Submission

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

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Dear Committee Secretary,

The Andrew & Ren

Australia may have breached its *non-refoulement* obligations by transferring asylum seeker adults and children to the Nauru RPC;
the current process of transferring children to Nauru appears to breach Australia's human rights obligations with res

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

1.5 Although Australia has incorporated certain of its *non-refoulement* obligations into domestic law,[8] in most cases the *Migration Act* precludes asylum seekers who arrived by boat after 19 July 2013 from accessing even those limited protections against *refoulement*.[9] Most seriously, Australian law also expressly authorises the transfer of asylum seekers intercepted at sea to any place, including Nauru, even in circumstances that would amount to *refoulement*.[10]

1.6 In the absence of effective domestic legal protections against *refoulement* for asylum seekers being considered for transfer to Nauru, the Australian Government seeks to give effect to its *non-refoulement* obligations by conducting a 'pre-transfer assessment' (PTA) for each asylum seeker prior to removing him or her to a regional processing country. The Department of Immigration and Border Protection (DIBP) has described the PTA as being 'used to consider whether appropriate support and services are available at the [offshore processing centre] and confirm that there are no barriers to the transfer occurring'.[11]

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

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

1.7 Despite the PTA process, however, in practice asylum seekers appear to have been (and may be at risk of being) transferred to the Nauru RPC in breach of Australia's *non-refoulement*

Recommendations concerning Australiaôs *non-refoulement* obligations

1. All transfers of asylum seekers to Nauru should be suspended immediately until the necessary law and procedures are in place to ensure that transfers only occur in accordance with Australia's *non-refoulement* obligations.

2. As a related measure, the *Migration Act* and *Maritime Powers Act* should be amended to provide that no asylum seeker should be transferred to Nauru (or (oF

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

Best interests assessed on a case-by-case basis

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

Best interests must be identified first

2.4 The second criterion of a BIA is that it is performed in two stages. First, the decision maker must identify what is in the child's best interests. Then, he or she must assess whether those interests are outweighed by any other consideration (or the cumulative effect of other considerations).[24] This two stage process – in which the best interests of the child are the starting point – has been affirmed by Australian courts.[25]

2.5 The words 'shall be a primary consideration' in Article 3(1) of the CROC 'place a strong legal obligation on States and mean that States may not exercise discretion as to whether children's best interests are to be assessed and ascribed the proper weight as a primary consideration in any action undertaken.'[26] Accordingly, when weighing the best interests of the child against other factors in the second stage of this process, 'a larger weight must be attached to what

[20] The UN Committee on the Rights of the Child has noted that in a decision concerning an individual child, his or her interests should not be understood as being the same as those of children in gen3n(d)-5(ec-11(h)2g(e)4(r)-6(e)

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

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

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

Australian law contains no requirement that the best interests of the child be

2.15 These failures to consider the best interest of children in, or liable to transfer to, the Nauru RPC reflect broader deficits in Australia's implementation of the best interests of the child principle

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

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

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

Recommendations concerning the best interests of the child

4. The Australian Government should immediately undertake a BIA that compiles with the criteria in paragraphs 2.3 to 2.7, in order to assess whether it is appropriate for children to remain in the Nauru RPC in light of recent allegations of abuse and other harm there.

5. Australian law should be amended to include an express requirement that the best

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

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

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

> 'Shall take' is a term which leaves no leeway for the discretion of States parties. Accordingly, States parties are under strict obligation to undertake 'all appropriate measures'