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## Submission to the Senate Select Committee

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

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## About the Human Rights Law Centre

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## Endorsements

UNICEF Australia has contributed to and endorses this submission.



**UNICEF Australia**  
Amy Lamoin  
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## Contents

1.	Executive summary	1
2.	Australia's obligations under the MOU	2
2.1	Undertaking to comply with human rights standards	2
2.2	Undertaking to assist with resettlement in safe third countries	3
3.	Australia's duty of care obligations and responsibilities	4
3.1	Common law duty of care	4
3.2	Obligations under international law	5
i.	Legal basis for extraterritorial obligations	5
ii.	Factual basis for Australia's human rights obligations at the RPC	6
4.	Other related matters	6
4.1	Lack of transparency	6
4.2	Focussing on the messenger instead of the message	8
4.3	LGBTI Transferees	9
5.	Conclusion	9

## 1. Executive summary

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1. The Senate Select Committee has asked for submissions to its inquiry into recent allegations relating to conditions and circumstances at the Nauru Regional Processing Centre (RPC). The inquiry arises out of the recent Moss Report, which details numerous allegations of serious physical and sexual violence against women and children detained at the RPC.
2. Much of the violence is alleged to have been perpetrated by people in positions of care and responsibility for asylum seekers. The individuals responsible should be held to account beyond just their employers and contractors by the legal system in Nauru.
3. More broadly, the allegations require honest and forthright review by the Australian Government as to the extent to which our policies and the manner of their implementation have created an environment carrying heightened risks of such harm taking place.
4. The reported abuse and violence did not occur in a vacuum. It occurred in the context of policy arrangements which are inherently harmful, breach international law and are cloaked in secrecy. Leaving a large number of especially vulnerable people indefinitely detained in harsh conditions with limited transparency creates preconditions for serious harm. Australia has failed to take reasonable steps to prevent that harm and devised, funds and maintains effective control over the arrangements which have given rise to it.
5. As a matter of principle and of international law, Australia therefore bears responsibility.
6. The HRLC recommends closing the Nauru RPC and processing asylum seekers onshore in order to ensure their safety and rectify Australia's non-compliance with international law.
7. In the event that the Nauru RPC is to remain open, the HRLC makes the following recommendations:

***Recommendation 1: Past acts of violence, abuse and exploitation inside the RPC must be independently investigated and alleged perpetrators prosecuted.***

***Recommendation 2: In accordance with the obligation under international law to remedy human rights violations, the Australian Government should ensure that Transferees who have been victims of acts of violence and abuse inside the Nauru RPC receive appropriate redress.***

**Recommendation 3: Urgent measures, such as those outlined in the Moss Report, must be taken to ensure further incidents of violence and abuse do not occur.**

**Recommendation 4: The Australian Government establish an onsite independent observer/monitor to oversee and regularly report on conditions inside the Nauru RPC.**

**Recommendation 5: Unless and until the safety and rights of asylum seekers under Australia's effective control on Nauru can be guaranteed, there should be a moratorium on further transfers to Nauru and all vulnerable Transferees on Nauru (particularly women, children, families and LGBTI asylum seekers) should be returned to Australia.**

## 2. Australia's obligations under the MOU<sup>1</sup>

8. On 3 August 2013 the Governments of Australia and Nauru entered into a new Memorandum of Understanding (**MOU**) which superseded the previous Memorandum of Understanding signed on 29 August 2012.<sup>2</sup> Australia is failing to meet its obligations under the MOU in several key respects.

### 2.1 Undertaking to comply with human rights standards

9. Under the terms of the MOU both Nauru and Australia undertake to treat Transferees 'in accordance with relevant human rights standards.'<sup>3</sup>

10. However, the UNHCR's most recent report on the Nauru RPC found that physical conditions in the Centre and the arrangements and legal framework underpinning it breach international law.<sup>4</sup> In particular, the UNHCR found that:

- (a) conditions inside the RPC are not safe or humane;

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<sup>1</sup> This part relates to 1.a. of the Committee's Terms of Reference.

