UNSW Law Society

Submission to Senate Legal and Constitutional Affairs References Committee

Inquiry into the conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea

UNSW Law Society

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Senate Legal and Constitutional Affairs Committee
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31 March 2016

Dear Committee Secretary,

Inquiry into the conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea

The UNSW Law Society welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs References Committee Inquiry into the conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea.

The UNSW Law Society is the peak representative body for all of the students in the UNSW Faculty of Law. Nationally, we are one of the most respected student-run law organisations, attracting sponsorship from prominent national and international firms.

We seek to develop UNSW Law students academically, professionally and personally. The UNSW Law Society is proud to celebrate a rich diversity of students with a multiplicity of aims, backgrounds and passions.

The submission below reflects the varied backgrounds, perspectives and opinions of the students of the UNSW Law Society. It addresses the following matters identified in paragraphs (b), (c) and (d) of the Committee's terms of reference, namely:

b. transparency and accountability mechanisms that apply to the regional processing centres in the Republic of Nauru and Papua New Guinea;

c. implementation of recommendations of the Moss Review in relation to the regional processing centre in the Republic of Nauru; [and]
d. the extent to which the Australian-funded regional processing centres in the Republic of Nauru and Papua New Guinea are operating in compliance with Australian and international legal obligations …

In respect of paragraph (b) of the terms of reference, the submission's key findings are:

- that the outsourcing of the exercise of public power to private corporations significantly distorts the transparency and accountability mechanisms that would apply if asylum seekers were processed within Australian borders;
- that the *Australian Border Force Act 2015* (Cth) ('*ABF Act*') and amendments to the *Criminal Code 1899* (Nauru) ('*Criminal Code*') have had the effect of limiting the transparency mechanisms that apply to the operation of regional processing centres despite the protections offered by the *Public Interest Disclosure Act 2013* (Cth);
- that the threat of criminal sanctions from these legislative developments will have a chilling effect on disclosures by medical personnel and create conflict with their professional ethical obligations, and this could be partially remedied by a widening of exemptions under the *ABF Act*; and
- that the combined effect of these limitations on transparency and accountability mechanisms significantly undermines the principle of responsible government.

In respect of paragraph (c) of the terms of reference, the submission's key findings are:

- that conditions relating to the personal safety and privacy of transferees on Nauru have not greatly improved since the Moss Review, despite the transition to an open centre arrangement;
- that there are significant structural and legal barriers in the Nauruan *Criminal Code* which limit the ability of the Nauru Police Force to investigate and prosecute incidents of sexual and physical assault in the Centre;
- that the Nauruan government and Department of Immigration and Border Protection ('DIBP') can enhance the existing policy framework for responding to incidents of sexual assault at the Centre by reviewing the pre-screening transfer procedures and disclosure laws, and by aiming to protect family units; and
- that the DIBP must assist Nauru in reviewing its *Criminal Code* and introduce mandatory reporting obligations that extend to child sexual, physical and psychological abuse, especially given the departure of Save the Children Australia from the Nauru Regional Processing Centre.

In respect of paragraph (d) of the terms of reference, the submission's key findings are:

- that Australia owes a non-delegable duty of care to asylum seekers detained on Nauru and Manus Island;

- that Australia continues to have obligations under international law, and the regional processing arrangements may be contrary to the constitutions of Nauru and Papua New Guinea;
- that Australia is not fulfilling its positive due diligence duties under international humanitarian law and may be in breach of its non-refoulement obligations by transferring asylum seekers to regional processing centres where they are subject to abuse; and
- that evidence from several sources, including a former detainee on Nauru interviewed for this submission, indicates Australia may be in breach of its international obligations under the *Convention on the Rights of the Child* by transferring children to regional processing centres.

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

Kind regards,

UNSW Law Society

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Table of Contents

UNSW Law Society

Term of Reference (b)

Transparency and accountability mechanisms that apply to the regional processing centres in the Republic of Nauru and Papua New Guinea

I *Introduction*

The transparency and accountability mechanisms that apply to the regional processing centres ('RPCs') in the Republic of Nauru and Papua New Guinea are wholly inadequate and present both ethical and democratic problems for Australia. For the past decade various groups, from politicians to integrity institutions and private citizens, have echoed this and have made various recommendations for accountability solutions.[1] Tellingly, the final report of the Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru notes that the Committee was not afforded full and transparent access to information from key stakeholders, in particular the Australian government.[2]

II *Privatisation*

We submit that the outsourcing of the exercise of public power to private corporations significantly distorts the transparency and accountability mechanisms that would apply if asylum seekers were processed within Australian borders. The Commonwealth-funded contractors have been demonstrated not to view transparency as their primary obligation but rather foster a 'culture of secrecy'.[3] This makes it 'difficult to establish the exact nature of Australia's control over asylum seekers detained there'.[4] The level of Australia's control is important in determining legal issues, for example: whether a duty of care is owed and the

[1] See, eg, Joint Standing Committee on Migration, Parliament of Australia, *Immigration Detention in Australia: Facilities, Services and Transparency – Third Report of the Inquiry into Immigration Detention in Australia* (2009) 113–15; Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, *Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru* (2015) 120.

[2] Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, *Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru* (2015) 120 ('*Select Committee on the RPC in Nauru Report 2015*').

[3] Ibid 43 [2.137].

[4] Madeline Gleeson, 'Offshore Processing: Australia's Responsibility for Asylum Seekers and Refugees in Nauru and Papua New Guinea' (Factsheet, Andrew & Renata Kaldor Centre for International Refugee Law, 8 April 2015) 10 <http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Offshore_processing_state_responsibility.pdf>.

Australian government accountable;[5] whether Australia's human rights obligations apply; and whether Australian courts exercise jurisdiction over asylum seekers held in RPCs.

A Privatisation and Australia's International Obligations

In public debate about offshore processing centres, there has been some ambiguity in regard to the responsibilities of the Australian government after it has contracted out its responsibilities for the management and maintenance of detention centres. However, we argue that the privatisation of traditionally public government services extends to the management of offshore immigration detention centres because the degree of control exercised by the Australian government over the RPC enlivens its jurisdiction. The consequence of this is that contracts associated with the operation of offshore processing centres should be delivering services which meet Australian standards, including standards of transparency and accountability.

The Memoranda of Understanding signed between Nauru and Australia[6] as well as between Papua New Guinea and Australia[7] relating to the transfer to and assessment of persons emphasise that all parties to the memoranda have made a commitment to treat Transferees 'with dignity and respect and in accordance with relevant human rights standards'.[8] Australia, Papua New Guinea and Nauru are parties to the *Convention Relating to the Status of Refugees* ('*Refugee Convention*') and its 1967 Protocol.[9] Despite these Memoranda, the Department of Immigration and Border Protection ('DIBP') has sought to reiterate the importance of respecting the sovereignty of nations who have agreed to host offshore

[5] ABC Radio National, 'Gillian Triggs on Scathing Senate Report of Nauru Detention Centre', *Radio National Breakfast*, 1 September 2015 (Gillian Triggs) <http://www.abc.net.au/radionational/programs/breakfast/gillian-triggs-on-the-scathing-senate-report-of-nauru/6739574>.

[6] *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*, Nauru–Australia (signed and entered into force 3 August 2013) ('*MOU – Nauru 2013*').

[7] *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea, of Certain Persons, and Related Issues*, Papua New Guinea–Australia (signed and entered into force 6 August 2013) ('*MOU – PNG 2013*').

[8] *MOU – Nauru 2013* cl 17; *MOU – PNG 2013* cl 17.

[9] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954); *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

processing centres such as Nauru, reiterating the idea that their control over the detention centres in other jurisdictions is minimal.[10]

According to the Andrew & Renata Kaldor Centre for International Refugee Law ('Kaldor Centre'), however, Australia does have legal obligations under international law to asylum seekers in offshore RPCs. As they explained, '[t]he crucial question is not *where* a person is, but rather which State has (or which States have) sufficient control over the person to affect directly his or her enjoyment of rights'.[11] The Moss Review report which was released to the public on 20 March 2015 highlights the extensive control the DIBP has over the day-to-day management of the detention centres in Nauru.[12] It reveals how service providers were reporting directly to the DIBP rather than Nauruan Operation Managers as they perceived themselves as contractors of the Australian government.[13]

The opinion expressed by the Kaldor Centre is in line with obiter from court decisions examining the availability of judicial review of private bodies contracted by the Australian government to provide services. In *Forbes v New South Wales Trotting Club Ltd* Murphy J stated that '[t]here is a difference between public and private power but, of course, one may shade into the other'.[14] The blurring between the two is particularly evident when the exercise of a power affects members of the public. In *NEAT Domestic Trading Pty Ltd v AWB Ltd,* Kirby J in a dissenting opinion, stated:

> This appeal presents an opportunity for this Court to reaffirm that principle in circumstances, now increasingly common, where the exercise of public power, contemplated by legislation, is 'outsourced' to a body having the features of a private sector corporation. The question of principle presented is whether, in the performance of a function provided to it by federal legislation, a private corporation is accountable according to the norms and values of public law or is cut adrift from such mechanisms of accountability and is answerable only to its shareholders and to the requirements of corporations law or like rules.[15]

[10] Evidence to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, Canberra, 9 June 2015, 43 (Michael Pezzullo, Secretary, Department of Immigration and Border Protection).
[11] Andrew & Renata Kaldor Centre for International Refugee Law, Submission No 60 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, 30 April 2015 10 (emphasis in original) (citations omitted).
[12] Philip Moss, 'Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru' (Final Report, 6 February 2015).
[13] Ibid 73–4.
[14] (1979) 143 CLR 242, 275.
[15] (2003) 216 CLR 277, 300 [67] (citations omitted).

In *Plaintiff M61/2010E v Commonwealth*,[16] a connection between the functions undertaken by independent contractors in assessing claims of asylum seekers arriving on Christmas Island and the Australian government was found to exist and give rise to rights under common law and statute.

As the Auditor-General stated in the report on the Management of the Detention Centre Contracts Performance Audit in 2004, providing services to people in detention centres is challenging.[17] However, since 1994 the *Migration Act 1958* (Cth) has legislated that all non-citizens arriving in Australia unlawfully must be detained.[18] It has been over two decades since we have introduced this measure and we should therefore be critically assessing the contracts associated with the provision of services in offshore processing centres such as Nauru. This is particularly important as reviews conducted by the Auditor-General have not previously extended to examine the arrangements in place for the offshore processing centres outside Australia. The release of the Auditor's Report in 2004, however, did reveal a number of significant issues which are mirrored in offshore detention centres, such as poor risk-management in terms of the delivery of services, limited assessment of whether detention objectives were being achieved, and a lack of research into the management of detention centres.[19] Further, contracts did not clearly specify standards to which services should be delivered nor did many of the performance measures include targets to assess the quality of service delivery.[20]

B Interaction of Sovereign Laws

The legal systems of Nauru and Papua New Guinea are based on a mixture of adopted English and Australian case law and statutes, local customary law, statutes enacted by their respective Parliaments, and their constitutions.[21] The contract between the DIBP and Transfield Services (Australia) Pty Ltd (now Broadspectrum) governing the welfare, garrison

[16] (2010) 243 CLR 319.
[17] Auditor-General (Cth), 'Management of the Detention Centre Contracts – Part A' (Audit Report No 54, Australian National Audit Office, 18 June 2004) 11.
[18] *Migration Act 1958* (Cth) s 196.
[19] Auditor-General (Cth), 'Management of the Detention Centre Contracts – Part A' (Audit Report No 54, Australian National Audit Office, 18 June 2004) 14–15.
[20] Ibid 16.
[21] For Nauru, see generally Peter H MacSporran, 'Nauru Legal Sources' (1993) 1 *Australian Law Librarian* 18; Peter H MacSporran, 'Land Ownership and Control in Nauru' (1995) 2(2) *eLaw Journal: Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/issues/v2n2/macsporran22.html>; Pacific Islands Legal Information Institute, *Nauru Primary Materials* <http://www.paclii.org/countries/nr.html>. For Papua New Guinea, see generally Pacific Islands Legal Information Institute, *Papua New Guinea Primary Materials* <http://www.paclii.org/countries/pg.html>; University of Melbourne, *Papua New Guinean Law – Legal Research Guide: Home* (8 December 2015) <http://unimelb.libguides.com/png>.

and accommodation services at the RPCs ('*Transfield Contract 2014*')[22] is subject to varying law and policy in relation to different aspects of the arrangement. The contract itself is to be construed according to Australian Capital Territory law,[23] while service delivery must be compliant with Commonwealth law, laws of the country in which the RPC is situated,[24] as well as Commonwealth government policy.[25] Workplace health and safety is subject to both Commonwealth and local laws and standards,[26] while industrial relations procedures are governed by Commonwealth 'Fair Work Principles'.[27] Local subcontractors may be exempt from compliance with particular obligations under the contract where the DIBP agrees.[28]

The interaction of the local law of the RPC countries with Australian law in practice has important implications for accountability mechanisms. While the legal systems of both are based on English law, there are, and will be, important distinctions based on the unique cultures of each country. How will these tensions be resolved? The contract includes dispute resolution mechanisms,[29] but a negotiated solution cannot be divorced from the context of prior and continuing aid, trade and diplomatic relations between the countries, where the Australian government is significantly more powerful.[30] For example, Nauru's Secretary for Justice and Border Control may appoint an employee of an RPC service provider (such as Transfield) to be an 'authorised officer', whose powers include the authority to use reasonable force,[31] subject to strict reporting requirements that allow oversight by the Secretary.[32] While on paper this appears to provide the Republic of Nauru with an important role of review of practice, the reality is that the RPCs are in the complete control of the Australian government.[33]

[22] Department of Immigration and Border Protection (Cth) and Transfield Services (Australia) Pty Ltd, *Contract in Relation to the Provision of Garrison and Welfare Services at Regional Processing Countries* (Contract, 24 March 2014).
[23] *Transfield Contract 2014* cl 17.12.1.
[24] Ibid cl 3.3.1.a.
[25] Ibid cl 3.3.1.b.
[26] Ibid cls 1.1.1 (definition of 'WHS Law'), 17.3.1.a, sch 1 pt 3 cl 7.1.1.
[27] Ibid cl 3.4; see Australian Government, *Fair Work Principles: User Guide* (at 1 January 2010).
[28] *Transfield Contract 2014* cl 6.7.1
[29] Ibid cl 14.
[30] See generally Thulsi Narayanasamy and Claire Parfitt, 'Partnership or Power Play? Australia's Relationship with Papua New Guinea' in Brian Tomlinson, Reality of Aid Network (ed), *Rethinking Partnerships in a Post-2015 World: Towards Equitable, Inclusive and Sustainable Development* (IBON International, 2014) 46.
[31] *Asylum Seekers (Regional Processing Centre) Act 2012* (Nauru) s 24.
[32] *Asylum Seekers (Regional Processing Centre) Act 2012* (Nauru) ss 6(5)(a), 24(2).
[33] Thulsi Narayanasamy and Claire Parfitt, 'Partnership or Power Play? Australia's Relationship with Papua New Guinea' in Brian Tomlinson, Reality of Aid Network (ed), *Rethinking Partnerships in a Post-2015 World: Towards Equitable, Inclusive and Sustainable Development* (IBON International, 2014) 46, 50.

Does this mean in practice that a higher standard is adopted in the provision of services, or a lower one? The broad aim of the agreement is to provide a standard and range of operational and maintenance services broadly comparable to Australia, with regard to the circumstances and environments of Nauru and Papua New Guinea.[34] Where local laws apply, can we be certain of the extent to which legal standards and protections in Nauru and Papua New Guinea are upheld and enforced? Each of these questions heightens the ambiguity around contractual provisions and their performance.

C 'Closed' Obligations and Quality of Performance

A wide number of service obligations are stipulated in the contract, and while some prescribe standards to be met, a significant portion are 'closed' obligations. Much like a closed question – one with either a yes or no answer – these 'closed' obligations can either be attempted (and therefore fulfilled) or not, without attention being paid to quality of performance. For example, in a number of service areas, the *Transfield Contract 2014* merely requires Transfield to develop and implement a policy in relation to a particular service area.[35] The importance of Transfield's freedom to develop their policies utilising expert advice cannot be understated however, and it may be for this reason that further details of the policy are left outside of the contract for later research and discussion.[36] A potential danger though, is that this may result in a 'reinvention the wheel' – service providers in the past must have had emergency protocols, as well as security and risk assessment policies, and these would be valuable background for Transfield's development of improved policies. Therefore, even if Transfield has met requirements under their contract, the efficiency and efficacy of their performance is in doubt. Thus, an assessment that Transfield had complied with their contractual obligations may serve little purpose to a review of conditions and treatment of asylum seekers in RPCs.

D Confidentiality and Transparency

The *Transfield Contract 2014* contains extensive provisions to protect the confidentiality and privacy of activities onsite. The strict confidentiality agreements pose significant barriers to obtaining information regarding the provision of services, which may prevent the DIBP from

[34] *Transfield Contract 2014* cl 2.1.1.b.
[35] Ibid cl 4.4.1, sch 1 pt 2 cls 2.1.1.b, 2.2.1, 2.14.1, 4.3.1, 5.1.1, 5.2.1, sch 1 pt 3 cls 2.10.2.g, 3.3.3, 6.1.1.
[36] This is comparable to the relationship between legislation and delegated legislation: see generally Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008) ch 14.

being accountable to the public. The service provider is precluded from making any public statements regarding services provided, the DIBP and its personnel, and anything directly or indirectly related to the contract.[37] Furthermore, media access to the site is not allowed, and all visitors to the site must wear identification passes.[38] Visitors are already limited by the visa laws of Nauru, including the recent cancellation and ban on visitors from Australia and New Zealand.[39] Limitation of access means *observance* of performance is limited to DIBP personnel, the Auditor-General, the Privacy Commissioner, and members of the Council for Immigration Services and Status Resolution,[40] not considering any limitations on reporting. While limiting the number of observers protects the privacy of transferees – an important aim – it prevents unbiased assessment of compliance with the contractual terms to ensure the well-being of asylum seekers in detention.

In Australia, there is a growing tendency of the government to contract out their functions to private sector bodies. The privatisation of traditionally public government services extends to the management of offshore immigration detention centres. This has implications in terms of the activities that can be carried out in offshore processing centres, the conduct of those in charge and the interaction between them and individuals, as well as the level and quality of services that are delivered. As such, it gives rise to tensions in regard to public expectations of the ethics, principles, standards and values that are implemented in carrying out functions of the Australian government across borders and by private bodies.

III *Secrecy Legislation*

A ***Australian Border Force Act 2015*** **(Cth)**

The recent implementation of the *Australian Border Force Act 2015* (Cth) (‘*ABF Act*’) was widely criticised in the media last year. Most notably, several doctors came forward, claiming that secrecy provisions within the statute presented a direct conflict with professional ethical obligations and risked criminal punishment for such behaviour.[41] These fears were dismissed

[37] *Transfield Contract 2014* cl 13.2.
[38] Ibid sch 1 pt 3 cl 4.9.1.
[39] Simon Cullen, ‘Nauru Cancels Visitor Visas for Australian and New Zealand Citizens’, *ABC News* (online), 19 February 2016 <http://www.abc.net.au/news/2016-02-19/nauru-cancels-visitor-visas-for-australian-nz-citizens/7183684>.
[40] *Transfield Contract 2014* sch 1 pt 2 cl 8.5.1.
[41] Melanie Kembrey, ‘Hundreds of Doctors and Health Workers Rally in Sydney against Border Force Act Secrecy Provisions’, *The Sydney Morning Herald* (online), 11 July 2015 <http://www.smh.com.au/nsw/hundreds-of-doctors-and-health-workers-rally-in-sydney-against-border-force-act-secrecy-provisions-20150711-gia1e4.html>.

by Immigration Minister Peter Dutton as 'inaccurate',[42] citing exceptions to the secrecy provisions as whistleblower protections under the statute.

The wording of section 42(1) of the *ABF Act* does not strike the correct balance between privacy and transparency and its penalty of imprisonment for two years is unduly punitive:

> (1) A person commits an offence if:
>
> (a) the person is, or has been, an entrusted person; and
>
> (b) the person makes record of, or discloses, information; and
>
> (c) that information is protected information.
>
> Penalty: Imprisonment for 2 years.

Key terms of this powerful provision are so loosely defined as to extend its scope far beyond what is necessary to legitimately pursue an interest in protecting privacy. For example, an 'entrusted person' essentially entails all employees, contractors and consultants working at offshore processing centres.[43] Likewise, 'protected information' refers to any information gained in the course of such work.[44] More narrowly defined terms would have a twofold benefit. First, terms themselves would be more concrete and as such, meaningful. Second, this would subsequently limit the encroachment upon the freedom of information and transparency of offshore processing centres.

Additionally, the Australian Border Force Commissioner is given wide-ranging powers to direct Immigration and Border Protection workers, even after they are no longer employed in that role. Under section 24 of the *ABF Act*, the Commissioner may request such a worker to make and subscribe an oath or affirmation.[45] In this section, the oath or affirmation is undefined. The worker in question must not then engage in conduct that is inconsistent with this oath or affirmation,[46] even when they no longer satisfy the criteria of a person to whom the Commissioner may make the original request.[47] Should a worker not comply, the *ABF Act* states that they will be subject to sanctions and penalties under sections 13(4), 15, 28 and 29 of the *Public Service Act 1999* (Cth).[48] These sections make an employee of the Australian Public Service ('APS') bound to comply with any Australian Act or any instrument made

[42] Peter Dutton, 'Inaccurate Media Statements on *ABF Act*' (Media Release, 1 July 2015).
[43] *ABF Act* s 4 (definitions of 'entrusted person' and 'Immigration and Border Protection worker').
[44] *ABF Act* s 4 (definition of 'protected information').
[45] *ABF Act* s 24(1).
[46] *ABF Act* s 24(3).
[47] *ABF Act* s 24(4).
[48] These sections are referenced by a note to section 24(3) of the *ABF Act*.

under an Act, with failure to comply providing grounds for termination of employment with the APS.

