
7 November 2016

PO Box A147
Sydney South
NSW 1235
DX 585 Sydney

refugees@alhr.org.au
www.alhr.org.au

Ms Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

**Introduction**

Australian Lawyers for Human Rights (ALHR) is grateful for the opportunity to provide a submission to the Legal and Constitutional Affairs Committee Inquiry into self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre.

ALHR was established in 1993 and is a network of legal professionals active in practising and promoting awareness of international human rights. ALHR has a national membership of lawyers and law students across Australia and active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

As the Committee is aware, on 31 March 2016, AHLR provided a submission to the Inquiry into the conditions and treatment of asylum seekers on Nauru and Manus. We attach that submission for your reference. To the extent that they are still relevant, given policy and other changes, the views we expressed in that submission remain unchanged.

In this submission, ALHR will address the following points under the terms of reference:



The terms of reference allow the Committee to consider 'any other related matters'. ALHR notes that this inquiry proceeds on the premise that offshore processing should continue. ALHR opposes offshore processing on Nauru and Manus Island in its current form. We believe that the current system breaches Australia's obligations under international human rights law and international refugee law.

In considering 'other related matters', we urge the Committee to consider the need for policy alternatives to offshore processing. From ALHR's perspective, it is clear that the current system of offshore processing is unsustainable, ineffective and causing considerable harm to asylum seekers and refugees.

We urge the Committee to consider the range of alternative policy options canvassed in the Human Rights Commission's Report, *Pathways to Protection: A human rights-based response to the flight of asylum seekers by sea.*[1]

ALHR agrees with the Commission that alternative solutions should be pursued. ALHR supports the Commission's recommendations to expand opportunities for safe entry into Australia and enhance Australia's foreign policy strategies on migration in the Asia-Pacific region.[2]

---

1 Australian Human Rights Commission, 'Pathways to Protection: A Human Rights-Based Response to Flight of Asylum Seekers by Sea' (2016).

2 Ibid 6–9.

## *1. The obligations of the Commonwealth Government and contractors relating to the treatment of asylum seekers, including the provision of support, capability and capacity building to local Nauruan authorities*

1.1. Conditions on Nauru and Manus Island are inadequate to ensure the health, safety and well-being of refugees and asylum seekers. The lack of basic infrastructure, health and other services and harsh living conditions have been well documented in submissions to this and other inquiries, so we will not repeat them here.

1.2. It is important to note that, as a matter of international law, Australia cannot absolve itself of its responsibilities towards asylum seekers and refugees by contracting out services to a third party, nor can it absolve itself of responsibility by merely transferring asylum seekers to Manus Island and Nauru.[3] Under international law, the starting point is that a State party to human rights treaty is bound to uphold those rights in respect of persons within the State's 'jurisdiction', even if this is outside its territory.[4] The 'jurisdiction' of a State extends to situations where it exercises 'effective control' in another state.[5] As the UNHCR as noted:

*'It is generally recognised that a State has jurisdiction, and consequently is bound by international human rights and refugee law, if it has* ***effective de jure*** *[legal]* ***and/or de facto*** *[actual]* ***control over a territory or over persons****. The existence of jurisdiction under international law does not depend on a State's subjective acknowledgment that it has jurisdiction. Jurisdiction is established as a matter of fact, based on the objective circumstances of the case.*

*This means that 'State 'A' may have jurisdiction over – and responsibilities under international law towards – people who are on the territory of State 'B' if State A nonetheless has de facto control over those people or the area where they are located (e.g. where State A runs reception arrangements or asylum procedures on the territory of State B)'.*[6]

1.3. While the High Court's judgment in *Plaintiff M68 v Minister for Immigration and Border Protection* upheld the constitutionality of offshore processing, members of

---

3 It has been UNHCR's longstanding position that the physical transfer or asylum seekers to an offshore processing country does not extinguish Australia's legal responsibility for the protection of asylum seekers affected by the transfer arrangements: UNHCR monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013, November 2013. Further, according to the UN Articles of Responsibility of States for Internationally Wrongful Acts, a country cannot contract out its international obligations: see article 8.

4 See UN Human Rights Committee, *General Comment No. 31* [80] noting that obligations of State parties extend to individuals both inside and outside its territory, but nevertheless subject to its jurisdiction. See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136(dealing in particular with rights under the ICCPR and the CRC). Pursuant to pursuant to the International Covenant on Civil and Political Rights (ICCPR), Australia will be in breach of its obligations if it removes a person to another country in circumstances where there is a 'real risk' that their rights under the ICCPR will be violated: See Australian Human Rights Commission, 'Human rights issues raised by the transfer of asylum seekers to third countries', 15 November 2012, p10, citing an extensive list of Human Rights Committee decisions.

