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

Supplementary Submission to Senate Standing Committee on Legal and Constitutional Affairs

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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

Introduction

1. The Australian Lawyers Alliance (ALA) provides the following supplementary submission to the Senate Committee on Legal and Constitutional Affairs for its current inquiry into 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.

2. This submission is an amended version of a submission that was provided to the Royal Commission on institutional responses to child sexual abuse (Royal Commission). It focuses specifically on our concerns regarding the response of the Department of Immigration and Border Protection (DIBP) to allegations of child sexual abuse (CSA) in offshore immigration detention.

Executive summary

3. This supplementary submission considers the framework policy of Operation Sovereign Borders, and the DIBP and local governments’ policy responses to CSA. This investigation reveals that the DIBP has instituted inadequate policy responses to CSA. We argue that the Commonwealth should not avoid scrutiny of the consequences of this policy due to international borders. The Commonwealth has chosen to house refugees and asylum seekers offshore, and it should not escape scrutiny or liability for making that choice.

4. We then delve further into the factors that have allowed the risk of CSA to persist at unacceptable levels in offshore detention. There are numerous factors that make these risks clear. Of particular concern is the fact that, despite the DIBP knowing since at least 2014 of the heightened risk of CSA in immigration detention, following an investigation into a Victorian-based facility, insufficient action has been taken to safeguard against this risk offshore. Local police forces are relied on to respond to the criminal aspects of CSA, despite there being no law in place on the issue in Nauru until June 2016. The fact that journalists are generally unable to access to Nauru can only compound these risks.

5. There seems to have been no adequate Commonwealth response to evidence that CSA was not being properly investigated on Nauru. The Nauruan Police Force (NPF) threatened to charge a woman who alleged she was raped with making a false allegation. They have said that most claims by asylum seekers that they have suffered

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abuse are false. Despite ample evidence that children are suffering abuse at school, and many are no longer attending because they are afraid of being abused, the school in the detention centre remains closed. This is exactly the climate that has allowed CSA to flourish in domestically based institutions, as the Royal Commission has revealed.

6. This evidence brings the ALA to the conclusion that immigration detention, particularly offshore immigration detention, is incompatible with protecting children from abuse. For this reason we believe that all child asylum seekers and refugees and their families must be brought immediately to Australia to await permanent resettlement, if Australia is unwilling to offer them refuge.

7. Where the policy of Operation Sovereign Borders conflicts with keeping children safe, protecting children from sexual abuse should always be the primary concern.

Operation Sovereign Borders

8. Operation Sovereign Borders is the policy framework within which child abuse in offshore detention countries occurs. This policy seeks to keep Australia’s international borders secure by turning back asylum seeker boats, preventing anyone who arrived in Australia by boat seeking asylum after July 2013 from ever settling in Australia. It is administered by the DIBP. This policy priority has had significant ramifications for both protecting children from and responding to CSA.

9. All allegations that CSA that has occurred in offshore immigration detention facilities have been responded to in the context of this policy. The DIBP is the primary Department responding to the allegations, often through its agents. It has delegated many of its functions to contractors, but retains ultimate control.

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10. The DIBP’s policy in relation to criminal behaviour in offshore detention is to refer allegations of CSA to the local police force for investigation and prosecution. The DIBP argues that responding to CSA allegations is a matter for local government authorities.

11. While the ALA accepts that the Commonwealth is entitled to implement immigration policies as it sees fit (so long as they comply with Australian and international law and standards), we believe that it is clear that the policy of offshore detention is incompatible with protecting children from abuse.

**Factors that may have contributed to the occurrence of CSA in offshore detention**

12. The policies and procedures of the Commonwealth in relation to child protection in offshore immigration detention facilities are inadequate to ensure that children are (a) protected from sexual abuse and (b) able to report any abuse that they have suffered safely.

13. The ALA’s major concerns in this regard relate to: the fact that risks of CSA are higher in detention; disincentives that exist to reporting abuse; inadequate responses by the DIBP and contractors to allegations of abuse; the lack of an adequate child protection framework applicable in offshore detention; inadequate engagement with Comcare to reduce the risk of CSA (which is a work health and safety issue as well as child safety issue); a lack of access by journalists; and the inadequate responses by the NPF to CSA.

14. The DIBP undoubtedly has the capacity to respond to CSA, including by removing children from Nauru. Making the policy decision to leave the primary response to the local police does not mean that the Commonwealth does not have capacity to respond, it simply means that it has chosen not to exercise it.

