Serious allegations of abuse, self-harm and neglect of asylum seekers in regional processing centres

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MELBOURNE

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Terms of Reference for the Inquiry:

To inquire into and report on:
The 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, with particular reference to:

a. the factors that have contributed to the abuse and self-harm alleged to have occurred,
b. how notifications of abuse and self-harm are investigated,
c. 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,
d. the provision of support services for asylum seekers who have been alleged or been found to have been subject to abuse, neglect or self-harm in the Centres or within the community while residing in Nauru,
e. the role an independent children's advocate could play in ensuring the rights and interests of unaccompanied minors are protected,
f. the effect of Part 6 of the Australian Border Force Act 2015,
g. attempts by the Commonwealth Government to negotiate third country resettlement of asylum seekers and refugees,
h. additional measures that could be implemented to expedite third country resettlement of asylum seekers and refugees within the Centres, and
i. any other related matters.
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Committee met at 09:03

CHAIR (Senator Pratt): I declare open this public hearing of the Senate Legal and Constitutional Affairs References Committee for its inquiry into the serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre and into any like allegations in relation to the Manus Regional Processing Centre. These are public proceedings being broadcast live via the web. The committee has resolved to allow media to be present at this hearing. I remind any members of the media not to film any computer screens or documents of witnesses, the secretariat or the committee. If any witness has an objection to being filmed, please let us know. I remind all witnesses that in giving evidence to the committee you are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of giving evidence to a committee, and any such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. The committee prefers evidence to be given in public, but under the Senate's resolutions witnesses have the right to request to be heard in camera. It is important that witnesses give the committee notice if they intend to seek to give evidence in camera. If you are a witness today and intend to request to give evidence in camera, please bring this to the attention of the secretariat. If a witness objects to answering a question, they should state the ground upon which the objection is taken, and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request the answer be given in camera. Such a request may, of course, be made at any other time.

So we are starting today's hearing with the references committee, and after the first witnesses have given their evidence, I am going to hand over to the chair of the legislation committee. As you understand, we have two topics of inquiry before us today, and we have sought to arrange our proceedings accordingly, because we know you have an interest in both matters. With those formalities over, I would like to welcome everyone here today, and invite you to make a short opening statement.

Ms Pearson: I thought I would start by giving you a brief overview of recent field work that we have done on Nauru and also on Manus, but on Manus I may defer to Daniel and my colleagues at the Human Rights Law Centre, as they have been there more recently. With regard to Nauru we have provided a very detailed written submission, but to touch on some of the highlights, Human Rights Watch visited Nauru in July 2016 and interviewed 35 refugees and asylum seekers on the island. We supplemented this with 10 in-person interviews here in Australia with people who were transferred to Australia from Nauru. We documented widespread harassment and violence against asylum seekers and refugees on the island. We also have concerns about the mental wellbeing of those on Nauru.

Firstly, in terms of harassment and violence, refugees and asylum seekers told us they suffer regular violent physical attacks from local Nauruans, which are rarely punished by local authorities. Both children and adults reported acts of intimidation, harassment or violence directed at them or family members by Nauruans acting alone or sometimes in groups. The types of physical abuse that we documented included spitting, throwing bottles and stones, swerving vehicles into the path of people as they walk or ride on motorcycles, breaking accommodation windows, destroying property and stealing. Refugees described being assaulted and robbed, both in the day and at night-time, particularly as they were walking along the roadside. Twenty out of the 35 refugees and asylum seekers that we interviewed had been physically attacked by Nauruans. Six women also described sexual assault or harassment, including groping, touching, explicit threats, demands for sex, and attempted rape.

Regarding how the community try to avoid such attacks, adults and children told us that they rarely leave their accommodation, especially at night. Women and girls rarely leave the camps alone; they only do so in groups or with male companions. With regard to children, we also documented harassment and violence against children in schools. Save the Children has documented that 85 per cent of refugee and asylum seeker children are not in school, and one of the reasons, particularly for girls, is that they were subjected to physical violence by other Nauruan students. In terms of the authorities' response to these types of harassment and violence, asylum seekers and refugees told us that local police make little or no effort to investigate the attacks against them, even in cases where the victims were able to clearly identify the perpetrators of such attacks. Often the police disregard their complaints, and in some cases they discourage them from filing reports altogether.
With regard to the mental health conditions, I think nearly every asylum seeker and refugee on Nauru that we interviewed expressed concern about their mental wellbeing. They described high levels of anxiety, trouble sleeping, mood swings, and feelings of listlessness and despondency. This began after they were forcibly transferred to the island. Children had begun to wet their beds, suffer nightmares and act out. In some instances they had stopped interacting with or speaking to people outside of their immediate family. We also spoke with children and parents of children who had considered or attempted suicide or engaged in other acts of self-harm such as cutting their arms, banging their heads against walls and not talking to anyone.

With regard to Manus, just to make three quick points, we visited Manus in June 2015. We spoke to 13 refugees. We also conducted a series of interviews here in Australia with people who had been held on Manus, and that was in conjunction with the Human Rights Law Centre. We share the same concerns for men on Manus Island regarding their safety, and we interviewed people inside the transit centre who had freedom to come and go from the centre, but we found that some of the men there are so terrified of possible attacks by locals that, even though they have the freedom to come and go, they rarely leave the centre. We have the same concerns about mental health conditions. Prolonged detention has driven people to breaking point. We saw alarming levels of trauma, depression and anxiety. Finally, gay asylum seekers and refugees are a particularly vulnerable cohort on Manus.

Mr Webb: We have prepared an opening statement on the lifetime ban bill, which I would like to get to later, but on the Nauru and Manus inquiry, I will say this: I think it is no secret that conditions inside both RPCs are and always have been appalling. The United Nations has said so repeatedly, leading international NGOs have said so repeatedly and whistleblowers have said so repeatedly. At the Human Rights Law Centre we assist over a dozen women who have been sexually assaulted or intimidated on Nauru and are so afraid of ever being sent back there that they cannot sleep. We assist children who have been so harmed by their time in that RPC that they have received inpatient psychiatric treatment.

My first trip to Manus—I have been there three times—was in March 2014, when I was allowed inside the detention centre as part of a court case. I had read everything, I think, that had been written about conditions inside that centre and I was still shocked to see them firsthand. It was shockingly overcrowded, the atmosphere was tense, and everywhere I went I was surrounded by people desperate for help and desperate to tell their story. But I will never forget the thing that people described as the worst about those arrangements. One of the men came to court to give evidence and said to the judge: 'The worst thing about it all is not the physical conditions; it's the uncertainty. I don't know whether I'll be here for one year, for two years or 10 years. I don't know if I will ever see my family again.' That was in March 2014, 2½ years ago. A lot has happened in my life in that 2½ years; this man, for every minute of every hour of every day of that 2½ years, has been trapped inside the same detention centre. I think the announcement that refugees from Nauru and Manus may have a pathway to the United States is an important concession that Nauru and Manus are dead-ends, that people cannot stay there forever and in fact they cannot stay there any longer. That needs to happen quickly, because that man is suffering, and there are 2,000 other people who are currently suffering on Nauru or Manus. Their harm does not end until they are off those islands.

CHAIR: Ms Frew, did you have any additional comments?

Ms Frew: No.

CHAIR: Many people have had difficulty visiting Nauru so it is particularly fortunate that as witnesses you have actually had a chance to talk to people who have been subject to detention there. Are you able to characterise the extent to which you have been able to engage with asylum seekers at both facilities?

Ms Pearson: I did not visit the Nauru facility myself; it was another Human Rights Watch researcher who is based in London but who is very experienced in child protection. He was able to visit the island. He did not visit the regional processing centre—it was closed but is now open—but he was able to interview people around the island in different facilities, particularly in the homes of asylum seekers and refugees. Some people were fearful to talk with him. Some people were also despondent because they felt that they have talked to other groups and nothing has really happened as a result.

CHAIR: Before this inquiry, you will recall some of the commentary around the idea that some of the allegations that have been made have been made in some way to feed a political situation. Can you characterise for us the nature of the evidence you have heard and its reliability about what people have been subject to on both Manus and Nauru?

Ms Pearson: Our researcher who visited Nauru has about 20 years experience in interviewing particularly refugee and asylum seeker children around the world in different contexts. He gathered the first-hand testimony
from victims and he also spoke to witnesses about stuff that they had witnessed. We also spoke to some service providers on the island to corroborate that information. We collected photographic evidence and, in some cases, there were medical reports. There were complaints filed by the police so we were able to corroborate those stories.

**CHAIR:** Are you concerned that some people are trying to portray that false allegations somehow undermine all of the allegations and evidence? I call on you perhaps to look at last week's *Hansard* for this inquiry, where we had an exchange with the department about this, because it has certainly been noted in the media and other places as a way of trying to undermine and paint a false picture about what is happening in detention.

**Mr Webb:** I can speak to the harm I have observed and about the people that we represent who have been evacuated from Nauru and Manus and brought back to Australia. Their injuries are real. They did not choose to suffer them but they did. When I was on Manus Island, I witnessed the aftermath of a very violent attack by a group of locals against two refugees. The two refugees were surrounded, were beaten with an iron bar and were robbed. One of them collapsed unconscious, and I saw that. Those men did not choose to suffer that harm as part of some sort of political agenda but it did happen. So I cannot comment on what others report; I can just comment on what I have seen first-hand over the last few years—the violence is real, the harm is real and the suffering is real.

**Senator WATT:** Mr Webb, this is probably best directed to you because I think Ms Pearson said that you had been in Nauru more recently than she had.

**Mr Webb:** It was Manus.

**Senator WATT:** Whoever is the right person to direct it to, I am interested in your view on whether conditions in Nauru or Manus have got better, worse, the same. This is something that has been going on for a long time and there have been reports along these lines for some time. Now for the average person in the street, just to try and get some context, are things getting better, worse or the same?

**Ms Pearson:** One of the improvements was lifting the restrictions on freedom of movement on both Manus and Nauru but that unfortunately has not translated into better conditions for a lot of the people on Nauru. That is because a lot of people feel quite unsafe in the accommodation they have been provided. They have described how locals get drunk and throw stones at their accommodation and how they have to lock the door as soon as it gets dark. They are fearful of going outside because they are fearful of being attacked. That is a problem, both on Nauru and on Manus: quite a lot of people feel safer inside the confines of the walled former detention centres than they do in the other accommodation that is being provided which affords them more basic civil freedoms.

**Mr Webb:** The gates have opened on Manus. After three years, being able to go for a walk is a small mercy for some men. Being able to have a mobile phone and more regularly call the family and tell them that they are doing okay is a small mercy. But when I was first there, 2½ years ago, it was made very clear to me by the men that the worst aspect of their situation was their limbo, was the indeterminacy of it all. That has not ended, and in fact it has gotten worse over the last three years. I think most of these men have now been found to be refugees. When they are found to be refugees and have been detained for three years, they do not need the ability to go for a walk down the road or to make a phone call; they need the ability to begin rebuilding their lives in safety, and they do not have that on Manus Island.

**Senator WATT:** I will come to the announcement on the weekend about the US resettlement deal in a minute, but, Ms Pearson, you mentioned some horrific statistics there about the number of people being physically attacked or sexually assaulted, and that 85 per cent of children are not enrolled in school because of concerns for their own safety. They are horrifying statistics. One of the other ones that leapt out to me was the lack of faith in systems to make complaints or have complaints investigated. I think in your submission you talked about how a remarkably low percentage of complaints referred by the department to Nauruan officials were investigated or led to charges. I am going to ask the department about this later, but I presume that for the department to refer a complaint to the local authorities, it needs to meet a certain threshold and cannot be a frivolous complaint, yet even amongst those complaints there is still a tiny fraction that ever even lead to charges. Can you tell us a little bit more about your views on the integrity of that investigation system in Nauru?

**Ms Pearson:** That was actually from ABC media reports that of the 50 cases that had been reported to the Nauru police by Australia's department of immigration over the last three years, only five charges had been filed and two convictions had been reported. The people that we interviewed on Nauru described various cases of having rocks thrown at their head—in one case a Somali women witnessed her husband being beaten and hit on the head with a machete by local Nauruans. Despite efforts to get the police to investigate these cases, often the police would simply shrug their shoulders and refuse to file the complaints. In one case, as an example, where the
refugee had diligently written down the licence plate of the car after he was held up at knifepoint, he was told that
that car belonged to a government official and was asked if he was therefore implying that the government official
had committed the abuse against him. He said: ‘That’s not what I’m implying at all. It was a young man driving the
car; I’m not saying that it was a government official.’ It is this kind of pressure on the refugees that makes them
give up and not want to report the cases to the authorities anymore. We found in a lot of these incident that they
have lost all faith in the police.

Senator WATT: Let us turn to the announcement on the weekend of a possible resettlement deal with the
United States. I realise all of us are operating with a very low level of detail about this agreement, but it sounds
like on the whole you welcome this development as a step forward for people in limbo.

Senator IAN MACDONALD: Can you ask them, rather than tell them?
Senator WATT: I am just interpreting what they have already said, and I would have thought you would be
happy about that.

CHAIR: I am chairing this section, Senator MacDonald.

Senator WATT: Can you put forward any concerns or any additional detail that you would like the
committee to seek when we ask other witnesses later?

Mr Webb: I think the recognition that we need to look at ways forward and that people cannot stay on Nauru
and Manus forever is important, welcome and long overdue. The announcement has no detail on numbers, no
detail on time frames, and no detail on who may be left behind and what the government plans to do with them. I
think the reality is that what ends people's suffering is removal from the island and rebuilding their lives in safety,
not just an announcement that that may happen in the future, and so that detail, that follow-through is crucial. The
people that I have spoken to are cautious in their optimism. They are hopeful that it is a sign that one day soon
they will be off the island, but they woke up this morning still in the Nauru and Manus RPCs.

The other thing that I would say is that there was no provision in the announcement for families that are split,
and we are aware of over 20 people on Nauru and Manus with immediate family members in Australia. Talk of
lifetime bans and third-country settlement only leaves those people fearful that their separation will be
entrenched. The other thing that concerned me about the announcement was that the immigration minister
foreshadowed the deportation of 370 people who are already here in Australia. He said that everyone here will be
sent back to Nauru or Manus. The minister has said that these women who have been sexually assaulted and these
children who have suffered harm on Nauru and been brought back to Australia will go back to Nauru. We are
talking about 40 babies who were born here—children who have never been to Nauru and have probably never
seen a boat—yet face mandatory deportation. We are talking about children in classrooms today who face a return
to Nauru at some point in the future. That part of the announcement, that these families and these children may be
uprooted, was particularly concerning.

Senator IAN MACDONALD: Can you tell me, perhaps on notice, the background to Human Rights Watch?
Could you briefly tell me what your membership is and where you get your funding from?

Ms Pearson: We are a global organisation headquartered in New York. We set up our Australian office in
2013. Our mandate is to investigate human rights abuses wherever they occur in the world. We do that work in
more than 90 countries around the world. We do not accept any government funding, so all of our funding comes
from philanthropists and private foundations.

Senator IAN MACDONALD: Do you have an organisation in Australia? How many members are in
Australia?

Ms Pearson: We are not a membership based organisation, but we have a small office in Sydney.

Senator IAN MACDONALD: I ask the same questions about the Human Rights Law Centre. Who are you
and how are you funded?

Mr Webb: We are an NGO that is predominantly funded by private members and philanthropic trusts.

Senator IAN MACDONALD: How many members do you have?

Mr Webb: We are not a membership based organisation.

Senator IAN MACDONALD: Where do you get your money from?

Mr Webb: We get a small percentage of our money from the state government, and the rest is from private
donations and philanthropy. I think that less than five per cent of our funding is from the state government.
Senator IAN MACDONALD: I notice in the Human Rights Watch submission you do not mention any names at all, so the evidence you are presenting to the committee is all hearsay on hearsay. Why don't you mention some of the names of these people that have been so brutalised?

Ms Pearson: Although we have that information, we cannot share it, because people spoke to us on the condition of confidentiality.

Senator WATT: You do have that information, though?

Ms Pearson: Yes.

Senator IAN MACDONALD: You have the information, but you cannot tell anyone. Mr Webb, can you describe the men that were being brutalised on your last visit? Are they young or old, children, 20 to 30, over 60? What are they?

Mr Webb: The two men that I saw—

Senator IAN MACDONALD: Two men?

Mr Webb: Two men. One of them collapsed unconscious; the other one maintained his consciousness. They were both recognised refugees, Afghan Hazara men. Since I came back, another man that I—

Senator IAN MACDONALD: Sorry, my question was, broadly speaking, how old they are.

Mr Webb: Broadly, they were young men. They went for a walk to the beach—

Senator IAN MACDONALD: Fit young men, not with any physical disabilities?

Mr Webb: No.

Senator IAN MACDONALD: You have generalised, so perhaps I can generalise. What is the country of origin of these people you spoke to who gave you all these accounts of harm and mental harm?

Ms Pearson: We spoke to men, women and children from Iran, Afghanistan, Pakistan, Burma, Sri Lanka, Somalia and Sudan. I think they are the main ones.

Senator IAN MACDONALD: There are no women on Manus, are there?

Ms Pearson: No, only adult men.

Senator IAN MACDONALD: How many of them have been determined by the UNHCR or the Manus or Nauruan authorities to be genuine refugees? Again, I am asking in a broad sense. Half of them? Three-quarters of them? All of them? None of them?

Mr Webb: A majority. My understanding—and I am happy to be corrected and to have the record note that this is my understanding—is that over 600 have been found to be refugees.

Senator IAN MACDONALD: Six hundred on both?

Mr Webb: On Manus.

Senator IAN MACDONALD: Out of?

Mr Webb: There are about 900 on the island. Some have their claims still pending, but of those who have reached the end of the refugee status determination process, I think over 95 per cent have had those claims accepted.

Senator IAN MACDONALD: I understand that, of those that were not, none wanted to go back home with a cash grant from the Australian government.

