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## Secrecy and human rights abuse in Australia's offshore immigration detention centres

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All asylum seekers who arrive in Australia's territorial waters by boat are subject to mandatory, indefinite and unreviewable detention on Nauru and Papua New Guinea. This offshore detention regime is characterised by a high degree of secrecy, low levels of transparency and accountability, and few opportunities for external oversight. This has created a closed, controlled environment, in which people are routinely neglected and harmed. To better understand the human impact of Australia's offshore detention regime, this article draws on research from social psychology regarding human behaviour in closed institutions. This research – which has substantially informed prison policies throughout the Western world – demonstrates the critical importance of external oversight, openness and transparency for the protection of human rights of people in closed institutions. This knowledge has not been applied to Australia's offshore immigration detention regime. To the contrary: creating a closed, opaque system of detention has been an explicit policy goal of the Australian government. By actively restricting transparency, this research demonstrates that not only are the abuses of detainees' human rights hidden from the public eye, they are inevitable.

**Keywords:** immigration detention; human rights; transparency; secrecy; Nauru; Manus Island

In Manus Prison, the pain is there to send you home.

Behrooz Boochani, Kurdish asylum seeker from Iran, detained on Manus Island since August 2013.<sup>1</sup>

This detention is created in such a way as to act as a deterrent, to encourage people to return [to their homeland], and to stop other people trying to seek asylum. The harmfulness is a 'designed-in' feature ... You can't allow transparency, if what you're trying to do is inflict suffering. Secrecy is necessary because these places are designed to damage.

Dr Peter Young, former Director of Mental Health Services at International Health and Medical Services<sup>2</sup>

### Introduction

Since 2010, all asylum seekers who arrive in Australia's territory by boat are moved to immigration detention centres on the Pacific island nation of Nauru, or Manus Island in Papua New Guinea (PNG), where they remain until their applications for refugee status

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are assessed, and they are either returned to their country of origin or resettled in a safe third country. This offshore immigration detention regime is characterised by a high degree of secrecy, low levels of transparency and accountability, and few opportunities for external oversight. The result is the creation of a closed, controlled environment, in which individuals confined are routinely harmed.

To better understand the human impact of Australia's offshore detention regime, this article examines the relationship between harm and transparency in closed institutions. Behavioural studies and social psychology research – which have substantially informed prison policies throughout the Western world – have demonstrated both the critical importance of external oversight, openness and transparency for the protection of human rights of people in closed institutions, and the inevitability of human rights abuses where such transparency is lacking. This same knowledge has not been applied to Australia's offshore immigration detention regime. To the contrary: as this article demonstrates, the explicit policy goal is to control information and create a closed, opaque system of detention. The outcome for the human rights of detainees is significant. By actively restricting transparency within Australia's offshore detention regime, abuses of detainees' human rights are not only hidden from the public eye, they are inevitable.

The purpose of such a programme is two-fold. On the one hand, the government hopes that such a harsh detention regime will deter potential asylum seekers from travelling to Australia by boat. On the other, the creation of a harmful environment encourages detainees to withdraw their application of asylum for Australia and return home. In the words of Iranian detainee Behrouz Boochani, detained on Manus Island since August 2013, 'in Manus prison, the pain is there to send you home'.<sup>3</sup> The government's key objective is then to deter both prospective and existing asylum seekers from reaching and settling in Australia, and this is achieved by creating an environment that harms detainees and restricts access and transparency. As Michael Grewcock comments 'There is no acknowledgement of the systemic harm and structural violence associated with border controls. Obstructing safe travel, indefinite detention and forced removal become routine practices in pursuit of the organisational goal of denying refugees the ability to seek asylum in accordance with the 1951 Refugee Convention'.<sup>4</sup> Assessing the type of harm perpetrated against asylum seekers and manner in which it is concealed by the government is the focus of this article.

Our argument is set out in four sections. First, we provide a brief background of Australia's immigration detention policies and their evolving function as a deterrence mechanism. Second, we summarise the literature on the relationship between harm and transparency in closed institutions, and demonstrate how this knowledge has long informed laws and policies regarding other types of closed institutions, such as prisons. In the third section we closely examine five key measures by which the government restricts transparency in its offshore detention regime: (a) by framing of the work of the Department of Immigration as a national security, military-style operation; (b) by failing to properly regulate service providers; (c) by capitalising on the deficits of democratic process in Nauru and PNG; (d) by placing restrictions on the media; and (e) by actively blocking external observers' access to offshore detention centres. Finally, in the fourth section, we close with a summary of some of the human rights outcomes of this policy.

### **Offshore processing as a policy of deterrence and denial**

Since the introduction of the policy of mandatory immigration detention in 1992 by the Labor Party, consecutive Australian governments have incrementally tightened the management of 'unauthorised' asylum seekers' arrivals. Offshore detention was introduced in 2001

and forms a keystone policy within a larger suite of policies now known as Operation Sovereign Borders (OSB). All non-citizens who arrive in Australian territory by boat without a valid visa are subject to mandatory, indefinite and unreviewable detention on the Pacific island nation of Nauru, or Manus Island in PNG, until their application for protection status is positively assessed and they are transferred to a safe third country, or their application is rejected and they are returned to their country of origin. Offshore detention, with no guarantee of resettlement in Australia, aims to deter asylum seekers who are considering travelling to Australia by boat.