5 For example, see article 2(1) of the ICCPR which requires States parties to 'respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.'

6 UNHCR, Maritime Interception Operations and the Processing of International Protection Claims, paras. 10, 11 (emphasis in original).

the court made it clear that Australia was responsible for, or had been implicated in, the detention of asylum seekers on Nauru.[7] In particular, the judgment of Gordon J explicitly held that Australia had exercised effective control on Nauru.[8]

1.4. ALHR agrees that Australia maintains **'**effective control' over the asylum seekers on Nauru and Manus Island**.** Though the precise degree of control over these asylum seekers is not entirely clear, as details are not often made publically available, the Australian Government forcibly sent these people to Nauru and Manus Island; it exercises control and makes decisions with respect to their daily lives; it funds the centres and services provided; it has been closely involved in the refugee status determination process; and it has engaged private contractors to run the centres.[9] ALHR argues that Australia also maintains 'effective control' over recognised refugees in both Nauru and Manus, as explained below.

1.5. Following the PNG Supreme Court's decision that detention on Manus Island breaches the right to freedom under the PNG Constitution,[10] in August 2016 the Australian and PNG Governments agreed to close the detention centre. ALHR understands that there are some 800 men left on Manus Island.[11] While the PNG Government has allowed the men limited freedom of movement on the island, those whose claims have not yet been processed or have been rejected are not allowed to leave the country.[12] For recognised refugees, no prospect of resettlement has been forthcoming and only 24 have opted to settle in PNG.[13] It is ALHR's understanding that the rest remain living in the detention centre and their movement is limited.[14]

1.6. Until a durable solution is found, they remain under Australia's effective control. According to UNHCR, with respect to recognised refugees on PNG, '[u]ntil safe and sustainable durable solutions are found in PNG or elsewhere, the safety and protection of refugees must remain the shared responsibility of the two States in accordance with the 1951 Refugee Convention.'[15] Indeed, asylum seekers and

---

7 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1. In particular, see the judgements of French CJ and Keifel, Bell, Gageler, Nettle and Gordon JJ.

8 Ibid, per Gordon J at [352] –[356].

9 UNSW, 'Factsheet: Offshore processing: Australia's responsibility for asylum seekers and refugees in Nauru and Papua New Guinea, 8 April 2015, pp10-11.

10 *Namah v Pato* [2016] PGSC 13; SC1497 (26 April 2016).

11 See Kaldor Centre for International Refugee Law, Transfer Tracker <http://www.kaldorcentre.unsw.edu.au/publication/transfer-tracker>

12 ABC News, 'Manus Island asylum seekers 'broken' after Supreme Court dismisses applications,' 28 October 2016, http://www.abc.net.au/news/2016-10-28/manus-island-asylum-seekers-broken-after-court-decision/7974164.

13 The Guardian, Papua New Guinea asks Australians for help resettling refugees from Manus Island,' 4 October 2016, https://www.theguardian.com/australia-news/2016/oct/04/papua-new-guinea-asks-australia-for-help-resettling-refugees-from-manus-island.

14 Asylum seeker Behrouz Boochani notes that freedom of movement in limited. 'There is a bus in front of the gate and we have to get in the bus and go to Lorengau' but that 'most of the people do not go outside and only a few persons go outside each day. This place is a navy place (Lombrum Naval Base) and we cannot go outside'. See, The National, Manus Refuges in Limbo, http://www.thenational.com.pg/manus-refugees-limbo/, 14 October 2016.

15 UNHCR, UNHCR Mission to Manus Island, Papua New Guinea: 15-17 January 2013, 4 February 2013, http://www.refworld.org/docid/5139ab872.html p3.

refugees would not be on Manus Island but for Australia's actions, and the fact that Australia is continuing to negotiate with third countries to resettle recognized refugees suggests that it continues to exercise effective control over the population.

1.7. In relation to Nauru, the Australian Government has consistently argued that the regional processing centre on Nauru does not constitute 'detention' since asylum seekers and refugees can take excursions around the island and can freely choose to go home, and because any restrictions on their movements are as a result of their visa conditions rather than being detained.[16]

1.8. However, as Amnesty International's 2016 report highlights, while people are not 'technically detained', Nauru is 'for all intents and purposes an open air prison that people cannot leave, even when they have been officially recognised as refugees'.[17] Indeed, despite New Zealand's long-standing offer to resettle 150 refugees a year from Nauru and Manus Island, none have been allowed to take up that offer by Australia.[18] Amnesty's report also highlights the extent to which the Australian Police Force (AFP) and the Australian Border Force (ABF) employees play a role — sometimes a key role — in the management of the processing centres and the refugee population living outside the centre.[19] Again, the fact refugees are not allowed to leave the island and that Australia is actively seeking third countries to resettle refugees suggests that despite the 'open centre' arrangements, Australia is still exercising 'effective control' over the population.

