

DOCTORS FOR REFUGEES INC V. COMMONWEALTH OF AUSTRALIA – HIGH COURT OF AUSTRALIA

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The *Australian Border Force Act 2015* (Cth) (“the ABF Act”) was enacted with bi-partisan support in July of last year. Doctors for Refugees Inc. has instructed Fitzroy Legal Service to bring a constitutional challenge to the secrecy provisions contained in Part 6 of the ABF Act. The Respondent to the case is the Commonwealth of Australia.

Doctors for Refugees is bringing this case to advocate for the public’s right to know what their government is doing in their name, and to support the public health imperative of transparency to mitigate harm occurring in detention centres on and offshore. The Court will be asked to consider whether communications regarding the making and implementation of Government policy in relation to asylum seekers, mandatory detention, and offshore detention – including conditions, health care and treatment of refugees and asylum seekers in detention – are protected by the freedom of political communication implied by the Constitution, and whether the ABF Act invalidly prohibits those communications.

Fitzroy Legal Service is supported in bringing this action by pro bono lawyers, and by counsel Ron Merkel QC, Craig Lenahan, David Hume and Andrew Yuile. Fitzroy Legal Service has a long history of working with the medical profession to further the protection of human rights.

The *Australian Border Force Act 2015* (Cth) can be found [here](#).

The *Australian (Secrecy and Disclosure) Rule 2015* (Cth) can be found [here](#).

The Determination for Immigration and Protection Workers made under the ABF Act by the Secretary to the Department of Immigration and Border Protection can be found [here](#).

The Secrecy Provisions

The Secrecy Provisions of Part 6 the ABF Act – in particular s 42 – make it a criminal offence, punishable by two years’ imprisonment, for an ‘entrusted person’ to record or disclose ‘protected

information’, which is defined as information obtained in a person’s capacity as an ‘entrusted person’. Entrusted persons include persons who are contracted to provide services to the Department of Immigration and Border Protection (DIBP), and sub-contractors working for such contractors. The secrecy provisions apply to protected information received in the past, and operate beyond the borders of Australia.

Exceptions

There are some exceptions to the prohibition in s 42.

- Information that is not personal information may be disclosed to Departments, agencies or authorities of the Commonwealth, the Australian Federal Police, State and Territory police, a coroner, officers or appointees of the Government, and other bodies prescribed by the rules. However, such information can only be disclosed *with the written permission of the Secretary to the DIBP, who has power to impose conditions on the nature of the information and steps to be taken prior to disclosure.*
- Information that is not personal information can be disclosed to a foreign country, a foreign agency or authority of a foreign country, or a public international organization. However, such information can only be disclosed where there is an *agreement in force* between the Commonwealth and the foreign country, agency, authority or public international organisation. The information may be disclosed for ‘permitted purposes’ (including purposes related to law enforcement, coronial matters, public health, migration laws, provision of services, and intelligence gathering functions by the Australian Security Intelligence Organisation), but only *if* the Secretary to Department of Immigration and Border Protection is *satisfied the information will be used in accordance with the terms of the agreement*, and an *undertaking is in place not to use or disclose the information other than in accordance with the agreement or otherwise as required or authorised by law*. The disclosure by the entrusted person may be authorised in writing and subject to conditions imposed by the Secretary.
- Similarly, information or a class of information that *includes* personal information may be disclosed to a foreign country, agency or authority of a foreign country or a public international organisation if the Secretary is satisfied the information will be used in accordance with the agreement in force, the Secretary is satisfied the disclosure is *necessary for a permitted purpose*, an undertaking is in place not to use or disclose the information except in accordance with the agreement or otherwise as required/ authorised by law, and the recipient of the information and class of information are prescribed in the rules. The

disclosure by the entrusted person may again be authorised in writing and subject to conditions imposed by the Secretary.

- Protected information about the affairs of a person or body may be disclosed where consent has been given by a person or body, and disclosure is in accordance with the consent.
- Protected information may be disclosed if the entrusted person reasonably believes that the disclosure is necessary to prevent or lessen a serious threat to the life or health of an individual, and the disclosure is for the purposes of preventing or lessening that threat.
- Protected information may also be disclosed if the disclosure is required or authorised by a law of the Commonwealth, a State or a Territory, or if the disclosure is required by an order of a Court or Tribunal.

There is no embedded exemption in the ABF Act to allow for recording or disclosure that is in the public interest.

Health practitioners challenge the ABF Act

Medical practitioners, allied health practitioners and students, have been amongst the most vocal critics of the secrecy provisions. Dominant themes in their criticisms have been the ethical duties of medical practitioners, systems of accountability within the health profession itself, and the quality/integrity of health care provided to patients under Australia's control and management. They have criticised the creation of special, additional restrictions applicable to health practitioners working with asylum seekers and refugees on behalf of the Commonwealth.

On 1 July 2015, the day of enactment of the ABF Act, the following open letter signed by forty medical practitioners was published, with large demonstrations ensuing across the country.

Open letter regarding the Border Force Act 2015

"Today the Border Force Act comes into force. It includes provision for a two-year jail sentence for "entrusted persons" such as ourselves if we continue to speak out about the deplorable state of human rights in immigration detention without the express permission of the minister for immigration and border protection. This strengthens the wall of secrecy which prevents proper public scrutiny.