Mr Webb: I did speak with many of them about that. I think the reality is that, after three years in detention with lots of money dangled in front of them, if going home was a possibility, they would have done it ages ago.

Senator IAN MACDONALD: I am talking about people that are not refugees.

Mr Webb: The very few who may have had their claims initially rejected are probably going through an appeals process.

Senator IAN MACDONALD: What is the name of the researcher who has visited a number of times?

Ms Pearson: To Nauru, it was Michael Bochenek.

Senator IAN MACDONALD: Did you say he has been there several times?

Ms Pearson: He has been to Nauru once, and I have visited Manus myself.

Senator IAN MACDONALD: I thought you said your researcher had visited Manus.

Ms Pearson: Daniel visited Manus several times.

Senator IAN MACDONALD: It is not cheap to get there. Who pays for you to go there, Mr Webb?
Mr Webb: The people who fund our organisation—namely, very generous philanthropists.

Senator IAN MACDONALD: That is interesting. Do you issue a public balance sheet on who your funders are and what your expenses are?

Mr Webb: Yes.

Senator IAN MACDONALD: Would I get that on the web somewhere?

Mr Webb: Yes.

Senator IAN MACDONALD: Some of you mentioned children in school. Was that on Manus or Nauru or both?

Ms Pearson: Nauru. There are no children on Manus.

Senator IAN MACDONALD: Sorry, of course. Is it a big school in Nauru? I am just trying to get the percentage of IMA children who are of school age, compared with the local population.

Ms Pearson: I am not sure of the total number of children in the school. I could take that on notice. I understand there are about 128 refugee and asylum seeker children on Nauru.

Senator IAN MACDONALD: I would suspect there would not be many more local school age children, would there?

Ms Pearson: I am afraid I do not know that. I could check.

Senator IAN MACDONALD: Most of the teachers at the school are Australian or Australian trained, aren't they?

Ms Pearson: Yes, quite a few are Australian. We spoke to Australian teachers. Some of the teachers have been trained in Australia.

Senator IAN MACDONALD: Are most of the teachers Australian, not local?

Ms Pearson: I would not know. I cannot answer that.

Senator IAN MACDONALD: You spoke to them. Are they unable to protect the children? You said that children would not go to school because they are fearful of what would happen at school, but are you telling me the teachers are powerless to do anything about that?

Ms Pearson: Teachers have not intervened in these cases. There have been repeated cases. For instance, a Muslim girl told us how she repeatedly had her headscarf pulled off her by other children at the school. Other children told us how they were shoved by other children. I mean, the reality is—

Senator IAN MACDONALD: How old is this girl?

Ms Pearson: I would need to check.

Senator IAN MACDONALD: I am no expert, but I thought young Muslim girls did not wear scarves at that age.

Ms Pearson: She was in high school.

Senator IAN MACDONALD: So there is a high school. Are you saying that these Australian or Australian-trained teachers were powerless to do anything.

Ms Pearson: I do not know whether the teachers were present when this actually happened. I do not think the teachers can be everywhere at once. A lot of times there have been repeated incidents where students have bullied, picked on and physically assaulted other students.

Senator IAN MACDONALD: Mr Webb, I think you said you were there in 2015. The camp had just been opened and they were able to go for a walk.

Mr Webb: Yes, I have been three times. The first time was in 2014 and then in 2015 when some of them found to be refugees were moved into what is called the transit centre and them, most recently, after the PNG Supreme Court had said that the detention centre was illegal and the gates were opened.

Senator IAN MACDONALD: When was that?

Mr Webb: That was in August this year. That was when my visit was. The Supreme Court decision was in, I think, March or April.

Senator IAN MACDONALD: Is your impression that conditions have improved since you first visited?

Mr Webb: The only time I was allowed inside the detention facility itself was when the National Court of Papua New Guinea expressly made orders that I be given that access. Every other time I have been there, access has been refused.
Senator IAN MACDONALD: By?
Mr Webb: That is an interesting question in that, ostensibly, access has been refused by the PNG government, but, when I have arrived at the gates of the transit centre and the detention facility, the question that has been asked of me is: 'Have you got approval from Australian Border Force?'
Senator IAN MACDONALD: Who asked you that?
Mr Webb: The guards at the gate.
Senator IAN MACDONALD: And who are they?
Mr Webb: Contractors employed by Wilson Security, who I think subcontract—
Senator IAN MACDONALD: Do you have the names of the people who asked you that?
Mr Webb: Of course not.
CHAIR: If you could give us any more detail of those arrangements for accessing the centre, that would be good.
Mr Webb: There is an application form on the internet that you download, complete and fax to a number. For each of the three times I visited, I did not get a response, so I made the application directly to people I have identified who are senior within the PNG Immigration and Citizenship Service Authority, PNGICSA. On all occasions access was refused, except when the PNG national court ordered that I be—
Senator IAN MACDONALD: Do have an email with the refusal that you could perhaps table?
Mr Webb: There was no response.
Senator IAN MACDONALD: So you have written to these people in the government, but they have just not responded.
Mr Webb: Yes.
Senator IAN MACDONALD: Regarding the people who told you at the gate, you did not take a photo of them or did not say to them, 'Excuse me, what's your name and what authority do you have?'
Mr Webb: I did not and I should—
Senator IAN MACDONALD: You are a lawyer and you did not do that?
Mr Webb: No, I did not take a photo of the guards who denied me access. I will say that I was always up-front about who I was, the purpose for my travel and my reason for seeking to inspect conditions. When I received no response, I followed up with phone calls on the island, I met with senior people from the Papua New Guinea—
Senator IAN MACDONALD: No names?
Mr Webb: I have names of the people I met. They told me that access was being refused.
Senator IAN MACDONALD: All of this is sort of hearsay upon hearsay upon hearsay. If you could give us some names, perhaps on notice, that could be useful and then we could follow them up.
Mr Webb: Sure.
Senator HINCH: Regarding the 85 per cent of children not going to school, is that recent? The Four Corners report showed how they were going to school before and then they were sent out into the Nauru system. Is that why the percentage is so high now?
Ms Pearson: The report was by Save the Children. I think it came out in July this year. It is referenced in our written submission, but I can also provide you with the link to that.
Senator HINCH: You say it has picked up since the schooling system changed, since they went out into the public system?
Ms Pearson: Yes. That change happened, I think, last year when it was a closed centre. Even before the centre was opened, I think there was an effort to try to integrate the children into local schools.
Senator HINCH: You also mentioned conditions on Manus. The government was saying in recent days that a lot of money has been spent on improving the accommodation and conditions, especially for families, and that families are being kept together on Nauru and not in prisonlike conditions. Are you saying that the situation has not improved in the last, say, year?
Ms Pearson: The accommodation for families is on Nauru. On Manus, the quality of the facilities in the transit centre is quite adequate, but that is not the concern of the men on Manus. The concern is their safety when
they leave that centre. They feel very worried about their personal security—the risk of being robbed, the risk of being beaten. That is the main problem on Manus.

On Nauru, I think there were varying degrees of accommodation. Some of the accommodation is quite adequate for the needs of refugees, but again I think the issue is really the lack of safety and the fact that people do not feel like they can leave their living quarters, because they are worried about their security, particularly at night-time.

**Senator HINCH:** On Manus I think you were saying, or one of the reports was saying, that several men have gone out into the workforce and have fled back into the 'protection' of the system.

**Ms Pearson:** Yes, I think the last figures we received from the department of immigration were that about 25 had moved to mainland Papua New Guinea, had been resettled, but several of those had returned to Manus because of problems that they faced in their living quarters, being robbed or having problems at their workplace. So they again did not feel safe in Port Moresby or Lae, which is why they ended up returning to Manus and actually wanted to re-enter the provided facilities but were unable to do so.

**Senator HINCH:** Mr Webb, I will have to leave briefly, but I am sure other senators will be asking about this. The lifetime ban—a lot of us look at this, and that is the one that is sticking in people's craw. How do you see it working? How do you see it being fixed?

**Mr Webb:** I think there are four key problems with the bill. The first is that it would unequivocally breach international law. The second is that—

**Senator HINCH:** How would it breach international law?

**Mr Webb:** Article 31 of the refugee convention expressly provides that states must not impose penalties on account of people seeking asylum without prior authorisation.

**Senator HINCH:** So once I am in Belgium, and I am following Belgian law, I cannot be constricted by something that Australia said 15 years ago?

**Mr Webb:** No, it just says that, if you arrive without authority and seek asylum and you are found to be a refugee, you cannot be punished because you arrived irregularly. That provision recognises that the nature of flight from persecution is often irregular, so it says you cannot punish people for that. A lifetime ban is nothing if not a penalty, so it is unequivocally a breach of article 31.

The second concern with the bill is that it applies to 370 people already here. Specifically, there is a provision in there for this bill, for this ban, to apply for transitory persons, so there are quite literally children right now in Australian classrooms whose parents would be banned from ever applying for a visa under this bill. That is the case.

The third problem with the bill is that it would entrench family separation. I met one man on Manus Island called Naysir. He is a stateless Rohingyan. He fled Burma together with his wife and children. They arrived on separate boats. His wife and children are rebuilding their life in the community in Sydney. He has been on Manus for the last three years. If this bill passes, he will never be able to apply for any kind of visa ever to come to Australia and see his wife and children. So that is the third problem with the bill.

The fourth problem is that all of that harm and all of that suffering is completely unnecessary. Previous immigration ministers have complained that they have too much power under the Migration Act to play God. The Migration Act and the regulations are dotted with broad, personal, ill-defined grounds for the minister and his delegate to reject visas if they want to. So the minister has plenty of tools at his disposal to knock back visa applications if he is so minded. This bill, this ban, is effectively a solution to a problem that does not actually exist.

**Senator HINCH:** The government says that a person—this mythical person who is suddenly living in Belgium—can apply to a future minister, 30 or 40 years from now, but obviously you think that is a myth.

**Mr Webb:** I think the application would be invalid because the law would say they have no ability to apply for a visa. But I think that that hypothetical, 'in 30 or 40 years, can you apply for a tourist visa?' demonstrates the absurdity of it.

My main concern is the direct impact it has on people that I have met. I spoke with this man Naysir after the bill was announced. It was incredibly painful for him because he woke up on a Sunday morning to the Prime Minister of our country saying: 'You're never going to set foot here. Your son has started school here. Your wife and kids have learnt English here and made friends, but never will you sit around a dinner table and have a meal with your wife and kids in Sydney.' That is my main concern with the bill: it entrenches a family separation that actually we have to end.
Senator McKIM: We are already well over time, and I want to hear from you guys particularly on the Migration Act, so I am going to truncate my questions a little bit. Mr Webb, just to follow up on something you said in your evidence earlier: you are telling the committee that you were denied entry to Lombrum on the basis that you did not have permission from Border Force?

Mr Webb: That conversation with a guard was at the gates of the transit centre, which is in east Lorengau. I arrived at the gate because one of the refugees who I had met on a previous visit saw me when I arrived and said, ‘Come and I'll cook you dinner.’ I went to the gate, and the guard said, 'Have you got permission from Australian Border Force?'

Senator McKIM: In the Human Rights Watch submission, it says:

Human Rights Watch and the Human Rights Law Centre visited the transit centre at Lorengau … in June 2015 but were not allowed to enter the Lombrum detention facility.

Was that a similar circumstance? Can you just talk us quickly through what happened at Lombrum there to deny you entry?

Ms Pearson: Yes. We initially tried to file the application through the fax number. The fax machine did not work, so I actually turned up at PNG Immigration in person to make the request. I subsequently followed up with many phone calls with people in PNG Immigration. The final result was that we were approved to visit the transit centre; however, we were not approved to visit the detention centre, and no reason was given.

Senator McKIM: So no reason at all was given, just an arbitrary refusal.

Mr Webb: Actually, after my colleague Elaine had left Manus, I did meet with PNG Immigration with an Australian government representative in tow, obviously, and I did ask why access was refused. The answer, put very bluntly, was, 'Because we thought you would criticise conditions.'

Senator McKIM: That was the reason given to you by an official from the Papua New Guinean department?

Mr Webb: Yes.

Senator McKIM: Because they thought you might be critical of what you saw in there?

Mr Webb: Yes.

Senator McKIM: I just want to touch on the announcement around the US arrangement—what little information has been received. I think, Mr Webb, you said that you or your organisation represents some women who are currently in Australia who are alleging that they were sexually assaulted?

Mr Webb: Yes.

Senator McKIM: Have you spoken to any of those people subsequent to the announcement?

Mr Webb: Yes. I have had many phone calls, and our office has had many phone calls from a lot of our clients since that announcement. I do not think there is concern with the US as a potential destination where they can rebuild their lives in safety. Their fear is having to go back to Nauru.

Senator McKIM: I want to ask you—obviously without referencing specific names or cases—what has the general response to that been, particularly from families in Australia and particularly from women who are alleging sexual assault and other crimes against them in Nauru?

Mr Webb: A lot of the families that are here have been in our communities for many months. Most of them were released in February this year, so you are talking a good eight or nine months in the community, making friends, joining sports teams—

Senator McKIM: Kids in school.

Mr Webb: so any removal from Australia is a huge upheaval in lives that have just started to be rebuilt. They are very concerned about that, obviously, but first and foremost their fear is any return to Nauru, irrespective of where it could be in transit to. Any return to an environment where they have already suffered significant harm, harm so serious that our own government has evacuated them—any possible return to Nauru—terrifies them.

Senator McKIM: Have any of them informed you that they have been approached by an Australian government agency for the purpose of giving effect to that announcement?

Mr Webb: We have had reports that yesterday some of our clients were told by representatives of the department that they would be going to Nauru.

Senator McKIM: That they would be?

Mr Webb: Yes.

Senator McKIM: Were they given any kind of time frame or process under which that would occur?
Mr Webb: Not that I am aware of.

Senator McKIM: Does your organisation also represent other people who are in that cohort of 370, not just the women who are alleging that they have been sexually abused but other people from Manus and Nauru that are currently in Australia?

Mr Webb: Yes.

Senator McKIM: Have you been contacted by any of the broader cohort, and, if so, what is their response?

Mr Webb: I have. I got a phone call last night from someone who said that his mother had been crying. I asked him about the United States, and their fear and their concern was not with the United States; it was that they would have to go back to Nauru. I think that sending them back to Nauru would be tremendously harmful. The possibility that it may at some indeterminate point in the future be a pathway to the United States, that uncertain prospect, does not lessen the harm.

Senator McKIM: Just to be clear: none of them would know for sure that it is a definitive pathway for them, because we simply do not know enough details?

Mr Webb: No time frames, no nothing.

Senator McKIM: Chair, I have a number of other questions. In the interests of getting to the Migration Act, I am happy to park the questions.

CHAIR: Before I close and hand over to the chair of the legislation committee, I just want to sound this out with you. I know you have taken evidence in confidence that you have used to put forward the nature of complaints that have been made about people's experiences on Nauru and Manus. We do have the capacity to take evidence in private, but that may or may not still prevent you from sharing more directly any of that information. But we are keen to try to reconcile those complaints with what the department is telling us about the number of complaints it has had and how they have been managed. I am keen to explore with you as witnesses how we might look more deeply into some of those incidents, serious incidents and complaints in terms of the way in which the Nauruan authorities or the department of immigration may or may not have actioned or followed up some of those incidents. Thank you. We will suspend our hearing until we take further evidence this afternoon.

Proceedings suspended from 09:53 to 14:09
CURR, Ms Pamela, Australian Women in Support of Women on Nauru

O'CONNOR, Ms Claire, Australian Women in Support of Women on Nauru

CHAIR: Welcome. This is the resumption of Legal and Constitutional Affairs References Committee and this afternoon we are inquiring into the serious allegations of abuse, self-harm and neglect of asylum seekers in the Nauru regional processing centre and any like allegations at the Manus regional processing centre. I will not go through all the formalities I read out this morning, but if any media should appear, are you comfortable with them remaining in attendance while you give evidence? Okay. If there is any evidence you want to give in camera, you are welcome to make that request, noting that you should do so as soon as possible. I invite you to invite you to make an opening statement. But, firstly, do you have any comments to make on the capacity in which you appear?

Ms Curr: Until a week ago, I was the detention and refugee rights advocate at the Asylum Seeker Resource Centre. I have been doing this work since 1999 and since 2004 at the Asylum Seeker Resource Centre. In that role I visit detention centres and I take calls for the offshore detention centres from people who are seeking assistance. I was part of a group of five who wrote this report, which was released in June this year. I hope you have a copy of the report. The report is Protection denied, abuse condoned: women on Nauru at risk and if you do not have a copy, we will make sure that we send you one online.

CHAIR: Would you like to submit it as evidence to us, through the formal submissions process?

Ms Curr: Yes, we would.

Ms O'Connor: Can I clarify one thing. We wrote a submission and our submission does connect to this inquiry. So our written submission has—

CHAIR: And draws on some of the—

Ms O'Connor: We are relying on that. It is in our first paragraph; we are relying on this report and we have provided a hyperlink to the report. This is simply printed version of the same document.

CHAIR: Thank you.

Ms Curr: Ms O'Connor will speak about the report in depth. What I want to do is bring the women and children's voices in to this inquiry because they are obviously not here. Part of the report is, first of all, talking about the women who were inside the camp who suffered sexual abuse and rape, and also the women who, following release from the camp and recognised as refugees, were placed in the community. The report shows they were placed in isolated locations around the island. There was a choice where they could have been placed in a community where there was fencing and where there was security. That did not happen. These women then had to walk to the shops in order to purchase their food. They when were placed at risk because the Nauruan community knew exactly where they were. This was done as a means of ensuring that the Nauruan community accepted people coming out of the camp in that the different landowner groups were paid rent for the number of people they had on their land.

CHAIR: The needs of the local Nauruan community were put first in terms of dispersing the economic benefit of having people placed with them—

Ms Curr: You could say that.