It is important to recognise that a number of exceptions exist to temper the secrecy law. These include disclosures for the purposes of preventing or diminishing a serious threat to an individual's health or life,[49] as well as those made lawful by other legislation.[50] However, these exceptions are vaguely defined and complicated, undermining their usefulness in balancing secrecy and accountability. The health and safety risk must overcome a relatively high threshold and it is unclear if determining whether a disclosure is indeed made for its purported purpose requires an objective or subjective analysis.

B *Public Interest Disclosure Act 2013* (Cth)

Disclosures made lawful by other statutes are even more problematic. The key legislative instrument relevant to this provision is the *Public Interest Disclosure Act 2013* (Cth) ('*PID Act*'), oft cited as a measure which protects whistleblowers in the face of the *ABF Act*. However, upon closer inspection of the *PID Act*, it is evident that making disclosures through the 'appropriate channels'[51] is hardly a straightforward process. The statute breaks public interest disclosures into four categories: internal, external, emergency and legal practitioner.[52] Excepting internal disclosures, whistleblowers face numerous complex conditions, such as having previously undertaken an internal disclosure process, reasonably regarded as inadequate in terms of response or timeliness.[53] Importantly, external, emergency and legal practitioner disclosures carry the requirement that they not involve 'intelligence information',[54] a broadly defined notion.[55] The term encompasses yet another vaguely defined term of 'sensitive law enforcement information'[56] which itself includes 'security intelligence'.[57] Given that political discourse surrounding the asylum seekers is often framed in terms of national security, it is very possible that a disclosure related to offshore processing centres would fall within the broad notion of 'intelligence information'.

[49] *ABF Act* s 48.
[50] *ABF Act* s 42(2)(c).
[51] Peter Dutton, 'Inaccurate Media Statements on *ABF Act*' (Media Release, 1 July 2015).
[52] *PID Act* s 26.
[53] *PID Act* s 26(1)(c) item 2 column 3 para (c).
[54] See, eg, *PID Act* s 26(1)(c) item 2 column 3 para (h).
[55] *PID Act* s 41(1).
[56] *PID Act* s 41(1)(g).
[57] *PID Act* s 41(2).

Moreover, the discloser bears an evidential burden in court to prove that the disclosure was done within legislative bounds.[58] Legal advice is limited to potential whistleblowers since, as noted above, legal practitioner disclosures are also subject to the requirement that they exclude intelligence information. This is a potent deterrent to whistleblowing.

Whilst whistleblowing is still theoretically possible the practical reality is fraught with uncertainty. Against a background of complex protocols and ambiguously defined terms, the risk of imprisonment associated with an unlawful disclosure presents an untenable deterrent effect for the few people who are exposed firsthand to the uncensored nature of offshore processing centres.

C *Criminal Code 1899* (Nauru)

Disclosures concerning the Nauru RPC could also be restricted due to the recent passing of the *Criminal Code (Amendment) Act (No 13) 2015* (Nauru) which inserted section 244A into the *Criminal Code 1899* (Nauru) ('*Criminal Code*').[59] We submit that the words employed in this section permit Nauruan authorities an undefined scope in prosecuting individuals who are critical of the government and their activities. For instance, an offence under section 244A is committed if '[a] person who makes or publishes any statement or material' causes emotional distress to a person and such statement or material is 'likely to threaten national defence, public safety, public order, public morality or public health'. These requirements are fraught with ambiguity: in the first instance, the provision leaves undefined what constitutes 'emotional distress' and to what extent a person must experience 'emotional distress' to satisfy the provision; in the second instance, public values such as morality are inherently determined on a fluid and contextual basis. Given this, it would be difficult to place these terms against any objectively fair yardstick in evaluating the threat of a particular statement or piece of published material. In achieving this object, the Second Reaching Speech of the Criminal Code (Amendment) Bill 2015 (Nauru) states that the amendment seeks to remedy the 'somewhat vile and tasteless words' that followed 'constructive critique' from the country's residents.[60] However, it is clear that in the statutory context 'vile and tasteless' goes far beyond simple moral censure of abusive words to include administrative considerations of great significance such as national defence.

[58] *Criminal Code Act 1995* (Cth) sch 2 s 13.3(3).
[59] *Criminal Code (Amendment) Act (No 13) 2015* (Nauru) sch 1 item 1.
[60] See 'Nauru Government Criticised over New Law Limiting Free Speech', *ABC News* (online), 14 May 2015 <http://www.abc.net.au/news/2015-05-14/nauru-introduces-law-curbing-dissent/6469202>.

At present, there has been no judgment from the Supreme Court of Nauru as to whether this provision is legitimate under the *Constitution of Nauru*. Article 12 of the *Constitution of Nauru* provides that a person has the right to freedom of expression. This right is limited by paragraph (3)(a), which states that nothing contained in or done under the authority of any law shall be held to be inconsistent with, or in contravention of, the provisions of article 12 to the extent that that law makes provisions that are 'reasonably required in the interests of defence, public safety, public order, public morality or public health'. The wording of section 244A of the *Criminal Code* clearly seeks to fall within this exception, but it is possible that the law may not be seen as 'reasonably required' to protect these interests.

The combined effect of the *ABF Act*, the *PID Act* and the *Criminal Code* has far reaching consequences. Limiting the provision of and access to information unduly hinders research efforts and potential legal actions which arise in the context of regional processing centres. However, the most troubling effect of these statutes is their apparent deterrence, if not intimidation, of important actors within the centres from voicing public interest concerns. This breeding of a culture of secrecy and the reluctance of Parliament to enable access to information embodied in the legislation presents a concerning acquiescence to the weakening of public accountability mechanisms, a key tenet of the democratic process.

IV *Medical Ethics and Transparency*

A Overview

A subset of the accountability issues inherent in privatisation manifests in medical transparency. Provision of healthcare in immigration detention is governed by International Health and Medical Services. While their private contract includes some reporting stipulations,[61] there is a danger inherent in privatisation that companies cannot be held to account by the Australian people to the same extent as the government.

The Migration Amendment (Health Care for Asylum Seekers) Bill 2012 (Cth) would have inserted section 198ABA into the *Migration Act 1958* (Cth) ('*Migration Act*'), calling for a health advisory panel appointed by the Minister to 'monitor and assess the health of offshore

[61] See, eg, *Select Committee on the RPC in Nauru Report 2015*, 107 [4.92].

entry persons';[62] travel to regional processing countries;[63] and create reports on health of offshore entry persons.[64] However, this Bill lapsed in Parliament at the end of 2013.

Prior to the introduction of the *ABF Act*, health care professionals had already raised concerns that they were not fulfilling their professional or ethical obligations in treating asylum seekers, particularly those in offshore detention.[65] One way doctors sought to diffuse this was by 'advocacy from within'[66] – drawing attention to deficiencies in the care of asylum seekers. However, under the *ABF Act*, as discussed above, this is no longer possible. Part 6 introduces new regulations on transparency in detention, providing for less accountability. This means that a doctor's duty to speak out where patients are at risk is even more imperative.[67]

B The *ABF Act*, the *Criminal Code* and Their Conflict with the Ethical Obligations of Australian Medical Personnel and Human Rights

Australian medical personnel involved in the operation of RPCs are at particular risk of finding themselves caught between their own ethical obligations and the provisions of the *ABF Act* and the *Criminal Code*.

The *Declaration of Geneva* is a medical ethics guideline adopted by the World Medical Association ('WMA'),[68] of which the Australian Medical Association is a constituent member.[69] Significantly, the Declaration provides that:

> At the time of being admitted as a member of the medical profession … [a medical practitioner] will not permit considerations of age, disease or disability, creed, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, social standing or any other factor to intervene between [his or her] duty and [his or her] patient.

[62] Migration Amendment (Health Care for Asylum Seekers) Bill 2012 (Cth) sch 1 item 1 ('Proposed s 198ABA') sub-s (1).
[63] Proposed s 198ABA sub-s (5)(b).
[64] Proposed s 198ABA sub-s (6).
[65] John-Paul Sanggaran, Grant M Ferguson and Bridget G Haire, 'Ethical Challenges for Doctors Working in Immigration Detention' (2014) 201 *Medical Journal of Australia* 377, 377.
[66] Ibid 378.
[67] Australian Medical Association, 'Health Care of Asylum Seekers and Refugees' (Position Statement, 23 December 2015) [17]–[18] <https://ama.com.au/position-statement/health-care-asylum-seekers-and-refugees-2011-revised-2015>.
[68] *Declaration of Geneva*, World Medical Association, 2nd General Assembly (adopted September 1948, amended September 1994) <http://www.wma.net/en/30publications/10policies/g1/>.
[69] World Medical Association, *Members' List* (2016) <http://www.wma.net/en/60about/10members/21memberlist/index.html>.

This is substantiated by the WMA's *International Code of Medical Ethics*, in which it is stated 'a physician shall be dedicated to providing competent medical service in full professional and moral independence, with compassion and respect for human dignity'.[70]

These values are also expressed in the Medical Board of Australia's *Good Medical Practice: A Code of Conduct for Doctors in Australia*,[71] and the Nursing and Midwifery Board of Australia's *Code of Professional Conduct for Nurses in Australia*.[72] Section 8.11 of the former provides that:

> A conflict of interest in medical practice arises when a doctor, entrusted with acting in the interests of a patient, also has financial, professional or personal interests, or relationships with third parties, which may affect their care of the patient. ... When these interests compromise, or might reasonably be perceived by an independent observer to compromise, the doctor's primary duty to the patient, doctors must recognise and resolve this conflict in the best interests of the patient.

Additionally, sections 140–3 of the Health Practitioner Regulation National Law as it applies in each State and Territory of Australia provide mandatory reporting requirements. These make it compulsory for health practitioners, employers and education providers to make a notification in the event that they form 'a reasonable belief' that a particular registered health practitioner has engaged in 'notifiable conduct'.[73] 'Notifiable conduct' is defined within these provisions as when a practitioner has: practised their profession while intoxicated; engaged in sexual misconduct in connection with their practice; placed the public at risk of substantial harm in the practice of their profession because they have an impairment; or placed the public at risk of harm because they have practised their profession in a way that constitutes a significant departure from accepted professional standards.

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[70] *International Code of Medical Ethics*, World Medical Association, 3rd General Assembly (adopted October 1949, amended October 2006) <http://www.wma.net/en/30publications/10policies/c8/>.
[71] Medical Board of Australia, *Good Medical Practice: A Code of Conduct for Doctors in Australia* (at 17 March 2014) <http://www.medicalboard.gov.au/Codes-Guidelines-Policies/Code-of-conduct.aspx>.
[72] Nursing and Midwifery Board of Australia, *Code of Professional Conduct for Nurses in Australia* (at August 2008, effective 7 May 2013) <http://www.nursingmidwiferyboard.gov.au/Codes-Guidelines-Statements/Professional-standards.aspx>.
[73] See, eg, *Health Practitioner Regulation National Law Act 2009* (Qld) sch ('Health Practitioner Regulation National Law'). Each state and territory except WA has enacted legislation adopting these regulations from the Queensland Act: *Health Practitioner Regulation National Law (ACT) Act 2010* (ACT) s 6; *Health Practitioner Regulation (Adoption of National Law) Act 2009* (NSW) s 4; *Health Practitioner Regulation (National Uniform Legislation) Act 2010* (NT) s 4; *Health Practitioner Regulation National Law (South Australia) Act 2010* (SA) s 4; *Health Practitioner Regulation National Law (Tasmania) Act 2010* (Tas) s 4; *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic) s 4. For the WA equivalent, see *Health Practitioner Regulation National Law (WA) Act 2010* (WA) ss 140–3.

The function of the Australian Health Practitioner Regulation Agency ('AHPRA') lies in 'manag[ing] the registration and renewal processes for health practitioners and students around Australia'.[74] Within this role, the AHPRA receives notifications about potential breaches of a health practitioner's professional obligations and has the authority to suspend or cancel medical registrations.[75] In NSW and Queensland, the Health Care Complaints Commission and Office of the Health Ombudsman handle these duties respectively.[76]

Significantly, the *ABF Act* appears to override these basic obligations of Australian medical personnel with its own. The Commissioner's power under section 24 is one example in which an Australian health practitioner could find himself or herself compelled to swear an oath of secrecy that is inconsistent with the aforementioned international and domestic professional standards.[77]

As a consequence, Australian health practitioners who are contracted to serve in the Nauru RPC in particular find themselves in a unique legal and ethical impasse. For example, making a statement deeply critical of the Nauru RPC may constitute 'political hatred' or a threat to 'public order' and therefore a criminal offence under the *Criminal Code* s 244A. If that individual made that statement in a manner inconsistent with the requirements of section 42 of the *ABF Act*, they could then also be liable to charges under that legislation. Alternatively, that individual could maintain silence, therefore running the risk that the AHPRA could suspend or cancel their medical registration if evidence arose demonstrating negligence in their ethical duties. In the words of a registered nurse involved in the 1 July 2015 open letter to the DIBP, Alanna Maycock:

> You uphold your mandatory reporting obligations and you break the law and could possibly be sent to prison. Or, you uphold the law, then your organisation finds out you were aware of something that affects the health of your patient and you lose your job and your nursing registration.[78]

[74] Australian Health Practitioner Regulation Agency, *What We Do* (5 January 2016) < http://www.ahpra.gov.au/About-AHPRA/What-We-Do.aspx>.
[75] Australian Health Practitioner Regulation Agency, *Monitoring and Compliance* (19 February 2016)<http://www.ahpra.gov.au/About-AHPRA/Monitoring-and-compliance.aspx>.
[76] Australian Health Practitioner Regulation Agency, *What Is a Notification?* (2016) Australian Health Practitioner Regulation Agency <http://www.ahpra.gov.au/Notifications/What-is-a-notification.aspx#making>.
[77] See Greg Barns and George Newhouse, 'Border Force Act: Detention Secrecy Just Got Worse' on *The Drum*, 28 May 2015 <http://www.abc.net.au/news/2015-05-28/barns-newhouse-detention-centre-secrecy-just-got-even-worse/6501086>.
[78] Alanna Maycock, 'Stuck between the law and responsibility' (2015) 72(10) *The Lamp* 16, 17.

The aforementioned exception provided by section 48 of the *ABF Act* is also not necessarily sufficient to cover medical personnel. The lack of an appropriate definition of what is 'serious' enough to warrant disclosure may leave medical personnel with '[m]any practical, ethical and clinical questions'.[79] Quite understandably, some medical personnel may not be prepared to take this step if it means having to defend themselves in court.

One potential formulation may extend from the requirements under Australian Privacy Principle ('APP') 6, in the *Privacy Act 1988* (Cth) schedule 1, when using and disclosing patients' health information. Under APP 6.2(c) and section 16A, an APP entity is permitted to collect, use or disclose health information if:

> (a) it is unreasonable or impracticable to obtain the individual's consent to the collection, use or disclosure; and
> (b) the entity reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety.[80]

The Office of the Australian Information Commissioner has subsequently qualified the terms 'reasonable belief' and 'serious threat'. A 'reasonable belief' must be 'not merely a genuine or subjective belief',[81] and a 'serious threat' must reflect 'significant danger', and could include a 'potentially life threatening situation or one that might reasonably result in other serious injury or illness'.[82] We submit that this formulation is an adequate one. For consistency with existing Commonwealth disclosure laws and strong possible benefits for Australia's human rights obligations, we also submit that the current provision under section 48 should be amended to add 'safety' to life and health as conditions for disclosure.

Certainly, the *ABF Act* and the *Criminal Code* are not solely responsible for the unethical nature of this situation. It is evident that the aforementioned emphasis on internal disclosures by the *ABF Act* in conjunction with the *PID Act* does not accord with a suitable level of accountability within RPCs. As concluded by the recent Select Committee in August 2015, service providers contracted by the Commonwealth have been 'essentially left to manage and report on complaints against their own staff'[83] with allegations being as serious as child abuse

[79] Comment, 'New Border Force Act Designed to Intimidate Doctors' (2015) 55(6) *Medicus* 12, 12.
[80] *Privacy Act 1988* (Cth) s 16A, sch 1 pt 3 cl 6.2(c).
[81] Office of the Australian Information Commissioner, *Australian Privacy Principles Guidelines: Privacy Act 1988* (at 31 March 2014) [6.59] <https://www.oaic.gov.au/resources/agencies-and-organisations/app-guidelines/APP_guidelines_complete_version_1_April_2015.pdf>.
[82] Ibid [C.9]–[C.10].
[83] *Select Committee on the RPC in Nauru Report 2015*, 124.

and sexual assault.[84] Additionally, Australian media scrutiny of Nauru is very limited: one Australian who visited Nauru on a journalist visa in October 2015 was the first foreign reporter to do so in 18 months.[85] The evident sluggishness and potential bias surrounding current internal complaint procedures, as well as the lack of external oversight, puts pressure on ethical individuals to act.

It is therefore incredibly difficult to see how medical personnel and their Commonwealth employers can fulfil their obligations under international human rights law in a context of such limited accountability. Testimony is given that contractors are briefed to refer to detainees by their boat identification numbers,[86] violating article 10 of the *International Covenant on Civil and Political Rights* stipulating that all persons who are detained should be treated with humanity and respect for their inherent dignity;[87] this has been promptly denied.[88] Evidence is provided that children under the age of four are not accommodated in air-conditioned marquees,[89] contravening articles 3(1) and 18(1) of the *Convention on the Rights of the Child* which denotes that the best interests of the child should be a primary consideration;[90] these have been poorly rationalized as the operational determinations of the Nauruan government.[91] There exists an overwhelming volume of testimonial evidence that the conditions within the Nauru RPC are inhumane, yet without clear independent review the situation will continue to be characterized by outright denial on the part of service providers.

C Recommendations

To effect change, there must be immediate and consistent qualitative measures to address internal and external accountability. We strongly support increasing the Immigration Ombudsman's role in overseeing the RPC.[92]

The *ABF Act*, in light of this context, has proven manifestly inadequate to provide contracted medical personnel with a means of reconciling their ethical obligations with the non-

[84] Ibid 23.
[85] Stephanie Anderson, 'Peter Dutton Cannot Confirm if Journalist Chris Kenny Was Assisted with Nauruan Visa', *ABC News* (online), 29 October 2015 <http://www.abc.net.au/news/2015-10-29/no-answers-on-nauru-visa-assistance-for-chris-kenny/6894208>.
[86] *Select Committee on the RPC in Nauru Report 2015*,178.
[87] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 10 ('*ICCPR*').
[88] *Select Committee on the RPC in Nauru Report 2015*, 179.
[89] Ibid 62.
[90] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 3(1), 18(1).
[91] *Select Committee on the RPC in Nauru Report 2015*, 62.
[92] Ibid ix.

disclosure restrictions placed upon them as an 'entrusted person'. In order to bring the *ABF Act* into compliance with the obligations of medical codes of conduct and international human rights law, we recommend that section 48 be amended so that a disclosure 'reasonably believed' to be necessary to prevent or lessen a serious threat to life, health *or safety* is henceforth mandatory.

V *Human Rights*

Australia has human rights obligations with respect to refugees.[93] While these have been previously applied to refugees detained offshore,[94] there is a current attempt to deny the jurisdiction of Australia over asylum seekers in offshore detention, part of which creates a lack of accountability. Australia has expressly excluded any international obligation of non-refoulement in relation to the removal of non-citizens through the introduction of section 197C into the *Migration Act*:

> (1) For the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.
> (2) An officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen.

The principle of non-refoulement is a fundamental tenet of humanitarian law which is eliminated as a ground of appeal by this section and significantly limits executive accountability.

Additionally, the recent case of *Plaintiff M68/2015 v Minister for Immigration and Border Protection* ('*Plaintiff M68*'),[95] while not turning on accountability, reinforced that Nauru is outside the jurisdiction of Commonwealth courts and section 198 of the *Migration Act* is about removal of asylum seekers while the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nauru), governs their detention. The Nauruan Act operates concurrently with the

[93] The UN Human Rights Committee has affirmed that the *ICCPR* applies to all State conduct that 'affect[s] the enjoyment of rights': UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel*, 78th sess, UN Doc CCPR/CO/78/ISR (21 August 2003) [11].
[94] See, eg, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014) ch 7; UN High Commissioner for Refugees, *UNHCR Mission to the Republic of Nauru* (Report, 14 December 2012) <http://www.refworld.org/docid/50cb24912.html>.
[95] [2016] HCA 1 (3 February 2016). See part I under Term of Reference (d) below for a fuller discussion of this case.

Migration Act, going so far as to refer to the 'Australian Act' in its Definitions (at s 3(1)).[96] The acts operate in tandem: one removes refugees to Nauru under Australian authority and then the Nauruan act operates to detain them. This system allows the Australian government to abrogate their responsibility to the removed persons and represent that technically *they* are not detaining the asylum seekers – Nauru is. This effectively removes the Australian government's accountability for the state of asylum seekers detained offshore.[97]

Finally, in 2014, visits by the Australian Human Rights Commission ('AHRC') to offshore detention centres were denied because the *Australian Human Rights Commission Act 1986* (Cth) does not bestow jurisdiction for them to act outside of Australia.[98] And while the AHRC can receive complaints in relation to human rights violations (under section 20(1)), the definition of human rights 'as they apply in Australia' in section 3(4) means they may not be able act on complaints raised at RPCs. This creates a lack of transparency to integrity organisations, which at best means that there is no information readily available as to the state of the human rights of asylum seekers in offshore detention, and at worst means that potential human rights abuses may be overlooked. It is self-evident that neither of these situations are desirable.