"If we witness child abuse in Australia we are legally obliged to report it to child protection authorities.

“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.

“Evidence of the devastating effects of institutional self-protection and blindness to child abuse has been presented before the current royal commission. We are determined not to collude with a system that repeats these same mistakes.

“There are currently many issues which constitute a serious threat to the health of those in detention for whom we have a duty of care. The Department of Immigration and Border Protection is aware of these problems and has for years failed to address them adequately.

“We are aware that in publishing this letter we may be prosecuted under the Border Force Act and we challenge the department to prosecute so that these issues may be discussed in open court and in the full view of the Australian public.”¹

The Border Force Commissioner, the Department of Immigration and Border Protection, and the Minister for Immigration and Border Protection have issued statements suggesting prosecution of health practitioners under the ABF Act is unlikely. For many, this has not altered the perception that the ostensible intent of the ABF Act is to silence doctors, teachers, social workers and others working in detention centres in making disclosures and engaging in debate regarding matter of public policy and health. Indeed, regardless of whether prosecutors exercise a discretion to charge health practitioners (or others) working with refugees and asylum, the law remains in place. Practitioners speaking out are subject to a Sword of Damocles, unsure when or if they might be investigated or charged for adhering to their ethical (and moral) obligations.

In late April 2016, Four Corners broadcast the documentary ‘Bad Blood’, investigating the circumstances of the death of asylum seeker Hamid Khazaei, detained on Manus Island. A number of health practitioners chose to comment publicly, probably in breach of the ABF Act, in relation to

¹ *‘Open letter on the Border Force Act – we challenge the Department to prosecute’*, The Guardian 1 July 2015 <http://www.theguardian.com/australia-news/2015/jul/01/open-letter-on-the-border-force-act-we-challenge-the-department-to-prosecute>; *‘Detention Centre staff speak out in defiance of new asylum secrecy laws’*, The Guardian 1 July 2015 <https://www.theguardian.com/australia-news/2015/jul/01/detention-centre-staff-speak-out-in-defiance-of-new-asylum-secrecy-laws>

treatment and conditions. No charges have been laid, though at least two doctors have been subject to investigation by the Australian Federal Police. The documentary can be viewed [here](#). The Ministerial and Department's response as to whether doctors will be prosecuted under the ABF Act can be viewed [here](#).

In late May 2016 an urgent motion was passed at the annual Australian Medical Association conference in Canberra, "That the Federal Council be requested to look into the matter of the Australian Federal Police conducting surveillance of doctors involved in the health care of asylum seekers and refugees." (106 voted for, 2 against, and 7 abstained).

Doctors and other health practitioners are governed by strict duties directed to promoting safe healthcare, rights of patients, and public health. The position of trust and responsibility held by doctors and other health practitioners in the community is governed by legislation, regulations, professional rules, common law, and the oversight of professional regulatory bodies. Doctors do not just owe legal duties to patients, but to the broader objectives of public health, and maintenance of the integrity/ standards of Australian health service provision as a whole.

About Doctors for Refugees

Doctors for Refugees Inc. has approximately 350 members, primarily health practitioners, and seeks as its primary objective to campaign and advocate for better health outcomes for refugees and asylum seekers. Doctors for Refugees came into existence in August 2013. In December 2013, the Independent Health Advisory Group (IHAG), which had performed the function of providing independent oversight of health care to asylum seekers and refugees in detention, and advocacy in relation to medical treatment and conditions of detention, was disbanded. A number of health practitioners perform a similar function on a voluntary basis with Doctors for Refugees. That is, health practitioners with specialist expertise provide independent assessments of medical care that has been provided to refugees and asylum seekers in detention.² The membership and committee of Doctors for Refugees is nationally based. Specific areas in relation to which Doctors for Refugees engage in advocacy include:

- the impact of mandatory detention and conditions in detention centres on physical and mental health;
- the impact of mandatory detention and conditions in detention centres on children, families, and detainees with compromised physical and/or mental health;
- the adequacy of facilities and treatment available in offshore detention centres;

² Subject to patient consent, and generally subsequent to the release of patient records by IHMS.

- conflicts between contractual obligations to employers and the requirements of the Health Practitioner National Regulation National Law;
- concerns about Government and/or International Health and Medical Services Pty Limited (IHMS) influence in decision making regarding where, when and what treatment should be provided, and in particular, decision making regarding transport of detainees out of detention centres to receive medical treatment;
- concerns regarding protocols to collaborate in providing health care with local hospitals and health service providers in medical emergencies;
- issues involving the regulation of overseas doctors working in offshore Australian facilities;
- concerns regarding the skills and qualifications of health practitioners working in offshore detention;
- concerns regarding the adequacy of qualities and clinical governance structures and processes within IHMS and between IHMS and the DIBP;
- concerns about timely and appropriate access to medical practitioners for detainees;
- concerns regarding administrative processes to enable emergency evacuation;
- the need for an independent medical advisory board, as advocated by the AMA and other peak health organisations, to monitor, to assess and advise the DIPB of systemic and procedural concerns in the delivery of appropriate and timely health services.