CHAIR: rather than actually working out what would have been in the best interests of those refugees which might have been to enable them to group them—

Ms Curr: The safety and security of the women was jeopardised.

Ms O'Connor: You could have detention on Nauru in an appropriate way that would not breach duties of care, that would not lead to abuse, neglect and sexual assault. There is a dual purpose. One purpose was, in fact, to sweeten the deal for the Nauruan community and that included the way the Nauruan locals would accept it and also included the financial benefit. But the second and most important imperative in creating the cruel environment that they did was to act as a deterrent. You cannot have a place that does not provide a cruel environment deterring other people from choosing that rather than choosing abuse or fear in their own home country. It cannot be a place that would have been able to have met the needs of the detainees there if it was not cruel. The purpose was a cruel purpose.

Ms Curr: I also want to raise the issue of the unaccompanied minors. There are currently 19 unaccompanied minors on Nauru; 13 living in one location, six in another. The 13 in one location will have designated birth dates on 31 December, when the immigration department will decide that they have turned 18 and are no longer unaccompanied minors. They currently live in fear, they cannot go to school and they are frequently attacked by...
locals. I have documentation of a young man who two weeks ago was beaten with sticks. He was lucky. He was attacked by 10 locals. One was armed with a hammer and one with a knife and the others with sticks.

CHAIR: How old was that person?

Ms Curr: Seventeen. He made a complaint. He went to the Nauru police on two occasions to make a statement. The first time they said they were too busy and turned him away. On our advice, he returned the next day. He made a statement, he signed it and nothing further has taken place. That is standard for the way in which asylum seekers on Nauru are treated by the local police.

Returning to the women, the first woman who contacted me in May 2015 after a very serious assault by a group of local men in which she had fuel poured on her and was burnt contacted me not because of the assault but because she was pregnant and she wanted a termination. She was terrified. It was the time before Border Force when there were still some compassionate staff in the immigration department and we were able to facilitate without any fuss a transfer to Australia where she had the termination. But that young woman remains in a detention centre in Australia 17 months later and she is not in a good way. There are a number of women in the same situation. Their voices are not heard. Obviously they want confidentiality, and that is why I am not identifying them or providing nationalities. But the situation on Nauru for these young women is really very unsafe.

There were, we believe, around 130 young single women transferred to Nauru. This was an entirely new cohort we had not seen in Australia before arriving by boat from Christmas Island. What happened is that, when the immigration department realised that this new group of young, single, unaccompanied women was arriving, they transferred them to Nauru within 48 hours. They remained in the camp for a long time, but then they were released to the community and they have been at risk.

I will leave it there, and Ms O'Connor will explain further our concerns. But before I do, there are some very wise words by Professor Newman in our report which I think, particularly for older groups, is so important to repeat. She said:

Compassion for rape survivors is a core Australian value. It has been hard fought for and needs to be protected. Respect for all women regardless of their visa status is a social responsibility …

Then she made the point:

This response on the part of government sets women's rights back 50 years to a time when rape victims were dismissed, denigrated and belittled, with huge social and psychological consequences.

I ask you to remember that these women, like Australian women, have suffered terribly and they have had no recognition or care provided for that suffering.

Ms O'Connor: I would like to address the broader issue of neglect and the breach of duty of care in relation to the conditions on both Manus and Nauru. Our written submission goes through the history of the research and reports for the last 15 years that have been available to the Australian government and which would have provided the Australian government with what we say is the knowledge that those conditions that were set up on Manus and Nauru were likely to lead to harm because of all the research that the Australian government already had in relation to the conditions that existed at Woomera, Baxter, Port Hedland, Curtin and Christmas Island and the numerous inquiries held thereon.

I was involved in relation to the unlawful detention of Cornelia Rau. I acted for her. I made submissions to the Palmer inquiry. In 2005 the Palmer inquiry, which was a government inquiry, told the Commonwealth how to provide conditions in immigration detention that were not in breach of duty of care. The year before, the High Court had delivered a decision of Behrooz, which said that conditions in immigration detention were tortious conditions, so a breach of a duty of care meant that a person could then sue. What has happened in Australia since that decision is that there have been dozens and dozens of people in your immigration detention centres in Australia—and now, with the class action in the Victorian Supreme Court for all the detainees on Manus—who are alleging breaches of the duty of care, and they relate to all the conditions, not just the conditions that we speak about in terms of the risk to women but also health, sanity, water, housing and the poor quality of the medical services.

It has to be, as we said in our submission, that you could not have sent a person to Manus or to Nauru without knowing the risk that the person would end up with a serious psychiatric condition after being detained there for about six months—which is about the watershed that all the psychiatrists have told you would likely lead to irreparable harm. Not only that, you do not only know it from all those reports—the two Human Rights Commission reports in relation to children, all the ombudsman's reports, all the litigation that has been run—but
you also know it because the Commonwealth, since 2004, have paid out millions of dollars in compensation claims for one thing: a breach of duty of care.

The Senate in 2011 provided—following, Senator McKim, your previous office holder asking a question before a similar committee—how much had been paid in compensation. It was then reported, because we never knew. What happens is that 99 per cent of these suits against the Commonwealth for breach of duty of care for immigration detainees end up with a settlement and a confidential deed. I know; in the last three years I have settled more than $1 million of claims against the department for historical and current detainees myself. We know that in 2011 the amount that had been paid out at that stage was $23 million. That was simply compensation given to detainees for the breaches of duty of care around those conditions in immigration detention. None of them related to Manus and none related to Nauru.

The class action in relation to Manus will be heard some time next year, but the Commonwealth already have all the evidence, because all the evidence-in-chief in that case is already before the courts. It had to be filed by 1 July. So you know about all the conditions. There is no point in us telling you that; you know already. We still do not know how much has been paid out since that 2011 figure. I would not be surprised if the figure was up around $30 million—and that does not include costs. That does not include the cost of lawyers like me, who act for detainees, and it does not include the cost of lawyers for the Commonwealth, who oppose it.

It cannot be that you sit here in 2016 and say, 'Tell us in which way we're failing to meet the needs of these people.' Since 2001 you have known. Since 2004 your own departments have told you. Since 2005 you have been paying compensation. Your Human Rights Commission and the Herriot commission have told you the harm you are doing to children, and you know, from the statements of claim that have been filed, that those immigration detention conditions—which you have mirrored in Manus and Nauru—ruin lives. People cannot recover from the breaches of duty of care that you have those people detained in.

I have been a criminal lawyer for most of my professional life. I have more than 30 years practice in criminal law. I have acted for murderers and I have acted for mass murderers. You cannot keep a prisoner in Australia in the types of breaches of duty of care that you keep immigration detainees in, because your prisons, in the state systems, are covered by regulations which set about conditions: no isolation, no deprivation of sensory materials. We do not have that in immigration detention. The Migration Act has never enacted regulations, although the High Court told you to in 2005. There are no minimum standards, so we have this common law breach of duty of care.

What was the answer in 2012, when this policy was proposed? The answer was to try to ship people, innocent people—men, women and children simply seeking asylum—to an off shore detention centre, where you were hoping they would escape the scrutiny of the Australian courts and the Australian public. That has been mirrored by the fact that people like me and Dr Lawrence, who tried to go to Nauru last year, could not get there. It is mirrored by the fact that Nauru charges $8,000 for a journalist visa to get there. If we cannot be witness to that, that makes me very, very worried about the commitment to provide a safe environment for anyone.

**Senator WATT:** Thank you very much for your evidence today. I realise you were not here for the previous sessions, but I found one of the things that came out of the session with the immigration department a surprise: for the—'unfortunate' does not begin to describe it—women who were raped in Nauru and have been brought here either for terminations or other medical treatments, and who remain here, if they want to take advantage of the US resettlement deal, it appears that they and any other asylum seekers in Australia now would need to first go to Nauru before then potentially being able to go to the US. We were told by the department that, if they were rejected by the US, they would probably remain on Nauru. Do you know how many women, roughly, we are talking about who are in that situation currently in Australia?

**Ms Curr:** As a rough reckoning, I believe there are around 10. In fact, I had a call from two of those women from Brisbane yesterday, and they said, 'You know, Pamela, they've just told us we have to go back to Nauru in order to get our visa process in order for us to go to America.' They said, 'We did not come here for a health treatment; we came here because of our mental health.' In one case, a young woman had a termination of pregnancy and, in the other case, she was mentally unwell following a violent assault on Nauru. They are absolutely in a panic at the thought that they may have to go back to Nauru in order to get out of this horrible situation and they are asking how that can be.

**Ms O'Connor:** Senator Watt, it is not just the women who have been raped, though. There are many people here who have been transferred here from Manus and Nauru who are too ill to receive appropriate treatment. There are no specialist treatment facilities on Manus Island, so, if they have to be transferred back to even make the application, they will then be unable to receive the specialist treatment that they have been receiving. They
only get moved here if it is absolutely necessary. It is hard to get someone here, and, if they have to go back, it would not just be rape victims; it would be all people here for health reasons.

Senator WATT: In fact, I think the department told us that there were about 370 people in that situation. I do not know whether that includes the people who are ill or if that maybe also includes family members who are with them.

Ms Curr: No, that includes the people who have been transferred here for either physical, surgical or mental health reasons from Nauru and from Manus.

Ms O'Connor: It is very hard sometimes to get family members transferred anyway, because that is the sweet deal: as soon as you are better you want to go back.

Senator WATT: So what that means is that all-up, whether we are talking about the women who were raped in Nauru or other people who have suffered some serious health problem that cannot be treated in Manus and Nauru, there are about 370 people in that situation currently in Australia?

Ms Curr: Sorry, I need to make a correction: that will also include the children—including I think around 40 babies who were born in Australia and who have never been to Nauru.

Senator WATT: One of the things you raised in your submission was about the role of a children's advocate, and I think your recommendation was that there be a children's advocate. Can you tell us a little bit about why you think that is important?

Ms Curr: Actually, that recommendation was made in June, but we have since had a clarification from Mr Pezzullo. I was reading the transcript from last week, and he explained that it was impossible to have a children's advocate, because Nauru is a sovereign nation, and we could not impose a children's advocate on this sovereign nation. So, in a way, that has answered the question.

Senator WATT: Leaving aside what Mr Pezzullo said, is it your view that a children's advocate would be a good thing?

Ms Curr: Our first view is that all people should be removed from Nauru—that is a given. There needs to be someone who can ensure that there is proper treatment of the children.

Ms O'Connor: It is all very well to have an advocate who will tell you exactly what we are telling you—that harm is occurring and is not being ameliorated. It is not an advocate you need; it is change. It is commitment to take on board what an advocate says. What is the point in having an advocate? We are all advocating. Where has that got us?

Senator WATT: What is your organisation's view of the government's proposed lifetime visa ban from visiting Australia?

Ms O'Connor: We are absolutely opposed to it.

Senator WATT: Do you care to elaborate?

Ms Curr: It is ridiculous and unnecessary. When a person is given refugee status in a country, they cannot then come to another country and seek it again. What is the purpose of it? If these people are given a status, say, in America or a European country and then in 10 years time want to travel here to visit family, there is no way that they can apply for a refugee visa, so why have this huge piece of legislation to cover something that is not possible?

Senator McKIM: Thank you both for coming in this afternoon, and thanks for your submission and for the report that you have provided to the committee today. You have been very clear about the global impact of conditions on people detained on Nauru. You have both interacted with a number of people on Nauru. I wanted to ask you specifically about your views on the capacity of the Nauruan police force to adequately investigate allegations and the capacity of the Nauruan justice framework to deliver justice?

Ms O'Connor: We wanted to research that for our report. There is no adequate reporting. There are no statistics. We could not go there and find out for ourselves. We are just as skilled as you are in determining whether the policing is adequate.

What we do know though is that there have been no prosecutions for women who have been sexually assaulted in the detention environment. What it tells us, and that is why our recommendation says this, is that if we owe the responsibility for this group of people—we do; we say that the Australian government has a duty of care—and the Nauru police do not have the skills or the ability or the forensic equipment to be able to investigate and then prosecute adequately, then we should be doing it. We should be providing that support, that education and that uplift to the Nauru government. We cannot just provide a problem to them and then criticise them for not doing it.
properly when we owe the duty. We do not want to get into mudslinging with the Nauru government or mudslinging with their police service. We owe the duty. We know it is not happening, so let us just do it ourselves.

**Senator McKIM:** Do either of you have direct knowledge about the impact on people who have made allegations of that fact that there have been no charges laid? Have either of you had interactions with people in that situation?

**Ms Curr:** Yes. I know that some of the young women who have, with advice, gone and made a police statement have then been bullied in the community. They have been threatened by those who realise that they have done it—that they have made a police statement against someone. They consider it is not worthwhile. I have spoken to a number of young women following attacks and said, 'Have you gone to the police?' Some of them say, 'There's no point. They never investigate anything and they will do nothing for us.'

This young man who was beaten the other day did go to the police. The first day he was turned away and told they were too busy. He returned with a Connect worker in order to make a statement about the fact that he was beaten by 10 men. He made the statement and he said: 'Now there is a new protocol. They won't give us a copy of our statement, because they say we've been sending them to Australia to advocates and to lawyers so people in Australia can see what is happening to us. So we can't have a copy.' I have a photograph of this young man's injuries, and there is no way you can deny that.

**Ms O'Connor:** What you have to remember is that many of the cohort of the victims who are attending, who have been detained in Manus and Nauru, are the survivors of sexual assault, torture and trauma. That is a weapon of war.

**CHAIR:** Ms Curr, would you like to table the picture?

**Ms Curr:** Yes.

**CHAIR:** Sorry to interject on your questioning, Senator McKim. In relation to that assault and raising that with Nauruan authorities, to what extent, if any, is there a separate reporting process to the Department of Immigration and Border Protection?

**Ms O'Connor:** The Department of Immigration and Border Protection is required to record all incidents of harm. They are required in the statistical analysis, so it will depend, really, whether there was a report made by the young man concerned. They are required to keep those statistics.

**CHAIR:** One of the issues we have is corroborating the incidents that advocates like yourself are aware of, the incidents that the Nauruan authorities are aware of, the incidents that the department is also aware of and the extent to which there is the same body of evidence attached to all of them in terms of whether individuals have made reports to all three.

**Ms Curr:** In this instance, we know that the department knows because the boy contacted Connect Settlement Services, who is contracted by the department, and asked for their help. They took him to the police station on the two occasions, so they know what happened to him. Senator Macdonald, in answer to your query: what happened was this young man was on his way home when he was attacked by 10 local men with sticks. One had a knife and one had a hammer. He was beaten on the back with the sticks, but he was very lucky because he managed to get on his bike and get going, so he got away before he suffered a worse injury.

**Senator IAN MACDONALD:** I can only see the photo of a person or a body. I have a photo of a red mark. What is that meant to be?

**Ms Curr:** They are the scars from being beaten across the back with sticks.

**Senator IAN MACDONALD:** That was the only injury he had, was it?

**Ms Curr:** That was taken in the first 24 hours.

**Senator IAN MACDONALD:** Is that the only injury he had?

**Ms Curr:** No, he had some others, but that was the most obvious one.

**Senator IAN MACDONALD:** Why wasn't a photo taken of all of his injuries?

**Ms Curr:** Because he is not a policeman or a lawyer. He is a 17-year-old kid who sent me a message and said, 'Look what they've done to me.'

**Senator IAN MACDONALD:** So he sent this to you?

**Ms Curr:** Yes.

**Senator IAN MACDONALD:** Okay. What is his name?
CHAIR: Are you seeking to go in camera, Senator Macdonald?

Senator IAN MACDONALD: Only if the witnesses want to. It is not my turn; I will come back to this.

Ms Curr: I will seek permission and provide it if the young man gives me permission. This is the third time he has been attacked.

CHAIR: I think we would need to take any such evidence in camera. It is difficult for this inquiry because many advocates have brought to us clear stories of incidents occurring. But, of course, once they are nameless, it is very difficult for us to follow those up with the department.

Senator McKIM: I just want to go back, Ms Curr, to where we were. I think you were advising the committee that you have been in direct contact with someone who had made a complaint to the Nauruan police and who was told they could not receive a copy of their complaint—is that right? It was on the basis that other detainees had allegedly—

Ms Curr: Yes, they were told it was a new protocol, and it was on the basis that other people had sent their statements. And they have sent statements; I have copies of police statements. They had sent their statements to advocates and to the media in Australia.

Senator McKIM: Are you aware of what supports are offered to detainees on Nauru who make complaints to the support services in the camp? This is not a question about Nauruan government; this is a question about those—

Ms Curr: You mean the private contractors who exist—

Senator McKIM: Yes, the contractors. If someone goes to a contractor and says, 'I've been assaulted,'—sexually assaulted, potentially—what supports can they expect? Are you aware of that?

Ms O'Connor: I know what the protocol is, but I think it would be best to ask the service providers.

Senator McKIM: Can you give us a quick synopsis of the process?

Ms O'Connor: It depends on the actual person who is providing the service. Some of the service providers are very sympathetic. Some of them have tried to whistleblow about the things that they have observed and seen. I am sure you are aware of the Four Corners program, I am sure you are aware of Eva Orner's movie and I am sure you have read Gleeson's book.

Senator McKIM: We have got in camera evidence before us.

Ms O'Connor: You have all that evidence, so all you are getting from us is second-hand information. You can get that firsthand information from the service providers.

Senator McKIM: All right. To the best of your knowledge, has the Australian government, in its contractual arrangements with the service providers, required service providers to respond in a particular way to complaints?

Ms Curr: The trouble with Manus and Nauru is it is exactly like a domestic violence victim. You know someone is being beaten up, so you provide treatment for them and then deliver them straight back into the environment that they are being harmed in. Professor Jureidini told the Commonwealth ten years ago that it is very hard to provide adequate services in the toxic environment people are detained in. So you can be 100 per cent effective at your job in a safe place, but in an unsafe environment you cannot treat, you cannot prevent, harm. So it is very difficult for those service providers and that is why they whistleblow when they come back.

