things that it could not legally do onshore'.<sup>17</sup> He submitted that Australia was not simply a link in the causal chain enabling human rights abuses to occur, but that it actively built the chain itself.<sup>18</sup>

#### ***Obligations pursuant to domestic law***

6.6 The committee also heard that the Commonwealth Government owed a non-delegable duty of care under common law to ensure the safety of asylum seekers detained at the Manus RPC.<sup>19</sup> The department provided a limited response to this matter, noting that the question was complex and was the subject of ongoing litigation.<sup>20</sup>

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13 Legal and Constitutional Affairs References Committee, *Incident at Manus*, December 2014, p. 132.

14 Legal and Constitutional Affairs References Committee, *Incident at Manus*, December 2014, p. 132.

15 Legal and Constitutional Affairs References Committee, *Incident at Manus*, December 2014, p. 133.

16 Office of the UN High Commissioner on Human Rights (UNHCR), Submission to the Legal and Constitutional Affairs References Committee, *Manus RPC*, December 2014, *Submission 21*, p. 1.

17 Mr Daniel Webb, Director of Advocacy (DA), Human Rights Law Centre, (HRLC), *Committee Hansard*, 12 July 2014, p. 59.

18 Mr Daniel Webb, DA, HRLC, *Committee Hansard*, 12 July 2014, p. 59.

19 Legal and Constitutional Affairs References Committee, *Incident at Manus*, December 2014, p. 143.

20 DIBP, answers to questions taken on notice, 11 July 2014 (received 17 September 2014).

## The findings of previous committees in relation to Australia's obligations

6.7 In December 2014, the committee concluded that:

...the degree of involvement by the Australian Government in the establishment, use, operation and provision of total funding for the 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.<sup>21</sup>

6.8 It found that, as the 'architect' of the offshore processing arrangement with PNG, the Australian Government had a 'clear and compelling moral obligation' to ensure that asylum seekers held on Manus Island were treated in accordance with principles and minimum standards according to international law.<sup>22</sup> Additionally, the committee found that Australia did owe duty of care responsibilities under Australian law, and urged the Commonwealth to 'urgently address any potential breaches of this duty of care'.<sup>23</sup>

6.9 The Select Committee on Recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru (select committee), likewise concluded in August 2015, that:

- Australia held obligations under both international and domestic law, as well as responsibilities pursuant to the relevant Memorandum of Understanding (MOU) between Australia and Nauru, in relation to the care of asylum seekers at the Nauru RPC;<sup>24</sup>
- there is a strong argument that the primary obligation to protect the human rights of asylum seekers in Nauru rests with Australia and, at a minimum, Australia holds joint obligations with the Government of Nauru in this regard;<sup>25</sup> and
- the Australian Government needed to 'intensify its efforts to achieve a genuine regional framework for irregular migration and processing of asylum seekers'.<sup>26</sup>

6.10 The select committee found that:

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21 Legal and Constitutional Affairs References Committee, *Incident at Manus*, December 2014, p. 151.

22 Legal and Constitutional Affairs References Committee, *Incident at Manus*, December 2014, p. 151.

23 Legal and Constitutional Affairs References Committee, *Incident at Manus*, December 2014, p. 152.

24 Select Committee on recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru (Select Committee), *Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru ('Nauru RPC')*, August 2015, p. 121.

25 Select Committee, *Nauru RPC*, August 2015, p. 121.

26 Select Committee, *Nauru RPC*, August 2015, p. 123.

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The Government of Australia's purported reliance on the sovereign and legal system on Nauru in the face of allegations of human rights abuses and serious crimes at the RPC is a cynical and unjustifiable attempt to avoid accountability for a situation created by this country.<sup>27</sup>

6.11 The committee also commented on the apparent lack of oversight of RPC contractors, and a disconnect between what the department was aware of on one hand, and what the contractors were aware of on the other, including in the case of extremely important video footage of a riot in the RPC.<sup>28</sup> It found that the Nauru RPC was 'not run well, nor [were] Wilson Security and Transfield Services properly accountable to the Commonwealth despite the significant investment in their services'.<sup>29</sup>

### **Statements made by the department in relation to a duty of care**

6.12 The department presented arguments to this committee about Australia's obligations pursuant to international law, Australia's obligations pursuant to domestic law, and when and how Australia may owe a duty of care in relation to refugees and asylum seekers in Nauru and PNG.

#### ***Obligations pursuant to international law***

6.13 In relation to Australia's obligations under international law, the department noted that Australia is a party to a number of international treaties.<sup>30</sup> It submitted that 'Under those treaties, Australia has certain obligations **to all persons within its jurisdiction**',<sup>31</sup> and argued that 'Australia's international obligations apply only to those who are within its jurisdiction'.<sup>32</sup>

6.14 The department advised that a key relevant obligation pursuant to international law is non-refoulement, or the requirement to not send a person back to a country where they would be a real risk of persecution of other types of harm (such as the death penalty or torture). The department argued that Australia is protected from any breach of its non-refoulement obligations in two ways: first by virtue of the MOUs signed with the Governments of Nauru and PNG, and second by the conduct of 'pre-transfer assessments' to all persons liable to be transferred to an RPC.<sup>33</sup>

6.15 The department submitted that, by virtue of the 'assurances' contained within the MOUs between Australia and the Governments of Nauru and PNG, Australia is protected from any breach of its non-refoulement obligation because they limit the

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27 Select Committee, *Nauru RPC*, August 2015, p. 122.