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5 Ibid.
INCREASED RISKS OF CHILD SEXUAL ABUSE IN DETENTION

15. The DIBP has acknowledged that ‘there are complex challenges that arise in an immigration detention environment that can increase the risk of child abuse and neglect. The characteristics that can increase these risks include mental health issues, family history of violence or abuse, situational stress and different cultural norms’.  

16. In onshore immigration detention, there are reporting lines that are activated if child abuse is reported. An investigation into an allegation of CSA in the Melbourne Immigration Transit Accommodation (MITA) facility in Victoria found that the DIBP responded appropriately ‘with reports to relevant authorities (such as the police and/or the child welfare agency) being made in a timely manner’. However, improved information sharing between the DIBP and the Victorian Department of Human Services was identified as a priority for both departments to further enhance protective factors. Such a response does not appear to be possible in offshore detention.

17. This review also identified risk factors inherent in the detention environment: ‘it is apparent that some families within the MITA have become complacent towards parenting and supervising their children, sometimes amounting to neglect. This is due to the belief that it is a secure and contained environment with service providers on-hand to supervise children and assist, should the need arise...

For a variety of reasons, it can be difficult to obtain a clear and accurate understanding of incidents following an allegation of child abuse. This is especially the case in an immigration context where alleged victims and/or witnesses to incidents are often unwilling to make formal reports or become involved with ongoing investigations as they are concerned it could harm their – or the alleged offender’s – visa and/or placement status. A further complicating factor is fear of retaliation between families or individuals when an allegation occurs within the facility...

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8 Ibid, [19].
Further, there have been a number of instances of alleged assaults at the MITA involving both adults and minors that have required the involvement of the police. While staff and service providers at the MITA reported positive engagement with the local police, investigations by police are sometimes seen to cause distress and stigmatisation among people involved, and likely further deter people from disclosing information, particularly for asylum seekers who are already apprehensive of authority figures. DHS indicated that where an assault involves a child, police and DHS should jointly commence investigations, which has not always occurred at the MITA.  

18. This extract makes it clear that the DIBP is aware that immigration detention by its very nature increases the risk of CSA. In onshore detention, even the presence of safeguards such as a local, expert, Department of Human Services, a positively engaged local police force and access to support for both detainees and workers seeking to render assistance did not adequately ameliorate the risk factors identified.

19. In offshore detention, these risks are exacerbated, and the safeguards are largely absent. Where reports to the local police are made, it appears that these are ineffective given the almost complete absence of prosecutions.

DISINCENTIVES TO REPORT ABUSE

20. For survivors of CSA, there may be numerous disincentives to reporting abuse on Nauru and Papua New Guinea, as the above extract demonstrates.  

21. Many of the documents in the Nauru Files contained statements by asylum seekers and refugees that they did not want to report abuse or injuries that they had suffered. Reasons provided include that they did not believe that anything would be done to help them and that they were scared of repercussions, either in terms of their asylum application or reprisals from members of the Nauruan public.

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10 DIBP, Submission: Responding to the Royal Commission into Institutional Responses to Child Sexual Abuse, 21 July 2015, released under FOI laws: [https://www.border.gov.au/AccessandAccountability/Documents/FOI/20160317_FA150701970_Documents_Released.pdf](https://www.border.gov.au/AccessandAccountability/Documents/FOI/20160317_FA150701970_Documents_Released.pdf), pdf page 19. While no children have ostensibly been accommodated on Manus Island since 2013, it is possible that children were abused prior to being removed.  
11 See, for example, incident reports [https://interactive.guim.co.uk/2016/08/nu-files/pdf/sca150394.pdf](https://interactive.guim.co.uk/2016/08/nu-files/pdf/sca150394.pdf).
22. Statements made by the NPF regarding false allegations made by asylum seekers, and threats to charge asylum seekers with making false allegations, clearly constitute a disincentive to report abuse. Following media reports that an alleged survivor of sexual assault was at risk of being charged with making a false allegation, the survivor was considered to be at an escalated risk of self-harm. It is not clear from the heavily redacted document whether this risk was related to the threats, the assault, or some other factor.

LACK OF DIBP CHILD PROTECTION FRAMEWORK APPLICABLE TO OFFSHORE DETENTION

23. In 2014, the DIBP confirmed in a meeting that its child protection framework did not have any application to offshore detention facilities. The risks of detaining children in the absence of such a framework were acknowledged, and it was not known by meeting participants if there was any child protection framework under domestic law on Nauru or Manus Island. In fact, the Child Protection and Welfare Act was only passed in Nauru in June 2016, meaning that children were detained on that island for three years in the absence of any legislative child protection framework.