With endorsement of the Australian Medical Association, Doctors for Refugees was given standing to appear as an interested party in the Hamid Khazaei coronial inquest.

Freedom of political communication

The constitutional protection or ‘freedom’ afforded to ‘political communication’ operates as a limit on legislative power. The freedom has been said to be an essential part of ensuring the integrity of the system of representative and responsible government that is established by the Constitution. The protection is designed to ensure that the people of the Commonwealth can ‘exercise a free and informed choice as electors.’³ It protects communications between electors, and between electors and their representatives, so that electors can properly participate in the electoral process and make choices about who to elect.

However, the ‘freedom’ is not absolute. Limitations can be justified if they can be shown to serve a legitimate purpose compatible with the system of representative and responsible Government

³ *McCloy v New South Wales* [2015] HCA 34

enacted by the Australian Constitution, and if the burden imposed on political communication can be characterised as proportionate (suitable, necessary, adequate in the balance) to its purpose.

Government policy and action in relation to asylum seekers and refugees, mandatory detention, and offshore detention are matters of political significance in Australia. The ABF Act imposes restrictions on communications relevant to those matters. In addition to referencing community/ government trust, and access of workers to secure environments and confidential information, the Explanatory Memorandum to the Australian Border Force Bill identifies the purpose of the secrecy provisions as follows:

The Bill, therefore, contains a number of integrity provisions to increase resistance to criminal infiltration and corruption and to enhance government and public confidence in Immigration and Border Protection workers, as well as the confidence of other partners including intelligence organisations and foreign governments. The Bill also includes provisions that enable the setting of standards for a highly trained, disciplined and flexible workforce.⁴

The Court will be asked to consider whether the secrecy provisions of the ABF Act serve a legitimate purpose (in terms of operation and effect), in the sense of being compatible with the accountability and responsibility of electors and the elected in a representative democracy. If the Act serves a legitimate purpose, the Court will also need to consider whether the burden imposed on political communication is proportionate to that purpose.

The varied obligations on professionals, employees, and public servants, to be faithful to those they provide care/ service to, their employers, the Australian government, and the Australian public are likely to be scrutinised through this litigation. The ultimate question is whether the secrecy provisions of the ABF Act undermine the proper functioning of our democracy and the right of electors to be informed accurately, openly and truthfully, about matters of national political importance.

Background

Below is an outline of events in which transparency/ oversight has been an issue of contention, and in which health professionals have sought to advocate on matters of policy and treatment for

⁴ The Parliament of the Commonwealth of Australia, Australian Border Force Bill 2015, *Explanatory Memorandum*, (Circulated by authority of the Minister for Immigration and Border Protection, the Honourable Peter Dutton MP)
http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bid=r5408

refugees and asylum seekers. The timeline is not comprehensive, and in particular, does not record all asylum seekers and refugees who have died, or suffered serious injury, whilst in detention.

Prior to the enactment of the ABF Act 2015:

- 12 October 2014 ‘Save the Children’ offices are raided in Nauru, with computers, mobile phones and flash drives seized. Ten staff are removed from Nauru, subject to reported allegations from then Minister for Immigration Scott Morrison, that staff have been campaigning to undermine government immigration policy by ‘making false claims’, using children in protests, and coaching self-harm to refugees and detainees.⁵
- 12 February 2015 The Australian Human Rights Commission (‘AHRC’) *“Forgotten Children”* Report is tabled in Parliament. The report finds that “prolonged, mandatory detention of asylum seeker children causes them significant mental and physical illness and developmental delays”, with 34% of children detained on and offshore manifesting mental health disorders requiring psychiatric support (as opposed with the general community average of less than 2%). The report calls for a royal commission into the treatment of asylum seeker children in detention.⁶ The report is described by the Government as a partisan ‘stitch up’.⁷
- 23 February 2015 The Immigration Department concedes in Question Time it is aware of 44 reported cases of sexual assault in detention centres in Australia (from 1 January 2013 to 10 July 2014). The Department cannot confirm how many instances directly involved children as victims.⁸
- 6 March 2015 The United Nations Special Rapporteur on Torture reports that mandatory detention policy and practice risks violating international laws against torture “by failing to provide adequate detention conditions; end the

⁵ ‘Office of Save the Children charity workers raided by police on Nauru’, The Sydney Morning Herald Sun 13 October 2015, <http://www.abc.net.au/news/2015-10-13/save-the-children-nauru-office-raided-by-police/6850834>

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

⁷ ‘MPs push to oust ‘partisan’ Triggs’, The Australian 13 February 2015 <http://www.theaustralian.com.au/national-affairs/mps-push-to-oust-partisan-triggs/news-story/661751848f73def75f15db5c190e399c>

⁸ ‘Immigration Department investigating 44 allegations of sex abuse in detention centres, cannot say how many involve children’, The Age 23 February 2015, <http://www.abc.net.au/news/2015-02-23/allegations-of-child-sexual-abuse-in-detention/6219014>

practice of detention of children; and put a stop to the escalating violence and tension at the regional processing centre.”⁹

