



Global Detention Project Submission to the UN Committee on Economic, Social and Cultural Rights (CESCR)

Australia

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Issues related to immigration detention

The Global Detention Project (GDP) welcomes the opportunity to provide information relevant to the Consideration of the fifth periodic report of Australia (due in June 2014 and received by the United Nations on 1 February 2016), with respect to the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The GDP is an independent research centre based in Geneva that investigates immigration-related detention. As per the GDP's mandate, this submission focuses on the State party's laws and practices concerning detention for immigration-related reasons. This submission is based on Global Detention Project research as well as research findings from other stakeholders and official Australian institutions.

I. Immigration detention context

Legal Framework

Australia has a policy of mandatory and indefinite detention of persons considered "unlawful non-citizens" or "illegal maritime arrivals" (irrespective of whether they are asylum seekers) as per provisions in the Migration Act 1958 (Section 189 "Detention of unlawful citizens" and Section 196 "duration of detention").¹ In addition, the Migration Act (Section 183) stipulates that courts cannot order the release from immigration detention of any designated person. For over a decade, human rights treaty monitoring bodies and special procedures of the Human Rights Council have made repeated recommendations to Australia to review, reconsider and repeal those policies.² Australian civil society, including medical associations and national human rights institutions have issued damning reports on the consequences of these provisions including with respect to access and enjoyment of economic, social and cultural rights (see below).

¹ Migration Act 1958, http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/

² Committee Against Torture, "Concluding observations on the combined fourth and fifth periodic reports of Australia," CAT/C/AUS/CO/4-5, 23 December 2014; Committee on the Rights of the Child, "Consideration of reports submitted by States parties under article 44 of the Convention - Concluding observations: Australia," CRC/C/AUS/CO/4, 28 August 2012; Committee on the Elimination of Racial Discrimination, "Consideration of reports submitted by States parties under article 9 of the convention Concluding observations of the Committee on the Elimination of Racial Discrimination – Australia," CERD/C/AUS/CO/15-17, 13 September 2010; Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo : Addendum : Mission to Australia A/HRC/20/18/Add.1, 18 May 2012; Report Of The Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover : Addendum: Mission to Australia, A/HRC/14/20/Add.4, 3 June 2010; Report of the Working Group on Arbitrary Detention, Addendum :Visit to Australia, * E/CN.4/2003/8/Add.2, 24 October 2002.

The legal language employed for detention-related provisions is often opaque, which can disguise problems associated with this practice. Asylum seekers are referred to as “unlawful non-citizens”, “designated persons” or “illegal maritime arrivals”. Remote Australian islands (i.e. Christmas Island) where people are sent for detention are defined as “excised” from Australian territory, preventing asylum seekers from lodging an asylum claim with Australia. Indeed, the whole of Australian territory is considered “excised” so that asylum seekers arriving by boat are prohibited by law to claim asylum or ask for a visa. Asylum seekers then become “transferees”. According to the MOU signed in 2012 with Nauru, Australia’s controversial offshore “Regional Processing Centre” is considered 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.³

Statistical data

According to official immigration detention statistics, as of 28 February 2017 there were 1,383 persons in immigration detention, of whom 100 were women and five children. These numbers include detention on Australian territory as well as in the Christmas Island Immigration Detention Centre (IDC), 2600 kilometres north-west of Perth in the Indian Ocean. The government also provides detention statistics concerning the 1,215 persons in Regional Processing Centres in the Republic of Nauru and the Manus Province of Papua New Guinea (PNG) in the Pacific Ocean (which at the time included 49 women and 45 children in Nauru).⁴

Government statistics for February 2017 indicate that 321 persons (23.2%) had been in immigration for more than 730 days and that “the average period of time for people held in detention facilities was 467 days.” According to the GDP comparative research findings for over 100 countries, the time span spent in administrative detention by persons who have committed no offence under Australian criminal law is extremely high.

Extraterritorial issues

Since 2012, Australia—a State Party to the International Covenant on Economic Social and Cultural Rights for more than four decades—has been transferring asylum seekers arriving by boat (and dubbed “illegal/unauthorized maritime arrivals”) to Nauru, which is *not* a party to ICESCR.⁵ As for PNG, host of the other Australian offshore detention site, although it acceded to ICESCR on 21 July 2008, it has *never* sent its initial report on implementation of the Covenant due since July 2010. Australia appears de facto to be skirting its responsibilities and avoiding monitoring and scrutiny of the economic, social and cultural rights of asylum seekers through transfers to countries not in a position to guarantee access to or enjoyment of those rights. This is also in violation of its obligations under the UN Refugee Convention.

