

Committee Secretary

Select Committee on the Recent Allegations relating to Conditions and Circumstances
at the Regional Processing Centre in Nauru

PO Box 6100

Parliament House

Canberra ACT 2600

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30 April 2015

Dear Committee Secretary,

The Andrew & Renata Kaldor Centre for International Refugee Law at UNSW welcomes the opportunity to provide a submission to the Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru (the Committee).

This submission addresses the following matters identified in sub-paragraphs 1(c) and (g) of the Committee's terms of reference, namely:

- 'the Commonwealth Government's duty of care obligations and responsibilities' with respect to the regional processing centre on Nauru (Nauru RPC); and
- 'any related matters', in particular the Australian Government's obligations and responsibilities with respect to asylum seeker children who are in Australia and may be considered for transfer to Nauru, and any other children who have previously experienced harm within the Nauru RPC.

This submission focuses on the Australian Government's obligations and responsibilities under both international law and domestic Australian law. With respect to international law, the submission considers in particular what obligations Australia has beyond those set out in its agreements with the Government of Nauru and private service providers operating there.

The submission's key findings about Australia's obligations in relation to the Nauru RPC are that:

- Australia has obligations under international law to asylum seeker children, including those in Australia who may be transferred to Nauru; those currently detained in the Nauru RPC; and those who have previously experienced harm within the Nauru RPC;

- Australia may have breached its *non-refoulement* obligations by transferring asylum seeker adults and children to the Nauru RPC;
- the current process of transferring children to Nauru appears to breach Australia's human rights obligations with respect to those children, including the obligation to make the best interests of the child a primary consideration in any decision affecting them; to refrain from detaining children except as a measure of last resort; and to make adequate provision for the protection of children; and
- Australia appears to be in breach of its obligations to respect, protect and ensure the human rights of children within the Nauru RPC on a continuing basis, and to provide an effective remedy to any child whose rights have been violated, regardless of whether he or she is still in detention or has been released.

In order to ensure that domestic law and policy is brought into line with Australia's international legal obligations, this submission makes the following recommendations:

- all transfers of children to the Nauru RPC be suspended immediately unless and until the Australian Government can guarantee that children will not face serious violations of their rights there;
- all children currently detained in the Nauru RPC be brought back to Australia and accommodated in appropriate and safe community settings, unless and until the Australian Government can ensure that they will not face serious violations of their rights in Nauru;
- the Australian Government take all necessary steps to ensure that children who have experienced harm within the Nauru RPC have access to an effective remedy for all violations of their rights, including compensation and measures for their physical and psychological recovery and social reintegration; and
- Australia's domestic law and policies relating to asylum seekers and refugees be reviewed immediately and amended to reflect Australia's international legal obligations, including specific obligations relating to children. These amendments should ensure that all rights contained within international human rights treaties to which Australia is a party are incorporated and directly enforceable under Australian law.

Please do not hesitate to contact us should you require further information.

Yours sincerely,

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1 *Non-refoulement* obligations

- 1.1 Under international refugee and human rights law, Australia has obligations to ensure that every person it expels, extradites, deports or otherwise removes from its territory will not face persecution or a real risk of significant harm in the country to which s/he is removed, and will not subsequently be sent anywhere else where s/he may face a real risk of persecution or significant harm (*non-refoulement* obligations).¹ Significant harm includes being exposed to arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment. These obligations form part of Australian law and are reflected in section 36 of the *Migration Act 1958* (Cth) (*Migration Act*).
- 1.2 The UN Committee on the Rights of the Child has also emphasized the *non-refoulement* obligations that bind States parties to the *UN Convention on the*

¹ These obligations arise *inter alia* from the express prohibitions on *refoulement* in article 33(1) of the *1951 Convention Relating to the Status of Refugees* (Refugee Convention) and article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). Australia is also bound by an implicit prohibition on *refoulement* in article 2 of the *International Covenant on Civil and Political Rights* (ICCPR). According to the UN Human Rights Committee, ‘the article 2 obligation requiring that States Parties respect and ensure the [ICCPR] rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed’: UN Human Rights Committee, *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004 (*General Comment No. 31*), [12].

*Rights of the Child (CROC)*² with respect to children in particular. According to the Committee:

... in fulfilling obligations under the Convention, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, *but by no means limited to*, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed.³

Further, it has emphasized that:

Return to the country of origin is not an option if it would lead to a ‘reasonable risk’ that such return would result in the violation of fundamental human rights of the child, and in particular, if the principle of *non-refoulement* applies. Return to the country of origin shall in principle only be arranged if such return is in the best interests of the child.⁴

- 1.3 Due to the fundamental nature of the principle of *non-refoulement*, which sits at the ‘core’ of international refugee and human rights law,⁵ Australia is not permitted to override its *non-refoulement* obligations by invoking national security, the integrity of Australia’s migration system or any other general policy objective.⁶
- 1.4 States must ensure that the principle of *non-refoulement* is respected whenever the movement of an asylum seeker to another territory is contemplated. This means that asylum seekers must not be transferred to Nauru (or any other place) if there is a real risk they would be subjected to persecution or other significant harm, whether by government officials, private contractors, other asylum

² Australia ratified the CROC on 17 December 1990.

³ UN Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, 1 September 2005 (*General Comment No. 6*), [27] (emphasis added). Article 6 affirms the inherent right to life of each child and establishes States’ obligation to ‘ensure to the maximum extent possible the survival and development of the child’. Article 37 prohibits the torture, cruel, inhuman or degrading treatment or punishment, and arbitrary detention of children, and guarantees rights to children deprived of their liberty.

⁴ *Ibid.*, [84]. The concept of the best interests of the child is explored further in Part 2.

⁵ At the Ministerial Meeting of States Parties to the Refugee Convention in 2001, States acknowledged ‘the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*’: *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (Geneva, 12-13 December 2001), [4]. The principle of *non-refoulement* is also described as the ‘cornerstone’ of international refugee law: UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, [5]; UNHCR Executive Committee, *Conclusion No. 6 (XXVIII): Non-refoulement*, 1977, [(c)].