VI *Responsible Government*

Privatisation, making offshore asylum processes non-transparent and making information difficult to access, is a threat to parliamentary accountability. The Westminster doctrine of responsible government, which is a cornerstone of Australia's governmental system, requires accountability. Parliamentary accountability, therefore, is a keystone of democracy.[99] The Australian people cannot be expected to hold the government accountable if they are unaware or unable to access what is going on in offshore detention.

Our democracy depends on various accountability mechanisms: responsible government, wherein each Minister is responsible to Parliament for his or her portfolio; the Parliament

[96] Although this reference was recently removed by the *Asylum Seekers (Regional Processing Centres) (Amendment) Act 2015* (Nauru) s 4.
[97] David Hume, 'Plaintiff M68-2015 – Offshore Processing and the Limits of Chapter III' on Gilbert + Tobin Centre of Public Law, *AUSPUBLAW* (26 February 2015) <http://auspublaw.org/2016/02/plaintiff-m68-2015>.
[98] *Australian Human Rights Commission Act 1986* (Cth) s 3(4).
[99] 'Parliament is traditionally seen as the apex of accountability. Citizens elect politicians who then form a government and are accountable to the Parliament and through it to the people. Public servants are accountable to their minister who is also accountable to Parliament': John Alvey, 'Parliament's Accountability to the People, the Role of Committees: A Queensland View' (Paper presented at the Australasian Study of Parliament Group Conference, Adelaide, 23–25 August 2007) 4.

which is in turn responsible to the electorate; and integrity institutions such as the AHRC, and the media. These can only function effectively if information flows openly. Citizens are not in any position to confer praise or blame on their representatives if they do not possess basic facts and information about offshore detention. Laws limiting this transparency undermine responsible government and flow contrary to the rule of law, whereby 'government in all its actions is bound by rules fixed and announced beforehand'.[100] The legislature, by amendments such as the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) is seeking to avoid judicial scrutiny of ministerial decisions surrounding offshore detention.[101]

In principle, judges give effect to the will of Parliament which is seen as carrying out the will of citizens.[102] It is questionable, then, whether the legislation that was in question in, for example, *Plaintiff M68,* which undermines responsible government, should be upheld in principle by the courts. The courts have been reluctant to interfere in the government's legislative power concerning asylum seekers. While, to date, no High Court decisions have focused on government accountability in offshore detention in the main, it is likely that cases may come to fruition in the next several years, particularly in light of the extensive powers in the *Australian Border Force Act 2015* (Cth).

VII *Conclusion*

The Australian government has used the language of the law to bring about apathy and destroy accountability in relation to offshore detention. At this stage, a full Royal Commission to reveal 'absolute clarity' regarding how these Centres operate is desirable.[103] The lack of accountability surrounding this issue is counter to the public interest of the Australian people and ultimately to democracy itself.

[100] F A Hayek, *The Road to Serfdom* (Routledge Classics, first published 1944, 2006 ed) 75.
[101] Robert Lindsay, 'Yes Minister? The 2012 Migration Amendments: Whence Have We Come and Whither Are We Going?' (2013) 72 *AIAL Forum* 63, 67.
[102] Justice Michael Kirby, 'The Struggle for Simplicity: Lord Cooke and Fundamental Rights' (1998) 24 *Commonwealth Law Bulletin* 496, 510–11.
[103] ABC Radio National, 'Gillian Triggs on Scathing Senate Report of Nauru Detention Centre', Radio National Breakfast, 1 September 2015 (Gillian Triggs).

Term of Reference (c)

Implementation of recommendations of the Moss Review in relation to the Regional Processing Centre in the Republic of Nauru

I *Introduction*

The Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru ('Moss Review') concluded in February 2015. It provided a total of 19 recommendations to the Department of Immigration and Border Protection ('DIBP'), contract service providers, and the government of Nauru. In response to Term of Reference C in the present Inquiry, the implementation and issues of Recommendations one, three, four five and six will be examined.

II *Recommendation One*

Recommendation one of the Moss Review was that:

> The Department and the Nauruan Government take into account the personal safety and privacy of transferees when making decisions about facilities and infrastructure at the Centre.

While the terms of reference of the Moss Review did not include investigation into facilities and infrastructure, comment was made on these aspects of the regional processing centre ('RPC'). The Review provided critique of arrangements where they impinged upon the safety and privacy of transferees, and made recommendations to the improvements of facilities. In reviewing the decisions of the Department and the Nauruan government regarding facilities and infrastructure we will examine the accommodation for transferees on Nauru, implementation of an open centre and educational facilities.

A Accommodation

Accommodation in the RPC is comprised of three categories. RPC 1 contains medical and administrative facilities, and also contains accommodation for staff, and for high risk and short-term transferees. RPC 2 accommodates single men. RPC 3 accommodates families, single women, and childless couples. At the time the Review was released, accommodation and some other facilities in RPC 2 and RPC 3 were comprised of 10 x 12 metre vinyl canvas

marquees, and particle board flooring.[1] Transferees were accommodated in large groups, in a dormitory fashion.

The Moss Review was critical of accommodation arrangements for transferees, noting the 'significant personal safety and privacy issues that marquee accommodation presents'.[2] The Review encouraged the government of Nauru to consider any alternate accommodation options.[3]

Several concerning issues regarding accommodation have emerged, with comment arising from the Moss Review, and in the final report of the Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru ('Select Committee on the RPC in Nauru'), released in August 2015.[4]

Firstly, a lack of ventilation and air-conditioning in the marquees, in correlation with the tropical climate, has led to temperatures in the marquees being dangerously high.[5] This has promoted health issues for transferees including dehydration, dizziness, and other illnesses. It has also prevented involvement of transferees in activities run by service providers and limited students' ability to study.[6]

Secondly, poor hygiene within the marquees, and the presence of persistent mould on the inside of the marquees has contributed to health issues for transferees, including skin and eye infections.[7]

Thirdly, marquee accommodation allows for minimal privacy for transferees. The Moss Review and the final report of the Select Committee on the RPC in Nauru highlighted instances of transferees being watched by Centre staff and guards whilst changing or sleeping, and potential of transferees or Centre staff to observe sexual encounters of

[1] Philip Moss, 'Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru' (Final Report, 6 February 2015) 21; Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, *Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru* (2015) 61.
[2] Philip Moss, 'Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru' (Final Report, 6 February 2015) 44 ('*Moss Review 2015*').
[3] Ibid 40.
[4] Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, *Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru* (2015) ('*Select Committee on the RPC in Nauru Report 2015*').
[5] Ibid 63.
[6] Ibid 63–4.
[7] Ibid 64.

transferees. Both reports illuminated the adverse effects of limited privacy on individuals and relationships, and particularly on children.[8]

Since publication of the Moss Review, Transfield (now Broadspectrum) has commented on these concerns. Regarding the temperature of marquees, the company asserted that air-conditioning and greater ventilation was in the process of being installed.[9] A timetabled commitment was not forecast, however. In response to concern about mould, the company asserted that a stricter cleaning regime had been enforced, but acknowledged the likelihood of mould returning.[10] Regarding privacy, Transfield asserted that more partitions had been introduced into marquees.[11]

It is our recommendation that the DIBP, together with the government of Nauru, introduce hard-walled and air-conditioned accommodation into RPC 2 and 3 as a matter of urgency. The measures taken fail to adequately address the concerns expressed by transferees and others. The issues of a lack of privacy and accommodation with high temperatures arise directly from housing transferees in marquees without air-conditioning instead of fixed accommodation. The presence of mould could also be mitigated through a transitioning out of marquee accommodation into hard-walled and air-conditioned accommodation.

B Open Centre Arrangements

On 5 October 2015, the DIBP announced that the Nauru RPC would transition to being an open centre, 24 hours per day.[12] This extended the former arrangement which allowed transferees to roam the island before a curfew time of 9.00pm on certain days.[13] The extension of the open centre eliminates this curfew, but educational, medical and accommodation needs of asylum seekers who remain to be processed are still addressed within the Centre.

[8] *Moss Review 2015*, 44; *Select Committee on the RPC in Nauru Report 2015*, 67.
[9] *Select Committee on the RPC in Nauru Report 2015*, 64.
[10] Evidence to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, Canberra, 20 July 2015, 21 (Derek Osborn, Executive General Manager, Logistics and Facilities Management, Transfield Services).
[11] *Select Committee on the RPC in Nauru Report 2015*, 64.
[12] Department of Immigration and Border Protection (Cth), 'Australia Welcomes Nauru Open Centre' (Media Release, 5 October 2015).
[13] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1 (3 February 2016), [339]–[342] (Gordon J).

Rhetoric of the DIBP, Nauruan government, and Transfield surrounding this shift has justified the open centre arrangements through the benefits of transferees gaining greater access to community services, and the potential of transferees to integrate more seamlessly into the Nauruan community upon being processed. It is significant to note that an open centre model was recommended in the Select Committee on the RPC in Nauru Report of August 2015.[14] Organisations such as the Refugee Council of Australia have also recognised that an open centre model improves on the former arrangements, in that it may in a small sense alleviate the negative impacts of prolonged detention.[15] We acknowledge that the transition to an open centre may be beneficial to asylum seekers who are now afforded slightly more freedom of movement on Nauru.

Despite this, there are several aspects of the open centre arrangement which threaten the safety of asylum seekers on Nauru. Since a transition from a closed to an open centre there have been reports of sexual and physical assault of asylum seekers by Nauruan locals.[16] Gillian Triggs, the President of the Australian Human Rights Commission ('AHRC'), noted that several detainees have communicated that they 'feel safer inside the camp than in the community'.[17] It is our view that the change to an open centre has not been implemented in a way that adequately considers the safety of transferees.

C Education Facilities

The DIBP approved the closure of the Australian-run school in RPC 1 in July 2015. Students were sent to the local schools. Several issues have been reported since students were relocated.

Firstly, facilities at the schools are inadequate in comparison with the RPC school. Students were transferred from air-conditioned classrooms with a low student to teacher ratio, into classrooms with no air-conditioning and a higher student to teacher ratio.[18]

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[14] *Select Committee on the RPC in Nauru Report 2015*, x.
[15] Refugee Council of Australia, 'Declaration of the Refugee Council of Australia: Universal Periodic Review Pre-session on Nauru, Geneva' (Media Release, October 2015) 2 <http://www.refugeecouncil.org.au/wp-content/uploads/2015/10/1510-UPR-Presession-Nauru.pdf>.
[16] Hayden Cooper, 'Raped on Nauru: Video Captures Moment Somali Refugee Pleads for Help from Police after Alleged Sexual Assault', *ABC News* (online), 28 September 2015 <http://www.abc.net.au/news/2015-09-28/two-refugees-allegedly-raped-on-nauru/6809956>.
[17] Australian Human Rights Commission, 'Commission Responds to Detention Changes on Nauru' (Media Release, 9 October 2015) <https://www.humanrights.gov.au/news/stories/commission-responds-detention-changes-nauru>.
[18] Chris Kenny, 'School Boycott Flashpoint between Refugees and Nauru Islanders', *The Australian* (online), 23 October 2015 <http://www.theaustralian.com.au/national-affairs/immigration/school-

Secondly, the educational standards of the Nauruan schools are inadequate. Several reports have emerged which indicate that lessons are taught exclusively in the Nauruan language, training requirements of teachers are low, and the special education needs of students are unable to be met.[19] These inadequacies in Nauruan schools and the detrimental impact this was having on students were reported in the AHRC's 'Forgotten Children' report, but have not been addressed.[20]

Thirdly, reports have arisen of harassment of asylum seeker children. This includes allegations from a former teacher that a five-year-old asylum seeker was urinated on by Nauruan students, and that several young female asylum seekers have been sexually harassed at the school. Other reports indicate that students have been harassed by local teachers, both verbally and physically.[21]

Fourthly, reports indicate that absenteeism from the Nauruan schools has risen dramatically amongst the asylum seeker population, with parents and students protesting the safety issues and conditions of the school.[22] However, a spokeswoman from the DIBP stated in June that:

> Integration of asylum seeker children into local schools is consistent with both open centre processing arrangements and education opportunities already accessed by refugee children in Nauru. Transition to local schools will minimise disruption of an asylum seeker child's education in the event that they are found to be owed Nauru's protection and therefore are required to enrol in local schools.[23]

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boycott-flashpoint-between-refugees-and-nauru-islanders/news-story/058f65a79a37eedca3b3fd38bd18fc37>.

[19] David Mark, 'Nauru Conditions "Cruel" and "Inhumane", Children Traumatised: Former Teacher', *ABC News* (online), 4 February 2016 <http://www.abc.net.au/news/2016-02-04/nauru-conditions-'cruel'-and-'inhumane'-former-teacher-says/7140484>; Nicole Hasham, 'Asylum Seeker Children on Nauru Abused, Sexually Harassed at School: Former Teacher', *Sydney Morning Herald* (online), 8 January 2016 <http://www.smh.com.au/federal-politics/political-news/asylum-seeker-children-on-nauru-abused-sexually-harassed-at-school-former-teacher-20160107-gm1mdh.html>.

[20] Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014) 184–5.

[21] Nicole Hasham, 'Asylum Seeker Children on Nauru Abused, Sexually Harassed at School: Former Teacher', *Sydney Morning Herald* (online), 8 January 2016 <http://www.smh.com.au/federal-politics/political-news/asylum-seeker-children-on-nauru-abused-sexually-harassed-at-school-former-teacher-20160107-gm1mdh.html>.

[22] Chris Kenny, 'School Boycott Flashpoint between Refugees and Nauru Islanders', *The Australian* (online), 23 October 2015 <http://www.theaustralian.com.au/national-affairs/immigration/school-boycott-flashpoint-between-refugees-and-nauru-islanders/news-story/058f65a79a37eedca3b3fd38bd18fc37>.

[23] Paul Farrell 'Nauru Plan to Move Asylum Seeker Children to Local Schools Sparks Concern', *The Guardian* (online), 30 June 2015 <http://www.theguardian.com/australia-news/2015/jun/30/nauru-plan-to-move-asylum-seeker-children-to-local-schools-sparks-concern>.

It is our understanding that the decision to close the RPC school did not consider the safety of asylum seeker children. No plans have been released for the reopening of the Australian-run school. Short of ending offshore processing of children, for reasons discussed elsewhere in this submission, it is recommended that the DIBP reinstate an Australian-run school on Nauru for children housed in the RPC to ensure asylum seeker children can access education of a good standard, in a safe and comfortable environment.

III *Recommendation Three*

Recommendation three of the Moss Review was that:

> The Department give consideration to how it could support the Government of Nauru to enhance forensic services to investigate, record and prosecute incidents of sexual and other physical assault in the Centre.

The Moss Review found that contract service providers were acting appropriately in dealing with complaints related to sexual assault and other assaults.[24] The main issue is that the most the contract service providers could do was refer the matter to the Nauru Police Force ('NPF').

The Moss Review concluded that the Nauruan authorities are not equipped to investigate, record and prosecute incidents related to sexual and other physical assault. The Review went on to suggest that improvements were much needed to enhance forensic services that would assist in investigating, recording and prosecuting incidents related to sexual assault.[25]

The review also recommended the availability of sexual assault kits and trained forensic personnel as these services are largely outside the capabilities of the Nauruan hospital and NPF.[26]

Finally, the Moss review also commented on Australia's need to assist the Nauruan government with reforming its outdated and ineffective *Criminal Code 1899* (Nauru) ('*Criminal Code*').[27]

[24] *Moss Review 2015*, 46.
[25] Ibid 46–7.
[26] Ibid.
[27] Ibid 47.

The following section will focus on ways in which the Australian government can assist the NPF with investigating sexual assault matters. This submission will also highlight how the Australian government must assist the Nauruan government with reforming its *Criminal Code*. It should be noted that the following section will only focus on sexual assault.

A The Nauru Police Force: Capacity, Resources and Motivation

The NPF has a pivotal role to play in the investigation and prosecution of sexual assault and other assaults. There are two key issues:

- NPF's capacity and resources to investigate these matters; and
- NPF's motivation or interest in pursuing these matters.

The NPF is a small force designed to meet the needs of a small population. It has been consistently stated in the Moss Review and the recent Select Committee on the RPC in Nauru that the NPF lack the capacity to investigate claims of sexual assault at the processing centre. The recent Select Committee for example, highlighted that the NPF are not adequately trained to work 'with trauma issues and sexual assault'.[28] A former Save the Children Australia employee further noted that sexual assault victims are not promptly taken to hospital for treatment, as well as not being provided with support services such as a psychologist or social worker. Forensic examination was reported to be virtually non-existent as part of the investigation process.[29]

There are numerous examples of the NPF failing to properly investigate sexual assault matters. One example in particular, highlights all the shortcomings of the NPF. An Iranian asylum seeker was attacked, forced to give oral sex and was bitten on her breasts and shoulders. The police officers who picked her up stopped on their way back to the station to watch a 45 minute fireworks display while she lay injured and traumatised in the police vehicle. The police also accused her of fabricating the story and commented on how she was not cooperating.[30]

This one example shows how the NPF are not qualified to investigate sexual assault. The NPF have demonstrated a lack of training when it comes to communicating with traumatised

[28] *Select Committee on the RPC in Nauru Report 2015,* 20.
[29] *Select Committee on the RPC in Nauru Report 2015,* 100.
[30] Nicole Hasham, 'Claims Nauru Police Watched Fireworks As Asylum Seeker Sexual Assault Victim Waited', *The Sydney Morning Herald* (online), 21 August 2015 <http://www.smh.com.au/federal-politics/political-news/claims-nauru-police-watched-fireworks-as-asylum-seeker-sexual-assault-victim-waited-20150820-gj3ipa.html>.

and vulnerable victims. The lack of forensic resources is also highlighted in this example as the NPF seemed adamant on relying on the victim's recount, rather than analysing her injuries and the crime scene. Since the NPF are not undertaking investigations to the expected Australian standards, it is therefore up to the Australian government to make sure that the NPF are equipped with the right resources, training and motivation to investigate sexual assault claims.

The Australian government has accepted every recommendation of the Moss Review and has claimed that it has put in action plans to meet these recommendations. Regarding recommendation three, the Australian government has indicated that it supports the Nauruan government with various safety and security initiatives. The most relevant is the Gender Violence and Child Protection Unit that aims to assist women and children with various mental and physical issues. Initiatives like this generally aim to develop a framework based on prevention, early intervention, treatment of victims and rehabilitation of offenders.[31] While these initiatives are positive, reporting crimes to the NPF still remains a critical issue. This appears to be a total roadblock that is being ignored by the Australian government as the NPF has continuously showed their inability to properly investigate and finalise matters.

The other means by which the Australian government can assist the Nauruan government with improving its forensic services is through the Australian Federal Police ('AFP'). In response to the Moss Review, the government has deployed four AFP officers to advise the NPF, bringing the total AFP presence to six. Two of the AFP officers specialise in sexual assault while the other two officers specialise in public disorder.[32] While it is beneficial to have experts educate the NPF, the AFP officers are strictly restricted to an advisory role. The AFP officers are not allowed to exercise Nauruan policing powers which means that the power to arrest, question witnesses/victims and to generally investigate are beyond the scope of the AFP. At best, the additional officers will do nothing more than educate and encourage better practices during police investigations.

It is submitted that the AFP need a far greater role at the NPF, to ensure that sexual assault is properly handled at the RPC. The AFP previously had a much larger and more effective role in Nauru, and it is disheartening that this has not continued when it is so evidently needed. Until July 2013, AFP officers used to hold the roles of police commissioner, operations

[31] Pacific Women, *Nauru Welcomes PACTAM Gender Based Violence Counsellor/Specialist* <http://www.pacificwomen.org/news/nauru-welcomes-pactam-gender-based-violence-counsellorspecialist/>.
[32] *Select Committee on the RPC in Nauru Report 2015*, 139.

adviser and logistics adviser, meaning that the AFP had the power to influence police investigations. The AFP was even funding the NPF to ensure that they were equipped with an adequate police headquarters.[33] Peter Law, former Resident Magistrate of Nauru, has previously submitted that since the dismissal of Police Commissioner Richard Britten, he has 'lost all confidence in the capacity of the NPF to act independently or competently'.[34] This is based on the NPF's failure to respond to Law's calls to undertake certain investigations. The diluted role of the AFP is concerning because at the end of the day, the NPF make the final judgment on which matters to pursue, how to investigate and who to arrest and charge.

The final point that was alluded to earlier is that the NPF are seemingly not interested in what occurs at the RPC. The United Nations has noted that the NPF's lack of interest in these crimes increases the risk of sexual assault repeating, as well as decreasing the chance of sexual assault being reported.[35] It seems that the NPF do not only require education and resources, they also need motivation. Unfortunately, the current assistance provided by the Australian government falls short of what is required. Nevertheless, it is worth highlighting as it makes the case for a stronger and more prevalent AFP presence.

B Reforming the *Criminal Code 1899* (Nauru)

The Moss Review noted that an important step towards improving the prosecution of sexual assault and other assaults is through reforming the *Criminal Code*. It should be noted that law reform alone will not alleviate this issue but it is a very important step in the right direction as a clear and detailed legislative framework will help aid in gaining proportionate convictions. A clear and detailed legislative framework will also increase the usefulness of any forensic evidence uncovered at a crime scene, as well as guide the relevant authorities to what constitutes unlawful behaviour during investigations.