28 Select Committee, *Nauru RPC*, August 2015, pp. 124-125.

29 Select Committee, *Nauru RPC*, August 2015, p. 125.

30 DIBP, *Submission 23*, p. 18 (our emphasis).

31 DIBP, *Submission 23*, p. 18.

32 DIBP, *Submission 23*, p. 19.

33 DIBP, *Submission 23*, pp. 18-19.

risk that a regional processing country will itself refole an asylum seeker.<sup>34</sup> It explained that these MOUs contain assurances that asylum seekers will:

- be treated with dignity;
- not be expelled or returned to another country where their life or freedom would be threatened;
- be provided with a Refugee Status Determination (RSD) assessment; and
- not be sent to another country where there is a real risk of being subjected to torture, cruel, inhuman, or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty.<sup>35</sup>

6.16 The department explained that its 'pre-transfer assessments' ensure that Australia does not breach its non-refoulement obligations because they consider whether 'appropriate support and services' are available in a regional processing country, and confirm there is no barrier to the transfer occurring (for example, the absence of non-refoulement obligations).<sup>36</sup>

6.17 The department also highlighted that Nauru and PNG are party to a number of international treaties, including the Refugee Convention, and Convention on the Rights of the Child (CRC). It noted that PNG is a party to the ICCPR, which Nauru has signed but is yet to ratify, and that Nauru is a party to the CAT.<sup>37</sup>

6.18 In relation to the allegations by some submitters that the detention of asylum seekers in Nauru and PNG constitutes torture pursuant to international law,<sup>38</sup> the department stated that this did not constitute torture.<sup>39</sup>

### ***Obligations pursuant to domestic law***

6.19 The department submitted to the committee that it has a duty of care to asylum seekers and refugees, but only within a 'tightly defined activity' pursuant to a contract to provide services to those refugees and asylum seekers:

...within a larger framework of responsibility in which we are not legally, jurisdictionally responsible, there are a number of specified activities, which are enumerated in intergovernmental agreements and contracts,

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34 DIBP, *Submission 23*, p. 19.

35 DIBP, *Submission 23*, p. 19.

36 DIBP, *Submission 23*, p. 19.

37 DIBP, *Submission 23*, p. 19.

38 Amnesty International, *Submission 6*, p. 3; Dr Anna Neistat, Senior Director of Research, Amnesty International, *Committee Hansard*, Wednesday 15 March 2017, pp. 5-6; Ms Tracie Aylmer, *Submission 10*, p. 2; Ms Jessica Bloom, *Submission 14*, p. 2; Australian Lawyers Alliance (ALA), *Submission 24*, p. 12; Australia Council for International Development (ACFID), *Submission 45*, p. 3; and Ms Laura Sawtell, *Submission 52*, p. 1.

39 Mr Michael Pezzullo, Secretary, DIBP, *Committee Hansard*, Monday 20 March 2017, p. 19.

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whereby the Commonwealth delivers services principally through its contractors.<sup>40</sup>

6.20 The department used the example of the provision of food to refugees and asylum seekers:

If the Commonwealth contracts anywhere for the provision of food to people, and that food makes them crook, in relation to that activity, pursuant to that undertaking, you have got a reasonably practicable duty to do everything within your directly contracted powers...

If the contract says we will provide garrison services and within garrison services we will provide a meal service then we cannot walk away and say, 'Well, bugger the quality of the food; if it poisons people, so be it.' We have a duty of care in relation to that very tightly defined activity.<sup>41</sup>

6.21 The department submitted that while it has a primary duty of care in relation to delivering food to people, this does not constitute 'running the centre'.<sup>42</sup> The department characterised its duty of care as one which related to a 'very tightly defined scope of activities', which required the department to conduct themselves in a 'diligent, safe and...statutorily defensible manner'.<sup>43</sup>

6.22 The committee asked the department what the duty of care owed by the Governments of Nauru and PNG towards refugees and asylum seekers required them to do, and what the relevant standard of care would be. The committee also asked how those governments would discharge such a duty of care when they do not have legal control over the services and amenities provided to RPC occupants (including food, water, clothing, shelter, medical services, and security services). The department responded that the 'nature or scope of a duty of care in this context is a complex legal question involving consideration of foreign laws', and submitted that this would normally entail judicial evaluation.<sup>44</sup> The department argued that it provides support and assistance to the Governments of Nauru and PNG, and that this assistance 'does not detract from or limit the ultimate control exercised by relevant authorities in these countries' in relation to RPCs.<sup>45</sup>

### **Current claims against the Commonwealth**

6.23 As stated above, the department submitted that it would only owe a duty of care to asylum seekers and refugees in Nauru and PNG in relation to tightly defined and discrete activities associated with the operation of the RPCs, and argued that Australia continues to meet its obligations pursuant to international law.

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40 Mr Michael Pezzullo, Secretary, DIBP, *Committee Hansard*, Monday 20 March 2017, p. 18.

41 Mr Michael Pezzullo, Secretary, DIBP, *Committee Hansard*, Monday 20 March 2017, p. 18.

42 Mr Michael Pezzullo, Secretary, DIBP, *Committee Hansard*, Monday 20 March 2017, p. 18.

43 Mr Michael Pezzullo, Secretary, DIBP, *Committee Hansard*, Monday 20 March 2017, p. 19.

44 DIBP, response to questions on notice, 31 March 2017 (received 14 April 2017).

45 DIBP, response to questions on notice, 31 March 2017 (received 14 April 2017).

6.24 However, the committee noted that there are a number of claims which argue that this is not the case. A class action is currently on foot in relation to the Manus RPC, and several submissions have been made to the Prosecutor for the International Criminal Court (ICC) arguing that the Australian Government has engaged in crimes against humanity through the operation of its RPCs.

***Class action in relation to the Manus RPC***

6.25 In December 2014, Mr Majid Karami Kamasae brought a class action against the Commonwealth of Australia, G4S Australia Pty Ltd and Broadspectrum (Australia) Pty Ltd in the Supreme Court of Victoria.<sup>46</sup> The claim in this matter is negligence, pursuant to tort law.