<sup>2</sup> Available at <<http://www.dfat.gov.au/geo/nauru/Pages/memorandum-of-understanding-between-the-republic-of-nauru-and-the-commonwealth-of-australia-relating-to-the-transfer-to-and.aspx>>.

<sup>3</sup> See clause 17 of the MOU.

<sup>4</sup> See UNHRC, *UNHRC Monitoring Visit to the Republic of Nauru 7 to 9 October 2013*, 26 November 2013, available at <<http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf>>.

- (b) the mandatory detention of asylum seekers without any time limit and without any individualised consideration of the necessity, reasonableness, or proportionality of their detention violates the prohibition against arbitrary detention;
  - (c) the combined effect of prolonged detention, slow processing and uncertain resettlement prospects creates 'an environment which clearly encourages returns' and may lead to *bona fide* refugees returning to their countries of origin; and
  - (d) the RPC is inappropriate for children and, accordingly, no child should be sent from Australia to Nauru.
11. Asylum seeker children, particularly those who are unaccompanied, require special protection measures in order to stay safe and have healthy development. Nauru does not have an existing child protection framework or functioning social services and is unable to respond to the complex protection and support needs of unaccompanied children and asylum seeker children and their families. Australia continues to transfer and detain children on Nauru regardless.
12. The Australian Human Rights Commission's inquiry found that children detained in the Nauru RPC 'are suffering from extreme levels of physical, emotional, psychological and developmental distress' and that the conditions in which children are being detained may breach the *Convention on the Rights of the Child*.<sup>5</sup>
13. While Australia is obliged, under both the MOU and international law, to treat asylum seekers detained on Nauru in accordance with human rights standards, that obligation is not being met.

## 2.2 Undertaking to assist with resettlement in safe third countries

14. Australia has also failed to permanently settle a single refugee from the Nauru RPC despite undertaking to do so almost two years ago. Instead, people found to be refugees continue to languish in limbo.
15. Under the terms of the MOU, Australia is responsible for assisting Nauru to:
- settle in a third safe country all Transferees who the Republic of Nauru determines are in need of international protection, other than those who are permitted to settle in Nauru.<sup>6</sup>

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<sup>5</sup> The Forgotten Children: National Inquiry into Children in Immigration Detention (2014), Australian Human Rights Commission, at p.36, available at <<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children>>.

<sup>6</sup> See clause 13 of the MOU.

16. Australia also undertakes to 'make all efforts to ensure that all Transferees depart the Republic of Nauru within as short a time as is reasonably necessary'.<sup>7</sup>
17. These commitments by Australia recognise that people found to be refugees require timely, durable solutions which Nauru – as the world's smallest Republic - has incredibly limited capacity to provide.
18. However, not one Transferee from Nauru has received any permanent outcome either in Nauru or a third country.<sup>8</sup> Australia has brokered the 'Cambodia refugee deal', but that arrangement has been condemned by the UNHCR as 'deeply concerning' and 'a worrying departure from international norms'<sup>9</sup> and has not yet led to the settlement of a single refugee.
19. On 17 April 2015 the UNICEF East Asia and Pacific Office also released a statement regarding the Cambodia transfer stating that 'governments that take actions that can reasonably be expected to increase the risks that children face must accept a special responsibility for the safeguarding of their rights'. The statement further states that no government policy or action should knowingly put children's lives or their wellbeing at increased risk.

### 3. Australia's duty of care obligations and responsibilities<sup>10</sup>

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20. Under both domestic and international law, Australia retains legal responsibility for the rights and wellbeing of people it transfers offshore.

#### 3.1 Common law duty of care

21. Despite Australia contracting out the operation and provision of services inside the Nauru RPC it is likely that the Australian Government still owes Transferees a 'non-delegable duty of care',

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<sup>7</sup> See clause 15 of the MOU.

<sup>8</sup> While Australia has entered into a bilateral agreement with Cambodia to resettle an unspecified number of refugees, no refugees have been resettled under that deal.

