



Australia: review of fifth periodic report

Submission to the United Nations Committee on
Economic, Social and Cultural Rights

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

In 2016 the ALA published a report, *Untold Damage*, which details workplace health and safety in immigration detention facilities. This report makes it clear that Australia has a duty of care in both onshore and offshore detention facilities. It is also clear that the *Work Health and Safety Act 2011 (Cth)*, which regulates workplace safety in all Commonwealth workplaces, applies to workers, asylum seekers and refugees living and working in those facilities.²

¹ www.lawyersalliance.com.au.

² ALA, *Untold Damage: Workplace health and safety in immigration detention under the Work Health and Safety Act 2011 (Cth)*, available at <https://www.lawyersalliance.com.au/ourwork/untold-damage/untold-damage>.

Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Committee on Economic, Social and Cultural Rights' fifth periodic review of Australia. This submission is relevant to articles 7(b) and 12 of the *International Covenant on Economic, Social and Cultural Rights*. Specifically, our concerns relate to workplace health and safety in immigration detention facilities and access to healthcare in immigration detention facilities.
2. Australia has been operating a system of offshore processing of asylum seeker claims, most recently since 2012. All asylum seekers who arrive in Australia by boat are sent to regional processing centres (RPCs) on either Nauru or Manus Island in Papua New Guinea (collectively, RPC countries). There are significant difficulties in this system, not least in ensuring that asylum seekers and refugees are kept safe, and have adequate access to the highest attainable standard of physical and mental health. A number of avoidable deaths have occurred since the policy has been operational. Ill-health, of both a physical and psychological nature, is endemic.
3. Australia also operates a system of immigration detention centres within its borders. Health and safety in these centres is also a matter of concern.

Workplace health and safety in immigration detention facilities – articles 7(b) and 12; list of issues [14]

4. Australia sends all asylum seekers who arrive by boat to RPC countries for the processing of their refugee claims. While originally all asylum seekers and refugees were detained in facilities established, paid for and operated by or under the direction Australia, in 2015 and 2016 centres on Nauru and Manus Island were respectively opened up, and people were able to come and go with a degree of autonomy. Now a number of asylum seekers and refugees live in the communities in Nauru and Papua New Guinea, although many remain living in the detention centres and continue to access the detention centres as needed.
5. A number of other people, including asylum seekers, refugees and others, are also accommodated in immigration detention facilities in Australia (onshore detention).

These people are detained for a number of reasons, including to await deportation or the outcome of appeals against visa cancellations.

6. Immigration detention, including offshore and onshore detention, invokes article 12, concerning the right of everyone to the highest attainable standard of physical and mental health. Offshore detention gives rise to greater complexity, as the Australian government argues that its obligations are diluted when asylum seekers and refugees cross international borders to have their refugee claims determined. As such, offshore detention attracts more detailed comment in this submission. The obligations discussed and recommendations made, however, are relevant to both offshore and onshore detention systems alike.
7. At present, Australian workplace law is the area of law with the greatest capacity to ensure the right of all asylum seekers, refugees and others to the highest attainable standard of physical and mental health, both offshore and onshore. As such, article 7(b) is also invoked. These centres are Commonwealth workplaces, and as such are subject to the requirement to afford safe and healthy working conditions. However, workplace law requires reform to ensure that this potential is realised.

Australia's obligations towards asylum seekers and refugees in RPC countries

8. Australia retains obligations to asylum seekers and refugees in RPC countries, notwithstanding their location outside of Australian territory, as explored below. The health of asylum seekers and refugees is demonstrably compromised as a result of their accommodation in RPC countries. Decisions made by Australian government officials directly affect the ability of asylum seekers and refugees to access healthcare and the standard of healthcare available to them.
9. According to international law, Australia is not able to evade its responsibility simply by sending asylum seekers and refugees to another country. It retains obligations in relation to *non-refoulement*, and to implement international human rights law that Australia has agreed to be bound by if it exercises effective control over the individuals concerned.³

³ UNHRC, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to*

10. Australia also retains an obligation under domestic law to ensure that it meets its obligations in relation to the asylum seekers and refugees it has sent to RPC countries. As noted by a recent parliamentary inquiry into health and safety of asylum seekers and refugees in RPC countries:

‘The [Department of Immigration and Border Protection – DIBP] has ultimate decision-making power as the contracting agency, makes final decisions in relation to the provision of specialist and emergency medical treatment, and (largely as a result of its capacity building measures) is the primary source of guidance and expertise to the Governments of Nauru and PNG in relation to the management of all matters associated with the presence of refugees and asylum seekers.’⁴