6.26 The first statement of claim, filed in December 2014, alleged that the three defendants were negligent in the provision of food, water, accommodation, health care services, and security to persons held there between 21 November 2012 and 19 December 2014.<sup>47</sup> On 1 August 2016 an amended statement of claim was filed, including an additional allegation that the defendants had falsely imprisoned detainees at the Manus RPC between 21 November 2012 and 12 May 2016.

6.27 The amended statement of claim submits that in the period during which G4S was contracted to provide services at the Manus RPC, and later when Transfield Services (later known as Broadspectrum) was contracted to provide services:

- (a) the Commonwealth of Australia was in control of the Manus RPC;<sup>48</sup>
- (b) the Commonwealth of Australia, directly and through its agents and contractors, owed a non-delegable duty;<sup>49</sup>
- (c) this duty of care required it to take reasonable care to avoid foreseeable harm to detainees at the Manus RPC;<sup>50</sup>
- (d) those foreseeable risks of harm arose from prolonged detention in difficult conditions, delayed remediation work, and a reliance on the local PNG police for international security;<sup>51</sup>
- (e) the Commonwealth of Australia breached that duty of care in relation to the provision of food and water, shelter and accommodation, health care treatment, internal security, and external security;<sup>52</sup> and

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46 *Kamasae v Commonwealth of Australia & Ors*.

47 Slater and Gordon Lawyers, *Manus Island Class Action*, [www.slatergordon.com.au/class-actions/current-class-actions/manus-island-class-action](http://www.slatergordon.com.au/class-actions/current-class-actions/manus-island-class-action) (accessed 22 March 2017).

48 Third Amended Statement of Claim, 1 August 2016, p. 16.

49 Third Amended Statement of Claim, 1 August 2016, pp. 24; 41-41; 100; 113.

50 Third Amended Statement of Claim, 1 August 2016, pp. 29-30; 105-106.

51 Third Amended Statement of Claim, 1 August 2016, pp. 30-40; 107-114.

52 Third Amended Statement of Claim, 1 August 2016, pp. 44-79; 115-139.



- (f) there was a causal connection between that failure, and harm which the plaintiffs experienced.<sup>53</sup>

6.28 The plaintiffs claim both exemplary and aggravated damages in relation to this alleged negligence.<sup>54</sup> Exemplary damages are a class of damages which focus on the conduct of a defendant rather than the loss of a plaintiff, and are intended to punish the defendant and deter similar future conduct.<sup>55</sup> Aggravated damages may be awarded 'when the harm done to [a plaintiff] by a wrongful act was aggravated by the manner in which the act was done'.<sup>56</sup>

6.29 An application in relation to this matter was heard before Justice McDonald of the Supreme Court of Victoria on Wednesday 22 March 2017.<sup>57</sup> At the date of this report, this matter is ongoing.

### ***Submissions to the International Criminal Court***

6.30 Several submissions have been made to the Office of the Prosecutor of the ICC requesting that Australia be investigated for crimes under international law.

6.31 The ICC is a permanent institution which exists to complement national criminal jurisdictions.<sup>58</sup> The *Rome Statute of the International Court 1951* (the Rome Statute), which establishes the ICC, provides that a case will be inadmissible before the court if it is being investigated or prosecuted by a State with jurisdiction over the case, unless the State is 'unwilling or unable genuinely to carry out the investigation or prosecution'.<sup>59</sup>

### ***Submission from Mr Andrew Wilkie MP***

6.32 On 23 January 2015, Mr Andrew Wilkie MP wrote to the ICC requesting that Australia be prosecuted for crimes against humanity pursuant to the Rome Statute, the Refugee Convention, the ICCPR, and the CRC.<sup>60</sup> Mr Wilkie highlighted the following issues in relation to RPC operation:

- deprivation of liberty in extreme physical conditions, including indefinite detention and the separation of families;<sup>61</sup>

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53 Third Amended Statement of Claim, 1 August 2016, pp. 86-91; 139-141.

54 Third Amended Statement of Claim, 1 August 2016, pp. 79-86; 146.

55 *Xl Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* [1985] HCA 12, 471 (per Justice Brennan).

56 *Uren v John Fairfax & Sons* (1966) 117 CLR 118, 149 (per Justice Windeyer).

57 Supreme Court of Victoria, Supreme Court List for Wednesday 22 March 2017, p. 4.

58 *Rome Statute of the International Criminal Court* ('Rome Statute'), 1951, article 1.

59 *Rome Statute*, article 17(1)(a).

60 Mr Andrew Wilkie MP, *Communique for the Office of the Prosecutor regarding Mr Andrew Wilkie's MP's application relating to crimes against humanity in Australia* ('Comminque'), 23 January 2015, <http://andrewwilkie.org/wp-content/uploads/2015/10/Brief-for-the-ICC-OTP-CR-322-14.pdf>.

61 Mr Andrew Wilkie MP, *Communique*, 23 January 2015, p. 6.

- the forcible transfer of asylum seekers to foreign detention facilities;<sup>62</sup> and
- intentional acts causing great suffering and serious injury by means of inhuman conditions in detention;<sup>63</sup>

*Submission from Mr Julian Burnside and others*

6.33 On 11 November 2016 a consortium of international lawyers, including Mr Julian Burnside AO QC, also requested that the Prosecutor of the ICC take action against Australia in relation to crimes against humanity.<sup>64</sup> The consortium submitted to the Prosecutor that they had provided sufficient evidence to warrant a preliminary investigation, and that the ICC was well-placed to investigate this matter because, as the Prosecutor of the ICC has stated:

Where national systems remain inactive or are otherwise unwilling or unable to genuinely investigate and prosecute, the ICC must fill the gap left by the failure of States to satisfy their duty.<sup>65</sup>

6.34 The consortium argued that successive Australian Governments had contravened the Rome Statute by instituting a system of indefinite mandatory offshore detention, and the forcible removal of asylum seekers to Nauru and PNG.<sup>66</sup>

6.35 In addition, the consortium posited that international case law supports the argument that Australia has control of the RPCs.<sup>67</sup> They argued that the Commonwealth has 'effective control' of the RPCs because the relevant conduct would have not occurred 'but for' Australia's involvement. They also argued that the circumstances would also constitute 'de facto control' pursuant to legal precedent, as well as satisfying the test of 'total and exclusive de facto, and subsequently also de jure control'.