1.9. Given that Australia maintains effective control over asylum seekers and refugees in Manus Island and Nauru, ALHR is of the view that Australia is obliged to ensure that their treatment is compatible with its obligations under the 1951 *Refugee Convention* and the other international human rights instruments to which it is party. This includes protection against *refoulement;* access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection; access to health, education and basic services; safeguards against arbitrary detention; and the identification and assistance of people with specific needs.[20] Significantly with respect to the subject of this

---

16 *AG v Secretary of Justice* [2013] NRSC 10, [52] – [54]. However, it is arguable that despite the open centre arrangements, the curfew place on asylum seekers and the limited time allowed outside the processing centre amounts to 'detention' under Article 9 of the ICCPR. This is because 'detention' is to be considered with respect to the severity of the restrictions, rather than the nature of substance of the restriction. See, Azadeh Dastyari, 'Detention of Australia's asylum seekers in Nauru: Is deprivation of liberty by any other name just as unlawful?' 2015 *UNSW Law Journal* 38(2).

17 Amnesty International, Island of Despair: Australia's 'Processing' of Refugees on Naruru, p 5.

18 Ibid p 45.

19 Ibid pp 42-46.

20 UNHCR, 'Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers', May 2013, p 2. Though these rights were listed with respect to transfer arrangements, UNHCR explains on p 3 that '[i]n terms of State responsibility post-transfer, at a minimum, and regardless of the arrangement, the transferring State remains, inter alia, subject to the obligation of *non-refoulement*. In addition, the transferring State may retain responsibility for other obligations arising under international and/or regional refugee and human rights

inquiry, this also includes an obligation to ensure the safety and security of both asylum seekers and refugees.

1.10. Australia also has an obligation to find a durable solution for each recognised refugee in Nauru and Manus Island within a reasonable time.[21] With respect to finding solutions for refugees whose claims have been processed under the joint responsibility of more than one State, in a processing centre located in the territory of one of these States, UNHCR has explained that '[r]esponsibility for the identification and implementation of solutions for those in need of international protection and resolution for others would remain with all States involved in the regional processing arrangement.'[22]

1.11. Australia does not have sole responsibility for the treatment of these asylum seekers and refugees: PNG and Nauru are also jointly responsible for ensuring that these people's treatment does not violate their own international obligations. However, while Australia's responsibilities for the treatment of asylum seekers and refugees in Nauru and PNG are shared with these two countries respectively, the obligations of each State are not identical. For example, Nauru is not party to the *International Covenant on Economic, Social and Cultural Rights* or the *International Covenant on Civil and Political Rights*. And while PNG is party to the 1951 *Refugee Convention*, it has made reservations limiting the rights it is obligated to provide to refugees.[23] Australia must therefore ensure that the standards of treatment applied by the PNG and Nauruan authorities are consistent with Australia's higher level of obligations under international human rights and refugee law.

1.12. If standards of treatment are not met in PNG or Nauru for reasons such as lack of resources or capacity, this does not absolve the Australian Government of its responsibilities. In order to ensure that the rights of asylum seekers and refugees are upheld, therefore, Australia must ensure that the authorities in Nauru and PNG are suitably equipped in terms of funding, skills, resources and capacity. This would require a substantial investment by the Australian Government towards improving the available facilities and enhancing security standards. It would entail working with the local authorities, including through education and training, to

---

law. This would be the case, for example, where the reception and/or processing of asylum-seekers in the receiving State is effectively under the control or direction of the transferring State.

21 UNHCR, 'Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers', May 2013, p2. This Note cites the following examples: ExCom Conclusion No. 85 (XLIX) (Conclusion on International Protection) (1998), para. (aa); ExCom Conclusion No. 58 (XL) (Problem of Refugees and Asylum-Seekers who move in an irregular manner from a country in which they had already found protection) (1989), para. (f); UN High Commissioner for Refugees, Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002), February 2003, available at: http://www.unhcr.org/refworld/docid/3fe9981e4.html.

22 UNHCR, Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing, Protection Policy Paper, November 2010, <http://www.refworld.org/pdfid/4cd12d3a2.pdf>, [54].