1 *Sexual Assault*

Nauruan laws related to sexual offences are simply inadequate and provide limited protection to asylum seekers currently being processed at Nauru. The legislation for sexual offences was

[33] Australian Federal Police, Submission No 5 to Joint Committee on the Australian Commission for Law Enforcement Integrity, Parliament of Australia, *Integrity of Overseas Commonwealth Law Enforcement Operations*, March 2012, 7.
[34] Peter Law, Submission No 28 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 2015, 2.
[35] 'UN Human Rights Office Raises Concerns about Sexual Assault Allegations by Asylum Seekers in Nauru', *UN News Centre* (online), 27 October 2015 <http://www.un.org/apps/news/story.asp?NewsID=52390#.VsrcLJx96Ul>.

adapted from mid-20th century colonial powers and simply does not reflect contemporary standards. These laws still are based around archaic concepts such as 'decency' and 'morality' and view rape as injury caused to a husband or father, rather than being a law in place that serves to protect women.[36]

The Nauruan government is not taking this issue seriously enough. Recent amendments to the Nauruan *Criminal Code* have instead focused on offences related to medical procedures[37] and the controversial offence that conceivably limits free speech.[38] The closest recent amendment instead comes from the *Criminal Procedure Act 1972* (Nauru) which introduced life imprisonment for habitual sexual offenders.[39] While the tougher penalty is welcome, it does not assist authorities with accordingly prosecuting sex offenders.

2 *Definition of 'Carnal Knowledge'*

The first major issue with the Nauruan legislation can be found in the definition of 'carnal knowledge' in the *Criminal Code* section 6:

> When the term '*carnal knowledge*' or the term '*carnal connection*' is used in defining an offence, it is implied that the offence, so far as regards that element of it, is complete upon penetration.

The ambiguous language used to define carnal knowledge is worrying as it fails to capture a complete set of sexual acts, instead restricting itself to penetration, which suggests penile penetration is a necessary requirement of rape.[40] As a result, the use of carnal knowledge in the definition of rape hinders the usefulness of the offence:

> Any person who has carnal knowledge of a woman or girl, not his wife, without her consent, or with her consent, if the consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to

[36] Christine Forster, 'Sexual Offences Law Reform in Pacific Island Countries: Replacing Colonial Norms with International Good Practice Standards' (2009) 33 *Melbourne University Law Review* 833, 834, 839.
[37] *Criminal Code (Amendment) Act (No 24) 2015* (Nauru) s 4, inserting *Criminal Code* s 199A; *Criminal Code (Amendment) Act (No 24) 2015* (Nauru) s 5, amending *Criminal Code* s 282.
[38] *Criminal Code (Amendment) Act (No 13) 2015* (Nauru) sch 1 item 1, inserting *Criminal Code* s 244A.
[39] *Criminal Procedure (Amendment) Act (No 12) 2015* (Nauru) sch 1 item 1, inserting *Criminal Procedure Act 1972* (Nauru) s 7A.
[40] See, eg, *Republic v Diehm* [2011] NRSC 24 (29 November 2011), [140] (Eames CJ); *Republic v Adam* [2007] NRSC 4 (6 December 2007); *Republic v Scotty* [2008] NRSC 1 (10 March 2008).

> the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape.[41]

This definition of rape fails to capture a range of sexual assaults that men or women at the processing centre may experience. For example, it fails to take into account forced or coerced acts that are still distressing and injurious to women that do not involve penile penetration.[42] In comparison, the *Crimes Act 1900* (NSW) is a legislative example that is generally compliant with the recommendations set out by the *Convention on the Elimination of all Forms of Discrimination against Women*.[43] The definition of 'sexual intercourse' in the *Crimes Act 1900* (NSW) section 61H provides a more detailed and inclusive list of sexual acts:

> (1) For the purposes of this Division, 'sexual intercourse' means:
>
> (a) sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person by:
>
> (i) any part of the body of another person, or
>
> (ii) any object manipulated by another person,
>
> except where the penetration is carried out for proper medical purposes, or
>
> (b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or
>
> (c) cunnilingus, or
>
> (d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

The Nauruan equivalent only covers section (1)(a) of the New South Wales definition. It does not specifically account for the penetration of the vagina, the anus or any other part of a victim such as the mouth. It also does not specify whether any other body part, such as the offender's hands or mouth or object can constitute sexual intercourse.

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[41] *Criminal Code* s 347.

[42] Christine Forster, 'Sexual Offences Law Reform in Pacific Island Countries: Replacing Colonial Norms with International Good Practice Standards' (2009) 33 *Melbourne University Law Review* 833, 835–6.

[43] Opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981). South Australian amendments to sexual assault definitions similar to those in NSW have been put forward as examples implementing the Convention: Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Australia – Addendum – Information Provided by Australia on the Follow-Up to the Concluding Observations of the Committee*, 46th sess, UN Doc CEDAW/C/AUL/CO/7/Add.1 (22 November 2012) 17–19.

It is recommended that the Australian government work with Nauruan authorities to amend Nauru's *Criminal Code* to create a more contemporary and accommodating sexual assault offence that applies to both males and females.

The lack of aggravating factors makes the offence of rape harder to prosecute when it comes to both charging and sentencing the offender. The judiciary has the task of deciding whether an offender should be sentenced to as little as 3 years' imprisonment[44] to potentially life imprisonment.[45] It is recommended that aggravated sexual assault offences be introduced to take into account certain contexts and situations, as well as accordingly punish offenders based on the severity of their crime.

The C*rimes Act 1900* (NSW) provisions for aggravated sexual assault include circumstances such as infliction of bodily harm,[46] threat to inflict bodily harm,[47] sexual assault in company,[48] when the victim is under authority of the offender,[49] and when the victim is deprived of his or her liberty.[50]

These are some examples of aggravating circumstances that can assist the prosecution process in being more efficient, as well as easily capture the seriousness of the types of sexual assaults asylum seekers experience at the processing centre.

3 *Indecent Assault*

The indecent assault provisions also suffer from similar issues to the rape provision. There are no aggravating factors and the narrow definition of the offence makes the prosecution process difficult. The *Criminal Code* section 350 provides that '[a]ny person who unlawfully and indecently assaults a woman or girl is guilty of a misdemeanour, and is liable to imprisonment with hard labour for two years'.

The main issue with the indecent assault provision is that since the rape provision does not account for other types of sexual violation, equally serious and injurious acts are subject to a relatively minor offence. Being classed as a misdemeanour means that the offender is only

[44] *Republic v Karl* [1985] NRSC 1 (20 November 1985) (Donne CJ).
[45] *Criminal Code* s 348.
[46] *Crimes Act 1900* (NSW) s 61J(2)(a).
[47] *Crimes Act 1900* (NSW) s 61J(2)(b).
[48] *Crimes Act 1900* (NSW) s 61J(2)(c).
[49] *Crimes Act 1900* (NSW) s 61J(2)(e).
[50] *Crimes Act 1900* (NSW) s 61J(2)(i).

liable to imprisonment for two years. This offence is inadequate and should have a range of penalties and aggravating factors that take into account the seriousness of certain sexual acts.

In conclusion, a stronger AFP presence at the NPF is needed to improve the skills of the Nauruan police. This involves providing resources to assist with forensic services and advice on how to handle complex crimes such as sexual assault. The Australian government should also push for a more influential AFP presence to ensure that the NPF are motivated to actually pursue sexual assaults at the processing centre. It is also submitted that the *Criminal Code* must be dramatically reformed to suit contemporary values. Reform should account for a range of offences and aggravating factors related to sexual assault as this will increase the success of prosecuting offenders.

IV *Recommendation Four*

Recommendation four of the Moss Review was that:

> Nauruan government officials and the Department review and enhance the existing policy framework for identifying, reporting, responding to, mitigating and preventing incidents of sexual and other physical assault at the Centre. All staff members working at the Centre (Nauruan, Departmental and contract service providers) must understand the framework and their responsibilities under it.

A Inadequate Pre-transfer Screening Procedures

The AHRC has substantiated, through numerous case studies, that the DIBP's inadequate pre-transfer assessment procedures have exacerbated the grievous psychological/physical conditions of certain asylum seekers. In particular, the Commission highlighted that a child who had been diagnosed with mental health problems on Christmas Island was transferred to Nauru.[51] Upon arriving at Nauru, the RPC was unable to supply the bed-wetting medication he required because the health provider had simply 'run out', and when he was eventually supplied with anti-depressants months later he developed faecal incontinence.[52] As such, this exemplifies the Department's disregard for identifying and determining whether the needs of certain individuals will be effectively met within the parameters and resource constraints pervading the RPC on Nauru.

[51] Australian Human Rights Commission, Submission No 25 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 27 April 2015, 3–4.
[52] Ibid.

It is also noted that in deeming the appropriateness of children for transfer to Nauru, all DIBP officers failed to record any individualised information in the Best Interest Assessment form.[53] Consequently, there are currently no specific considerations that must be accounted for in regard to the condition of children, which is further evidenced by the use of identical generalised statements (between 1 January 2014 and 31 March 2014) as the basis for transferring unaccompanied children.[54] These features suggest that the pre-screening process is being conducted arbitrarily and not according to law.

The detrimental consequences of insufficient pre-screening procedures are not only limited to children and extend to all individuals who are transferred to Nauru. Medical assessments are conducted within a time horizon of 48 hours which has been deemed to be grossly inadequate by the Royal Australasian College of Physicians.[55] This is because a detailed history and thorough examination for chronic or acute conditions cannot be properly conducted due to the narrow time restraints placed on medical staff.[56] This is further exemplified by the fact that a doctor on Christmas Island claims that a woman deemed to be pregnant with twins and a four year old boy suffering from cerebral palsy were transferred to Nauru.[57] Clearly, the purpose of pre-transfer screening appears to involve protecting the Department's best interests as opposed to the needs of asylum seekers.

Another significant pitfall of the Department's pre-transfer screening procedures is that it does not identify individuals that have previously been victims of mental trauma and physical or sexual assault.[58] The United Nations High Commissioner for Refugees has further confirmed this fact by expressing concern over the continued identification of torture and trauma survivors through post-transfer mental health screening conducted by International Health and Medical Services.[59]

These inadequacies need to be addressed in order to prevent people with vulnerable or unstable physical or mental conditions from being placed in a volatile environment that the lacks appropriate medical facilities to handle their conditions.

[53] Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014) 193.
[54] Ibid.
[55] Ibid 190–2.
[56] Ibid.
[57] Ibid.
[58] Ibid.
[59] Ibid.

B *Australian Border Force Act 2015* (Cth) and Under-reporting of Incidents

Of particular concern is the way in which section 24 of the *Australian Border Force Act 2015* (Cth) ('*ABF Act*') compels DIBP workers and contractors employed by the Department to subscribe to an oath which is not particularised.[60] Due to the obscurity encompassing the contents of the oath it is unclear whether staff at the Centre are prevented from reporting cases of physical and mental harm, which causes a dichotomy between their ethical and professional obligations and the requirements of the *ABF Act*.[61] Therefore, the fear of prosecution and possible termination of their contract subverts the responsibilities of the staff at the Centre.

Contractors face further issues in clearly identifying the boundaries they operate within and comprehending their responsibilities due to the limitation on self-autonomy imposed by section 26 of the *ABF Act*.[62] This section enables the Australian Border Force Commissioner to direct individuals employed by the Department with full discretion and reduces the transparency/accountability of reporting mechanisms on Nauru. For example, medical staff on Nauru could be required to seek permission before briefing their work to organisations.[63] As a result, this only serves to augment the prevalence of under-reporting pertaining to various forms of assault by staff on Nauru.

The lexical choices of 'entrusted person', 'protected information', and 'secrecy' in section 42 of the *ABF Act* resonate with the notion that reporting mechanisms on Nauru are inherently distorted due to the provisions of this legislation. The disclosure of certain knowledge constitutes an offence and thereby intimidates staff members from fulfilling their ethical and professional obligations. When interpreted purposively, section 42 of the Act appears to deny accountability and suppress the basic human rights of asylum seekers on Nauru. This results in a conflict between the duty of care and the obligation to follow the law which reinforces the structural issues of under-reporting. Thus, we submit that in order to fully realise the intent of Recommendation four an independent monitor must be established on-site to facilitate dialogue between the DIBP and Nauru in rectifying complaints of assault.[64]

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[60] Greg Barns and George Newhouse, 'Border Force Act: Detention Secrecy Just Got Worse' on *The Drum*, 28 May 2015 <http://www.abc.net.au/news/2015-05-28/barns-newhouse-detention-centre-secrecy-just-got-even-worse/6501086>.
[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] See, eg, Save the Children Australia, Submission No 30 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, April 2015, 31–2.

C Disruption of Family Units

The inability of parent-child relationships to cope with the arrangements of Nauru has resulted in the destruction of family units and propagated high levels of anxiety and stress. In particular, former Save the Children Australia ('SCA') employee Tobias Gunn's submission to the Select Committee on Nauru noted that children devoted their time to SCA staff members because they are the only ones to own toys.[65] As a result, this alienated parents from their children which culminated in some individuals deciding to relinquish the care of their children.[66]

The unhealthy disconnect between parents and children noted above fosters an environment permeated by extreme levels of anxiety which could trigger incidents of assault. Nauruan officials and the DIBP could easily mitigate this matter and satisfy the criterion expressed in Recommendation four by supplying basic resources appropriate for children (such as toys) and generating a structured approach for the way in which staff members communicate to children. This would allow for the family dynamic to be preserved in a healthy manner and indirectly suppress the unhealthy proliferation of incidents of assault. Further, shared family activities and skill-based vocational programs could produce positive cognitive feedback and generate a supportive and communal environment.

Furthermore, aspects of the physical layout of the Nauru RPC create a risk of assault. Previous submitters have noted that the distance between the accommodation and the toilets is unsafe.[67] The toilets retain poor external lighting and are purportedly one area where sexual and physical harassment occurs frequently.[68] The strict rules governing access to toilet facilities are in and of themselves likely to place individuals in scenarios that are inductive to assault; for example, individuals must attend toilets that they are designated irrespective of

[65] Tobias Gunn, Submission No 68 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 2015, 6.
[66] Submission No 84 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 20 May 2015, 4.
[67] Asylum Seeker Resource Centre, Submission No 27 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 2015, 4; Submission No 80 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 2015, 7.
[68] Viktoria Vibhakar, Submission No 63 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 8 May 2015, 31; *Select Committee on the RPC in Nauru Report 2015*, 111 [4.108].

whether there are closer facilities.[69] It is our submission that the DIBP and officials of Nauru immediately remove such strict procedures.

Professor David Isaacs in his submission to the Select Committee on the RPC in Nauru claimed that attempting to reach toilet facilities involves 'crossing dark, open land, often under the gaze of large male guards'.[70] This raises especial concern for women who feel so intimidated that they suffer from nocturnal enuresis rather than attending the toilet at night. It is our submission that the DIBP and Nauru officials engage in assigning same sex guards to escort individuals to and from the toilet facilities in order to prevent incidents of assault and increase the quality of life for asylum seekers on Nauru.

D Formulating Effective Responses to Sexual Assault

There are virtually no safeguards for victims of sexual assault due to the severely lacking health services that currently exist on Nauru. No specific psychiatric support is available for victims of sexual assault and no screening available for sexually transmitted infections.[71] Also, psychologists on Nauru lack expertise in sexual assault.[72] This further emphasises the clear lack of sufficient health professionals on Nauru that are capable of effectively responding to victims of sexual assault.

V *Recommendations Five and Six*

Recommendations five and six of the Moss Review were, respectively, that:

> The Department liaise with the Government of Nauru to ensure that child protection issues are reflected in the work currently being done on the Nauruan criminal code.
>
> The Department and the contract service providers continue to work with the Nauruan government to ensure that a robust child protection framework is developed.

[69] Submission No 84 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 20 May 2015, 3; *Select Committee on the RPC in Nauru Report 2015*, 112–13 [4.113]–[4.114].
[70] Professor David Isaacs, Submission No 11 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 2015, 1.
[71] Jenna Price, 'Where Are the Safeguards for Victims of Assault on Nauru?', *The Sydney Morning Herald* (online), 19 October 2015 <http://www.smh.com.au/comment/where-are-the-safeguards-for-victims-of-assault-on-nauru-20151019-gkch6i.html>.
[72] Ibid.

A Moss Review Findings

The Moss Review received evidence from multiple sources of several incidents of self-harm, sexual and other physical assault involving minors. The Review was not able to substantiate all of these allegations but confirmed that there were 17 recorded incidents involving the self-harm of minors between October 2013 and October 2014.[73] It also investigated 'a number of' formal allegations of sexual and physical assault of children that were reported between 8 September 2013 and 30 October 2014.[74]

A key concern raised by the Moss Review was the lack of legal mechanisms for redress available to victims of child abuse and an absence of child protection provisions in the Nauruan *Criminal Code*. The Review recommended that the DIBP 'liaise with the Government of Nauru to ensure that child protection issues are reflected in the work currently being done on the Nauruan criminal code'.[75] It also stressed the importance of developing a robust child protection framework in cooperation with the Nauruan government and contract service providers.[76]

B Response to the Moss Review and the Child Protection Panel

In May 2015, the Abbott Government appointed a Child Protection Panel in response to the recommendations of the Moss Review. The Panel's mandate is to provide independent advice on issues of child protection. According to the Panel's terms of reference published by the DIBP, the Panel will assess the 'adequacy of Departmental and service provider policy and practice around the management of incidents of abuse, neglect or exploitation involving children' and subsequently issue a report recommending better practices.[77] The Panel has been charged with reviewing allegations of sexual and other physical assault of minors dating back to 2008 and assessing whether each complaint was handled appropriately.[78] It was also

[73] *Moss Review 2015*, 36 [3.92].
[74] Ibid 36–7 [3.97].
[75] The Moss Review, Recommendation 5
[76] The Moss Review, Recommendation 6.
[77] Department of Immigration and Border Protection (Cth), *Child Protection Panel – Terms of Reference* (11 January 2016) <https://www.border.gov.au/about/reports-publications/reviews-inquiries/child-protection-panel-terms-of-reference>.
[78] Heath Aston, 'Expert Panel into Child Protection in Detention Announced As AFP Heads to Nauru', *The Sydney Morning Herald* (online), 9 May 2015 <http://www.smh.com.au/federal-politics/political-news/expert-panel-into-child-protection-in-detention-announced-as-afp-heads-to-nauru-20150508-ggxeo8.html>.

reported that six AFP officers were to be sent to Nauru to collaborate with and advise the NPF on investigating cases of sexual abuse.[79]

The Select Committee on the RPC in Nauru was established on 26 March 2015, and received 101 submissions. In its submissions to the Select Committee on RPC in Nauru, the DIBP asserted that it was working with the Nauruan government to insert child protection elements into Nauruan legislation and develop a child protection framework.[80]

These are welcomed as positive developments in implementing Recommendations five and six of the Moss Review.

C Nauru *Criminal Code* and Child Protection

The Moss Review noted that the Nauruan government was working with the Australian Attorney-General's Department to revise its criminal code.[81] A concerning feature of the *Criminal Code* is that its provisions as they currently stand do not provide adequate protection for children against sexual abuse. Children living in the RPC in Nauru are particularly vulnerable to sexual assault. Not only do employees of contract service providers and members of the NPF have unprecedented access to minors, but the availability of complaint mechanisms is severely limited.

One of the primary issues with the *Criminal Code* in the context of child protection is that the prescribed penalties do not reflect the severity of the offences. The vast majority of provisions dealing with sexual offences against children are described as misdemeanours. The offence of 'unlawful carnal knowledge' of a girl under the age of seventeen, for example, is a misdemeanour and is punishable by imprisonment with hard labour for two years.[82] Similarly, while a person who has unlawful carnal knowledge of a girl under the age of twelve is liable to imprisonment with hard labour for life, attempted unlawful carnal knowledge is considered only a misdemeanour with a penalty of three years imprisonment. [83] This appears to be drastically out of step with the prescribed penalty of life imprisonment for the crime of rape.[84] Although the crime of rape applies to girls, a lack of consent must be established in order to prove the offence. Many legislative provisions that create offences for

[79] Ibid.
[80] *Select Committee on the RPC in Nauru Report 2015*, 22–3 [2.50].
[81] Moss Review, 50 [3.182].
[82] *Criminal Code* s 216.
[83] *Criminal Code* s 212.
[84] *Criminal Code* s 348.

child sexual assault in other jurisdictions remove the consent element.[85] This provides an additional layer of protection for children.

As discussed in Part III above, the act of 'carnal knowledge' as defined in the *Criminal Code* involves penetration. It is unclear, however, what the elements of offences involving non-penetrative acts are. Sections 210 and 216 make it a crime to 'unlawfully and indecently' deal with boys under the age of fourteen years and girls under the age of seventeen years respectively. The term 'deal with' is defined as analogous to an act that, if done without consent, would constitute an assault, but the *Criminal Code* does not clearly define the parameters of sexual assault. Further, there is only one prescribed sexual offence in relation to boys below the age of 14.[86]

We recommend that in implementing Recommendation five of the Moss Review, the Nauruan government, in cooperation with the Australian Attorney-General's Department, ensure that the penalties for sexual offences against children are directly proportionate to the severity of the offence. We also recommend that the current provisions regarding child sex abuse be replaced with gender-neutral provisions and that the confusing classification of offences based on age be simplified. In accordance with good practice, such provisions should recognise aggravating or situational factors, such as if the perpetrator is a caregiver or family relative, or if the assault occurs in a situation involving a breach of trust. While it is not strictly necessary to differentiate between penetrative and non-penetrative acts, the parameters of sexual assault should be clearly outlined. A model should be implemented that recognises the unique circumstances surrounding child sexual assault, such as grooming and other coercive techniques.