Many Australian institutions appear to provide evidence that challenge Australia’s stance in its response to CESCR’s list of issues⁶ that persons transferred to the Regional Processing Centres (RPCs) are essentially under the laws of Nauru and PNG:

³ See Mariette Grange, “Smoke Screens: Is There a Correlation between Migration Euphemisms and the Language of Detention?” Global Detention Project, Working Paper, 17 September 2013, <https://www.globaldetentionproject.org/smoke-screens-is-there-a-correlation-between-migration-euphemisms-and-the-language-of-detention>.

⁴ Australian Government, Department of Immigration and Border Protection, Australian Border Force, « immigration Detention and Community Statistics Summary, » 31 January 2017. <https://www.border.gov.au/about/reports-publications/research-statistics/statistics/live-in-australia/immigration-detention>.

⁵ Nauru’s initial report to the Committee against Torture, due in 2013; remains overdue.

⁶ Committee on Economic, Social and Cultural Rights, “List of issues in relation to the fifth periodic report of Australia Addendum Replies of Australia to the list of issues, * E/C.12/AUS/Q/5/Add.1, 17 March 2017.

- For years, the Australian government’s monthly statistical summaries on immigration detention have routinely included data on persons in Regional Processing Centres;
- In 2015 the Australian Senate commissioned an enquiry into “recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru;”⁷
- The Commonwealth Ombudsman, required by the Migration Act 1958 “to assess the appropriateness of the immigration detention of each person detained for more than two years,” has been processing many cases of persons temporarily transferred to and back from Nauru and Manus Island’s RPCs to Australian territory (often in relation to health problems);⁸
- According to reports by the Australian National Audit Office, the Australian government bore “all costs associated with the construction and operation of the centres” in Nauru and Papua New Guinea” and it “entered into contracts for the delivery of garrison support and/or welfare services with a number of providers. Garrison support includes security, cleaning and catering services. Welfare services include individualised care to maintain health and wellbeing such as recreational and educational activities.”⁹

According to the GDP’s comparative research findings across over 100 countries Australia is the *only country* that includes immigration detention statistics in foreign countries into its national statistical summaries and where the national institutions report on cases of asylum seekers transferred back and forth from offshore processing centres in foreign countries.

The extra-territorial responsibilities of Australia with respect to the establishment and management of the RPCs in Nauru and PNG and persons transferred to the RPCs are amply documented including by UN treaty monitoring bodies.¹⁰

In February 2016, the UN refugee agency adopted an empathic position following a decision by the High Court of Australia to uphold the government’s authority under Australian law to enter into agreements with Nauru and service providers in relation to the detention of asylum seekers transferred from Australia. UNHCR affirmed “its long-standing position that Australia maintains responsibility for the protection of asylum seekers and refugees transferred to offshore processing centres under the existing bilateral arrangements with Nauru and Papua New Guinea respectively, and that any such arrangements must meet the respective countries’ international obligations.”¹¹

In March 2017, the CESCR recalled that core obligations under the Covenant on Economic, Social and Cultural Rights require that “The essential minimum content of each right should be preserved in all circumstances and the corresponding duties extended to all people under the effective control of the State, without exception.”¹²

⁷ The Senate, “Select Committee on the Recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru – Taking Responsibility: conditions and circumstances at Australia’s Regional Processing Centre in Nauru,” August 2015.

⁸ See for instance, Commonwealth Ombudsman, Report by the Commonwealth and Immigration Ombudsman for Tabling in Parliament under s 486O of the Migration Act 1958, first s 486O report on Mr X who has remained in restricted immigration detention for a cumulative period of more than 30 months (two and a half years), October 2016.

⁹ Australian National Audit Office, Offshore Processing Centres in Nauru and Papua New Guinea: Procurement of Garrison Support and Welfare Services, 13 September, 2016; Offshore Processing Centres in Nauru and Papua New Guinea: Contract Management of Garrison Support and Welfare Services, 17 January ,2017, <https://www.anao.gov.au/work/performance-audit/offshore-processing-centres-nauru-and-papua-new-guinea-contract-management>.