⁶ Although the Refugee Convention contains an exception to the principle of *non-refoulement* in article 33(2), such that a refugee will not be protected against *refoulement* if there are reasonable grounds for regarding him or her as a danger to the security of Australia, or if he or she has been convicted by a final judgment of a particularly serious crime and constitutes a danger to the Australian community, Australia’s *non-refoulement* obligations under the ICCPR and CAT apply to all people without exception. In this respect, human rights law has, in effect, limited the application of the article 33(2) exception: Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed., Oxford University Press, Oxford, 2007, pp. 243-244.

seekers or any other person(s).⁷ In order to ensure that transfers do not occur in these circumstances, all decisions about removing an asylum seeker from Australia should be made on a case-by-case basis, after proper consideration of all the facts as they stand at the time the decision to remove is made.

- 1.5 Although Australia has incorporated certain of its *non-refoulement* obligations into domestic law,⁸ in most cases the *Migration Act* precludes asylum seekers who arrived by boat after 19 July 2013 from accessing even those limited protections against *refoulement*.⁹ Most seriously, Australian law also expressly authorises the transfer of asylum seekers intercepted at sea to any place, including Nauru, even in circumstances that would amount to *refoulement*.¹⁰
- 1.6 In the absence of effective domestic legal protections against *refoulement* for asylum seekers being considered for transfer to Nauru, the Australian Government seeks to give effect to its *non-refoulement* obligations by conducting a ‘pre-transfer assessment’ (PTA) for each asylum seeker prior to removing him or her to a regional processing country. The Department of Immigration and Border Protection (DIBP) has described the PTA as being ‘used to consider whether appropriate support and services are available at the [offshore processing centre] and confirm that there are no barriers to the transfer occurring’.¹¹

⁷ UN Committee on the Rights of the Child, *General Comment No. 6*, [27]. Where non-State actors are the source of harm, a person will generally be considered not to face a real risk of persecution or significant harm if the State in which it will take place is able to provide effective protection against the harm.

⁸ Australia’s *non-refoulement* obligations are incorporated into domestic law to a limited extent through provisions of the *Migration Act* that allow for the grant of a protection visa to a person who is owed protection obligations under the Refugee Convention, or who would face a real risk of significant harm if removed from Australia (see, for example, s. 36 and the definition of ‘*non-refoulement* obligations’ in s. 5(1) of the *Migration Act*). For an analysis on how the incorporation of Australia’s *non-refoulement* obligations into domestic law is imperfect, and how the *Migration Act* may not provide protection to all those who are entitled to it under international law, see Part 5 of the joint submission of the Andrew & Renata Kaldor Centre for International Refugee Law and Associate Professor Michelle Foster to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), available at: <http://www.kaldorcentre.unsw.edu.au/sites/default/files/Final%20legacy%20caseload%20sub%2031%2010%2014%20SENT.pdf>.

⁹ Under the *Migration Act*, all ‘unauthorised maritime arrivals’ and ‘transitory persons’ are barred from applying for a visa, including a protection visa, unless the Minister thinks that it is in the ‘public interest’ to lift this bar and exercises a non-compellable discretion to do so: ss. 46A, 46B. These sections effectively preclude asylum seekers who are in Australia having arrived by boat without a visa, or who have been transferred back to Australia from Nauru on a temporary basis, from accessing the visas that give effect to Australia’s *non-refoulement* obligations.

¹⁰ Under section 72 of the *Maritime Powers Act 2013*, Australian maritime officers are authorised to take any person found on a vessel in or outside of Australian waters to any place in or outside of Australia. Section 75A provides that the exercise of this power is not invalid even if (a) there has been a failure to consider Australia’s international obligations, (b) there has been a ‘defective consideration’ of those obligations, or indeed (c) the taking of a person to that place is inconsistent with these obligations.

¹¹ DIBP, *Submission to the Australian Human Rights Commission’s National Inquiry into Children in Immigration Detention 2014*, 30 May 2014, <https://www.humanrights.gov.au/sites/default/files/Submission%20No%2045%20-%20Department%20of%20Immigration%20and%20Border%20Protection.pdf>, p. 73.

- 1.7 Despite the PTA process, however, in practice asylum seekers appear to have been (and may be at risk of being) transferred to the Nauru RPC in breach of Australia's *non-refoulement* obligations. PTAs have been described as focusing more on an asylum seeker's 'fitness' for travel and placement in a regional processing country, rather than on whether the asylum seeker will face risks of: (a) persecution or significant harm (including cruel, inhuman or degrading treatment) in the regional processing country, and/or (b) being sent on from there to a country where such harm is feared.¹² Pressure from the DIBP to complete PTAs within 48 hours is also reported to affect their quality.¹³ In light of these issues, the UN High Commissioner for Refugees (UNHCR) expressed concern in December 2012 and again in November 2013 about the effectiveness of PTAs as a mechanism for ensuring that asylum seekers, especially vulnerable asylum seekers, are not transferred to the Nauru RPC in breach of Australia's international obligations.¹⁴
- 1.8 UNHCR's concerns remain relevant to the current situation in the Nauru RPC. Conditions of detention in the Nauru RPC may amount to cruel, inhuman or degrading treatment, especially when their cumulative impact is considered.¹⁵ Further, detention may have a particularly severe impact on vulnerable asylum seekers, including children, pregnant women, families, survivors of torture and persons with physical or mental health conditions that cannot properly be treated in Nauru. If conditions in the Nauru RPC meet the threshold for being cruel, inhuman or degrading – either specifically for individuals within these vulnerable groups or generally for all asylum seekers – the transfer of these individuals to Nauru will constitute removal to a place where they risk significant harm, and will therefore violate Australia's *non-refoulement* obligations. In such cases, a suspension of transfers to Nauru (generally or in relation to specific vulnerable individuals) is required to bring Australia into line with its international obligations.¹⁶

¹² See, for example: Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014*, November 2014 (*The Forgotten Children*), [12.14].

¹³ *Ibid.*; UNHCR, *UNHCR Monitoring Visit to the Republic of Nauru - 7 to 9 October 2013*, 26 November 2013, pp. 25-26.

¹⁴ UNHCR, *UNHCR Mission to the Republic of Nauru: 3-5 December 2012*, 14 December 2012, pp. 2, 13-14; UNHCR, *UNHCR Monitoring Visit to the Republic of Nauru - 7 to 9 October 2013*, 26 November 2013, pp. 3, 25-27.