In many respects, OSB has its origins in the 'Pacific Solution' first introduced by Prime Minister John Howard and Minister for Immigration Philip Ruddock. Between 1999 and 2001 this Coalition government commissioned a number of taskforces, which recommended strategies to 'reduce the incentives of using Australian refugee law to achieve a migration outcome'.<sup>5</sup> A standoff between the Australian government and a Norwegian freighter, the *M/V Tampa*, with 433 rescued asylum seekers on board, provided the opportunity for the government to make a public stand against asylum seeker arrivals. The Australian government refused to allow the *Tampa* permission to dock in Australian territory, which eventually resulted in the Australian military boarding the freighter and reluctantly 'taking custody of its human cargo'.<sup>6</sup> The Pacific Solution was introduced in the aftermath of the *Tampa* affair in late 2001 and became the central administrative system for deterring people seeking asylum. The Pacific Solution encompassed various border control strategies, most significantly the detention of asylum seekers on Nauru and PNG in exchange for a large increase in Australian aid payments. Those who were found to be refugees were placed on temporary protection visas, the terms of which allowed individuals to stay in Australia for three-year terms and which denied refugees the certainty of permanent settlement. Under Operation Relex, the Australian Defence Force were charged with the responsibility of patrolling, detecting and intercepting unauthorised boat arrivals.

In response to mounting public pressure regarding the increasing numbers of detainees and the conditions of their custody, this exercise in offshore processing was slowly wound back from 2005. However, the Pacific Solution's official closure by the newly elected Labor Prime Minister Kevin Rudd in March 2008 was largely symbolic. Construction continued on the high-security Christmas Island Immigration Detention and Reception Facility, which opened in 2008. As part of the Indonesian archipelago, and with flights only a few times per week (and at the cost of a fare to Europe), Christmas Island continued to fulfil many of the criteria of keeping detention centres out of sight.

From 2009 the numbers of unauthorised arrivals began to increase and an Expert Panel was created in order to propose a way forward. The panel proposed reviewing the processes for 'determining refugee status, making it legal to remove asylum seekers to any country, a "no advantage principle" whereby any asylum seeker arriving by boat would not gain an advantage over those waiting in camps, and reopening the detention facilities on Nauru and Manus Island'.<sup>7</sup> Labor Prime Minister Julia Gillard adopted all the findings and reopened the regional processing centres on Nauru and Manus Island in 2012, 'effectively reintroducing the Pacific Solution' and prohibiting any prospects for refugees arriving in Australia without a visa to permanently settle within Australia.<sup>8</sup> The Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 took effect on 18 August. Australia and Nauru signed a Memorandum of Understanding on 29 August 2012, and the first group of asylum seekers arrived at Nauru on 14 September 2012.

In November 2013 a Liberal-National Coalition was elected to government. The Coalition, under the leadership of Tony Abbott, had appealed strongly on its border control credentials, with 'Stop the Boats' becoming a central refrain of their campaign.

OSB was introduced on 18 September 2013, 11 days after the government's election to office. OSB is an overarching policy approach to asylum seekers who arrive in Australian territory by boat. It encompasses the militarisation of border control (including the interception and turning back of boats), institutional changes to the administration of asylum policy, the re-introduction of temporary protection visas and expanding the capacity to process and detain asylum seekers within offshore detention centres on Nauru and Manus Island. Asylum seekers who are subject to Australia's offshore immigration detention regime are detained on a mandatory, indefinite and unreviewable basis. In September 2015, Malcolm Turnbull took office as the new prime minister. Despite the fact that the Coalition removed the incumbent prime minister, Tony Abbott, in large part due to increasing public criticism of his reductive rhetoric concerning 'Stop the Boats', OSB remains intact as the principle policy managing immigration and border protection.

### **The inevitability of human rights abuses in closed institutions**

Protecting the dignity of people within closed institutions, such as prisons and detention centres, has long concerned scholars, policymakers and advocates.<sup>9</sup> Prisons have received special attention, and there exists an extensive literature exploring the conditions, treatment and human rights of prisoners.<sup>10</sup> The notion of prisoners' welfare emerged simultaneously with, and as a product of, the development of ideas of liberalism and democratic governance, which emphasised the respect and well-being of the individual and the curtailment of arbitrary authoritarian power. The protection of prisoners' dignity is mentioned in the English Constitution of 1688, amendments to the Constitution of the United States of America, and the French *Déclaration des droits de l'homme et du citoyen*.<sup>11</sup> Apart from the right to freedom of movement and association, the guiding principle is that prisoners should retain all rights that are not necessarily lost as a result of their incarceration.<sup>12</sup>

That human rights abuses will inevitably occur within unregulated, closed institutions is now well-established in social psychology, and reflected in national and international laws.<sup>13</sup> Social psychologists point to the dangers of creating conditions whereby one group of people have unmitigated and arbitrary authority over another group, and particularly if the confined group has lesser social status.<sup>14</sup> Abuse occurs not because of the inherent cruelty of prison guards, but because of environmental factors inherent to closed institutions: including group conformity, deference to authority, and the identification of an 'outgroup' as both 'lesser' in status and 'threatening cherished values'. Two classic studies of human behaviour remain instructive. The 1963 Milgram study showed how volunteer participants, acting as 'teachers', were willing to follow the instructor's orders to punish 'students' with electric shocks to 'lethal' levels. One decade later, the 1973 Stanford Prison study demonstrated how ordinary college students, randomly assigned to be full-time guards or detainees in a temporary prison, behaved respectively as abusers and victims. The study was abandoned only six days into the two-week experiment, because 'guards' began to physically abuse and psychologically humiliate their fellow student 'prisoners', displaying indifference to the obvious suffering that their actions produced. Moreover, the worst treatment occurred at night, when the guards believed their actions went unobserved.<sup>15</sup> These two studies, using volunteers, contribute to a large body of scholarship on the social dynamics created by closed institutions. To explain the abuses of Iraqi prisoners in the Abu Ghraib prison in 2003, Fiske and colleagues<sup>16</sup> drew on findings summarised in a meta-analysis of 25,000 reliable studies involving over eight million participants over the course of a century.<sup>17</sup> The evidence about human behaviour and capability gathered in

this research, they argue, demonstrates that ‘Abu Ghraib resulted in part from ordinary social processes ... the right (or wrong) social context can make almost anyone aggress, oppress, conform, and obey’.<sup>18</sup>