¹⁰ See for instance: Committee Against Torture, “Concluding observations on the combined fourth and fifth periodic reports of Australia*,” CAT/C/AUS/CO/4-5, 23 December 2014.

¹¹ UNHCR Regional Representation in Canberra, “Detaining asylum seekers and refugees in offshore detention centres subject to international obligations, despite High Court decision,” 5 February 2016

¹² Committee on Economic, Social and Cultural Rights, “Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights,” Statement by the Committee on Economic, Social and Cultural Rights, E/C.12/2017/1, 13 March 2017.

Responsibilities of private corporations contracted by the Australian Government

According to audits by the Australian National Audit Office, “In October 2015, Transfield [now called Broadspectrum Ltd, and owned by Spanish giant corporation Ferrovial became the sole provider of all garrison support and welfare services to asylum seekers at the offshore processing centres in Nauru and on Manus Island. In February 2016 these arrangements were extended through to 28 February 2017 and in August 2016 the contract with Transfield was further extended until 31 October 2017.” Many reports, including the 2015 Senate enquiry have documented severe abuse by private corporations’ staff and failure by those corporations to report on serious incidents.

Restrictions on professionals

In a Working Paper for the Global Detention Project, mental health professionals who have worked in Australian detention centres reported on their first-hand experiences seeing how “clinicians who spoke openly about the role of the broader environment in causing harm or who were openly critical of the policy were seen or felt to have inappropriately engaged in political advocacy. This usually ended with a contract being cancelled or not being renewed. It was a strange situation where everyone appeared to acknowledge that the environment caused mental health issues and harm but this could not be discussed openly.”¹³

The Australian Border Force Act 2015 includes provisions on secrecy for “immigration and border protection workers” under which persons working in immigration detention (as for instance doctors and teachers) dubbed “entrusted persons”, who disclose information deemed “protected” can be sentenced to up to two years in jail. Upon adoption of the Act, the medical professions denounced this new offence in law as contrary to their code of conduct and argued that it would stop them for speaking up for their patients. In an open letter, detention centre staff stated: “We have advocated, and will continue to advocate, for the health of those for whom we have a duty of care, despite the threats of imprisonment, because standing by and watching sub-standard and harmful care, child abuse and gross violations of human rights is not ethically justifiable. If we witness child abuse in Australia we are legally obliged to report it to child protection authorities. If we witness child abuse in detention centres, we can go to prison for attempting to advocate for them effectively. Internal reporting mechanisms such as they are have failed to remove children from detention; a situation that is itself recognised as a form of systematic child abuse.”¹⁴

The Border Protection Act was finally amended on 30 September 2016 to exempt health professionals from this offence. However Doctors for Refugees observed that being allowed to speak for their patients did not “change the appalling lack of care they often seem to receive.” Save the Children observed that the ban remained in place for others such as child protection workers and teachers.¹⁵

Economic and financial costs in relation to Regional Processing Centres in Nauru and PNG

¹³ Stephen Brooker, Steve Albert, Peter Young, and Zachary Steel, “Challenges to Providing Mental Health Care in Immigration Detention,” Global Detention Project, December 2016, <https://www.globaldetentionproject.org/challenges-to-providing-mental-health-care-in-immigration-detention-global-detention-project-working-paper-no-19>.

¹⁴ Open Letter on the Border Force Act: “We challenge the department to prosecute,” The Guardian, 30 June 2015, <https://www.theguardian.com/australia-news/2015/jul/01/open-letter-on-the-border-force-act-we-challenge-the-department-to-prosecute>

¹⁵ Bianca Hall, “A huge win for doctors”: Turnbull government backs down on gag laws for doctors on Nauru and Manus, The Sydney Morning Herald, 20 October 2016, <http://www.smh.com.au/federal-politics/political-news/a-huge-win-for-doctors-turnbull-government-backs-down-on-gag-laws-for-doctors-on-nauru-and-manus-20161019-gs6ecs.html>

In addition to well-documented problems and abuse in relation to conditions of detention in onshore and offshore facilities (see below), civil society, national human rights institutions, inter-governmental organisations and official sources (including a Senate investigatory committee) have decried the “extraordinarily” large sums spent in implementing these policies.”¹⁶ According to Save the Children Australia (SCA) and Unicef Australia, close to \$9.6 billion were spent between “between 2013 and 2016 on implementation of mandatory policies and “offshore processing alone is estimated to cost over \$400,000 per person, per year.” Official budget sources for offshore processing centres in Nauru and PNG for 2016-17 “indicate that estimated actual spending in that year was almost \$1.1 billion”.¹⁷

