

# Business in Abuse

*Transfield's complicity in gross human rights abuses within Australia's offshore detention regime*

October 2015



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## 1 Introduction

### 1.1 About No Business in Abuse (NBIA)

NBIA is an independent, non-profit, non-government initiative bringing together a cross-section of Australian society including faith-based groups, unions, lawyers and human rights campaigners. NBIA seeks to end the complicity of corporate entities in human rights abuses perpetuated within Australia's immigration system.

Since early 2015, NBIA representatives have met with a broad cross-section of the financial sector, including banks, analysts and institutional investors, regarding corporate complicity in human rights abuses perpetuated within Australia's immigration system. Many of these entities hold securities in, or have financial or business links with, Transfield. NBIA representatives have also met with Transfield, and other private contractors to Australia's immigration detention system. In September 2015 Transfield released a document detailing NBIA's activities and responding to our view regarding Transfield's complicity in gross human rights abuses. As a result, NBIA released a statement in response, and began a public campaign with the support of GetUp! to end business in abuse within Australia's immigration detention centres.

The No Business in Abuse campaign is based upon a simple thesis. In the modern economy, no company operates in a vacuum. We invest in them, either as individuals or through our banks and super funds. We hire them to service our schools, hospitals and businesses. We consume products sold by their most valued clients. The network of money that keeps abuse in business is large – but we're at the centre of it.

Ultimately, the No Business in Abuse campaign is working to transform the Australian market – 35,000 people have signed our pledge, backed up by local businesses and institutions. We are sending a loud and clear message to corporations like Transfield: **being complicit in abuse has consequences.**

### 1.2 About this report

As this report details, there is a long and substantial evidence base regarding the human rights violations within Australia's system of offshore and onshore immigration detention. However, much of this analysis has focused on the violations committed by the Australian (or Nauruan, or PNG) State, not on the obligations of the private providers of detention services. This report was initially drafted in November 2014 to fill this gap, and start with the specific obligations and responsibilities of the private contractors for the offshore detention centres, including lead contractor Transfield.

From early 2015, NBIA used this report as the basis for interaction with the financial sector, freely providing an overview of its analysis and source evidence, including to Transfield and other private contractors. Over this period, significant tranches of new evidence were released, which strengthened the NBIA analysis – including the release of the Moss Inquiry report, and the 2015 Senate Inquiry Report. On 31 August 2015, Transfield Services was named the sole preferred tenderer for the forthcoming 5 year offshore detention contract, and NBIA decided to publish this report and provide the public with the extensive evidence base and analysis of Transfield's historical and ongoing complicity in gross human rights abuses.

### 1.3 Terminology

The terminology regarding the offshore detention regime differs, particularly between the Australian Government and civil society actors.<sup>i</sup> The Australian Government and its private contractors refer to the situation as one of ‘regional processing’ of ‘illegal maritime arrivals’ or ‘transferees’ in ‘regional processing centres’ within designated ‘regional processing countries’.<sup>ii</sup>

An explanation for this terminology was provided in an October 2013 letter to the Secretary of the Department of Immigration and Border Protection, the then Minister for Immigration and Border Protection, Scott Morrison instructed<sup>iii</sup>

*“Detainees – All persons held in onshore detention facilities will no longer be referred to as clients, but detainees. Persons in held detention are not there to be provided with a service, they are being detained.*

*Transferees – All persons held in offshore processing centres should not be referred to as clients, but continue to be referred to as transferees.”*

Except where directly quoting others, this report refers to the ‘offshore detention regime’ of ‘asylum-seekers or refugees’ in ‘offshore detention centres (ODCs)’ within the states of Nauru and PNG.

For further information on how these quibbles over semantics belie the strong underlying contestation between the Australian Government, its private contractors and civil society over the offshore detention regime see section 6 below.

