



MONASH University
Castan Centre for Human Rights Law



Submission to the Senate

Legal and Constitutional Affairs References Committee

**Inquiry into the serious allegations of abuse, self-harm and neglect
of asylum seekers in relation to the Nauru Regional Processing
Centre and Manus Regional Processing Centre**

Prepared by Dr Tania Penovic

with research assistance by Caitlin McInnis

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We are grateful for the opportunity to make a submission to this important enquiry. We have made submissions to a number of previous enquiries addressing the processing of asylum seekers. These have included the 2015 Senate Joint Select Committee enquiry into conditions and circumstances at the regional processing centre in Nauru and the Senate Legal and Constitutional Affairs References Committee's enquiry into events of February 2014 at Manus Island. We understand that the committee has access to all documents relating to these previous enquiries, and other relevant documents including the report of Moss enquiry.¹

The concerns we expressed in our submissions to previous enquiries have intensified with the passage of time. We will not repeat the content of these submissions but will focus instead on items (a), (c) and (f) of the terms of reference.

(a) Abuse and self-harm

Allegations of abuse, neglect and self-harm in regional processing centres are not new. They have been a concomitant of offshore processing in these settings and can properly be characterised as a manifestation of Australia's refugee policy.

Self-harm has become a feature of life in regional processing centres. The death of Omid Masoumali and horrific injuries suffered by Hodan Yasin demonstrate the extremes of suffering borne of hopelessness and desperation in these environments. More than 2000 incident reports published in The Guardian as *The Nauru Files* reveal alarming instances of abuse, including accounts of serious assaults of children by security guards² and a practice of under-reporting incidents or failing to document their seriousness. Recent reports³ reveal children living in constant fear of violence, being unable to access education or have their most basic needs met.

¹ Philip Moss, Final Report of Review into Recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, 6 February 2015 at

<https://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-conditions-circumstances-nauru.pdf>

See also Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014* (2014), Amnesty International, *Island of Despair: Australia's "processing of refugees on Nauru"*, ASA 12/4934/2016, October 2016 and the Nauru Files at

<https://www.theguardian.com/news/series/nauru-files>

² See for example incident 20150903-1.

³ See generally Amnesty International, *Island of despair: Australia's 'processing' of refugees on Nauru* (2016), ABC 4 Corners, *The Forgotten Children* (October 2016) at <http://www.abc.net.au/4corners/stories/2016/10/17/4556062.htm>

Factors which contribute to abuse and self-harm have been identified, documented and analysed by a range of professionals in reports which have been available for some time.⁴ These include depriving members of an already vulnerable group of liberty in circumstances in which they are isolated, deprived of hope about future prospects and denied information about their future and basic support services.

While deprivation of liberty for an indeterminate period has a detrimental impact on mental health, the impact is exacerbated by prolonged detention. The effect of these contributing factors is heightened in children and asylum seekers addressing the effects of prior trauma. In the time that has elapsed since the previous enquiries, many asylum seekers have remained in the regional processing centres at Nauru and Manus Island. The effluxion of time has not offered them hope or the prospect of safe and durable resettlement. It has exacerbated their suffering and intensified the effects of offshore detention on their mental health.

A lack of transparency and accountability in the operation of regional processing centres have contributed to an environment of abuse and neglect, in which serious violations of fundamental human rights are commonplace. These factors emanate from the arrangements under which the centres are run; in other nations by a range of contractors and sub-contractors. Obtaining permission to visit regional processing centres is notoriously difficult, reflecting the opacity of their operations.

The *Australian Border Force Act 2015* (ABFA) has cemented an accountability vacuum, creating a climate of secrecy and intimidation and heightening the risk of neglect and abuse. We believe that the climate of secrecy created by the Act is fundamentally inconsistent with Australia's human rights obligations and democratic traditions. The ramifications of the ABFA are considered below under item (f).

⁴ D Silove, P McIntosh, and R Becker, 'Risk of Retraumatization of Asylum-Seekers in Australia' (1993) 27 *Australian & New Zealand Journal of Psychiatry* 606; Z Steel and D Silove, 'The Mental Health Implications of Detaining Asylum Seekers' (2001) 175 *Medical Journal of Australia* 596; Z Steel and others, 'Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees' (2006) 188 *British Journal of Psychiatry* 58; L Newman, M Dudley and Z Steel, 'Asylum, Detention and Mental Health in Australia' (2008) 27 *Refugee Survey Quarterly* 110. More recent examples include Green JP, Eagar K. The health of people in Australian immigration detention centres. (2010) 192(2) *Medical Journal of Australia* 65-70; Newman et al, 'Mental illness in Australian immigration detention centres', *The Lancet*, Volume 375, Issue 9723, 1344-1345; Editorial: 'Mental illness in Australian immigration detention centres', *The Lancet*, Volume 375, Issue 9713, Page 434, 6 February 2010.

