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31 March 2016

Dear Committee Secretary,

**Submission to Senate Standing Committee on Legal and Constitutional Affairs -
Conditions and Treatment of Asylum Seekers and Refugees at the Regional
Processing Centres in the Republic of Nauru and Papua New Guinea**

Australian Lawyers for Human Rights (“ALHR”) thanks the Senate Standing Committee on Legal and Constitutional Affairs for the opportunity to make this submission on the Conditions and Treatment of Asylum Seekers and Refugees at the Regional Processing Centres in the Republic of Nauru and Papua New Guinea.

ALHR was established in 1993 and is a network of legal professionals active in practising and promoting awareness of international human rights. ALHR has a national membership of lawyers and law students across Australia and active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

This submission addresses issues concerning the treatment of people seeking asylum and refugees who are detained at the Regional Processing Centres (“RPCs”) in the Republic of Nauru and Papua New Guinea (“PNG”). It also examines how the Australian

Government's current policies, laws and practices contravene Australia's obligations under international human rights law including the 1951 Convention relating to the Status of Refugees and 1967 Protocol Relating to the Status of Refugees ("the Refugee Convention"), the International Covenant on Civil and Political Rights ("ICCPR") and the United Nations Convention Against Torture ("UNCAT").

ALHR holds the view that the harm, and potential harm, to those seeking asylum and refugees held at the RPCs on Nauru and PNG resulting from Australia's current laws, policies and practice has worsened. Urgent reform is needed if Australia is to fulfil its obligations under international human rights law.

If you would like to discuss any aspect of this submission, please contact Claire Hammerton, ALHR Refugee Sub-Committee Coordinator by email at refugees@alhr.org.au.

Yours faithfully,

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Table of Contents

1. About this submission	2
2. Conditions and Treatment in RPCs in Nauru and PNG	2
2.1 Conditions and Treatment at the RPC in Nauru	2
2.2 Conditions and Treatment at the RPC in PNG	6
3. Children In Detention and International Legal Obligations.....	10
4. Implementation of recommendations of the Moss Review in relation to the regional processing centre in the Republic of Nauru.....	12
5. Mandatory Detention and International Legal Obligations.....	13
6. Transparency and Accountability.....	17
7. Conclusion.....	18

1. About this submission

As lawyers and other legal professionals with an interest and background in legal affairs, ALHR members strive towards a society where justice and fairness is upheld in law, policy and practice. The treatment of those seeking asylum and refugees by the Australian Government has been identified as a priority area for ALHR and is cause for great concern amongst ALHR members.

This submission will consider some of the most concerning aspects of Australian law, policy and practice as it relates to the treatment of refugees and people seeking asylum who are detained at the RPCs in Nauru and PNG.

2. Conditions And Treatment in RPCs in Nauru and PNG

According to the Australian Human Rights Commission's National Inquiry¹, the impact of long-term detention to the physical and psycho-social well-being of those detained is well-known and demonstrated most graphically by information provided by the Department of Immigration and Border Protection on the rates of self-harm, suicide and community violence in immigration detention facilities across Australia.² These are a disturbing but predictable consequence of Australia's mandatory detention regime.³ Australia has one of the harshest asylum seeker and refugee regimes in the world, which allows for prolonged and indefinite mandatory detention of people seeking asylum, and is one of the only countries in the world where those seeking asylum are detained in jail-like conditions for lengthy periods of time that are often exceed a year.⁴

As at 29 February 2016, there were 1,379 people detained at the RPCs in Nauru and PNG.⁵ This includes 365 men, 55 women and 50 children detained in Nauru, and 909 men detained on Manus Island in PNG.⁶ This number does not include refugees who were previously detained at the RPCs and are now living in the community in Nauru or PNG.

ALHR is strongly opposed to the practice of mandatory offshore detention for many reasons, including:

- the lack of accountability and transparency regarding the management and conduct of detention centre staff at these facilities;
- the detrimental impact upon the mental wellbeing of people seeking asylum resulting from indefinite detention and uncertainty regarding resettlement;

¹ Australian Human Rights Commission, *The Forgotten Children National Inquiry into Children in Detention*. 2014.

² Department of Immigration and Border Protection, *Deaths Self-harm and Incidents*, Item 11, Document 11.1, Schedule 2, First Notice to Produce, 31 March 2014; Department of Immigration and Border Protection, *Actual Self Harm*, Item 36, Schedule 3, First Notice to Produce, 31 March 2014.

³ Submission by the Office of the United Nations High Commissioner for Refugees, *Inquiry into Australia's Immigration Detention Network*, Joint Select Committee on Australia's Immigration Detention Network, 19 August 2011, available at: <http://unhcr.org.au/>

⁴ The Royal Australian & New Zealand College of Psychiatrists, Position Statement 46 *The provision of mental health services to asylum seekers and refugees*, available at:

https://www.ranzcp.org/Files/Resources/College_Statements/Position_Statements/ps46-pdf.aspx

⁵ Australian Department of Immigration and Border Protection and Australian Border Force, 29 February 2016, 'Immigration Detention and Community Statistics Summary', at p4

<https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-29-feb-2016.pdf> accessed 22 March 2016.

⁶ Ibid

- the poor standard of living conditions in detention facilities – including overcrowding, inadequate sanitation and poor ventilation, all impacting on mental wellbeing;
- inadequate health services, especially specialised health services;
- substantial evidence regarding the use of force and violence, including sexual violence, by detention staff against detainees;
- lack of access to legal services for people seeking asylum and lack of procedural fairness in relation to seeking legal redress;
- lack of educational and recreational opportunities for children at the RPC in Nauru, breaching the United Nations Convention on the Rights of the Child; and
- frequent reports of actual and threatened self harm by detainees, including attempted suicide and hunger strikes.

In November 2013, the United Nations High Commissioner for Refugees (“UNHCR”) described Australia’s offshore detention facilities as amongst things “unsatisfactory”, “cramped” “oppressive” and “harsh”.⁷ The harsh conditions, indefinite detention and violation of international law has led some to label those islands that host Australia’s offshore detention centres as “Australia’s Guantanamo Bay”.⁸

On February 2016, Dr Karen Zwi, Paediatrician, who has worked with children detained in RPCs stated that: “these kids feel to me like they’ve been through a mincing machine. They’ve had one traumatic event after another. I sometimes feel they are broken into little bits and it’s really hard to put the pieces back together again”.⁹ A second paediatrician, Dr Hasantha Gunasekera, claims that a report of sexual assault among refugees held on Nauru is made every 13 days, most of the alleged victims being children.¹⁰

On 17 February 2014, it was reported that Mr Reza Berati, an Iranian detained on Manus Island, was bludgeoned to death with a rock by local security staff during a riot which involved PNG police firing live rounds of ammunition, as well as PNG nationals, security staff, and Australian ex-pats, beating detainees using fists and improvised weapons.¹¹ In September 2014, a second asylum seeker, a 24 year old Hamid Kehazaei, died after contracting septicaemia from a cut to his foot at the PNG detention facility.¹² The significant delays in providing him with appropriate medical treatment arguably constitute medical negligence and a failure of duty of care by the Australian Government.

⁷ United Nations High Commissioner for Human Rights, ‘UNHCR Monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013’, 26 November 2013 (accessed 16 September 2014).

⁸ Conor Duffy, ‘UN Condemns Australia’s Guantanamo Bay’, ABC Television, 25 February 2014 (accessed 16 September).

⁹ See 7:30 Report ‘Doctors risk jail time for speaking out about treatment of children in detention’ <http://www.abc.net.au/7.30/content/2015/s4399153.htm> (accessed 15 March 2016)

¹⁰ See Kate Aubusson ‘Boy to be sent back to island where alleged rapist is: report’, The Sydney Morning Herald 3 February 2016 <http://www.smh.com.au/national/a-five-year-old-boy-allegedly-raped-to-be-sent-back-to-nauru-where-his-rapist-lives-abc-730-reports-20160202-grmk1lg.html#ixzz42sCWWMh0> (accessed 15 March 2016)

¹¹ See Robert Cornall, Report to the Secretary, Department of Immigration and Border Protection: Review into the Events of 16U18 February 2014 at the Manus Regional Processing Centre, 23 May 2014, (accessed 16 September).

¹² Oliver Laughland, ‘Asylum Seeker Declared Brain Dead After Leaving Manus Island’, The Guardian Australia, 3 September 2014.

In 2014 Dr Peter Young, former Director of the International Health and Mental Services (“IHMS”), a service provider contracted by the Australian Government to provide health services at offshore immigration detention facilities, provided evidence to the Australian Human Rights Commission’s National Inquiry into Children in Immigration Detention (“AHRC Inquiry”) that the Australian Government had requested that IHMS remove figures from a report highlighting the pervasiveness of mental health distress in child detainees.¹³

Dr John-Paul Sanggaran, who worked as a medical practitioner at detention facilities on Christmas Island, also provided evidence to the AHRC’s Inquiry detailing instances of medications, hearing aids, and prosthetic limbs being removed from detainees and destroyed before the detainees were transferred to an offshore detention facility.¹⁴

Ms Kristy Jane Diallo, a child protection support worker at the immigration detention centre on Nauru, gave evidence to the AHRC Inquiry that detainees at the RPC in Nauru live in tents at the bottom of a quarry, that there is no privacy, that it is extremely hot with temperatures reaching 40 degrees Celsius in the tents, and that white rocks covering the ground attracts significant glare from the white rocks – “for staff you always had to wear sunglasses because the glare would hurt your eyes ... often children and families didn’t have sunglasses, they also didn’t have hats, but we [the staff] would wear hats”.¹⁵

Alanna Maycock, a paediatric nurse who visited the RPC in Nauru in December 2014 recently spoke about the conditions and treatment of those detained. She spoke about the lack of dignity and privacy, and poor access to health. In a speech at an Australian Medical Association forum on 21 February 2016 she said:

Behind where we were standing were the showers and then it occurred to me that they had no door, and 7-10 meters in front of this row of showers was a table with three male guards sitting at it. I said to the IHMS director who was with us at that time and the security staff. Do you realise those showers have no door on them...

In referring to lack of dignity and access to basic sanitary items for woman she said:

One mother we met cried as she told us she had been wetting the bed. This was a very proud and beautiful Iranian lady. She said she was just too scared to make the journey to the toilet at night. Not in my 20 years as a nurse have I ever met a mother that is bed wetting because she is too scared to get up and use the facilities unless there is something medically wrong with them... One mother we met had been menstruating for around two months. She said she had reported this several times but had not been referred to a gynaecologist for review of her symptoms. She was using material from tent her tent to hold the bleeding because she didn’t have free access to sanitary products. And one night the bleeding was so bad and she was extremely dirty, she decided to make the journey to the toilet. As she got near to the toilet where the male guards were sitting a blood clot fell from her to the ground. This woman ran to the toilet as a trail of blood followed ...

¹³ Evidence given by Dr Peter Young, Australian Human Rights Commission, National Inquiry into Children in Immigration Detention 2014 (Public Hearing, Sydney, 31 July 2014).

¹⁴ Evidence given by Dr JohnTPaul Sanggaran Australian Human Rights Commission, National Inquiry into Children in Immigration Detention 2014 (Public Hearing, Sydney, 31 July 2014).

¹⁵ Evidence given by Kirsty Jane Diallo, Australian Human Rights Commission, National Inquiry into Children in Immigration Detention 2014 (Public Hearing, Sydney, 31 July 2014).

ALHR submits that such poor and inhumane conditions are in breach of Australia's human rights obligations and international human rights standards. People detained at the RPCs are entitled to have their basic human rights afforded to them.

The Impact on Mental Health

The Australian Human Rights Commission has raised concerns for many years about the fact that mandatory detention leads to breaches of Australia's international human rights obligations. The Commission has repeatedly raised concerns about the significant human impacts of mandatory detention on mental health and well being of those seeking asylum:

- *Between January 2011 and February 2013 there were 4,313 incidents of actual, threatened and attempted serious self-harm recorded in immigration detention facilities in Australia. In the 2012–2013 financial year there were 846 incidents of self-harm across the immigration detention network. Between 1 July 2010 and 20 June 2013, there were 12 deaths in immigration detention facilities. Coroners have found that six of those deaths were suicides. These figures on self-harm reflect the longstanding concern that Australia's system of mandatory and indefinite detention has a detrimental impact on the mental health of those detained...The UN Human Rights Committee found that Australia breached the right not to be subjected to cruel, inhuman or degrading treatment or punishment, and the right of people detained to be treated with dignity, by continuing to detain people in the knowledge that it was contributing to mental illness.*¹⁶

Furthermore, in May 2013, the Commonwealth Ombudsman published a report following a two-year investigation. The investigation was prompted by an increasing number of self-harm incidents in immigration detention. The Ombudsman's findings in relation to the impact of detention on the mental health of people seeking asylum align with the observations of medical practitioners and the AHRC. In particular, it has been clearly established that detention for prolonged and uncertain periods of time both causes and exacerbates mental illness, and there is a strong link between the length of time spent in detention and the deterioration of mental health. It is also known that detention in remote, climatically harsh and overcrowded conditions, and a lack of meaningful activities and adequate services have a negative impact on the mental health of detainees.¹⁷

Research has also found that bringing together groups of people in the same situation, experiencing frustration, distress and/or mental illness, can result in a 'contagion' effect. 'Dysfunctional thinking' can be magnified; behaviours such as self-harm and rioting are reinforced as responses to problems; and witnessing others self-harm can increase the risk of self-harming behaviour in imitation.

The mental health impact on detainees extends to impaired cognitive function, memory and concentration. This can have a negative impact on a detainee's case for asylum by impairing their ability to present a coherent, consistent, fact-based claim. Furthermore, the medical cost of treating mental illnesses exacerbated or caused by prolonged detention is

¹⁶ The Australian Human Rights Commission, *Asylum seekers, refugees and human rights - Snapshot Report*, available at: <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/asylum-seekers-refugees-and-human-rights-snapshot>

¹⁷ Ibid.

conservatively estimated at an average of \$25,000 per person.¹⁸ Finally, since 2011, despite steps taken by the Department of Immigration and Border Protection (DIBP) to strengthen its psychological support programs, medical professionals have concluded that it is often the detention environment itself that causes mental illness. Accordingly, it is the removal of people from closed detention that will have the most powerful effect in mitigating mental illness and ensuring that Australia complies with its international human rights obligations.¹⁹

2.1 Conditions And Treatment at the RPC in Nauru

According to the latest government statistics dated 29 February 2016, there are currently 365 men and 55 women detained at the RPC in Nauru.²⁰

Women and men who are detained at the RPC in Nauru are exposed to harm regularly. The evidence suggests that rape, sexual assaults, and sexual harassment incidents are especially prevalent amongst females. However, as many victims are discouraged from reporting such incidents due to real or perceived impunity, flawed investigations, and fear of reprisal, the actual number of incidents is difficult to estimate.²¹

There have also been other factors that deter females at the RPC in Nauru from reporting sexual assault or harassment. The Moss Review highlighted that family and cultural concerns could contribute to the underreporting of sexual assaults.²² However, this is unlikely the sole reason for underreporting, as many victims are discouraged from reporting their assault due to real or perceived impunity, flawed investigations, and fear of reprisal.²³ The existing reluctance and fear of reporting such incidents was undoubtedly not aided by the recent report of a Somali refugee who alleged she was dragged into bushes and raped by two men. In releasing a statement alleging her story to be false, the refugee's full name, address, and explicit details of her gynaecological tests after the rape were released by the Nauruan Government's PR firm.²⁴

Further, many of the incidents of assault or harassment were allegedly perpetrated by detention centre guards. It has also been alleged that detention centre guards threatened detainees that, if they did not behave appropriately, it could negatively impact their asylum claims.²⁵ Transfield Services, now known as Broadspectrum,²⁶ reported that 30 formal allegations of child abuse had been made against RPC staff, 15 allegations of sexual assault or rape, and four allegations relating to the exchange of sexual favours for contraband. Of the 30 child abuse allegations, 24 involved alleged physical contact, two related to sexual assault, and single allegations were made of sexual harassment, inappropriate relationship with a minor, excessive use of force, and verbal abuse. As a result of these, six employees

¹⁸ Ibid.

¹⁹ Triggs Gillian, "Mental health and immigration detention" *The Medical Journal of Australia* (2013) available at: <https://www.mja.com.au/journal/2013/199/11/mental-health-and-immigration-detention>.

²⁰ Australian Department of Immigration and Border Protection and Australian Border Force, 29 February 2016, 'Immigration Detention and Community Statistics Summary', at p4 <https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-29-feb-2016.pdf> accessed 22 March 2016.

²¹ See the Philip Moss Review – Final Report (6 February 2015) 46 [3.162]

²² The Philip Moss Review – Final Report (6 February 2015) 46 [3.158]

²³ The Philip Moss Review – Final Report (6 February 2015) 46 [3.158-162]

²⁴ Dan Conifer, 'Nauru threatens to charge Somali refugee over 'false' rape claim', ABC News (Online), 16 October 2015, <http://www.abc.net.au/news/2015-10-16/woman-could-face-charges-for-making-false-rape-claim-in-nauru/6858944>

²⁵ See Viktoria Vibhakar, Former Child Protection Worker, SCA, Submission 63, 29

²⁶ In 2015 Transfield changed its trading name to Broadspectrum:

<http://www.businessspectator.com.au/news/2015/11/3/construction-and-engineering/transfield-changes-name-broadspectrum>

school. A young Iraqi asylum seeker was threatened by a security guard that he would hurt him once he left the facility.³³

Nauru's human rights record was recently examined by the Universal Periodic Review ("UPR"), 23rd Session from 2nd to 13th November 2015³⁴, in which treatment of those seeking asylum highlighted. A Joint Submission of Franciscans International and Edmund Rice International to the UPR³⁵, highlighted four reported incidents, in which asylum seeker children were struck on the back of the head and knocked to the ground; removed from play areas with excessive force; pushed and intimidated and denied medical facilities. The submission further elucidated that between January 2013 and March 2014, asylum seeker children on Nauru were involved in or exposed to 207 incidents of actual self-harm, 27 children were engaged in voluntary hunger strikes, 171 children threatened self-harm, 233 assaults involved children, and 33 incidents of sexual assault were reported - the vast majority involving children.³⁶

In a submission to Nauru's UPR by the International Center for Advocates Against Discrimination, it was emphasised that sexual harassment is not criminalised in Nauru and only instances of sexual harassment with a physical assault involved are punishable by law in Nauru. Rape and indecent assault on women account for only 1 per cent of violent crimes prosecuted. For those cases that are prosecuted, the sexual history of the women can be mentioned to imply that the victim was promiscuous. For victims, there are counselling services on Nauru, but none that deal with sexual assault.³⁷

2.2 Conditions And Treatment at the RPC in PNG

According to government statistics dated 29 February 2016, there are currently 909 men detained on PNG.³⁸ There are no women or children detained there.

Amnesty International has reported that conditions at the RPC in PNG are extremely overcrowded, with up to 112 men sharing a single dormitory. Detainees at the RPC lack adequate drinking water and do not have sufficient access to toilets and showers, and shoes and clothing.³⁹ It has been reported that detainees are given 500ml drinking water per day – an amount that is clearly insufficient water given the humidity of Manus Island.⁴⁰

Amnesty International also submitted that it had serious concerns for gay men who were to be resettled in PNG, as homosexual sex is criminalised in PNG and police often

³³ Sydney Morning Herald, 'Asylum Seeker Children on Nauru Abused, Sexually Harassed at School', 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>

³⁴ <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRSessions.aspx>

³⁵ Joint Submission of Franciscans International and Edmund Rice International, http://www.edmundriceinternational.org/?page_id=3086, para 19 accessed 22 March 2016

³⁶ Ibid, para 20

³⁷ Submission of the International Center for Advocates Against Discrimination <http://icaad.ngo/wp-content/uploads/2015/04/ICAAD-Submission-23rd-UPR-Session-Nauru.pdf> accessed 22 March 2016

³⁸ Ibid

³⁹ Amnesty International, 'This Is Breaking People: Human Right Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea', December 2013, http://www.amnesty.org.au/images/uploads/about/Amnesty_International_Manus_Island_report.pdf

⁴⁰ Ibid, 6-7

target the LGBTQI community in general. Detention staff reportedly warned certain men at the RPC not to engage in homosexual acts, as they would report them to local police.⁴¹

A Human Rights Watch (“HRW”) report indicated that 40 former Manus Island detainees were found to be refugees and relocated to a transit centre in January 2015, only to languish there where they have no access to work and study opportunities.⁴² After hunger strikes in January 2015, detainees were taken to local PNG jails where under PNG law they can be held indefinitely and without access to a legal representative. One asylum seeker recalled being held in the jail cell for 21 days with 40 to 60 others seeking asylum.

HRW highlighted an incident on 1 June 2015, in which a refugee stayed out past his curfew. He was confronted by three immigration officials who hit him repeatedly in the face and allegedly punched him 10 to 15 times. The report also indicated that people seeking asylum held at the RPC in PNG who identify as gay were particularly vulnerable to threats and intimidation and feared leaving detention for this reason.⁴³

The following cases have been reported in the media and clearly demonstrate the poor treatment and conditions at the RPC in PNG:

- i. In February 2014, escalating protests between people seeking asylum, PNG police, and local security staff resulted in violent altercations where one asylum seeker, Reza Barati, was murdered and 77 others seeking asylum were treated for injuries. Thirteen of these involved serious injuries, such as a gunshot to the buttocks and a critical basal skull fracture that required evacuation to Australia. The detainees alleged they did not start the protests and were attacked by local people who entered the compound and struck them with machetes and bats.⁴⁴
- ii. A key witness in the trial of the murder of Reza Barati has stated he was being followed and stalked by Manus Island security guards and fears he will be killed in reprisal for giving evidence about the murder of Reza Barati.⁴⁵
- iii. The inadequacy of health services on Manus Island was highlighted when a 24-year-old Iranian asylum seeker died from a bacterial infection in 2014, which began in his foot. It was alleged that due doctors being ‘booked out’, the cut on his foot was unable to be treated early enough, which could have prevented the infection from escalating and ultimately resulting in his death.⁴⁶
- iv. Men detained at the RPC in PNG have engaged in numerous hunger strikes to protest the length and harsh conditions of their detention. In January 2015, over

⁴¹ Ibid

⁴² Human Rights Watch, ‘Australia/Papua New Guinea: The Pacific Non-Solution’, 15 July 2015, <https://www.hrw.org/news/2015/07/15/australia/papua-new-guinea-pacific-non-solution>

⁴³ Ibid

⁴⁴ The Guardian, ‘Manus Island: One dead, 77 injured and person shot in the buttock at Australian asylum centre’, 18 February 2014, <http://www.theguardian.com/world/2014/feb/18/manus-island-unrest-one-dead-dozens-injured-and-man-shot-in-buttock>

⁴⁵ The Guardian, ‘Key witness in Reza Barati murder trial fears he will be killed on Manus Island’, 16 January 2016, <http://www.theguardian.com/australia-news/2016/jan/16/key-witness-in-reza-barati-trial-fears-he-will-be-killed-on-manus-island>

⁴⁶ Sydney Morning Herald, ‘Iranian Asylum Seeker Hamid Kehazaei died from rare bacterial infection from Manus Island: Report’, 4 October 2014, <http://www.smh.com.au/nsw/iranian-asylum-seeker-hamid-kehazaei-died-from-rare-bacterial-infection-from-manus-island-report-20141004-10qa9h.html>

700 detainees went on hunger strike to call attention to the poor conditions of the centre and slow processing times.⁴⁷

- v. According to IHMS (the medical contractor for Nauru and Manus Island), about half of all detainees held at the RPC on Manus Island are suffering from significant depression, stress or anxiety.⁴⁸
- vi. Security guards are putting those seeking asylum in solitary confinement in Manus Island at a rate of nearly three per week, holding them without any means of communication for around 4 days each.⁴⁹

3. Children in Detention at the RPC in Nauru and International Legal Obligations

According to the government's latest statistics dated 29 February 2016, there are currently 50 children detained at the RPC in Nauru.⁵⁰ There are no children detained at the RPC in PNG.

In 2015, Transfield Services (now Broadspectrum) gave evidence that there had been 67 allegations of child abuse in Nauru.⁵¹ 12 of these were referred to the Nauru Police Force, but the Police had not charged anyone in relation to any of these alleged incidents as at 20 July 2015.⁵² In a reporting period of February to May 2015, there had been two incidents of child sexual assault and 11 incidents of other assaults against children in immigration detention centres in Australia.⁵³

Children are a vulnerable group and as such are afforded special protection under international human rights law. For this reason, ALHR has dedicated a special section of this submission to the issues facing children in detention and to highlight the Australian Government's legal obligations to ensure that all children are safe from harm. ALHR is deeply concerned about the lack of basic human rights afforded to children in immigration detention. It submits that the poor treatment of children at the RPC in Nauru is in breach of the United Nations Convention on the Rights of the Child ("CRC"). In some circumstances, prolonged detention or detention involving violence or abuse is likely to constitute torture in

⁴⁷ The Conversation, 'Manus Island hunger strikes are a call to Australia's conscience', 19 January 2015, <http://theconversation.com/manus-island-hunger-strikes-are-a-call-to-australias-conscience-36419>

⁴⁸ The Age, 'Manus Island asylum seekers in mental health crisis', 26 May 2014, <http://www.smh.com.au/federal-politics/political-news/manus-island-asylum-seekers-in-mental-health-crisis-20140525-38wwd.html>

⁴⁹ The Guardian, 'Manus Island asylum seekers put in solitary confinement at a rate of three per week', 12 December 2014, <http://www.theguardian.com/australia-news/2014/dec/12/three-asylum-seekers-a-week-are-locked-in-solitary-confinement-on-manus-island>

⁵⁰ Australian Department of Immigration and Border Protection and Australian Border Force, 29 February 2016, 'Immigration Detention and Community Statistics Summary', at p4 <https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-29-feb-2016.pdf> accessed 22 March 2016.

⁵¹ Transfield Services, answer to question on notice, 19 May 2015 (received on 16 June 2015) in The Senate. Select Committee on the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru. August 2015. p162

⁵² Ms Erin O'Sullivan, Commercial and Strategy Manager, Transfield Services, Committee Hansard, 20 July 2015, p6 in The Senate. Select Committee on the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru. August 2015. p162

⁵³ The Senate. Select Committee on the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru. August 2015. p162

contravention of Article 2 of the UNCAT or cruel, inhumane or degrading treatment or punishment under Article 16 of the UNCAT.

A report released in 2016 by the AHRC examined the impact of prolonged mandatory, indefinite immigration detention on the mental and physical health of children revealing that the RPC in Nauru is dangerous and unsafe for children.⁵⁴ The health concerns of children who had been detained on Nauru, and now being held at Wickham Point Detention Centre, included “recurrent abdominal pain, headaches, nausea, vomiting, poor feeding, poor sleeping and poor weight gain in young children. Some had developed nocturnal enuresis or encopresis.”⁵⁵

The AHRC’s recent report stated that “harm increases with the duration of detention, and most of these children have been in prolonged detention for over a year”. The authors of the report were deeply disturbed by the numbers of young children who expressed intent to self-harm and talked openly about suicide’.⁵⁶ Out of 127 children assessed as part of the report, the length of stay at the RPC in Nauru was on average 10 months.⁵⁷ The impact this has on a child’s developmental growth was examined and it found that 100% of the children assessed were in the highest two categories of developmental risk, higher than any published results anywhere in the world.⁵⁸

Detaining children as a first resort is a breach of Australia’s international human rights obligations including Article 37(b) of the CRC. Under current Australian law, children who arrive in Australia seeking asylum are sent to detention offshore (currently the RPC in Nauru) without other options being explored. Further, children are frequently detained for lengthy periods of time without alternatives being considered. This arguably also amounts to a breach of the ICCPR and the UNCAT. It is clearly not in the best interests of a child to be detained. In fact, detention impacts adversely on all aspects of a child’s wellbeing including their physical, emotional, mental and social wellbeing.

Australia lacks immigration laws and policies that uphold the best interests of the child⁵⁹ or that uphold a presumption against detention. Laws and policies that uphold this presumption would ensure compliance with the CRC. Laws and policies should be modeled on prevention, safeguarding and humane treatment.⁶⁰ Further, children should not be detained because their parents or carers do not have legal status in a country.⁶¹ In the context of child migration, the Committee on the Rights of the Child has found that:

“Children should not be criminalised or subject to punitive measures because of their or their parents’ migration status. The detention of a child because of their or their parent’s migration status constitutes a child rights violation and always contravenes

⁵⁴ Report to the Australian Human Rights Commission Monitoring Visit to Wickham Point Detention Centre, Darwin, NT. *The Health and Well-being of Children in Immigration Detention*. October 2015. Report released February 2016.

⁵⁵ n53, p9

⁵⁶ n53, p3

⁵⁷ n53, p12

⁵⁸ n53, p14

⁵⁹ Convention on the Rights of the Child, Article 4.

⁶⁰ Convention on the Rights of the Child, Article 37(c).

⁶¹ Convention on the Rights of the Child, Article 2.

the principle of the best interests of the child" Recommendation 79, General Day of Discussion 2012.⁶²

The current situation in Australia requires urgent reform to ensure that children seeking asylum are afforded their human rights. The instability and detrimental mental health impact that detention causes to children is often long lasting and may mean that for the rest of their lives these children are scarred or traumatised by this treatment. All children in detention must be afforded the special protection they rightly deserve.⁶³

ALHR is also concerned about the conflict of interest that exists in relation to the Minister for Immigration and Border Protection and unaccompanied children. Under the *Immigration (Guardianship of Children) Act 1946* (Cth) the Minister is the guardian of unaccompanied children and as such has a duty of care to those children.⁶⁴ Given the hard line policies and practices against those seeking asylum, the Minister clearly has a conflict of interest with respect to protecting the rights and interests of the children in whose best interests he is charged to act. ALHR submits that the Minister is not the appropriate person to be the guardian of unaccompanied minors and cannot adequately protect them from torture or other human rights abuses.

4. Implementation of recommendations of the Moss Review in relation to the RPC in Nauru

ALHR supports the immediate and full implementation of Recommendations 1 to 19 of the Moss Review in relation to the RPC in Nauru. The recommendations address the personal safety and privacy of transferees; procedures in relation to sexual harassment and assault, child protection and social media; the AFP investigation into the removal of ten Save the Children staff members from providing services in Nauru; and, DIBP's interaction with the Nauruan Government, contract service providers and police in relation to the RPC.

ALHR considers that the concerns underpinning the Moss Review are widespread in Australia's RPCs and, on that basis, the recommendations provide a minimum standard against which regional processing centres in addition to Nauru should be reviewed.

ALHR supports the conclusion of the Review of Recommendation Nine from the Moss Review ("Doogan Report") that the Department was unwarranted in removing ten Save the Children staff members from providing services in Nauru on 2 October 2014, and that on that basis they should be compensated.

Following the release of the Moss Review on 20 March 2015, DIBP stated that it would work to implement the recommendations. However, allegations of abuse continue. DIBP is accountable for those transferred to RPCs but, given these continuing allegations, is unable to provide the necessary oversight and mechanisms to prevent and address issues of sexual assault and abuse in its RPCs. Proper oversight can only really be achieved

⁶² The Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of all children in the context of International Migration. http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC_DGD-Childrens_Rights_InternationalMigration.pdf accessed 27 March 2016

⁶³ Convention on the Rights of the Child, Article 20.

⁶⁴ Immigration (Guardianship Of Children) Act 1946 (Cth), s 6.

through transparent and accountable onshore procedures aimed at protecting people seeking asylum.

ALHR reiterates that in order for DIBP to discharge its obligations fully and consistently with international human rights law, the RPCs should be closed and asylum claims processed onshore in Australia.

5. Mandatory Detention And International Legal Obligations

Australia's mandatory detention legislation – background

Under subsection 189(1) of the *Migration Act 1958* (Cth) (“the Act”), “*if an officer knows or reasonably suspects that a person in the migration zone...is an unlawful non – citizen, the officer must detain the person*”.⁶⁵

The Labor Government, led by then Prime Minister Paul Keating, enacted the *Migration Legislation Amendment Act 1992* (Cth) (“Amendment Act”), which inserted section 189 and its requirement to mandatorily detain all unlawful non-citizens. The then Minister for Immigration, Gerry Hand, in his second reading speech made clear that:

*The Government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community...this legislation is only intended to be an interim measure. The present proposal refers principally to a detention regime for a specific class of persons. As such, it is designed to address only the pressing requirements of the current situation....*⁶⁶

Mandatory detention – a more permanent state

Despite the stated purpose of the amendment being purely to act as a temporary solution to prevent the influx of particular persons attempting to escape a particular situation, mandatory detention to manage the arrival of unlawful non-citizens has not ceased. Rather, it has broadened in use and scope. Successive Australian Governments have been unabashed in their admissions that the objective of deterrence retains primacy in its asylum seeker laws and policies. This is despite the UNHCR Executive Committee Conclusions and Guidelines (based on international law obligations) not providing for deterrence as a ground under which a person's liberty can be restricted or denied.⁶⁷ This is also despite a lacuna of evidence to suggest that: “...the prospect of being detained [even] deters irregular migration, or discourages persons from seeking asylum”.⁶⁸

⁶⁵ “*The migration zone means the area consisting of the States, the Territories, Australian resource installations and Australian sea installations...*” See section 5 of the Act. A lawful non-citizen is defined as “A non-citizen in the migration zone who holds a visa that is in effect...” sees section 13 of the Act. An unlawful non-citizen is defined as “A non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non – citizen” – see section 14 of the Act.

⁶⁶ G Hand (Minister for Immigration, Local Government and Ethnic Affairs), *Migration Amendment Bill 1992*, Second reading speech, 5 May 1992.

⁶⁷ UNHCR in Executive Committee Conclusion No. 44 (ExCom 44) and Guideline 3 of the *UNHCR Guidelines for the Detention of Asylum Seekers* as cited in the ALHR Submission to the Joint Select Committee on Australia's Immigration Detention Network, August 2011.

⁶⁸ Edwards, A April 2011 ‘Back to Basics: The Right to Liberty and Security of Persons and ‘Alternatives to Detention’ of Refugees, Asylum – Seekers, Stateless Persons and Other Migrants,’ *UNHCR Research on Legal and Protection Policy Research Series*. See also analysis in Menadue, J; Keski – Nummi and A and Gauthier, K August 2011, ‘A New Approach,

Offshore and onshore mandatory detention

Contrary to UNHCR's Guidelines, in June of 1992, there were 478 people in detention in Australia.⁶⁹ As at 29 February 2016, this had increased to 1,753 people held in immigration detention centres and an additional 1,379 detained in RPCs.⁷⁰ These statistics ostensibly reflect an absence of proof to substantiate mandatory detention as an effective deterrent strategy.⁷¹ Whilst the number of children in detention has reduced since 2013, there are still more than 100 children in immigration detention onshore and offshore, leaving numerous children vulnerable to the devastating effects of detention, both in the short and long term.

Time in detention

The detrimental impact on the physical and psychological wellbeing of those held in detention has been well documented. The Australian Psychological Society ("APS") has voiced its concerns around the detrimental effects of immigration detention on the mental health and wellbeing, especially where detention occurs in offshore and remote locations:

There is overwhelming evidence that detention has an independent, adverse effect on mental health, over and above any pre-existing illness or trauma. This is compounded when detention is offshore and in remote locations where there is little if no access to mental health and other services (including legal, medical and interpreting services), and where the ethical delivery of such services is seriously compromised.

The extensive physical and mental trauma is also exacerbated by the unduly long periods of time that people spend in detention waiting for their refugee status to be determined. In 1994, the 273-day time limit on detention was removed from The Act. The Amendment Act instead provided that "an unlawful non-citizen could only be released from detention on the grant of a visa, removal or deportation from Australia".⁷² As at 29 February 2016, from a total of 1,753 people held in immigration detention 45.6% were detained for more than 366 days which is an increase of 1.2% since 31 January 2016.⁷³ There was also an increase in the number of people detained for more than 730 days.⁷⁴ ALHR is greatly concerned by the fact that the average length of time that people are held in immigration detention has increased steadily, exceeding the peak of January 2015. The average length of time for people currently held in detention facilities is 464 days.⁷⁵

Breaking the Stalemate on Refugees and Asylum Seekers, 'A Centre for Policy Development as cited in in the ALHR Submission to the Joint Select Committee on Australia's Immigration Detention Network, August 2011.

⁶⁹ Phillips, J and Spinks, H 20 March 2013, *Immigration detention in Australia* at http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/Detention#_ftn27.

⁷⁰ Australian Department of Immigration and Border Protection and Australian Border Force, 29 February 2016, 'Immigration Detention and Community Statistics Summary', at p4 <https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-29-feb-2016.pdf> accessed 22 March 2016.

⁷¹ Immigration detention centres ("IDCs") in Australia are located in: Maribyrnong in Melbourne; Perth; Villawood in Sydney; Yongah Hill; and on Christmas Island. Further, there are three immigration residential housing facilities ("IRH") and three immigration transit accommodation facilities ("ITA") spread around Australia. These are notably still regarded as "closed detention facilities but with less intrusive measures than IDCs".

⁷² 'A last resort? National Inquiry into Children in Immigration Detention,' 13 May 2004, *Australian Human Rights Commission*, accessed on 6 September 2015 <https://www.humanrights.gov.au/publications/last-resort-national-inquiry-children-immigration-detention/6-australias-immigration>

⁷³ Australian Department of Immigration and Border Protection and Australian Border Force, 29 February 2016, 'Immigration Detention and Community Statistics Summary' at p11. <https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-29-feb-2016.pdf> accessed 22 March 2016.

⁷⁴ Ibid

⁷⁵ Ibid

Other countries in the world have time limits on detention – Ireland has 21 days; Belgium has two months; Spain and Portugal have 60 days; Taiwan has 15 days; and USA has 180 days.⁷⁶ Further, the European Union Returns Directive has a limit of 6 months with an additional 12 months if removal efforts are likely to last longer.⁷⁷

As part of Australia's review before the UN Committee Against Torture in 2008, the Committee recommended that:

- Australia consider abolishing its policy of mandatory detention;
- Detention be used as a measure of last resort only;
- A reasonable time limit for detention be set; and
- Non-custodial measures and alternatives to detention be made available to persons in immigration detention.⁷⁸

Australia has not adopted any of these recommendations and, in fact, mandatory detention of “unauthorized maritime arrivals” remains entrenched in Australian law and government policy.

Furthermore, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in a 2015 report concluded that “the Government of Australia by failing to provide adequate detention conditions; end the practice of detention of children; and put a stop to the escalating violence and tension at the Regional Processing Centre” has violated the right of people seeking asylum to be free from torture or cruel, inhuman or degrading treatment, as stipulated by Articles 1 and 16 of the UNCAT.⁷⁹

ALHR submits that time limits should be set for those detained in RPCs and in Australian immigration detention centres that are in accordance with international standards on immigration detention in order to reduce harms caused by lengthy time periods.

ALHR maintains its position that mandatory immigration detention should be abolished and that Australia's persistent failure to do so places Australia in breach of its international human rights obligations. Australia's policy of mandatory detention is a clear breach of Article 7 and 9 (and potentially Article 26) of the ICCPR⁸⁰ as well as the welfare rights under Chapter IV in the Refugee Convention and Articles 1, 2, 3 and 16 of the UNCAT. It is also important to note that Australia has not implemented any clear and articulate system as required under Articles 4 – 8, 10 – 16 of the UNCAT in relation to our immigration detention system. ALHR strongly advocates for alternatives to offshore mandatory immigration detention to be adopted and implemented.

⁷⁶ The Report of the Inquiry into the use of Immigration Detention in the United Kingdom. A Joint Inquiry by the All Party Parliamentary Group on Refugees <https://detentioninquiry.files.wordpress.com/2015/03/immigration-detention-inquiry-report.pdf> accessed 27 March 2016

⁷⁷ EU Returns Directive <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF>

⁷⁸ Committee Against Torture, Fortieth session 28 April – 16 May 2008, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/AUS/CO/3, 22 May 2008, para 11

⁷⁹ *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/28/68/Add.1, 6 March 2015 at para 19:

http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_68_Add.1_AV.doc

⁸⁰ ALHR Submission to the Joint Select Committee on Australia's Immigration Detention Network, August 2011.

Alternatives to detention

There are many alternatives to detention, which ALHR submits offer more humane conditions for people seeking asylum while their claims are being processed including:

- Release without conditions (for example, once a person's identity has been assessed and the State has not shown that the person poses a threat to national security);
- Release with the provision of support services (for example, provision of a case worker, legal referral);
- Community-based release: under the Act, the Minister for Immigration can grant a person the right to reside in the community subject to certain conditions (e.g. reporting, not working, living at the specified address). This and other community-based alternatives should be available, for assessment on a case-by-case basis, to all people seeking asylum irrespective of their mode of entry into Australia;
- Supervised release to an individual/family/NGO: this has, in the past, been adopted by Australia in an ad hoc fashion in circumstances concerning children in detention;
- Release on bail, bond or payment of a surety; and
- Release to a designated residence (e.g. State-sponsored accommodation centre).

ALHR is of the view that these alternatives are clearly more in line with Australia's human rights obligations than the current system of mandatory detention and, further, that use of these alternatives would mean that Australia would be less likely to breach its obligations under the ICCPR, UNCAT, CRC and other human rights treaties.⁸¹

Other reasons for pursuing alternatives

Notwithstanding the most imperative reasons to pursue alternatives to detention, to comply with international law and to preserve the dignity and respect of people seeking asylum, there are a suite of practical reasons why the continuation of mandatory detention is anachronistic and requires review.

The cost of immigration detention is also more expensive than the above listed alternatives. The UNHCR estimates that "community detention per person is \$225.00 per day cheaper and that savings per person per day for alternatives to detention range from \$117.00 to \$333.00 per day".⁸²

Alongside the cost saving advantages, these alternatives will allow the Government to process applications in an expeditious and humane manner in line with its international human rights obligations and as a moral impetus. ALHR recommends that the Australia Government abolish mandatory detention and establish a formal framework of alternatives to detention, which is available to persons currently held in immigration detention facilities, and

⁸¹ ALHR submission to committee against torture (2014) <http://alhr.org.au/wp/wp-content/uploads/2014/10/ALHR-Submission-to-Committee-Against-Torture-17.10.14.pdf>

⁸² Edwards, A April 2011 'Back to Basics: The Right to Liberty and Security of Persons and 'Alternatives to Detention' of Refugees, Asylum – Seekers, Stateless Persons and Other Migrants,' *UNHCR Research on Legal and Protection Policy Research Series* as cited in the ALHR Submission to the Joint Select Committee on Australia's Immigration Detention Network, August 2011.

to other persons who seek asylum in Australia in future, in order to ensure the conditions and treatment of those seeking asylum does not impact negatively on their wellbeing.

6. Transparency and Accountability

Australia lacks a comprehensive system of oversight of detention, and in particular preventive detention monitoring. This is most obvious in the area of detention of those seeking asylum. The Australian Human Rights Commission and the Commonwealth Ombudsman have, in some circumstances, been permitted to visit places of immigration detention but neither has a comprehensive legal mandate nor the resources to conduct in-depth, regular preventive visits from a human rights framework.

Further, there is no comprehensive independent oversight of Australia's offshore detention facilities in Nauru or PNG. In relation to these offshore detention centres, Australia has sought to circumvent its human rights obligations by arguing that these facilities are outside its control and are the responsibility of the PNG and Nauru Governments.⁸³ However, even if the fact that Australia is exercising effective control over detainees on Nauru and PNG is put to one side, given the level of influence that Australia exercises vis-à-vis these countries it should show leadership, insight on oversight, and work collaboratively with Nauru and PNG to establish proper independent oversight of asylum detention centres.

The UNHCR has previously undertaken monitoring visits to both Nauru and Manus Island. The UNHCR found that conditions and operations of the centre in Nauru did not comply with international standards, including that they “constitute arbitrary and mandatory detention under international law; ... do not provide a fair, efficient and expeditious system for assessing refugee claims; do not provide safe and humane conditions of treatment in detention; and do not provide for adequate and timely solutions for refugees.”⁸⁴ Similarly, the conditions on Manus Island were deemed to be “arbitrary detention that is inconsistent with international human rights law.”⁸⁵

Border Force Act 2015

Effective and good governance requires openness, transparency and accountability. These principles have been dangerously threatened, if not subverted, by the Australian Government's recent enactment of legislation promoting secrecy and suppressing freedom of speech. The *Border Force Act 2015* (Cth) (“Border Force Act”), which attempts to silence health care workers and other officers and employees of the Government during the course of their work involving RPCs, strays from good governance and enters into a territory of secrecy leaving democratic processes in question. The Border Force Act has been described as legislation that has “been formed with the intention of quasi-militarising the

⁸³ <http://www.abc.net.au/news/2014-02-27/who-is-responsible-for-asylum-seekers-detained-on-manus/5275598>

⁸⁴ UNHCR, ‘UNHCR Monitoring Visit to the Republic of Nauru 7 to 9 October 2013’, 26 November 2013, p 1 <<http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf>> (accessed 31 August 2015); UNHCR, ‘UNHCR Monitoring Visit to Manus Island, Papua New Guinea 11-13 June 2013’, 12 July 2013, p 1 <[http://unhcr.org.au/unhcr/files/2013-07-12_Manus_Island_Report_Final\(1\).pdf](http://unhcr.org.au/unhcr/files/2013-07-12_Manus_Island_Report_Final(1).pdf)> (accessed 31 August 2015).

⁸⁵ UNHCR, ‘UNHCR Monitoring Visit to Manus Island, Papua New Guinea 11-13 June 2013’, 12 July 2013, p 1 <[http://unhcr.org.au/unhcr/files/2013-07-12_Manus_Island_Report_Final\(1\).pdf](http://unhcr.org.au/unhcr/files/2013-07-12_Manus_Island_Report_Final(1).pdf)> (accessed 31 August 2015).

functions of customs and immigration".⁸⁶ Controlling how and when someone speaks out about what they observe and witness, especially when what they witness clearly violates the human rights of individuals, does not fit comfortably with the principles of transparency and accountability. A country founded on democracy and freedom should empower its people to speak up and encourage open debate and discussion.

ALHR supports the idea of openness, transparency and accountability and, with that, we support laws that encourage people to speak up, not laws which punish people for being good citizens. The Border Force Act not only offends the rule of law, the cornerstone of any well functioning democracy, but also breaches fundamental human rights standards and as such should be repealed with laws that encourage reporting of abuse and reporting of maltreatment of people seeking asylum.

7. Conclusion

The evidence presented in this submission highlights the serious harm caused to people who are detained at the RPCs in Nauru and PNG. The treatment and conditions faced by people in the RPCs is of grave concern, and there is little doubt that such treatment is perpetuated and exacerbated by the lack of transparency and accountability of these centres. The poor living standards, the lengthy periods of detention and the negative impact on physical and mental wellbeing are all a breach of fundamental human rights and need to be addressed by the Australian Government to prevent any further harm.

In order for Australia to fulfil its legal obligations, ALHR submits that the Australian Government must end both mandatory detention and offshore processing and set a timetable for closing the RPCs in Nauru and PNG and expeditiously processing the claims of all people seeking asylum who are detained there.

⁸⁶ Michael Bradley, 'Border Force Act: why do we need these laws?' ABC News, <http://mobile.abc.net.au/news/2015-07-16/bradley-border-force-act:-why-do-we-need-these-laws/6623376> accessed 25 March 2016