*Submission from a further group of lawyers*

6.36 On 13 February 2017, another group of lawyers submitted a communique to the Prosecutor of the ICC requesting that the Prosecutor investigate the Australian

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62 Mr Andrew Wilkie MP, *Communique*, 23 January 2015, p. 7.

63 Mr Andrew Wilkie MP, *Communique*, 23 January 2015, pp. 8-9.

64 Mr Courtenay Barklem, Mr Tony Fisher, Professor Bill Bowring, Ms Mary Johnson, Mr Julian Burnside AO QC, Mr Oliver Kidd and Ms Alison Battisson, *In the matter of a prosecution of the Australian Government in relation to indefinite detention and forcible removal of asylum seekers ('Prosecution of the Australian Government')*, November 2016, [www.julianburnside.com.au/whatsinside/uploads/2016/11/Communique%C3%A9-to-ICC.pdf](http://www.julianburnside.com.au/whatsinside/uploads/2016/11/Communique%C3%A9-to-ICC.pdf) (accessed 20 March 2017).

65 The Office of the Prosecutor, *Policy Paper on Preliminary Investigations*, November 2013, p. 23, [https://www.icc-cpi.int/iccdocs/otp/OTP-Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf) (accessed 20 March 2017).

66 *Prosecution of the Australian Government*, November 2016, p. 6.

67 *Prosecution of the Australian Government*, November 2016, pp. 13-14.

Government for crimes against humanity.<sup>68</sup> The communique argued that Australia's immigration detention policy breaches Article 7 of the Rome Statute because it constitutes a widespread and systematic attack directed at a vulnerable civilian population, involving acts of legislative, administrative and physical violence.<sup>69</sup>

6.37 The authors further argued that the Australian Government (and its agents) have imprisoned a civilian population in contravention of the right to be free from arbitrary detention, as defined under Article 9 of the ICCPR, and as interpreted by the UN Human Rights Committee.<sup>70</sup> They highlighted guidance provided by the Committee in relation to 'arbitrary detention' in the context of immigration detention:

...a detention may be authorized by domestic law and nonetheless be arbitrary. The notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. Detention in the course of proceedings for the control of immigration is not arbitrary per se, but the detention must be justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security. The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic reevaluation and judicial review. The decision must also take into account the mental health condition of those detained. Individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion. The inability of a State party to carry out the expulsion of an individual does not justify indefinite detention.<sup>71</sup>

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68 Professor James Cavallaro, Ms Diala Shamas, Professor Beth Van Schaack and others, *Communique to the Office of the Prosecutor of the International Criminal Court Under Article 15 of the Rome Statute: The situation in Nauru and Manus Island: Liability for crimes against humanity in the detention of refugees and asylum seekers ('The situation in Nauru and Manus')*, 13 February 2017, <https://www-cdn.law.stanford.edu/wpcontent/uploads/2017/02/Communiq%C3%A9-to-Office-Prosecutor-IntlCrimCt-Art15RomeStat-14Feb2017.pdf> (accessed 24 March 2017).

69 Professor James Cavallaro, Ms Diala Shamas, Professor Beth Van Schaack and others, *The situation in Nauru and Manus*, 13 February 2017, pp. 59-63.

70 Professor James Cavallaro, Ms Diala Shamas, Professor Beth Van Schaack and others, *The situation in Nauru and Manus*, 13 February 2017, pp. 63-73.

71 *F.J. v Australia*, Case No. CCPR/C/116/D/2233/2013, 18 April 2016, para 10.3, [https://uploads.guim.co.uk/2016/05/17/CCPR-C-116-D-2233-2013-English-cln-auv\\_\(1\).pdf](https://uploads.guim.co.uk/2016/05/17/CCPR-C-116-D-2233-2013-English-cln-auv_(1).pdf) (accessed 24 March 2017).

6.38 The authors argued that this conduct constituted torture within the meaning of Article 7(1)(f) of the Rome Statute,<sup>72</sup> and persecution within the meaning of Article 7(1)(g).<sup>73</sup> The authors further submitted that the Australian Government, and its agents, had contravened article 7(2)(d) of the Rome Statute by forcibly deporting individuals who were 'lawfully present' on open water at the time they were stopped, and may have been lawfully present if they were in Australian waters at the time.<sup>74</sup>

6.39 At the date of this report, there is no publicly available information in relation to any action taken by the Office of the Prosecutor of the ICC in response to any of these submissions.

### **Australia's ratification of the OPCAT**

6.40 On 8 February 2017 the Australian Government announced its intention to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) by the end of this year.<sup>75</sup> The OPCAT was adopted by a General Assembly of the UN on 18 December 2002, and entered into force on 22 June 2006.<sup>76</sup>

6.41 The OPCAT sets out a number of general principles, establishes a 'Subcommittee on Prevention' and sets out its mandate, and lays down national preventative mechanisms. It states that:

- the objective of the OPCAT is to establish a system of regular visits by independent international and national bodies to places where people are deprived of their liberty;<sup>77</sup>
- 'deprivation of liberty' means  
...any form of detention or imprisonment or the placement of a person in a public or private custodial setting in which that person is not permitted to leave at will by order of any judicial, administrative or other authority.<sup>78</sup>
- at a domestic level, each state will establish one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (to be known as a 'National Preventative Mechanism');<sup>79</sup>

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72 Professor James Cavallaro, Ms Diala Shamas, Professor Beth Van Schaack and others, *The situation in Nauru and Manus*, 13 February 2017, pp. 74-83.