11. That Committee rejected the DIBP’s ‘assertion that it does not bear ultimate responsibility for all aspects of the operation of the RPCs’.⁵
12. Regular reports are received regarding harm that befalls asylum seekers and refugees in RPC countries.⁶ International boundaries, however, mean that it can be difficult for advocates, journalists or government agencies to access these people to ensure that obligations under the ICESCR and other human rights treaties are being

extraterritorial processing, (November 2010), available at <http://www.refworld.org/docid/4cd12d3a2.html>, [9]-[10]. For a thorough exploration of Australia’s obligations to asylum seekers and refugees in RPC countries, see Madeline Gleeson, ‘Offshore processing: Australia’s responsibility for asylum seekers and refugees in Nauru and Papua New Guinea’, *Andrew & Renata Kaldor Centre for International Refugee Law*, (2015), <http://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-australia%E2%80%99s-responsibility-asylum-seekers-and-refugees-nauru-and>.

⁴ Senate Standing Committee on Legal and Constitutional Affairs, *Report: Serious allegations of abuse, 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* (April 2017), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Report, [7.66].

⁵ *Ibid.*

⁶ For a good example of the types of injuries and incidents that threaten the health and safety of asylum seekers and refugees, see the *Nauru Files*, a collection of incident reports released by a whistleblower to *the Guardian* newspaper in 2016: <https://www.theguardian.com/news/series/nauru-files>. While these files focus solely on Nauru, evidence suggests that equivalent risks are faced by asylum seekers and refugees on Manus Island. See, for example, Geoff Thompson and Wayne Harley, ‘Bad Blood’, *ABC Four Corners*, 26 April 2016, <http://www.abc.net.au/4corners/stories/2016/04/25/4447627.htm> for an overview of how one man died from an infection that would have been easily treated by antibiotics had he been able to access medical treatment in Australia.

adhered to. The Australian government also seeks to obfuscate its obligations, arguing that it is the decisions of local governments that determine access to the RPCs and RPC countries. While there is an element of truth to this, the reality is that the Commonwealth exercises extensive influence and control.

The role of Comcare in ensuring health and safety in immigration detention

13. The only government agency with clear oversight of RPCs is Comcare, the workplace health and safety regulator, by virtue of the *Work Health and Safety Act 2011* (Cth) (WHS Act). It is also one of the only agencies with oversight of onshore detention facilities. As such, it plays an important role in ensuring that obligations under articles 7(b) and 12 can be realised in immigration detention facilities.
14. Comcare receives reports of health and safety incidents concerning workers, asylum seekers and refugees. It has conducted a number of visits to onshore and offshore detention facilities to assess health and safety conditions there and make recommendations to the DIBP as to how they could be improved. Comcare is administered by the Department of Employment.
15. Under the WHS Act, all ‘persons conducting a business or undertaking’ (PCBU) have a duty of care to ensure, as far as reasonably practicable, the health and safety of workers while they are working.⁷ They must further ensure that the health and safety of ‘other persons’ (including asylum seekers, refugees and others) is not put at risk by the work carried out as a part of the conduct of the business. The Act has extraterritorial application by virtue of s12F.⁸ Obligations cannot be transferred or contracted out of.⁹
16. In immigration detention facilities, the PCBU is the DIBP. Other persons include asylum seekers and refugees. Thus there is a clear legislative duty of care, requiring

⁷ Section 19(1).

⁸ This section refers to s15.1 of the *Criminal Code Act 1995* (Cth), which extends offences to conduct that occurs wholly outside of Australia where the offending person is an Australian citizen, or the offending corporation is incorporated in Australia. As such, any offences committed in RPCs by people or corporations, including contractors, can be prosecuted in Australia. The DIBP is also bound by the obligations generally, including owing duty of care to workers, asylum seekers and refugees, and many of the decisions that impact on health and safety in RPCs are taken in Australia.

⁹ WHS Act, s272.

that the DIBP ensure that the health and safety of asylum seekers, refugees and others is not put at risk by the work of detaining them, and granting Comcare oversight of this obligation.