(b) the obligations of the Commonwealth government

The Commonwealth retains obligations with respect to asylum seekers processed offshore under international human rights law and under the general law.

Non-delegable duty of care

The Commonwealth owes a duty of care to asylum seekers transferred to Nauru or Papua New Guinea (PNG) under its policies and processed in regional processing centres. This duty cannot be outsourced to contractors or the governments of other nations.

In our submission to the Select Committee concerning the conditions and circumstances at the regional processing centre in Nauru, we considered the jurisprudence regarding the Commonwealth government's non-delegable duty of care towards asylum seekers processed at the regional processing centre in Nauru. This position has since been embodied in a judgment of the Federal Court of Australia with respect to the health care needs of a refugee in Nauru in *Plaintiff S99 v Minister for Immigration and Border Protection* [2016] FCA 483.

The applicant identified as 'S99' is a refugee from an undisclosed African nation who travelled from Indonesia to Australia by boat in October 2013 and was detained by the Minister under the *Migration Act 1958* and then transferred to Nauru for the processing. After being recognised as a refugee, S99 was released from detention and while awaiting resettlement she was raped and became pregnant as a consequence of the rape. The attack exemplifies the vulnerability of refugees living in Nauru, where they have been subjected to hostility and violent attacks by Nauruan locals.⁵

Because Nauru did not provide an appropriate medical or legal setting for a termination of S99's pregnancy, the Minister made arrangements for an abortion to be performed in Papua New Guinea (PNG) and S99 was transferred to Port Moresby. Like Nauru, PNG did not provide an appropriate medical or legal setting. Abortion is unlawful in PNG and evidence provided by a range of medical professionals (with expertise in neurological, gynaecological, and psychiatric medicine and anaesthesia) revealed that the resources required to perform a safe abortion in S99's circumstances were not available. In light of S99's complex medical needs,

⁵ For example ABC 4 Corners, *The Forgotten Children* (October 2016), note 3 above.

the risks of an abortion being conducted in PNG or an equivalent medical setting would include brain damage, pneumonia or death.

The case was concerned with the question of whether the Minister owed the applicant a duty to exercise reasonable care to provide a safe and lawful abortion. Because of an absence of authority holding that a duty of care exists in directly comparable factual circumstances, Bromberg J considered a number of factors (known as 'salient features' which are used to determine whether a duty of care exists in novel circumstances) to ascertain the existence and scope of the duty owed. Important factors included S99's vulnerability and dependence on the Commonwealth for her very existence (at [252]). She had no means of survival independent of the services provided by the Commonwealth through its service providers on Nauru, including access to food, water, housing and health care.

Further salient features included the foreseeable and grave (possibly extreme) harm which would result from the absence of a safe and lawful abortion. Of further salience were the degree and nature of control exercisable by the Minister to avoid harm. The Minister was in a position of control as to whether S99 can access an abortion and over the legal and medical setting of the abortion.

His Honour declared that it would be a breach of the Minister's duty (to exercise reasonable care to discharge the responsibility he assumed to procure a safe and lawful abortion) to procure an abortion so that it takes place in a location where participation does not expose persons to criminal liability or where the abortion is procured so that it takes place in a medical facility without specialist doctors with the necessary neurological, psychiatric, anaesthetic and gynaecological expertise.

The Commonwealth's arrangements for the applicant's medical services were made through its contactors pursuant to its powers under section 198AHA of the *Migration Act 1958* or its executive power. Its duty of care could not be delegated to its contractors.

His Honour concluded that the abortion procured by the Minister for the applicant in PNG did not discharge his duty of care. His Honour granted injunctions to restrain the Minister from failing to exercise his duty. These included an order that the abortion not be procured so that it takes place in PNG, that the abortion not be procured in a place where those participating in

the procedure are exposed to criminal liability and that it not be procured in a place without the expertise and facilities required to address S99's medical needs.

International human rights norms

While the duty of care under the general law cannot be outsourced or delegated, the Commonwealth's obligations under international human rights law are not displaced by offshore processing. Australia remains bound by these obligations where it exercises power and effective control. We have outlined this position in our previous submissions.⁶

The offshore processing of asylum seekers has seen Australia fail to meet its obligations under treaties which include the Convention relating to the Status of Refugees, the International Covenant on Civil and Political Rights (ICCPR), Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child (CRC). We are aware that the Committee has documents addressing specific violations of human rights. We will not revisit the detailed discussion of human rights norms in our submission but reiterate our previous recommendation that the processing of asylum seekers at both regional processing centres has been associated with a range of abuses of fundamental human rights and should cease.