73 Professor James Cavallaro, Ms Diala Shamas, Professor Beth Van Schaack and others, *The situation in Nauru and Manus*, 13 February 2017, pp. 92-96.

74 Professor James Cavallaro, Ms Diala Shamas, Professor Beth Van Schaack and others, *The situation in Nauru and Manus*, 13 February 2017, pp. 87-92.

75 ABC News, *OPCAT: Australia makes long-awaited pledge to ratify international torture treaty*, 9 February 2017.

76 Office of the High Commissioner for Human Rights (OHCHR), *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*.

77 OPCAT, article 1.

78 OPCAT article 4(2).

- each state party will allow visits by these mechanisms 'to any place under its jurisdiction and control where persons are or may be deprived of their liberty';<sup>80</sup> and
- each state party undertakes to receive the Subcommittee on Prevention and grant it access to places of detention, provide all relevant information to the Subcommittee, and encourage and facilitate contacts between the Subcommittee and its national preventative mechanisms.<sup>81</sup>

6.42 Nauru signed the CAT on 26 September 2012, and became a State Party to the OPCAT in January 2013. The Subcommittee on Prevention visited Nauru for the first time in May 2015. Subcommittee members, who visited the RPC, noted that Nauru was yet to establish a National Preventative Mechanism, and commented on the importance of doing this 'given the number of people currently being held on the island'.<sup>82</sup>

6.43 PNG is yet to ratify the CAT.

### **Obligations of the department pursuant to the *Work Health and Safety Act 2011***

6.44 The committee received a significant body of evidence dealing with the department's responsibilities pursuant to the *Work Health and Safety Act 2011* ('WHS Act'), the capacity of Comcare to investigate alleged breaches of this Act, and alleged failures on the part of the department to report incidents which are 'notifiable' pursuant to the Act.<sup>83</sup> The committee also received evidence from Comcare, the regulator responsible for administering this Act, as to the complexity applying the legislation in a workplace outside Australia, particularly one which involves a number of subcontractors. The committee heard that the department's obligations pursuant to the WHS Act relate to RPC workers, and may extend to refugees and asylum seekers.

#### ***The WHS Act***

6.45 The WHS Act establishes a national framework 'to secure the health and safety of workers and workplaces'.<sup>84</sup> It establishes a number of duties relating to workplaces. A 'workplace' is defined to mean a place where work is carried out for a

79 OPCAT, article 3.

80 OPCAT, article 4.

81 OPCAT, article 12.

82 OHCHR, *UN torture prevention body urges Nauru to set up detention monitoring mechanism*, 6 May 2015.

83 DIBP, *Submission 23*, p. 72; ALA, *Submission 24*; Hunter Asylum Seeker Advocacy Service (HASA), *Submission 28*; Ms Paddy McGorry and Mr Max Costello, *Submission 47*; Mr Max Costello, *Submission 48*; and Doctors for Refugees (DFR), *Submission 56*, p. 21;

84 *Work Health and Safety Act 2011*, s. 3(1).

business or undertaking, and includes any place where a worker goes, or is likely to go, while at work.<sup>85</sup>

6.46 The WHS Act states that 'persons conducting a business or undertaking' (known as a 'PCBU') owe a primary duty of care to workers and other people.<sup>86</sup> A PCBU must, 'so far as is reasonably practicable', ensure that the health and safety of workers which it has engaged, or caused to be engaged while those workers are at work in the business or undertaking.<sup>87</sup> A PCBU must also, 'so far as is reasonably practicable', ensure that the health and safety of 'other persons' is not put at risk from work carried out as part of the business or undertaking.<sup>88</sup>

6.47 In 2012 the NSW Industrial Relations Commission indicated that 'other persons' includes 'persons put at risk from work carried out as part of the conduct of a [PCBU]'.<sup>89</sup>

6.48 The WHS Act states that 'reasonably practicable' means 'that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety' taking in account (among other things) the likelihood of the hazard or risk, the degree of harm which might result from the risk or hazard, and what the person concerned knew or should have known about the risk and ways of eliminating or minimising it.<sup>90</sup>

6.49 The WHS Act imposes obligations on a PCBU. A PCBU must advise Comcare when a 'notifiable incident' has taken place 'arising out of the conduct of the business or undertaking'.<sup>91</sup> A notifiable incident means the death of a person, a serious injury or illness of a person, or a dangerous accident.<sup>92</sup> The WHS Act provides that:

- a PCBU must notify Comcare of a 'notifiable incident' immediately after becoming aware that a notifiable incident 'arising out of the conduct of the business or undertaking has occurred'.<sup>93</sup> The penalty for failing to do this is \$50,000 in the case of a body corporate and \$10,000 in the case of an individual;
- a PCBU must also keep a record of each notifiable incident for at least five years from the day the notice of the incident was given to Comcare.<sup>94</sup>

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85 *Work Health and Safety Act 2011*, s. 8.

86 *Work Health and Safety Act 2011*, s. 5.

87 *Work Health and Safety Act 2011*, s. 19(1).

88 *Work Health and Safety Act 2011*, s. 19(2).

89 *Essential Energy (ACN 37 428 185 226) and WorkCover Authority of New South Wales* [2012] NSWIRComm 83 (3 August 2012), para. 23.

90 *Work Health and Safety Act 2011*, s. 18.

91 *Work Health and Safety Act 2011*, s. 38(1).