Senator McKIM: I have no dispute whatsoever with that comment.

Ms Curr: To add to the experience of women who were subject to sexual assault and attacks in the camp, when they came down here we got to know them by visiting in detention. After we had built up a degree of trust, on several occasions women have told me what happened to them in the camp. I have advised them to ask to make a statement. What happened was that the Australian Federal Police came into the detention centre and interviewed two of the women that I know. They returned, in one instance four months later and in another instance three months later, and told them that they could do nothing about their complaint because it was a matter that happened on Nauru, but they had sent the statements to the Nauru police. Our concern, and the concern of the women, is that the Nauru police now have a record of what they said in Australia, and if they are sent back to Nauru they are afraid of what will happen to them.

Senator McKIM: Are those women currently in Australia?

Ms Curr: In detention, yes.

Senator McKIM: In community detention or—

Ms Curr: In locked detention.
Ms O’Connor: Your question was about the adequacy of services, from my understanding of what is available at Manus in particular, and also Nauru, there is no doubt about the inadequacy of properly trained psychiatric services, because we are talking bottom of the cliff stuff. We have already harmed people and we already know they are going to be extremely ill—90 per cent are going to be suffering from psychiatric conditions after having been in detention for in excess of 18 months. Do they have adequate psychiatric and psychological services from trained persons? No. There is no commitment to doing that. But we should not have to do it; we should not be causing the pain in the first place.

Senator McKIM: Regarding the people you have referred to who are in locked detention at the moment, these are women who have made serious allegations about mistreatment?

Ms Curr: Yes.

Senator McKIM: Is that in the camps?

Ms Curr: Yes.

Senator McKIM: So the allegations are that they were assaulted or whatever it was in the camps. They are currently in Australia but they have been told that if they want to apply to be resettled in the US they actually have to go back to the camp—

Ms Curr: That is correct.

Senator McKIM: in which they were allegedly assaulted.

Ms Curr: Yes, the camp and the community in which they were assaulted.

Senator McKIM: If the assaults occurred in the camp, it is entirely possible that the personal who actually committed the alleged assault is still working in the camps.

Ms O’Connor: And the camps are open, too.

Senator McKIM: I understand that.

Ms O’Connor: They could be residents of the island. And you have seen how small it is. If there is going to be a deal done with a foreign country to accept people that we owe a responsibility to and provide them with protection, there is no reason that the processing cannot happen at MITA. There is no geographical reason that I can see why there should be the expense of sending someone back to a place, regardless of whether or not they were harmed.

Senator McKIM: I could not agree more.

Ms Curr: The other problem is that some of the people here have family members back in Nauru. There is a woman in a northern camp here who has a husband and two small children, including a two-year-old, stuck on Nauru—separated. There is a woman here in Melbourne with her daughter who has not seen her husband and son for 22 months, and they are separated. There are not many but there are several families completely separated. What is going to happen to them?

Senator IAN MACDONALD: I was not going to ask any questions, because I have read the submission and that is probably all I needed to know. But having heard some of the questions, Ms O’Connor you are a skilled lawyer of note. What is this photo I am holding supposed to mean?

Ms O’Connor: What that tells me is that it is an injury on a back without a police statement attached to it. That is what it looks like to me. I can see skin and I can see the shape of the back. That is what I would say I was looking at. But if I were running a trial I would want to have an accompanying statement with the statement of the person who took the photograph to tell me forensically what it is. But I understand that that is what I am looking at.

CHAIR: They are the kind of questions the Nauru police should have asked but clearly did not.

Ms O’Connor: To me, I can see the spine—

Senator IAN MACDONALD: I appreciate that, because it means nothing to me.

Ms O’Connor: I can see a spine and I can see the side of a body.

Senator IAN MACDONALD: You have good eyesight then.

Ms O’Connor: I have seen it closeup as well.

Senator IAN MACDONALD: Do you have any other photos of this particular person that this represents?

Ms O’Connor: Are you addressing this to me?

Senator IAN MACDONALD: Either of you—
Ms O'Connor: I did not take the material.

Senator IAN MACDONALD: Photos that might indicate the extent of other injuries. You said he was badly beaten, yet we have this one photograph.

Ms Curr: I have a photograph of his face but I cannot provide it, because I do not want to identify him.

Ms O'Connor: But the police in Nauru ought to have it, because we understand a complaint was made—

Senator IAN MACDONALD: I am afraid the police in Nauru are not giving evidence at this inquiry. I note your comment about the hell-hole conditions—perhaps not your words, but the awful conditions—on these two islands. Has either of you ever been to any Indigenous villages in North Queensland, the Northern Territory or the top of Western Australia?

Ms O'Connor: I worked for the Aboriginal legal rights movement in South Australia and covered the whole of South Australia, so, yes. I also did their Royal Commission into Aboriginal Deaths in Custody and the Hindmarsh Island Bridge royal commission. I have been involved in Indigenous matters for a long time.

Senator IAN MACDONALD: So how do you compare some of the conditions that Australian Indigenous people live in compared with what is on Manus and Nauru—their air conditioning, their doctors. There is plenty of—

Ms O'Connor: The medical services within South Australia and the Northern Territory, which are the two areas in which I have experience, are very good medical services. We know that they are supplemented—

Senator IAN MACDONALD: Okay.

Ms O'Connor: I do not know if you want me to answer the question—but I know they are supplemented by the very good medical services in South Australia, with a large amount of dialysis and a large amount of mental health services. But people who live in communities in remote areas in South Australia and in the Northern Territory choose to live there. They choose to remain there and they move about a lot and come into health services when they can. The people on Manus and Nauru, all they did was come here and ask for protection—

Senator IAN MACDONALD: My question was: have you been to them? And your answer is yes.

Ms O'Connor: I have. You asked me to compare them. You did not asked me if I had been there; you asked me to compare them. So I think that requires—

Senator IAN MACDONALD: I asked if you had ever been there, but my next question was to compare them with what you saw on Manus and Nauru—the accommodation, the housing.

Ms O'Connor: I remember in particular because I have taken quite a few statements from people who have been on Manus Island. There is one long tin shed. It is a half circle. It had some standard fans that sometimes did not work and it had no ventilation at all. Up to 50 detainees were kept in that shed. There are five parts of the Manus Island detention centre and only one of them had air conditioning. So, no, they are appalling conditions.

Senator IAN MACDONALD: What year or time line are you talking about?

Ms O'Connor: Up until June this year.

Senator IAN MACDONALD: It is quite contrary to what the department has told us. So one of you is not telling us accurately. It would not be you so it must be the department. We will follow that up.

Ms O'Connor: I cannot see the relevance between—
Senator IAN MACDONALD: You are not asked to understand the relevance. You are just here to answer the questions.

Ms O'Connor: My answer to that question is twofold. One is that if there is substandard housing for our Indigenous communities—I have absolutely no doubt there is—we are breaching our duty of care to those individuals. To say that we breach our duty of care to other people because we breach our duty of care already on land is neither relevant and it is insulting.

Senator IAN MACDONALD: I understand that, but I was interested in your comparison and your concern for these people. You both talk a lot about the mental health of these people. Do you think the fact that these people have left war-torn areas—where they have perhaps been subjected to rape and torture—undertaken a plane trip to Malaysia or Indonesia and then dealt with people smugglers, got on leaky boats and been in horrific conditions on these boats might have had anything to do with their mental health?

Ms O'Connor: I will answer that. You know, the interesting thing about that question is that if you think—

Senator IAN MACDONALD: I am asking you—

Ms O'Connor: I do, 100 per cent—and I think you know that. So when this person arrives at our door and says, 'I am seeking sanctuary because this is where I have escaped from. I have seen my parents burnt in front of me. I have seen my town blown up,' we know that they arrive already tender. We know that they arrive already damaged. And what do we do? Do we assess them? No. Do we treat them? No. We put them in conditions that are going to compound that problem. Of course I think they arrive like that. They would not be seeking sanctuary if they were not already harmed.

Senator IAN MACDONALD: Are you suggesting there are no medical or mental health services on either Manus or Nauru?

Ms O'Connor: I am suggesting that the medical and mental health services are so inadequate and unable to provide adequate assessment and treatment of detainees that it amounts to a breach of duty of care—

Senator IAN MACDONALD: Could you describe—

Ms O'Connor: I have to finish the sentence—

Senator IAN MACDONALD: Could you describe what services there are for mental health in those two communities that you say are inadequate? What is there?

Ms O'Connor: So you are asking me, as an advocate who is not allowed to go to Nauru, when you can get that information from IHMS and the government.

Senator IAN MACDONALD: You have made the comment. As you would understand, I am trying to test your evidence. You have said the health conditions are no good. I am just wanting to know: what are the conditions that you are saying are no good?

Ms O'Connor: I will tell you how I know it.

Senator IAN MACDONALD: No—what are they? I am not asking how you know; tell me what they are.

Ms O'Connor: The conditions are inadequate to meet the psychiatric needs of the contained population in Manus and Nauru—

Senator IAN MACDONALD: How many psychiatrists have they got there—

Ms O'Connor: because we know, after people have been in immigration detention on Manus and Nauru for in excess of 12 to 18 months, that they are suffering from severe psychiatric illnesses to such an extent that many of them are being transported to the mainland, and many of them—

Senator IAN MACDONALD: That is great advocacy, Ms O'Connor. I am asking a simple question of what the services are.

Ms O'Connor: Inadequate.

Senator IAN MACDONALD: But what does inadequate—

CHAIR: Ms O'Connor is probably not able to give you a list of the services, because she has not—

Senator IAN MACDONALD: That is the thing: most of the evidence we have heard today is hearsay on hearsay on hearsay. And when you ask for some details—

CHAIR: If you want to explore hearsay, then I no longer need to give you the call.

Senator IAN MACDONALD: Sorry?
CHAIR: You have had your 10 minutes, as have other senators.

Senator IAN MACDONALD: You gave half an hour for two senators—that is 15—but never mind. I understand. I was not even going to enter into this, because I know what it is all about. I have heard all the evidence before.

CHAIR: I have been fair in my allocation of time and not even used my own allocation.

Ms O’Connor: Can I make one point? Senator Macdonald, what you have got is a history. You have got 15 years of history of your own department's investigation into the adequacy—the immigration department, or Commonwealth departments—15 years of history into the inadequacy of mental health services within your immigration detention centres. Secondly, and more importantly, you have 15 years of evidence of how the way that you are operating detention centres causes mental health problems to an already sensitive cohort. The very description you gave me of where they are fleeing from and how they get here and the very kinds of population you are dealing with—women and children. We know young children who stopped talking—

Senator IAN MACDONALD: Yes, young children, women—I keep hearing that and I am sure it is right. Ms O’Connor, the difference is that the department tell us—and I take notice of them because I have no reason for any other comment—that there are adequate services, that there are psychiatrists, that there are mental health workers—which you do not see in many Aboriginal communities. That is why I am simply asking. Your evidence is so contrary to that of independent public servants, who have no reason to tell—

Ms O’Connor: They are not here as independent public servants.

Ms Curr: Senator Macdonald, why then, if there are adequate services on Manus and Nauru, are 370 people transferred to Australia for services? I think the question is answered by the department itself. The services are not adequate and people continue to deteriorate to the extent that they have to be brought to Australia in order to keep them alive.

Senator IAN MACDONALD: I appreciate your view. I know it is a seriously held, emotionally held view.

CHAIR: Senator Macdonald.

Senator IAN MACDONALD: I can only go on what I am told by independent public servants, and it is contrary to what you are telling me.

CHAIR: Thank you both for your evidence this afternoon. It was very insightful, as were your exchanges with committee members.
JENKINS, Dr Kym, President Elect, Royal Australian and New Zealand College of Psychiatrists

PHILLIPS, Dr Georgina, Fellow, Australasian College for Emergency Medicine

[14:55]

CHAIR: Welcome. Do you wish to make opening statements?

Dr Jenkins: I would just like to make a few comments.

CHAIR: Okay—if you could keep them brief. We need to keep our discussions down to half an hour, as a whole, for questions as well.

Dr Jenkins: I am a consultant psychiatrist as well as being the president-elect of the college. Thank you for the opportunity to be here today. I have just tabled a statement from RANZCP, which is a very brief summary of our full submission. Our college has done quite a bit of work in this area. We have an asylum seeker and refugee health working group, which has been the main author of our submission. Part of that group are several psychiatrists who have firsthand experience of the conditions on Nauru and Manus Island. Various college policy documents are referenced in our full submission, but, to summarise the key points of the RANZCP submission, we really oppose the prolonged detention and indefinite detention of refugees and asylum seekers, particularly children. The effects of prolonged and indefinite detention on the mental health of asylum seekers cannot be underestimated. We are very concerned about the exposure of asylum seekers in processing centres to alleged sexual and physical assault. We advocate for better provision and immediacy of mental health facilities and more timely processing. We advocate for greater transparency and accountability in these areas, particularly regarding health issues.

The main message is that we are really opposed indefinite detention of uncertain length because of its poor mental health outcomes. We are particularly opposed to the prolonged detention of kids or the detention of children at all. We are very aware that children particularly are incredibly vulnerable and we may be compounding any mental health issues that they experience later on in life. We would prefer to see quality mental health services in detention centres. We are glad that the section—whatever section it was—of the border security act has been repealed. We feel that, if medical practitioners are not allowed to speak to each other and to other health workers about what is happening to the people they are looking after, it is contrary to good medical practice. Those are my key points, but I can expand on everything later.

CHAIR: Thank you. They are also well outlined in your submission.

Dr Phillips: As you know, the Australasian College for Emergency Medicine, ACEM, is the peak body for emergency medicine in Australia and New Zealand, including all postgraduate training and support in emergency medicine and advocacy around all issues pertaining to the practice of emergency medicine, emergency and prehospital care, and emergency departments. We have endorsed the Royal Australasian College of Physicians' position statement on asylum seeker health from 2015, and we have also published our own policy statement on the health of the asylum seekers, both of which are publicly available.

Fundamentally, and in agreement with our medical and health colleagues, ACEM opposes mandatory detention of asylum seekers, particularly offshore detention, because of the many health harms that are known to be caused by this practice and very well documented through the submissions from our combined professional bodies. With specific regard to the committee's terms of reference to this inquiry, ACEM firmly believes that the principal factor leading to abuse and self-harm of asylum seekers is their persistent and indefinite detention on Nauru and Manus Island.

ACEM has further information that pertains to items c. and d. in the inquiry terms of reference relating to the impact of the Nauruan detention centre on the health geopolitics of the Pacific region as a whole. We would like to note that there are three key health harms for the Pacific region as a result of the Nauru facility. The first is maldistribution of limited health workforce and incommensurate salary scales at the expense of health service in other Pacific island countries. Second is the perpetuation and dissemination of harmful, negative and prejudiced attitudes towards asylum seekers and refugees amongst the Pacific island medical workforce and, therefore, around the Pacific generally. The third is unrealistic, unsustainable and potentially harmful expectations of service delivery around the Pacific because of extra health resource maldistribution to Nauru—population 10,000—such as, for example, a CT scanner. This informs poor decision making and resource allocation in neighbouring Pacific islands countries who feel their population and needs are greater.

CHAIR: Thank you both very much. Would you like to start the questioning, Senator Macdonald?

Senator IAN MACDONALD: I am happy to. Was your last point that, because Nauru has a CAT scanner and others do not, that impacts on our relationship with other South Pacific island nations?
Dr Phillips: Other Pacific island countries see what resources are being made available for Nauru and think, 'We're bigger. Our needs are equal or greater. We should be able to have the same kinds of resources.'

Senator IAN MACDONALD: What evidence do you have for saying that?

Dr Phillips: We have a wide network of fellows of the Australasian College for Emergency Medicine who are in short- and long-term positions of work and capacity development activities around the Pacific region. We also have a network of clinicians and colleagues that work in the Pacific.

Senator IAN MACDONALD: Which countries do not have the same standard? They are independent countries, of course, that are recipients of very large amounts of Australian aid.

Dr Phillips: That is true. There are CT scanners in Papua New Guinea and in Fiji. They are the two main referral sites for the Pacific region.

Senator IAN MACDONALD: The Solomons?

Dr Phillips: No.

Senator IAN MACDONALD: Your colleagues tell you that?

Dr Phillips: Yes, and I have made visits this year to Fiji, Kiribati, the Solomon Islands and Papua New Guinea.

Senator IAN MACDONALD: Have people mentioned to you that Manus and Nauru get these but they do not so they think Australia is awful?

Dr Phillips: That is information that we have received through our network.

Senator IAN MACDONALD: Thank you for your submission, which I have read. Who puts your submission together? Do you have a subcommittee of the college?

Dr Phillips: We have staff of the college who, when they are compiling this kind of report, put information out to all fellows of the college to provide information and put submissions in. Then the staff members—

Senator IAN MACDONALD: So it is prepared by staff.

Dr Phillips: do research and use the information that they have received from fellows.

Senator IAN MACDONALD: Could I ask the same question of you, Dr Jenkins?

Dr Jenkins: Our report is predominantly the work of the working party that we have had into refugee and asylum seeker health. I cannot recall the exact number of psychiatrists that are part of that, but, as I said in the opening, a number of the psychiatrists on that have had very much direct experience in that area. They have worked with people—

Senator IAN MACDONALD: The psychiatrists have actually worked in Manus and Nauru, have they?

Dr Jenkins: I do not know whether they have actually worked on site, but they have been part of the workforce issues there and been to visit and things.

Senator IAN MACDONALD: Were you aware of any psychiatrists or mental health workers on either Manus or Nauru?

Dr Jenkins: I am aware that psychiatrists visit there. I do not have the actual numbers of the psychiatric workforce there. Our trainee psychiatrists do rotations to these centres as part of their training—obviously, not many trainees are going to have that experience—and they are supervised by a consultant psychiatrist when they have these training experiences. I can find out for you how many psychiatrists would be there, but I do not have that information at the moment. I can take that on notice.