In light of serious allegations of child abuse, we wish to consider the CRC in the context of the growing awareness of the causes and consequences of child abuse in addition to the factors that assist in prevention and redress.

Children's rights

In the formal opening of the Royal Commission into Institutional responses to Child Sexual Abuse, Justice Peter McClellan made reference to Australia's obligations under the CRC, characterising the Royal Commission as a step towards compliance with its obligations. He described the Convention as having 'both symbolic significance and practical consequences in Australia' and representing 'a critical step in our society being prepared to look at the manner in which the obligations owed to our children have been met, acknowledge wrongdoing and

⁶ See also the Statement of the Office of the United Nations High Commissioner for Refugees (Regional Representation, Canberra), *Detaining asylum seekers and refugees in offshore detention centres subject to international obligations, despite High court decision*, 5 February 2016 at <http://www.unhcr.org/news/press/2016/2/58100b124/detaining-asylum-seekers-and-refugees-in-offshore-detention-centres-subject.html>

provide practical means to redress those wrongs and assist in the healing of those who have suffered.⁷ Counsel assisting the Royal Commission acknowledged that Australia is obliged to take all appropriate legislative, administrative, social and educational measures to protect children from sexual and other forms of abuse including measures for the prevention, identification, reporting, referral, investigation, treatment and follow up of incidents of child abuse.⁸

Over the ensuing three and a half years, the Royal Commission has conducted numerous hearings and 45 case studies. It has examined institutional settings in which children are vulnerable to sexual abuse and the impediments to the protection of children and reporting of abuse. It has identified the factors which make institutions safe for children⁹, drawing on the CRC and its underpinning principle that the best interests of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies¹⁰. The Royal Commission has observed that all institutions that directly engage with or provide services to children should act with the best interests of the child as a primary consideration and ensure that the principle is widely known and understood by staff and volunteers and integrated into all elements of its operation.

The Royal Commission has investigated a number of institutional environments in which children are vulnerable to abuse. It is clear that the Nauru Regional Processing Centre is one such environment. We understand that the Royal Commission is conducting an ongoing investigation into allegations of child sexual abuse in immigration detention centres¹¹ but will not investigate events which have occurred outside Australia. We believe that Australia bears responsibility for these events under international law and that the Royal Commission is well placed to investigate.

⁷ ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE FORMAL OPENING OF THE INQUIRY AT THE COUNTY COURT OF VICTORIA ON WEDNESDAY, 3 APRIL 2013 AT 10.00 A.M, at 2:<http://www.childabuseroyalcommission.gov.au/documents/transcript-3-april-2013.pdf>

⁸ Ibid, Gail Furness SC at 12.

⁹ Royal Commission into institutional responses to Child Sexual Abuse, Creating Child Safe Institutions, July 2016 at <https://www.childabuseroyalcommission.gov.au/getattachment/5d0dc659-68c2-46f9-847b-fafd52f58673/Creating-child-safe-institutions>

¹⁰ Article 3(1).

¹¹ Royal Commission into Institutional Responses to Child Sexual Abuse, Statement on immigration detention centres, 15 August, 2016 at <http://www.childabuseroyalcommission.gov.au/media-centre/media-releases/2016-08/statement-on-immigration-detention-centres>

The government's establishment and funding of the Royal Commission demonstrates a commitment to meeting our obligations under the CRC. A commitment to the rights of the child requires children to be removed from the institutional environments of immigration detention facilities, where they are vulnerable to sexual and other forms of abuse. It requires that the abuse of children be investigated, that perpetrators be held accountable and survivors provided with support and redress. We believe that removing all children from the unsafe environment of the Nauru regional processing centre would represent an important first step in compliance with our international obligations. We furthermore recommend that the enquiries of the Royal Commission should be expanded to abuse alleged to have occurred in Nauru.

(f) the effect of Part 6 of the Australian Border Force Act 2015

The lack of transparency and accountability that have been a concomitant of offshore processing have been compounded by the climate of secrecy and intimidation created by Part 6 of the ABFA. This legislation undermines Australia's ability to comply with its obligations with respect to the treatment of asylum seekers.

In order to respect, protect and fulfil our human rights obligations, Australia is required to take steps to prevent abuse and ensure accountability and redress in circumstances where abuse occurs. An absence of transparency generates a significant risk of human rights abuse. Where abuse is un-(or under-) reported, perpetrators are not held to account and abuses continue while victims remain unprotected and without redress. The ABFA carries the threat of punishing those who seek to protect human rights, while hampering accountability in the inaccessible, isolated and under-scrutinised environment of regional processing centres.