Research on prison systems in several jurisdictions supports these findings, and establishes the crucial function of independent external oversight in mitigating harm. For instance, the Canadian Office for the Correctional Investigator was established in the 1990s as an acknowledgement that within unregulated, closed and tightly controlled environments, there is a ‘natural drift’ towards ‘callousness at best and brutality at worst’.<sup>19</sup> Prison policy in Germany emphasises the fundamental principle that a ‘human rights-compliant prison policy include[s] the conduct of regular independent oversight of all places of confinement ... in order to mitigate inevitable systemic abuses of power that arise whenever humans gain control of others’.<sup>20</sup> Most European countries fall under the auspices of the Committee for the Prevention of Torture and the Inhuman and Degrading Treatment of Prisoners (CPT), which has the power to inspect and report on conditions in any prison in its jurisdiction.<sup>21</sup> The United Kingdom has three different oversight bodies, fulfilling different functions, and also takes recommendations from the CPT.<sup>22</sup> Although there exist in many countries problems in implementing policies of oversight,<sup>23</sup> the United States stands alone among Western nations as having underdeveloped external oversight procedures for its vast, and harmful, prison system.<sup>24</sup>

Often these national laws work in conjunction with international laws and treaties. The Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (ICCPR, 1966), the Standard Minimum Rules for the Treatment of Prisoners (1977), and the Convention against Torture (CAT, 1984), all explicitly set out the rights of incarcerated people.<sup>25</sup> The Optional Protocol on the Convention against Torture (OPCAT, 2006) was developed to give practical force to the CAT, and this is achieved by independent external oversight.<sup>26</sup> OPCAT requires signatory states to set up a two-tiered system of monitoring: one domestic, and one international. Both are required to have free access to ‘all places of detention’. The most controversial aspect of OPCAT, as it is seen as a challenge to state sovereignty,<sup>27</sup> is the requirement that state parties allow access to a United Nations (UN) observer to inspect all places of detention at any time and with no advance notice.

How then does independent external oversight work to protect the rights of prisoners? First, it can improve the conditions of single institutions, thus bettering the daily life for detainees and increasing their chances of successful integration once released. Second, independent monitoring can advocate for system-wide improvement, particularly in advocating for the special needs of minority groups, such as women or children. Third, oversight is preventative, and in this way is more effective than the law, which seeks to remedy breaches of rights only after they have occurred. Finally, it is a key part of public accountability and good governance for sites of incarceration.<sup>28</sup> Although rarer, there is also an important role for whistleblowers from within organisations to alert a wider audience to the social dynamic within the institution, and prevent their peers from continuing unethical behaviour.<sup>29</sup> Ideally, several levels of independent external oversight should form a framework designed to protect the human rights of people imprisoned, including national and international monitoring and auditing bodies, citizen groups and domestic and international human rights organisations.<sup>30</sup>

In Western democracies external oversight over prisons is both extensive<sup>31</sup> and taken for granted.<sup>32</sup> The frameworks regulating *immigration detention centres*, however, are more ad hoc, less extensive and less stringently applied.<sup>33</sup> In Australia, the difference between the management of prisons and immigration detention centres is particularly

stark. Australian prisons are regulated by Ombudsman's offices, the Human Rights Commission, and specialised monitoring bodies.<sup>34</sup> Australia became party to OPCAT in 2009, but has not ratified it, and as such has not implemented a national preventative mechanism with free access to 'all places of detention' as required by the treaty. As this article will demonstrate, this is just one of several ways that external oversight is limited in Australia's immigration detention centres.

Before turning to the question of external oversight in Australia's offshore detention centres, it is worth establishing the exceptional status of these centres within the broader category of closed institutions. We can apply much of what we learn from prison research to detention centres, but there are a number of important ways that immigration detention is unique, and thus requires special attention.<sup>35</sup> First, as an extra-judicial form of incarceration, immigration detention centres are not subject to the same regulatory framework as Australia's prison system, affecting the conditions under which people are held, their length of detention, and their avenues for appeal. Second, the people subject to immigration detention are particularly vulnerable because of their non-citizen status, their history of persecution or other trauma, and their uncertain future. Third, the mandatory and indefinite application of immigration detention in Australia has a distinct and negative impact on detainees' psychological health. Finally, Australia's offshore detention centres are effectively private businesses operating in foreign countries which means geography, and several levels of agreements, contracts and operating procedures, stymie transparency and external oversight. Furthermore, the governments of Nauru and PNG – both experiencing, to different degrees, democratic deficit – have been disinclined to facilitate measures for protecting the human rights of people detained on their territory. In short, while Australia's offshore detention centres share many characteristics with prisons and other closed institutions, offshore detention centres have unique features that further jeopardise the human rights of detainees. We now turn to examine Australia's current immigration policy and its offshore immigration detention regime directly, and the five main ways that external oversight is restricted and inhibited with the current regime.

### **The militarisation of the immigration department**

The formal shifting of responsibility for managing border protection from the Department of Immigration to the military has been one of the key institutional features of OSB. In a pre-election policy document, it was stated that:

If elected, a Coalition government will establish a military-led response to combat people smuggling to protect our borders – *Operation Sovereign Borders*. An incoming Coalition government will treat the border protection crisis as a national emergency and tackle it with the focus and energy that an emergency demands.<sup>36</sup>

When launching OSB, the Abbott government appointed the Deputy Chief of Army Angus Campbell to coordinate more than a dozen federal government departments and agencies involved in border protection. In the process, Campbell was promoted to a three-star general, and given powers to bypass normal defence force command structures.<sup>37</sup> At the time, the Australian Defence Association expressed concern that having a military officer answer directly to the Minister for Immigration might breach the Defence Act, along with the convention of separating military command from civil control.