92 *Work Health and Safety Act 2011*, s. 35.

93 *Work Health and Safety Act 2011*, s. 38(1).

94 *Work Health and Safety Act 2011*, s. 38(7).

Failure to do this carries a penalty of \$5,000 in the case of individuals and \$25,000 in the case of a body corporate; and

- a person with management or control of a workplace at which a notifiable incident has taken place must ensure, so far as is reasonably practicable, that the incident site is 'not disturbed until an inspector arrives at the site or any earlier time than an inspector directs' (noting that matters associated with a police investigation are not to be prevented by this duty).<sup>95</sup>

6.50 The limitation period for prosecutions under the Act is two years from the time the offence first came to Comcare's attention, or one year after a coronial report, coronial inquiry or inquest ended, or other official inquiry ended.<sup>96</sup>

6.51 Section 15.1 of the *Criminal Code* (extended geographical jurisdiction – category A) applies to an offence under the WHS Act.<sup>97</sup> A person does not commit an offence to which section 15.1 applies unless (among other things) the conduct constituting the alleged offence occurred:

- wholly or partly in Australia; or
- wholly or partly outside Australia and a result of the conduct occurred wholly or partly in Australia; or
- wholly outside Australia and, at the time of the alleged offence, the person was an Australia citizen or a body corporate incorporated under Australian law.<sup>98</sup>

6.52 Comcare inspectors have a number of powers under the Act, including the power to:

- obtain information (by serving a written notice on a person requiring that person to give the regulator particular information, produce documents required, and/or appear before the person to give oral or written evidence, or produce those documents);<sup>99</sup>
- enter a workplace;<sup>100</sup> and
- require the production of documents or answer questions.<sup>101</sup>

6.53 Comcare explained that the extended geographical jurisdiction outlined above does not apply to the exercise of these powers.<sup>102</sup>

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95 *Work Health and Safety Act 2011*, s. 39.

96 *Work Health and Safety Act 2011*, s. 232(1).

97 *Work Health and Safety Act 2011*, s. 12F(3).

98 *Commonwealth Criminal Code*, s. 15.1(1).

99 *Work Health and Safety Act 2011*, s. 155.

100 *Work Health and Safety Act 2011*, s. 163.

101 *Work Health and Safety Act 2011*, s. 171.

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### *Applying the Act to Australia's RPCs*

6.54 Comcare explained:

- (a) that is regards the department as a PCBU in relation to its role in Australia's RPCs;<sup>103</sup>
- (b) that as a PCBU, the department has 'duties that extend into overseas environments',<sup>104</sup>
- (c) asylum seekers and refugees in Nauru and PNG are considered 'other persons' for the purposes of the WHS Act;<sup>105</sup> and
- (d) that the department owes a duty of care to its own employees working at the RPCs, contractors, subcontractors, and other persons to ensure that they are not put at risk from work carried out as part of the undertaking.<sup>106</sup>

6.55 Comcare also explained that its capacity to investigate matters at the RPCs is unclear. Acting Chief Executive Office Ms Lynette MacLean advised the committee that, although it is clear that the department is a PCBU for the purposes of the Act:

What is less clear, however, is the extent to which the DIBP owes duties, and the extent to which they have control of the operations of RPCs, particularly as they relate to detainees. Understanding the extent of these duties is complex and needs to be assessed on a case-by-case basis, as it involves relationships with foreign governments, foreign and Australian contractors, and employees of DIBP.<sup>107</sup>

6.56 Ms MacLean further described the issue of who owes duties to whom, and whether a worker works for the department or a foreign government as a 'complex web', and one which requires a case-by-case analysis of individual incidents or complaints.<sup>108</sup>

6.57 Comcare advised the committee that a particular incident may be a notifiable incident for the purposes of the Act, but this requires consideration of 'who has been

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102 Ms Lynette MacLean, Acting Chief Executive Officer (A/CEO), Comcare, *Committee Hansard*, Wednesday 15 March 2017, p. 10.

103 Ms Lynette MacLean, A/CEO, Comcare, *Committee Hansard*, Wednesday 15 March 2017, p. 11.

104 Mr Justin Napier, General Manager, Regulatory Operations Group, Comcare, *Committee Hansard*, Wednesday 15 March 2017, p. 11.

105 Ms Lynette MacLean, A/CEO, Comcare, *Committee Hansard*, Wednesday 15 March 2017, p. 11.

106 Mr Anthony Blucher, Senior Director, Regulatory Operations Group, Comcare, *Committee Hansard*, Wednesday 15 March 2017, p. 15.

107 Ms Lynette MacLean, A/CEO, Comcare, *Committee Hansard*, Wednesday 15 March 2017, p. 9.

108 Ms Lynette MacLean, A/CEO, Comcare, *Committee Hansard*, Wednesday 15 March 2017, p. 11.



involved, how they were involved, what the contractual arrangements were and who was responsible for what'.<sup>109</sup> It also requires consideration of whether the alleged conduct in question [meets] the threshold for a 'notifiable incident', as defined in section 35 and explained further in section 36. Comcare explained that an incident (for example, serious mental injury or illness, or the sexual assault of a child), may meet the description of a 'notifiable incident', but this will depend on the individual circumstances of the case.<sup>110</sup> Comcare explained that since both RPCs have been reclassified as being 'open centres', the questions as to whether or not a duty is enlivened, remain the same.<sup>111</sup>

### *Comcare's work relating to the RPCs to date*

6.58 Comcare explained that it has undertaken some work on the RPCs in Nauru and PNG, including visiting the RPCs themselves and requesting information from the department.