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15 http://ronlaw.gov.nr/nauru_lpms/files/acts/66d8a517262f0aadab959f3155b08b0db.pdf. While there are compulsory reporting requirements found under s50 of this Act, it is unclear how these are operating in practice or indeed if the DIBP is monitoring these requirements.
24. It is not known if a child protection framework is currently overseen by the DIBP in offshore detention facilities. Even if one has been introduced since 2014, detaining children offshore for any period of time in the absence of such a framework is clearly problematic.

NAURUAN POLICE FORCE

25. There are clear challenges faced by children and their guardians in reporting CSA to police, as the Royal Commission has repeatedly heard.\(^\text{16}\) In response to these challenges, special measures have been introduced in Australian jurisdictions since the early 1990s.\(^\text{17}\) Police have also introduced a number of reforms to assist them to respond appropriately to CSA, including ‘the introduction of specialist squads and taskforces; specialist training; pre-recording investigative interviews for use as the complainant’s evidence-in-chief; and participating in multi-disciplinary approaches that combine policing, child protection, and health expertise and facilitate access to support services’.\(^\text{18}\) These reforms can be seen as a base line for law enforcement agencies’ capacity to respond effectively to CSA.

26. As far as the ALA is aware, similar reforms have not taken place in Nauru. Despite this, however, the DIBP refers all allegations of sexual abuse to the NPF for investigation. It was only in June 2016 that child protection legislation was introduced in Nauru. This legislation includes safeguards for children where their allegations of CSA lead to a prosecution.\(^\text{19}\)

27. Nauruan police have responded unhelpfully to claims of sexual abuse, as outlined above. The first, and possibly only, charge for assault of an asylum seeker occurred in October

\(^{16}\) The role of police in responding to CSA has been explored in the Royal Commission’s Case Studies 38, 28, 17 and 9.


\(^{19}\) Child Protection and Welfare Act 2016 (Nr), s55.
2016, where an unnamed individual was charged for indecent assault of a six-year-old.\textsuperscript{20} It is not known if the person charged was a local Nauruan or connected with Australia’s offshore processing policy.

28. These responses and inaction indicate that sexual assault is not being appropriately responded to by the NPF. The responses outlined above will discourage any child or their guardians from reporting abuse that they experience. Even if these disturbing responses have ceased (and the ALA does not have any information as to whether they continue or not), the fact that they have been made in the past will continue to act as a disincentive to reporting future instances of abuse.

29. A lack of action to punish perpetrators of CSA can enable further child abuse. It also sends the message to abusers that what they have done is not problematic and can continue, and to survivors that their experiences are either not believed or not important. The longer-term impact of these messages can be devastating.

SCHOOL CLOSURE

30. The closure of the school in the Nauru detention facility in 2015 appears to have contributed to the occurrence of sexual abuse of asylum seeker and refugee children. As the Nauru Files have indicated, children have complained about being touched inappropriately by local students at school. A number of children have stopped attending the school due to the harassment and bullying they have experienced there, which will have lasting ramifications for their opportunities in life.\textsuperscript{21} The ALA has extracted instances of child abuse reported in the Nauru Files and include them with this submission in the Appendix.


RESPONSES BY THE DIBP AND CONTRACTORS TO ALLEGATIONS OF ABUSE

31. The Commonwealth is in a complex situation with regard to investigating crimes in foreign countries, particularly where the alleged perpetrator is a national of that country and not a national of Australia. As such, relying on local law enforcement is unlikely to meet with Australia’s obligations under international law, including the Convention on the Rights of the Child and the Refugee Convention. It is also unlikely to adequately safeguard against the risk of CSA without comprehensive and enforceable commitments from local authorities. These commitments would need to ensure that any crimes against children would be thoroughly investigated and any perpetrators punished adequately. They are also likely to require effective witness protection measures.

32. It is clear that, even if appropriate commitments have been given by local authorities, they are not being implemented in investigations of allegations of CSA in offshore detention countries. The ALA’s concerns, including worrying statements made by the NPF and a lack of prosecutions of crimes against the asylum seeker and refugee population generally, are outlined in more detail above.

33. It is important to emphasise, however, that it is within the Commonwealth’s capacity to respond more appropriately to CSA allegations if the NPF prove unwilling or unable to meet Australian best practice, including by bringing all children to Australia.