23 These reservations apply to article 17(1) (work rights), article 21 (housing), article 22(1) (education), article 26 (freedom of movement), article 31 (non-penalisation for illegal entry or presence), article 32 (expulsion) and article 34 (facilitating assimilation and naturalisation).

ensure the proper treatment of asylum seekers and provision of services including housing, medical and psychological care, education, and recreational activities. It would also extend to addressing issues related to security standards in both PNG and Nauru including impunity, the failure to protect, and alleged police misconduct.

1.13. The conduct of persons and entities who are acting on the instructions of, or under the direction or control of, a State in carrying out the conduct, may also be attributable to that State.[24] In PNG and Nauru, the private companies and organisations contracted by the Australian Government to provide services 'act on the instructions' of the Department of Immigration and Border Protection (DIBP) and also act under the DIBP's 'direction or control.'[25] Their obligations, therefore, are in line with those of the Australian Government.

## *2. The role an independent child's advocate could play in ensuring that the rights of and interests of unaccompanied minors are protected*

2.1. Australia is a party to the UN *Convention on the Rights of the Child*.[26] As such it has an obligation to ensure that children's rights are protected. Under the Convention, this includes: the right to be free from abuse, neglect and violence by their parents or anyone else looking after them;[27] the right to be free from torture or cruel, inhuman or degrading treatment or punishment;[28] the right to special help and protection as refugees;[29] the right to adequate health care, clean water, food and a healthy environment;[30] and the right to be protected from activities that would harm their development.[31] Overall, the best interests of the child must be a primary consideration in all actions concerning children.

2.2. Specifically with respect to unaccompanied children, Article 20 of the *Convention on the Rights of the Child* provides that a child temporarily or permanently deprived of his or her family environment shall be entitled to special protection and assistance provided by the State. According to UNHCR, unaccompanied children should not be detained and their detention cannot be justified on the basis of their migration status.[32]

---

24 Responsibility of States for Internationally Wrongful Acts, UN General Assembly resolution 62/61, A/RES/62/61, 8 January 2008, http://www.refworld.org/docid/478f60c52.html (Responsibility of States for Internationally Wrongful Acts), arts. 4, 5, 7 and 8.

25 UNSW, 'Factsheet: Offshore processing: Australia's responsibility for asylum seekers and refugees in Nauru and Papua New Guinea, 8 April 2015, p5.

26 *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990).

27 Ibid art 19.

28 Ibid art 37.

29 Ibid art 22.

30 Ibid art 24.

31 Ibid arts 6, 36.

32 United Nations High Commissioner for Refugees, Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), Guideline 9.2, para 54.

2.3. ALHR is of the view that offshore detention is no place for children, particularly those who are unaccompanied.[33] The recent allegations contained in the Nauru files, and the evidence of teachers and other workers on Manus and Nauru aired on Four Corners, raises concerns that Australia is breaching its international obligations in respect of asylum seeker and refugee children.[34] These allegations add to a growing body of evidence, including from the Moss Inquiry, which uncovered evidence supporting allegations of sexual and physical assaults on Nauru including allegations of rape, one of which was against a child.[35] Further, the Australian Human Rights Commission's 2014 report, *The Forgotten Children*, also provides evidence of breaches of Australia's obligations under the *Convention on the Rights of the Child*.[36]

2.4. ALHR notes that 'unaccompanied minors' — those who seek asylum and arrival without a parent or legal guardian — are in a particularly vulnerable situation. *The Forgotten Children* report points to evidence that detention has severe impacts on these children's emotional and mental wellbeing and raises the risk of self-harm. In light of the recent information revealed in the Nauru files, as well as in the information contained in Amnesty's recent report, *Island of Despair*, ALHR is concerned that children — and especially unaccompanied minors — will be exposed further harm if they are left on Manus and Nauru. Therefore, the best option is to bring these children to Australia where their welfare and safety can be guaranteed.

## *3. Recommendations with respect to an independent child's advocate for unaccompanied minors*

3.1. ALHR's starting point is that all children in offshore processing centres must be brought to Australia and the centres must be closed. In the interim, ALHR supports the appointment of an independent children's advocate to ensure that the rights and interests of all unaccompanied child asylum seekers and refugees are protected. As evidenced in Amnesty International's recent report, *Island of Despair*, Nauru's child protection framework is virtually non-existent,[37] raising serious concerns about the protection of all children, especially those who are unaccompanied. The Human Rights Commission's *Forgotten Children* report has further highlighted that the lack of an independent child's advocate has dire consequences for children on Nauru.[38]

---

33 Australian Lawyers for Human Rights, Ten changes ALHR would like to see with respect to the Australian Government's policies towards asylum seekers and refugees < https://alhr.org.au/10-needed-changes-australian-governments-policies-towards-asylum-seekers-refugees/>

34 See ABC, Four Corners: The Forgotten Children < http://www.abc.net.au/4corners/stories/2016/10/17/4556062.htm> (24 October 2016); The Guardian, The Nauru Files < https://www.theguardian.com/news/series/nauru-files>.