At the same time, the government department responsible for immigration (formerly the Department of Immigration and Citizenship) was rebranded as the Department of Immigration and Border Protection (DIBP) to reflect the change in government policy. Subsequently



in July 2015, the DIBP was merged with the Australian Customs Agency to form the Australian Border Force (ABF). Ostensibly a 'budget savings measure', the 'single, integrated border agency'<sup>38</sup> escalated the militarisation of Australia's response to asylum seekers travelling by boat. There were several implications of this merger. It marked a shift in culture within the government department, both in terms of services delivered and the manner in which they were executed. Areas formerly under the department's remit, such as management of skilled migration, tourism, student visas, citizenship, humanitarian resettlement and multiculturalism policy were stripped back, and jobs were lost. Senior ABF officials began wearing military-style uniforms, and its officers were now armed.<sup>39</sup> There was also a shift in the timely and responsive release of Freedom of Information (FOI) documents. In January 2014, it was being reported that the Immigration Department had blocked the release of a list of all briefings made to the Immigration Minister, Scott Morrison, despite repeated FOI requests.<sup>40</sup>

This institutional shift has been accompanied by distinct modification in the language used to describe the ABF's operations. Heightened military language was accompanied by obfuscation, justified by the nature of the operation as a national security crisis. For example, Prime Minister Abbott refused to confirm rumours of an operation underway in January 2015, arguing:

We are in a fierce contest with these people smugglers. And if we were at war, we wouldn't be giving out information that is of use to the enemy just because we might have an idle curiosity about it ourselves.<sup>41</sup>

When asked to justify the way he was controlling information about OSB, Morrison continued with the 'battle-ready' metaphor, arguing he would not be speaking about 'on-water matters',<sup>42</sup> that this was 'not uncommon with military-style operations',<sup>43</sup> and in another instance that 'the battle is being fought with the full arsenal of measures'.<sup>44</sup> In his first interview with the media as the ABF's new Commissioner, Roman Quaedvlieg stated that he would not release information about 'on water matters', and that 'operational security is paramount to conducting effective strategic and tactical operations'.<sup>45</sup>

The securitisation of immigration matters is not new in Australian politics: in 2001 Prime Minister John Howard also tightly controlled the release of information to the public regarding the *Tampa* and Children Overboard<sup>46</sup> affairs. With OSB, however, the Abbott government persistently invoked the imperatives of defence and protection as a means of justifying the lack of transparency surrounding the execution of its policy. The hyperbole relating to 'war' and 'battle' attempted to validate the government's re-definition of 'border protection' from that of a civilian law enforcement role to a military operation, and to justify secrecy over its operations. In some ways, however, the ABF Act extends beyond those usually relating to military operations. For example, ABF officers are excluded from sections 28, 29 and 39 of the Work Health and Safety Act 2011. Sections 28 and 29 require workers to take reasonable care of their own health and safety and that of other persons in the workplace, and section 39 relates to preserving a site for evidence if a workplace injury has occurred. As one commentator explained, 'those engaged in turning back unarmed people in wooden boats don't have to exercise reasonable care'.<sup>47</sup> Australian frontline military personnel, including those engaged in Afghanistan, do not require such exemptions.

OSB also saw the expansion of the Customs' service fleet, as part of the department's transformation into an 'effective Coast Guard'.<sup>48</sup> While the exact expenditure associated with such an upgrade was not published, it was reported that the Customs and Border Protection budget for 2013–2014 came in at AUD\$324 million. By May 2015, the Coast Guard was in full operation, with reports that since the inception of OSB, 18 boats of asylum seekers and migrants had already been turned back.<sup>49</sup> 'Scant details' regarding two such



turn-backs were revealed in a Senate estimates inquiry, in which it was learnt that a boat carrying 46 Vietnamese people had been intercepted and eventually returned to a Vietnamese port four weeks later.<sup>50</sup> The same Senate inquiry heard that a second boat had been intercepted, and at the time of the inquiry it had not been returned to the country of origin: the ABF major-general reported that it was in 'an area where we anticipate there will be further ventures' and to discuss the matter might 'defeat the tactics and techniques'.<sup>51</sup> It can thus be argued that the militarisation of border control achieves the two central objectives of OSB: to prevent asylum seekers from reaching Australian territory, and to conceal those measures through a discourse of national security that posits asylum seekers and their smugglers as a threat warranting the might of a military operation.

### **No accountability for service providers**

The privatisation of all Australian immigration detention services contributes to their opacity. The detention centres on Nauru and Manus Island are, effectively, private businesses operating in foreign countries. Several corporations are involved. Broadspectrum (formerly Transfield Services) holds the primary contract with the Department of Immigration for the operation of the centres. Broadspectrum is responsible for contracting the other organisations working in detention. Wilson Security provides security services, while welfare services are provided by Connect, the Australian Red Cross, and (until 2015) Save the Children. There are no mandatory reporting frameworks between these organisations, or with DIBP. This, and a culture of secrecy, has resulted in the systematic under-reporting of serious incidents, including medical emergencies, self-harm and abuse.<sup>52</sup>

Broadspectrum is a listed company that provides 'asset management services' across a range of sectors, focusing on a wide range of engineering projects, including bridges, coal power stations, oil rigs, powerlines and naval shipbuilding. The name change from Transfield Services to Broadspectrum in 2015 coincided with pressure from community groups, including divestment from superannuation funds, for their involvement in the detention centres.<sup>53</sup> The contract from 2012 to 2015 was reported to be worth AUD\$1.5 billion (\$1.4 million per day).<sup>54</sup> The contract for the detention operations was renewed in 2015, at a reported cost of AUD\$2.7 billion.<sup>55</sup> The department's contract with Broadspectrum is subject to commercial in-confidence restrictions, as are its subcontracted organisations.