LACK OF ACCESS BY JOURNALISTS AND INDEPENDENT INVESTIGATORS

34. Access for journalists to Nauru to independently verify conditions for asylum seekers and refugees on the island is near impossible.22 Even where applications conform to requirements, they are often denied or cancelled.23

35. Independent scrutiny of facilities and living conditions for refugees and asylum seekers is important to assess the validity of claims regarding the incidence of CSA. Following the release of the Nauru Files, officials from the DIBP claimed that allegations regarding

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widespread sexual assault were unfounded.\(^{24}\) However, in May 2016 the Office of the UN High Commissioner for Refugees (UNHCR) called for asylum seekers and refugees to be immediately moved to humane conditions following a visit to Nauru.\(^{25}\) In circumstances where there is such a divergence of opinion from official sources, media access is essential to provide independent insight into conditions.

36. As the Royal Commission has heard, cultures of secrecy and denial can contribute directly to the occurrence of CSA, as well as hampering efforts to effectively respond to instances of abuse to minimise lasting psychological and physical injuries.

**UNDERREPORTING BY THE DIBP TO COMCARE UNDER THE WHS ACT**

37. The reporting record of the DIBP to Comcare is haphazard, compromising the ability of this agency to oversee health and safety in immigration detention. No other independent agency is able to exercise this oversight function. As such, this lack of consistent reporting may have contributed to the occurrence of CSA and undermined the ability to implement an effective strategy to combat and appropriately respond to CSA.

38. From records that the ALA has received, it appears that only three reports of sexual assault across the immigration network were made by the DIBP to Comcare in the period between July 2013 and June 2015.\(^{26}\) Report between July 2015 and June 2016 dropped dramatically, suggesting Comcare’s ability to provide oversight was further hampered.\(^{27}\)

39. The ALA reviewed all of the critical and serious incidents in the Nauru Files (which cover May 2013 to October 2015) to assess whether the incidents reported to Comcare were


comparable with the incidents reported in the Nauru Files, which were accessible to the DIBP. This review indicated that 12 instances of sexual assault had been reported involving children, which do not appear to have been reported to Comcare. It is possible that an unknown number of instance of CSA have not been reported in any format, for reasons outlined above.

40. The DIBP have informed the ALA that they interpret their reporting requirement under the WHS Act as only requiring reporting of ‘incidents arises out of the Department’s undertaking. The expression “arises out of” connotes a causal connection between the incident and the undertaking.’ It does not further define how this causal connection is understood, although this could explain the recent drop in reporting.

41. There is a need for legislative reform to clarify reporting requirements and ensure that all instances of CSA are reported to Comcare, as outlined above.

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28 Letter from DIBP to ALA, dated 28 February 2017.
Recommendations

The ALA makes the following recommendations:

- Where there is a conflict between protecting children from abuse and the objectives of Operation Sovereign Borders to provide a disincentive to potential asylum seekers, priority should always be given to protecting children from abuse;
- Given the DIBP was on notice that the risks of CSA were heightened in offshore detention and continued to choose to send children offshore without adequate safeguards, compensation should be available to any child who has been sexually abused in offshore immigration detention. Any offer of permanent resettlement in a third country should not undermine their ability to access compensation;
- All children and their families currently detained or living in the community on Nauru or Manus Island should be brought to Australia and supported to live in the community until such time that a suitable third country is found for a permanent resettlement option, if Australia is unwilling to offer permanent asylum;
- In the absence of this move, there is an urgent need for reform to ensure safeguards against CSA are available for all children in offshore detention pursuant to Memoranda of Understanding between Australia and offshore detention countries. These safeguards include:
  - Ensure that there are clear lines of legal liability and accountability between asylum seekers and refugees living on Nauru and Manus Island and the Commonwealth government that are not displaced by the fact that the Commonwealth has chosen to locate these facilities in different countries;
  - Australia must take responsibility for ensuring allegations of CSA are investigated and prosecuted. Training and monitoring of the NPF to ensure that practices meet at a minimum baseline law enforcement standards that exist in Australia should be provided. If the minimum baseline standards are not met by the NPF, Australian law enforcement officers should conduct the investigations and appropriate diplomatic arrangements should be made to facilitate this;
  - Re-open the school in the detention facility on Nauru to ensure that children have access to education without the risk of being exposed to sexual abuse;
  - Journalists should be permitted to access Nauru unhindered by either the Australian or Nauruan governments.