

## THE BALLARAT DECLARATION

This statement, entitled THE BALLARAT DECLARATION, was issued by concerned Australian citizens and residents who attended a public meeting – sponsored by Grandmothers Against Detention of Refugee Children Ballarat – that was held at the Ballarat Trades and Labour Council’s hall on 14 August 2018.

This statement, noting that Australia’s Immigration ‘detention centres’<sup>1</sup> are Commonwealth workplaces and therefore subject to the *Work Health and Safety Act 2011* (Cth) (the WHS Act)<sup>2</sup>, declares

- firstly, that the way centres have been and are being run involves apparent criminal offences against that Act;
- secondly, that the regulator, Comcare, has largely failed “to monitor and enforce compliance with this Act”;
- and therefore thirdly, that the combined result is a state of apparent ‘criminality with impunity’.

Given the wall of secrecy around detention regime processes, from ‘on-water’ matters onwards, this statement calls for an official inquiry, with powers to compel witnesses to

- (a) attend, and
- (b) give evidence on oath or affirmation, into the matters listed below that were canvassed at the public meeting. Organisations with relevant knowledge, e.g., Doctors for Refugees, might suggest additional matters. However, to be consistent with this statement, matters should be WHS Act-related<sup>3</sup>.

---

<sup>1</sup> Facilities, however precisely named, that accommodate persons detained under the *Migration Act 1958* (Cth).

<sup>2</sup> Via its section 12F(3) “extended geographical jurisdiction”, the Act applies to the Nauru centre, and applied to the Manus Island centre until it closed on 31/10/2017 – because Nauru and PNG have no equivalent law.

<sup>3</sup> This Declaration is NOT about (well documented) breaches of the Refugees Convention and other international instruments, because they don’t carry ‘breach of duty’ criminal offences; whereas, if found guilty of the WHS Act’s most serious offence, the department (Home Affairs, formerly Immigration and Border Protection) could face a \$3m maximum fine; while its senior officers could incur up to \$600,000 and/or up to 5 years in jail.

The inquiry would mainly examine issues relating to “other persons” (non-workers), such as:

1. Whether section 12D (2) of the WHS Act enabled the Defence Chief to issue the December 2013 declaration that exempts Operation Sovereign Borders personnel from their section 28 (b) duty to “take reasonable care”, while working on water, for the health and safety of “other persons”.
  
2. Given the following “health and safety duty” obligations
  - the relevant department – including, from 1 July 2015 onwards, its enforcement arm, Australian Border Force – has a section 19 (2) “primary duty of care” to “ensure, so far as is reasonably practicable, that the health [including psychological health] and safety of other persons [i.e., detention centre residents] is not put at risk ...”;
  - sections 17 and 18 say that a “reasonably practicable” duty requires the duty holder to (in brief) pro-actively identify all hazards (potential dangers to health and safety), risk-assess them (how likely to occur, how harmful) to identify the significant risks, then find and implement ways to eliminate or (if that’s not realistically practicable) control those risks;
  - each “officer”<sup>4</sup> of the relevant department has a section 27(1) duty to “exercise due diligence to ensure that [the department] complies with [all its duties]”;
  - whether the department and its officers complied with their respective duties in relation to:
    - (a) calling centre residents by a number, not their name;
    - (b) holding for years or resettling people on Nauru, despite known cadmium health risks;

---

<sup>4</sup> “A person who makes, or participates in making, decisions that affect the whole, or a substantial part, of a business or undertaking of the Commonwealth is taken to be an officer for the purposes of this Act” – section 247(1). Section 247(2) makes clear that a Minister of the Commonwealth is not, in that capacity, an officer.

- (c) deciding the Manus Island medical centre need not hold an antibiotic that effectively treats common tropical infections, e.g., the one contracted by Hamid Khazaei;
- (d) accommodating Nauru centre residents (except for very young children and their families) in marquees that lack air-conditioning and, to this day, are mouldy;
- (e) handcuffing mainland centre residents attending medical or dental appointments;
- (f) at 4am (no notice or explanation), transferring 'onshore' residents to another centre;
- (g) opposing (despite 11 'fly them here' court orders) urgent medical airlifts to Australia; and
- (h) imposing a 'hostile to visitors' regime that's decimating 'onshore' visitor numbers.