¹⁵ In December 2014, the UN Committee against Torture expressed concern about Australia's policy of transferring asylum seekers to the regional processing centres in Nauru and Papua New Guinea, and noted that '[t]he combination of the harsh conditions, the protracted periods of closed detention and the uncertainty about the future [in both centres] reportedly creates serious physical and mental pain and suffering': UN Committee against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, CAT/C/AUS/CO/4-5, 23 December 2014, [17]. Similarly, in response to a complaint about escalating violence in the regional processing centre on Manus Island, Papua New Guinea, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment concluded in March 2015 'that the Government of Australia, by failing to provide adequate detention conditions; end the practice of detention of children; and put a stop to the escalating violence and tension at the Regional Processing Centre, has violated the right of the asylum seekers, including children, to be free from torture or cruel, inhuman or degrading treatment': UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/28/68/Add.1*, 6 March 2015, [19].

¹⁶ For information about comparable suspensions in relation to Greece and Italy in the European context, see: Andrew & Renata Kaldor Centre for International Refugee Law, *Factsheet: Offshore Processing and Australia's Responsibility for Asylum Seekers and Refugees in Nauru and Papua New*

Recommendations concerning Australia's *non-refoulement* obligations

1. All transfers of asylum seekers to Nauru should be suspended immediately until the necessary law and procedures are in place to ensure that transfers only occur in accordance with Australia's *non-refoulement* obligations.
2. As a related measure, the *Migration Act* and *Maritime Powers Act* should be amended to provide that no asylum seeker should be transferred to Nauru (or any other regional processing country) unless the transfer complies with Australia's *non-refoulement* obligations. Due to the fundamental nature of these obligations, it is not sufficient for the Minister for Immigration and Border Protection (the Minister) to provide non-binding assurances that they will be considered in practice through administrative procedures.
3. All DIBP guidelines and policies that inform decisions about whether transfer to a regional processing country is appropriate in a given case should: (a) ensure that decision makers have the capacity to make individual assessments on a case-by-case basis and exempt an asylum seeker from transfer where it would be inappropriate, and (b) be reviewed and amended on a regular basis as necessary, including after *every new report* of possible significant harm in the Nauru RPC comes to the attention of the DIBP.

2 Obligation to consider the best interests of the child

The 'best interests of the child' principle

- 2.1 Under the CROC, Australia is required to make the 'best interests of the child' a primary consideration when taking action that affects them. Article 3(1) of the CROC states:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.¹⁷

How to determine what is in the best interests of the child

- 2.2 The best interests of the child is a flexible and dynamic concept.¹⁸ As such, neither international law nor Australian law prescribes *what* is in the best interests of a particular child in a given situation. However, they do provide guidance on *how* the best interests of a child should be assessed.¹⁹ A 'best interests assessment' (BIA) must be performed on a case-by-case basis. A child's best interests must be identified first, before they can be weighed against

Guinea, 8 April 2015,

<http://www.kaldorcentre.unsw.edu.au/sites/default/files/State%20responsibility%20factsheet.pdf>

(*Offshore Processing Factsheet*), pp. 5-6.

¹⁷ CROC, art 3(1).

¹⁸ UN Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14, 29 May 2013 (*General Comment No. 14*), [1].

¹⁹ *Ibid.*, [11].

other considerations. Reasons for the decision must be given. These criteria are set out in more detail in the following paragraphs.

Best interests assessed on a case-by-case basis

- 2.3 The first criterion for a BIA is that a child's best interests are determined individually, on a case-by-case basis.²⁰ Since each child is different, a BIA 'should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs.'²¹ It should not be presumed that an action or decision will affect all children in the same way, and '[d]etermining what is in the best interests of the child should start with an assessment of the specific circumstances that make the child unique'.²² Further, since the best interests of a child in a specific situation of vulnerability will not necessarily be the same as those of all children in the same vulnerable situation, the relevant '[a]uthorities and decision makers need to take into account the different kinds and degrees of vulnerability of each child, as each child is unique and each situation must be assessed according to the child's uniqueness.'²³

Best interests must be identified first

- 2.4 The second criterion of a BIA is that it is performed in two stages. First, the decision maker must identify what is in the child's best interests. Then, he or she must assess whether those interests are outweighed by any other consideration (or the cumulative effect of other considerations).²⁴ This two stage process – in which the best interests of the child are the starting point – has been affirmed by Australian courts.²⁵
- 2.5 The words 'shall be a primary consideration' in Article 3(1) of the CROC 'place a strong legal obligation on States and mean that States may not exercise discretion as to whether children's best interests are to be assessed and ascribed the proper weight as a primary consideration in any action undertaken.'²⁶ Accordingly, when weighing the best interests of the child against other factors in the second stage of this process, 'a larger weight must be attached to what

²⁰ The UN Committee on the Rights of the Child has noted that in a decision concerning an individual child, his or her interests should not be understood as being the same as those of children in general. Rather, 'the best interests of a child must be assessed individually': *Ibid.*, [24], [32], [34].

²¹ *Ibid.*, [32].

²² *Ibid.*, [49].

²³ *Ibid.*, [76].

²⁴ The UN Committee on the Rights of the Child has noted that '[t]he best interests of the child – *once assessed and determined* – might conflict with other interests or rights': *ibid.*, [39] (emphasis added).

²⁵ For example, the Full Court of the Federal Court of Australia in *Wan* held that the Administrative Appeals Tribunal 'was required to identify what the best interests of Mr Wan's children required ... *and then* to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration': *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133 (*Wan*), [32] (emphasis added). This passage was approved by Lady Hale giving the leading judgment for the Supreme Court of the United Kingdom in *ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4 (*ZH*), [26].