- 18 March 2015 Peak medical bodies and professionals publish an open letter calling for the release of all children from detention, and an independent guardian to be appointed for unaccompanied children. Signatories include the Royal Australasian College of Physicians, Royal Australian College of General Practitioners, Royal Australian and New Zealand College of Psychiatrists, Royal Australian and New Zealand College of Obstetricians and Gynaecologists, Australasian College for Emergency Medicine, Australian Medical Association, Australian Psychological Society, Public Health Association of Australia, Children’s Healthcare Australasia, Australian Association of Social Workers, Australian Medical Students for Refugee and Asylum Seeker Mental Health, Australian College of Nursing, Australian College of Mental Health Nurses, Australian College of Midwives, Maternal, Child and Family Health Nurses Australia.¹⁰
- 20 March 2015 The Moss Review upholds allegations of sexual abuse in Nauru Detention Centre. The Review finds no evidence to support the allegations made against Save the Children staff.¹¹
- 24 March 2015 Senator Hanson-Young announces an inquiry to follow up allegations from the Moss Review.¹²
- 7 April 2015 Former Nauru workers publish an open letter alleging the Government has known about abuse on Nauru for 17 months, and call for a royal commission. They report sexualized behaviour in children as young as five and instances of self harm.¹³
- 19 May 2015 Answering Questions on Notice Transfield Services reports there have been 67 allegations of child abuse, 33 allegations of sexual assault or rape, and 5

⁹ ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’, Human Rights Council, Juan E. Méndez 6 March 2015 <http://static.guim.co.uk/ni/1425873116713/Mendez-report.pdf>

¹⁰ ‘AMA among 15 peak health bodies calling for all asylum seeker children to be freed’ The Guardian 16 March 2015 <http://www.theguardian.com/australia-news/2015/mar/18/ama-among-15-peak-health-bodies-calling-for-all-asylum-children-to-be-freed>

¹¹ ‘Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre Nauru’, <https://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-conditions-circumstances-nauru.pdf>. See also Doogan Review June 2015 <https://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/doogan-report.pdf>

¹² ‘New Senate Inquiry to probe sexual abuse in Nauru detention centre’ Sydney Morning Herald, 23 May 2015 <http://www.smh.com.au/federal-politics/political-news/new-senate-inquiry-to-probe-sexual-abuse-in-nauru-detention-centre-20150323-1m5sn5>

¹³ ‘Immigration Department aware of sexual abuse allegations against children for 17 months but failed to act, say former Nauru workers’ The Age 8 April 2015, <http://www.abc.net.au/news/2015-04-07/nauru-letter-of-concern-demands-royal-commission/6374680#letter>

allegations of sexual favours for contraband via the Incident Reporting framework to 30 April 2015, and the Complaints Management framework from 21 February to 30 April 2015.¹⁴

19 June 2015 Doctors warn that the ABF Act is in direct conflict with the Medical Board of Australia's Code of Conduct — the official Australian standard for doctors. Health law and patient rights expert Dr Marie Bismark says those rules could clash with at least five parts of the Medical Board of Australia's Code of Conduct — the official Australian standard for doctors. "Doctors are required to manage conflicts of interest, so if their duty to their patients is at odds with obligations to employers, they need to manage that conflict appropriately," she said. "Where doctors see patients being harmed there's an obligation to try to prevent those adverse effects from happening again."¹⁵

Events subsequent to the enactment of the Australian Border Force Act 2015 (Cth):

21 July 2015: Documents are leaked indicating IHMS is failing to meet Departmental targets and is including incorrect data in reports.¹⁶

21 August 2015 HESTA (one of Australia's larger superannuation funds) sells its stake in Transfield Services, contracted by the Australian Government to operate detention centres of Nauru and Manus Island. HESTA chief executive Debbie Blakely cites 'significant' evidence of numerous sexual and physical assaults within the centres, and points out that the United Nations and the Australian Human Rights Commission were among those who have found prolonged detention to be a breach of human rights law.¹⁷

31 August 2015 Transfield is announced as the preferred tenderer to provide welfare services on Nauru and Manus Island.¹⁸

¹⁴ Questions taken on notice by Transfield Services at the hearing on 19 May 2015, Part 2 (this is a PDF downloadable by searching this reference).

¹⁵ 'Doctors warn detention centres conflict medical code of conduct' ABC News, 19 June 2015 <http://www.abc.net.au/news/2015-06-19/doctors-warn-detention-centres-conflict-medical-code-of-conduct/6559940>

¹⁶ 'Fraud 'inevitable' over asylum seeker health targets, leaked documents show', The Guardian 21 July 2015

<https://www.theguardian.com/australia-news/2015/jul/21/inevitable-over-asylum-seeker-health-targets-leaked-documents-show>

¹⁷ 'Hesta dumps Transfield citing detention centre abuses' Sydney Morning Herald 18 August 2015

<http://www.smh.com.au/business/banking-and-finance/hesta-dumps-transfield-citing-detention-centre-abuses-20150818-gj218u.html>

¹⁸ 'Transfield named Coalition's 'preferred tenderer' for Manus and Nauru centres', The Guardian 31 August 2015