D Reporting Incidents of Child Abuse

A key recent development that is likely to inform the implementation of Recommendation six of the Moss Review is the enactment of the *ABF Act*, which commenced on 1 July 2015. Part 6 of the Act makes it an offence for an 'entrusted person' to disclose 'protected information', punishable by 2 years imprisonment.[87] This effectively imposes a 'gag order' on individuals

[85] See, eg, *Crimes Act 1900* (NSW) s 66A.
[86] *Criminal Code* s 210.
[87] *ABF Act* s 42.

who wish to come forward about allegations of abuse and precludes media scrutiny of conditions on Nauru, particularly in relation to child protection issues.[88]

The DIBP declared that individuals who wish to report cases of child abuse may lawfully do so in accordance with the *Public Interest Disclosure Act 2013* (Cth) ('*PID Act*').[89] What is troubling, however, is that the coverage of *PID Act* does not extend to disclosures made regarding the conduct of anyone who is not an Australian government official or contractor. This means that disclosures about Nauruan government officials, police officers or detainees are not protected by *PID Act*. Whistleblowers are also required to make 'complex legal assessments about whether their disclosure has been "adequately dealt with"' by internal review procedures before coming forward in order to be protected from prosecution.[90] The legislation further stipulates that the disclosure must not be 'contrary to the public interest',[91] a determination which the average person is not equipped to make.

The exception contained in section 48 of the *ABF Act* that allows disclosures where there is a serious threat to the life or health of an individual arguably extends to cover disclosures regarding serious allegations of child abuse. However, individuals who wish to rely on this exception bear the onus of proving that a 'serious threat' is present. The potential consequences – imprisonment or loss of employment – that may stem from a failure to satisfy this requirement may act as a serious disincentive to report instances of child abuse.

In October 2015, Shadow Immigration Minister, Richard Marles, introduced into Parliament the Migration Amendment (Mandatory Reporting) Bill 2015 (Cth) ('Mandatory Reporting Bill'), which would place an obligation on individuals and organisations working in detention centres to report the sexual or physical assault of children to the Australian Border Force Commissioner within 24 hours of forming a reasonable belief that this has occurred.[92] If passed, the Mandatory Reporting Bill will fall within the exception provided for by section 42(2)(c) of *ABF Act*, which permits disclosure where it is required or authorised by a law of the Commonwealth, a state or a territory.

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[88] George Newhouse, 'Let Me Clear Up the Government's Clarification of the *Border Force Act*', *The Guardian* (online), 8 July 2015 <http://www.theguardian.com/commentisfree/2015/jul/08/let-me-clear-up-the-governments-clarification-about-the-border-force-act>.
[89] Department of Immigration and Border Protection and the Australian Border Force, 'Secrecy Provisions of the Australian Border Force Act' (Media Release, 7 July 2015) <http://newsroom.border.gov.au/releases/secrecy-provisions-of-the-australian-border-force-act>.
[90] George Newhouse, 'Let Me Clear Up the Government's Clarification of the *Border Force Act*', *The Guardian* (online), 8 July 2015 <http://www.theguardian.com/commentisfree/2015/jul/08/let-me-clear-up-the-governments-clarification-about-the-border-force-act>.
[91] *PID Act* s 26.
[92] Mandatory Reporting Bill sch 1.

The Mandatory Reporting Bill alone, however, does not suffice in building a strong child protection framework in Nauru. It suffers from a number of deficiencies: first, it does not make reference to non-physical forms of abuse; second, it does not protect individuals from prosecution who wish to report claims of abuse to the media as it applies only to an internal reporting procedure; and third, it does not operate as a guarantee of adequate investigation by the NPF.

The psychological trauma induced by mandatory detention cannot be overstated. Human Rights Watch has detailed the serious long-term impacts that children in detention may suffer, which include 'developmental delays, anxiety, depression, post-traumatic stress disorder, [and] memory loss'.[93] The Report published by the Select Committee concluded: 'these children are not only denied a reasonable approximation of childhood in the RPC, but often do not feel safe'.[94] The failure of the Mandatory Reporting Bill to specify psychological abuse in the definition of 'reportable assault' means that individuals who wish to report incidents involving the psychological harm of minors do not fall within the exception contained in section 42(2)(c) of the *ABF Act*.[95] We recommend that the Mandatory Reporting Bill incorporate psychological abuse within the definition of 'reportable assault'.

The introduction of mandatory reporting will not enable the public greater access to information regarding the welfare of children on Nauru given it applies only to internal reporting. The UN Special Rapporteur on Torture noted that regular and independent monitoring of immigration detention centres functions as a vital safeguard against the ill-treatment of children.[96] A lack of transparency is prohibitive in establishing any kind of accountability mechanism for contract service providers involved in running the RPC. Allowing the public and media greater access to information regarding allegations of child abuse will enable more comprehensive assessments of the adequacy of responses to such allegations. We recommend that there be greater transparency in relation to the wellbeing of children on Nauru. This can be achieved by extending the protection available in the Mandatory Reporting Bill to disclosures to the media to facilitate the appropriate level of public scrutiny of the situation of children in the RPC.

[93] Human Rights Watch, Submission No 72 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 5 June 2015, 3.
[94] *Select Committee on the RPC in Nauru Report 2015*, 131 [5.72].
[95] Migration Amendment (Mandatory Reporting) Bill 2015 (Cth) sch 1.
[96] Juan E Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 28th sess, Agenda Item 3, UN Doc A/HRC/28/68 (5 March 2013) 18–19 [83].

Serious doubt has been cast on the capacity of the NPF, particularly in responding to allegations of abuse made by detainees.[97] Khanh Hoang, an associate lecturer at the Australian National University, writes that of the 50 cases referred to the NPF over the last two and a half years only five charges were laid and two convictions recorded.[98] Former resident magistrate, Peter Law, has lamented the NPF's failure to properly address reported incidents of sexual and physical assault against women and children.[99] The NPF's limited training in dealing with traumatised and vulnerable victims seriously hinders adequate investigation of allegations of child abuse. As discussed elsewhere in this submission, we submit that a stronger AFP presence on Nauru that can provide advice to the NFP on how to handle sexual offences against children is necessary.

Finally, the Moss Review observed that there is a phenomenon of under-reporting instances of abuse and harassment for cultural and familial reasons.[100] We recommend that the DIBP and contract service providers not only implement concrete methods of addressing allegations of child abuse but take steps to foster an environment that encourages detainees to report incidences of harassment and assault.

E Departure of Save the Children Australia

The implementation of Recommendation six rests upon the presence of a body of trained professionals who possess expertise in child protection matters.

In both Transfield and the Department's submissions to the Select Committee, they pointed to the central role played by SCA in the provision of welfare services and support to children.[101] SCA was responsible for assessing incidents regarding the safety and welfare of children. The SCA Safeguarding and Protection Manager develops a case management plan,

[97] *Moss Review 2015*, 46.
[98] Khanh Hoang, 'Protecting Children from Abuse in Detention Requires More Than Mandatory Reporting' on *The Conversation* (14 October 2015) <https://theconversation.com/protecting-children-from-abuse-in-detention-requires-more-than-mandatory-reporting-49048 >.
[99] Peter Law, Submission No 28 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 2015, 1–2.
[100] *Moss Review 2015*, 4.
[101] Transfield Services, Submission No 29 to Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 1 May 2015, 8; Department of Immigration and Border Protection (Cth), Submission No 31 to Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, May 2015, 14.

escalates reporting of incidents to the Department and arranges for support for the child and their family.[102]

A press release issued by SCA declares that the organisation left Nauru on 31 October 2015 upon the expiration of their contract after they lost their bid to renew the contract to provide welfare services on the Island.[103] Several media reports confirm that Transfield Services won the bid to be the sole contract service provider on Nauru.[104] While Transfield has experience providing welfare services to adult men, they do not possess expertise in dealing with more vulnerable subsets of the detainee population, namely women and children. In their submissions to the Select Committee, Transfield assured the committee that they incorporated the Child Safeguarding Protocol ('CSP'), developed by SCA, into their induction program for new employees.[105] However, the inclusion of the CSP in Transfield's induction program will not in itself suffice without staff members who are properly trained in child protection matters. It is now also unclear what the process will be for reporting and managing incidents involving child abuse.

We recommend that a body of trained professionals with expertise in child protection matters be deployed to Nauru in order to ensure that children in the RPC are receiving the necessary medical, social and education services. Clear guidelines dictating how allegations of sexual, physical and psychological abuse of children are to be managed, escalated and responded to must be firmly implemented. We further recommend that a robust procedural framework be developed containing clear avenues for reporting the physical, sexual and psychological abuse of minors.

[102] *Select Committee on the RPC in Nauru Report 2015*, 107 [4.93].
[103] Save the Children Australia, 'In Its Last Act on Nauru, Save the Children Calls for Independent Oversight across All Australian-Run Processing Centres', (Media Release, 31 October 2015) <https://www.savethechildren.org.au/about-us/media-and-publications/media-releases/media-release-archive/years/2015/in-its-last-act-on-nauru,-save-the-children-calls-for-independent-oversight-across-all-australian-run-processing-centres>.
[104] Sarah Whyte and Jeanavive McGregor, 'Timeline: Why Save the Children Workers Want Almost $1 Million Compensation from the Federal Government', *ABC News* (online), 22 February 2016 <http://www.abc.net.au/news/2016-02-22/timeline-save-the-children-workers-on-nauru/7180992>.
[105] *Select Committee on the RPC in Nauru Report 2015*, 105 [4.84].

Term of Reference (d)

The extent to which the Australian-funded regional processing centres in the Republic of Nauru and Papua New Guinea are operating in compliance with Australian and international legal obligations

I *Australia Has a Non-Delegable Duty of Care to Asylum Seekers Detained on Nauru and Manus Island*

A Introduction

As previous submissions have noted, the question of whether the Commonwealth owes a duty of care to asylum seekers in the regional processing centres on Nauru and Manus Island has not been answered by the High Court.[1]

However, this submission argues that the state of Australian common law is such that the Commonwealth owes a non-delegable duty of care to those asylum seekers, given the facts about their relationship with the Commonwealth.

B What Is a Non-Delegable Duty of Care?

A non-delegable duty of care is a duty to *ensure* that one's duty of care is discharged. More precisely, one party, *A*, has a *non-delegable* duty of care to another party, *B*, if and only if *A* has a duty to *ensure* that *A*'s duty of care regarding *B* is discharged.[2]

C What Are the Consequences of a Non-Delegable Duty of Care?

If *A* owes *B* a non-delegable duty of care, then *A*'s duty of care to *B* cannot be discharged simply by employing a qualified and competent independent contractor to perform the tasks that are intended to fulfil the duty of care.[3] *A* must *additionally* ensure that reasonable care

[1] See, eg, Australian Lawyers Alliance, Submission No 14 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 27 April 2015, 18.
[2] See, eg, *Kondis v State Transport Authority* (1984) 154 CLR 672, 686–7 (Mason J); *Commonwealth v Introvigne* (1982) 150 CLR 258, 571 (Mason J).
[3] *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 331–2 (Brennan CJ); see also *Burnie Port Authority v General Jones Pty Ltd* (1994) 552 CLR 520, 550 (Mason CJ, Deane, Dawson, Toohey, and Gaudron JJ).

and skill is used by the employed contractor in performing the relevant tasks.[4] So if that contractor fails to exercise either reasonable care or skill in performing those tasks, then *A* will be liable for failing to *ensure* that the contractor performs the tasks for which they are employed with reasonable care and skill.[5]

Further, if that task carries with it an inherent risk of damage to the person (which is a question of fact, and not law)[6] and that risk eventuates, the employer can be liable for that damage to the person *even if* the employed contractor exercised reasonable care and skill in performing the relevant tasks.[7] That is because the employer allowed the possibility of the risk eventuating, and may themselves be in breach of their own duty for failing to avoid that risk.[8]

The harm that eventuates upon breach of a non-delegable duty of care need only be a variation of, and need not be identical with, the harm the risk of which was reasonably foreseeable in order to incur liability.[9]

D Two Arguments for a Non-Delegable Duty

So, do the facts about the relationship between the Commonwealth government and the asylum seekers they transfer to Nauru and Manus Island give rise to a non-delegable duty of care? There are two arguments for the conclusion that the Commonwealth owes those asylum seekers a non-delegable duty of care.

1 *Argument One: Argument by Analogy*

The first premise is that the Australian government is detaining the asylum seekers they transfer to Nauru and Manus Island. The second premise is that Australian common law recognises the detainer–detainee relationship as a relationship that gives rise to a duty of care. The third premise is that certain features about the relationship between the Commonwealth government and the asylum seekers they transfer to Nauru and Manus Island make that duty non-delegable.

[4] Ibid.
[5] *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 332 (Brennan CJ).
[6] Ibid 333.
[7] Ibid 332.
[8] Ibid.
[9] *Chapman v Hearse* (1961) 106 CLR 112, 120–1 (The Court).

Note that this argument applies to asylum seekers detained on Manus Island, and asylum seekers kept on Nauru up until early 2015. In early 2015, the regional processing centre ('RPC') at Nauru was 'opened' and asylum seekers kept in the centre could, with permission, leave the centre under certain conditions,[10] and in October the centre transitioned to a fully open arrangement.[11] It would seem, therefore, that asylum seekers kept on Nauru are currently not being 'detained'.

However, this argument still has force for allegations of breach of the government's non-delegable duty of care to asylum seekers detained on Manus Island, and asylum seekers detained on Nauru up until early 2015. Moreover, since the opening of the centre on Nauru occurred administratively, and was not the result of an enactment of statute, there is no legal obstacle preventing the future re-closing of the centre.

(a) Detention Gives Rise to a Duty of Care

According to Australian common law, prison authorities have a duty of care towards the prisoners they detain.[12] That duty requires prison authorities to exercise reasonable care and skill for the safety of prisoners in their custody, and that extends to preventing harm from the unlawful activities of third parties.[13] The duty is grounded in a necessary fact about the detainer–detainee relationship: in detaining a prisoner, a prison authority deprives a prisoner of his liberty and control of his person, and therefore of his capacity to protect himself.[14]

(b) Extending that Duty to Immigration Detention

In *NSW v Bujdoso*, the High Court cited with approval American authorities which noted that that necessary fact about detention is essential to all relationships in which one party stands *in loco parentis* for the other – that is, in all relationships in which one party has charge of the

[10] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1 (3 February 2016) [339]–[342] (Gordon J).
[11] Department of Immigration and Border Protection (Cth), 'Australia Welcomes Nauru Open Centre' (Media Release, 5 October 2015).
[12] See, eg, *Howard v Jarvis* (1958) 98 CLR 177, 183 (The Court); *L v Commonwealth* (1976) 10 ALR 269, 273 (Ward J); *New South Wales v Bujdoso* (2005) 227 CLR 1, 9–10 (The Court) ('*Bujdoso*').
[13] *Howard v Jarvis* (1958) 98 CLR 177, 183; *L v Commonwealth* (1976) 10 ALR 269, 273; *New South Wales v Napier* [2002] NSWCA 402 (13 December 2002) [75] (Mason P); *Bujdoso* (2005) 227 CLR 1, 9–10, 14–15.
[14] *Howard v Jarvis* (1958) 98 CLR 177, 183; *L v Commonwealth of Australia* (1976) 10 ALR 269, 273; *Bujdoso* (2005) 227 CLR 1, 14–15.

other in circumstances which deprive the latter of normal means of self-protection.[15] That generalization allows for the natural extension of the duty of care to immigration detention.[16]

In *S v Secretary, Department of Immigration*, Finn J found that the Commonwealth owed a non-delegable duty of care to asylum seekers detained at Baxter immigration detention centre.[17] This was for the following reasons. Firstly, even though the Commonwealth employed GSL to perform detention tasks at Baxter, that detention was both by and on behalf of the Commonwealth.[18] Secondly, the relationship between asylum seekers detained in Baxter and the Commonwealth is one of special dependence because the conditions in which they are detained entail that they have no capacity to provide for their own needs.[19] Thirdly, the content of the Commonwealth's duty of care regarding Baxter detainees requires a consideration of the contracting arrangements organized by the Commonwealth.[20] Thus the Commonwealth has a duty to *ensure* that reasonable care is taken of the detainees – that is, a non-delegable duty of care.[21] Justice Gordon ran a similar line of argument in *MZYYR v Secretary, Department of Immigration*.[22]

In *S v Secretary*, Finn J held that the Commonwealth's non-delegable duty of care regarding Baxter detainees minimally includes a duty to ensure their safety and welfare.[23] Further, his Honour held that the Commonwealth's non-delegable duty also minimally includes a duty to ensure that detainees are provided with a level of healthcare that is reasonably designed to meet their healthcare needs.[24] This was also affirmed in *MZYYR* and *A S v Minister for Immigration*.[25]

[15] (2005) 227 CLR 1, 14.
[16] See, eg, *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 498–9 (Gleeson CJ) ('*Behrooz*'); *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour* (2004) 207 ALR 83, 100 (Lander J) ('*Mastipour*'); *SBEG v Commonwealth* (2012) 208 FCR 235, 239 (The Court); *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs and Another* (2005) 143 FCR 217, 226–7 (Finn J) ('*S v Secretary*').
[17] (2005) 143 FCR 217, 259, 261 [213]; see also *MZYYR v Secretary, Department of Immigration and Citizenship and Another* (2012) 292 ALR 659, 671 (Gordon J) ('*MZYYR*').
[18] *S v Secretary* (2005) 143 FCR 217, 259 [205].
[19] Ibid 262 [216].
[20] Ibid 262 [217].
[21] Ibid 262–3 [218].
[22] (2012) 292 ALR 659, 671.
[23] (2005) 143 FCR 217, 227 [39].
[24] Ibid 262–3 [218].
[25] See *MZYYR* (2012) 292 ALR 659, 663 (Gordon J); *A S v Minister for Immigration and Border Protection* [2014] VSC 593 (28 November 2014), [24] (Kaye J).

(c) Asylum Seekers Held on Nauru and Manus Island are Detained by the Commonwealth

The question of whether asylum seekers detained on Manus Island and Nauru are detained by the Commonwealth is a question of fact, once the meaning of '*detention*' is settled.

The most recent consideration by an Australian court of the question of whether asylum seekers detained on Nauru are detained by the Commonwealth was by the High Court in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* ('*Plaintiff M68*').[26] In *Plaintiff M68*, the court addressed a series of questions that speak to the issue of the constitutional validity of the Commonwealth's activities in transferring and supporting the detention of asylum seekers on Nauru. What is relevant to this submission is that in doing so, the Court examined the question of whether those asylum seekers are detained by the Commonwealth.[27] Not every justice addressed that question by invoking the same meaning of '*detention*'.

In a joint judgement, French CJ, Kiefel and Nettle JJ held that the plaintiff – an asylum seeker held on Nauru – was being detained by Nauru, and not by the Commonwealth, up until the opening of the centre in early 2015.[28] Their Honours invoked the meaning of '*detention*' outlined in *Lim v Minister for Immigration*, according to which: '"Detention" in this context is detention in the custody of the State and involves the exercise of governmental power'.[29] Their Honours held that the detention of the plaintiff was carried out by the Executive government of Nauru under Nauruan law.[30] Given this, and the absence of a condominium or any agreement between Australia and Nauru for the joint exercise of government authority, the Commonwealth did not and could not compel Nauru's detention of the plaintiff.[31]

In a separate judgement, Keane J agreed with the majority in finding that the plaintiff had been detained by Nauru, and not by the Commonwealth.[32] Justice Keane followed the same line of reasoning as their honours in arriving at that conclusion.

[26] [2016] HCA 1 (3 February 2016).
[27] Ibid [29]–[41] (French CJ, Kiefel and Nettle JJ), [79]–[93] (Bell J), [147]–[185] (Gageler J), [237]–[241] (Keane J), [352]–[356] (Gordon J).
[28] Ibid [36].
[29] Ibid [30] (citations omitted), citing *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ) ('*Lim*').
[30] *Plaintiff M68* [2016] HCA 1, [32].
[31] Ibid [35]–[36].
[32] Ibid [239].

However, Bell, Gageler and Gordon JJ diverged from the majority in finding that the plaintiff had been detained by the Commonwealth.[33] Justice Bell reasoned that since essential detention services such as security and garrison services were provided by the private corporations Transfield and Wilson, and since the Commonwealth engaged, regulated and held step-in powers over those services via its contractual arrangements with Transfield and Wilson, the Commonwealth exercised effective control over the detention of asylum seekers in Nauru.[34] Further, the plaintiff could not have been detained on Nauru without application for an RPC visa by an officer of the Commonwealth.[35] That occurred without the plaintiff's consent. In so doing, Bell J invoked the meaning of '*detention*' outlined in *Lim*.[36]

Justice Gageler reasoned along similar lines to Bell J. That is, firstly, the plaintiff could only be detained on Nauru as a result of application for an RPC visa by an officer of the Commonwealth, which occurred without the plaintiff's consent.[37] Secondly, the plaintiff's detention in Nauru was maintained as a result of physical control exerted by Wilson security.[38] However, since, in doing so, they were performing services explicitly contracted for by the Commonwealth government, they were acting as de facto agents of the Commonwealth Executive in physically detaining the plaintiff in custody.[39] Thus Gageler J agreed with Bell J that the plaintiff had been detained in Nauru by the Commonwealth in the *Lim* meaning of '*detains*'.