²⁶ UN Committee on the Rights of the Child, *General Comment No. 14*, [36].

serves the child best.’²⁷ As the UN Committee on the Rights of the Child has explained:

The expression ‘primary consideration’ means that the child’s best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.²⁸

- 2.6 Courts in Australia and comparable jurisdictions have affirmed that while the best interests of the child need not always outweigh other primary considerations (or the cumulative effect of other considerations), a decision maker must not treat any other consideration as inherently *more* significant than the best interests of the child.²⁹

Reasons provided for decision

- 2.7 In order to ensure that a BIA meets the two criteria set out above, decision makers must give reasons for their findings. These reasons:

should state explicitly all the factual circumstances regarding the child, what elements have been found relevant in the best-interests assessment, the content of the elements in the individual case, and how they have been weighted to determine the child’s best interests. If the decision differs from the views of the child, the reason for that should be clearly stated. If, exceptionally, the solution chosen is not in the best interests of the child, the grounds for this must be set out in order to show that the child’s best interests were a primary consideration despite the result.³⁰

When providing these reasons, ‘[i]t is not sufficient to state in general terms that other considerations override the best interests of the child.’³¹

General comments about Australia’s obligation to consider the best interests of children in or liable to be sent to the Nauru RPC

- 2.8 Australia’s obligations under the CROC extend to all children within its ‘jurisdiction’.³² Under international human rights law, a State is generally considered to have jurisdiction over people within its territory. It may also have jurisdiction over – and therefore human rights obligations with respect to – people outside its territory, if it has a certain degree of power, authority or

²⁷ Ibid., [39].

²⁸ Ibid., [37].

²⁹ For example, the Full Court of the Federal Court of Australia held in *Wan* at [32] that ‘[p]rovided that the tribunal did not treat any other consideration as inherently more significant than the best interests of [the] children it was entitled to conclude, after proper consideration of the evidence and other material before it, that the strength of other considerations outweighed the best interests of the children.’ See also Lady Hale in *ZH*, [26] and [33].

³⁰ UN Committee on the Rights of the Child, *General Comment No. 14*, [97].

³¹ Ibid.

³² CROC, art. 2(1).

‘effective control’ over them or the territory in which they are located.³³ A State may have ‘extraterritorial’ human rights obligations in these circumstances even if it has not completely replaced the authority of the sovereign State in which the people are located.³⁴ The crucial question is not *where* a person is, but rather which State has (or which States have)³⁵ sufficient control over the person to affect directly his or her enjoyment of rights.

2.9 The available evidence suggests that Australia exercises a considerable degree of control and decision making power over asylum seekers within the Nauru RPC (as well as asylum seekers within the regional processing centre on Manus Island in Papua New Guinea (Manus RPC)), and therefore has a significant and direct impact on their enjoyment of rights.³⁶ On the basis of this evidence, UNHCR and an Australian Senate Committee inquiry, among others, have concluded that Australia has jurisdiction over the Nauru RPC and Manus RPC, and human rights obligations with respect to the asylum seekers detained there.³⁷ Accordingly, Australia has an obligation to consider the best interests of asylum seeker children in Australia subject to removal to Nauru (regardless of their designation as ‘unauthorised maritime arrivals’ or ‘transitory persons’ under the *Migration Act*), as well as the best interests of children detained in the Nauru RPC.

2.10 A BIA is relevant to the following kinds of decisions by Australia:

- decisions by the Australian Parliament to enact laws that affect asylum seeker children generally, including recent amendments to the *Migration Act* and *Maritime Powers Act*;³⁸

³³ For example, the UN Human Rights Committee has affirmed that a State party to the ICCPR ‘must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party’: UN Human Rights Committee, *General Comment No. 31*, [10]. See also: UNHCR, *Maritime Interception Operations and the Processing of International Protection Claims: legal standards and policy considerations with respect to extraterritorial processing*, Protection Policy Paper, November 2010, [9], [10]. For more information about the extraterritorial scope of Australia’s international obligations, see: Andrew & Renata Kaldor Centre for International Refugee Law, *Offshore Processing Factsheet*, pp. 6-7.

³⁴ For example, in the case of *JHA*, the UN Committee against Torture held that Spain had jurisdiction over a group of migrants from the time they were rescued in international waters and throughout the subsequent identification and repatriation process, including while some were detained in a former fish-processing plant in Mauritanian territory: UN Committee against Torture, *JHA v Spain*, CAT/C/41/D/323/2007, 21 November 2008, [8.2]. For more examples of cases where States have been found to have extraterritorial human rights obligations, see: Andrew & Renata Kaldor Centre for International Refugee Law, *Offshore Processing Factsheet*, p. 7.

³⁵ More than one State may have overlapping and concurrent human rights obligations with respect to a given person. For more information, see: Andrew & Renata Kaldor Centre for International Refugee Law, *Offshore Processing Factsheet*, Part 6.1.

³⁶ *Ibid.*, pp. 8-9.

³⁷ See, for example: UNHCR, *UNHCR Mission to the Republic of Nauru: 3-5 December 2012*, 14 December 2012, p. 1 and [15]-[16], [31]; UNHCR, *UNHCR Monitoring Visit to the Republic of Nauru - 7 to 9 October 2013*, 26 November 2013, [92]-[93], [128]; Senate Legal and Constitutional Affairs References Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, December 2014, [8.33]. See also the reports of the UN Committee Against Torture and the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment cited in note 15 above.

³⁸ *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

- decisions and actions taken by the DIBP that affect children in or liable to be sent to the Nauru RPC generally, including decisions to act *or to refrain from acting*³⁹ on matters such as:
 - reports of systemic abuse and self-harm;
 - the conduct of private service providers in relation to children;
 - the adequacy of protection frameworks and the capacity of the relevant authorities to investigate and prosecute crimes against children;
 - the location, type, quality and suitability of accommodation for children and their families in the Nauru RPC;
 - the quantity and quality of basic supplies available to children, such as underwear, clothes, shoes, toys, bedding and soap;
 - the quality and capacity of physical and mental health services available to children in the Nauru RPC;
 - the appropriateness of a detention setting generally, and the Nauru RPC detention setting in particular, for children; and
 - the education of children in the Nauru RPC; and
- decisions and actions taken by the DIBP that affect specific children in, or liable to be sent to, the Nauru RPC, including decisions about:
 - whether it is appropriate to transfer a child to, or back to, Nauru;
 - how to respond to specific cases of asylum seeker children in Australia who are distressed and self-harming due to fear at the prospect of returning to Nauru;
 - how to respond to reports of abuse against a specific child; and
 - the physical and mental health needs of a specific child or children.