<https://www.theguardian.com/world/2015/aug/31/transfield-named-coalitions-preferred-tenderer-for-manus-and-nauru-centres>

- 31 August 2015 The Senate Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru releases its final report. The report makes 15 recommendations, including increased the transparency of conditions and operations of offshore detention centres (including by ensuring reasonable access by the Australian Human Rights Commission and the media), developing a plan for the removal of children from the Nauru detention centre as soon as possible, and a full audit of all allegations of sexual abuse, child abuse and other reported criminal conduct to be undertaken by the Department of Immigration and Border Protection, in consultation with the Australian Federal Police.¹⁹
- 25 September 2015 The United Nations Special Rapporteur on the human rights of migrants cancels a visit to Australia, on the explicit basis that access to offshore detention centres is denied, and the Commonwealth is not prepared to guarantee intimidation/ imprisonment of persons would not occur as a result of participation in the fact finding visit.²⁰
- 5 October 2015 Against the backdrop of High Court proceedings challenging the legality of mandatory detention, the Nauruan government announces the Regional Processing Centre will now allow people in detention freedom to come and go, and processes the remaining 600 claims in a week. The Justice Minister of Nauru describes the new policy as “an even more compassionate program” than the previous model.²¹
- 11 October 2015 Doctors at Melbourne’s Royal Children’s Hospital announce they will no longer release children into detention, following a month-long standoff with the Immigration Department over the release of a sick child.²²

¹⁹ ‘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 August 2015 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Final_Report

²⁰ ‘Migrants / Human rights: Official visit to Australia postponed due to protection concerns’ United Nations Human Rights Office of the High Commissioner 3 May 2016 <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16503&LangID=E>

²¹ ‘Nauru Easing Rules at Detention Center for Australia Asylum Seekers’ New York Times, 5 October 2015 http://www.nytimes.com/2015/10/06/world/asia/australia-nauru-detention-center-immigration-asylum.html?_r=0

‘Nauru says it will process remaining 600 refugee claims within a week’ The Guardian, 5 October 2015 <https://www.theguardian.com/australia-news/2015/oct/05/nauru-says-it-will-process-remaining-600-refugee-claims-within-a-week>

²² ‘Royal Children’s hospital doctors refusing to send asylum seeker children back to detention centres’ Herald Sun 11 October 2015 <http://www.heraldsun.com.au/news/victoria/royal-childrens-hospital-doctors-refusing-to-send-asylumseeker-children-back-to-detention-centres/news-story/6973f30f15154eea91ace932049cdbc>

16–18 October 2015 Following up the Forgotten Children report, AHRC staff visit the Wickham Point Detention Centre in Darwin, to monitor ‘conditions in immigration detention and the well-being of detainees, including children and their families’. The AHRC is accompanied by two specialist doctors of paediatrics and child health, Professor Elizabeth Elliott AM²³ and Dr Hasantha Gunasekera²⁴, whose are tasked to report on conditions of detention and children’s health. Recommendations included immediate removal of children from immigration detention to the mainland Australian community, and that under no circumstances should children be returned/ transferred to Nauru. Subsequent to the visit and collation of evidence, the authors expressed the following view:

‘We were deeply disturbed by the numbers of young children who expressed intent to self-harm and talked openly about suicide and by those who had already self-harmed. The only appropriate management of this situation is removal of children from the toxic detention environment which is causing and/or exacerbating mental ill-health.’²⁵

19 October 2015 The case of ‘Abyan’, a twenty three year old Somali woman who has been raped in offshore detention, is brought to public attention as health practitioners, lawyers and the public, engage in advocacy seeking appropriate care and treatment for Abyan. Health practitioners speak out on the psychological trauma of rape, provision of untimely access at fourteen weeks (abortion is illegal in Papua New Guinea), and the harm of victim blaming in the face of violence.²⁶ Minister Dutton expresses concern regarding advocacy in the case, stating “There are some who are motivated not, frankly, through helping this lady and others, but through advancing their own causes and I'm not going to allow women in this situation to be

²³ Professor of Paediatrics and Child Health, University of Sydney, Consultant Paediatrician, The Sydney Children’s Hospitals Network (Westmead) Practitioner Fellow, National Health and Medical Research Council of Australia

²⁴ Senior Lecturer, Discipline of Paediatrics and Child Health, University of Sydney; Consultant Paediatrician, The Refugee Clinic, The Sydney Children’s Hospitals Network (Westmead)

²⁵ Professor Elizabeth Elliott AM MD MPhil MBBS FRACP FRCPCH FRCP, Dr Hasantha Gunasekera MBBS DCH MIPH (Hons) FRACP PhD, ‘The Health and Wellbeing of Children in Detention - Report to the Australian Human Rights Commission, Monitoring Visit to Wickham Point Detention Centre, Darwin, NT October 16th – 18th 2015’ 2016 <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/health-and-well-being-children-immigration>

²⁶ ‘This is Abyan’s story and it is Australia’s story’ The Guardian 28 October 2015 <https://www.theguardian.com/australia-news/2015/oct/28/this-is-abyans-story-and-it-is-australias-story> Director of the Centre for Women’s Mental Health at the Royal Women’s Hospital and Professor of Psychiatry at the University of Melbourne Doctor Louise Newman issues a public statement in relation to the approach taken by IHMS and the Department.