35 Moss Review, *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre on Nauru* (2015).

36 Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014).

37 Amnesty International, Island of Despair: Australia's Processing of Refugees on Nauru (2016), 19.

38 Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014), 168.

3.2. An independent child's advocate must have the necessary expertise and qualifications in child welfare, in order to monitor properly and ensure that children's interests and needs are appropriately safeguarded. It must have authority to oversee both the living conditions faced by children and the provision of services. If an independent children's advocate is to be effective, it must be given access to all children in offshore processing facilities, as well as those in the community, in order to monitor and report on whether their rights and interests are being protected.

3.3. The independent child's advocate should have the power to provide support to children and ensure their appropriate treatment; advocate and take legal proceedings on children's behalf; investigate issues that arise with respect to children's safety, treatment and wellbeing, including with respect to the provision of services; and monitor and publically report on whether children's rights and interests are being protected. In particular, it must have the powers to represent children throughout the refugee status determination process, to ensure that their asylum claims are properly heard and considered. It must also have mandatory reporting obligations with respect to child abuse. Measures must also be put in place that would require the Australian Government to consider, formally respond to and act upon any reports and recommendations of the independent child's advocate.

## *4. Reforms to guardianship arrangements*

4.1. ALHR notes that the appointment of an independent child's advocate on Nauru does not necessarily resolve the issue of guardianship. It is not clear whether the term 'advocate' in the terms of reference would also encompass guardianship duties. ALHR notes that existing guardianship arrangements for unaccompanied children in Australia and offshore processing centres are inadequate with respect to the best interest of the child.

4.2. Under the *Immigration (Guardianship of Children) Act 1946* (Cth), the Minister for Immigration and Border Protection is appointed the guardian of 'non-citizen' unaccompanied minors.[39] The Minister has the same 'rights, powers, duties, obligations and liabilities as a natural guardian of the child'.[40] As raised in our previous submission, ALHR is of the view that the Minister for Immigration and Border Protection should not be the guardian of unaccompanied minors: the Minister has a conflict of interest in his role as a visa decision-maker and as the person responsible for administering the detention regime. It is concerning that neither the Minister, nor those to whom powers are delegated, are required to be equipped with specialist knowledge or experience in relation to children.[41]

---

39 *Immigration (Guardianship of Children) Act 1946* (Cth) s 6(1).

40 Ibid.

41 Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014), 167.

4.3. In our view, it is also necessary for an independent legal guardian to be appointed for all unaccompanied refugee and asylum seeker children in Australia and in offshore processing centres. We refer the Committee to the *Guardian for Unaccompanied Minors Bill 2014 (Cth),* as this framework provides a good starting point. The Bill seeks to introduce an Office of the Guardian for Unaccompanied Non-citizen Children which would be responsible for overseeing the provision of legal and other assistance, including education, language, health and accommodation. The Office would have a number or functions, including:

- acting as legal guardian for unaccompanied children;
- promoting the needs and rights of unaccompanied children and advocating for their best interests;
- involving unaccompanied children in decision making about their situation; and
- monitoring policies and practices relating to service provision for unaccompanied children — advocating for the provision of suitable accommodation, care, education, language support and health care for unaccompanied non-citizen children, both during and after the time that their refugee status is being considered.

4.4. If such an office were set up, it would be possible for some or all of the abovementioned functions to be delegated to officers who would act as 'child advocates' on Nauru or Manus. In ALHR's view, the establishment of an independent Office of Guardian for Unaccompanied Minors would be the most sensible solution.

## *5. The effects of Part 6 of the Australian Border Force Act 2015*

5.1. The enactment of Part 6 of the *Australian Border Force Act 2015 (Cth)* ('ABF Act') was a result of bi-partisan support in July 2015. The ABF Commissioner, Mr Roman Quaedvilieg indicated that the enactment of Part 6 was about:

> *….the leaking of classified information that can compromise operational security or our sovereignty, it's not about people having a right to be outspoken in the community about a range of things*.[42]

5.2. However, Part 6 establishes a whistle-blowing deterrent for any individuals such as doctors, counsellors, and other contractors including members of not-for-profit organisations who are working in the detention centres. This part is commonly referred to as the 'secrecy provisions'.[43] The ABF Act has an extensive definitions list of who is considered to be an 'entrusted person'. The inference is that any individual who is working inside a detention centre is captured by Part 6 regardless of who the employer or head contractor is.[44]

---

42 Doorstop interview with Australian Border Force Commissioner, Roman Quaedvlieg < http://newsroom.border.gov.au/releases/d0e3ab05-52b6-47ce-addd-762791fddbfc> (1 July 2015).