2.11 Australia must take ‘*all* appropriate legislative, administrative, and other measures’⁴⁰ to ensure that the best interests of the child principle is properly respected and implemented in each of the decisions and actions set out in paragraph 2.10 above. To do so, Australia is required at a minimum to ensure that:

- the requirement to consider the best interests of asylum seeker children as a primary consideration is reflected and implemented in all national laws and regulations, rules governing the operation of private or public institutions providing services or impacting on children, and judicial and administrative proceedings at any level;⁴¹
- a BIA meeting the criteria set out in paragraphs 2.3 to 2.7 above is conducted whenever a decision will have a major impact on a child or children;⁴²
- there are formal mechanisms to appeal and revise decisions concerning children whenever the requirements for a BIA do not appear to have been

³⁹ The UN Committee on the Rights of the Child has noted that ‘[i]naction or failure to take action and omissions are also ‘actions’, for example, when social welfare authorities fail to take action to protect children from neglect or abuse’: UN Committee on the Rights of the Child, *General Comment No. 14*, [18].

⁴⁰ CROC, art. 4 (emphasis added).

⁴¹ UN Committee on the Rights of the Child, *General Comment No. 14*, [15(a)].

⁴² *Ibid.*, [6(c)], [14(b)].

met, or when there appears to have been a procedural or substantive error in the decision regarding the child;⁴³ and

- the best interests of children be assessed on an ongoing basis wherever a child continues to be affected by decisions or actions taken by Australian authorities. In the asylum context, BIAs meeting the criteria set out in paragraphs 2.3 to 2.7 above should be conducted for each asylum seeker child *at all stages of the asylum process*, including, at a minimum, each time a child is to be transferred to or back to Nauru, and each time important new information becomes available about the conditions for children in the Nauru RPC.⁴⁴ It is not sufficient to perform a single BIA at the time a child is initially transferred to Nauru and not to review this assessment on a continuous basis. In the United Kingdom, this rule is recognised in the UK Home Office’s guidelines about processing asylum applications from children, which state that the best interests principle requires ‘a continuous assessment that starts from the moment the child is encountered and continues until such time as a durable solution has been reached’.⁴⁵

2.12 Australia has additional obligations under the CROC with respect to the best interests of unaccompanied asylum seeker children (UACs). Under the CROC, ‘[a] child temporarily or permanently deprived of his or her family environment ... shall be entitled to special protection and assistance provided by the State’, and ‘States Parties shall in accordance with their national laws ensure alternative care for such a child.’⁴⁶ Moreover, as the guardian of UACs in Australia,⁴⁷ the Minister has an additional duty under the CROC to act with the best interests of each UAC as his or her ‘basic concern’.⁴⁸ The Australian Human Rights Commission has stated that in fulfilling this duty, ‘the best interests of an unaccompanied child must not only be a primary consideration (as suggested by article 3(1) of the Convention), but **the** primary consideration for the person acting as a child’s legal guardian.’⁴⁹ UNHCR and the UN Committee on the Rights of the Child have provided guidance as to how guardians in the position of the Minister should fulfil their obligations with respect to children in their care.⁵⁰

Failure to fulfil the obligations concerning the best interests of the child

2.13 In relation to asylum seeker children in, or liable to be transferred to, the Nauru RPC, Australia is failing to comply with all of the obligations set out in paragraphs 2.11 and 2.12 above. In particular:

⁴³ Ibid., [98].

⁴⁴ UN Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of all Children in the Context of International Migration*, 2013, [72], [74].

⁴⁵ United Kingdom Border Agency, *Asylum Process Guidance: Processing an Asylum Application From a Child*, 16 April 2013,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257469/processingasylumapplication1.pdf, [1.3].

⁴⁶ CROC, art. 20(1) and (2).

⁴⁷ *Immigration (Guardianship of Children) Act 1946* (Cth), s. 6.

⁴⁸ CROC, art. 18(1).

⁴⁹ Australian Human Rights Commission, *The Forgotten Children*, [12.15] (emphasis in original).

⁵⁰ UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, February 1997; UN Committee on the Rights of the Child, *General Comment No. 6*, [33].

- Australian law contains no requirement that the best interests of the child be taken into account as a primary consideration when deciding whether to detain or remove asylum seeker children from Australia (in contrast to comparable jurisdictions such as the United Kingdom⁵¹ and Canada⁵²);
- the purported BIA performed when deciding whether to transfer a child to the Nauru RPC is deficient (see paragraphs 2.17 to 2.20 below);
- it does not appear that BIAs meeting the criteria set out in paragraphs 2.3 to 2.7 are performed to ensure that the decisions and actions set out in paragraph 2.10 are taken with due regard to the best interests of the child, especially when those decisions relate to children who have already been transferred to Nauru. The Committee may wish to seek information about this matter from the DIBP; and
- in relation to decisions about whether to transfer UACs to Nauru, there is an ‘unambiguous conflict of interest’ between the Minister’s dual roles of guardian and administrator of the *Migration Act*.⁵³ As a result, UACs appear to have been transferred to Nauru without their best interests being taken into account as *the* primary consideration.⁵⁴

2.14 These deficiencies in the process of assessing the best interests of children prior to removing them from Australia have led UNHCR to conclude that ‘children have been transferred [to the Nauru RPC] without an assessment of their best interests and without adequate services in place to ensure their mental and physical well-being.’⁵⁵ For these children, Australia’s initial failure to meet its obligations in the pre-transfer stage is compounded by its subsequent failures to consider the best interests of children on a continuing basis as it makes decisions affecting them throughout the course of their detention in the Nauru RPC.

⁵¹ Section 55 of the *Borders, Citizenship and Immigration Act 2009* (UK) provides *inter alia* that the Secretary of State must make arrangements for ensuring that a range of functions relating to immigration and customs ‘are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom’. Statutory guidance in relation to this provision also states: ‘in accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children’: UK Border Agency, *Every Child Matters: Statutory Guidance to the UK Border Agency on Making Arrangements to Safeguard and Promote the Welfare of Children*, November 2009, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257876/change-for-children.pdf, [2.7].

⁵² Section 25(1) of the *Immigration and Refugee Protection Act* (Canada) provides that the Minister may exercise a discretion to grant permanent residence status to a foreign national ‘if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, *taking into account the best interests of a child directly affected*’ (emphasis added).