Reports on the Manus Island and Nauru detention centres describe an unregulated environment in which staff have repeatedly behaved in a heavy-handed manner towards asylum seekers, and rather than provide protection, are often the perpetrators of abuse. In the worst instance, a former Salvation Army worker, and another security worker, have been charged with the death of the asylum seeker Reza Berati during a riot in Manus Island detention centre in February 2014.<sup>56</sup> The Senate Committee charged with examining conditions on Nauru found that the high volume of evidence in relation to the behaviour of staff indicated that there was a cause for ongoing concern. For example, the committee found that, 'despite the likelihood of significant under-reporting', the internal complaints mechanism managed by Transfield Services (now Broadspectrum) recorded 725 complaints about service provider staff over a 14-month period to April 2015.<sup>57</sup> These included 45 allegations of child abuse and sexual assault.<sup>58</sup> The report went on:

The committee considers that a system in which contractors are essentially left to manage and report on complaints against their staff is inadequate ... given the pervasive culture of secrecy which cloaks most of the department's activities in relation to the Nauru RPC, the committee believes that a far greater level of scrutiny, transparency and accountability is required.<sup>59</sup>

The Senate Committee found instances whereby the ‘pervasive culture of secrecy’ meant that some abuses were not known to the department due to the absence of a clear and mandatory reporting procedure between Wilson Security, Transfield Services and the department. For example, during a six-month period in 2013–2014, Wilson Security operated without an internal computer server: officers were saving important documents, including incident reports and health records, to their computer desktops. The inquiry also received evidence that Wilson Security management ‘frequently’ destroyed incident reports made by Save the Children and Transfield Security by placing them into ‘File 13’, a codename for the shredder. This included incident reports relating to the use of unreasonable force by Wilson Security officers.<sup>60</sup>

The culture of secrecy also explains two examples of direct obfuscation. The Senate Committee reported that Wilson Security misled the committee with regard to the behaviour of its staff during a riot in July 2013. Video footage of the event was eventually shown to the committee that revealed Wilson’s account to be ‘untrue’.<sup>61</sup> The report explains:

The footage appeared to show security personnel planning to use unreasonable force against asylum seekers, and those visible in the footage used derogatory language to refer to asylum seekers. The footage revealed a workplace culture which is inconsistent with Wilson Security’s role to provide safety and security to asylum seekers within the facility ...<sup>62</sup>

Despite knowing of the existence of the footage, Wilson Security did not reveal the evidence to the committee, and at no time did they attempt to correct the record, until it was uncovered by the media.

The second instance of obfuscation is the occasion in which a Wilson Security officer fabricated an allegation of assault by an asylum seeker. The matter was investigated by Nauruan police and brought before the local court, in which the officer gave wrongful evidence, before the officer revealed his deception in a secret recording to a colleague. The officer claimed he wanted the asylum seeker convicted so he would never be settled in Australia. The asylum seeker, a young Iranian man, spent four weeks in jail in Nauru and attempted suicide three times after being falsely accused.<sup>63</sup> The Senate Committee found that the department’s ‘ignorance’ of the matter ‘demonstrates the limits of Commonwealth control or oversight of the RPC on Nauru’.<sup>64</sup> The event represents the only time a person has been charged by the Nauruan police, or brought to court, in relation to an incident that has occurred in detention.

In July 2015, this ‘pervasive culture of secrecy’ was enforced in law with the introduction of the ABF legislation. Under the ABF Act, it is an offence to disclose ‘documents and information about the provision of services to persons who are not Australian citizens’.<sup>65</sup> Staff working in the centres risk imprisonment for up to two years if they reveal information to the media concerning the detention centres. The Act defines an ‘entrusted person’ as anyone who works for the Department of Immigration or is a contractor to it, and makes it a criminal offence if an entrusted person ‘makes a record of, or discloses’ protected information. ‘Protected information’ is defined as ‘information that was obtained by a person in the person’s capacity as an entrusted person’.<sup>66</sup> The law effectively prevents employees from recording or disclosing instances of ill treatment or abuse witnessed within the detention centres: as lawyer Julian Burnside pithily explained, the law makes it ‘a criminal offense to report a criminal offense’.<sup>67</sup>

Additionally, organisations working in Australia’s immigration detention centres on Australian territory and on Nauru and PNG are also asked to sign a ‘performance security’ clause as part of their contracts. This clause involves payment of a bond – in the case of

Save the Children, a bond of AUD\$2 million – that is relinquished if the terms of the contract are contravened. Contravening the contract includes speaking to the media without government approval. Transfield Services, Connect Settlement Services and the Australian Red Cross all agreed to the clause and paid the bond. Save the Children did not agree to the clause, and 12 months later lost its contract. The chief executive of Save the Children, Paul Ronalds, explained that ‘the imposition of performance securities was interpreted by us as discouraging us to speak publicly on policy issues’, and that ‘we had to work hard to ensure that Save the Children’s right to continue to advocate was maintained’.<sup>68</sup> Save the Children were not replaced, and Broadspectrum assumed its welfare role in the detention centres: hence there are no human rights organisations with access to immigration detention.<sup>69</sup>

### **Deficits of democratic process in Nauru and PNG**

Situating the detention centres on Nauru and Manus Island, PNG, has created an additional element of isolation, hindering transparency and accountability. Although the actual figures are undisclosed, the detention centres are important to both countries’ economies, as a major source of income from Australia and as an employer for locals. Nauru, a small Pacific island nation with a population of 10,000, was once one of the wealthiest per capita nations in the world as a result of its phosphate mining. After the exhaustion of its phosphate reserves in the 1960s, and the irresponsible spending of Nauru’s wealth, the nation faced bankruptcy during the 1990s before Australia approached it in 2001 with financial incentives to set up the detention centre. In 2015 the detention centre was its largest income source.<sup>70</sup> PNG, an Australian colony until 1975, had long had problems with poverty and is dependent on Australian aid. The ‘asymmetrical power relationship’<sup>71</sup> between Australia and both countries has facilitated an accommodating environment for Australia’s offshore detention regime.