3. Why Comcare did not:

- (a) focus on 19(2) compliance when 83% of 2013–14 harm reports involved centre residents;
- (b) ask for 15 child sexual assault reports before the 2-year deadline for laying charges expired;
- (c) see any WHS Act breach in the Manus riot, the Khazaei airlift delay, or at detention centres;
- (d) prevent major non-compliances with 19(2) and 27(1) by issuing improvement notices; and
- (e) tell its Minister that its inspectors couldn't exercise their powers at offshore centres.

**Motions to Endorse**  
**“The Ballarat Declaration”**  
**and Follow-Up Action**

1. This meeting of the **Refugee Action Collective (Vic)** on 27 August 2018, having considered **“The Ballarat Declaration”** (endorsed by a 14 August 2018 public meeting called by Grandmothers Against the Detention of Children Ballarat), specifically
  - (a) Its allegations (particularised by 8 and 5 instances respectively) concerning:
    - (i) The apparent, and apparently systemic, criminal offending against section 19(2) of the *Work Health and Safety Act 2011* (Cth) (“WHS Act”) – which requires workplace operators to ensure the physical and psychological health, and safety, of “other persons” (non-workers)<sup>5</sup> – by the Department of Home Affairs (including Australian Border Force) and its predecessor, the Department of Immigration and Border Protection, and by senior officers thereof, in relation to residents of all Immigration ‘detention centres’, even those offshore (via the Act’s “extended geographical jurisdiction”)<sup>6</sup>; and
    - (ii) The failure by the Act’s regulator, Comcare, to pro-actively “monitor and enforce compliance with this Act”, and its failure “to conduct [detention centre-related prosecution] proceedings under this Act before a court ...”;
  - (b) Its question of whether the WHS (Operation Sovereign Borders) Declaration of December 2013 – approved by the then Minister for Employment, Eric Abetz, and issued by the then Chief of the Defence Force – validly exempts OSB workers from their WHS Act duty to “take

---

<sup>5</sup> Section 19(1) requires workplace operators to ensure the health and safety of workers.

<sup>6</sup> Section 12F(3). The Act applies at and in relation to the Nauru Regional Processing Centre (RPC). It likewise applied re the Manus Island RPC until it closed on 31 October 2017. Thereafter, the Act has had no application in PNG.

reasonable care” for the health and safety of “other persons”, i.e., the people on the boats they intercept; and

- (c) Its proposal for an official inquiry – that can compel witnesses to attend and to answer questions on oath or affirmation – into (a) and (b) above,

endorses The Ballarat Declaration’s call for an official inquiry, that can compel answers on oath or affirmation, into (1) what appears to be a ‘WHS Act offending with impunity’ situation at all ‘detention centres’ (however precisely named), and (2) the validity of the 2013 Declaration exempting Operation Sovereign Borders workers from their WHS Act duty to “take reasonable care” for the health and safety of people on intercepted boats.

Moved: **Max Costello**

Seconded: **Kerry Phillips**

2. That, to help give momentum to the call for such an inquiry, this meeting agrees that RAC (Vic) will send the Declaration, our endorsement, and the attached Media Release to ARAN, calling on ARAN to seek similar endorsement from all ARAN members.

Moved: **Max Costello**

Seconded: **Kerry Phillips**

## **MEDIA RELEASE 15 AUGUST 2018**

### **Ballarat Public Meeting calls for inquiry into apparent criminal offences, at Immigration Detention Centres, by Peter Dutton's Home Affairs Department**

Grandmothers Against the Detention of Refugee Children Ballarat

Contacts: Maureen Riches (Grandmothers) 0419 178 152

Guest Speaker: Max Costello 0425 701 690

---

On Tuesday 14 August 2018, a public meeting in the Victorian regional city of Ballarat called for an official inquiry into alleged breaches of workplace law, at Immigration detention centres, by Minister Dutton's Department of Home Affairs.

The call for this inquiry was set out in a statement called "The Ballarat Declaration" that the meeting endorsed without dissent. It said the inquiry should also examine the apparent failure by the workplace regulator, Comcare, to enforce that law.

The meeting, convened by Grandmothers Against the Detention of Refugee Children Ballarat, was addressed by a former prosecuting solicitor for WorkSafe Victoria but now retired, Max Costello. His address was entitled, "Criminality with Impunity" - how Australia's Immigration 'detention centres' are operated'.

Mr Costello explained that, since all detention centres are Commonwealth government workplaces, they come under the Commonwealth's workplace law, the *Work Health and Safety Act 2011*.