Finally, Gordon J agreed with Bell and Gageler JJ that the plaintiff had been detained on Nauru by the Commonwealth.[40] However, whereas Bell and Gageler JJ formulated that proposition in terms of the meaning of detention outlined in *Lim* – that is, in the custody of a State – Gordon J held that to do so obscures the fundamental fact that, as a matter of substance, the plaintiff had been detained on Nauru by the Commonwealth.[41] Her Honour argued that, by its acts and conduct, the Commonwealth detained the plaintiff on Nauru.[42] Her Honour set out some of those acts, including the Commonwealth's requiring Transfield to exercise use of force to detain asylum seekers held in Nauru in certain circumstances.[43]

[33] Ibid [93] (Bell J), [173], [180] (Gageler J), [355] (Gordon J).
[34] Ibid [84]–[93].
[35] Ibid [80]–[81].
[36] Ibid [78].
[37] Ibid [168]–[169].
[38] Ibid [172].
[39] Ibid [173].
[40] Ibid [352]–[353].
[41] Ibid [352], [356].
[42] Ibid [353]–[354].
[43] Ibid.

Therefore, although a majority found that the plaintiff had been detained by Nauru and not by the Commonwealth, that finding was powerfully challenged by the dissenting minority. The majority reasoned that a straightforward application of *Lim* revealed the detaining party to be Nauru. But it is fair to say that the actual physical context surrounding the plaintiff's detention was examined in greater detail by the dissenting minority. The minority found that, notwithstanding the fact that the physical context of the plaintiff's detention is on Nauru, an independent and sovereign jurisdiction, that physical context was and is regulated, controlled and monitored by the Commonwealth. So too, therefore, was the plaintiff's detention in that physical context. It is important to note that the question of the whether the asylum seekers at RPCs are detained, as in *Lim*, by Australia or by Nauru or Papua New Guinea is a question of fact, and not of law, dependent on the circumstances of the case:[44] future courts are not bound to accept the view of the majority in *Plaintiff M68* that asylum seekers are detained on Nauru under the meaning of detention in *Lim.*

In addition, inquiries by the Senate have found that the Commonwealth exercised control, to varying degrees, over the detention of asylum seekers kept on Nauru and Manus Island.[45]

Further, the recent Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru ('Select Committee on the RPC in Nauru') found that the extent of the control exercised by the Commonwealth over the centre on Nauru strongly suggests, 'the primary obligation rests with Australia under international law for protecting the human rights of the asylum seekers, and for compliance with the *Refugees Convention*'.[46] The same inquiry found that the Commonwealth's attempt to escape responsibility for human rights abuses and crimes at Nauru by gesturing to the fact that the centre exists in Nauruan territory constituted, 'a cynical and unjustifiable attempt to avoid accountability for a situation created by this country'.[47]

[44] See, eg, ibid [93] (Bell J), [240]–[241] (Keane J).
[45] Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014) found that 'the degree of involvement by the Australian government in the establishment, use, operation, and provision of total funding for the centre clearly satisfies the test of effective control in international law': at 151 [8.33].
[46] Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, *Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru* (2015) 121 [5.16] ('*Select Committee on the RPC in Nauru Report 2015*').
[47] Ibid 122 [5.19].

It is the position of this submission, for the reasons listed by Gordon J in *Plaintiff M68*, that asylum seekers kept on Manus Island are, and those on Nauru up until early 2015 were, being detained by the Commonwealth. Therefore, a relationship of detainer–detainee exists between those asylum seekers and the Commonwealth. Hence, the Australian government has a non-delegable duty of care towards those asylum seekers.

2 *Argument Two: Argument from the Ground Up*

Nevertheless, a court might resist holding that a relationship of detainer-detainee exists between the Commonwealth and asylum seekers kept on Nauru and Manus Island. However, an alternative argument establishes a non-delegable duty of care on the part of the Commonwealth towards those asylum seekers.

(a) The Commonwealth Has a Duty of Care to Asylum Seekers Detained on Nauru and Manus Island

If a court finds that asylum seekers detained on Nauru and Manus Island are not detained by the Commonwealth, on the *Lim* sense of detention, then, according to that court, the party that is the detainer in the *Lim* sense (ie, Nauru or Papua New Guinea) is not the same party as the party that has assumed responsibility for the provision of services essential to the well-being of the detained asylum seekers (ie, the Commonwealth). In those circumstances, a case alleging that the Commonwealth breached its duty of care to those asylum seekers would become a novel case, and not analogous to any preceding detention or immigration detention case heard before the High Court.

This submission finds that, by applying *Crimmins v Stevedoring Industry Financing Committee* ('*Crimmins*'),[48] the Commonwealth owes a duty of care to asylum seekers who are detained in RPCs. In *Crimmins*, McHugh J set out a six factors to be satisfied in novel cases in which it is alleged that a statutory authority owes a duty of care, namely:[49]

1. it must be reasonably foreseeable that injury would result from some act or omission of the defendant;
2. the defendant must have power to protect a specific class of people by reason of assumed or statutory obligations;
3. the plaintiff must be placed in a situation of vulnerability;
4. the defendant must have knowledge of the risk of harm;

[48] (1999) 200 CLR 1.
[49] Ibid 39.

5. the defendant must not exercise 'core policy-making' or 'quasi-legislative' functions; and
6. there must not be any other supervening reasons in policy to deny the existence of a duty of care.

These criteria have already been applied in at least one Federal Court level case to the question of whether the Commonwealth owes asylum seekers a duty of care.[50] The plaintiff in that case was detained on Australian territory, and the court found that the Commonwealth owed him a duty of care.[51]

We submit that the first four requirements of the criteria laid out by McHugh J in *Crimmins* point to a duty of care owed to asylum seekers on RPCs. In short, it is foreseeable that the Commonwealth's actions and omissions would result in harm to asylum seekers; the Commonwealth has the power to protect asylum seekers as a specific class of vulnerable persons.

The first requirement of reasonable foreseeability in the *Crimmins* test is fulfilled because there is extensive evidence concerning the conditions in which those asylum seekers are detained.[52] That evidence clearly reveals the harsh and oppressive conditions in which those asylum seekers are detained. There is no room for doubt that these are conditions which are conducive to harm.[53]

The court in *Plaintiff M68* was divided with respect to the question of whether the Commonwealth or Nauru was the true detainer of the plaintiff in the *Lim* sense. However, it was unanimous in finding there to be a heavy involvement of the Commonwealth in the facts of the plaintiff's detention.[54] This includes: the Commonwealth causes, by transfer, their presence on Nauru and Manus Island; the Commonwealth has discretion concerning who to

[50] See *MZYYR* (2012) 292 ALR 659, 671 (Gordon J). The fact that, in that case, the plaintiff was detained on Commonwealth territory is not relevant to the centrality of the *Crimmins* criteria on the question of whether the Commonwealth owes asylum seekers a duty of care. *Crimmins* was also discussed in *Behrooz* (2004) 219 CLR 486, 507 (McHugh, Gummow and Heydon JJ).
[51] *MZYYR* (2012) 292 ALR 659, 671.
[52] See, eg, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014); *Select Committee on the RPC in Nauru Report 2015*.
[53] See, eg, Australian Medical Association, Submission No 2 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Conditions and Treatment of Asylum Seekers and Refugees at the Regional Processing Centres in the Republic of Nauru and Papua New Guinea*, 2 February 2016.
[54] See, eg, *Plaintiff M68* [2016] HCA 1, [39] (French CJ, Kiefel and Nettle JJ), [93] (Bell J), [173] (Gageler J), [239] (Keane J) [352] (Gordon J).

transfer whereas the host countries are compelled to accept;[55] the Commonwealth bears all costs of the arrangement;[56] the Commonwealth is kept informed about the day-to-day conditions of the centres;[57] and the Commonwealth provides security and healthcare services in the centres.

These facts, combined with the acts and conduct of the Commonwealth, which were described by Gordon J in *Plaintiff M68*,[58] entail that it was and continues to be reasonably foreseeable that the Commonwealth, by those acts could cause injury to asylum seekers detained on Nauru and Manus Island.

The second criterion of power to provide protection is also satisfied. The Commonwealth, via its contractual arrangements, has undertaken to provide security, healthcare and garrison services at the centres. The provision of those services is an obligation assumed by the Commonwealth. Moreover, despite the Court's division with respect to the question of the identity of the detaining party in *Plaintiff M68*, every justice suggested, either implicitly or explicitly, that the conditions at the RPC on Nauru are controlled by the Commonwealth.[59]

That the third criterion of vulnerability is satisfied follows immediately from the fact that the asylum seekers detained on Nauru and Manus Island are in detention. They are therefore deprived of their liberty and the capacity to care for themselves.[60]

The fourth criterion of knowledge of the risk of harm is also satisfied, given the findings of the Moss Review, the 2015 Select Committee on the RPC in Nauru, and other investigatory bodies reporting to the government which have all highlighted the health concerns of prolonged detention.

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[55] *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*, Nauru–Australia (signed and entered into force 3 August 2013) cl 7 ('*MOU – Nauru 2013*'); *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea, of Certain Persons, and Related Issues*, Papua New Guinea–Australia (signed and entered into force 6 August 2013) cl 8 ('*MOU – PNG 2013*').
[56] *MOU – Nauru 2013* cl 6; *MOU – PNG 2013* cl 6.
[57] *MOU – Nauru 2013* cl 21; *MOU – PNG 2013* cl 22.
[58] [2016] HCA 1, [353]–[354].
[59] Ibid [39] (French CJ, Kiefel and Nettle JJ), [86]–[93] (Bell J), [169]–[173] (Gageler J), [239] (Keane J), [352] (Gordon J).
[60] See, eg, *Howard v Jarvis* (1958) 98 CLR 177, 183 (The Court); *L v Commonwealth of Australia* (1976) 10 ALR 269, 273 (Ward J); *Bujdoso* (2005) 227 CLR 1, 14–15 (The Court); *Behrooz* (2004) 219 CLR 486, 498–9 (Gleeson CJ); *Mastipour* (2004) 207 ALR 83, 100 (Lander J); *SBEG v Commonwealth* (2012) 208 FCR 235, 239 (The Court); *S v Secretary* (2005) 143 FCR 217, 226–7 (Finn J).

(b) The Commonwealth's Duty of Care Is Non-Delegable

In *Kondis v State Transport Authority*, Mason J explained that person *A* owes a non-delegable duty of care to person *B* if and only if either of two conditions are met:

i. *A* has undertaken the care, supervision or control of *B*; or
ii. *A* is so placed in relation to *B* as to assume a particular responsibility for *B*'s safety, in circumstances where *B* might reasonably expect that due care will be exercised.[61]

The Commonwealth, via its contractual engagement of sub-contractors to provide security, garrison and healthcare services, has undertaken the care, supervision and control of asylum seekers detained on Nauru and Manus Island.

Alternatively, the Commonwealth forcibly transfers those asylum seekers to Nauru and Manus Island. Further, the services that the Commonwealth has assumed the responsibility to provide are services that are essential for their safety and well-being. Finally, since those asylum seekers are kept in detention, and are therefore deprived of their liberty and the capacity to care for themselves, it is reasonable for them to expect that due care will be exercised.[62]

These conclusions accord with remarks by Mason CJ, Deane, Dawson, Toohey and Gaudron JJ in *Burnie Port Authority v General Jones Pty Ltd* who described the relationship that gives rise to a non-delegable duty of care as one of special dependence or vulnerability:

> Viewed from the perspective of the person to whom the duty is owed, the relationship of proximity giving rise to the non-delegable duty of care in such cases is marked by special dependence or vulnerability on the part of that person.[63]

And in *S v Secretary*, Finn J noted that the situation of asylum seekers kept in immigration detention is one of special dependence or vulnerability.[64] That case dealt with an asylum seeker who was detained on Commonwealth soil, and so the plaintiff was detained by the Commonwealth, in the *Lim* sense of '*detention*'. However, there is no reason to think that the remarks of Finn J are not consistent with, or do not extend to, a situation such that the party that is the detainer in the *Lim* sense is not the same party as the party that has assumed

[61] (1984) 154 CLR 672, 687
[62] Ibid.
[63] (1994) 552 CLR 520, 551 (citations omitted).
[64] *S v Secretary* (2005) 143 FCR 217, 262 [215]–[217].

responsibility for the provision of services essential to the well-being of the detained asylum seekers.

Finally, there is significant empirical evidence regarding the special vulnerability to harm of asylum seekers kept in immigration detention.[65]

Thus even if it is not the case that the asylum seekers detained on Manus Island and Nauru are detained by the Commonwealth, in the *Lim* sense of '*detention*', the Commonwealth still has a non-delegable duty of care regarding those asylum seekers.

II *Australia's Obligations under International, Nauruan and Papua New Guinean Law*

A Overview

The Australian government has attempted to distance itself from the operation of RPCs in the Republic of Nauru and on Manus Island in the Independent State of Papua New Guinea. In doing so, the Australian government has also attempted to shift its responsibility of upholding the human rights of those asylum seekers held in RPCs to foreign governments. This submission seeks to clarify the legal obligations of the Australian government in the operation of RPCs. Through the consideration of international covenants and both Nauruan and Papua New Guinean municipal law, this submission will identify issues in the operation of RPCs where the Australian government has violated the human rights of asylum seekers held in the Nauru and Manus Island RPCs. The violation of human rights of asylum seekers further undermines the legality of the operation of the RPCs by the Australian government.

Australia has both signed and ratified various international instruments of law including:[66] the *Universal Declaration of Human Rights* ('*UDHR*'),[67] the *International Covenant on Civil and Political Rights* ('*ICCPR*'),[68] the *International Covenant on Economic, Social and*

[65] See, eg, Australian Medical Association, Submission No 2 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Conditions and Treatment of Asylum Seekers and Refugees at the Regional Processing Centres in the Republic of Nauru and Papua New Guinea*, 2 February 2016.
[66] Australian Human Rights Commission, 'Human Rights Explained: Australia and Human Rights Treaties' (Fact Sheet No 7, 2009) <https://www.humanrights.gov.au/human-rights-explained-fact-sheet-7australia-and-human-rights-treaties>.
[67] GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).
[68] Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

Cultural Rights ('*ICESCR*'),[69] the *Convention Relating to the Status of Refugees* ('*Refugee Convention*'),[70] and the *Vienna Convention on the Law of Treaties*.[71] As a result, the Australian government has legal obligations under these international instruments to ensure that the human rights of individuals are respected.

B Jurisdiction

The fact that RPCs are located in foreign territory raises the issue of whether Australia retains jurisdiction over the operations of the RPCs and the asylum seekers that are held within them. Article 2(1) of the *ICCPR* states:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2 of the *ICCPR* has been held to extend to asylum seekers where they are subject to the jurisdiction of a state, in this case, Australia.[72] Furthermore, under the 2013 Memoranda of Understanding between Australia and Nauru and Australia and Papua New Guinea, Australia is partly responsible for the operation of both RPCs through funding and providing staff and services to ensure the operation of the RPCs.[73]

In considering the effect of the Australian government's conduct in relation to the operation of the Nauruan RPC, Gordon J stated in her Honour's dissenting judgment in *Plaintiff M68* that the detention of asylum seekers on Nauru is '"facilitated, organised, caused, imposed [or] procured by the Commonwealth"'.[74] While the majority of the High Court of Australia did not agree to the full extent of the judgment of Gordon J, they accepted that the actions of the Australian government have been materially supportive in the detention of asylum seekers by the Nauruan government.[75] While this recent case dealt with a claim from an asylum seeker held on Nauru, the same principles can be applied to the case of those asylum seekers held at the Manus Island RPC as the operation of the two RPCs are somewhat analogous with the

[69] Opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[70] Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).
[71] Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).
[72] Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, 80th sess, 2187th mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 4 [10].
[73] *MOU – Nauru 2013* cls 2, 6; *MOU – PNG 2013* cls 2, 6.
[74] *Plaintiff M68* [2016] HCA 1, [354].
[75] See footnote 59 above and accompanying text.

exception of asylum seekers held on Manus Island being held in much stricter detention. Thus, while asylum seekers held in Nauru and Papua New Guinea are no longer within Australian territory, they still remain under Australian jurisdiction due to their status as asylum seekers.

C Disputes between International and Municipal Law

Despite Australia's ratification, international instruments do not form part of domestic Australian law unless explicitly incorporated into Australian law through the passing of legislation.[76] This does not mean, however, that Australia is not bound by and can disregard international law. The High Court of Australia has held international instruments that have been ratified by Australia to be influential in determining domestic law and enforcing legal obligations, particularly in the area of human rights.[77]

Australia has ratified the *Vienna Convention on the Law of Treaties* which outlines the law governing the operation of international instruments. Article 27, titled 'International Law and the Observance of Treaties', states:

> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

This means that Australia must abide by the treaties that it has ratified – the *UDHR*, *ICCPR*, *ICESCR* and *Refugee Convention* – and that any part of Australian municipal law cannot be utilised to justify the abrogation of any of the aforementioned international instruments.

D Detention under International Law

The detention of asylum seekers in RPCs is a major issue of contention in examining the operation of these centres under international law. Article 9 of the *UDHR* states:

> No one shall be subjected to arbitrary arrest, detention or exile.

Article 9(1) of the *ICCPR* states:

[76] Australian Human Rights Commission, 'Human Rights Explained: Australia and Human Rights Treaties' (Fact Sheet No 7, 2009) <https://www.humanrights.gov.au/human-rights-explained-fact-sheet-7australia-and-human-rights-treaties>.
[77] See, eg, *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J).

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

While Nauru has not ratified the *ICCPR*, the operation of the Nauru RPC is still subject to the articles under the *ICCPR* as Australia retains control and power over the operation of the RPC and the asylum seekers held within. Papua New Guinea has ratified the *ICCPR* which entered into force there in 2008. Therefore, the Manus Island RPC is also subject to the *ICCPR* under both Papua New Guinea and Australia's international obligations.

In the Nauruan Supreme Court case *AG v Secretary of Justice*, the court found that asylum seekers in the Nauru RPC were detained.[78] A major point of contention in this case was whether the restrictions then in place at the Nauru RPC, allowing asylum seekers only limited movement and access to the outside world, amounted to detention. While the current operation of the Nauru RPC as an open centre that begun on 5 October 2015 may not amount to detention, it is clear that prior to this scheme asylum seekers were detained within the RPC.

Furthermore, Bell J noted in her Honour's judgment in *Plaintiff M68* that the Nauruan government may reverse the scheme at any time.[79] As the Manus Island RPC operates on a strict detention scheme, the asylum seekers on Manus Island are also clearly detained. The issue raised by both the *UDHR* and the *ICCPR* is whether the detention of asylum seekers on Nauru and Manus Island is arbitrary.

The *Refugee Convention* contains a number of clauses relating to the arbitrariness of detention on Nauru and Manus Island. Article 31 of the *Refugee Convention* states:

> (1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States

[78] *AG v Secretary of Justice* [2013] NRSC 10 (18 June 2013), [51]–[55] (von Doussa J).
[79] [2016] HCA 1, [63].

> shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

The Australian government has interpreted the term 'directly' in paragraph (1) to mean that if an individual has spent a significant period of time in a third country between their origins from which they are fleeing and Australia, this section will not apply and the asylum seekers will therefore be subject to penalties. However, other interpretations of the *Refugee Convention* have held this section to apply only to asylum seekers who have previously settled in other countries as refugees, and not to those who are merely transiting another country between their origins and Australia with good reason not to apply for protection in the transit countries.[80]

With regard to paragraph (2), the initial period for restricting the movements of refugees should not be long as this provisional period is only intended to be a few days.[81] The periods asylum seekers have spent in RPCs on Nauru and Manus Island have greatly exceeded this amount. For example, figures from April 2015 indicated that the average time spent in detention on Nauru was 402 days.[82] Guidelines for the implementation and execution of the *Refugee Convention* state that 'fair and efficient' procedures are essential.[83] Therefore, the legal detention of asylum seekers cannot be justified under the *Refugee Convention* given the immense delay in processing asylum seeker claims. This renders the detention of asylum seekers arbitrary which is in contravention to the *UDHR* and the *ICCPR*.

E Discrimination against Asylum Seekers Arriving by Sea

A major feature of the Australian government's operation of RPCs is the removal of asylum seekers arriving by boat from Australian territory to the RPCs on Nauru and Manus Island. This contrasts with asylum seekers arriving by plane on a valid visa and applying for asylum once in Australia who are not removed from Australia, raising questions of discrimination against so called 'boat people'.

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[80] Catherin Skulan, 'Australia's Mandatory Detention of "Unauthorized" Asylum Seekers: History, Politics and Analysis under International Law' (2006) 21 *Georgetown Immigration Law Journal* 61, 98–9, citing Guy S Goodwin-Gill, 'Article 31 of the 1951 *Convention Relating to the Status of Refugees*: Non-penalization, Detention and Protection' (Requested Paper, Department of International Protection for the UNHCR Global Consultations, October 2001) 33–4.

[81] Catherine Skulan, 'Australia's Mandatory Detention of "Unauthorized" Asylum Seekers: History, Politics and Analysis under International Law' (2006) 21 *Georgetown Immigration Law Journal* 61, 99, citing James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 421.

[82] *Select Committee on the RPC in Nauru Report 2015*, 47.

[83] UNHCR, *Global Consultations on International Protection: Asylum Processes (Fair and Efficient Asylum Procedures)*, UN Doc EC/GC/01/12 (31 May 2001) 2.

Article 7 of the *UDHR* states:

> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 2(1) of the *ICCPR* states:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2 of the *ICESCR* states:

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Each of these international instruments declares that equality and equal treatment regardless of an individual's particular circumstances is a fundamental human right. Thus, asylum seekers that arrive by sea should not be discriminated against and treated in a manner that undermines their basic human rights.

