Immigration Detention in Nauru

March 2016

The Republic of Nauru, a tiny South Pacific island nation that has a total area of 21 square kilometres, is renowned for being one of the smallest countries in the world, having a devastated natural environment due to phosphate strip-mining, and operating a controversial offshore processing centre for Australia that has confined asylum seeking men, women, and children.

Considered an Australian "client state" by observers, Nauru reported in 2015 that "the major source of revenue for the Government now comes from the operation of the Regional Processing Centre in Nauru."[1] Pointing to the numerous alleged abuses that have occurred to detainees on the island, a writer for the *Guardian* opined in October 2015 that the country had "become the symbol of the calculated cruelty, of the contradictions, and of the unsustainability of Australia's $3bn offshore detention regime."[2]

Nauru, which joined the United Nations in 1999, initially drew global attention for its migration policies when it finalised an extraterritorial cooperation deal with Australia to host an asylum seeker detention centre in 2001. This deal, which was inspired by U.S. efforts to interdict Haitian and Cuban asylum seekers in the Caribbean, was part of what later became known as Australia's *first* "Pacific Solution" migrant deterrence policy, which involved intercepting and transferring asylum seekers arriving by sea—dubbed "irregular maritime arrivals" (IMAs)—to "offshore processing centres" in Nauru and Manus Island, Papua New Guinea.[3]

As part of this initial Pacific Solution, which lasted until 2008, the Nauru offshore processing centre was managed by the International Migration Organisation (IOM). During the facility's seven years in operation, 1,544 persons, including women and children, were detained. These detainees were largely beyond the reach of independent scrutiny or oversight, many of them remained in detention for up to five years, and none of them had access to appropriate procedural safeguards or legal mechanisms to challenge their detention.[4]

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[1] Nauru Bulletin, Issue 7-2015/125, Republic of Nauru, Government Information Office, 25 June 2015. According to the Bulletin, Australia recently signed a five-year plan according to which it will disburse US$23.5 million per year in visa fees for asylum seekers transferred to the island and other costs related to hosting the Regional Processing Centre.
[2] Ben Doherty, "This is Abyan's story, and it is Australia's story," The Guardian, 28 October 2015, http://www.theguardian.com/australia-news/2015/oct/28/this-is-abyans-story-and-it-is-australias-story.
[3] For an account of the history of the first Pacific Solution, see Michael Flynn, "How and Why Immigration Detention Crossed the Globe," Global Detention Project Working Paper No. 8, April 2014, pp. 15-19, http://www.globaldetentionproject.org/publications/how-and-why-immigration-detention-crossed-globe-0.
[4] Janet Phillips, "The 'Pacific Solution' revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island," the Parliamentary Library, Parliament of Australia, 4 September 2012, http://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/bn/2012-2013/pacificsolution#_Toc334509638.

In 2003, the UN High Commissioner for Refugees (UNHCR) expressed concern that the situation in Nauru (and Papua New Guinea) constituted mandatory detention, which is not compatible with international law, and denounced the country for employing "arbitrary detention in conditions that do not meet international standards."[1] UNHCR also highlighted the complex legal and protection issues raised by Australia's extraterritorial detention arrangements, which stemmed in part from the fact that at the time it was established Nauru had not even ratified the Convention Relating to the Status of Refugees.

The detention conditions on Nauru led to serious mental health problems for detainees. They engaged in hunger strikes and self-harm. After many years of heated dispute and criticism, the offshore centre was finally abandoned in 2008.[2]

In June 2011, Nauru ratified the UN Refugee Convention. In 2012, following an increase in boat arrivals, an Australian government expert panel recommended a resumption of the regional processing arrangements. A new Memorandum of Understanding (MOU) was signed with the Republic of Nauru[3] and Australia issued a 76 million USD contract to the Queensland builder Canstruct to build a new Regional Processing Centre (RPC) on Nauru in 2012.[4]

According to the MOU, the RPC is a "facility established in Nauru for the purposes of processing transferees' international protection claims." Notably, the language used in this offshore arrangement—"transferees," "processing," "protection claims"—reflect the same misleading qualities of the terms used in the first Pacific Solution ("irregular maritime arrivals") and studiously avoids the language of detention and asylum, which imply important legal obligations.[5]

Protection and other issues that marred the first "Pacific Solution" quickly re-emerged in implementation of this new extraterritorial cooperation policy. The Australian Human Rights Commission (AHRC) carried out an eight-month independent national inquiry about the health impact of detention of children. The commission wrote in its November 2014 report that while it could not exercise its powers on Nauru it retained "jurisdiction to consider the legality of Commonwealth activities on the island as they affect the 186 children currently held there." It thus relied on expert evidence in its inquiry about the situation at the Nauru facility.[6] It concluded that "No child be sent offshore for processing unless it is clear that their human rights will be respected."