<sup>9</sup> UNHCR, 'UNHCR statement on Australia-Cambodia agreement on refugee relocation', 24 September 2014, available at [http://unhcr.org.au/unhcr/index.php?option=com\\_content&view=article&id=513:unhcr-statement-on-australia-cambodia-agreement-on-refugee-relocation&catid=35:news-a-media&Itemid=63](http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=513:unhcr-statement-on-australia-cambodia-agreement-on-refugee-relocation&catid=35:news-a-media&Itemid=63).

<sup>10</sup> This part relates to 1.b and c of the Committee's Terms of Reference

being a requirement not only to take care but to ensure care is taken where responsibility has been delegated to a third party.<sup>11</sup>

22. The existence of a non-delegable duty of care has previously been recognised in the context of onshore detention centres, despite the management of those centres also being contracted out.<sup>12</sup> It is, in our view, likely that those principles would apply equally to offshore detention centres.
23. The consequence is that the Australian Government could be liable in instances where the required standard of care has been breached notwithstanding that such breaches may relate more directly to the conduct of others.

### 3.2 Obligations under international law

24. Australia's international legal obligations and responsibilities do not end at our borders. Australia has responsibilities in relation to people and activities within its "power or effective control," regardless of whether those people or activities are in Australian territory.<sup>13</sup>
  - i. Legal basis for extraterritorial obligations
25. Australia is obliged to perform its human rights obligations in good faith.<sup>14</sup>It cannot avoid or divert the obligations it has accepted by contracting them out or otherwise.
26. Nor can Australia do offshore things that would violate its international law obligations if done onshore. A key rationale for the extraterritorial application of a country's human rights obligations is that "it would be unconscionable... to permit a State party to perpetrate violations...on the territory of another State, which violations it could not perpetrate on its own territory."<sup>15</sup>
27. More specifically in the context of States responses to refugee flows, the UNHCR has emphasised:

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<sup>11</sup> *Anastasios Kondis v State Transport Authority* (1984) CLR 672; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 and *Northern Sandblasting v Harris* (1997) 188 CLR 313.

<sup>12</sup> *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* (2005) 143 FCR 217, [199].

<sup>13</sup> UN Human Rights Committee, General Comment No. 31.

<sup>14</sup> Article 26 the *Vienna Convention on the Law of Treaties*.

<sup>15</sup> *Lopez Burgos v Uruguay*, Communication No. R.12/52, 29 July 1981 at 12.3.

States are bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life, or torture or other cruel, inhuman or degrading treatment or punishment.<sup>16</sup>

ii. Factual basis for Australia's human rights obligations at the RPC

28. Australia's involvement in the transfer and detention of asylum seekers at the Nauru RPC is significant:

- (a) Australian authorities transport asylum seekers under their direct control to Nauru;
- (b) Those transfers occur under Australian law in order to give effect to Australian policy;
- (c) Once asylum seekers arrive in Nauru they are detained at the Nauru RPC, which is entirely funded by the Australian Government;
- (d) Operational, maintenance and welfare support services are provided by service providers at the Nauru RPC under contract with the Australian Government – the Nauruan Government is not a party to those contracts; and
- (e) Asylum seekers with medical issues are frequently brought back to Australia for treatment and then returned to Nauru – bringing Transferees back and forth reflects the high degree of control which Australia continues to exert over people it transfers.

29. From the moment they are received by Australian authorities and throughout their detention on Nauru, asylum seekers are effectively subject to Australia's jurisdiction and control. That practical reality translates under international law to a legal one, such that Australia retains human rights obligations to asylum seekers it transfers to detention on Nauru.

## 4. Other related matters<sup>17</sup>

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### 4.1 Lack of transparency

30. There is a concerning lack of transparency in relation to the Nauru regional processing Centre.

31. Transparency is vital to ensuring scrutiny and accountability for the conditions in which asylum seekers are being detained. It is also vital to the Australian people's ability to evaluate current policy and the manner of its implementation.

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<sup>16</sup> UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, pp 8 – 9 (citations omitted).

<sup>17</sup> This part relates to 1.g. of the Committee's Terms of Reference.