Senator IAN MACDONALD: I am curious as to who put this report together, which is a serious contribution to the debate. One of the recommendations is:

… a commitment by the Commonwealth … to take allegations of abuse, violence, neglect and self-harm seriously and impartially, based on the evidence of each individual case, and unimpeded by political bias.

This is a submission you stand by?

Dr Jenkins: Yes.

Senator IAN MACDONALD: How would you compare the services on Manus and Nauru with those that are available to Indigenous Australians living in remote parts of Australia? Perhaps that is not a fair question. If it is, tell me so.

Dr Jenkins: I am going tell you so because I think it is probably unfair on many levels. It is a question without notice. I have come here today to present our submission about Nauru and Manus, and I would rather
focus our discussion on that. Like the previous witness, my personal belief and the belief of many members of my college is that the services we provide for our own Indigenous populations leave a lot to be desired, but that does not take away from the needs of the detainees on Manus or Nauru. It does not diminish what those people are going through either or the mental health risks for them.

Senator IAN MACDONALD: Do your members volunteer to go up to Manus and Nauru? I know that a lot of medical groups do send volunteers to Pacific island regions, in particular. I have seen them over there and spoken to them. They are general medical people, not necessarily psychiatrists.

Dr Jenkins: I am not sure of the exact numbers of people who have been there as volunteers as opposed to people who have been paid for the work that they do in those centres. If you would like to know out of session and after today, we can probably find that information for you.

Senator IAN MACDONALD: That would be useful if, on notice, you could do that.

CHAIR: Senator Macdonald, that is your limit for questions.

Senator McKIM: Good afternoon to you both. Thank you for coming in. To you first, Dr Jenkins: your submission makes it clear that asylum seekers and refugees are the most vulnerable of all migrant groups due to the circumstances they are fleeing.

Dr Jenkins: We have a good comparison there about the mental health of refugee migrants as opposed to economic migrants as being twice as high in the way of mental health problems.

Senator McKIM: Would it be a fair synopsis of that fact to say that, in relative terms, they are an extremely vulnerable group?

Dr Jenkins: I think that would be very fair.

Senator McKIM: And that is before they even get to Manus or Nauru or other detention centres. You are talking about the circumstances that have led them to become people seeking asylum or refuge, are you not?

Dr Jenkins: We are. We are talking about people who are very vulnerable because of the processes and everything else they have been through before they get to this situation.

Senator McKIM: That is right.

Dr Jenkins: What we are also very aware of is the retraumatisation when they get there and how the environments that they are in are not conducive to good mental health care. The big issue that we always push as psychiatrists is that any adequate mental health treatment needs to approach not only someone's biological needs, their treatment with medications, but their psychological needs and their social needs as well. Trying to treat mental illness while somebody is in this sort of social situation—and I am here to advocate for mental health, not for social policy—is like trying to fill the bath with the plug out, because you are not looking after all the dimensions you need to look after for somebody's good mental health care.

Senator McKIM: Thank you. That is a great analogy. That is where I was going to go with this line of questioning: to ask you how hard it is to treat mental conditions that are, at least in significant part, caused by the environment that the people are in without actually taking them out of the environment. Would you regard it as futile or would that be putting it too strongly?

Dr Jenkins: I would not say it is futile, because that might imply that we should provide no services whatsoever. Certainly, any attempt at helping and trying to ameliorate the things that lead to poor mental health outcomes, no, is not futile. But it is just not possible to provide effective mental health care in that setting while people are being constantly retraumatised and exposed to things that we know have poor mental health outcomes. In making those comments, it is with particular reference to adults. It is so much worse for the children, who are at risk during their developmental stage, and for people—and this is in our submission—who may have developmental delay, other cognitive difficulties and other impairments that would need special care and consideration in any setting.

Senator McKIM: Thank you. I will put this question to both of you. It goes to the exemption that was recently given to doctors and other health professionals around the nondisclosure provisions, if you like. I call them the secrecy provisions of the Australian Border Force Act. I want to take you back to before that exemption was in place and offer the opportunity to both of you to expand a little bit on what the implications of that were. Firstly, I go to the personal wellbeing of the doctors and medical health professionals and, as importantly, their capacity to provide top-level health care and health responses to the people who needed it in the detention centres. I offer that to both of you as a question.

Dr Phillips: Certainly it has had a significant impact. Australasian emergency physicians, as far as I know, have never been invited to Manus or Nauru to provide care, but we know that our fellows have been involved in
the treatment of asylum seekers when they have come to Australia and also perhaps in retrieval situations. All of them have been very reticent to share information, even preferring to be anonymous for the purposes of this inquiry. Certainly it has meant a culture of silence and an unwillingness to speak out about things that we know and hear of that could be controversial or would reflect badly.

Senator McKIM: Before I come to you, Dr Jenkins, I go again to Dr Phillips: have people who are in the situations you just spoke about raised with you concerns that those nondisclosure provisions actually impacted their capacity to provide medical assistance?

Dr Phillips: I do not think any emergency clinician would alter the care that they provide for a patient because of some threat of litigation in the future, but it might change the way they talk about it later on. I do not think the actual care provision would be.

Senator McKIM: I accept that. To follow up on that, would there be concerns that, by providing that treatment, they may in fact be in breach of the legislation?

Dr Phillips: I cannot comment on that.

Senator McKIM: Dr Jenkins—just on the fundamental question around compromising medical or psychiatric care.

Dr Jenkins: I think, and it is the view of members of our college, that we have an ethical duty to advocate for good mental health care for our patients, and being silenced and not able to speak out about the conditions people are receiving mental health care in is contrary to our ethical stance on providing good medical care. Advocacy for our patients is part of providing good mental health care. I also have concerns about the personal health of the workers in that setting and the secondary traumas they experience because of the difficulty and the complexity of the patients they are looking after and the frustrations they feel in not being able to provide that adequate care. I think the effects upon our workforce and people who go to these centres cannot be underestimated.

Senator WATT: Thanks very much for coming along today. Based on either your own observations or those of your members who are reporting back to you, can you give us a general description of the condition of the mental health of asylum seekers in Nauru and Manus at the moment? I know every case is different but in a general sense, as a cohort, how would you describe the mental health status of detainees?

Dr Jenkins: That is a hard one, to give that broad generalisation. We have got the published data from people who have researched about the appalling mental health outcomes there. I have been in receipt of various anecdotes of people's experiences there, but it is hard to generalise from what one psychiatrist finds particularly traumatic about their stay there. I can only say that I have not had any colleagues who have come back from working in these centres who have not been severely personally and professionally challenged by the work they have to do there, and these are experienced, very dedicated psychiatrists. That gives you a qualitative answer. It does not give you a quantitative answer to your question.

Senator WATT: I am not sure if you are across this, but you might be aware that currently before the parliament there is a bill which seeks to effectively ban people who came to Australia by boat from ever applying for a visa, even to travel here as a tourist or whatever. Do you have a medical view of how that lifetime ban would impact on the mental health of asylum seekers?

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Senator WATT: Do you have a view, Dr Phillips, or of any of your members? Any views they have about the likely impact on the mental health of asylum seekers has not been something discussed with you by any of your members?

Dr Phillips: There are a lot of personal views about what that impact might be. That is informed by our professional training as medical professionals, but it is not a position statement of the college.

Senator WATT: One of the other things we have heard quite a lot about today is the risk, depending on how the legislation is implemented, that families could be separated as a result of this bill. Does the college have a view, or do you personally have a view, about the mental health impact on children if that bill does lead to families being separated?

Dr Phillips: I think it is fairly obvious what our professional opinion about that would be—that it would be harmful.

Senator WATT: Not necessarily to a nonpsychiatrist.

CHAIR: We cannot quote you on that.

Dr Phillips: As a medical professional my opinion is that that would be a harmful practice that would lead to greater stress and psychological and psychiatric illness.

Senator WATT: Why is that?

Dr Phillips: I will hand over to my expert colleague on that matter.

Dr Jenkins: For vulnerable children, being with their families is clearly the best place for them to be. The thought that children may be separated from their families is not going to help their mental health, it is not going to help their emotional and psychological development and it is going to make them more vulnerable to mental-health issues as time progresses.

CHAIR: Thank you, Dr Phillips and Dr Jenkins, for giving us your time this afternoon. It is much appreciated. I am sorry we do not have longer with you, but we are already running a little bit behind.
BUTTON, Ms Lisa, Asylum Seeker and Refugee Policy and Advocacy Adviser, Save the Children
LAMOIN, Ms Amy, Head of Policy and Advocacy, UNICEF Australia
TINKLER, Mr Mat, Director, Policy and Public Affairs, Save the Children

[15:21]

CHAIR: Thank you for returning and breaking up your day to come and see us again this afternoon, Mr Tinkler and Ms Button. As you understand, we are now taking evidence in relation to abuse, self-harm and neglect of asylum seekers in relation to Nauru and Manus. We do not have a lot of time, but I will invite Ms Lamoin to make a short opening statement and perhaps invite a few brief remarks as well from Save the Children.

Ms Lamoin: Good afternoon, Chair and Senators. I might actually, in the interests of time, noutshell what I have set out this afternoon. Thank you for the opportunity to address you briefly. As you know, UNICEF works in over 190 countries to ensure the survival, protection and development of every child.

This week UNICEF Australia has welcomed the news of the US resettlement arrangement as a safe and sustainable pathway for refugee children on Nauru and their families. We hope to see continued discussions between Australia and suitable resettlement countries to ensure that all refugees and vulnerable people are resettled in the most appropriate context possible.

I should say that, from a UNICEF perspective, it is no surprise that we are having these conversations and that we have had these repeated conversations over and over. In fact, the selection of Nauru as an appropriate choice for a regional processing centre itself is actually problematic. Recently UNICEF, our Pacific office and implementing partners did quite a lengthy child protection review looking at the entire child protection system in Nauru, and it had some very clear findings. I will run through those very quickly for you. Essentially, while the system is certainly evolving and there have been some positive developments—like the development of a brand-new child welfare law and a new child protection directorate—the report found overall that even the most basic building blocks for a child protection system are missing. Subsequently, none of what we hear today should come as a surprise to any committee members.

The report recommended the following: a finalised child protection framework strategy and implementation plan—they were missing—to ensure that there are sufficient funds for a child protection policy. We also need to develop a plan for the long-term developments of the social welfare sector. At the time the report was being drafted and researched, we could not confirm that there were any accredited and adequately trained social workers that belonged to the government. Of course that is a fairly major gap for any kind of child protection system. We need to activate mandatory reporting of child abuse for staff in the justice, welfare, education and health sectors. We need to develop case management and referral protocols, which were essentially non-existent. We need to develop a child protection policy for schools, which did not exist, and we urgently need programming to address the high rate of gender-based violence on the whole of the island.

So while the child protection system is in fact evolving and there has certainly been much work done, to the credit of the Nauruan government with support from the Australian government, it is a very fair statement, from a UNICEF perspective, to say that the system itself fundamentally failed the very complex needs of refugee children. I might leave it at that for now.

CHAIR: Do you have a copy of that report that you are able to table for us?
Ms Lamoin: I do.
CHAIR: Thank you, that would be helpful. Has it already been submitted to us as evidence?
Ms Lamoin: It has not.
CHAIR: So we can table that now and accept it as a submission. Thank you. Save the Children?

Mr Tinkler: Thanks for having us back. This is the fifth inquiry into Nauru that we have given evidence to. Some of those inquiries have been public and some of those have been not public. For that reason, we have chosen not to do a detailed submission on the allegations of abuse and rights violations of children.

There are two things I will draw your attention to. We produced a report called At what cost? recently which looked at the human, economic and strategic costs of these policy settings. We produced a report recently looking at the education system on Nauru. We had a staff member there between January and May this year looking at that. We did draw to the committee’s attention the previous confidential submission we made to the last inquiry which documented in great detail some of the impacts of the detention settings on children.
CHAIR: You have made those reports available to us as a committee and we are indeed drawing on the evidence you have previously provided to earlier inquiries. With that, we can move to questions.

Senator McKIM: Good afternoon. I wanted to start with UNICEF and the evidence you just gave. You have said that progress has been made around the child protection framework in Nauru. How would you categorise it now? I will go back to before in a minute, but how would you categorise it now relative to, say, the child protection framework in Australia?

Ms Lamoin: There is no point of comparison. I should say that I actually have not been present on Nauru, but I do work closely with my colleagues in the Pacific who do spend time on the island and who have contributed to this report. There is no point of a reasonable comparison between those two frameworks. Again, the two big achievements recently in relation to the Nauru child protection framework is the child protection directorate being established and also the new child welfare law. I think my concerns are largely that while this exists as part of the framework, as we see things like the guardianship act exist as part of the framework, really there are big gaps in relation to funding and implementing this approach. In terms of the actual effect we see for children, there are major gaps. Of course, developing proper legal frameworks is part of a good approach. It is a really important first step in building a child protection system, but it is a very long and slow process and unfortunately it is unlikely to have particularly positive effects, certainly for the refugee children currently on Nauru.

Senator McKIM: Back to the early days, if I can put it like that, when the centre was first established, you said—correct me if I am wrong—the basic building blocks for a child protection framework were missing. Is that right?

Ms Lamoin: That is correct. In fact, they still are. It is very much an evolving picture for Nauru.

Senator McKIM: Would it be fair to say there was no child protection framework in Nauru when we established the camp for the first time?

Ms Lamoin: There was certainly no formalised or completed child protection framework. In relation to actual, trained staff and referral processes, as I mentioned, there were gaps. So I guess it is very fair to say that those basic building blocks were missing, and to some degree they remain missing though good work has been done to try to address some of those gaps.

Senator McKIM: When you talk about a child protection framework are you talking in policy terms or are you talking human and other resources on the ground?

Ms Lamoin: A child protection system is both the legal frameworks and the human resources and adequate funding. There are gaps in relation to all elements of that system.

Senator McKIM: And there are currently still gaps in relation to all elements?

Ms Lamoin: There are. Although good work is being done there still remain some serious gaps.

Senator McKIM: Maybe this is just my thing—I want to apply labels to a situation, so I am just going to put another one to you. Please feel free to reject it if you think it is unreasonable. Back when the Nauru camp was established, would it be fair to describe Nauru's child protection system as completely inadequate?

Ms Lamoin: Yes. I think the important thing to add is that UNICEF has response systems worldwide for children, so we work on systems in host countries both for local children and also for refugee and asylum seeker children. It was inadequate for Nauruan children as well.

Senator McKIM: I am not trying to have a crack at Nauru here. I am just trying to understand how we could establish a camp there, basically. I think you went to that in your opening statement as well. Thank you for that. Save the Children, you have done a report on education in Nauru. I think that covered a period up to early this year—correct me if I am wrong.

Mr Tinkler: It covered up to May 2016.

Senator McKIM: Have you got any further information for the second half of this year?

Mr Tinkler: No, our contract expired in October 2015, and that is when the bulk of our staff left Nauru. I had one staff member there from January to May this year, but he is back in Australia now.

Senator McKIM: Okay, thanks. When your contract expired, were there changes in eligibility requirements that prevented you from reapplying?

Mr Tinkler: Yes, there were two things done. The first thing was the government grouped what was called 'garrison and welfare services', so that effectively meant that the contract for services to establish security and infrastructure run by Transfield Services and Wilson Security was grouped with child protection and education welfare support. In practice, that made Save the Children ineligible to apply because we do not run security.
Senator McKIM: Because you did not have capacity in that area?
Mr Tinkler: Right. The second thing, more substantively, was the tender requirements were changed so that only a company limited by shares could tender for the work. An NGO, by definition, is not limited by shares and therefore could not tender directly. So we could bid for contracts, and we did, with a private sector partner, but only as a subcontractor in that arrangement, which was far from ideal because we lost our direct reporting line to the government.

Senator McKIM: Are you able to inform the committee whether you were successful?
Mr Tinkler: We were unsuccessful.

Senator McKIM: Did the department explain to you why they were changing the eligibility requirements?
Mr Tinkler: No. No rationale was given.

Senator McKIM: Did you ask?
Mr Tinkler: Not directly. There may have been some conversations that I was not privy to, but not to my knowledge.

Senator McKIM: Thank you. The committee will no doubt consider your education report, but can you, just in general terms, outline the effect of the Australian government not taking steps to ensure that the curriculum was appropriate for the children of refugees and people seeking asylum?

Mr Tinkler: Yes. While the detention centre was up and running, Save the Children were in a school inside that centre. We had a very high attendance rate—around 90 per cent. The idea, when the centre was moved to an open model, was for children to transition into the Nauruan schools. In practice, we support that ambition because it is good to have kids educated in the local community, but it is only useful if the appropriate support is provided, and that means things like English as a second language, tuition and instruction, and integration programs for students, teachers and the community around people from different cultural backgrounds—those kinds of things. They were missing. In addition, the Nauruan education system also had some challenges of its own. Attendance was already very low among students, and it was low among teachers on some occasions as well. The learning methods were a bit like rote learning. There was a high incidence of bullying and rough behaviour in the school ground, so their learning environment was not ideal to begin with. That is not uncommon in a developing country, but it was certainly a challenge for that group of refugee children attending school.

Senator McKIM: At the time when your school closed in the detention centre and the expectation was that education would be provided in the Nauruan community, were there resources dedicated to building that social cohesion that you expect would be necessary in that circumstance?

Mr Tinkler: Certainly not enough, in our view. The government commissioned Brisbane Catholic Education to do some teacher capacity building and support for Nauruan school curriculum development and teacher training. But there was very little in the way of hands-on support provided. There was very little in the way of cultural awareness. There was nothing really done to address attendance rates. There was very little done to address the incidence of bullying and intimidation in schools.

That is why we established the program we did—to pilot some of those antibullying frameworks in those schools. That was something we funded through Save the Children public donations, and the Nauruan government provided financial support as well over time but just for a small pilot project in a couple of schools.