Finally, in this report NBIA makes frequent reference to the term ‘human rights abuse’, where readers may be used to seeing the term ‘human rights violations’. It is worth quoting directly from the FAQ on the UN Guiding Principles as to the reasoning behind this terminology:

***“Human rights abuses v. human rights violations***

*In the Guiding Principles, the term “human rights abuse” is used about adverse human rights impact that is caused by non-State actors—in this context, business enterprises. The term “violations” is normally applied to adverse human rights impact committed by the State—in violation of its obligations to protect, respect and fulfil human rights. Because non-State actors generally do not have the same obligations under international human rights law, the Guiding Principles use “abuses” for such impact rather than “violations”.”<sup>iv</sup>*

## 2 Executive Summary

Barely a week passes in Australia without bleak revelations about our treatment of refugees and asylum seekers: a new allegation of abuse, further condemnation by an international human rights body, protesting doctors and nurses.

**Australia stands alone in the world in its policy of mandatory and indefinite immigration detention as a first action for asylum seekers who have sought to reach Australia by boat.**

Despite international condemnation, the policy of mandatory, indefinite detention has enjoyed long-term bipartisan support between Australia's two major political parties, and public approval. In September 2012 a system of 'offshore' detention of asylum seekers in two detention centres located on remote islands in the Pacific was re-opened. Again, this policy – under which asylum seekers were forcibly transferred to the nations of Nauru and Papua New Guinea (PNG) – has broad political and public support.

Perhaps it is this support which lulled one of Australia's major publicly listed multinational corporations, Transfield Services Limited (Transfield), into playing an essential role in the operation of Australia's offshore detention centres.

### 2.1 The role of Transfield

Since September 2012, Transfield has been the lead contractor administering the Nauru Offshore Detention Centre (Nauru ODC), and since February 2014 has been the lead contractor for both the Nauru ODC and the Manus Island ODC (in PNG). Mere months after Transfield began its work at the Nauru ODC, an Amnesty International team visited the camp and described it as "a human rights catastrophe ... a toxic mix of uncertainty, unlawful detention and inhumane conditions."<sup>v</sup>

In both ODCs Transfield makes decisions about detainee welfare, movement, communication, behaviour, accommodation, food, clothing, water, security and environment. To a large extent, Transfield Services has responsibility for a significant portion of the matrix of factors that form the basis for the daily lives of detainees living in the ODCs. Transfield can make recommendations as to whether the placement of detainees is appropriate, and is permitted the use of force against detainees. Transfield conducts a twice-daily headcount. Transfield controls entry and exit, and is responsible for 'discreetly monitoring the movement and location of all people on the Site'.<sup>vi</sup> Transfield has indemnified the Australian Government for any personal injury, disease, illness or death of any person at the ODCs (a bold acceptance of responsibility given litigation on behalf of injured detainees is an ongoing feature of Australia's mandatory detention regime). Whilst the Governments of Nauru and PNG are ostensibly in charge, and Australia's Department of Immigration and Border Protection (ADIBP) attends daily morning meetings at the ODCs, there can be no doubt that without Transfield the operation of the ODCs, and with them, the entire system of mandatory, indefinite, offshore detention would be impossible.

**For its essential role, the company has been paid an average of \$1.4 million a day by the Australian Government since 31 October 2012.**

### 2.2 Transfield's responsibility to respect human rights

A clearly lucrative contract with an OECD government implementing a policy that enjoys bipartisan political support – the commercial attraction is not difficult to understand. But this view overlooks an essential detail: that all companies, including Transfield, have an overarching responsibility to

respect human rights in their business activities. A responsibility clearly outlined by the authoritative global standard – the United Nations Guiding Principles on Business and Human Rights (the UN Guiding Principles), and echoed in a host of other international and domestic standards.

Significantly, many of Transfield's stakeholders, including clients, investors and financiers, have publicly and explicitly committed themselves to the human rights standards set out in the UN Guiding Principles.

The corporate responsibility to respect human rights is a global standard, applying to any business, anywhere in the world. Neither the ostensible domestic legality of the ODCs under Nauruan, PNG or Australian law, nor the support of the states of Nauru, PNG and Australia allow Transfield to circumvent its individual responsibility to respect human rights.