⁵³ NSW Human Rights Law Clinic, Andrew & Renata Kaldor Centre for International Refugee Law and UNSW Faculty of Arts and Social Sciences, *Submission to the Australian Human Rights Commission National Inquiry into Children in Immigration Detention*, June 2014, http://www.kaldorcentre.unsw.edu.au/sites/default/files/ahrc_submission_children_in_detention.pdf, p. 14.

⁵⁴ For more information, see: *Ibid.*; Australian Human Rights Commission, *The Forgotten Children*, [10.5] and [12.9].

⁵⁵ UNHCR, *UNHCR Monitoring Visit to the Republic of Nauru - 7 to 9 October 2013*, 26 November 2013, [105].

2.15 These failures to consider the best interest of children in, or liable to transfer to, the Nauru RPC reflect broader deficits in Australia's implementation of the best interests of the child principle. In its most recent review of Australia's compliance with the CROC, the UN Committee on the Rights of the Child stated that it was:

... concerned that the principle of the best interests of the child is not widely known, appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings and in policies, programmes and projects relevant to and with an impact on children. In this context, the Committee is particularly concerned at the inadequate understanding and application of the principle of the best interests of the child in asylum-seeking, refugee and/or immigration detention situations.⁵⁶

2.16 The Committee 'stresse[d] the need for [Australia] to pay particular attention to ensuring that its policies and procedures for children in asylum seeking, refugee and/or immigration detention give due primacy to the principle of the best interests of the child',⁵⁷ and to ensure that 'determinations of the best interests are consistently conducted by professionals who have been adequately trained on best-interests determination procedures'.⁵⁸

Specific comments about Australia's obligation to consider the best interests of the child when transferring asylum seeker children to Nauru

2.17 There is limited information publicly available about how the DIBP seeks to ensure that decisions to transfer children to the Nauru RPC comply with the best interests of the child principle. The Committee may wish to seek further information from the DIBP about this issue. The following analysis is based on version 1.4 of the DIBP form entitled 'Best Interests Assessment for transferring minors to an RPC' dated 13 February 2014 (BIA Form),⁵⁹ which is available on the DIBP website.

2.18 According to the BIA Form, the PTA (see paragraph 1.6) performed for each asylum seeker child must include a 'best interests assessment' conducted pursuant to the instructions on the BIA Form. The BIA Form acknowledges Australia's obligations under Article 3(1) of the CROC, but states:

In so far as the requirement under section 198AD of the Migration Act 1958 to take unauthorised maritime arrivals to an RPC extends to unauthorised maritime arrivals who are children, the best interests of such children *are outweighed* by other countervailing primary considerations, including the need to preserve the integrity of Australia's migration system and the need to discourage children taking, or being taken on, dangerous illegal boat journeys to Australia.

⁵⁶ UN Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention. Concluding observations: Australia*, CRC/C/AUS/CO/4, 28 August 2012, [31].

⁵⁷ *Ibid.*, [32].

⁵⁸ *Ibid.*, [81(b)].

⁵⁹ DIBP, 'Best Interests Assessment for transferring minors to an RPC (forming part of the Pre-Transfer Assessment)', Version 1.4, 13 February 2014, <http://www.immi.gov.au/About/foi/Documents/FA140201097.pdf>.

Accordingly, while this assessment considers a range of factors to ensure that care, services and support arrangements are available to meet the needs of the individual child, *it does not consider whether the best interests of the child would be served by the individual child being transferred to an RPC.*⁶⁰

2.19 As noted by the Australian Human Rights Commission, the process of considering whether a child should be transferred to Nauru pursuant to this form is a best interests assessment ‘in name only’.⁶¹ The process does not meet Australia’s obligations under the CROC because:

- it does not meet the criteria for a best interests assessment, as set out in paragraphs 2.3 to 2.7 above;
- due to the Australian Government’s policy that all asylum seekers who arrived by boat after 19 July 2013 will be transferred to a regional processing country without exception, there is no possibility for an asylum seeker child to remain in Australia even if it were open to a decision maker to find that this was in the child’s best interests and outweighed other considerations;
- decision makers are limited in their ability to identify properly what is in the best interests of the child, because the BIA Form instructs them to take into account certain information about the availability and quality of ‘arrangements, support and services’ for children on Nauru which may not necessarily exist; and
- children do not appear to have an opportunity to appeal or seek independent review of any decision to take action that is not in their best interests.

2.20 Other issues of concern with the assessment conducted pursuant to the BIA Form include that:

- the BIA Form appears to be used to determine whether UACs should be transferred to Nauru, despite the fact that as the guardian of these children the Minister should ensure that all decisions are made with their best interests as *the* primary consideration, not just *a* primary consideration;⁶²
- it is unclear whether an assessment of a child’s suitability for transfer to Nauru – even in the limited context of the BIA Form – is conducted when children are transferred back to Nauru after a temporary return to Australia, or only once before their initial transfer. The Committee may wish to seek information about this matter from the DIBP; and
- in stating that the best interests of the child ‘are outweighed’ by ‘the need to preserve the integrity of Australia’s migration system’ and ‘the need to discourage children taking, or being taken on, dangerous illegal boat journeys to Australia’, the BIA Form presupposes that there is in fact some causal link, established by evidence, between transferring children to Nauru against their best interests and achieving those objectives. It is questionable whether such a link exists given that more people arrived in Australia by boat in 2013 (after offshore processing had been re-established) than in any previous year.⁶³

⁶⁰ DIBP, BIA Form, p. 1. (emphasis added)

⁶¹ Australian Human Rights Commission, *The Forgotten Children*, [12.15].

⁶² See paragraph 2.12 above.