Despite covering costs and providing significant financial incentives, however, the Australian government persistently disputes responsibility over the detention centres and their conditions. The secretary to the Department of Immigration, Mike Pezzullo, has argued:

The Australian government does not run the Nauru regional processing centre. It is managed by the government of Nauru, under Nauruan law, with support from the Australian government ... The government of Nauru assesses asylum claims and, where persons are found to be in need of protection, arranges settlement. The government of Nauru is specifically responsible for security and good order and the care and welfare of persons residing in the centre.<sup>72</sup>

Two memorandums of understanding place responsibility with Nauru’s secretary of justice for the ‘security, good order and management of the centre, including the care and welfare of persons residing in the centre’. The memorandums of understanding require that activities undertaken by the Australian government comply with Australia’s constitution and laws, and that ‘where no relevant Nauruan standard exists’; the contracts of service providers ‘adhere to Australian standards in the delivery of services’.<sup>73</sup> Regardless, the Senate Committee investigation into the circumstances and conditions of the Nauru detention centre concluded:

The level of control exercised by the Government of Australia over the RPC supports a strong argument that the primary obligation rests with Australia under international law for protecting the human rights of the asylum seekers, and for the compliance with the refugees Convention. At a minimum, the committee is convinced that Australia holds joint obligations with the Government of Nauru in that regard.<sup>74</sup>

The committee also confirmed that there was a 'comparable situation' at the Manus Island Regional Processing Centre regarding responsibility.<sup>75</sup>

These disputes regarding responsibility are all the more serious when considered within the context of recent dramatic incidents of democratic erosion within each nation. During 2014 Nauru removed its chief justice, magistrate and police commissioner, all Australians appointed to oversee the correct dispensation of justice.<sup>76</sup> In doing so they effectively 'got rid of their judiciary'.<sup>77</sup> Most opposition members of parliament have also been removed from Nauru's parliament, and the media is tightly controlled. According to expelled Chief Justice Geoffrey Eames:

Nauru is a closed society. The government controls the media, with directions that they are not allowed to interview or place on the news any opposition speakers . . . . The opposition politicians expressed criticism to international media attacking the breach of law, outside of parliament. They were removed from the house for exercising their democratic rights to freedom of speech. They have had a very successful *coup d'état*.<sup>78</sup>

The Australian government, however, has consistently refused to acknowledge the manner in which such in-country political developments impact the operation of its detention centres and the welfare of the detainees. As Professor William Maley observed, 'the location of a refugee processing centre on Nauru has . . . allowed the Australian government to benefit from the weaknesses in accountability associated with poor governance and the collapse of the rule of law on Nauru'.<sup>79</sup> While Australia maintains the position that democracy in Nauru is satisfactory, New Zealand has suspended aid to Nauru's judicial sector in protest of these developments.<sup>80</sup> In Nauru, there has been a striking lack of criminal justice responses to allegations of abuse in detention. Of the 50 cases referred to the under-resourced Nauruan Police Force by August 2015, they had laid charges in just five of these cases,<sup>81</sup> but to date, no Nauruan has been charged for the assault of a non-Nauruan. Nonetheless, Australian Department of Immigration officials have consistently held that 'sexual assault in Nauru is a matter for the Nauruan Police Force'.<sup>82</sup>

In PNG, Supreme Court Judge David Cannings initiated an own-motion inquiry into the violence that led to the death of Reza Berati on Manus Island in 2014. He granted first-time access to journalists and observers during his inspection. The PNG government, with support from Australia, stopped the judge's inquiry.<sup>83</sup> The Sydney-based barrister representing 75 Manus Island detainees who witnessed Berati's death has been blocked from speaking to his clients, and twice deported from the country.<sup>84</sup> However, in April 2016 Australia was not able to obstruct PNG's Supreme Court ruling that its detention centres were illegal and unconstitutional. As a result PNG announced its intention to close all its facilities, while the Immigration Minister, Peter Dutton, claimed that the government would 'continue discussions with the PNG government to resolve these matters'.<sup>85</sup> At the time of writing, the Turnbull government had presented no alternative plan for the 850 detainees currently on Manus Island, simply reiterating the fact that none of the asylum seekers currently on Manus Island would be resettled in Australia.

### **Restrictions placed on the media**

The media has an important role in providing external oversight over sites of incarceration. A key strategy of OSB has been to inhibit the flow and exchange of information between the immigration department and the media. Shortly after the election of the Abbott Coalition government, and at a time of much DIBP activity, including turning back boats from

Australian territorial waters, the Minister for Immigration and Border Protection Scott Morrison stopped the practice of providing information to the media on boat arrivals in real time. Initially, the minister announced that he would hold weekly briefings in Sydney rather than Canberra, which made it difficult for the Canberra-based Press Gallery to attend.<sup>86</sup> For many journalists these weekly briefings were unsatisfactory: not all the questions were answered immediately and many were placed on hold until the following week, and transcripts omitted questions from the record.<sup>87</sup> In late 2014 the weekly briefings were abandoned altogether, replaced with briefings on an 'as needs basis'.<sup>88</sup> As Morrison explained, when questioned by journalists about lack of information regarding the turning back of boats: 'If there was a significant event happening then I would be reporting on it ... there is no such report for me to provide to you today.'<sup>89</sup> In several interviews, the minister claimed he had 'answered the question', even when the reply frequently took the form of reciting the line that it was 'standard practice under Operation Sovereign Borders' not to report on maritime operations.<sup>90</sup>