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[1] United Nations High Commissioner for Refugees, "UNHCR reports harsh conditions and legal shortcomings at Pacific Island asylum centres," 26 November 2013, http://www.unhcr.org/52947ac86.html.

[2] Janet Phillips, "The 'Pacific Solution' revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island," the Parliamentary Library, Parliament of Australia, 4 September 2012, http://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/bn/2012-2013/pacificsolution#_Toc334509638.

[3] Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues, Australian Government, Department of Foreign Affairs and Trade. 3 August 2013, http://dfat.gov.au/geo/nauru/pages/memorandum-of-understanding-between-the-republic-of-nauru-and-the-commonwealth-of-australia-relating-to-the-transfer-to-and.aspx.

[4] Matt O'Sullivan and Bianca Hall, "Asylum seeker industry's $8 billion money spinner," Sydney Morning Herald, 21 April 2013, http://www.smh.com.au/national/asylum-seeker-industrys-8-billion-money-spinner-20130420-2i781.html.

[5] The Global Detention Project has noted the use of similar euphemisms in detention regimes in numerous countries across the globe. See Mariette Grange, "Smokescreens: Is There a Correlation between Migration Euphemisms and the Language of Detention?" Global Detention Project Working Paper No. 5, September 2013, http://www.globaldetentionproject.org/publications/smoke-screens-there-correlation-between-migration-euphemisms-and-language-detention-0.

[6] Australian Human Rights Commission, "The Forgotten Children: National Inquiry into Children in Immigration Detention (2014),"November 2014, https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children.

Following serious "allegations relating to the conditions and circumstances" at the Nauru RPC, the Australian Minister for Immigration and Border Protection commissioned a review into the allegations, which was led former Integrity Commissioner of the Australian Commission for Law Enforcement Integrity Philip Moss. The "Moss Review," released in February 2015, investigated allegations of sexual abuse and other physical assaults of "transferees," as well as the conduct and behaviour of staff employed by Transfield Services and Wilson Security.[7] It made 19 recommendations. The main focus was on the need for the Australian Department of Immigration and Border Protection (the Department) and the Nauruan Government to better guarantee the personal safety of "transferees" and child protection. Other issues included accountability of the service providers for the treatment of detainees and safeguards against sexual harassment, as well as their relationship to the Nauruan Police Force and respect for Nauruan culture and staff members.

In October 2014, there were widespread reports about a leaked intelligence briefing claiming that Save the Children staff providing service in Nauru had been involved in "encouraging and coaching" self-harm to "achieve evacuations to Australia."[8] According to Moss Recommendation 9, there was a lack of conclusive evidence for the alleged misconduct of the ten staff members, whom the department had ordered removed from Nauru, and advised that the department review its decision and inform Save the Children of its review.[9]

Spurred by the commission and the Moss report, the Australian Senate decided to determine the responsibilities of the Commonwealth Government in connection with the management and operation of the Regional Processing Centre in Nauru. The Senate Committee report, released in mid-2015, produced 15 recommendations, including: that Nauru and Australia commit to a model timeframe for refugee status determination; that the Australian Immigration Ombudsman undertake an independent review of all complaints involving the conduct of Australian-funded staff; that information be provided to asylum seekers on their rights to lodge complaints with independent bodies such as the Ombudsman, the AHRC and the International Committee of the Red Cross; and that the government "extent" its policy of removing children from detention on the mainland to Nauru.[10] According to the report, from 2012 and June 2015, 2,238 persons had been transferred to the RPC and at 13 July 2015, 637 asylum seekers were detained at the RPC, including 86 children.

The Senate Committee recommendations also included increased transparency requirements regarding the costs of operating the Nauru RPC. The Senate Committee described the costs as "extraordinary," concluding that the Australian taxpayer spent 310

[7] Philip Moss, "Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru," 6 February 2015, http://www.border.gov.au/Search/Pages/Results.aspx?k=Moss.
[8] Simon Benson and Jennifer Rajca, Truth overboard: Claims of asylum seeker abuse on Nauru were 'fabricated'," The Daily Telegraph, 3 October 2014, http://www.dailytelegraph.com.au/news/nsw/truth-overboard-claims-of-asylum-seeker-abuse-on-nauru-were-fabricated/news-story/cbe8350e21ebd8d3a17d39d53e121c59.
[9] Refugee Council of Australia, "Moss Review finds urgent need to protect asylum seekers on Nauru," 20 March 2015, http://www.refugeecouncil.org.au/latest/moss-review-finds-urgent-need-to-protect-asylum-seekers-on-nauru/.
[10] Parliament of Australia, "Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru, Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru," 31 August 2015. http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Final_Report

million USD "in the first ten months of the 2014-15 financial year in capital and operating costs for a facility that housed 677 asylum seekers as at 30 April 2015."[11]