This is not a new concept. The notion of international human rights emerged from a situation of state-sanctioned (and domestically legal) gross human rights abuses that occurred in various parts of the world prior to the adoption of the 1948 UN Universal Declaration of Human Rights. Historically speaking, state-sanctioned human rights abuse is a feature of, not an exception to, human rights case law. The UN Guiding Principles simply underline that a State's permission, support and even direct order, provides no defence to individual or corporate complicity in gross human rights abuses. Whatever arguments may be made by Transfield about mere "implementation of government policy," the international legal system and standards of conduct adopted and expected by Transfield's multinational corporate peers are clear: there can be no business in human rights abuse, regardless of state authorisation.

### **2.3 The gross human rights abuses in the ODCs during Transfield's provision of services**

**This report details Transfield's complicity in gross human rights abuses on a massive scale, violating 47 international laws. Evidence from the ODCs depicts horrifying abuses, with severe mental and physical harm inflicted upon detainees.**

This report is hampered by serious and rapidly accumulating restrictions on independent public scrutiny of the centres. It adopts a conservative approach in compiling its evidence base of human rights abuses, eschewing reliance on media reporting in favour of the findings of international and domestic expert authorities and evidence reviewed by cross-party Parliamentary Inquiries. Despite these restrictions, despite the limits we have imposed on our methodology, the weight of international and domestic evidence is overwhelming: gross human rights abuses are occurring, and have occurred at the Manus and Nauru ODCs.

As at July 2015, more young men had died than had been resettled from the Manus ODC. On Transfield's own figures, sexual assault and major incidents of self harm occur with unacceptable regularity in the Nauru ODC. These impacts have been inflicted on a population including pregnant women, children (even children detained without any family), men with the scars of recent torture; people who have fled their homelands in search of safety. It is difficult to imagine a more vulnerable cohort than the roughly 2000 asylum seekers and refugees for whom the offshore detention regime is an ongoing and prolonged trauma.

### **2.4 Transfield's complicity in the gross human rights abuses**

Of grave concern is the predictable nature of the abuses that have occurred, and the obvious foreseeability of serious harm at the re-opening of the ODCs in 2012. Mandatory and indefinite detention of asylum seekers on remote islands will cause significant mental and physical harm to



those detained. How do we know this? **Because we've been here before.** Under the Australian Government's Pacific Solution from 2001 – 2008, detainees suffered significant mental and physical injury amidst a chorus of international condemnation. It is implausible that in 2012 basic due diligence could have failed to apprehend this risk. Even a Google search was unnecessary, the issue dominated the media headlines. Yet, Transfield, with no previous involvement in the ODCs, decided within 48 hours in September 2012 that it would mobilise to provide essential services to a re-enlivened offshore detention regime.

The UN Guiding Principles, published just a year earlier, had helpfully outlined a pertinent example of how a business could contribute to or be complicit in human rights abuses: **“performing construction and maintenance on a detention camp where inmates were allegedly subject to inhumane treatment.”**<sup>vii</sup>

A company doesn't need to be the sole cause of an abuse to hold responsibility for it. It can aid and abet that abuse, knowingly providing practical assistance or encouragement that has a substantial effect on the commission of the abuse – like controlling the entry to and exit from a detention centre in which men, women and children are detained arbitrarily, and in contravention of international law.

Perhaps Transfield operated under the notion that gross human rights abuses could be justified under the banner of deterring asylum seekers from making the risky journey by boat to Australia. If so, they failed to notice that no derogation is permitted for these abuses except under existence of 'a public emergency that threatens the life of a nation' and 'to the extent strictly required by the exigencies of the situation' – neither of which apply to a policy of imprisoning some people for the purpose of deterring others. For the most severe abuses such as torture and cruel inhuman and degrading treatment, they are completely non-derogable, under any circumstance whatsoever. Even presuming that the provisions of international human rights law were not considered at all, it is difficult to imagine how, in modern Australia, any company would enter an association with child abuse, let alone profit from the systemic infliction of it. Again, evidence of this abuse dominated regular headlines, to pick just one example in 2014, the Medical Journal of Australia published a report stating that the vast majority of Australian paediatricians believe mandatory detention of asylum seeker children constitutes child abuse.<sup>viii</sup>

In NBIA meetings with the company, Transfield attempted to put the argument that if Transfield wasn't complicit in abuse, then a (hypothetically) worse company could be. It is hard to know where to begin with this rationale, as it simply wouldn't be acceptable in any other circumstance. Would a court accept as a defence to involvement in child abuse that if the abuser hadn't taken such action, a hypothetical other would have?