Yet these extraordinary amounts spent for mandatory detention do not appear to have contributed to the enjoyment of economic, social and cultural rights of immigration detainees, in particular on offshore processing facilities. New eligibility requirement since 2015 bar not-for-profit organisations from providing welfare services in RPCs and this will likely result in less visibility for abuse of detainees, especially in a context where media access is very limited and subject to very high media visa fees.¹⁸

Economic consequences of Australia’s agreement to establish Offshore/regional Processing Centres

The Republic of Nauru is 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 and having a devastated natural environment from phosphate strip-mining. 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.”¹⁹ In its report to the Committee on the Elimination of Discrimination against Women (CEDAW) in 2016, the Nauru government described the RPC as a “significant source of income and employment” which offered “800 jobs to Nauruans.” The report noted: “There is no care economy in Nauru, which means, no aged care facilities or child care centres. Infants and the sick are cared for by female relatives in the last year, a number of skilled female workers (10 teachers and 7 nurses) have not returned from maternity leave or have left their careers to take up unskilled jobs at the Offshore Processing Centre (OPC).”

Enjoyment of human rights, including economic, social and cultural rights by asylum seekers transferred to Nauru and PNG

Access to and enjoyment of economic, social and cultural rights is intertwined in access to and enjoyment of access to civil and political rights. In cases of deprivation of liberty, including in administrative detention, persons become even more vulnerable to abuse. Scores of reports have been published by civil society and national human rights institutions (see in particular information submitted by civil society for this 61 CESCR session).

Following a country visit to Australia – including in the regional processing centres of Nauru – in November 2016, the Special Rapporteur on the Human Rights of Migrants stated that the “punitive approach adopted by Australia towards migrants who arrived by boat has served to

¹⁶ Save the Children Australia and Unicef Australia, *At What Cost? The Human, Economic and Strategic Cost of Australia’s Asylum Seeker Policies and the Alternatives*, September 2016.

¹⁷ Elbritt Karlsen, “Australia’s offshore processing of asylum seekers in Nauru and PNG: a quick guide to statistics and resources”, Parliament of Australia, Law and Bills Digest Section, Updated 19 December 2016, http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/Offshore#_Total_number_of

¹⁸ John Gooding, “Media access to Nauru is Australia’s concern”, *The Interpreter*, Lowy Institute for International Policy, 20 July 2016, <https://www.lowyinstitute.org/the-interpreter/media-access-nauru-australias-concern>.

¹⁹ Nauru Bulletin, Issue 7-2015/125, Republic of Nauru, Government Information Office, 25 June 2015. According to the Bulletin, Australia also 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.

erode their human rights”.²⁰ The Special Rapporteur visited Yongah Hill, Maribyrnong Immigration Detention Centre, Melbourne Immigration Transit Accommodation, Brisbane Immigration Transit Accommodation and Villawood Immigration Detention Centre as well as the Regional Processing Centres in Nauru. He observed that “Unauthorized maritime arrivals are treated very differently from unauthorised air arrivals, especially when these arrivals result in protection claims” and “face obstacles that other refugees do not face, including mandatory and prolonged detention periods, transfer to RPCs in foreign countries (Papua New Guinea and Nauru), indefinite separation from their family, restrictions in the social services and no-access to citizenship.” The Special Rapporteur confirmed findings by other human rights mechanisms, including the Committee against Torture that conditions of detention amount to cruel, inhuman and degrading treatment. He stated that prolonged administrative detention for indefinite periods has a strong and lasting impact on “migrants’ wellbeing, with many cases reported of self-harm, Post-Traumatic Stress Disorder (PTSD), anxiety and depression.

Although both the Nauru and Australian government claim that the Regional Processing Centres are now open facilities²¹ the Special Rapporteur observed the “detention-like” conditions in Nauru in fenced in premises resembling military barracks guarded by security officers. Persons transferred to Nauru by Australia have to sign in and out every time they leave or return to the camp. He described PTSD anxiety, depression, insomnia, nightmares and bed-wetting among children. The expert also received testimonies about attempted suicides and self-harm, mental disorder and developmental problems. He reiterated that these persons are under the effective control of Australia, which funds the RPCs and contracts private corporations to operate them.