⁶³ Janet Phillips, ‘Boat arrivals in Australia: a quick guide to the statistics’, *Parliament of Australia*, 23 January 2014,

Recommendations concerning the best interests of the child

4. The Australian Government should immediately undertake a BIA that compiles with the criteria in paragraphs 2.3 to 2.7, in order to assess whether it is appropriate for children to remain in the Nauru RPC in light of recent allegations of abuse and other harm there.
5. Australian law should be amended to include an express requirement that the best interests of the child be taken into account as a primary consideration when deciding whether to detain or remove asylum seeker children from Australia. This law could be modelled on similar provisions in comparable jurisdictions.⁶⁴
6. The BIA process conducted prior to transferring a child to Nauru should immediately be reviewed and amended to ensure that it complies with the criteria in paragraphs 2.3 to 2.7, and that the issues identified in paragraphs 2.19 and 2.20 are addressed. Formal mechanisms to appeal and revise these decisions where necessary should be established.
7. The Australian Government should take all appropriate legislative, administrative, and other measures to ensure that the best interests of children are taken into account in all decisions and actions concerning children within the Nauru RPC, including those set out in paragraph 2.10.
8. An independent guardian should be appointed to ensure that the best interests of the child are a paramount consideration in all decisions concerning UACs.

3 Obligations regarding detention of children

- 3.1 Australia has obligations not to subject anyone to arbitrary detention.⁶⁵ In addition, numerous international and domestic bodies, as well as Australian domestic law, stress that children should only be detained as a measure of last resort and for the shortest possible time, and never in circumstances where the detention is unlawful or arbitrary.⁶⁶ This obligation applies both to children in Australia and children in the Nauru RPC (see paragraphs 2.8 and 2.9).
- 3.2 Since all asylum seekers transferred to Nauru are detained while they await the determination of their protection claims, Australia's decisions to transfer asylum seekers to Nauru are, in effect, also decisions to detain. This detention:
 - is not a measure of last resort, because there is no legal or practical reason why children could not instead be accommodated with their families in a community setting in Australia while their claims are processed; and

http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/QG/BoatArrivals.

⁶⁴ See notes 51 and 52 above.

⁶⁵ ICCPR, art. 9(1).

⁶⁶ CROC, art. 37(b); *Migration Act*, s. 4AA; UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012 (*Detention Guidelines*), Guideline 9.2.

- is not for the shortest appropriate period of time and is arbitrary. While detention in the migration context is not prohibited under international law *per se*,⁶⁷ ‘in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.’⁶⁸ Detention should never be imposed as a blanket policy. It is only lawful if, on a case-by-case basis, it can be justified as necessary for reasons of public order, public health or national security.⁶⁹ The Australian Government has not identified these or any other purposes as justifying the detention of asylum seeker children in a closed centre while they are on Nauru. Relevantly, UNHCR has affirmed that ‘[d]etention that is imposed in order to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is inconsistent with international norms.’⁷⁰

3.3 The decision to transfer children to Nauru to be detained in the Nauru RPC may also be inconsistent with Australia’s other obligations concerning the detention of children under the CROC, including its obligations to ensure that every child deprived of liberty:

- is ‘treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age’;
- is separated from adults unless it is considered in the child’s best interest not to be separated;
- has the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances; and
- has the right to ‘prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action’.⁷¹

Recommendations concerning the detention of asylum seeker children

9. All transfers of children to Nauru should immediately be suspended unless and until arrangements are implemented for children to live in a community setting in Nauru while they await a determination of their asylum claims. Until such arrangements are put in place, all children in arbitrary detention in the Nauru RPC should be returned to Australia to live in a community setting.

⁶⁷ UNHCR, *Detention Guidelines*, Guideline 4, [18].

⁶⁸ UN Human Rights Committee, *Madani v. Algeria*, Communication No. 1172/2003, 28 March 2007, CCPR/C/89/D/1172/2003, [8.4]. UNHCR has stated in similar terms that ‘[t]o guard against arbitrariness, any detention needs to be necessary in the individual case, reasonable in all the circumstances and proportionate to a legitimate purpose ... Further, failure to consider less coercive or intrusive means could also render detention arbitrary’: UNHCR, *Detention Guidelines*, Guideline 4, [18].

⁶⁹ UNHCR, *Detention Guidelines*, Guideline 4, [21].

⁷⁰ UNHCR, *Detention Guidelines*, Guideline 4, [32].

⁷¹ CROC, art. 37(c) and (d).

4 Other international obligations concerning the protection of children

4.1 Australia has a range of other obligations directly relevant to children in, or liable to be sent to, the Nauru RPC, including general obligations to:

- ensure that they are given such protection and care as is necessary for their well-being;⁷²
- ensure that they have a standard of living adequate for their physical, mental, spiritual, moral and social development;⁷³
- ensure to the maximum extent possible their survival and development;⁷⁴ and
- take appropriate measures to ensure that, as children seeking refugee status, they receive appropriate protection and humanitarian assistance in the enjoyment of their rights under the CROC and other international human rights treaties to which Australia is a State party.⁷⁵

4.2 Specifically in relation to the physical, sexual and psychological harm that children may experience in the Nauru RPC, Australia has obligations to:

- take all appropriate legislative, administrative, social and educational measures to protect such children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse and all other forms of exploitation prejudicial to any aspect of their welfare;⁷⁶
- ensure that the institutions, services and facilities responsible for the care and/or protection of these children conform with the standards established by competent authorities concerning safety, health, the number and suitability of staff, and competent supervision;⁷⁷
- ensure that such children are not subjected to torture or other cruel, inhuman or degrading treatment or punishment;⁷⁸ and
- take all appropriate measures to promote the physical and psychological recovery and social reintegration of all children who are victims of any form of neglect, exploitation, abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment. This recovery and reintegration must take place in an environment which fosters the health, self-respect and dignity of the child.⁷⁹

4.3 As with the obligations concerning the best interests of the child and detention set out in Parts 2 and 3 above, the obligations listed in paragraphs 4.1 and 4.2 are more than mere guidelines or recommendations about how States should treat children within their jurisdiction. The UN Committee on the Rights of the Child has emphasised that, ‘in the context of the [CROC], States must see their role as fulfilling *clear legal obligations* to each and every child.

⁷² CROC, art. 3(2).

⁷³ Ibid., art. 27(1).

⁷⁴ Ibid., art. 6(2).

⁷⁵ Ibid., art. 22.

⁷⁶ Ibid., arts. 19, 24, 36.

⁷⁷ Ibid., art. 3(3).

⁷⁸ Ibid., art. 37(a).

⁷⁹ Ibid., art. 39.