Nauru had also come under criticism by Australian human rights lawyers and academics because immigration detention at the RPC appeared to be at odds with the Nauruan Constitution.[12]

In addition, the offshore processing in Nauru has raised complex questions concerning who has effective custody of "transferees." Evidence from the Australian High Court, financial contracts for the RPC and Nauruan security forces, as well as contracts for private management of the offshore facility highlight the blurred lines of accountability and responsibility. However Australia has repeatedly tried to distance itself from taking responsibility for the treatment of asylum seekers sent to Nauru. For instance, in response to a review of its human rights record by the UN Human Rights Council, Australia wrote in February 2016 that it "recognises that the regional processing centres in Nauru and Papua New Guinea (PNG) are facilities within Nauru's and PNG's sovereign borders respectively. These centres operate under Nauruan and PNG jurisdiction and are subject to the laws of those countries."[13]

During an offshore case hearing, in October 2015, Australian government lawyers argued before the High Court (HC) that Australia had not *required* Nauru to detain asylum seekers sent to the Island.[14] However, while the High Court subsequently ruled that Australia's participation in the detention of asylum seekers in Nauru was authorized by the Migration Act 1958, one HC judge opined that the plaintiff's detention on Nauru was caused and effectively controlled by the Commonwealth and another judge found that the detention was procured by the Commonwealth.[15] The Justice Department page on the official website of the Republic of Nauru refers only to visa administration issues in relation to the RPC.[16] According to media reports, since 2012 Nauru has received 21.7 million USD in visa fees from Australia to keep asylum seekers in detention.[17]

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[11] Parliament of Australia, "Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru, Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, 31 August 2015, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Final_Report.

[12] Whyte Sarah, "Lawyers launch constitutional challenge in Nauru over detainees," Sydney Morning Herald, 7 February 2014, http://www.smh.com.au/federal-politics/political-news/lawyers-launch-constitutional-challenge-in-nauru-over-detainees-20140206-324m3.html; and Azadeh Dastyari, "Detention of Australia's Asylum Seekers in Nauru: Is Deprivation of Liberty by Any Other Name Just as Unlawful?" 1 May 2015, University of New South Wales Law Journal, Vol. 38, No. 2, 2015, Monash University Faculty of Law Legal Studies Research Paper No. 2015/08, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2610477##.

[13] Human Rights Council, "Report of the Working Group on the Universal Periodic Review - Australia," United Nations, Advance Version, A/HRC/31/14/Add.1, 29 February 2016, http://lib.ohchr.org/HRBodies/UPR/_layouts/15/WopiFrame.aspx?sourcedoc=/HRBodies/UPR/Documents/Session23/AU/A.HRC.31.14.Add.1_AV-Australia-E.docx&action=default&DefaultItemOpen=1.

[14] Daniel Hurst, "Australia did not require Nauru to detain asylum seekers, high court told," The Guardian, 8 October 2015, http://www.theguardian.com/australia-news/2015/oct/08/australia-did-not-require-nauru-to-detain-asylum-seekers-high-court-told.

[15] Mark Hosking, "High Court upholds Commonwealth participation in offshore detention regime," Commbar Matters, 22 February 2016, http://www.commbarmatters.com.au/2016/02/22/high-court-upholds-commonwealth-participation-in-offshore-detention-regime/.

[16] Justice Department, The RPC Administration section, http://www.naurugov.nr/government/departments/department-of-justice-and-border-control/regional-processing-centre-administration.aspx.

[17] Paul Farrell, "Australia has paid Nauru $29m in visa fees to keep asylum seekers in detention," The Guardian, 22 May 2015, http://www.theguardian.com/australia-news/2015/may/22/australia-has-paid-nauru-29m-in-visa-fees-to-keep-asylum-seekers-in-detention.

Because of Australia's transparency in its procurement activities a great deal of information is available to clarify were responsibility lies for RPC management. In May 2015, a public Contract Notice for an initial 1.6 billion USD was granted to Transfied Services (Australia) Pty Limited for "Operational, Maintenance and Welfare support services for the Manus and Nauru RPCs" for March 2014 to February 2016.[18] In 2012 Transfield Services (now called Broadspectrum[19]) sub-contracted security at the RPCs in Nauru and Manus Island to Wilson Security. According to Wilson Security, "Matters of law and order remain the responsibility of the Nauru and Papua New Guinea Police Forces."[20] But according to Nauru government information, two Nauruan police officers were stations at the RPC in August 2015 only. Acting Commissioner of Nauru Police Superintendent Kalinda Blake said that the officers are the first point of contact for any incident requiring police investigation and that "the move was not a response to recent allegations made at an Australian Government Senate Inquiry, but a measure "designed to make it easier for those who want to file a complaint, whether they be asylum-seekers, RPC employees or anyone else who works at the centre."[21]