Senator McKIM: How did that go?

Mr Tinkler: It went very well from one perspective in that we had a very highly qualified Australian teacher. He felt that he had a huge impact in creating a better learning environment for both teachers and students. But he was spread very thinly. Our recommendation was the program should be continued and ramped up, but the Nauruan government effectively withdrew support for the project earlier this year and so it has not continued.

Senator McKIM: Is Save the Children aware of what resources, if any, were dedicated to building social cohesion more broadly in the Nauruan community not just in the schools? Do you have any observations to make about that?

Mr Tinkler: I am not aware of a specific stream of funding dedicated to community cultural awareness in that environment. I know we had a conversation from time to time with the government around the need to invest in those kinds of things. Indeed, one of the reasons we ran the program at the start of this year was that we felt the complete absence of civil society NGOs such as UNICEF or Save the Children with a permanent presence in Nauru was problematic. Certainly I am not aware of a great deal that was done. If it was done, I do not think it was done very extensively.
Senator McKIM: Does Save the Children currently have any presence on Nauru—

Mr Tinkler: No, not at the moment.

Senator McKIM: or on Manus?

Mr Tinkler: No.

Senator McKIM: So you have no presence at all.

Mr Tinkler: No.

Senator McKIM: What about UNICEF?

Ms Lamoin: The UNICEF Pacific office does visit Nauru but, given the scope of responsibility of all of the Pacific islands, those visits are not regular enough or sufficient enough in our view. We would like to spend more time there. There is really no-one there doing any kind of independent human rights monitoring or looking specifically at protection issues for children.

CHAIR: This touches on your characterisation of the child protection framework or lack of it. More broadly, how would either Save the Children or UNICEF characterise the complaints handling processes in relation to criminal allegations on Nauru?

Mr Tinkler: Our experience is that it is very poor. It has been on the public record at numerous forums that there were a high number of allegations of abuse and sexual assault. Ultimately, allegations of that nature were referred to the Nauruan police. But our experience was that there was a very low capability and expertise to effectively prosecute those kinds of allegations. Indeed, there have been no successful prosecutions to date.

CHAIR: There have been none on any criminal act, notwithstanding the types of acts that have been reported to this committee?

Mr Tinkler: At least not in relation to allegations to do with children that we were supporting during our time on Nauru.

CHAIR: In that context, how would Save the Children rate the issues that should have been followed up by the Nauruan authorities and the extent to which the Department of Immigration and Border Protection also followed up on those allegations?

Mr Tinkler: The process was that, if an incident was observed, it would be reported by our staff or other staff. If it was of a serious nature it would be escalated internally and if it raised the suggestion of a criminal act it would be referred to the Nauruan police. I think that process worked in as far as allegations of a serious nature were brought to the attention of the police. Where it fell down then was with the subsequent ability of the police to successfully prosecute.

CHAIR: Is there any responsibility for the Department of Immigration and Border Protection in those processes at all? You are contracted to provide those services by Nauru who is in turn contracted to provide them by the Department of Immigration and Border Protection; is that correct?

Mr Tinkler: Yes, there are responsibilities. For example, the condition of detention—the living conditions and settings—lends itself to a high preponderance of these kinds of acts. There are steps that can be taken to prevent or mitigate these actions—for example, separation of offenders or potential offenders from children. So the department had a responsibility to follow up recommendations from child protection advisers inside the centre, for example.

CHAIR: Did they follow those up?

Mr Tinkler: It varied. On occasion our recommendations were accepted and on occasion they were not.

CHAIR: That is quite interesting. If a serious allegation were made, it would need to be followed up by the Nauruan authorities. But, from what you are saying, there has never been any successful prosecution. You have the Department of Immigration and Border Protection contracting to the Nauruan authorities, who are in turn contracting to you. How is the feedback loop supposed to work? If something fails with the Nauruan authorities how do you then advocate to make sure that something like the appropriate separation of children and perpetrators takes place?

Mr Tinkler: We were not contracted by the Nauruan authorities. We were contracted directly by the department of immigration. If there was a failure to effectively prosecute and there was a chance that a child protection risk arose as a result of that, we would make our recommendations to the department and to the other service providers on the island, but we could not always ensure that they were acted upon.

Ms Lamoin: UNICEF would add that we had some fairly serious concerns about the capacity of the Nauruan police to investigate, particularly in relation to gender-based violence claims and sexual assault where they did
not necessarily have the right kind of forensic training or equipment to be able to conduct what we would consider adequate investigations.

CHAIR: Do you mean forensic testing? When you made a recommendation—for example, about the separation of children—to whom were you making that recommendation? Was it to the Nauruan authorities or to the Department of Immigration and Border Protection or to both?

Mr Tinkler: If it was in a detention environment there would be a group of service providers—Transfield, Wilson Security, IHMS, the health adviser and representatives of the department of immigration. There would be a governance mechanism involved in all of those stakeholders, and we would make the recommendation through that mechanism.

CHAIR: If you were advocating, for example, the equivalent of child-safe policies and frameworks which would fit with a good child protection system, you are saying that those contracted services were not meeting the standards that would put in place those protective mechanisms?

Mr Tinkler: I would say two things: (1) it is almost impossible to ensure the safety of children in that environment by its nature; and (2) all we could do as a service provider was make a professional recommendation based on the facts, but we could not ensure that it was acted upon.

CHAIR: Can you explain exactly why it is not possible to ensure a safe environment for children.

Mr Tinkler: Because I think prolonged detention by its nature is harmful to children. There is an impact on their mental health and wellbeing. Their living arrangements were such that you had many families sleeping in cramped accommodation, separated by a tarpaulin. That, by its nature, was not a very safe environment for children.

CHAIR: It would certainly not meet the standards here for a child-safe framework.

Ms Lamoin: Can I also add that the conditions themselves are concerning. I agree with what Matt has just outlined, but it is important to not overlook the fact that refugees arrive with particularly complex needs in terms of their core health, mental health and broader psychosocial support and their education needs, particularly for children. They arrive with those very complex, specific needs, which is often why we need to see fairly specialised services.

CHAIR: There have been calls for an independent children's advocate. Ms Lamoin and Save the Children, what would be your response to the call for something like that, noting all of those jurisdictional issues, and which jurisdiction should it apply et cetera?

Ms Lamoin: UNICEF Australia has supported an independent monitor for children on Nauru, particularly to look at what kind of preventive effect having someone there who had presence over time and who provided a safe pathway for complaints could have. In addition to that, we see that the minister for immigration's current role presents a conflict and that we do need an independent guardian, particularly for unaccompanied children.

CHAIR: You have not touched on who would have the jurisdiction over that commissioner. Are you talking about recommending to the Nauruan government that they have one or that Australia still have independent guardianship for such children that have been placed overseas? I am unclear.

Ms Lamoin: Onshore, I guess. Under the previous regime, we talked about having an independent guardian to make decisions for unaccompanied children. In relation to Nauru, there is already guardianship legislation. I think the justice minister has acted as the guardian, but I think, regardless, there needs to be an ongoing independent monitor.

CHAIR: Thanks for clarifying that. So, technically, the Nauruan justice minister is currently the guardian for those unaccompanied minors in Nauru?

Ms Lamoin: He has been, yes.

CHAIR: And, in a sense, you would look for an independent children's advocate within the Nauruan context that would be applicable to all children within this child protection type framework?

Ms Lamoin: Certainly. The challenge that we keep hitting in relation to those conversations is that it should be their role always as an independent advocate to consider the best interests of children. Of course, in that kind of environment, it is very difficult to see how anyone is able to make decisions genuinely based on children's best interests if children are not necessarily able to leave the island, they are not attending school and we are not able to keep them safe from day to day.
CHAIR: How would you perceive the capacity of someone of the Nauruan government to play that role of providing an advocate and advocating on behalf of those children when in fact the government of Nauru is largely economically dependent on the provision of these detention services on the island?

Ms Lamoin: There is that question. But, in addition, if you are an independent advocate for children, you are still reliant on a functioning child protection system. So you should be one healthy and independent element of a broader child protection system. It would be difficult to understand at this stage exactly what steps, actions or referrals you could take under the current system.

CHAIR: I guess the question I am asking is: is it sustainable or even possible for the Nauruan government to critique itself and say it is or is not capable of providing a secure environment for these children when, in turn, it is, I guess, economically dependent on their presence there?

Mr Tinkler: I think any children's advocate needs to be completely independent of both the Nauruan and the Australian government. There is an inherent conflict, as you have outlined, that the Nauruan government is heavily reliant on income from the offshore processing regime—and, capability-wise, I would question its ability as well. Our position is that we very much support an independent children's advocate if children are to be detained in that environment again—and we would prefer they are not. If they are, the guardian is important from three perspectives. One, it has more accountability to ensure any complaints are followed up properly. Two, it gives Australian taxpayers more visibility of the impact of detention so they can judge properly whether it is a price worth paying for stopping the boats. Three, from our perspective our staff are often placed in a very difficult position of having a conflict between their confidential obligations at law under their contracts and their professional judgement as child protection workers or welfare workers or teachers. Often that requires them to have an invidious choice about whether to disclose an issue or not, and that really should not be put on an individual; there should be a mechanism to ensure that those issues are properly ventilated.

CHAIR: I understand what you are saying. I guess my point is: if you do have an independent commissioner of some sort, you still need a jurisdiction to create it. I was wondering if you have a view about that.

Mr Tinkler: I think you could have an independent body like the UNHCR or an appropriate rapporteur from the UN who could undertake the work.

Senator WATT: I do not think anyone has touched on this yet. Ms Lamoin, I am interested in UNICEF's view of the visa ban bill. I noticed on Twitter late last week that UNICEF's position was that it was unreasonable, unnecessary and disproportionate. Is that a fair summary?

Ms Lamoin: That is correct.

Senator WATT: Would you like to elaborate a little on why you have concerns about the bill?

Ms Lamoin: We do think it is unreasonable, unnecessary and disproportionate. I will not go into any detail on that. We do not think there is any reasonable justification at this stage. Our concerns are that this may create further family separation over time as children come into adulthood and if they choose to come back to Australia, it can create, potentially, a family separation. So we have not supported the proposed measure.

Senator WATT: I presume UNICEF has connections with many other countries within our region and around the world on matters to do with refugees and resettlement. Do have a view based on your dealings with other countries about how measures like this visa ban bill would affect other countries' opinion of Australia and, therefore, their willingness to deal with Australia about managing asylum seekers?

Ms Lamoin: I attended a global UNICEF conference in Geneva around six weeks ago and lots of feedback from colleagues there, and government representatives across Europe, was commenting on Australia's current asylum seeker framework. While I cannot necessarily speculate in relation to other nations' views, this certainly has a lot of attention and has been considered to be quite an extreme measure by UNICEF colleagues in other countries.

Senator WATT: In the interests of time, I think many other issues with Save the Children have been already canvassed, so I might not take it any further.

CHAIR: Thank you, all three of you, for the time that you have given us today. It is very much appreciated by the committee.
ALBERT, Mr Matthew, Liberty Victoria

BURNSIDE, Mr Julian, AO QC, Liberty Victoria

LEIGH-DODDS, Ms Gemma, Policy Committee, Young Liberty for Law Reform, Liberty Victoria

[15:51]

CHAIR: Welcome. Mr Burnside, thank you for making yourself available. Are you appearing alongside Liberty Victoria in your own capacity?

Mr Burnside: No, I am appearing for Liberty Victoria.

CHAIR: Terrific. I just wanted to clarify that. I am glad to know you are associated with them.

Mr Burnside: I have been on the committee for some years.

CHAIR: Yes, a long time—good. I am a friend of Jamie Gardiner, so I am well familiar with the excellent work you do. Thank you to representatives from Liberty Victoria for appearing. I invite you to make an opening statement for the committee.

Mr Burnside: I assume you have seen the submission, which is quite short, but which also calls in aid a longer submission put forward by YLLR, Young Liberty for Law Reform. It is also part of Liberty Victoria. I think it is invoked on the second or third page.

CHAIR: Yes.

Mr Burnside: In any event, can I just address two of the terms of reference in particular. Firstly, terms of reference a, factors contributing to abuse and self-harm in the regional processing centres. It is our view that the factors contributing to abuse and self-harm are, specifically, the shocking conditions in which they are held and the shocking treatment to which they are subjected. I was interested to hear the discussion in the committee about the possibility of an independent commissioner, and the question immediately is: why would you do that?

I did a quick check on UNHCR’s website today. There have been over 200 reports about conditions and circumstances in Nauru and Manus since 2001, when the Pacific Solution was set up—all of them intensely critical of Australia. The most recent of them, one by Human Rights Watch in August of this year and one by UNHCR in October of this year are very, very critical of what we are doing. I do not think anyone who bothers to read the reports could be in any doubt about why people are suffering abuse and self-harm. It is blindingly clear.

The UN Committee on the Rights of the Child in October this year was extraordinarily critical of the treatment that children are exposed to on Nauru. I will draw attention to a couple of points in the report from the Committee on the Rights of the Child. We are looking at the Convention on the Rights of the Child as distinct from the Refugee Convention. The report outlines ‘life-threatening conditions, inhuman treatment and self-harm’ of young children—none of which can be surprising. The Moss report, which was tabled 15 months ago I think, identified in detail what is going wrong, yet for some reason so far nothing has been done. No measures have been implemented which might alleviate the problems which have already been identified. The UN Committee on the Rights of the Child outlined ‘cramped, humid and life-threatening’ conditions to which children are exposed on Nauru. They reported restrictions on drinking water and the lack of a paediatrician. I hope the committee is aware of all of these things. Then the question is: if the committee, and I assume the parliamentarians generally, know about these things why do they tolerate them?

That leads to the second term of reference, paragraph f, which are the secrecy provisions. We think that the secrecy provisions are highly undesirable. Part 5 of the Australian Border Force Act purports to make it a criminal offence for a person, in effect, working in the detention system to disclose anything they learn in that capacity. Consistent with what I have said before, there is probably nothing much they can tell us that we do not already know. It does have a chilling effect, however. It is very hard to get people who are prepared to step forward as witnesses. I know in one major piece of litigation in the Victorian Supreme Court it has been necessary to get the judge to make orders permitting health workers to give evidence in the case. That sort of thing should not be necessary in an open society, yet it is, because of part 5 of the Australian Border Force Act.

CHAIR: It has the same effect on us as a committee.

Mr Burnside: I am astonished. I had not researched that, but I am astonished. The question to which all of this gives rise is: why are we hiding the facts or trying to hide the facts? Have a look at the 200 reports. See what is known and say, ‘Why are we trying to hide what is going on?’ It does rather look as though the ring of steel, of which the Prime Minister spoke recently, is not just a ring of steel that keeps boats out but it is a ring of steel that keeps information in so that the broad mass of the public, who do not bother to go the UNHCR website—and I would not criticise them for that—simply do not know what is being done in their name with their taxes.
CHAIR: I appreciate I am interrupting your opening statement in asking you this question, but it is of key concern to us as a committee in terms of trying to interrogate the fact that in effect the Australian government's policy is to outsource this detention to another jurisdiction—notwithstanding the fact that we still hold many of the contracts. But because they make the legal responsibility of that, purportedly, the Nauruan government, it means that this committee does not have our usual set of powers as far as gaining access to that information is concerned. Notwithstanding the fact that the department of immigration may well hold some of that information in any case, do you have any advice for us in terms of trying to piece that picture together?

Mr Burnside: Yes. Have a look at the 200 reports, which you can download. Every single one of them is on the UNHCR world website. Second, it would be worth asking the government why they think it is so important to keep the information under wraps. It is very hard to understand that policy. Doctors who have worked in the system are now able to give evidence about what goes on. There is another response to your question, I suppose: why is it that Australia is spending more than $1 billion a year on this whole exercise if it is nothing to do with us?

CHAIR: Even if the government should choose to keep that information under wraps, this committee is still at liberty to ask those questions beyond the scope of that government policy, but where we reach those limits is in claims of public interest immunity because of international relations with another jurisdiction. It goes beyond the policy of keeping things under wraps within the contracts and that internal policy and is complicated by the interjurisdictional nature of the way they hide that information.

Mr Burnside: If you are just trying to find what is going on, the UNHCR website will tell you in excruciating detail what is going on.

CHAIR: We do not need to ask the department, in other words?

Mr Burnside: I do not think you do, although I suppose, in principle, you could extract the most egregious facts from those reports and ask the department whether they want to contradict those facts. I would be very surprised if they did, but that is something that occurs to me.

CHAIR: Thank you. I might well follow that course of action.

Senator McKIM: Can I just commend Young Liberty for Law Reform on their report. It is really informative and very well put together. I found it a very useful contribution to this committee's work, so thank you for that. I just want to start with what I will call in broad terms the secrecy provisions, section 42—and Mr Burnside has been speaking about that. I am happy for anyone to answer these questions, by the way. The government has consistently argued that what it calls whistleblower protections mean that those provisions, the secrecy provisions, are ameliorated somewhat. You have addressed this to a degree in your submission, but can you just talk the committee through a little bit about your conclusion there and whether you would accept the government's argument that whistleblowers, as long as they satisfy certain criteria, are in fact protected from the Border Force Act?

Mr Burnside: Self-evidently I am not Young Liberty, but can I chip in on that? I have had conversations with a lot of people who would, in the ordinary way of things, be able to reveal all sorts of interesting material, and I have pointed out to them that section 48 does provide a very interesting defence and that I am pretty confident that any prosecution under section 42 would fail if a person were fair dinkum just disclosing things that they thought represent a serious threat to the life or health of a person—not just detainees but also people working there. A number of them have said, in substance, 'That's all very well; I might be a successful defendant; I just don't want to be a defendant,' and that is understandable. Whistleblower protection is all well and good, but if the protection is only available once you have been prosecuted, and you have to go to lawyers and you live day to day wondering whether you will be convicted or not, that is a real chilling effect, and it is the chilling effect, I think, that the government has worked on.