32. After UNHCR's visit to the Centre in October 2013, UN and NGO access has been tightly restricted. The United Nations Working Group on Arbitrary Detention had agreed with Nauru that it would conduct its first official visit from 14 to 19 April 2014.<sup>18</sup> However, three weeks before the visit was to take place the Nauruan Government withdrew its invitation, saying it 'did not invite this group to visit' and alleging the planned visit was 'merely another publicity stunt by a group with a political agenda.'<sup>19</sup> Amnesty International was also denied permission to visit on the basis that the country's immigration authorities were 'incredibly busy'.<sup>20</sup>
33. In January 2014 Nauru increased the visa fee for journalists from AUD 200 (USD 155) to AUD 8000 (USD 6220).<sup>21</sup> The fee is non-refundable even if the visa application is rejected. The 3900 percent fee hike has discouraged foreign journalists from travelling to Nauru to report on the treatment of asylum seekers transferred there by Australia.<sup>22</sup> To date, not one journalist has been able to inspect the Nauru RPC.
34. People working in the detention centre on Nauru also face a significant risk of reprisals if they speak out about human rights abuses. Service providers on Nauru are subject to restrictive contractual 'gag clauses'.<sup>23</sup> Some individuals who have spoken publically about mistreatment

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<sup>18</sup> Xabier Celaya, *Cancellation of the first official visit to Nauru by the UN Working Group on Arbitrary Detention* (9 April 2014) OHCHR

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14495&LangID=E>.

<sup>19</sup> Oliver Laughland, *Nauru blocks UN human rights delegation from visiting island* (9 April 2014) The Guardian (online), <http://www.theguardian.com/world/2014/apr/09/nauru-blocks-un-human-rights-delegation-from-visiting-island>.

<sup>20</sup> Karen Barlow, *Asylum seekers: Amnesty accuses Nauru of hiding conditions after refusing detention centre access* (30 April 2014) ABC News <http://www.abc.net.au/news/2014-04-29/nauru-hiding-asylum-seeker-conditions-amnesty-says/5418924>.

<sup>21</sup> *Nauru government defends media visa price hike* (10 February 2014) ABC News <http://www.abc.net.au/news/2014-02-10/an-nauru-visa-price-hike-for-journalists/5250568>.

<sup>22</sup> Elaine Pearson, *Dispatches: Foreign Journalists Aren't Welcome in Nauru* (10 January 2014) Human Rights Watch <http://www.hrw.org/news/2014/01/10/dispatches-foreign-journalists-aren-t-welcome-nauru>.

<sup>23</sup> Melissa Davey, *Mandatory detention of children 'abusive', say Australian paediatricians'* (6 October 2014) The Guardian <http://www.theguardian.com/australia-news/2014/oct/06/mandatory-detention-children-abusive-australian-paediatricians>; Paul Osborne, *Greens attack Nauru health deal* (21 September 2012) The Sydney Morning Herald <http://news.smh.com.au/breaking-news-national/greens-attack-nauru-health-deal-20120921-26c0t.html>.

they have witnessed and conditions inside the centre have faced criminal investigation and the threat of prosecution.<sup>24</sup>

35. The Australian Government maintains that access to the RPC is a matter for Nauru. However, Australia built the Centre and underwrites it at considerable taxpayer expense. Asylum seekers are only detained therein because Australia sends them there. Australia plainly has a responsibility to push for independent scrutiny of their treatment.
36. The Australian Government should work with Nauru to ensure appropriate access. It is not reasonable to continually refer to Nauruan sovereignty when denying access to media, monitors and others.

#### 4.2 Focussing on the messenger instead of the message

37. The allegations of serious physical and sexual violence, and exploitation against people detained in the Nauru RPC ought to have triggered an urgent investigation into those claims and a review of the arrangements which have exposed people, including children, to the risk of harm. Instead, in the immediate aftermath of those allegations the then Minister of Immigration and Border Protection, Scott Morrison, made comments which appeared intended to shift the focus away from victims of abuse and onto whistleblowers and service providers who helped expose it.
38. When Minister Morrison announced the Moss Review he placed a disproportionate emphasis on speculation that service providers within the centre were actively encouraging (I) asylum seekers to self-harm (II) children to become engaged in protest activity and (III) the fabrication of allegations of abuse in order to undermine Government policy. There was a grossly inadequate focus on the reports of violence, abuse and exploitation inside the centre.<sup>25</sup>
39. The Moss Review ultimately found there was no evidence to support claims that service providers or advocates had behaved in such a way. It is both disappointing and deeply troubling that when presented with credible reports of serious abuse against women and children inside an Australian-run and funded facility, the responsible Minister focused his public comments on those who had made the reports.