The Australian Human Rights Commission, which unveiled the dire consequences of immigration detention on the health of children in a report in 2014, issued a “Snapshot Report on refugees, asylum seekers and human rights” in 2017. According to its President: “Third country processing in Nauru and Papua New Guinea’s Manus Island continues to raise numerous human rights concerns. Inadequate pre-transfer assessments and the variable quality of refugee status determination processes create a risk of refoulement; living conditions remain below international standards; there has been an increase in safety concerns, including multiple reports of physical and sexual assault; and durable solutions for people found to be refugees have proven difficult to find. The combination of these factors continues to have a deleterious impact on the physical and mental health of people subject to third country processing. There also remains a need to improve independent monitoring of third country arrangements.”²²

According to official statistics as a result of official refugee determination processes, 79% of asylum-seekers in Nauru and 82% in PNG have been found to be refugees as of 31 October 2016.²³ This extremely high refugee recognition rate appears to defeat the rationale for the Australian government to have placed so many persons in clear need of protection in harsh detention conditions, at times for years.

So far recognized refugees remain stranded in Regional processing centres, with scant access to and enjoyment of the rights monitored by ICESCR. In the GDP’s experience based on research findings in over 100 countries, the continued and sustained level of abuse and suffering by persons in immigration detention in Regional Processing Centres, in hostile climatic and other conditions is particularly dire, especially for children and women. This is further compounded by an atmosphere of impunity due to the offshore externalization context

²⁰ “End mission Statement by the UN Special Rapporteur on the human rights of migrants on his official visit to Australia (1-18 November 2016),” Office of the High Commissioner for Human Rights, 17 November 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20885&LangID=E> n

²¹ Bill Frelick, “Will “America First” Mean Refugees Last?” Human Rights Watch, 24 April 2017, <https://www.hrw.org/news/2017/04/24/will-america-first-mean-refugees-last>

²² Australian Human Rights Commission, “Asylum Seekers, Refugees and Human Rights: Snapshot Report (2nd Edition) 2017

²³ Elibritt Karlsen, “Australia’s offshore processing of asylum seekers in Nauru and PNG: a quick guide to statistics and resources,” Parliament of Australia, Law and Bills Digest Section, Updated 19 December 2016,

and the outsourcing of security, management and services to private companies, which prevents scrutiny of the enjoyment of economic, social and cultural rights of persons transferred by Australia to foreign countries.

II. Key Questions for Australia

- How does Australia ensure respect for the economic, cultural and social rights of persons it has transferred to Nauru and Papua New Guinea?
- How does Australia justify the different treatment afforded to persons dubbed “unauthorized maritime arrivals” and the obstacles they face including mandatory and prolonged detention periods, transfer to RPCs in foreign countries (Papua New Guinea and Nauru), indefinite separation from their family, and restrictions in the social services?
- How does Australia ensure that children in Regional Processing Centres are protected from abuse by centre staff and the local population (ICESCR arts 10 – 15)?
- How does Australia ensure access to health and education for children in offshore detention (ICESCR arts 12 and 13)?
- How does the government of Australia follow up on complaints and recommendations on cases forwarded to it by the Ombudsman?²⁴
- How does Australia hold private corporations accountable for abuse of persons in Regional Processing Centres and what mechanism is in place to combat impunity, punish those responsible for abuse and provide redress and compensation to the victims?
- How does Australia ensure that professional staff other than medical personnel working in Regional Processing Centres are not penalised for reporting abuse?
- How many persons transferred from Nauru and Manus Island to Australia for medical reasons currently are in Australia and what is the logic for returning them to Nauru and Manus Island?
- What steps will Australia take to ensure the wellbeing and respect for the human rights of people currently at the facility in Papua New Guinea when that facility closes later this year?

²⁴ See for instance : REPORT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN FOR TABLING IN PARLIAMENT Under s 486O of the Migration Act 1958 -first s 486O report on Mr X who has remained in restricted immigration detention for more than 24 months (two years): in which “The Ombudsman notes with concern the Government’s duty of care to detainees and the serious risk to mental and physical health prolonged detention may pose. Without an assessment of the claims of Mr X to determine if he is found to engage Australia’s protection obligations, it appears likely that he will remain in detention for an indefinite period.”