Under section 5AA of the *Migration Act 1958* (Cth), persons arriving by sea to Australia without a visa are designated 'unauthorised maritime arrivals'. These individuals are then subject to removal by an officer to a 'regional processing country' under section 198AD.[84] The Australian government has stated that asylum seekers who are removed from Australia to Nauru and Papua New Guinea have no chance of returning to Australia for the purposes of resettlement as a refugee.[85] In contrast, asylum seekers who arrive in Australia by plane on a valid visa, and then apply for asylum are not immediately removed from Australia and retain the possibility of resettlement in Australia as a refugee.

[84] *Migration Act 1958* (Cth) s 198AD(2).
[85] Emma Alberici, Interview with Peter Dutton, Minister for Immigration and Border Protection (Television Interview, 5 October 2015) <http://www.abc.net.au/lateline/content/2015/s4325585.htm>.

By removing a class of asylum seekers from Australia and eliminating their potential resettlement in Australia, the Australian government is discriminating against those asylum seekers who arrive by sea. Article 14(1) of the *UDHR* recognises the right of every individual to seek asylum, providing a legal right to asylum seekers arriving by sea that cannot be abrogated by removing them to another country. Past figures have shown that 70–97 per cent of asylum seekers arriving by sea have been declared refugees.[86] This indicates that the vast majority of asylum seekers arriving by sea are refugees and Australia cannot discharge its responsibility for these individuals by removing them to RPCs in other countries. Article 31(2) of the *Refugee Convention* prohibits the imposition of penalties on those entering 'illegally' coming directly from a territory where their life is threatened. The opposite is currently occurring where asylum seekers arriving by sea are being penalised through their removal to RPCs in Nauru and Papua New Guinea where they are held in detention for extended periods of time.

F Operation of Regional Processing Centres under Nauruan Law

In addition to legal obligations under international covenants, Australia's operation of the Nauruan RPC must also be in accordance with Nauruan municipal law. As Australia retains control and exercise of the Nauruan RPC and exterritorial jurisdiction over asylum seekers in Nauru, the Australian government is responsible for ensuring that the operations of the RPC do not violate Nauruan law.

1 *Detention under Nauruan Law*

The *Constitution of Nauru* outlines the law for detaining individuals under article 5, stating:

> (1) No person shall be deprived of his personal liberty, except as authorised by law in any of the following cases: …
>
> (h) for the purpose of preventing his unlawful entry into Nauru, or for the purpose of effecting his expulsion, extradition or other lawful removal from Nauru.

This section was considered in *AG v Secretary of Justice*, where the court looked to article 5(1) of the European *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*ECHR*'),[87] which is structured similarly to article 5(1) of the *Constitution of*

[86] Asylum Seeker Resource Centre, *Asylum Seekers and Refugees: Myths, Facts and Solutions* (July 2013) 8 <http://www.asrc.org.au/wp-content/uploads/2013/07/MythBusterJuly2013FINAL.pdf >.
[87] Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

Nauru, in order to clarify the operation of the Nauruan clause.[88] Article 5(1) of the *ECHR* was examined in the case of *Guzzardi v Italy*,[89] the facts of which are somewhat analogous to the case of asylum seekers held on Nauru. In *Guzzardi v Italy*, a suspected member of the Italian mafia was removed from the Italian Mainland and held on the island of Asinara for three years. He could apply to leave the island supervised by police if he had good reason, and he was permitted to work (albeit in limited function) and be visited by family members from the Italian mainland.[90] The European Court of Human Rights found that the cumulative impact of restrictions amounted to Guzzardi's detention.[91]

Thus, the test in determining if asylum seekers are detained on Nauru is 'one of degree not substance' – that is, whether the cumulative impact of restrictions would amount to detention.[92] In comparing asylum seekers on Nauru to Guzzardi's situation, it is clear that they are also detained. The area of Nauru is less than half of the area of the island of Asinara and asylum seekers are not permitted to work or be visited by family members from outside the island.[93] As a result, the Supreme Court of Nauru found that asylum seekers were detained in the RPC.[94]

2 *Is the Detention Authorised by Nauruan Law?*

The first limb of article 5(1)(h) of the *Constitution of Nauru*, 'for the purpose of preventing his unlawful entry', cannot be used as justification for the detention of asylum seekers on Nauru. Asylum seekers detained on Nauru are issued a regional processing visa that allows for their lawful entry and stay in Nauru. The 2013 Memorandum of Understanding between Australia and Nauru also affirms the legal status of asylum seekers in Nauru upon their transfer to the RPC.[95]

In, *AG v Secretary of Justice*, the Nauruan Supreme Court relied on the second limb of article 5(1)(h), 'for the purpose of effecting his expulsion, extradition or other lawful removal from

[88] *AG v Secretary of Justice* [2013] NRSC 10, [39]–[41] (von Doussa J).
[89] (1981) 3 EHRR 333.
[90] Azadeh Dastyari, 'Detention of Australia's Asylum Seekers in Nauru: Is Deprivation of Liberty by Any Other Name Just as Unlawful?' (2015) 38 *University of New South Wales Law Journal* 669, 679.
[91] *Guzzardi v Italy* (1981) 3 EHRR 333, 363–4 [95].
[92] *AG v Secretary of Justice* [2013] NRSC 10, [41] (von Doussa J).
[93] Azadeh Dastyari, 'Detention of Australia's Asylum Seekers in Nauru: Is Deprivation of Liberty by Any Other Name Just as Unlawful?' (2015) 38 *University of New South Wales Law Journal* 669, 680.
[94] *AG v Secretary of Justice* [2013] NRSC 10, [51]–[55] (von Doussa J).
[95] *MOU – Nauru 2013* cl 16.

Nauru', holding that the detention of asylum seekers in Nauru is in accordance with the *Immigration Act 1999* (Nauru) for the purpose of their lawful removal from Nauru.[96]

However, the continued operation of the RPC raises questions regarding the operation of the second limb of article 5(1)(h). The period of time that many asylum seekers have spent in the RPC may amount to an indefinite period of detention that would not accord with the purpose of effecting their lawful removal from Nauru.[97] The 2013 Memorandum of Understanding also states that asylum seekers who have been found to be refugees would be resettled on Nauru for a period of five years before being resettled in Cambodia or being resettled permanently in Nauru for those who refuse to resettle in Cambodia. This furthers the argument that detention in the RPC is not for the purpose of lawful removal as they will be settled on Nauru for a significant period of time.

Thus, the ongoing detention and prospects of permanent settlement in Nauru violates article 5 of the *Constitution of Nauru* which renders the detention of asylum seekers arbitrary. This has further implications for the role of the Australian government in the operation of the Nauru RPC as it indicates that the operation of the centre itself is in violation of the *Constitution of Nauru*.

G Operation of Regional Processing Centres under Papua New Guinean Law

Similar to the Nauruan case above, the Australian government retains control of the Manus Island RPC and retains jurisdiction over asylum seekers held within the centre. Thus, the Australian government is responsible for ensuring that the operation of the RPC is in accordance with Papua New Guinean Law.

1 *Detention under the Constitution of Papua New Guinea*

The *Constitution of Papua New Guinea* outlines the law for detention under section 42 which states:

> (1) No person shall be deprived of his personal liberty except –
>
> …

[96] *AG v Secretary of Justice* [2013] NRSC 10, [76] (von Doussa J).
[97] Azadeh Dastyari, 'Detention of Australia's Asylum Seekers in Nauru: Is Deprivation of Liberty by Any Other Name Just as Unlawful?' (2015) 38 *University of New South Wales Law Journal* 669, 685.

> (g) for the purpose of preventing the unlawful entry of a person into Papua New Guinea, or for the purpose of effecting the expulsion, extradition or other lawful removal of a person from Papua New Guinea, or the taking of proceedings for any of these purposes; or
>
> (ga) for the purposes of holding a foreign national under arrangements made by Papua New Guinea with another country or with an international organisation that the Minister responsible for immigration matters, in his absolute discretion, approves;
>
> (2) A person who is arrested or detained –
>
> (a) shall be informed promptly, in a language that he understands, of the reasons for his arrest or detention and of any charge against him; and
>
> (b) shall be permitted whenever practicable to communicate without delay and in private with a member of his family or a personal friend, and with a lawyer of his choice ...

As with the Nauru RPC, the 2013 Memorandum of Understanding between Australia and Papua New Guinea states that asylum seekers will be lawfully accepted by Papua New Guinea,[98] removing justification for the detention of asylum seekers under the first limb of section 42(1)(g).

The 2013 Memorandum of Understanding also states that asylum seekers determined to be refugees will be settled in Papua New Guinea.[99] As a result, the second limb of section 42(1)(g) cannot be used to justify the detention of asylum seekers on Manus Island as the asylum seekers will not be expelled or removed from Papua New Guinea.

2 *Constitutional Validity of the Scheme*

Section 42(1)(ga) would act to justify the detention of asylum seekers in Manus Island. However, this clause was inserted in 2014, after the 2013 Memorandum of Understanding and after many asylum seekers had already been transferred and detained at the Manus Island RPC.[100] For this clause to apply to those asylum seekers who were transferred prior to its insertion in the constitution, it would have to act retrospectively. The general principle in law is that for legislation to act retrospectively, it must be explicitly say so.[101] In this case, it is not explicitly stated that this section would act retrospectively and, therefore, it cannot be used to justify the detention of asylum seekers prior to its insertion in 2014.

[98] *MOU – PNG 2013* cls 8, 14.
[99] Ibid cls 13–15.
[100] See *Constitutional Amendment (No 37) (Citizenship) Law 2014* (Papua New Guinea) s 1.
[101] See generally *Director of District Administration v Sacred Heart Mission (New Britain) Property Trust* [1974] PGSC 8 (2 October 1970).

Evidence also suggests that section 42(2) is being undermined as asylum seekers who are detained are being barred from accessing adequate legal services. The Senate Committee looking into the incident on Manus Island in 2014 reported that staff provided to asylum seekers are unable to provide adequate legal advice and that legal officers have been denied entry to the RPC.[102]

As a result, the detention of asylum seekers in the Manus Island RPC is in contravention of the *Constitution of Papua New Guinea*. Thus, Australia's continued operation of the RPC in Papua New Guinea is in violation of the municipal law of the state as asylum seekers are subject to arbitrary detention.

III *Australia's 'Due Diligence' and Non-Refoulement Obligations under International Human Rights Law*

A Overview

Australia has a responsibility under international human rights law to respect the right to be free from torture and ensure all individuals within its territory and subject to its jurisdiction are not subjected to torture, or to cruel, inhuman or degrading treatment.[103] Allegations of sexual assaults, sexual exploitation and abuse reported to the Moss Review and the Select Committee on the RPC in Nauru could constitute prohibited ill-treatment. While the actions of the alleged perpetrators may not be directly attributable to Australia, the government still has obligations of due diligence to prevent and respond to violations of international human rights.[104]

[102] Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014) 64–5 [4.38], 123–4 [6.82]–[6.83].
[103] *ICCPR* arts 2(1), 7; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) arts 1, 2(1).
[104] *ICCPR* art 2(1); *Velásquez Rodríguez Case (Merits)* (1989) 28 ILM 291, 325 [172] (Inter-American Court of Human Rights, 29 July 1988); Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, 80th sess, 2187th mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 3–4 [8].

B Allegations of Sexual Exploitation as 'Torture' or 'Cruel, Inhuman or Degrading Treatment'

According to the definition in article 1(1) of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('*CAT*'),[105] an act constitutes torture when it:

- causes severe pain or suffering (physical or mental suffering);[106]
- is for the purposes of obtaining information or a confession, punishment, intimidation or coercion, or any reason of discrimination; and
- is inflicted by or at the instigation or with consent of a public official or other person acting in an official capacity.

The allegations of sexual exploitation, rape, indecent assault and sexual harassment reported to the Moss Review and the inquiry of the Select Committee on the RPC in Nauru reach the requisite threshold of causing 'severe pain or suffering'.[107] The European Court of Human Rights jurisprudence, though not binding on Australia but providing a persuasive enunciation of international human rights law, has held that any rape will meet the threshold of 'severe pain or suffering'.[108] This position reflects the position of UN Human Rights Committee,[109] Committee against Torture,[110] and the Committee on the Elimination of all Forms of Discrimination against Women.[111] Therefore, the allegations of sexual exploitation constitute evidence of prohibited ill-treatment on the Nauru RPC.

The allegations report that such abuse was done as a form of coercion and intimidation – trading contraband or more time in the shower for sexual favours.[112] An interview conducted for this submission with a former resident of the Nauru RPC echoed the allegations made to

[105] Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
[106] Human Rights Committee, *CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 44th sess, (adopted 10 March 1992) [5] <http://www.refworld.org/docid/453883fb0.html>.
[107] Philip Moss, 'Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru' (Final Report, 6 February 2015) 23–42 ('*Moss Review 2015*'); *Select Committee on the RPC in Nauru Report 2015*, 87–116.
[108] *DJ v Croatia* (European Court of Human Rights, Chamber, Application No 42418/10, 24 July 2012) [83].
[109] Human Rights Committee, *General Comment No 28: Article 3 (The Equality of Rights between Men and Women)*, 68th sess, UN Doc CCPR/C/21/Rev.1/Add.10 (adopted 29 March 2000) [11].
[110] Committee against Torture, *General Comment 2: Implementation of Article 2 by State Parties*, UN Doc CAT/C/GC/2 (24 January 2008) 5 [18].
[111] Committee on the Elimination of Discrimination against Women, *General Recommendation 19: Violence against Women*, 11th sess (1992) [7].
[112] *Moss Review 2015*, 32–5 [3.67]–[3.83]; *Select Committee on the RPC in Nauru Report 2015*, 23 [2.54].

the Moss Review of trading cigarettes, lipstick and makeup for sexual favours: 'They'll let them [the officers] do whatever they want to get the cigarettes'.[113] Such forms of sexual abuse have been committed against female adult asylum seekers,[114] demonstrating that sexual discrimination is a basis for this form of ill-treatment.[115]

Finally, many of these alleged acts were committed by staff contracted by the Australian government to run the day-to-day operations of the RPC. Even if the contractual relationship between Wilson Security or Transfield and the Australian government may not be characterised as a principal–agent relationship, the lack of accountability of contracted staff for the prohibited ill-treatment can suggest consent or acquiescence by the Australian authorities. If this acquiescence is found to be the case, the wrongful acts constitute torture and are directly attributable to the Australian government.[116]

If this level of attribution cannot be found, nevertheless the acts still constitute cruel, inhuman or degrading treatment which Australia still has positive obligations to prevent.[117] Australia incurs such extra-territorial obligations for this non-derogable right as Australia has effective control over the asylum seekers in Nauru.[118] Australia would be liable to make reparations to the victims for an international wrongdoing if these obligations have not been discharged.[119]

[113] Interview with Former Nauru RPC Detainee (Face to Face, 4 February 2016).
[114] *Moss Review 2015*, 23–42; *Select Committee on the RPC in Nauru Report 2015*, 87–116.
[115] *Declaration on the Elimination of Violence against Women*, 48th sess, 85th plen mtg, Agenda Item 111, UN Doc A/RES/48/104 (23 February 1994) Preamble; Committee against Torture, *General Comment 2: Implementation of Article 2 by State Parties*, UN Doc CAT/C/GC/2 (24 January 2008) 6 [22].
[116] International Law Commission, *Report of the International Law Commission: Fifty-third Session (23 April – 1 June and 2 July – 10 August 2001)*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001) 68–74, 92–5.
[117] Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, 80th sess, 2187th mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 3 [6]–[7].
[118] Law Council of Australia, Submission No 57 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 12 Mary 2015, 13–14; *Select Committee on the RPC in Nauru Report 2015*, 12–15; Andrew & Renata Kaldor Centre for International Refugee Law, Submission No 60 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, 30 April 2015, 9–10 [2.8]–[2.9]; Committee against Torture, *General Comment 2: Implementation of Article 2 by State Parties*, UN Doc CAT/C/GC/2 (24 January 2008) 5 [16].
[119] *CAT* art 14; International Law Commission, *Report of the International Law Commission: Fifty-third Session (23 April –1 June and 2 July – 10 August 2001)*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001) 223–31.

C Due Diligence Measures Required by International Human Rights Law

The *CAT* prescribes due diligence measures that state parties must comply with to discharge their obligations to protect individuals from human rights abuses. These include the obligation to take effective legislative, administrative and judicial measures to prevent acts of torture,[120] enacting criminal legislation,[121] submitting accused to prosecution,[122] making prompt and impartial investigations,[123] ensuring victims have the right to complain to, and have their case promptly and impartially examined by competent authorities,[124] and ensuring there is a system for obtaining redress and compensation.[125] Such measures to protect are also inherent in the *ICCPR*,[126] and the *Declaration on the Elimination of Violence against Women*.[127]

1 *Complaints Process and Accountability of Contractors*

Submissions and evidence to the Moss Review and the Select Committee on the RPC in Nauru found deficiencies in the internal processes for reporting, investigating and dealing with complaints.[128] There have been reports of Wilson Security staff members shredding incident reports.[129] Furthermore, former employees working at the RPC reported that the environment deters asylum seekers from making complaints of misconduct against staff of Wilson Security and Transfield.[130] An incident reported to the Moss Review of two female asylum seekers' experience filing a complaint against a Wilson Security Staff member demonstrates the deficiencies of the reporting process.[131] After filing an initial complaint alleging indecent exposure, the Wilson Security Behaviour Team informed them that they

[120] *CAT* art 2.
[121] *CAT* art 4.
[122] *CAT* art 7.
[123] *CAT* art 12.
[124] *CAT* art 13.
[125] *CAT* art 14.
[126] *ICCPR* arts 2(1), 7; Human Rights Committee, *CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 44th sess, (adopted 10 March 1992) [2], [14].
[127] *Declaration on the Elimination of Violence against Women*, GA Res 48/104, 48th sess, 85th plen mtg, Agenda Item 111, UN Doc A/RES/48/104 (23 February 1994) art 4.
[128] *Moss Review 2015*, Recommendation 3; see *CAT* art 13.
[129] *Select Committee on the RPC in Nauru Report 2015*, 24 [2.57]; Submission No 62 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, (2015) 2; Jon Nichols, Submission No 95 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, (2015) 1.
[130] *Select Committee on the RPC in Nauru Report 2015*, 38 [2.115]–[2.116].
[131] *Moss Review 2015*, 29 [3.42]–[3.44]; Martin McKenzie-Murray, 'Fear and Abuse: The Nauru Letters', *The Saturday Paper* (online), 15 November 2014 <https://www.thesaturdaypaper.com.au/news/politics/2014/11/15/fear-and-abuse-the-nauru-letters/14159700001254>.

lost the report, resulting in a time delay. Additionally, one of the security guards entered the room while an interview with the Behaviour Team was taking place, causing the complainants to fear reprisal for making a complaint against the alleged perpetrator.[132]

As a consequence, there is a significant level of under-reporting of abuse.[133] In the aforementioned interview, a former resident of the Nauru RPC recalled an incident of verbal abuse and physical attack inflicted on her by a guard. When she went to report this incident, the other staff dismissed her complaint because there were no witnesses or cameras to investigate the complaint. She concluded: 'So … the more you try to fix something, the more you get blamed and the more you get upset. So you just keep quiet, no matter what happens to you'.[134]

Having a robust system of reporting creates an environment of accountability which will prevent and give redress to victims of ill-treatment.[135] Australia, as recommended by previous inquiries,[136] must implement such systems to be in compliance with its international human rights obligations.

2 *Legislative Framework for the Protection Children*

States parties to the *ICCPR* and *CAT* undertake to take necessary steps to adopt legislative measures to give effect to rights under those instruments.[137] Numerous submissions to the Select Committee in 2015 noted that there is no child protection legislation in Nauru which would protect children from prohibited ill-treatment.[138] Despite assurances by Australian and Nauruan authorities that there has been progress to introduce a legislative framework to protect children, there have only been reports of the creation of administrative bodies such as the Gender Violence and Child Protection Unit within the Nauruan Department of Home

[132] Ibid.
[133] *Moss Review 2015*, 25–6 [3.16], 27–8 [3.31], Recommendation 4; *Select Committee on the RPC in Nauru Report 2015*, 38 [2.115]–[2.116].
[134] Interview with Former Nauru RPC Detainee (Face to Face, 4 February 2016).
[135] See Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, 80th sess, 2187th mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 3–4 [8], 7 [17].
[136] *Moss Review 2015*, Recommendations 3, 4; *Select Committee on the RPC in Nauru Report 2015*, Recommendations 13, 14.
[137] *ICCPR* art 2(2); *CAT* art 2; Committee against Torture, *General Comment 2: Implementation of Article 2 by States Parties*, UN Doc CAT/C/GC/2 (24 January 2008) 3 [8].
[138] See, eg, Human Rights Legal Centre, Submission No 58 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, (13 May 2015) 3; Kirsty Diallo, Submission No 64 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, (2015) 4.

Affairs and a Child Protection Panel within the Department of Immigration and Border Protection.[139] Effective legislative measures for protection against torture, cruel and inhuman treatment is imperative to discharging Australia's human rights obligations.

3 *Capacity of the Nauruan Police to Investigated Allegations*

There have been doubts raised by former chief justices and magistrates regarding the capacity of the Nauruan police to investigate allegations and the state of the rule of law on Nauru. According to former Chief Justice Eames: 'there is a serious question about their independence and about their willingness to investigate allegations against Nauruans who are charged with assaults of non-Nauruans'.[140] While there have been 18 allegations referred to the Nauruan police, none have been charged and prosecuted. In a high-profile investigation of an alleged sexual assault of Somali refugee, the Nauruan police disclosed the complainant's identity through an email attachment while announcing that there was insufficient evidence to pursue an investigation.[141] Additionally, former magistrate Peter Law has called into question the lack of independence and professionalism of the Nauruan Police Force.[142] Furthermore, the lack of resources meant that the police force was very reliant on the Australian Federal Police.[143] Nauruan Justice Department press statements continue to reiterate that there is no danger to women on Nauru and criticise the media for misrepresenting the situation.[144] In the face of mounting allegations of misconduct and international concern for the human rights situation, such statements indicate an unwillingness to take complaints of abuse seriously by the Nauru administration.