Mr Albert: Can I add to that that really the Australian Border Force Act is one part of the puzzle. As I am sure you are aware, the role of part 6 provisions in terms of silencing people is to an extent questionable in circumstances where you already had section 70 of the Crimes Act, which does much of the bidding of section 42 of the Australian Border Force Act. There is a question as to the extent to which repealing the Australian Border Force Act, part 6, would actually alleviate the overriding problem. That is one part of it. The second part of it is that the calls which we heard in response to the report were: the Public Interest Disclosure Act provides a mechanism for people to give information, and there is a pathway for people to do it safe from the reach of the law and safe, supposedly, from becoming a defendant in circumstances that Julian has outlined.

The response to that is that the Public Interest Disclosure Act provisions turn on the phrase 'disclosable conduct.' The content of that phrase has not been determined by a court as yet. It is very hard for anyone to
determine—including a group of lawyers sitting around for months, as we did for this report, trying to work out what the extent of that protection is. If a group of lawyers sitting around for months cannot work it out, how a person, in the heat of the moment on Nauru, who wishes to disclose something can do so with the security supposedly provided by the Public Interest Disclosure Act is anybody’s guess. The danger is, if you like, multi-layered. While we strongly support the suggestion in the terms of reference that part 6 be repealed, that is not the whole solution. It is part of the problem that, as Julian rightly says, leads to a really severe chilling effect on information that needs to come out coming out so that a proper assessment can be done by this committee in the future—by parliament, perhaps most importantly, and, indeed, by the courts as litigation arises.

Senator McKIM: I think it is that chilling effect—the culture of secrecy—that is at least partially at issue here. Your submission also goes to—now, forgive me, I usually get this wrong—a reversal of the onus of proof with the Border Force Act, and if you were going to rely on the whistleblower provisions you would have to step up and prove certain things. Could you talk the committee through that, please?

Mr Albert: I would principally rely on the report, which goes through it in detail. The short version is that, as soon as the hypothetical litigation is initiated, the burden that falls on the person who has been the whistleblower is very heavy and very hard to dislodge. So, quite apart from having to navigate legal intricacies of terms which are darker than is usually the case in legislative drafting, you also have to then navigate providing the evidence to show that what you did reveal in those circumstances was justified by one of the classified categories in the legislation. Quite apart from the financial burden, the personal burden and the professional burden, you also have this very heavy legal burden at the end of all of that that you are going to have to overcome if you end up in the unhappy situation of being a defendant.

Senator McKIM: Mr Burnside, I saw you drawing breath there. Is there anything you would like to contribute?

Mr Burnside: Matthew pointed out a very good quote, which is found in the Young Liberty report—Judge Keith: ‘Democracies die behind closed doors.’ It is a good answer to any sort of secrecy that covers the sort of stuff we have seen in the 200 reports.

Senator McKIM: I may come back for some further questions.

Senator WATT: Mr Burnside, I want to pick up on a couple of things you raised in your submission to the inquiry into the visa ban bill. Thank you for making that submission. One of the things that we have heard from a number of witnesses today is concern about the potential for this bill to break up families, depending on how it is applied. We are told by the department and told by the minister, ‘It is all okay, ministerial discretion,’—nudge nudge, wink wink—‘it will all be fine.’ But I noticed that you do not take comfort from that in your submission and you mention that he, being the current minister, has previously refused to exercise his discretion in favour of a result which most people would regard as in keeping with Australian values. Would you care to share with the committee any experience you have had or know about that make you concerned?

Mr Burnside: Yes, one in particular that I had in mind when I wrote that, and I am sure most people behind me would have other examples, is a young woman who came to Australia from Iran. I think she was 17 when she arrived. She lived in Brisbane, was going to school and doing year 12, and met and married an Iranian who was on permanent residency here. On her 18th birthday, she was taken into detention. Her community visa was cancelled and she was put into detention in Brisbane. Her husband was still able to visit her. They then moved her to Wickham Point in Darwin, so that the husband could not even visit her anymore.

CHAIR: I recall this case.

Mr Burnside: Yes, there was a bit of publicity about it and I did a case in the Federal Court about her. She made it very clear that she was not willing to return to Iran because she had been raped by her uncle and her father had tried to force her to marry a man 60 years her senior. So she was faced with the prospect of spending the rest of her life in detention because the minister refused to give her a new visa so she could be sent back to her husband. I would have thought that was the kind of case where a minister with the usual human feelings might have thought it was not a bad idea to let her into the community, even though he did not regard her as a refugee, because she would not go back. She actually said in her evidence she felt safer in detention than she would feel in Iran. Maybe I am just a bleeding heart, but I think that is a tough decision and that is why I do not have confidence in the present minister exercising his discretion in the way you might hope if families are going to be broken up. Certainly I have not heard any public expression of concern on his part about families being broken up.

Senator WATT: Mr Albert, I noticed when I was asking Mr Burnside that question, you were shaking your head, I think, or nodding. Did you want to express a view on this too?
Mr Albert: I do not have a personal example, certainly not one as powerful as Julian's. Can I add two brief but important points about these new powers. The first is that the powers are by reference to an exercise of ministerial discretion 'in the public interest'. That phrase you will find in the Migration Act many, many times—and, it should be said, an increasing number of times. When powers phrased in those terms were first introduced, I think, the minister at the time was Gareth Evans and he referred to those powers as giving him, as minister at the time, the power to 'play God'. That is not an unfair description of precisely what it is that is proposed to be given to the minister in this new scenario, and that on its own is a problem.

The second point—and it is a really important one that underlies the question of why this bill is being put forward at all, let alone now—is that the minister's personal non-compellable powers at present include a power to do exactly what it is that the minister has said publicly he seeks to do by this new bill. The relevant provision is section 501 of the Migration Act, which gives the minister the power to refuse visas for exactly the reasons that he is saying he wants to refuse these people visas indefinitely into the future. So, in fact, you have a completely legally redundant bill being put forward in circumstances where it is, at the very least, unclear to me what the impetus is and in circumstances where you already have more than enough provisions of the Migration Act that allow the minister, as Gareth Evans said, to play God. Those would be additional concerns which really underline, in a legal sense, what Julian was talking about.

Senator McKIM: It may be legally redundant but not politically redundant, Chair.

Senator WATT: That is my only question. Thank you for coming.

Senator McKIM: Mr Albert, you spoke about non-compellable powers. Some of the evidence the committee heard this morning is that, should the minister engage his powers, then there are opportunities for judicial review on any decision he makes. But the bill is very clear that the minister actually has the capacity to effectively do nothing when an application is made and that there can be no judicial review of the minister, just simply allowing an application to gather dust on his or her desk. Would you like to respond to that and give us your views on whether that is a correct assessment?

Mr Albert: Technically speaking, there is scope for judicial review. Section 75(v) of the Constitution says that that is always available in respect of a decision of the minister. On a very narrow footing, technically, what the minister says is right. However, if one looks at any of the case law about the scope and content of the term 'public interest' or 'national interest', in particular in the context of the Migration Act, you will find case after case after case on judicial review of the High Court and other courts saying, 'While you can bring the case, while we will hear the case, our capacity to decide that you have done something outside the public interest is spectacularly narrow.' So it is technically true but, in practical, legal terms, it is really a bit of a furphy, with respect.

Senator McKIM: I expect that goes to the matter of whether or not something done is in the public interest.

Mr Albert: Yes.

Senator McKIM: You might not have the legislation in front of you, but I will just read out the relevant section, 'The minister does not have a duty to consider whether to exercise the power.' In other words, the minister does not have a duty to even engage with an application, and a refusal to engage is not judicially reviewable. Would you agree with that statement?

Mr Albert: Yes, I would, and one need look no further than the High Court decision in plaintiff M61, where they dealt with precisely that question and essentially came to that conclusion.

Senator McKIM: Thanks, Chair.

Mr Burnside: If I could add one broader point that covers all of this territory, leaving decisions that have such a profound effect on a person's life and family to a minister who repeatedly refers to refugees or boat people as 'illegal', when that is false, and speaks of the exercise of pushing them away as 'border protection', when that is false, leaves you wondering whether it is safe to rest that sort of power in the hands of that sort of person. I am not just singling out the present minister, because previous ministers have done likewise ever since 2001, and it seems to be part of government policy to refer to boat people falsely as illegal so as to create the impression in the public that they are criminals and we are being protected from them.

Senator IAN MACDONALD: In fairness, he refers to them as illegal arrivals not as illegal.

Mr Burnside: And in what sense are they illegal? What offence did they commit?

Senator IAN MACDONALD: You tell me in what sense they are legal, coming in—

Mr Burnside: No, that is not the point. The point is—

Senator IAN MACDONALD: You are saying—
Mr Burnside: Just a minute.

Senator IAN MACDONALD: he calls them illegals; he doesn't. He says they are illegal arrivals, illegal maritime arrivals, which is a correct description. Your premise should at least be accurate.

Mr Burnside: No, you are wrong. The expression 'illegal arrival' is simply false because they do not commit any offence by the method by which they arrive. On the contrary, they are exercising a right at international law recognised in the Universal Declaration of Human Rights, article 14, to seek asylum in any country they can reach. Second, 'illegal maritime arrival' is an expression which was imposed by Mr Morrison when he was minister for immigration in 2013 and he simply issued a decree that people previously referred to as irregular maritime arrivals must thereafter be referred to as illegal maritime arrivals. It is very, very hard to understand reference to anyone as being illegal or having arrived illegally—

Senator IAN MACDONALD: Illegal arrival.

Mr Burnside: Illegal arrival is a recent twist on the language. They have been called 'illegals'—

Senator IAN MACDONALD: You are saying Mr Dutton refers to them as illegals.

Mr Burnside: He has done.

Senator IAN MACDONALD: He refers to them as illegal arrivals.

Mr Burnside: He has done, and even if he refers to them as illegal arrivals, I would say that is false and he is misleading the public and it is, at the very least, inappropriate that a minister of the Crown should mislead the public or, even worse, lie to the public in order to create the impression that the deliberate mistreatment of human beings is being done because they are criminals.

Senator IAN MACDONALD: We do not need to get into a slanging match. Some people might say you lie to the public.

CHAIR: Now, now.

Senator IAN MACDONALD: Well, it is okay to say it about the minister but not about—

CHAIR: Some people say a lot of things but not what you are implying. I would ask you to withdraw it.

Senator IAN MACDONALD: I am just saying to Mr Burnside perhaps we could leave aside the slur and assertions.

CHAIR: I would like to continue very quickly with some final questions before we conclude—

Senator IAN MACDONALD: It is okay for one but not for the other.

Mr Burnside: I do not mind. If you would like to point to anything I have said publicly, Senator Macdonald, which you would say is false, then I will explain it or withdraw it.

Senator IAN MACDONALD: I only have five minutes!

Mr Burnside: Okay. I made a specific allegation of false statement by the minister—

Senator IAN MACDONALD: You said the minister was lying.

Mr Burnside: Yes, it is a lie.

Senator IAN MACDONALD: All I am saying in this hearing, we do not need to—

CHAIR: Mr Burnside was saying it is legally not true.

Senator IAN MACDONALD: We do not need to take ourselves down to that level and call each other names. I would say some people might call you a liar.

Mr Burnside: They might.

Senator IAN MACDONALD: Not that I would.

Mr Burnside: And if they would identify what I had said was false, I would cop it sweet.

Senator IAN MACDONALD: Yeah, okay.

CHAIR: Thank you, Mr Burnside, for clarifying those legal points—you have done that very usefully. You might care to clarify something for me. I put this question to the department earlier today—I am not a lawyer, but they seemed to imply that I should understand the legal principles behind this. The position I put to the department was: if I were an Australian citizen married to someone who was subject to the bill that the government wants us to pass, which would exclude my spouse from ever applying for a visa, and if I were to appeal to the minister on behalf of myself and my spouse and the request from my spouse to live in Australia with me was declined by the minister, what do my rights in terms of judicial appeal actually look like? My understanding is that it is on the bill before us and that there are actually no grounds on which the judiciary is
actually compelled to assess that against in terms of whether it would be substantially the same as to the authenticity and legitimacy of my relationship. Could you perhaps enlighten me and explain to me what that judicial review process actually looks like?

Mr Burnside: Judicial review is different from a merits appeal. A merits appeal says that the fact finding went wrong or the law was wrongly applied, and, if you get up on either of those points, you win. Judicial review simply looks to see whether there was an error of law in the procedure adopted by the decision-maker. That is much more difficult. If the minister works on the footing that your relationship is not authentic, that is a pity for you, unless it was a decision which was beyond—

CHAIR: But the minister may well agree that it is authentic but reject it anyway because of the policy principle that no asylum seeker who has come by boat should ever be given a visa in Australia. In other words, there would be no obligation to actually consider the merits of the request.

Mr Burnside: Yes, that is right. I think it would operate very harshly. The reverse side of that is that I think it also operates harshly because, if one part of the family is in Australia on a temporary protection visa and the husband who is on Manus gets resettled in the US, Canada or somewhere, if ever the family leaves Australia to meet up with the husband in, say, Vanuatu, Hawaii or somewhere they will not be allowed to come back to Australia. So they will find themselves floating around and hoping that maybe they can get a visa to the country where their husband has a visa. Alternatively, they are faced with the prospect of returning to the country that persecuted them.

CHAIR: I put it to the department that, in fact, the bill runs counter to their policy objective. If they want to encourage people to settle in the US, the preclusion on ever returning to Australia when they have perhaps got family living in both countries would be a disincentive for people actually taking up that resettlement option. Would you agree with that?

Mr Burnside: I can see that it could operate that way, yes. Although, I guess, if people have the choice of being stuck in Nauru for 20 years or not seeing their husband again, that is going to be an interesting test of the strength of their relationship. It is not a very happy one. By the way, there is another point about this, of course, which I think is important. If the family members who have been in a regional processing centre are sent to, say, America or Canada and they settle there, why would they dream of wanting to come to Australia for more than a tourist visit or for business or the like? After the way we have treated them, I really do not think it is very likely that they will want to uproot themselves from Canada and resettle in Australia. It just defies ordinary human experience.

CHAIR: I am inclined to agree with you.

Mr Albert: Can I give a fairly dry legal response to your question about the spouse visa scenario, because I understand that that has been one of the policy rationales for the proposed bill. As I understand it, what the bill would do, in effect, is make the visa application invalid from the beginning—that is, in your scenario, a spouse visa. All that then could be challenged is whether that person, the spouse overseas, fits the definition in the bill of a person excluded by this bill. That is all that you could get judicial review on. It would have, to respond to your question, absolutely nothing to do with the strength or genuineness of the relationship or, indeed, the length of the relationship. All you would be able to challenge is this extremely narrow point, which would be, 'No, I didn't come on a boat in the defined period of time,' which, of course, if you did, is going to be a losing case. It is only after that that the public interest power of the minister could be enlivened, but because, as Senator McKim said, it is a non-compellable power you are not going to be able to seek judicial review of its non-use. It all adds up to an extremely narrow capacity to challenge something in circumstances where, on your scenario, you would be almost bound to fail.

CHAIR: Thank you for clarifying that for me; that is very useful. I think that concludes our questions for you all. Thank you very much for giving evidence this afternoon. That is very much appreciated.
COSTELLO, Mr Max, Private capacity

TALBOT, Ms Anna, Legal and Policy Adviser, Australian Lawyers Alliance

[16:26]

CHAIR: I call forward Ms Talbot from the Australian Lawyers Alliance and Mr Max Costello.

Mr Costello: To assist the committee we have prepared a summary of both sets of submissions and, likewise, a compilation of the two sets of recommendations to give the committee a convenient shorthand reference document.

CHAIR: Thank you, that is very helpful.

Mr Costello: Do I have permission to have that tabled?

CHAIR: Yes, thank you. I invite both Mr Costello and Ms Talbot to make a statement to the committee.

Mr Costello: My joint submission with Ms Paddy McCorry and my supplementary personal submission with a legal angle on the same submission has not been, as yet, published on the website, so, before I commence, I want to ask if the committee has seen it?

CHAIR: Yes, we have the submission with us. We are free to refer to it and discuss it during the hearing, but we have not yet determined that it be published and made public, because we have not had a chance to review the committee’s obligation. You have made certain assertions within it as to whether other parties need to be given an opportunity to comment on that before we publish.

Mr Costello: If it comes to it and there is particular wording that is of concern that might need some tweaking for various considerations, my co-submitter and I are more than happy to—

CHAIR: We could also look to not publish all of it until we are able to go through a due process with some of the matters that you have raised.

Mr Costello: I understand.

CHAIR: Please feel free to make a statement, Mr Costello.

Mr Costello: Because there is a bit of joint coverage of the Work Health and Safety Act, I propose to focus on that. I will just begin by mentioning that I come here as a former prosecutor in health and safety law and a former university lecturer in employment law. My co-submitter is also experienced in health and safety, as both of us have worked at WorkSafe. I have a Master of Laws in employment law.

The key thing to establish first up is that the Work Health and Safety Act applies to Manus and Nauru. Let me start with that. We addressed that on pages 2 and 3 of our summary. In relation to term of reference c., detention centres are Commonwealth workplaces. This is a workplace work health and safety law, so it applies to them. Therefore, all the department’s immigration detention centres—I will use the shorthand term ‘detention centres’ even though some of them are ‘come and go’—are all Commonwealth workplaces, and the act imposes duties on various parties, including the PCBU. As you will see in our summary, we put the definition at the top. They used to be called ‘employers’; now they are called the ‘person conducting either a for-profit business or a not-for-profit undertaking’. But also the officers and workers of those PCBUs have a lesser duty. They have to take reasonable care that their acts or omissions do not adversely affect the health or safety of other persons and comply with their PCBU’s instructions on health and safety.