treated as political pawns, which they have been.”²⁷ Documents are later obtained alleging inconsistencies in relation to the Department’s public statements regarding the circumstances of Abyan.²⁸

- 23 October 2015 The International Federation of Journalists issues a statement condemning the secrecy provisions under the ABF Act, describing the laws as an attack on the freedom of the press and the democratic function whistleblowers and journalists serve.²⁹
- 6 November 2015 Authorities on Nauru refuse to evacuate a 34 year old Kurdish Iraqi woman, 40 weeks pregnant, for caesarean treatment to accommodate the complexities of her pregnancy. Medical providers on Nauru make a last-minute appeal on the LinkedIn social business network asking for specialists come to the island to provide appropriate care. Health practitioners including the president of the Australian Medical Association, criticise the Government for unnecessarily placing lives at risk. A spokesperson for the Department of Immigration and Border Protection states, “As the government has previously indicated there was a group of transferee and refugee women on Nauru who were refusing appropriate medical assistance with their pregnancies. However most are now engaging with health service providers.”³⁰
- 26 January 2016 A leading health practitioner, Professor David Isaacs,³¹ challenges the Government to prosecute him under the ABF Act, stating “Doctors and nurses have a moral duty both to serve and to speak out.”³²
- 21 February 2016 Baby Asha, a one-year old asylum seeker child who was transferred with her family from Nauru to Brisbane’s Lady Cilento Children’s hospital for medical treatment, is released into community detention. Doctors at the hospital refuse to discharge the baby after the completion of her treatment, fearing

²⁷ ‘Immigration Department under scrutiny over botched Border Force operation and the case of Abyan’ LateLine ABC 19 October 2015 <http://www.abc.net.au/lateline/content/2015/s4334810.htm>

²⁸ ‘Pregnant refugee Abyan abortion inquiry Nauru immigration’ The Guardian 2 January 2016 <https://www.theguardian.com/australia-news/commentisfree/2016/jan/02/pregnant-refugee-abyan-abortion-inquiry-nauru-immigration>

²⁹ ‘Concern over media restrictions on Australia’s asylum seeker policy’, IFEX, International Federation of Journalists , Media, Entertainment and Arts Alliance 23 October 2015, https://www.ifex.org/australia/2015/10/23/asylum_seeker_policy/

³⁰ ‘Doctors plead for pregnant refugee to be sent from Nauru to Australia for caesarean’, The Guardian, 6 November 2015 <https://www.theguardian.com/australia-news/2015/nov/06/doctors-plead-for-pregnant-refugee-to-be-sent-from-nauru-to-australia-for-caesarean>

³¹ Professor David Isaacs MBBChir MD FRACP FRCPCH, Senior Staff Specialist, Dept of Infectious Diseases & Microbiology, Clinical Professor in Paediatric Infectious Diseases, University of Sydney; the children's hospital at Westmead

³² ‘Doctor challenges PM over immigration centres’, ABC News 26 January 2016 <http://www.abc.net.au/news/2016-01-26/doctor-challenges-pm-over-immigration-detention-centres/7113966>

she will be transferred back to Nauru. Members of the public rally and hold vigils outside the hospital, and Baby Asha is subsequently released into community detention. Then head of the Australian Medical Association, Professor Brian Owler, expresses support for staff at Lady Cilento and his belief that Australian immigration and border protection department is “pulling apart the moral fabric of the country”, with prolonged detention a form of “state-sanctioned child abuse”.³³ Minister Dutton confirms people will be returned to Nauru once medical and legal issues are resolved. Opposition leader Bill Shorten states the safety of the asylum seeker child is paramount, and highlights the need for independent oversight.³⁴

23 Feb 2016

Claims Baby Asha was deliberately burned by her family to get her off Nauru are dismissed subsequent to Queensland police investigation. Former Save the Children staff member Natasha Blucher reports to media that questioning of Baby Asha’s mother included whether Blucher had coached her to harm her baby. Minister Dutton is criticised for the implications during Question Time, with Tasmanian MP Andrew Wilkie moving to censure Dutton for his comments, telling parliament the accusation that people self-harmed to gain citizenship is “one of the ugliest things I have heard in this place in my time serving here”³⁵

15 April 2016

An Iranian refugee who has spent two years in detention, and who is the father of an eight year old child, is convicted of attempted suicide, with prosecutors seeking a jail sentence "to deter other would-be offenders who resort to self harm to avoid lawful actions against them or to get what they want".³⁶

³³ ‘Prolonged detention is state sanctioned child abuse says head of doctors group’, The Guardian, 21 February 2016 <https://www.theguardian.com/australia-news/2016/feb/21/prolonged-detention-is-state-sanctioned-child-abuse-says-head-of-doctors-group>

³⁴ ‘Baby Asha transferred to community detention Peter Dutton’, ABC News, 22 February 2016 <http://www.abc.net.au/news/2016-02-22/baby-asha-transferred-to-community-detention-peter-dutton/7188252>