6.59 Comcare has visited both the Nauru and Manus RPCs three times, with the last visits taking place in 2015.<sup>112</sup> It explained that its powers did not extend extra-territorially, and so it had to seek the consent of the department in order to do so, and this consent was provided.<sup>113</sup> Comcare also advised that since 2012, it has commenced 17 inspections at the Manus RPC, as well as 17 inspections at the Nauru RPC.<sup>114</sup>

6.60 Comcare inspectors conducted inspections of the Manus RPC in September and October 2014, and November 2015; and the Nauru RPC in December 2014, and November 2015.<sup>115</sup> The findings and observations of these inspections include:

- Inspection of the Manus RPC, September and October 2014
  - significant mould growth on timber shower doors,<sup>116</sup> and a recommendation that these doors be replaced with more mould resistant material;<sup>117</sup>

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109 Ms Lynette MacLean, A/CEO, Comcare, *Committee Hansard*, Wednesday 15 March 2017, p. 15.

110 Mr Justin Napier, General Manager, Regulatory Operations Group, Comcare, *Committee Hansard*, Wednesday 15 March 2017, p. 12.

111 Mr Anthony Blucher, Senior Director, Regulatory Operations Group, Comcare, *Committee Hansard*, Wednesday 15 March 2017, p. 15.

112 DIBP, *Submission 23*, p. 25.

113 Mr Anthony Blucher, Senior Director, Regulatory Operations Group, and Ms Lynette MacLean, A/CEO, Comcare, *Committee Hansard*, Wednesday 15 March 2017, p. 16.

114 Mr Justin Napier, General Manager, Regulatory Operations Group, Comcare, *Committee Hansard*, Wednesday 15 March 2017, p. 14.

115 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017).

116 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Manus RPC Inspector Report, 30 September 2014, p. 3.

- the approval process to have patients medically evacuated from the Manus RPC was 'convoluted' and could 'unnecessarily delay an evacuation', and a recommendation that a 'more streamlined approach with less layers would have a direct impact on providing the best care';<sup>118</sup>
- Inspection of the Manus RPC, October 2015
  - where a detainee was placed in the Managed Accommodation Area (MAA) Wilson Security staff were required to notify the department of any stay longer than 24 hours;<sup>119</sup>
  - if there is an 'imminent risk of harm', Wilson Security will discuss this with the department immediately;<sup>120</sup>
  - the IHMS Clinic is large and well equipped;<sup>121</sup>
  - IHMS staff identified that time and uncertainty were factors impacting the mental health of detainees;<sup>122</sup>
  - shower doors and floors had been replaced with non-porous materials;<sup>123</sup>
  - departmental staff viewed their role on-site as 'one of capacity building and contract management';<sup>124</sup>
  - a recommendation that Comcare inspectors return in the next 6-9 months;<sup>125</sup>
- Inspection of the Nauru RPC, October 2014
  - mould on the tents in RPC2 and RPC3 be treated;<sup>126</sup>

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117 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Manus RPC Inspector Report, 30 September 2014, p. 1

118 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Manus RPC Inspector Report, 30 September 2014, p. 4.

119 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Manus RPC Inspector Report, 21 October 2015, p. 5.

120 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Manus RPC Inspector Report, 21 October 2015, p. 5.

121 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Manus RPC Inspector Report, 21 October 2015, p. 6.

122 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Manus RPC Inspector Report, 21 October 2015, p. 6.

123 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Manus RPC Inspector Report, 21 October 2015, p. 7.

124 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Manus RPC Inspector Report, 21 October 2015, p. 8.

125 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Manus RPC Inspector Report, 21 October 2015, p. 1.

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- consider increasing bathroom facilities;<sup>127</sup>
  - the department consider providing information and/or advice to staff and stakeholders regarding the 'health impacts, if any, as a result of being geographically located near phosphate mining activities (short, medium and long term) and the 'altered quality, if any, of bottled water after significant sun exposure';<sup>128</sup>
  - Inspection of the Nauru RPC, November 2015
    - A significant issues with mould and consequent damage to accommodation blocks, including severe damage to the internal linings of individual accommodation pods;<sup>129</sup>
    - IHMS advised that there is a 'high rate of workers that IHMS do not believe have the appropriate fitness for site' and that pre-deployment screening of such staff is not being conducted appropriately;<sup>130</sup>
    - IHMS advised that department staff at an APS 4 to 6 level were being deployed for unreasonable periods (13 weeks), and this was leading to behavioural changes in some workers, including increased alcohol consumption and fatigue;<sup>131</sup>
    - The Republic of Nauru Hospital was, at the time of the inspection, 'very basic and generally in a state of poor repair';<sup>132</sup>
    - School attendance is reported to be as low as 57 per cent;<sup>133</sup>
    - in relation to previous recommendation that advice be given to workers about the potential risks of working close to phosphate mining activity,

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126 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Nauru RPC Inspector Report, 27 October 2014, p. 1.

127 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Nauru RPC Inspector Report, 27 October 2014, p. 1.

128 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Nauru RPC Inspector Report, 27 October 2014, p. 1.

129 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Nauru RPC Inspector Report, 15 November 2015, p. 4.

130 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Nauru RPC Inspector Report, 15 November 2015, p. 4.

131 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Nauru RPC Inspector Report, 15 November 2015, p. 5.

132 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Nauru RPC Inspector Report, 15 November 2015, p. 6.