43 *Australian Border Force Act 2015* (Cth) s 42.

44 Ibid s 4.

5.3. The ABF Act itself offers very limited protection to 'whistle-blowers' who disclose information to the public — for example, protection is provided where disclosure is necessary to prevent or lessen a serious threat to the life/health of an individual.[45] While the government has maintained the whistle blowers would be protected by the *Public Interest Disclosures Act 2013* (Cth), significant hurdles must be overcome before a person can report publicly. First, a person must report their concerns internally and disclosure to the public is only available where the person has reasonable grounds for believing that the investigation was inadequate or the response was inadequate.[46]

5.4. Further, where a Minister takes action or proposes to take action in respect of a disclosure, a person cannot disclose to the public only on the basis that they disagree with the action that has been taken or is proposed to be taken.[47] Neither can a public disclosure be defended on the grounds that a person disagrees with public policy.[48] Lastly, public disclosures under the Act must not, on balance, be contrary to the 'public interest'.[49] The *Public Interest Disclosures Act* does not define what the 'public interest' is.

5.5. In ALHR's view, the effect of secrecy provisions of the *Border Force Act* and the limited protections under the *Public Interest Disclosures Act* leave whistle blowers vulnerable to prosecution. It is imperative for the rule of law that government actions — and those of its contractors — can be subject to public scrutiny. This is especially so in relation to any serious allegations of breaches of international human rights on Manus and Nauru.

5.6. While ALHR is supportive of the Australian Government's move to exempt 'health practitioners' from the secrecy provisions, it remains concerned that other 'entrusted persons' are deprived of the same protection.[50]

5.7. ALHR is of the view that Part 6 of the Border Force Act should be repealed in its entirety. In instances where there are serious breaches of international human rights law, it is in the public interest for Australians to be made aware of these breaches, and to hold the Australian, PNG and Nauruan governments to account. Maintaining a culture of secrecy on offshore detention centres is contrary to good government, the rule of law and the need to respect the fundamental rights of asylum seekers and refugees.

---

45 Ibid s 48.
46 Public Interest Disclosures Act 2013 (Cth) pt 2 div 2.
47 Ibid s 31.
48 Ibid.
49 Ibid s 26.
50 Department of Immigration and Border Protection, Determination of Immigration and Border Protection Workers – Amendment No 1 (30 September 2016).

## *6. Attempts by the Commonwealth Government to negotiate third country resettlement of asylum seekers and refugees additional measures that could be implemented to expedite third country resettlement of asylum seekers and refugees within the Centres*

6.1. First and foremost, ALHR emphasises that pursuant to the 1951 *Refugee Convention*, the refugees on Nauru and Manus Island have the right to protection in Australia. The most humane, logical and lawful solution would be for the Australian Government to cease searching for third country resettlement options and to immediately bring all recognised refugees to Australia. Resettlement is intended as a means to relocate refugees from one country to another that has greater capacity to meet their protection needs. As explained by UNHCR, resettlement 'has a vital role for refugees whose life, liberty, safety, health or other human rights are at risk in the country where they sought refuge.[51]' Australia is a traditional resettlement country itself and does not fit within this description. It should not be calling on other countries to resettle refugees within its responsibility, particularly those countries with less capacity to protect and support refugees. The following points must be read against this background.

6.2. It should also be highlighted that Australia is causing considerable damage to its international reputation, not only due to its treatment of asylum seekers and refugees on Nauru and Manus Island but also owing to its unwillingness to accept recognised refugees that have sought asylum in Australia. Solving refugee situations requires international cooperation. If Australia continues to pursue such a protectionist, self-interested approach, it will become increasingly difficult for Australia to engage in positive, cooperative discussions with other countries in the region. This will have adverse consequences in the longer-term, including for Australia. Australia should take the lead in the Asia-Pacific region, rather than being the laggard.

## *7. Manus Island – resettlement attempts to date*

7.1. On 26 April 2016, the Papua New Guinea (PNG) Supreme Court ruled that the detention of Australia's asylum seekers was illegal. The men housed in the Manus Island RPC were theoretically released from detention, but were still living in the detention centre and their movements limited due to safety concerns. Both the PNG and Australian Governments agreed the Manus Island Regional Processing Centre (RPC) would be closed - although a timeline has not been given.