Section 19 of that law imposes on all operators of Commonwealth workplaces, including therefore Home Affairs, a "primary duty of care" – a pro-active and preventative duty – to ensure that both workers and "other persons" do not face risks to their health and safety.

"Health" includes psychological health. At detention centres, those "other persons" are the people held there – the residents.

One example of a breach of the duty to ensure psychological health at onshore centres is the Border Force practice of routinely handcuffing residents going to and from medical appointments. Some residents won't go to appointments because of the humiliation. Another is the practice of waking residents at 4am, with no warning or explanation, and taking them to another centre interstate or on Christmas Island. A 'hostile to visitors' regime, involving Kafkaesque red tape

and administrative delays, is decimating visitor numbers, leaving residents feeling increasingly isolated and depressed.

Such breaches of duty are criminal offences, with the most serious offence carrying hefty penalties. If charged and found guilty of that offence, Home Affairs could face a fine of up to \$3 million, while its most senior officers could be fined up to \$600,000 and/or imprisoned for up to 5 years.

Mr Costello detailed the apparent offending, past and present, by the Department of Home Affairs (formerly Immigration and Border Protection) and its enforcement arm, Australian Border Force. He also detailed Comcare's failures to properly investigate that apparent offending.

"In short," he said, "Australia's government has been apparently breaking one of its own laws; and the 'cop on the beat', Comcare, has been letting them get away with it."

Mr Costello explained that the Work Health and Safety Act has "extended geographical jurisdiction" in relation to Commonwealth workplaces located in countries that, like Nauru and Papua New Guinea, have no such law. Accordingly, the Act applies at the Nauru centre, and applied at the Manus Island centre until it was closed on 31 October 2018.

He also noted that, via sections 14 and 272, the Act absolutely prohibits the transfer of health and safety duties to anyone else. So any claims by the Australian government, that PNG was – and Nauru is – legally responsible for offshore residents' health and safety, are false and misleading.

One ongoing alleged offence involves the repeated refusals by Home Affairs, via Border Force, to allow medical airlifts to Australia of extremely ill Nauru centre residents. Instead of complying with its section 19 duty to pro-actively protect the health of residents, Border Force is effectively putting their health at extreme risk. So much so that, in 11 such instances during 2018, nearly all involving young children, the Federal Court has made 'fly them here' orders.

A historical alleged offence, from 2012 to 2015, was the department's failure to protect women and girls at the Nauru centre from the risk of sexual abuse.

At a Senate Committee hearing on 20 July 2015, the department revealed that it had received from its main contractor, Transfield, 15 reports of child sexual assault from September 2012 to June 2015.

Mr Costello told the meeting that, in August 2015, he formally requested Comcare to prosecute the department for breaching section 19 by failing to prevent sexual assault risks. His letter quoted the July 2015 Senate Committee transcript, thus alerting Comcare to the 15 vital items of evidence.

However, at a subsequent Committee hearing on 15 March 2017 – by which date the Act’s time limit for laying charges had already expired – Comcare admitted that it hadn’t even asked the department to hand over the 15 reports.

Mr Costello commented that, in relation to the cases for which the department could have been prosecuted, “those children and their families have been cruelly and permanently deprived of access to such justice”.

Mr Costello also contrasted Comcare’s investigation into the 3-day Manus riot in February 2014, during which 69 people were injured and one resident, Reza Barati, was murdered, with WorkSafe’s investigation into the 2015 riot at Melbourne’s Ravenhall remand centre, which lasted 15 hours and involved dozens of injuries.

Quoting from the documents concerned, Mr Costello said that WorkSafe charged and successfully prosecuted the Department of Justice and Regulation over four alleged offences, including two for failing to ensure the safety of “other persons”, and obtained a court-imposed fine of \$300,000; whereas Comcare “did not identify any breaches of ... (the WHS Act) ...” and concluded that the department “provided a safe workplace ...”. “WorkSafe Victoria put Comcare to shame”, he said.

The Ballarat Declaration endorsed by the meeting lists eight alleged but unprosecuted Home Affairs offences and five apparent failures by Comcare to properly investigate them or otherwise enforce the law. It says “the combined result is a situation of apparent ‘criminality with impunity’ “.

Finally, noting what it calls “the wall of secrecy around detention centre processes”, the statement says the official inquiry must have powers to compel witnesses to attend and to give evidence on oath or affirmation.