17. It is clear that this duty extends to asylum seekers and refugees living in the communities in Nauru and Manus Island, following the Federal Court judgment of *Plaintiff S99/2016 v Minister for Immigration and Border Protection (S99)*.¹⁰ In that case, a refugee living in the Nauruan community was seeking a pregnancy termination that was medically required, after being raped. She suffered severe seizures, and thus required specialist medical care so that the procedure could be conducted safely. The requisite expertise was not available in RPC countries, although initially the plaintiff was sent to PNG for the procedure.
18. This case also supports the contention that Australia exercises effective control over individual asylum seekers and refugees, thereby owing them obligations under international law. Bromberg J found that it was clear that:

‘the applicant was dependent upon the assistance provided by the Commonwealth to sustain her very existence. In that respect, the Commonwealth provided or was directly responsible for the provision to her of food, water, housing, security and medical services to maintain her health and wellbeing.’¹¹
19. The Minister was found to owe the plaintiff a duty of care. While the content of the duty was not fully explored, it was clear that it extended to ensuring that the plaintiff’s health was not put at risk by limiting her access to medical care to that available in the RPC countries.
20. The policy of offshore detention is ultimately incompatible with Australia’s obligations under articles 7(b) and 12. The reality is, however, that until offshore detention centres are closed, Comcare remains the only entity with any ability to influence the conditions in which asylum seekers and refugees in RPC countries live. It also plays an important role in ensuring that onshore detention facilities are safe and do not compromise the rights of people detained there to the highest attainable standard of physical and mental health.

¹⁰ [2016] FCA 483.

¹¹ *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483, [250].

21. For the Commonwealth of Australia to be able to meet its obligations under these articles in relation to this group of people, the WHS Act must be reformed. Comcare must be equipped to ensure that both onshore and offshore immigration detention facilities are safe, and do not compromise the right of asylum seekers and refugees to the highest attainable standard of physical and mental health.

Comcare, reporting obligations and limitations of the WHS Act

22. Comcare is the Commonwealth agency with oversight of the WHS Act. It receives reports of health and safety incidents, which the PCBU is required to make pursuant to s38 of the WHS Act. It can conduct investigations and make recommendations, and ultimately has the power to prosecute infringements if offences under the WHS Act have been committed.
23. The reporting requirements under the WHS Act, however, do not adequately reflect the risks to health and safety that exist in immigration detention facilities. The types of incidents that need to be reported are detailed in ss36 and 37 and reflect the risks that exist in industrial workplaces, such as serious burns, amputations or de-gloving (see Appendix for extract of relevant sections of this legislation).
24. It is clear, however, that the risks to health and safety in immigration detention are of a very different nature. While some industrial-style accidents have occurred, the greatest threat to health and safety for asylum seekers and refugees relate to their psychological health, self-harm, and in RPC countries, sexual and physical assault and sanitation.
25. The ALA has argued that the reporting requirements in the WHS Act should be interpreted to apply to these risks, given the obvious risk to health and safety (and thus the obvious ramifications they have for exercising the duty of care imposed by s19) that incidents such as self-harm and assault can pose. Comcare, however, has claimed that incidents such as suicide attempts or rape need only be reported to it if they result in death, or require treatment as an in-patient in a hospital.¹² This

¹² Answers to questions taken on notice, provided by Comcare to the Senate Select Committee on the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, received 26 August 2015, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Additional_Documents, 1.

limited interpretation risks compromising the rights of asylum seekers, refugees and others in immigration detention facilities under article 12.

26. As such, the legislation would benefit from clarification. The ALA believes that the WHS Act should be amended to add the following provisions:

Section 36(a), should be amended as follows: ‘immediate treatment as an in-patient in a hospital or equivalent facility, including where medical advice that such treatment is necessary but is not provided’;

Section 36(b), add:

- (ix) a self-harm attempt; or
- (x) a sexual assault; or
- (xi) any injury or illness that gives rise to an emergency response by the PCBU related to health and safety [NB this would include ‘Code Blues’ in immigration detention facilities, which are medical emergencies according to Paul Stevenson, psychologist and traumatologist employed in Nauru to safeguard the mental health of Wilson Security guards].

Section 37, add:

- (m) bullying and harassment (including sexual harassment) causing fear for personal safety; or
- (n) a series of serious injuries or illnesses that might be related [this would capture spates of self-harm, allowing identification of events that may increase the risk of self-harm for asylum seekers or refugees].

27. See the Appendix for an extract of the current reporting requirements found in the WHS Act.
28. This recommendation aligns with a recommendation from the parliamentary inquiry into serious allegations of abuse, self-harm and neglect of asylum RPC countries discussed above at [10].¹³ There has been no government response to this inquiry as at the time of writing.