Disclosing human rights abuses accords with professional codes of conduct.¹² With respect to child abuse and neglect, all Australian jurisdictions have reporting requirements, reflecting the reality that such disclosure is a concomitant of child protection.¹³ Yet the ABFA has placed

¹² See for example Medical Council of Australia, Good Medical Practice: A Code of Conduct for doctors in Australia, March 2014 at [5.3] Health Advocacy which provides that '[g]ood medical practice involves using your expertise and influence to protect and advance the health and wellbeing of individual patients, communities and populations:

<http://www.medicalboard.gov.au/Search.aspx?q=protect+and+advance+the+health>

¹³ For a summary of mandatory reporting laws in Australia, see <https://aifs.gov.au/cfca/publications/mandatory-reporting-child-abuse-and-neglect>

workers in the invidious position of risking prosecution for disclosing information which they would ordinarily be obliged to disclose.

The risk of criminal liability has had a chilling effect on the flow of information. The breadth of the Act's definitions of 'entrusted person' and 'protected information' raise the possibility of criminal liability with respect to a range of disclosures which are in the public interest and consistent with the freedom of expression enshrined in article 19 of the ICCPR.

The restrictions upon the freedom of expression created by the Act do not sit comfortably within a mature democracy. These restrictions undermine Australia's international standing and stifle constructive dialogue with international human rights bodies and experts. The scheduled visit to Australia by the United Nations Special Rapporteur on the Human Rights of Migrants, Francois Crépeau, could not be carried out due to the operation of the ABFA. Professor Crépeau observed that the 'threat of reprisals with persons who would want to cooperate with me on the occasion of this official visit is unacceptable' and that the ABFA 'prevents me from fully and freely carrying out my duties during the visit, as required by the UN guidelines for independent experts carrying out their country visits.'¹⁴

The 'stifling' effect of the ABFA and a concomitant 'atmosphere of fear, censorship and retaliation' in the context of human rights debate was observed by another independent expert in the context of a visit to Australia.¹⁵ Michel Forst, United Nations Special Rapporteur on the situation of Human Rights Defenders observed that laws such as the ABFA have 'created significant barriers to legitimate whistleblowing on human rights abuses... [and]... led to a worrying trend of pressures exerted by the Government on civil society through intimidation and persecution.'¹⁶ The Special Rapporteur's final report will be presented to the United Nations Human Rights Council and General Assembly.

¹⁴ United Nations Human Rights, Office of the High Commissioner; Migrants / Human rights: Official visit to Australia postponed due to protection concerns

¹⁵ United Nations Human Rights, Office of the High Commissioner; End of mission statement by Michel Forst, United Nations Special Rapporteur on the situation of human rights defenders, Visit to Australia, 18 October 2016 at

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E>

¹⁶ Ibid

In his end-of-mission statement, Mr Forst expressed concerns about the fear created by legislation such as the ABFA and called on defenders of human rights to become more familiar with the Declaration on Human Rights Defenders¹⁷ adopted by the General Assembly in 1998 to mark the 50th anniversary of the Universal Declaration of Human Rights. The Declaration on Human Rights Defenders recognises responsibilities of states and the rights and responsibilities of individuals, groups and associations to promote respect for and foster knowledge of human rights. It encompasses the right to know, seek, obtain, receive and hold information about human rights (article 6(1)), to freely disseminate this information or knowledge (article 6(b)) and the right of everyone to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realisation of human rights (article 8(2)).

The Declaration states in Article 8(1) that everyone has the right, individually and in association with others, to have effective access, on a non-discriminatory basis, to participation in the government of his or her country and in the conduct of public affairs. We regard the current enquiry as being consistent with this article. It offers an important opportunity to take steps towards changing the dialogue and meeting the recommendations of the Special Rapporteur; in particular to restore an atmosphere of trust and confidence with human rights defenders and review secrecy laws such as the ABFA with a view to eradicating provisions that are in contravention with international human rights principles.¹⁸

We note the effect of the Determination of 30 September 2016 which exempts Health Practitioners from the secrecy and disclosure provisions of the ABFA. This represents an important steps towards enabling health practitioners to uphold their professional obligations and advance the health and well-being of their patients. The determination nevertheless excludes other professionals such as teachers and social workers. Until all staff are relieved of the threat of criminal liability with respect to the disclosure of information, a climate of secrecy and intimidation will prevail. We therefore recommend the repeal of Part 6 of the ABFA.

¹⁷ Resolution adopted by the General Assembly [on the report of the Third Committee (A/53/625/Add.2)], Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms at <http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>

¹⁸ End of mission statement by Michel Forst, note 13 above.