Therefore the lack of resources, the politicisation of criminal investigations and lack of impartiality of the police force indicates that complaints of violations of human rights may not be investigated and prosecuted effectively as required under international human rights

[139] Department of Immigration and Border Protection, 'Child Protection Panel and Extra Police Officers To Start Work' (Media Release, 9 May 2015) <http://www.minister.border.gov.au/peterdutton/2015/Pages/child-protection-panel-extra-police-officers.aspx>; Government Immigration Office (Nauru), 'Nauru Is a Safe Place for Refugees, Says Government' (Media Release, 7 October 2015) <http://www.naurugov.nr/government-information-office/media-release/nauru-is-a-safe-place-for-refugees,-says-government.aspx>.

[140] Evidence to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, Canberra, 20 July 2015, 73 (Former Chief Justice Eames).

[141] Hayden Cooper, 'Nauru Police Say Not Enough Evidence to Prove Somali Woman Was Raped on the Island' *ABC News* (online), 16 October 2015 <http://www.abc.net.au/news/2015-10-12/not-enough-evidence-to-prove-rape,-nauru-police-say/6846814>.

[142] Ibid.

[143] *Select Committee on the RPC in Nauru Report 2015*, 19 [2.35].

[144] Government Immigration Office (Nauru), 'Nauru Is a Safe Place for Refugees, Says Government' (Media Release, 7 October 2015) <http://www.naurugov.nr/government-information-office/media-release/nauru-is-a-safe-place-for-refugees,-says-government.aspx>.

law.[145] Therefore, Australia has to take greater steps to ensure the rights of asylum seekers are protected.

D Non-Refoulement Obligations

Finally, under the *Refugee Convention*,[146] *ICCPR*,[147] and *CAT*,[148] there is an obligation not to send people to another state where there is a risk that their rights under human rights treaties would be violated. With mounting evidence of prohibited ill-treatment against women and children on Nauru, Australia would be violating its non-refoulement obligations by transferring asylum seekers from Australia to the RPC on Nauru.[149]

IV *Australia's Compliance with the Convention on the Rights of the Child for Asylum Seeker Children Detained in Regional Processing Centres*

A Overview

Asylum seeker children and their families living in the regional processing centre ('RPC') on Nauru face a serious lack of adequate health, safety and wellbeing which has been recognised, reported and reviewed by the Moss Review and other humanitarian, legal and media sources. This submission will collate these sources to outline the physical and sexual assaults faced by asylum seekers, the lack of privacy and healthcare available, and include an anonymous primary source from an asylum seeker who was detained on Nauru. This submission will then outline Australia's human rights obligations under the *Convention on the Rights of the Child* and assess Australia's compliance with the convention. Finally, this submission will provide recommendations regarding the protection of privacy, and from assault and abuse.

[145] *CAT* art 14; Committee against Torture, *General Comment No 3: Implementation of Article 14 by State Parties*, UN Doc CAT/C/GC/3 (19 November 2012) 1 [1]–[3].
[146] *Refugee Convention* art 33.
[147] *ICCPR* arts 7, 13.
[148] *CAT* art 3.
[149] See Madeline Gleeson, 'Offshore Processing: Australia's Responsibility for Asylum Seekers and Refugees in Nauru and Papua New Guinea' (Factsheet, Andrew & Renata Kaldor Centre for International Refugee Law, 8 April 2015) 6–8 <http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Offshore_processing_state_responsibility.pdf>.

B Sexual and Physical Assault

According to the Moss Review, there is an overall under-reporting of sexual and physical assaults, likely due to familial and cultural reasons, and because of the fear that reporting incidents will negatively impact their asylum claims.[150] It was noted that even when assaults are reported, the responses of investigating claims of assault by service providers and police have not always been timely or adequate.[151] For minors there have been numerous reported and unreported allegations of sexual and other physical assault.[152]

The Moss Review team and a Child Protection Practitioner travelled to Nauru and spoke with transferees about the allegations of assaults by staff. The Review received numerous reports of sexual assault and harassment, including: allegations of rape and threatened rape against women;[153] guards asking to look at women and children's naked bodies;[154] and local staff hired to protect detainees being intoxicated on duty and offering children marijuana in return for sexual favours.[155] Incidents such as these were also reported by the Australian Human Rights Commission ('AHRC'), including the sexual assaults of a 16-year-old boy by a cleaner, and of an eight-year-old boy by adult detainees, both occurring in view of security staff.[156] These incidents are a fraction of those reported, and indicate an overall lack of safety and protection for children and their families from sexual harassment and assault.

It has also been reported that physical assaults are widespread on Nauru. The Moss Review were told of how a boy who threw a rock at a Wilson security staff member was then chased, caught by the hair and dragged along the ground by the staff member.[157] Multiple other news sources also commented on reported assaults, such as *The Guardian* in an article describing how Save the Children staff members made a complaint about a contract service provider staff member who hit a four-year-old girl in the back of the head, causing her to fall to the ground.[158] *The Guardian* also reported an incident where a bus driver threatened a school bus

[150] *Moss Review 2015*, 46 [3.157]–[3.158].
[151] Ibid 46–7 [3.159]–[3.163].
[152] Ibid 23–4 [3.5].
[153] Ibid 25 [3.15], 27–8 [3.27]–[3.31].
[154] Ibid 24–5 [3.9]–[3.10].
[155] Ibid 18 [1.33].
[156] Australian Human Rights Commission, *Tell Me About: Children in Immigration Detention in Nauru* (2015) 2–3.
[157] *Moss Review 2015*, 40 [3.121].
[158] Oliver Laughland, 'Nauru Guards Accused of Assaulting Children in Detention Camp', *The Guardian* (online), 24 April 2014 <http://www.theguardian.com/world/2014/apr/24/nauru-guards-accused-of-assaulting-children>.

full of children with a cricket bat,[159] and this was corroborated by an interview conducted by the Moss Review.[160]

Moreover, an *ABC News* article noted that a convicted rapist was able to join the reserve Nauruan police force,[161] and another article published by *The Guardian* described International Health and Medical Services employees not undergoing proper background checks or criminal record checks, and how not all staff were approved to work with children living in detention.[162] All these incidents demonstrate the conditions children and their families living in offshore processing are exposed to under the supervision of under-qualified and potentially dangerous staff.

In addition to extensive violence, sexual assault and negligence on Nauru, the complaints process available to asylum seekers is widely depicted as ineffective and unsupportive. The Moss Review stated that there is a large number of people not following through with complaints because 'nothing happens and we do not trust them [referring to Wilson Security]'.[163] This perspective is affirmed in the firsthand account below of an asylum seeker who was detained on Nauru. The consensus of the Moss Review and other reports and articles is that allegations of assault are being dealt with too slowly or not at all, causing a lack of confidence in the complaints process and under-reporting of incidents of assault and abuse.

C General Living Conditions

The living conditions at the Nauru RPC have been described as 'very hot and cramped … in vinyl tents, with no privacy or air-conditioning' by reports received by the AHRC's National Inquiry into Children in Immigration Detention in 2014.[164] A former Save the Children case manager described the tents as 'very hot' and 'covered in mould', with many people housed

[159] Oliver Laughland, 'Child Asylum Seekers' rights on Nauru "Systematically Violated", Inquiry Told', *The Guardian* (online), 14 August 2014 <http://www.theguardian.com/world/2014/aug/14/child-asylum-seekers-rights-on-nauru-systematically-violated-inquiry-told>.
[160] *Moss Review 2015*, 41 [3.129]–[3.131].
[161] Michael Walsh, 'Nauruan Police Face Fresh Scrutiny After Convicted Rapist Allowed to Join Police Reserves', *ABC News* (online), 15 October 2015 <http://www.abc.net.au/news/2015-10-15/nauru-police-face-scrutiny-after-convicted-rapist-joined-reserve/6856298>.
[162] Richard Ackland, 'IHMS Revelations Bolster the Legal and Political Case against the Detention of Asylum Seekers', *The Guardian* (online), 23 July 2015 <http://www.theguardian.com/australia-news/2015/jul/23/ihms-revelations-bolster-the-legal-and-political-case-against-the-detention-of-asylum-seekers>.
[163] *Moss Review 2015*, 42 [3.133].
[164] Australian Human Rights Commission, *Tell Me About: Children in Immigration Detention in Nauru* (2015) 2.

within the same partitions, and 'lizards, crabs, cockroaches and mice' also present.[165] Similar conditions have since been described by a former Transfield case manager.[166]

The AHRC has also received reports pertaining to the lack of water available on Nauru, with the result that during water shortages showers are limited to 30 seconds per day and are sometimes unavailable[167] and washing machines are barely available once a month.[168]

More generally, President of the AHRC Gillian Triggs has noted that many asylum seekers on Nauru have a 'genuine and deeply held fear for their personal safety' due to a lack of security and protection from sexual and physical assault.[169] These living conditions no doubt adversely impact the mental health of asylum seekers, as has been noted by former employees on Nauru.[170] According to a doctor quoted by the 2014 AHRC Inquiry 'every day … there were teenagers and unaccompanied children who were either on suicide or self-harm watch' during their six weeks of employment on Nauru between February and March 2014.[171]

D Healthcare

Despite the risks posed by such conditions, many aspects of the healthcare system for RPCs, including the health screening procedures[172] and supply of medication on Nauru,[173] have been found to be inadequate. The healthcare services on Nauru are managed by International Health and Medical Services, and the Select Committee on the RPC in Nauru found these

[165] Charlotte Wilson, Submission No 79 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 2015, 2.
[166] Nicole Hasham, 'Water Shortages, Toilet Restrictions and Constant Fear: Details about Life on Nauru Revealed', *The Sydney Morning Herald* (online), 10 February 2016 <http://www.smh.com.au/federal-politics/political-news/water-shortages-toilet-restrictions-and-constant-fear-details-about-life-on-nauru-revealed-20160209-gmpcwo.html>.
[167] Australian Human Rights Commission, *Tell Me About: Children in Immigration Detention in Nauru* (2015) 2.
[168] Nicole Hasham, 'Water Shortages, Toilet Restrictions and Constant Fear: Details about Life on Nauru Revealed', *The Sydney Morning Herald* (online), 10 February 2016.
[169] Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 9 February 2016 (proof copy) 18.
[170] Charlotte Wilson, Submission No 79 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 2015, 6; Nicole Hasham, 'Water Shortages, Toilet Restrictions and Constant Fear: Details about Life on Nauru Revealed', *The Sydney Morning Herald* (online), 10 February 2016.
[171] Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014) 186.
[172] Ibid 190–2.
[173] Australian Human Rights Commission, Submission No 25 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 27 April 2015, 3–4.

services to be slow and to involve asylum seekers, including children, queuing for large periods of time.[174] Furthermore, submissions to the Select Committee found the healthcare services to be inadequate in many respects, including unreliable immunisation records for children, lack of tuberculosis screening, and unavailability of paediatric medicines.[175] Further, the United Nations High Commissioner for Refugees ('UNHCR') following a monitoring visit to Nauru in October 2013 highlighted the lack of adequate medical facilities, including x-rays, other medical equipment, and medication.[176]

These accounts, combined with the firsthand evidence below from an asylum seeker detained on Nauru, reveal the exacerbating effects of detention conditions on mental and physical healthcare problems.

E Firsthand Account of Asylum Seeker Detained on Nauru

The authors of this policy submission spoke with an asylum seeker who had been detained on Nauru when she was under the age of 18.[177] With regards to the officers, she stated:

> Some of the men are very bad, the Nauruan officers. … Some of them will come to you and say whatever they want to say. Some officers will say as you are walking to dinner, 'Do you want a banana?' – it's not a real banana of course that they are referring to. It's disgusting. … Some asylum seekers ask the Nauruan people for cigarettes. They'll let them [the officers] do whatever they want to get the cigarettes. Lipstick, makeup – it's always the same question – 'Do you want a banana for that?'

[174] *Select Committee on the RPC in Nauru Report 2015*, 82 [3.108]; Alanna Maycock, Submission No 66 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 4 May 2015, 1–2.

[175] David Isaacs and Alanna Maycock, Submission No 66 Supplementary Submission to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 31 December 2014, 5–7. Other issues noted by this submission include: guards listening to discussions about patients; lack of information provided to patients for psychological support; long waiting times at the hospital; lack of communication and coordination between health professionals administering medication; inefficiency of the appointment system which results in patients missing scheduled meals; visiting staff not being provided with a copy of Nauru's clinical governance guidelines, best practice guidelines, and medical/nursing standards of care expected when working on Nauru; lack of interpersonal communication, compassion and respect between healthcare professionals and patients; patients being referred to by their boat number rather than their name and date of birth; and lack of growth charts in doctor's office resulting in poor assessment of growth in paediatrics.

[176] United Nations High Commissioner for Refugees, *UNHCR Monitoring Visit to the Republic of Nauru – 7 to 9 October 2013* (26 November 2013) 21. The UNHCR also expressed concern about the challenges this would create in the treatment of pregnant women.

[177] Interview with Former Nauru RPC Detainee (Face to Face, 4 February 2016).

When she reported the incident to an Australian officer, she was told in response, 'Well there's no camera, there's nothing, so you can't prove that he said that to you'.

She recalled one day where asylum seekers were shown a video of former Immigration Minister Scott Morrison saying, in her words, 'Do not waste your time on Nauru. You will never see Australia. You will never call Australia home.' She recalled:

> When he said that, people started hitting themselves on the walls and things. The immigration officer – people were chasing him, they wanted to kill him. One hundred people attempted suicide that day. Hanging themselves, cutting themselves, everybody was screaming and running. Everyone was so upset.

We questioned her on the complaints process in the RPC on Nauru when an incident had occurred. She described one time when she made a complaint and the officer responded by asking her how she would 'prove it' without witnesses or a camera. She stated:

> But how can I have witnesses in the dark? And there are no cameras. So … the more you try to fix something, the more you get blamed and the more you get upset. So you just keep quiet, no matter what happens to you.

This firsthand account consolidates the overall consensus regarding incidents of assault, lack of protection or privacy for asylum seekers, and the lack of a reliable or effective complaints process. The interview additionally details the environment that asylum seeker and refugee children and their families are experiencing every day in offshore processing.

F Australia's Obligations under the CROC

This submission will consider provisions contained in the *Convention on the Rights of the Child* ('*CROC*')[178] in light of the abovementioned issues and incidents that asylum seeker children and their families are facing as they are detained in Australia's RPC on Nauru.

1 *CROC Provisions*

The *CROC* recognizes that children have certain inalienable and fundamental human rights, including the right to seek asylum. This right to seek asylum is confirmed in the *Universal Declaration of Human Rights* and is internationally recognized.[179]

[178] Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

Article 22 of the *CROC* is foremost relevant to the conditions of children living on Nauru, as it specifically posits that all the provisions of the *CROC* apply to asylum seeker children. The article states that asylum seeker and refugee children have the right to special assistance and protection. Under this obligation, Australia should take appropriate measures to ensure that children, irrespective of their refugee status, receive protection and humanitarian assistance in the enjoyment of applicable rights set forth in the Convention.

The overriding principles that form the articles of the *CROC* focus on the protection of children, the best interests of the child, and the right to adequate privacy, safety, health and wellbeing.[180] In light of greater understanding on the conditions of children on Nauru ascertained through the Moss Review as well as endemic reporting of human rights breaches, it is recommended that the welfare and best interests of the child should be further considered. Recommendations for how this may be enacted will be discussed below in the recommendations sections.

2 *Implementation in Australia*

The *CROC* as an international human rights instrument is the most widely endorsed, through acceptance and ratification, international convention in the international community.[181] It has also been ratified by Australia (and by Papua New Guinea, and it has been formally accepted by Nauru). This would seem to elucidate that the overriding articles and principles of the *CROC* should operate internationally and nationally in Australia. Furthermore, elements of the *CROC* have been adopted into Australian pieces of legislation, and Australia's obligations on a humanitarian level should dictate some acknowledgement of responsibility for ensuring compliance with the *CROC* for children seeking asylum.

Whilst international treaties and conventions such as the *CROC* are not directly enforceable in domestic law, they can and have influenced Australian legal thought through legislative actions to incorporate it and through judicial interpretation. Australia has incorporated elements of the *CROC* into pieces of domestic legislation, including it in section 46MB(6)(b)(v) of the *Australian Human Rights Commission Act 1986* (Cth) which gives the National Children's Commissioner the obligation to consider the *CROC* in performing its

[179] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 14; Law Council of Australia, *Asylum Seeker Policy* (2014).
[180] *CROC* arts 2, 3, 16, 22, 24, 27, 34, 37.
[181] 'UN Lauds Somalia as Country Ratifies Landmark Children's Rights Treaty', *UN News Centre* (online), 20 January 2015 <http://www.un.org/apps/news/story.asp?NewsID=49845#.VviKevl96hc>.

functions of promoting the rights of children in Australia. It has also been incorporated into state law such as in the *Children and Young Persons (Care and Protection) Act 1998* (NSW),[182] *Adoption Act 2000* (NSW),[183] *Children and Young Persons Act* 1999 (ACT),[184] Child Protection Act 1999 (Qld),[185] and the *Children's Protection Act 1993* (SA).[186]

In terms of judicial interpretation, the High Court case of *Minister of State for Immigration and Ethnic Affairs v Teoh* determined that Australia's international human rights obligations may assist courts in interpreting and applying domestic case law and statutes.[187] The Court found that ratification of an international treaty, in the absence of express provisions to the contrary, would give rise to a legitimate expectation that the executive will act consistently with the provisions of the treaty.[188]

However, it is possible that grounds for any legitimate expectations that may have been based on the ratification of treaties have been removed by ministerial statements of 25 February 1997 and 10 May 1997 and in the proposed Administrative Decisions (Effect of International Instruments) Bill 1997. Nevertheless, where there is ambiguity the judiciary should prefer the interpretation that conforms most fully with Australia's obligations under the *CROC* and other international human rights instruments, which provides rights and should influence the treatment and protection of children.[189]

Therefore, the actions of the Australian State in incorporating elements of the Convention into domestic legislation and judicially interpreting a legitimate expectation of compliance, alongside Australia's fundamental humanitarian responsibilities in overseeing and detaining asylum seekers, together generate a strong national obligation to comply with the *CROC*.

3 *Australia's Compliance*

At large, Australia's actions fail to comply with the *CROC* in the duty over children and their families in offshore processing. Specifically, the voluminous reportage of incidents of sexual

[182] *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 10.
[183] *Adoption Act 2000* (NSW) s 9.
[184] *Children and Young Persons Act 1999* (ACT) s 12.
[185] *Child Protection Act 1999* (Qld) ss 5–5E.
[186] *Children's Protection Act 1993* (SA) s 4(3).
[187] (1995) 183 CLR 273, 288 (Mason CJ and Deane J).
[188] Ibid 291 (Mason CJ and Deane J), 302 (Toohey J); Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [3.22].
[189] *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ); Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [3.21].

and physical assault, cruel punishment and intimidation by guards and staff collectively breach the threshold of protection and rights to safety and wellbeing under the *CROC*.[190]

Described incidents of intruding into the privacy of asylum seeker children and their families, including the lack of private housing and guards watching children whilst showering, are in clear breach of the right to privacy and reputation under the *CROC*.[191] Moreover, the living conditions faced by asylum seekers, including living in over-crowded and over-heated tents with minimal showering and healthcare, breaches the right to an adequate standard of living.[192] Finally, the inadequate healthcare afforded to asylum seeker children and their families on Nauru, breaches the right to the highest attainable standard of healthcare.[193]

All of these reported incidents indicate an overall breach of the best interests of the child,[194] and the right to special protection and assistance for refugees and asylum seekers.[195] The system of processing asylum seekers and protecting refugee children fails to provide them with 'appropriate protection and humanitarian assistance' as seen through the lack of protection from assault and abuse, cruel punishment and intimidation exercised by staff and guards, as well as the inadequate standards of living, privacy and healthcare. Overall, this illustrates Australia's failure to commit to appropriate assistance and protection for children in offshore processing under the *CROC*.

G Recommendations

This submission recommends that the Department of Immigration and Border Protection increase collaboration with contracted service providers on Nauru, the Nauruan government and the Nauruan police force to improve and regulate staff training and conduct. This submission reiterates a need for extended welfare services and police presence to ensure the prevention of sexual and physical assault against asylum seeker children and their families. This recommendation aims at increasing the standard of protection and the protection of privacy for children. Additionally, this recommendation aims to be preventative, rather than focusing on solely adopting a reactionary system of response to individual incidents of abuse and assault. This is in line with various recommendations of the Moss Review, specifically Recommendations one to four.

[190] *CROC* arts 34, 37.
[191] *CROC* art 16.
[192] *CROC* art 27.
[193] *CROC* art 24.
[194] *CROC* art 3.
[195] *CROC* art 22.

Furthermore, this submission reaffirms the recommendations put forth by the Moss Review in increasing identification and response mechanisms to incidents of violence and sexual assault. As aforementioned, an increasingly integrated and regulated response with improved partnership between the Nauruan operations managers, the Department of Immigration and Border Protection, and contract service providers could increase accountability and compliance with human rights and child protection principles outlined in the *Convention on the Rights of the Child*.