133 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Nauru RPC Inspector Report, 15 November 2015, p. 6.

and any altered quality of bottled water, staff advised inspectors that this information is not provided in deployment preparation;<sup>134</sup>

- the department consider providing information and/or advice to staff and stakeholders regarding the 'health impacts, if any, as a result of being geographically located near phosphate mining activities (short, medium and long term)' and the 'altered quality, if any, of bottled water after significant sun exposure';<sup>135</sup>
- Comcare inspectors return to conduct an inspection in the next 6-9 months;<sup>136</sup>

6.61 Comcare explained that in March 2016, it exercised its section 155 power to obtain information from the department because it was able to serve that notice at the department's headquarters in Australia.<sup>137</sup> Ms MacLean described the process as:

[An] ongoing dialogue, if you like, with Immigration in relation to their responsibilities as a business or undertaking of the Commonwealth. **We asked them to provide documents so we could ascertain the extent of the business or undertaking at the regional processing centres and the extent of their duties under the WHS Act, as far as reasonably practicable.** We asked for quite a breadth of material from them.<sup>138</sup>

6.62 Comcare, which provided the committee with a copy of this notice,<sup>139</sup> requested a wide range of documents from the department, including copies of:

- all executed contracts, agreements, deeds or memoranda of understanding that the department entered into with all corporations, individuals and foreign States for the provision of services which refer to, affect or could reasonably be expected to relate (whether wholly or in part) to the health and safety of Transferees at all RPCs since 24 March 2014 to the date of the notice;
- all documents, which refer to, affect, or could reasonably be expected to relate (whether wholly or in part) to the health and safety of Transferees, relating to the establishment and operation of the Joint Committee for the practical arrangements required to implement the Nauru and PNG Memorandums of Understanding, including sub-committees relevant to health and safety;

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134 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Nauru RPC Inspector Report, 15 November 2015, p. 9.

135 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Nauru RPC Inspector Report, 15 November 2015, p. 1.

136 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017), Comcare Nauru RPC Inspector Report, 15 November 2015, p. 1.

137 Mr Anthony Blucher, Senior Director, Regulatory Operations Group, Comcare, *Committee Hansard*, Wednesday 15 March 2017, pp. 15-16.

138 Ms Lynette MacLean, A/CEO, Comcare, *Committee Hansard*, Wednesday 15 March 2017, p. 12 (our emphasis).

139 Comcare, response to question on notice, Wednesday 15 March 2017 (received 21 March 2017).

- information about the day-to-day operations of the RPCs since 24 March 2014 including details of the scope of responsibilities and duties of each of the PNG and Nauruan operations managers and their respective duty managers; and details of the roles and responsibilities of the department's employees;
- any complaints processes that employees of the department and contract service provider employees were expected to follow;
- any risk assessments relating to the risk of serious psychological illnesses to Transferees, or the risk of rape, assault, sexual assault or sexual harassment to Transferees;
- any work health and safety plans, and any documents associated with their development (including meeting minutes);
- any documents which set out or demonstrate the existing policy framework for identifying, reporting, responding to, mitigating and/or preventing incidents of sexual and other physical assault at the RPCs; and
- any documents relating to the development of, and content of, any child protection framework (however described) within the RPCs.

6.63 Comcare explained that the department has provided information in response, but 'there were gaps in the information which prevent [Comcare] from finding a definitive view of where some duties lie or do not lie'.<sup>140</sup>

6.64 Comcare advised that it had received the following notifications of 'notifiable incidents':<sup>141</sup>

Year	Nauru RPC	Manus RPC
2012-2013	0	1
2013-2014	7	8
2014-2015	13	17
2015-16	9	6
2016-2017 (year to date)	2	4

6.65 Comcare explained to the committee that it can access material from a range of sources in relation to potential notifiable incidents at the RPCs, and that 'having establishing that threshold question...about the jurisdiction', would make inquiries in

140 Mr Anthony Blucher, Senior Director, Regulatory Operations Group, and Ms Lynette MacLean, A/CEO, Comcare, *Committee Hansard*, Wednesday 15 March 2017, p. 12.

141 Comcare, *Committee Hansard*, Wednesday 15 March 2017, pp. 13-14.

relation to that intelligence.<sup>142</sup> It clarified that notifiable incidents are just one of several triggers for Comcare to commence an inspection.<sup>143</sup>

6.66 Mr Justin Napier of Comcare explained that its approach to the application of the Act to the department, in relation to the RPCs has been:

...to establish whether, and the extent to which, DIBP has duties to detainees. Having established that threshold question, we issued the 155 notice. We have assessed that, we have sought legal advice and we are in a position, now that we have clarity as to whether the act extends to the risks related to detention...which we have established now—to ask those questions and seek further information.<sup>144</sup>

6.67 Ms MacLean explained that, at this point, Comcare cannot be satisfied that all notifiable incidents have been reported to Comcare, or that the department or any of its contractors may or may not be in breach of the WHS Act.<sup>145</sup>

6.68 Comcare explained that it plans to conduct a further visit to the Nauru and Manus RPCs, but is yet to establish either the scope or terms of reference in relation to this proposed visit.<sup>146</sup>

6.69 Comcare explained that it, in its view, the section 232 period of limitation (of two years) for offences under the WHS Act, does not commence until Comcare is in possession of sufficient facts so as to make a determination.<sup>147</sup> It confirmed that it does not regard itself to be in such a position and, as such, does not believe that the limitation period 'clock' has started counting down.

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142 Mr Justin Napier, General Manager, Regulatory Operations Group, Comcare, *Committee Hansard*, Wednesday 15 March 2017, p. 19.

143 Mr Justin Napier, General Manager, Regulatory Operations Group, Comcare, *Committee Hansard*, Wednesday 15 March 2017, p. 14.

144 Mr Justin Napier, General Manager, Regulatory Operations Group, Comcare, *Committee Hansard*, Wednesday 15 March 2017, p. 20.

145 Ms Lynette MacLean, A/CEO, Comcare, *Committee Hansard*, Wednesday 15 March 2017, p. 20.

146 Ms Lynette MacLean, A/CEO, Comcare, *Committee Hansard*, Wednesday 15 March 2017, p. 19.

147 Ms Lynette MacLean, A/CEO, Comcare, *Committee Hansard*, Wednesday 15 March 2017, p. 13.