³⁵ ‘Police dismiss claims Baby Asha deliberately hurt by mother in order to leave Nauru’, The Guardian, 23 February 2016 <https://www.theguardian.com/australia-news/2016/feb/23/police-dismiss-claims-baby-asha-deliberately-hurt-by-mother-in-order-to-leave-nauru>

³⁶ ‘Refugee on Nauru convicted fined for attempting suicide’, Sydney Morning Herald, 15 April 2016 <http://www.smh.com.au/federal-politics/political-news/refugee-on-nauru-convicted-fined-for-attempting-suicide-20160415-go72i2.html>

- 26 April 2016 Omid Masoumali, a refugee who was living in Nauru for three years sets himself on fire. He is medically evacuated to Australia more than 24 hours later and dies in a hospital in Brisbane on Friday 29 April 2016.³⁷
- 26 April 2016 Papua New Guinea's Supreme Court rules that the transfer and detention of asylum seekers on Manus Island are both illegal and in breach of the right to personal liberty in the Papua New Guinea constitution. The Supreme Court orders that immediate steps be taken to end the detention of asylum seekers in Papua New Guinea. Minister Peter Dutton responds that the people detained in the centre will not be brought back to Australia.³⁸
- 2 May 2016 A young Somali refugee living in Nauru sets herself on fire. She is later flown to Australia by air ambulance to receive treatment. Reports suggest that she was transferred from Brisbane Immigration Transit Accommodation to Nauru a week before the incident. She was initially transferred to Brisbane for medical treatment. Minister Dutton expressed anger at advocates and others "who are encouraging some of these people to behave in a certain way, believing that that pressure exerted on the Australian Government will see a change in our policy in relation to our border protection measures."³⁹
- 3 May 2016 The United Nations Human Rights Commission calls for the immediate movement of refugees and asylum seekers to humane conditions, and issues the following statement:

'There is no doubt that the current policy of offshore processing and prolonged detention is immensely harmful. There are approximately 2000 very vulnerable refugees and asylum-seekers on Manus Island and Nauru. These people have already been through a great deal, many have fled war and persecution, some have already suffered trauma. Despite efforts by the

³⁷ 'Omid Masoumali, refugee who died after setting himself on fire, 'suffered without medical care', ABC News, 2 May 2016 <http://www.abc.net.au/news/2016-05-02/omid-masoumali-without-proper-medical-care-for-hours,-says-wife/7374884>; Omid 'Masoumali set himself on fire after UNHCR told him he would remain on Nauru, asylum seekers say', ABC News, 2 May 2016 <http://www.abc.net.au/news/2016-05-02/refugee-set-himself-on-fire-after-unhcr-meeting;-asylum-seekers/7377396> 'Nauru asylum-seeker who set himself on fire to protest Australia's detention laws 'went 10 hours before he was given pain relief' for his burns', Daily Mail UK, 2 May 2016 <http://www.dailymail.co.uk/news/article-3568932/Nauru-asylum-seeker-set-fire-protest-Australia-s-detention-laws-went-10-hours-given-pain-relief-burns.html#ixzz4D8pHQRDj>

³⁸ 'Papua New Guinea tell UN it accepts court decision on Manus Island illegality', The Guardian, 7 May 2016 <https://www.theguardian.com/australia-news/2016/may/07/papua-new-guinea-tells-un-it-accepts-court-decision-on-manus-island-illegality>

³⁹ 'Reports of a second refugee setting themselves on fire at Nauru', Sydney Morning Herald, 2 May 2016 <http://www.smh.com.au/federal-politics/political-news/reports-of-second-refugee-setting-themselves-on-fire-at-nauru-20160502-gokg9y.html#ixzz4Dacm1Afj>

Governments of Papua New Guinea and Nauru, arrangements in both countries have proved completely untenable.

*'The situation of these people has deteriorated progressively over time, as UNHCR has witnessed firsthand over numerous visits since the opening of the centres. The consensus among medical experts is that conditions of detention and offshore processing do immense damage to physical and mental health. UNHCR's principal concern today is that these refugees and asylum-seekers are immediately moved to humane conditions with adequate support and services.'*⁴⁰

- 6 May 2016 Justice Mordecai Bromberg of the Federal Court of Australia finds that the immigration minister had a duty to provide a woman, identified as S99, raped whilst experiencing seizures and unconscious, with a safe and legal termination. The circumstances of S99 were not considered sufficiently 'exceptional' to permit abortion to be procured in Australia or a third country (abortion is illegal in Papua New Guinea).⁴¹ The advice of three eminent health practitioners in relation to the circumstances and appropriate treatment for S99 had not been accepted by the Department. In response to the ruling, the Minister referenced concerns regarding access gained to lawyers where refugees are treated onshore.⁴² The Commonwealth considered appealing the decision, but did not ultimately elect to do so.⁴³
- 6 May 2016 An apology is issued and compensation deal struck by the Government in relation to the removal of Save the Children staff, and unsubstantiated allegations made against workers in the NGO.⁴⁴
- 11 May 2016 A twenty four year old Bangladeshi man dies of suspected heart failure in Nauru. Refugee advocates claim the death was the result of an overdose.