The main one, and this is central to it, is the section 19 primary duty of care to safeguard ‘so far as is reasonably practicable’ the health and safety—and health includes psychological health—of both workers, that is section 19(1), and other persons, section 19(2). Those other persons, at detention centres onshore and offshore, are the asylum seekers. It is a proactive duty because it goes with sections 17 and 18, which require the PCBU—the department, in this case—to look at all possible hazards and assess the risks, that is, how likely they are to occur and, if so, how harmful they might be, and then, if practicable, eliminate those risks or at least minimise them unless with a particular risk the cost is grossly disproportionate. So it is a proactive, preventative duty.

Section 12F(3) says:

Section 15.1 of the Criminal Code (extended geographical jurisdiction—category A) applies to an offence against this Act. The effect of that is that overseas if there is not an equivalent health and safety law then this act applies. Apart from those two offshore processing centres, the department has 29 offices overseas. People want to apply for visas in Vientiane, Dili—you name it. If there is a health and safety law over there that is equivalent to the Australian one, well and good. But if there is not then this act applies. Nauru has no health and safety law. Papua New Guinea has one but it applies only to factories. Therefore, this act applies overseas.
Furthermore, the Commonwealth, the department, has the duty as the overall controller of those workplaces. Section 14 says 'A duty cannot be transferred to another person.' In law, another person includes another government. So this act prohibits the Commonwealth of Australia and the department of immigration from transferring its health and safety duties to Papua New Guinea or Nauru. Section 272 goes on to say that any attempt to do so is ‘void’. The same applies with outsourcing. Section 272 also says that those health and safety duties cannot be contracted out. So the service providers have duties as well because they run businesses, but they cannot do the Commonwealth's work for it and the department knows all these things.

The notifiable incidents component of this act is where the department notifies Comcare of incidents. It says so in its annual report. In fact, in the last three annual reports 1,236 incidents of death, injury, illness or danger were reported across all the department's workplaces.

**CHAIR:** That includes both onshore and offshore workplaces?

**Mr Costello:** Yes, and the overseas ones as well. Interestingly, the 2013-14 annual report said 83 per cent of all those incidents of death, danger, illness and so on reported by the department were about asylum seekers. That is why this is a major concern. On every one of those incident reports where it has who runs the workplace, it does not have the heading 'Government of Papua New Guinea', 'Government of Nauru'; it has the heading 'Department of Immigration and Border Protection'. So this statement we often hear that the duty to look after the health and safety of the asylum seekers on Manus and Nauru belongs to the governments of Papua New Guinea and Nauru is legal falsehood, demonstrably so, prohibited by the act.

**CHAIR:** Mr Costello, you are in your opening statement. I might ask you to conclude so that I can give Ms Talbot an opportunity to make one.

**Mr Costello:** On 14 August 2015, I wrote two letters to Comcare asking for a prosecution to be brought—the act provides for that. It referred, in one of the letters, to risks to psychological health, and I said, in discussions with the manager and inspector at the time, 'The witness statements you need and the expert evidence statements you need have in effect been written for you. Just read those provided to the Human Rights Commission's children in detention report and the submissions and evidence in the Senate select committee on Nauru inquiry. All you've got to do is top and tail them. They are already made, in effect—to overstate the case a bit. Fifteen months later, there is still no decision as to prosecute.

In conclusion, the recommendations we have made boil down to—and I suspect Anna and the Lawyers Alliance are on the same page—two things that we want: for workplace law to be complied with and for the rule of law to be upheld.

**CHAIR:** Thank you. That was compelling.

**Ms Talbot:** Thank you for seeing me again today. As you know, I am the legal and policy adviser with the Australian Lawyers Alliance. We are an association of lawyers dedicated to protecting and promoting justice, freedom and the rights of the individual. In June this year, you may or may not have seen, we released a report called *Untold Damage*. The report contained findings based on our assessment of the Work Health and Safety Act and other legislation. Documents released to us under freedom of information legislation and reports in the media and elsewhere detail events inside immigration detention facilities, primarily the facilities on Nauru and on Manus Island.

You will have seen our submission so today I would like to draw attention to elements that are relevant as a result of developments since we made that submission just over a week ago. There are currently refugees and asylum seekers living on these islands today so, regardless what happens with them in the future, there is still a need to deal with their rights under legislation today. It is essential that the law that we discuss in our submission and in our report is implemented and seen to be implemented. The government needs to follow its own laws.

Even if the refugees and asylum seekers were all to leave tomorrow, the evidence presented must be investigated and appropriate penalties have to be applied if breaches of the law are found. In this regard, ensuring accurate information is available in a timely way is key. To that end, we believe that the repeal of the secrecy provisions of the Border Force Act as advocated by the UN Special Rapporteur on Human Rights Defenders and others should be a priority. Related to this, we believe that ending the culture of focusing on silencing whistleblowers rather than investigating that abuses that they reveal is essential. This focus on the whistleblowers may well indicate that the Work Health and Safety Act has been infringed as we detail in our submission.

**CHAIR:** Are there questions from the committee?

**Senator IAN MACDONALD:** Thank you both for your submissions. Thank you, Mr Costello, for the effort you put into yours.
Senator McKIM: Mr Costello, while I was outside the room I think the chair was explaining to you—or I hope she was—that I received your submission only this morning.

Mr Costello: No, I did not hear that.

Senator McKIM: Well, I received your submission only this morning, so I need to say to you that I have not had a chance to go through it yet. But I found your remarks, as the chair said, very compelling. Perhaps I could just put to you that the committee might ask you to make yourself available into the future at some stage.

Mr Costello: I would be more than happy.

Senator McKIM: I would welcome an opportunity to go through your submission in some detail before I raise questions from it.

Mr Costello: Yes, my co-submitter and I feel that this is a very important perspective that has remained under the radar for a long time. There is a lot that I think the committee could further explore. When you have a workplace law apparently being systemically contravened—

CHAIR: I am not a lawyer, and perhaps you could explain to me, if you are able, the legal relationship between the work health and safety legal obligation as it pertains to a contracted offshore setting. We are outside our own jurisdiction. Nevertheless, we are delivering services or we are contracting those services to someone else. Could you explain that to me?

Mr Costello: As I have said, section 12F(3) gives the act extended geographical jurisdiction where there is no equivalent law. That is step 1. I will not go into too much detail—

CHAIR: That is as it pertains to contracts and expenditure. Is that right?

Mr Costello: Yes. There is no problem about the government—the Commonwealth—contracting to carry out tasks, and they do. There is not a problem with that. But, in doing so, what you cannot do as the primary overseeing body—the PCBU, the employer—is contract out your health and safety duties. The contractors—Wilson Security, Ferrovial, Broadspectrum—also have duties. They are also PCBUs, but they are, if you like, second-order PCBUs. They have to work together. The act provides for shared duties. But the Commonwealth, via the department, is at the top of the pyramid. As I said, it writes the contracts to tell them what to do, including that they must comply with health and safety law. But it is the overarching prime responsibility of the Commonwealth via the department. Is that sufficient?

CHAIR: Yes. And perhaps you might compare it for me with other parts of government activity that are active overseas. Clearly within the defence forces WHS has a different set of rules, because you have your own defence rules, I assume. But also the Department of Foreign Affairs and Trade would have the same onuses on them, and they would seek to uphold that practice, except where they are funding a program but not delivering it themselves, not contracting out something, if that makes sense.

Mr Costello: Yes. I will stick to where I am secure, but if the Commonwealth government, through its department, has a joint presence at an offshore location where that location is really a Commonwealth workplace, then what I have said pertains. If they are both there then the Commonwealth, through the department, has the overarching duty to ensure the health and safety of workers and other persons. So do the others, but the buck stops with the Commonwealth. There are two things I would add. This act is identical, with a few tiny local variations, except for the extraterritorial bit, to seven other state and territory acts. They have an extraordinarily powerful provision. The officers of a PCBU have a duty to ensure that the organisation—in this case the department—fully complies with the act at all times. So, there is a further obligation. I think it has not been used much, but it sits there. I do not want to take you through unnecessary detail. But if the Commonwealth, through its department, has not prevented preventable risks, the question is: which officer or officers have not been complying with their duty to make sure that the DIBP did comply with that prevention task?

CHAIR: If the Commonwealth is contracting employment services within Australia, it covers the staff, but then, logically, the standards within that also cover the clients of that employment service. In that sense, that is parallel to the fact that asylum seekers are subject to this—

Mr Costello: The other persons in most workplaces are your clients, your customers and so on. The problem with detention centres—to use that term generically—is that they are not there for five minutes or half an hour as a usual client is, or even, as a patron at a movie house is, for two hours; they are there 24/7, 52 weeks a year, for years on end. Therefore, the demand on both the overarching PCBU and the staff to look after the health and safety of other persons is extraordinarily onerous. And, in particular, there is a further onerousness about it because the clientele are not a cross-section of the community; they are people who have suffered trauma getting here by boat; they are people in Northern Territory youth detention who are in all sorts of trouble et cetera. So
what we have called for in one of our recommendations is a code of practice to help the department with its detention centres, through these harmonised acts, by amending them all—or using them all, because they all provide for a code of practice to help the people in charge of these difficult-to-manage workplaces. So we have not just been critical; we have been constructive in looking to see what we can contribute by way of solutions.

The same applies with the notifiable incidents regime. There are problems with the definition and its application. We have proposed amendments—and I can say the ALA has not identical, but along the same lines—to make sure that self-harm, sexual abuse and assaults are notifiable incidents. A lot of them are not. Comcare, the regulator, never hears about them.

CHAIR: Even though they would be notifiable incidents—

Mr Costello: No. They are not necessarily. I do not want to take up too much time. The definition of a notifiable incident comes out of a British factory in 1850—scraping, loss of a limb, loss of an eye and that sort of thing. The only thing that it picks up more generically is: 'requires in-patient treatment in a hospital'. Someone self-harming does not necessarily require that. Secondly, the incident, even if it qualifies as serious enough to be an incident, is not notifiable unless, according to section 38, it is 'arising out of the conduct of the workplace'. What the department tends to say, if someone self-harms, is: 'That's just what they did; it's nothing to do with the workplace.' Likewise, there have been two self-immolations. You have seen them on the news; one person died. They were not reported to Comcare—not notifiable, according to the department. Extraordinary! That is why this whole area of the extent to which notifications happen and what Comcare does about it needs looking at.

CHAIR: Can I ask you both what the department would need to do that it is not currently doing?

Ms Talbot: I will just add to what Max was saying. There are two problems: firstly, the problem of the department notifying Comcare—they do it in a haphazard way. In our submission, we detailed two similar sets of circumstances of mass incidents of self-harm. In Nauru, some were notified to Comcare and Comcare found that they were not notifiable. On Manus Island, someone notified them to Comcare and they were found to be notifiable. They were very similar sorts of circumstances but they were being assessed differently.

Senator McKIM: But found by whom? Who found those two cases to be notifiable or not notifiable?

Ms Talbot: The department reports haphazardly, and then, once the information gets to Comcare, Comcare assesses it haphazardly. So it is Comcare that is making that assessment—whether it is notifiable or not notifiable. Of course, Comcare does not get the opportunity to make that assessment if the information never gets to them in the first place. That is the situation with those two self-immolations that we saw in May. According to the freedom of information requests that we made, they were not reported to Comcare. We were very concerned to see that there was a significant drop. In 2014-15 there were 643 notifications to Comcare, including a number of self-harm incidents and sexual assaults. In 2015-16, that number went down to just over 100 and very few self-harm incidents, including the fact that those self-immolations, which would have clearly fitted within the definition of requiring in-patient treatment at a hospital, were not notified.

CHAIR: What other instruments are you aware of that create a framework for requiring an incident to be reported? For example, we were referring earlier to the Nauruan child protection system, which is non-existent. What is your awareness of what is within the Department of Immigration and Border Protection? You have raised Comcare and the Work Health and Safety Act. What is your awareness of the landscape of other reference points for accountability?

Ms Talbot: This is so important because they are offshore and this act has that ability to cross international waters. The protections that that act provides are a backstop where a lot of other legislation does not apply. The reporting obligations, in terms of child sexual assault, for example, stop at international borders, but the Comcare work health and safety—

CHAIR: So any other reporting obligations are a matter of policy and contractual arrangements between the Department of Immigration and Border Protection and whatever the Nauruan law upholds in the context of any international obligation. But this is the only part of Australian law that has any reach. Is that right?

Ms Talbot: Comcare is the main agency that we are aware of that has oversight on these offshore detention centres. Obviously, the AFP has its role to play as well.

CHAIR: Yes. For example, there are criminal laws in relation to child abuse or child trafficking that have international jurisdiction. They have accountabilities that stretch beyond our borders. But in this offshore immigration detention centre setting this is the key one that has any application. Is that right?

Ms Talbot: As far as we are aware.
Mr Costello: I think there is a further perspective to add, and this is unique to health and safety law, which is: in referring to Nauru, all those other agencies and the Crimes Act and the child protection act and so on all deal only, as I understand it, with individual perpetrators—the assaulter, the abuser. This is the only one that asks: what about the overarching body in charge of that workplace? What has that body done to prevent these things? That is the difference.

CHAIR: Yes. In that sense you are right that the immigration department has sat here quite often and said, 'Well, that is a matter for the Nauruan authorities.' They have done that quite systematically. But, in other words, you are—

Mr Costello: I will use the term carefully: a 'legal falsehood'.

Ms Talbot: There are obligations, obviously, under international law. We cannot send people off to different countries to be tortured, for example. There are obligations there that can have an impact on the way that law plays out in Australia, but this is a very clear, structured framework. There is an agency that has an obligation to oversee it. Its effectiveness in that regard is—

CHAIR: The department has commented that when an incident takes place on site they do have some internal accountabilities for that, but that anything external to the detention centre's border is simply a matter for the Nauruan authorities. Can you reflect on the limit of the jurisdiction, if any?

Ms Talbot: There are a couple of things there. The way that the act defines the people that it applies to, it is people that are affected by the conduct of the workplace. So it is not just things that happen within that border. It is things that happen across all of the work that the department does.

CHAIR: The policy is: I let you go through the gate to be subjected to that, and—

Ms Talbot: There is also the duty of care. In the S99 case that was handed down recently, the woman was a refugee who was living in the community in Nauru; she was not living in the detention centre. There was a duty of care found in that case.

CHAIR: So one of the situations that was—

Mr Costello: That is a common-law duty of care, not a statutory duty under this act.

CHAIR: How would you relate, for example, the policy decision that was made to place families around Nauru within different communities rather than settling them together because it suited them economically to break families up, and in terms of due diligence as to whether there was an appropriate risk assessment for the obligations of something like that under this act?

Ms Talbot: I think it is quite clear that that has not been done effectively. The department's annual report says that its role is to monitor those workplaces. I have not checked the latest 2015-16 FOI as closely as the other ones, but up until recently they were reporting incidents haphazardly that happened to people outside of the detention centres. It does not stand up to scrutiny.

Senator McKIM: Mr Costello, your basic contention about the jurisdiction of this act is that it not only applies to people working in the regional processing centres—let us use the jargon for a minute—but also applies to other persons. Your contention is that detainees would be included in ‘other persons’?

Mr Costello: Yes, any person whose health and safety could be negatively affected, either at or in relation to the operation of a workplace. Two years ago, a wall collapsed here in Swanston Street. That was defined as a workplace. People walking past were killed when it collapsed.

Senator McKIM: On a public footpath.

Mr Costello: It was not strictly at the workplace, but it certainly arose or was in relation to the workplace.

Senator McKIM: Ms Talbot, I have had the opportunity to go through your submission. From what I can make out, you have been in furious agreement with that point?

Ms Talbot: Yes.

Senator McKIM: I find that very interesting evidence, indeed. Ms Talbot, you have submitted that the ALA believes that the treatment of refugees and people seeking asylum in the RPCs amounts to torture under international law. You would presumably be aware of the Amnesty International report—

Ms Talbot: Yes.

Senator McKIM: that, effectively, found the same. Your submission goes to this in some detail in terms of the knowledge of the harm that is inflicted. I am at para 28 of your submission. In your view, would indefinite detention, of itself—regardless of the conditions—still constitute torture?
Ms Talbot: It is certainly likely. You will always have to assess these things on a case-by-case basis. Given the impacts that are known to come from indefinite detention, it is certainly likely. I would not want to say it is automatically the case.

Senator McKIM: All right. Later on in your submission, you say that torture provisions under the Commonwealth Criminal Code Act may also have been infringed. Are you suggesting that that act would apply on Manus Island and Nauru or are you making an observation that, had it occurred in Australia, it would have been infringed?

Ms Talbot: It could apply. Under that act, for acts that have taken place offshore, if prosecutions are to take place, the Attorney-General needs to give permission for those prosecutions. That could be a stumbling block. It would be a problematic stumbling block—

Senator McKIM: You could say that!

Ms Talbot: because if the Attorney-General is refusing to give permission for prosecutions that would potentially hide torture that would be a problem. But it could apply.

Mr Costello: By contrast, Comcare inspectors, since the law applies, can go and inspect. And, having clarified with you emphatically that the government of Nauru and the government of Papua New Guinea are not bound by this act, they should have no trouble letting them in because they are not going to be suspects in the investigation.

Senator McKIM: Thanks, Mr Costello and Ms Talbot.

Mr Costello: The two documents we have supplied—the summary and the compilation of the recommendations—my submission would be that they are pretty innocent documents and I would seek to have them put in the public domain.

CHAIR: You can table those as supplementary submissions.

Mr Costello: Yes.

CHAIR: We will still have to go through our usual process, but I can see that they will not take quite the same level of analysis in order to make them public.

I would like to thank everyone who has given evidence today. I do not know if anyone took questions on notice—did they? The date of return of any questions taken on notice is 25 November.

Mr Costello: Does that mean that submitters can propose them, or you are talking about the questions on notice that the committee is raising? Which are you talking about?

CHAIR: The committee questions that were unanswered in the hearing today. You are, of course, welcome to send us further inquiries.

Mr Costello: There are quite a few in our submission.

CHAIR: Thank you.

Committee adjourned at 17:01