The Senate Committee recommended that the Australian government review the RPC operation towards a more open, lower security living arrangement for asylum seekers. One month before Nauru's human rights situation was due to be reviewed by the chief United Nations' (UN) human rights body, the government announced in October 2015 that it would "open" the RPC and lift restrictions on the detainees' freedom of movement.[22] However, this move did not deflect criticism from many UN member states, including many in the Asia-Pacific region, over the offshore processing deal with Australia.[23]

The decision to open the RPC was interpreted as a move to weaken challenges to the constitutionality of offshore immigration detention and it was announced shortly before the above Australian High Court hearing on the constitutionality of Australia's funding of offshore detention. Australia's solicitor general, noting the change in policy, argued that the RPC had become a "designated place of residence" and no longer a place of detention.[24]

Since the "opening" of the RPC, there have been numerous reports concerning threats of sexual abuse and allegations of rape, including of children, and asylum seekers are reportedly living in a state of constant fear. The Human Rights Law Centre (HRLC) litigated a test case on behalf of a pregnant Bangladeshi woman detained on Nauru who had been brought to Australia for urgent medical treatment. According to HRLC lawyers,

[18] Contract Notice View - CN2163702-A2, Operational, Maintenance and Welfare support services for the Manus and Nauru RPCs, AusTender, https://www.tenders.gov.au/?event=public.cn.Amendment.view&CNUUID=F9521702-F5C2-73B0-8E4186A2B1945549.

[19] According to the Sydney Morning Herald, the decision to change the name to Broadspectrum was made in order "to distance itself from … the controversy over the company's detention centre contracts on Nauru and Manus Island." Quoted in Jenny Wiggins and Michael Smith, "Transfield Services to change name to Broadspectrum as founders sever ties," 25 September 2015, http://www.smh.com.au/business/transfield-services-to-change-name-to-broadspectrum-as-founders-sever-ties-20150924-gjum0b.html#ixzz42yS9hyxo.

[20] Wilson Security, "Nauru and Manus Island," Fact Sheet, undated.

[21] Republic of Nauru, "Nauru police now stationed at Regional Processing Centre," 22 August 2014, http://www.naurugov.nr/government-information-office/media-release.aspx?page=4.

[22] Republic of Nauru, "No more detention for Nauru asylum seekers," 6 October 2015, http://www.naurugov.nr/government-information-office/media-release/no-more-detention-for-nauru-asylum-seekers.aspx.

[23] Human Rights Council," Report of the Working Group on the Universal Periodic Review – Nauru," United Nations, A/HRC/31/7, 16 December 2015, http://www.ohchr.org/EN/HRBodies/UPR/Pages/NRSession23.aspx.

[24] Tom Allard, "Nauru's move to open its detention centre makes it "more dangerous" for asylum seekers," Sydney Morning Herald, 9 October 2015, http://www.smh.com.au/federal-politics/political-news/naurus-move-to-open-its-detention-centre-makes-it-more-dangerous-for-asylum-seekers-20151008-gk4kbt.html#ixzz42WHCRWFW.

more than 260 people have also been brought to Australia for urgent medical treatment after suffering harm in offshore detention centres. In February 2016, however, the High Court ruled in favour of Australia concerning a challenge to the legality of offshore funding. This has spurred concerns that many people face imminent deportation to Nauru.[25]

Civil society has responded to these developments by urging the government to consider the best interest of the children, one of the tenets of the Convention on the Rights of the Child (CRC), when setting policy on Nauru. The Australian Refugee Council has also argued that the decision from the High Court "clearly shows the Australian Government is responsible for the operation and therefore the care of those within these detention camps."[26]

International human rights treaty monitoring mechanisms mandated to verify implementation of Australia's human rights obligations have urged it to abolish mandatory detention of asylum seekers, end offshore processing, use detention as a last resort, adopt time-limits, and apply best interest determination for children. The UN Committee against Torture has argued that transfers to RPCs in Nauru (and Papua New Guinea) do not release Australia from its obligations under the relevant convention.[27] None of these UN bodies has to-date examined the situation in Nauru due to its very late ratification of relevant treaties. The government of the 10,000-inhabitant island has also been very late in reporting to the Committee on the Rights of the Child. The country's first report on its implementation of the CRC, which it ratified in 1994, is scheduled for consideration in September 2016.

[25] Human Rights Law Centre, "Families fear imminent deportation as High Court confirms Government's Nauru arrangements do not breach Australian domestic law," 3 February 2016, http://hrlc.org.au/families-fear-imminent-deportation-as-high-court-confirms-governments-nauru-arrangements-do-not-breach-australian-domestic-law/.
[26] Refugee Council of Australia, "Moral question of offshore detention remains for Government," 3 February 2016, http://www.refugeecouncil.org.au/latest/moral-question-of-offshore-detention-remains-for-government/.

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