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<sup>24</sup> Sarah Whyte, *Legal experts criticise Scott Morrison's use of 'draconian' law* (9 October 2014) *The Age* <<http://www.theage.com.au/federal-politics/political-news/federal-politics/political-news/legal-experts-criticise-scott-morrison-s-use-of-draconian-law-20141008-10rwn3.html>>; Bec Zajac, *Speaking out* (21 January 2015) *The Monthly* <<http://www.themonthly.com.au/blog/bec-zajac/2015/21/2015/1421797900/speaking-out>>.

<sup>25</sup> Scott Morrison, *Press Conference On Nauru Sexual Assault Claims* (3 October 2014) <<https://www.youtube.com/watch?v=PfMXPO1PLwk>>.

### 4.3 LGBTI Transferees

40. The HRLC has heard concerns from refugees resettled on Nauru regarding risk of harm towards gay men. The HRLC has received reports that gay men detained and resettled in Nauru have been harassed and subjected to violence by other refugees and the local population.<sup>26</sup>
41. While Nauruan laws<sup>27</sup> criminalising male-to-male sexual conduct are reportedly not actively enforced and the Nauru Government has undertaken take action to repeal such laws,<sup>28</sup> the fact remains that male-to-male sexual relations are criminalised in Nauru.
42. It is potentially seriously harmful for same-sex attracted men to be resettled in a country that criminalises homosexuality, especially if refugees have fled persecution on those grounds from their country of origin<sup>29</sup>. Given that the safety and security of same-sex attracted men cannot be guaranteed in Nauru, those found to be refugees should be resettled in an alternative country that provides a safe environment for this particular cohort.

## 5. Conclusion

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43. Successive Australian Governments have indefinitely detained large numbers of asylum seekers in remote locations with limited scrutiny and transparency. The arrangements inherently violate international law and the conditions inside the RPC have been assessed by the UN as being inhuman and unsafe.
44. Detention, especially of children, in such conditions creates heightened risks of harm. Where that harm occurs, Australia can retain legal responsibility for it.
45. The HRLC recommends closing the Nauru RPC and processing asylum seekers onshore in order to ensure their safety and rectify Australia's non-compliance with international law.
46. In the event that the Nauru RPC is to remain in operation, Australia must:
  - (a) Ensure that past acts of violence and abuse inside the Nauru RPC are investigated and that alleged perpetrators are held to account;

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<sup>26</sup> Based on interviews with individuals currently residing in Nauru.

<sup>27</sup> *Criminal Code* (Republic of Nauru), s 208, 209, & 211.

<sup>28</sup> Human Rights Council, *Report of the Working Group on the Universal Periodic Review – Nauru*, 17<sup>th</sup> sess, Agenda Item 6, 8 March 2011, UN Doc A/HRC/17/3, <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/116/35/PDF/G1111635.pdf?OpenElement>>.

<sup>29</sup> UNHCR, *Guidelines on International Protection No. 9*, 23 October 2012, available at <<http://www.refworld.org/docid/50348afc2.html>>.

- (b) Ensure victims of past violence and abuse receive appropriate redress;
- (c) Take urgent measures, such as those outlined in the Moss Report, to ensure further incidents of violence and abuse do not occur;
- (d) Establish an onsite independent observer/monitor to oversee and regularly report on conditions inside the Nauru RPC;
- (e) Cease transfers to Nauru and return all vulnerable asylum seekers (including women, children, families and LGBTI asylum seekers) from Nauru unless and until the safety and rights of asylum seekers under Australia's effective control on Nauru can be guaranteed.