7.2. Apart from returning to their countries of origin – which risks amounting to *refoulement* in contravention of international law – the only option given to refugees on Manus Island to date has been resettlement in Papua New Guinea

---

[51] UNHCR, Frequently Asked Questions About Resettlement < http://www.unhcr.org/hk/wp-content/uploads/sites/13/2016/04/FAQ-about-Resettlement.pdf>

(PNG). The Minister for Immigration and Border Protection has recently reiterated that there is no third country option for asylum seekers and refugees on Manus Island. The PNG Government itself has requested the Australian Government assist with resettling 560 refugees who remain on Manus Island and say they will not be safe if forced to settle in PNG.

7.3. PNG is not a viable option for resettlement of asylum seekers and refugees. Recent reports of those who have attempted to resettle in PNG have described discrimination, poor standards of living, and enduring violence. Specifically, refugees in the town of Lae have been held up at gun point by street criminals and at one point, refugees reported criminals attempting to enter their sleeping compound. The DFAT website itself advises visitors to exercise a 'high degree of caution' due to high levels of serious crime, including high instances of sexual assault where foreigners have been targeted.

7.4. In addition to these conditions, the men who had found work in Lae were earning around $1.50AUD an hour in labouring jobs which is not sustainable. Some may argue that local Papua New Guineans make do with this wage; but refugees are not surrounded by a family network or support to rely on.

7.5. In early October 2016, PNG's Foreign Affairs Minister told the ABC that only 24 refugee men have been resettled in PNG.[52] ALHR would reiterate that for the above reasons, Papua New Guinea is not a viable resettlement option for refugees.

## *8. Nauru – resettlement attempts to date*

8.1. On 26 September 2014, Australia and Cambodia signed an agreement so that refugees on Nauru could be settled in Cambodia. It was a costly arrangement costing the government $55 million for the transfer of five refugees to Cambodia. This arrangement has been seen as unsuccessful since "only two remained for any length of time, and the Cambodian government admitted that its government 'does not have the social programs to support them'".[53] Only one remains, though in October 2016, two additional refugees expressed interest in resettling in Cambodia.

8.2. Cambodia is a developing country where basic rights are not protected. It is poorly suited to accept and support refugees. According to the Australian director of

---

52 The Guardian, Papua New Guinea asks Australians for help resettling refugees from Manus Island,' 4 October 2016, https://www.theguardian.com/australia-news/2016/oct/04/papua-new-guinea-asks-australia-for-help-resettling-refugees-from-manus-island.

53 Sydney Morning Herald, Australia's Cambodia refugee resettlement plan 'a failure', 3 April 2016 < http://www.smh.com.au/world/australias-cambodia-refugee-resettlement-plan-a-failure-20160403-gnx3jv.html>.

Human Rights Watch, Elaine Pearson, Cambodia is 'far from a tropical democratic paradise. The reality is that Cambodia is a struggling economy with ineffective and corrupt law enforcement where its own citizens face corruption, repression and violence on a daily basis.' A spokesperson for the Cambodian Government, Siphan Phay, has described the agreement with Australia as 'a failure', adding that Cambodia 'doesn't have social services like ultra-modern governments' to support refugees, and that 'we don't have that much money to support them'.

8.3. Apart from returning to their countries of origin or resettling in Cambodia, the only other option presently available to refugees on Nauru is to temporarily resettle in the Nauruan community. Yet despite being party to the Refugee Convention, refugees in Nauru do not have access to their basic rights. Amnesty International's report, *Island of Despair*, describes, among other things, persistent intimidation and attacks against refugees in the community including robberies, attempted home invasions, violent attacks including against children, and sexual assaults; consistent failure of police to investigate or hold perpetrators accountable for these crimes; arbitrary arrests and intimidation of refugees in the community; and children being denied the right to safely access education services.[54]

8.4. Further, the option to resettle in Nauru is temporary and not available to all refugees. Back in 2001, when the first offshore processing arrangement was negotiated, Nauru agreed to act as a processing centre for asylum seekers provided that any refugees be resettled in Australia or other countries. Though the current arrangement is subject to a different memorandum of understanding, Scott Morrison confirmed in April 2014 that '[t]he agreement was never there for permanent resettlement in Nauru but there will be a lengthy period of temporary resettlement in Nauru.'[55]

8.5. Other options for the resettlement of refugees from Nauru and/or Manus Island have included the Philippines, Kyrgystan and Malaysia, but no concrete resettlement offers have been made.

## *9. Additional measures that could be implemented*

9.1. The Australian Government is currently in search of resettlement options for the 1800 refugees on Manus Island and Nauru.