¹³ Recommendation 12 of the report from that inquiry was that ‘the Australian Government review the *Work Health and Safety Act 2011* to ensure that Comcare can exercise its regulatory powers in

Recommendations

The ALA has made the following recommendations to the Commonwealth of Australia, which may be of interest in drafting concluding observations relating to articles 7(b) and 12:

- Close offshore detention facilities immediately and bring all asylum seekers and refugees to Australia, pending determination of refugee claims and lasting settlement solutions being found; and
- Reform the Work Health and Safety Act to ensure that Comcare has the ability to provide adequate and appropriate oversight of the health and safety of asylum seekers, refugees and others in immigration detention facilities, both onshore and offshore.

relation to Australian workplaces outside Australia's geographical jurisdiction, in a timely and straightforward manner': Senate Legal and Constitutional Affairs References Committee, *Report: Serious Allegations of abuse, 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*,
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Report/b02.

Appendix: Extract from the WHS Act detailing the duty of care and existing reporting requirements

19 Primary duty of care

(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:

- (a) workers engaged, or caused to be engaged by the person; and
- (b) workers whose activities in carrying out work are influenced or directed by the person;

while the workers are at work in the business or undertaking.

(2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

(3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable:

- (a) the provision and maintenance of a work environment without risks to health and safety; and
- (b) the provision and maintenance of safe plant and structures; and
- (c) the provision and maintenance of safe systems of work; and
- (d) the safe use, handling and storage of plant, structures and substances; and
- (e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and
- (f) the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and
- (g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.

35 What is a *notifiable incident*

In this Act, *notifiable incident* means:

- (a) the death of a person; or
- (b) a serious injury or illness of a person; or

- (c) a dangerous incident.

36 What is a *serious injury or illness*

In this Part, ***serious injury or illness*** of a person means an injury or illness requiring the person to have:

- (a) immediate treatment as an in-patient in a hospital; or
- (b) immediate treatment for:
 - (i) the amputation of any part of his or her body; or
 - (ii) a serious head injury; or
 - (iii) a serious eye injury; or
 - (iv) a serious burn; or
 - (v) the separation of his or her skin from an underlying tissue (such as degloving or scalping); or
 - (vi) a spinal injury; or
 - (vii) the loss of a bodily function; or
 - (viii) serious lacerations; or

- (c) medical treatment within 48 hours of exposure to a substance;

and includes any other injury or illness prescribed by the regulations but does not include an illness or injury of a prescribed kind.

37 What is a *dangerous incident*

In this Part, a ***dangerous incident*** means an incident in relation to a workplace that exposes a worker or any other person to a serious risk to a person's health or safety emanating from an immediate or imminent exposure to:

- (a) an uncontrolled escape, spillage or leakage of a substance; or
- (b) an uncontrolled implosion, explosion or fire; or
- (c) an uncontrolled escape of gas or steam; or
- (d) an uncontrolled escape of a pressurised substance; or
- (e) electric shock; or
- (f) the fall or release from a height of any plant, substance or thing; or
- (g) the collapse, overturning, failure or malfunction of, or damage to, any plant that is required to be authorised for use in accordance with the regulations; or
- (h) the collapse or partial collapse of a structure; or
- (i) the collapse or failure of an excavation or of any shoring supporting an excavation; or
- (j) the inrush of water, mud or gas in workings, in an underground excavation or tunnel; or

(k) the interruption of the main system of ventilation in an underground excavation or tunnel; or

(l) any other event prescribed by the regulations;

but does not include an incident of a prescribed kind.

38 Duty to notify of notifiable incidents

(1) A person who conducts a business or undertaking must ensure that the regulator is notified immediately after becoming aware that a notifiable incident arising out of the conduct of the business or undertaking has occurred.

Penalty:

(a) In the case of an individual—\$10 000.

(b) In the case of a body corporate—\$50 000.

(2) The notice must be given in accordance with this section and by the fastest possible means.

(3) The notice must be given:

(a) by telephone; or

(b) in writing.

Example: The written notice can be given by facsimile, email or other electronic means.

(4) A person giving notice by telephone must:

(a) give the details of the incident requested by the regulator; and

(b) if required by the regulator, give a written notice of the incident within 48 hours of that requirement being made.

(5) A written notice must be in a form, or contain the details, approved by the regulator.

(6) If the regulator receives a notice by telephone and a written notice is not required, the regulator must give the person conducting the business or undertaking:

(a) details of the information received; or

(b) an acknowledgement of receiving the notice.

(7) A person conducting a business or undertaking must keep a record of each notifiable incident for at least 5 years from the day that notice of the incident is given to the regulator under this section.

Penalty:

(a) In the case of an individual—\$5000.

(b) In the case of a body corporate—\$25 000.