Implementation of the human rights of children must not be seen as a charitable process, bestowing favours on children.⁸⁰

- 4.4 Whereas the obligation to consider the best interests of the child under Article 3(1) of the CROC allows some leeway for other considerations to outweigh the best interests of the child, the obligations listed above are expressed in absolute terms. For example, as the UN Committee on the Rights of the Child notes in relation to the obligation to protect children against violence and abuse in all their forms:

‘Shall take’ is a term which leaves no leeway for the discretion of States parties. Accordingly, States parties are under strict obligation to undertake ‘all appropriate measures’ to fully implement this right for all children.⁸¹

- 4.5 In relation to children in, or liable to be sent to, the Nauru RPC, it is convenient to divide the measures Australia is required to take into two broad categories: measures to prevent harm to children, and measures to provide an appropriate remedy when harm has already occurred.

- 4.6 In relation to *preventing harm*, the UN Committee on the Rights of the Child ‘emphasizes in the strongest terms that child protection must begin with proactive prevention of all forms of violence as well as explicitly prohibit all forms of violence.’⁸² On Nauru, this obligation to prevent harm appears to require the Australian Government to do more than implement general guidelines and policies to improve the protection of children. If mental, physical and sexual harm is a systemic and inherent part of the detention framework, then ‘proactive prevention’ may require Australia to suspend all transfers of children to the Nauru RPC and bring those who are still there back to Australia to await resolution of their asylum claims in a safe environment.

- 4.7 In relation to providing an appropriate *remedy* after a child’s rights have been violated, it is relevant to note that ‘for rights to have meaning, effective remedies must be available to redress violations.’⁸³ The UN Committee on the Rights of the Child has observed that ‘children’s special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights[, s]o States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives.’⁸⁴ Appropriate remedies for children who have suffered harm in the Nauru RPC would need to be determined on a case-by-case basis, taking into account the needs of individual children. However, they are likely to include ‘appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and

⁸⁰ UN Committee on the Rights of the Child, *General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, CRC/GC/2003/5, 27 November 2003 (*General Comment No. 5*), [11]. (emphasis added)

⁸¹ UN Committee on the Rights of the Child, *General comment No. 13 (2011) on the right of the child to freedom from all forms of violence*, CRC/C/GC/13, 18 April 2011, [37].

⁸² *Ibid.*, [46].

⁸³ UN Committee on the Rights of the Child, *General Comment No. 5*, [24].

⁸⁴ *Ibid.*

reintegration, as required by article 39 [of the CROC].'⁸⁵ The obligation to provide an effective remedy extends to all children who have experienced violations of their rights within the Nauru RPC, even if they have now been released.

Recommendations concerning the protection of children generally

10. All transfers of children to Nauru should immediately be suspended unless and until the Australian Government is able to guarantee to all children in the Nauru RPC the protections set out in paragraphs 4.1 and 4.2 above. Until such guarantees can be assured, all children in the Nauru RPC should be returned to Australia to live in a community setting, and the Australian Government must seek to provide these protections there.
11. Australia must ensure, by all appropriate means, that the obligations set out in paragraphs 4.1 and 4.2 above are fully reflected and given legal effect in relevant domestic legislation, so that Australian law is fully compatible with the CROC and its provisions can be applied and enforced directly.⁸⁶ The Australian Government should also ensure that these provisions in Australian law are supported by general measures of implementation (such as guidelines, policies and regulations) to guarantee their fulfilment.
12. The Australian Government must ensure that all children who have suffered harm in the Nauru RPC, or as a result of awaiting transfer to or back to the Nauru RPC, have access to an effective remedy. This remedy should include immediate release from the detention environment that has caused the harm, and access to the psychological, social and medical assistance necessary for recovery. It may also include compensation.

5 Information the Committee may wish to seek from the DIBP

- 5.1 This submission's analysis of Australia's obligations in relation to asylum seekers in, or liable to be transferred to, the Nauru RPC is based on the limited information that is publicly available about the relevant law, policy and practice. However, given the general lack of transparency about transfers to, and the operation of, Australia's regional processing centres in Nauru and Papua New Guinea, the Committee's may wish to seek further information from the DIBP to assist it in identifying the Australian Government's obligations and the extent to which they are being fulfilled.
- 5.2 Information the Committee may wish to seek from the DIBP for this purpose includes answers to the following questions:

Non-refoulement obligations

- Does the Australian Government consider itself to be bound by a legal obligation not to transfer asylum seekers to a regional processing country unless transfer is consistent with Australia's *non-refoulement* obligations?

⁸⁵ Ibid.

⁸⁶ Ibid., [18]-[23].

- What processes are in place to ensure that individual assessments occur and no asylum seeker is transferred to a regional processing country unless the transfer is consistent with Australia's *non-refoulement* obligations? What guidelines or policies inform how these processes are carried out?
- Is it possible for asylum seekers to be exempted from transfer to a regional processing country if it is determined that transfer would amount to *refoulement*? If so, how many asylum seekers have been exempted from transfer on this basis?

Best interests of the child

- What specific policies, procedures, guidelines and/or regulations govern the Australian Government's assessment of whether it is in a child's best interests to be transferred to Nauru?
- Does the Australian Government take any steps to consider the best interests of the child when taking actions concerning children already detained in the Nauru RPC, including those set out in paragraph 2.10?
- Does the Australian Government perform a BIA that meets the criteria set out in paragraphs 2.3 to 2.7 when considering whether to transfer a child back to Nauru after a temporary stay in Australia?
- Does the Australian Government have any empirical evidence establishing a direct causal link between the detention of asylum seeker children in Nauru and the objectives of its offshore processing policy, including 'the need to preserve the integrity of Australia's migration system' and 'the need to discourage children taking, or being taken on, dangerous illegal boat journeys to Australia' (as stated on the BIA Form)?

Detention as a last resort

- Can the Australian Government identify an appropriate justification for transferring asylum seeker children to be detained in the Nauru RPC, and is this detention reasonable, necessary and proportionate to achieve that purpose?
- Has the Australian Government considered alternatives to detention in the Nauru RPC for asylum seeker children?

Other international obligations concerning children

- What measures does the Australian Government take to implement its obligations under the CROC to protect children from violence and abuse, and help them to recover if such abuse occurs? In particular, what measures does it take to 'proactively prevent' harm to children in the Nauru RPC and provide an effective remedy to children who have experienced harm there?