9.2. On 15 September 2016, ALHR wrote to the Ministers of Immigration/Foreign Ministers of Canada, the US, Germany and New Zealand requesting them to consider resettling the refugees on Nauru and Manus Island. We received a reply

---

54 Amnesty International, Island of Despair: Australia's 'processing' of refugees on Nauru (2016), pp 34-40.

55 ABC News, Refugees will be able to temporarily resettle in Nauru, Immigration Minister Scott Morrison says < http://www.abc.net.au/news/2014-04-10/nauru-asylum-seekers-scott-morrison/5382350> (11 April 2014).

from Hon Michael Woodhouse, New Zealand's Minister of Immigration, reiterating that his offer to resettle up to 150 refugees annually still stands and that '[i]t is for Australia to take up the offer.'

9.3. ALHR makes the following recommendations to the Australian Government:

(1) Bring all recognised refugees on Nauru and Manus Island to Australia immediately and grant them with permanent protection visas.

(2) If (1) is not complied with, immediately accept New Zealand's offer to resettle up to 150 refugees as soon as possible.[56] This offer was first made in 2013; Australia has therefore already lost the opportunity for up to 300 people to have been resettled.

(3) For the remaining refugees, the Australian Government must find safe third countries that will accept them for resettlement. These countries should already have resettlement experience. At a minimum, these countries must:

a. Be parties to the 1951 *Refugee Convention*;

b. Have a legal and policy framework in place to provide resettled refugees with a secure legal status on arrival and access to fundamental civil, political, economic, social and cultural rights, including the prospect of acquiring citizenship. This includes access to health and education, work rights, freedom of movement and family reunion; and

c. Have an institutional framework to support resettlement, including a decision-making structure, division of responsibilities, and resource allocation, as well as information-sharing and training of key partners including levels of government, non-governmental organizations, and other service providers; and

d. Have a reception and integration programme to deliver essential services including reception, orientation, housing, financial assistance, medical care, language classes, employment preparation, and education, and to support community engagement. Given the traumatic conditions these refugees have endured in Nauru and PNG, as well as in their countries of origin and in transit, this must include access to appropriate psychological support; and

e. Not be countries that might return the refugees to their countries of origin. This would violate Australia's *non-refoulement* obligations under international law, as well as those of the returning country; and

f. Not include Nauru or PNG. As emphasised above, these are not suitable resettlement countries.

(4) If Australia pursues third country resettlement pursuant to point (3), ALHR urges the government to open this option up to those refugees that have already accepted to resettle in PNG or Cambodia, as these countries do not meet appropriate standards for resettlement.

---

[56] Note that the offshore processing centres in Nauru and Manus Island must be closed as soon as possible, and certainly before the next financial year. Therefore, given that New Zealand's offer is to resettle up to 150 refugees per financial year, it is likely that a maximum of 150 people will have access to this solution.

(5) It is possible that some recognised refugees on Nauru and/or Manus Island will not be accepted by the resettlement countries identified by Australia. Solutions must be found for these people: no one can be left behind. These individuals must be brought to Australia or resettled in another country that meets the requirements set out in point (3).

(6) Those refugees on Nauru and Manus Island with family members in Australia must be brought to Australia, pursuant to their right to family reunion.[57]

a. It has been suggested that the Australian Government will seek to reunite families in a third country. This has a number of problems. Refugees in Australia also have the right to family reunion. The Government cannot impose a condition that in order to enjoy this right, they must leave the country. Further, the Government cannot require third resettlement countries that agree to take refugees from Nauru and Manus Island to also accept their family members who are already recognised refugees receiving protection in Australia.

b. The number of refugees that would be settled in Australia pursuant to family reunion is small. It would go unnoticed. Yet it would be consistent with the strong family values that most Australians hold.

(7) Once resettlement solutions have been found for all refugees on Nauru and Manus Island (and humane, lawful solutions have been found for those asylum seekers whose claims were rejected at the first instance and this was reaffirmed on review) the offshore processing centres must be closed. Australia must end its agreements with Nauru and PNG and re-instigate processing of asylum seekers on the Australian mainland.

If you would like to discuss any aspect of this submission, please contact either of the authors.

Yours faithfully,

Rebecca Dowd
Khanh Hoang

Co-Chairs, Refugee Rights Subcommittee
Australian Lawyers for Human Rights
E: refugees@alhr.org.au

[57] According to the Universal Declaration on Human Rights, Article 16(3) and the International Covenant on Civil and Political Rights, Article 23, 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' According to the International Covenant on Economic, Social and Cultural Rights, Article 10(1), '[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.'