## 2.5 Transfield cannot continue this business in abuse

Transfield has had many opportunities to end its complicity in the systemic abuse of the offshore detention centres. It has repeatedly signed new contracts, and indeed is now the 'preferred tenderer' to sign a further 5 year contract as the lead private contractor to the ODCs. **Even with the best of intentions, Transfield, and indeed, no private contractor to the ODCs can prevent the abuses ongoing in the ODCs.** One of the previous private contractors, Save the Children Australia, acknowledged this in April 2015 when it stated:

*It is the act of prolonged and arbitrary detention that creates the circumstances that give rise to harm. No amount of hard work, collaboration or improvement to process or infrastructure can make up for this fact.*<sup>ix</sup>

Transfield is also facing the reality that, for the roughly 2000 asylum seekers and refugees on Manus Island and Nauru, they are the victims of its historical complicity in abuse. The response required by the company under the UN Guiding Principles, and indeed all the involved States, is to provide a remedy for these abuses, not simply reduce the likelihood of their reoccurrence. A woman who has been sexually abused in a dark toilet block is not remedied when lighting is installed, she is remedied when there is a prompt, thorough, and impartial investigation, cessation of the violation and adequate reparation.<sup>x</sup> Similarly for all those asylum seekers suffering severe mental harm in the Nauru ODC from years of arbitrary detention, being able to take a walk outside the ODC at night does not remedy the situation or prevent ongoing abuse. Specialist medical care and immediate and genuine freedom of movement does, a situation that cannot be fulfilled in the current context on Nauru.

The UN Guiding Principles explicitly recognise that companies may undertake commitments or activities to support and promote human rights, which may contribute to the enjoyment of these rights. Transfield points to such activities, including the provision of malaria eradication services on Manus Island. But, as the UN Guiding Principles state, “there is no equivalent of a carbon off-set for harm caused to human rights: **a failure to respect human rights in one area cannot be cancelled out by a benefit provided in another.**”<sup>xi</sup>

The company also faces an urgent question – will it sign a new contract? If it does, it will do so with this report in front of it, with full, prior knowledge of both the practical impossibility of complying with its obligation to respect human rights, and the contribution it will make to a system of gross human rights abuses against a population already subject to severe historical abuses and suffering from their impacts.

**Will Transfield sign up to 5 more years of business in abuse?**

### 3 ‘The only country in the world’ - Australia’s offshore detention regime

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*‘States have a right to determine who enters their territory. But this is limited by the requirements of international law. Thus people in distress at sea must be rescued and disembarked in conditions of safety and dignity. States must refrain from using harsh interception and deterrence measures to prevent people from reaching their territory. On arrival, everyone has the right to individual determination of her or his situation, including asylum procedures. Specific attention must be paid to refugees, and to people who are at particular risk – such as children, pregnant women, victims of torture, survivors of sexual or gender-based violence, people with disabilities, and older persons. Regardless of status, no-one should be subjected to prolonged or arbitrary detention, discriminatory decision-making, unlawful profiling, or disproportionate interference with the right to privacy. The absolute prohibition on refoulement must be upheld...Policies that seek to stamp out migration do not decrease the numbers of would-be migrants’*

*United Nations High Commissioner for Human Rights (Mr Zeid Ra’ad Al Hussein), December 2014.<sup>xii</sup>*

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Australia’s detention of asylum seekers has been a focus of human rights condemnation for decades.<sup>xiii</sup> For the purposes of this report it is unnecessary to lengthily detail this history. However, for international readers it is worthy to note Australia’s unique status in the global realm as the only country in the world with a policy that imposes mandatory and indefinite immigration detention on asylum seekers as a first action. The Australian Human Rights Commission (AHRC) provides the following outline:

*Australia is the only country in the world with a policy that imposes mandatory and indefinite immigration detention on asylum seekers as a first action. While other countries detain children for matters related to immigration, including Greece, Israel, Malaysia, Mexico, South Africa and the U.S.; detention in these countries is not mandatory and does not occur as a matter of course.<sup>xiv</sup>*

The singularity of the Australian policy and practice towards asylum seekers is extended by the issue which is the focus of this report – the forced transfer and subsequent ‘offshore’ detention and processing of asylum seekers outside of Australia’s borders, in the sovereign nations of Papua New Guinea (PNG) and Nauru.