Since the introduction of OSB, the DIBP has been proactive in applying pressure to journalists covering asylum matters using so-called anti-whistleblower laws. At least eight journalists suspected of breaching the 'unauthorised disclosure of Commonwealth information', an offence under the Crimes Act, have been referred by DIBP to the Australian Federal Police (AFP) for investigation, the largest number by any government department. Six of these related to leaked information about detention on Nauru, 'prompting claims [the government] is pursuing whistle-blowers instead of those who allegedly assaulted and raped asylum seekers'.<sup>91</sup> In one example, in response to an article journalist Paul Farrell wrote on the incursion of an ABF vessel into Indonesian waters, the AFP conducted an investigation into his confidential sources. The 200-page, heavily redacted file Farrell accessed under Freedom of Information laws revealed an energetic investigation by the AFP.<sup>92</sup>

Nauru has implemented its own laws making it difficult for foreign journalists to access the country. In January 2014, it raised the amount it costs to lodge an application for a journalistic visa to the country from AUD\$200 to \$8000, non-refundable even if the visa is refused.<sup>93</sup> It again tightened access in February 2016, refusing a visa to all Australian and New Zealand passport holders (contract workers excepted).<sup>94</sup> These restrictions not only deny journalists from observing and reporting on the conditions on Nauru, they reveal the manner in which Australia has capitalised on the shortfalls of democratic process in such countries as Nauru and PNG and attempted to abnegate responsibility for the activity and operational matters of its centres.

In October 2015, conservative journalist Chris Kenny from *The Australian* newspaper became the first journalist to gain access to Nauru in over 18 months. Kenny filed several reports from Nauru, most controversially two regarding the fate of a Somali asylum seeker (using the pseudonym Abyan), who claimed to have been raped in detention and, becoming pregnant, was initially denied an abortion by the Australian government.<sup>95</sup> While Kenny was criticised for allegedly being granted access to Abyan against her wishes, he also came under fire for not addressing the systemic abuses within the justice and parliamentary systems overseeing the treatment of asylum seekers on Nauru.<sup>96</sup> Kenny's privileged access also raised questions as to why he had been granted permission at all, and the role of the Australian government in facilitating his application. When asked how he had successfully obtained a visa to Nauru, Kenny replied 'if my public support for strong border protection measures helped sway Nauru's decision, so be it'.<sup>97</sup> Far from reassuring the Australia public that offshore detention centres remain accessible to journalistic observation, the case of Kenny's visit instead illustrates the extent to which the Australian government has intruded on the media's freedom to report on its offshore detention regime.

### **No access to independent external observers**

As outlined above, allowing access by independent external observers is a crucial component for the protection of the human rights of people in closed institutions, and as such is recognised in international law and domestic prison policies. The lack of access granted to external observers to the offshore detention centres has long concerned human rights organisations. Since the introduction of OSB, further barriers inhibit external review, transparency and accountability of the centres and the experiences of those detained and employed there. Amnesty International, for example, has been denied access to Nauru since 2012, and Manus Island since 2013.<sup>98</sup>

Two examples provide good illustrations of the restriction of external oversight. In the first case, Australian Human Rights Commissioner Gillian Triggs sought access to Nauru in 2014 to investigate the impact of detention on the 184 children detained there at that time. Her request was denied, citing the commission's jurisdiction to investigate human rights abuses within Australia. The Commission's report, entitled *The Forgotten Children*, nevertheless included a substantial chapter about Nauru, drawing on evidence from detainees, eyewitness accounts from the UN High Commissioner for Refugees, and submissions from staff and service providers. The report detailed the unsatisfactory conditions of detention for children and the widespread neglect and abuse occurring there, including 233 assaults of children, 33 sexual assaults, and 128 acts of self-harm by children between January 2013 and March 2014. On the report's release, Commissioner Triggs was subject to an unprecedented and personal attack by many senior government ministers. The prime minister criticised Triggs for conducting a 'blatantly partisan politicised exercise',<sup>99</sup> and the attorney general sought her resignation.<sup>100</sup> Another senior minister 'boasted' that he would not read the report, describing it as 'unnecessary, irrelevant and inaccurate' and 'not worth the paper it was written on'.<sup>101</sup>

The second case regards the cancellation of a planned visit by the UN Special Rapporteur for the Human Rights of Migrants, Francois Crepeau, to inspect immigration detention centres in Australia, Nauru and PNG in September 2015. This arranged visit was the most recent of many requests by Crepeau to gain access to Australia's onshore and offshore detention centres, of which all but this last request had been blocked. Given the penalties in the ABF Act 2015 for contracted staff to disclose information regarding their work in detention, Crepeau asked the government to provide to him a written guarantee that the people whom he interviewed would not be at risk of sanctions. This request was refused, and Crepeau concluded that the ABF Act prevented him from 'fully and freely carrying out his duties during the visit', and cancelled the trip.<sup>102</sup> The Director of the Human Rights Legal Centre, Hugh de Kester, described the cancellation as 'unprecedented for a Western Liberal democracy'.<sup>103</sup>

### **The human rights outcomes for people detained on Nauru and Manus Island**

So far we have outlined the five central measures by which the government has actively restricted transparency over its offshore immigration detention centres. Before closing, it is important to provide a brief summary of the human rights outcomes for people subject to this detention regime. Despite the government's attempt to regulate and control information regarding the detention centres, five investigations provide good evidence of the conditions and experiences of detention. These are the Moss report (Nauru, 2015)<sup>104</sup> and the Cornall report (Manus Island, 2014),<sup>105</sup> both commissioned by the DIBP; two Senate inquiries (Manus Island, 2014<sup>106</sup>; and Nauru 2015<sup>107</sup>); and the Australian Human Rights



Commission's report *The Forgotten Children* (Nauru 2014).<sup>108</sup> In addition to these investigations there have been numerous 'leaks' to the media by detention centre contractors in defiance of the ABF Act ban on speaking publicly about their experience. Together, these investigations and contractors' accounts provide substantial detail on the conditions and experiences of offshore detention.