⁴⁰ 'UNHCR calls for immediate movement of refugees and asylum seekers to humane conditions', United Nations Human Rights Commission, 3 May 2016 <http://unhcr.org.au/news/unhcr-calls-immediate-movement-refugees-asylum-seekers-humane-conditions/>

⁴¹ 'Refugee raped on Nauru flown to PNG', ABC News, 6 May 2016 <http://www.abc.net.au/news/2016-05-06/refugee-raped-on-nauru-flown-to-png/7392600>

⁴² 'Peter Dutton may appeal court ruling which found he risked safety of asylum seeker', The Guardian, 9 May 2016 <https://www.theguardian.com/australia-news/2016/may/09/peter-dutton-may-appeal-court-ruling-which-found-he-risked-safety-of-asylum-seeker>

⁴³ 'Government will not appeal Federal Court S99 abortion ruling', ABC News, 10 May 2016

<http://www.abc.net.au/news/2016-05-10/government-will-not-appeal-federal-court-s99-abortion-ruling/7402364>

⁴⁴ 'Immigration department pays compensation to sacked Nauru Save the Children Workers', The Guardian, 6 May 2016 <https://www.theguardian.com/australia-news/2016/may/06/immigration-department-pays-compensation-sacked-nauru-save-the-children-workers>

Senator Hanson Young claims she is being prevented from visiting Nauru to meet with the grieving widow.⁴⁵

- 24 May 2016 Doctor Peter Young, previous employee of IHMS with responsibility for oversight of the mental health of asylum seekers in all Australian run detention centres from 2011 to mid 2014, and vocal critic of detention conditions and the quality of health care provided to asylum seekers and refugees, is investigated by the Australian Federal Police. It is reported his metadata is accessed, and colleagues questioned. The investigation follows leaks of medical records relating to Hamid Khazaei, a Manus Island asylum seeker who died in September 2014 after a cut on his leg progressed to septicaemia. Doctor Young was not working with IHMS at the time of Khazaei's death and did not have access to his medical records, and states suggestions he was responsible for the leak were "absolutely ridiculous".⁴⁶
- 6 June 2016 Australian Women in Support of Women on Nauru publish the report 'Protection Denied, Abuse Condoned: Women on Nauru at Risk', disclosing women's allegations of rape and sexual assault on Nauru.⁴⁷
- 13 June 2016 Bill Shorten, leader of the Australian Labor Party, commits to greater transparency for the offshore asylum seeker detention centres including allowing journalists onto Manus Island and Nauru.⁴⁸
- 20 June 2016 Psychologist specializing in trauma and Order of Australia recipient, Paul Stevenson speaks publicly about conditions and treatment of refugees and asylum seekers in detention, described as a deliberate infliction upon people of the worst trauma he has ever seen. Incidents reported on by the Guardian include six boys attempting suicide using the same razor blade.⁴⁹

⁴⁵ 'Turnbull government allegedly bans detention centre visits during election campaign', Sydney Morning Herald, 11 May 2016 <http://www.smh.com.au/federal-politics/political-news/election-2016-turnbull-government-allegedly-bans-detention-centre-visits-during-election-campaign-20160511-gos9y9.html>

⁴⁶ 'Peter Young spoke out about a man's death – suddenly the AFP was looking at his phone records', 24 May 2016 <http://www.smh.com.au/federal-politics/political-news/peter-young-spoke-out-about-a-mans-death-suddenly-the-afp-was-looking-at-his-phone-records-20160524-gp2fs6.html>

⁴⁷ Authored by Wendy Bacon, Pamela Curr, Carmen Lawrence, Julie Macken, Claire O'Connor, and available at <http://www.awswrn.org/the-report/>; cited in 'Dogs will kill you if you don't suck my private part – the torment of women at Nauru', Sydney Morning Herald, 6 June 2016 <http://www.smh.com.au/federal-politics/political-news/dogs-will-kill-you-if-you-dont-suck-my-private-part-the-torment-of-women-at-nauru-20160606-gpcfeg.html>

⁴⁸ 'Bill Shorten raises prospect of indigenous treaty and university cap', The Guardian, 13 June 2016 <https://www.theguardian.com/australia-news/2016/jun/13/qa-bill-shorten-raises-prospect-of-indigenous-treaty-and-university-fee-cap>

⁴⁹ 'The worst I've seen – trauma expert lifts lid on atrocity of Australia's detention regime', The Guardian, 20 June 2016 <https://www.theguardian.com/australia-news/2016/jun/20/the-worst-ive-seen-trauma-expert-lifts-lid-on-atrocity-of-australias-detention-regime>

21 June 2016

After fourteen deployments to Nauru and Manus Island, Paul Stevenson's contract with PsyCare, the company through which is employed to provide counselling to guards working in offshore detention, is terminated. Stevenson says the news is not unexpected. "But the public needs to hear about the consequences people face for speaking out, and to understand the level they go to in minimising access."⁵⁰

⁵⁰ 'Offshore detention whistle-blower loses job after condemning atrocity of camps', 21 June 2016 <https://www.theguardian.com/australia-news/2016/jun/21/offshore-detention-whistleblower-loses-job-after-condemning-atrocity-of-camps>