#### 3.1 Australia’s Detention Regime

Since 1992 Australia has had a system of mandatory immigration detention. Any non-citizen who is in Australia without a valid visa must be detained according to the *Migration Act 1958* (Cth) (Migration Act). These people may only be released from immigration detention if they are granted a visa, or removed from Australia.<sup>xv</sup> These people include asylum seekers who have arrived in Australia without a valid visa.

##### 3.1.1 Onshore Detention Regime

There is currently a system of detention centres and other facilities within Australia’s borders, which includes Christmas Island, in this report this is referred to as the ‘onshore detention regime’.

The number of people held within the onshore detention regime changes constantly. According to the latest statistics published by the Australian Department of Immigration and Border Protection (ADIBP), as at 30 September 2015, there were 2,044 people in immigration detention facilities within Australian borders, including 1,759 in immigration detention on the Australian mainland and 285 in immigration detention on Christmas Island.<sup>xvi</sup>

There is no time limit to how long a person may be held in immigration detention in Australia, or under extraterritorial application of its laws. As at 30 September 2015 the average period of time a person had spent in Australia's onshore detention facilities was 417 days, with 466 people having been held in immigration detention for over 2 years.<sup>xvii</sup>

Many if not all of the human rights abuses discussed in this report are applicable to the onshore detention regime, including Christmas Island. However, the focus of this report is on Australia's 'offshore' detention regime, operating in the sovereign states of Papua New Guinea (PNG) and Nauru. The onshore detention regime will be the subject of a later report by NBIA.

### 3.1.2 Previous Offshore Detention Regime: The Pacific Solution 2001 – 2008

Australia first set up an offshore detention regime in the states of PNG and Nauru in 2001, as a part of the then Howard government's "Pacific Solution" to deter asylum seekers from attempting to reach Australia by boat.<sup>xviii</sup> Under this policy, islands to the north of Australia such as Christmas Island were excised from Australia's migration zone so that asylum seekers arriving there by boat could not make asylum protection claims under Australian law, or with access to Australian courts.<sup>xix</sup> Instead, the Australian Government reached agreements with Nauru and PNG under which asylum seekers whose boats were intercepted (often by Australia's navy) would be transferred for offshore processing of their applications for asylum at two specially created detention centres on Nauru and Manus Island (PNG).<sup>xx</sup>

The Pacific Solution was partially dismantled by the Labor Government in 2008 (although by 12 May 2005 there were no residents at the Manus Island facility<sup>xxi</sup>) and the two specially created offshore detention centres in Nauru and Manus Island (PNG) were closed.

In totality during this first 'Pacific Solution' incarnation of the offshore detention regime, 1637 people were detained in the Nauru and Manus Island Detention Centres between 2001 and 2008, including 786 Afghans, 684 Iraqis and 88 Sri Lankans.<sup>xxii</sup> Seventy per cent of those detained were found to be refugees and resettled in other countries, of these, around 61 per cent (705 people) were resettled in Australia, with the others in countries such as Sweden and New Zealand.<sup>xxiii</sup>

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*Diverting boat loads of people to detention centres in Nauru and Papua New Guinea in exchange for huge sums of money perpetuates the very trafficking of human misery that the Australian Government claims it is seeking to prevent.*

*Irene Khan, Amnesty International Secretary General, 7 March 2002<sup>xxiv</sup>*

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The Pacific Solution was roundly criticised by a host of independent non-government organisations (NGOs), human rights experts and medical professionals as being an expensive response which inflicted gross human rights abuses on those detained.<sup>xxv</sup> As outlined in a report by A Just Australia and Oxfam in which they reviewed the offshore detention regime in 2007:

*Australian taxpayers have spent more than \$1 billion to process less than 1,700 asylum seekers in offshore locations – or more than half a million dollars per person.*

*The majority of detainees have spent two years on Nauru, with a smaller number being held for up to six years.*

*Medical studies, figures from the Department of Immigration and Citizenship (DIAC), testimony from staff and former asylum seekers on Nauru all paint a shocking picture of psychological damage for the detainees - including 45 people engaged in a serious hunger strike, multiple incidents of actual self-harm and dozens of detainees suffering from depression and other psychological conditions each year and being treated with anti-depressants or anti-psychotic medication.*

*A lack of hospital infrastructure and a lack of timely access to adequate physical health care saw at least 40 people airlifted to Australia from Nauru for medical treatment. A 26-year old asylum seeker with no known physical or mental health problems died on Nauru in August 2002.<sup>xxvi</sup>*

A particular feature of the offshore detention regime was a lack of access to and communication from the facilities, and a lack of independent and public scrutiny. A Background Note regarding the Pacific Solution prepared by the Parliamentary Library of Australia discussed the evidence provided to various Senate Committees stating:<sup>xxvii</sup>

*Several witnesses to the Committee also expressed concern about the lack of independent scrutiny, difficulty in obtaining access to the facilities and an apparent lack of access to legal advice for detainees. Australian Lawyers for Human Rights told the Committee that when they sought to send a team of lawyers to Nauru to provide legal advice to asylum seekers the Nauruan Government refused them visas. In 2002, the Australian Human Rights Commission (AHRC—formerly HREOC) also requested permission to inspect the facilities on Nauru and Manus Island in Papua New Guinea as part of its National Inquiry into Children in Immigration Detention, but the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) ‘reiterated its position that the HREOC Act did not have extra-territorial effect and declined to assist the Inquiry with these visits’.*

The international community chorused its approval<sup>xxviii</sup> at the end of the ‘Pacific Solution’ offshore detention regime, the with UNHCR stating:

*UNHCR has been troubled by the ‘deterrence’ policy which diverted more than 1,600 asylum seekers to third countries (Nauru and PNG), denying them access to Australian territory to lodge asylum claims. “Many bona fide refugees caught by the policy spent long periods of isolation, mental hardship and uncertainty -- and prolonged separation from their families,” said Towle. “The prompt decision taken by the new Government to end the Pacific Solution and bring refugees to Australia goes a long way to show Australia as a humane society and in keeping with its international obligations.”<sup>xxix</sup>*

It appeared at the time that the fruitless brutality of the offshore detention regime had ended, never to be repeated by the Australian, PNG and Nauruan Governments.

### 3.2 Current Offshore Detention Regime: 2012 –

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*[T]he Nauru “solution” is no solution at all. It failed before and will fail again.*  
John Menadue, former Secretary of the Australian Department of Immigration, 14 March 2012<sup>xxx</sup>

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However, in controversial circumstances in August 2012<sup>xxxi</sup> the ALP-led Australian Government decided to re-initiate the offshore detention regime in response to further boat arrivals of asylum seekers. Australia enacted the Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012. The Act provided for asylum seekers arriving by boat in Australia, including unaccompanied children, to be taken to a third country for processing.

New designations of Nauru<sup>xxxii</sup> and PNG<sup>xxxiii</sup> as these ‘regional processing countries’ in September and October 2012 meant that all new boat arrivals were transferred to the re-opened detention centres on either Nauru or Manus Island (PNG). In contrast to the earlier Pacific Solution incarnation of the offshore detention regime, those asylum-seekers found to be refugees would not be resettled in Australia, but would instead be resettled in Nauru, Papua New Guinea or an unnamed third country. When it came to power in September 2013, the Coalition Government maintained these Regional Resettlement Arrangements.

The timeline below includes information compiled by the Australian Human Rights Commission,<sup>xxxiv</sup> and shows the development of the current incarnation of the offshore detention regime:

[August 2012 - ALP Government – