

Human Rights Watch

Submission to the Select Committee on the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru

June 5, 2015

Human Rights Watch makes this submission to provide the Select Committee with information and legal analysis regarding the Australian government's fulfilment of its obligations under the 2013 Memorandum of Understanding¹ between Nauru and Australia, the government's duty of care obligations and responsibilities with respect to its regional processing center in Nauru, and related matters. This submission focuses in particular on Australia's obligations relating to the protection of children under the age of 18 who are held in the Nauru detention center and makes recommendations to the Australian government.

Human Rights Watch has reviewed but has not independently confirmed reports of conditions and practices in the Nauru detention center. This submission draws on reports of the office of the United Nations High Commissioner for Refugees (UNHCR),² the Australian Human Rights Commission,³ and the independent inquiry led by former integrity commissioner Philip Moss (the "Moss Review").⁴ While this submission focuses on the detention of children, it is worth recalling that, under international standards, the detention of any asylum seeker, whether a child or an adult, should normally be avoided and should only be a measure of last resort.⁵

¹ Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer and assessment of persons in Nauru, and related issues [the 2013 Memorandum of Understanding], August 3, 2013, <http://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> (accessed June 1, 2015).

² United Nations High Commissioner for Refugees (UNHCR), "UNHCR Mission to the Republic of Nauru, 3-5 December 2012: Report," http://unhcr.org.au/unhcr/images/2012-12-14%20nauru%20monitoring%20report%20final.pdf#_ga=1.101697922.2042998675.1431090683 (accessed June 1, 2015); UNHCR, "UNHCR Monitoring Visit to the Republic of Nauru, 7 to 9 October 2013," <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf> (accessed June 1, 2015).

³ Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014), https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf (accessed June 1, 2015).

⁴ Philip Moss, "Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Final Report" [the Moss Review], February 6, 2015, <http://www.immi.gov.au/about/dept-info/files/review-conditions-circumstances-nauru.pdf> (accessed June 1, 2015).

⁵ UNHCR, "Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention" [UNHCR Detention Guidelines] (2012), para. 2.

Conditions for children

Australia's regional processing center in Nauru, a detention center for asylum seekers, held 103 children at the end of March 2015.⁶

Under the 2013 Memorandum of Understanding, Australia and Nauru committed to “treat Transferees with dignity and respect and in accordance with relevant human rights standards.”⁷ The Memorandum of Understanding also provides that “[s]pecial arrangements will be developed and agreed to by the Participants for vulnerable cases, including unaccompanied minors.”⁸

These undertakings have not been fulfilled with respect to all detained asylum seekers and certainly not with respect to detained children.

Conditions of detention

A UNHCR monitoring visit to Nauru in October 2013 found that the “harsh and unsuitable environment at the closed RPC [regional processing center] is inappropriate for the care and support of child asylum-seekers.”⁹ This conclusion was confirmed by the Australian Human Rights Commission's report on children in immigration detention¹⁰ and is supported by the final report of the Moss Review.¹¹ These authorities identified the following serious shortcomings, among others, at Australia's Nauru detention center in 2014:

- Families were (and presumably still are) held in an area known as RPC3, in vinyl tents measuring 10 meters by 12 meters. These tents hold up to 22 people each in close quarters that afford little privacy.¹²
- The heat in the detention center is routinely described as overwhelming. Nauru has an average daily temperature of 31 degrees Celsius and humidity between 75 and 90 percent. Inside the tents, the temperature is often between 45 and 50 degrees.¹³
- A severe shortage of water meant that showers were restricted to two to four minutes, or even less time. On some days, water is not available at all. The center also ran out of soap at times.¹⁴

⁶ Australian Government, Department of Immigration and Border Protection, Immigration Detention and Community Statistics Summary, March 31, 2015, <http://www.immi.gov.au/About/Documents/detention/immigration-detention-statistics-mar2015.pdf> (accessed June 4, 2015).

⁷ 2013 Memorandum of Understanding, para. 17.

⁸ 2013 Memorandum of Understanding, para. 18.

⁹ UNHCR, UNHCR Monitoring Visit to the Republic of Nauru, 7 to 9 October 2013, p. 2.

¹⁰ *The Forgotten Children*, pp. 181-95.

¹¹ Moss Review, paras. 3.1, 3.10, 3.91-3.133, 3.135.

¹² Moss Review, paras. 2.8-2.9.

¹³ *The Forgotten Children*, p. 181.

¹⁴ *The Forgotten Children*, p. 183; Moss Review, para. 3.2.

- The detention center had shortages of footwear and clothing, including underwear.¹⁵
- The unhygienic, crowded conditions in the detention center led to “outbreaks of lice, gastroenteritis, and school sores [bacterial skin infections] that are difficult to contain,” staff reported to the Australian Human Rights Commission.¹⁶
- The Moss Review examined disturbing reports that children and adults had been subjected to sexual assault. The review noted that “between 8 September 2013 and 30 October 2014, there were a number of formally reported allegations of sexual and other physical assault involving minors.”¹⁷ In addition, “five minors told the Review that various security staff members had: offered them marijuana; offered them marijuana in return for sexual favours; committed an assault; offered to obtain items in return for sexual favours; and been on duty while under the influence of alcohol.”¹⁸
- Specialist health services were limited, and detainees faced barriers in access to health care.¹⁹

In addition, in May 2015, the Nauru government ordered Internet service providers to block the Facebook website entirely, supposedly in order to protect users from child pornography and cyber-bullying, even though Facebook has policies in place to prevent child pornography and cyber-bullying. The Nauru government has not stated when the temporary block will end.²⁰

Internet blocking and filtering is a form of censorship. Such restrictions affect the ability of all users on Nauru to seek, receive, and impart information, but are especially troubling for detained asylum seekers who only have a few means of communicating with family and advocates.

Consequences for children’s mental health

The detention of children has serious long-term impacts, including developmental delays, anxiety, depression, post-traumatic stress disorder, memory loss, and other mental health consequences. Conditions in the Nauru detention center and the mandatory, indefinite nature of detention in the center compound these mental health consequences.

¹⁵ *The Forgotten Children*, p. 183.

¹⁶ *The Forgotten Children*, p. 187.

¹⁷ Moss Review, para. 3.97.

¹⁸ Moss Review, para. 1.33

¹⁹ *The Forgotten Children*, p. 189.

²⁰ Paul Farrell, “Nauru Says Facebook Block a ‘Temporary Restriction’ to Keep Public Safe from ‘Sexual Perverts,’” *Guardian*, May 11, 2015, <http://www.theguardian.com/weath/2015/may/11/facebook-block-in-nauru-a-temporary-restriction-says-government> (accessed June 4, 2015); Paul Farrell, “Human Rights Groups Condemn Nauru’s Criminalisation of Political Protest,” *Guardian*, May 27, 2015, <http://www.theguardian.com/world/2015/may/28/human-rights-groups-condemn-naurus-criminalisation-of-political-protest> (accessed June 4, 2015).

It is unsurprising, therefore, that children held in the Nauru detention center were “suffering from extreme levels of physical, emotional, psychological and developmental distress.”²¹

In particular, self-harm and thoughts of suicide were far too common: a doctor told the Australian Human Rights Commission that “every day . . . there were teenagers and unaccompanied children who were either on suicide or self-harm watch.”²²

Between October 2013 and October 2014, according to the Moss Review, International Health and Medical Services (IHMS), the company contracted by Australia to provide medical services in the Nauru detention center, recorded 17 children as engaging in self-harm. “The incidents ranged from an attempted hanging by a 16-year-old to the infliction of minor lacerations. The youngest child recorded as having self-harmed was an 11-year-old who swallowed a metal bolt and a rock.”²³

Lack of individual assessments of children

The Convention on the Rights of the Child requires that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”²⁴

Twenty-seven unaccompanied children transferred to the Nauru detention center between January and March 2014 purportedly received a Best Interest Assessment before their transfer. The Australian Human Rights Commission found, however, that these “assessments” contained “almost identical generalised statement[s] of reasons” along the following lines: “Appropriate arrangements are in place in Nauru, therefore the child’s transfer was appropriate.”²⁵ The Australian Human Rights Commission observed:

The Best Interest Assessment form provides space for a Departmental officer to record specific considerations about the services that a child might need in the Regional Processing Country. In all of the Best Interest Assessment forms reviewed by the Commission, this space was left blank. This strongly suggests a lack of assessment of the individual needs of the child.²⁶

²¹ *The Forgotten Children*, p. 195.

²² *The Forgotten Children*, p. 186.

²³ Moss Review, para. 3.92. In addition, one father told the review that his child had placed a plastic fence tie around the neck in an incident that does not seem to have been included in those reported to IHMS. Moss Review, para. 3.95.

²⁴ Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, art. 3(1).

²⁵ *The Forgotten Children*, p. 193.

²⁶ *The Forgotten Children*, p. 193.

Australia's duty of care and responsibilities for rights violations at the Nauru detention center

Australia continues to bear responsibility for safeguarding the human rights of the asylum seekers it has transferred to Nauru. Australian authorities have been intimately involved in every aspect of the apprehension, detention, and transfer of asylum seekers to Nauru. These asylum seekers have been intercepted and taken into custody by Australian authorities, usually in Australian territorial waters, and held on Australian territory for several days or more before transfer to Nauru by aircraft. Australia bears all costs of the transfer of asylum seekers to the detention center and of the detention center's operation.²⁷ In short, Australia exercises effective control, as that term is used in international law,²⁸ over the Nauru detention center, and it has continuing international responsibility for asylum seekers it transfers to Nauru. It is, therefore, responsible for human rights violations suffered by detained asylum seekers. In addition, Nauru is responsible on a joint basis with Australia for human rights violations that take place in the detention center.²⁹

The Australian government has disputed that it exercises effective control over its offshore detention centers.³⁰ Its argument is without merit: evaluating the responsibility of the Australian government in relation to the refugee processing center on Manus Island, Papua New Guinea—which operates under a memorandum of understanding that is identical in material respects to the 2013 Memorandum of Understanding with Nauru, and with an equivalent degree of Australian government involvement in operations and funding³¹—the Senate Legal and Constitutional Affairs References Committee observed in December 2014 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

²⁷ 2013 Memorandum of Understanding, para. 6.

²⁸ 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, January 26, 2007, <http://www.refworld.org/docid/45f17a1a4.html> (accessed June 4, 2015), para. 35. See also *ibid.*, paras. 36-43.

²⁹ As UNHCR observed, “the physical transfer of asylum-seekers from Australia to Nauru, as an arrangement agreed by two 1951 Refugee Convention States, does not extinguish the legal responsibility of the transferring State (Australia) for the protection of the asylum-seekers affected by the arrangements. In short, both Australia and Nauru have shared and joint responsibility to ensure that the treatment of all transferred asylum-seekers is fully compatible with their respective obligations under the 1951 Convention and other applicable international instruments.” UNHCR, UNHCR Monitoring Visit to the Republic of Nauru, 7 to 9 October 2013, para. 22.

³⁰ For example, in reply to a December 2013 Amnesty International report, the Australian government stated, “The consistent position taken by Australia is that while we are assisting PNG and Nauru in the management of the centres, this assistance does not constitute the level of control required under international law to engage Australia's international human rights obligations extraterritorially in relation to the persons concerned.” See “Australian Government's Response to Amnesty International reports arising from visits to Manus Offshore Processing Centre,” p. 2, quoted in Senate Legal and Constitutional Affairs References Committee, Incident at the Manus Island Detention Centre from 16 February to 18 February 2014 (December 2014), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island/Report (accessed June 1, 2015), para. 7.29.

³¹ Amnesty International, “*This Is Breaking People*”: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea (2013), pp. 83-86.

international law, and the government's ongoing refusal to concede this point displays a denial of Australia's international obligations.”³²

UNHCR's monitoring reports and the findings of the Australian Human Rights Commission document numerous specific human rights violations arising in the context of children's detention on Nauru. These include the failure to protect children from violence and exploitation,³³ the failure to treat detained children with humanity and respect for the inherent dignity of the human person,³⁴ the failure to ensure that children who are seeking refugee status receive appropriate protection,³⁵ and the failure to ensure the highest attainable standard of health for children in detention.³⁶

More generally, Australia's practice of detaining migrant children has been explicitly, and sharply, criticized by the UN Committee against Torture, the UN Committee on the Rights of the Child, and other UN bodies. Indeed, in a sign of its isolation on this issue, Australia is perhaps the only Organisation for Economic Cooperation and Development country to impose mandatory, indefinite detention of children.

Mandatory and indefinite detention of children violates the principle that the detention of children should be used only as a matter of last resort and for the shortest appropriate period of time.³⁷

Moreover, the detention of children solely because of their own or their parents' immigration status violates the prohibition on arbitrary detention.³⁸ The UN General Assembly has called on states not to detain migrant children solely because they or their parents have breached immigration laws.³⁹ The UN Committee on the Rights of the Child, which oversees states' compliance with the Convention on the Rights of the Child, has urged countries to “expeditiously and completely cease the detention of children on the basis of their

³² Senate Legal and Constitutional Affairs References Committee, Incident at the Manus Island Detention Centre from 16 February to 18 February 2014, para. 8.33.

³³ Convention on the Rights of the Child, art. 19.

³⁴ Convention on the Rights of the Child, art. 37(c). See also UNHCR Detention Guidelines, Guideline 8 (minimum conditions of detention).

³⁵ Convention on the Rights of the Child, art. 22.

³⁶ Convention on the Rights of the Child, art. 24.

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

³⁸ Convention on the Rights of the Child, art. 37(c).

³⁹ UN General Assembly, Third Committee, Migrant Children and Adolescents, U.N. Doc. A/C.3/69/L.52/Rev.1 (November 19, 2014), para. 3.

immigration status.”⁴⁰ And, as the UN secretary-general confirmed in 2013, “Detention of migrant children constitutes a violation of child rights.”⁴¹

Within Europe, the Council of Europe’s Parliamentary Assembly concluded in 2011 that “no detention of unaccompanied children on migration grounds should be allowed.”⁴² In the Americas, the Inter-American Court of Human Rights has found that the detention of children solely on the basis of their migration status exceeds the requirement of necessity, is contrary to children’s best interests, and is therefore incompatible with regional human rights treaties.⁴³

Recommendations:

Human Rights Watch calls on the Australian government to:

- Immediately end mandatory detention of migrant children in both onshore and offshore facilities and establishing true alternatives to detention. Alternatives to detention need to go hand-in-hand with other protections;
- Ensure access to lawyers and guardians to safeguard unaccompanied children’s best interests;
- Ensure regular contact with family members. Children should also be able to see and interact with the outside world—including by attending local schools, and taking part in religious services and youth groups if they wish;
- Provide unaccompanied migrant children the same opportunities as other children to get the life skills they will need as adults, including through education and vocational training.

⁴⁰ Committee on the Rights of the Child, Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration (2012), para. 78.

⁴¹ UN General Assembly, International Migration and Development: Report of the Secretary General, U.N. Doc. A/68/190 (July 25, 2014), para. 75.

⁴² Parliamentary Assembly, Council of Europe, “Unaccompanied Children in Europe: Issues of Arrival, Stay and Return,” Resolution 1810 (2011), para. 5.9

⁴³ Inter-American Court of Human Rights, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14 of August 19, 2014 (Inter-Am. Ct. H.R.), paras. 154-60.