The *Forgotten Children* report and Senate inquiry (Nauru), provide a clear picture of the conditions of the detention centre on Nauru. Nauru has a tropical climate with an average temperature of 31 degrees Celsius, and regularly reaches 45–50 degrees.<sup>109</sup> The camp where families and children are accommodated is a gravel construction site, with un-air-conditioned tents situated on loose and uneven rocks. The white rocks reflect the heat of the sun, and children are not provided with eye protection or hats, and are only offered flip-flops (often in adult sizes) as footwear. (Notably contractors are not allowed to enter the camp without hats, sunglasses and workboots to protect against the glare and the uneven surface.)<sup>110</sup> There is insufficient shade. The tents, furnished only with beds, accommodate 12 to 15 families each. There is little privacy between families. The tents are not air-conditioned. There is a shortage of toys, books, play equipment, and other requirements for education, including paper.<sup>111</sup> Staff refer to detainees using a number, which is allocated when they arrive, rather than by their name. Children have referred to themselves and signed artworks using this number.<sup>112</sup> Water shortages mean that showers are restricted to 30 seconds per day. When the water runs out, toilets become blocked and overflow, and detainees report that the floors are always wet with toilet overflow. The toilet facilities are so unclean that many women and children avoid drinking to the point of dehydration in order to avoid visiting the facilities, or wet their beds overnight.<sup>113</sup>

The reports also detail numerous incidents of abuse, including sexual abuse, and self-harm by detainees, including children. The *Forgotten Children* report documented, from January 2013 to March 2014: 57 serious assaults; 233 assaults involving children; 207 incidents of actual self-harm; 436 incidents of threatened self-harm; 33 incidents of reported sexual assault (the majority involving children); and 183 incidents of voluntary starvation/hunger strikes (with a further 27 involving children).<sup>114</sup> The report also documents several instances of suicide and self-harm by children, and other symptoms of mental distress including depression, anger, regression, bed-wetting and severe weight-loss, concluding that children on Nauru were 'suffering from extreme levels of physical, emotional, psychological and developmental distress'.<sup>115</sup> There exists no child protection framework in operation on Nauru,<sup>116</sup> and many incidents of assaults of children and adults were not reported by Broadspectrum to DIBP or the Nauruan Police Force.<sup>117</sup> As of June 2015, no charges had been laid in relation to any allegations of abuse.<sup>118</sup> The Senate inquiry also heard allegations that some detainees had been subject to techniques commonly associated with torture, including waterboarding.<sup>119</sup>

The detention centre on Manus Island, for men only, has accommodated an average of 1,000 people since its re-opening in 2012. To the Senate inquiry (Manus), a former Salvation Army employee described the conditions there in this way:

When I arrived on Manus Island during September 2013, I had previously worked on Nauru for one year. I thought I had seen it all: suicide attempts, people jumping off buildings, people stabbing themselves, people screaming for freedom whilst beating their heads on concrete. Unfortunately I was wrong; I had not seen it all. Manus Island shocked me to my core. I saw sick and defeated men crammed behind fences and being denied their basic human rights, padlocked inside small areas in rooms often with no windows and being mistreated by those who were employed to care for their safety.<sup>120</sup>

Defying the Border Force Act and risking up to two years imprisonment, doctors spoke to ABC's *Four Corners* programme in April 2016 about the needless death of a Manus Island detainee, Iranian asylum seeker, Hamid Khazaei. Despite presenting to doctors with acute symptoms on 23 April 2015, and medical staff filing an urgent request for an immediate flight to Port Moresby, bureaucrats in Canberra denied the request, citing that there was not enough information to warrant such action. Mr Khazaei was eventually airlifted to the capital three days later, where he suffered multiple cardiac arrests as a result of sepsis and was left brain-dead. His life support was switched off on 5 September 2015. President of the Australian Medical Association, Professor Brian Owler, made the case that Mr Khazaei's death was not inevitable: 'He could have been saved and he could have been treated properly.'<sup>121</sup>

As of January 2016, 1,459 people were detained on Nauru and Manus Island, including 68 children on Nauru. The average length of time people had spent in detention was 445 days (to December 2015), with 23% of detainees spending longer than 750 days in detention.<sup>122</sup> As the tragic case of Hamid Khazaei demonstrates, the bureaucracy surrounding the Border Force Act and the restrictions put in place by the Australian government, have meant that detainees' human rights are persistently devalued and diminished, at worst resulting in the death of those in custody.

## Conclusion

There is substantial and incontrovertible evidence that the human rights outcomes of Australia's offshore detention centres are devastating. The overwhelming weight of evidence points to an environment that is 'not adequate, appropriate or safe for the asylum seekers detained there',<sup>123</sup> characterised by poor facilities; neglect of the medical, welfare and educational needs of detainees; dehumanising treatment by staff; widespread mental illness and rates of self-harm; and pervasive physical and sexual abuse of detainees, including children.<sup>124</sup> We have argued here that these outcomes are a predictable consequence of policy designed to limit transparency and to create a culture of secrecy: policy in contradiction to the evidence that Australia and other Western nations routinely apply when designing policy for other closed institutions, such as prisons.

There exists a debate among scholars and practitioners regarding the place of non-governmental organisations and charities working within Australia's immigration detention regime: some argue that the employment of such organisations in detention effectively legitimises the policy.<sup>125</sup> This is an important argument and we agree with its general principles. Yet, the evidence that we have set out here demonstrates the importance of openness, transparency and external independent oversight for protecting the human rights of people detained. This would include, among other things, the involvement of various specialist and expert service providers in the day-to-day operations of detention; unannounced and regular inspections by independent external organisations; mandatory reporting obligations for service providers; and strictly enforced accountability measures, including criminal justice proceedings where abuses occur. While Australia's offshore immigration detention regime persists, the policy and its implementation should be informed by the knowledge regarding human behaviour and closed institutions. If it does not, human rights abuses will continue to be as inevitable as they are avoidable.

## Disclosure statement

No potential conflict of interest was reported by the authors.

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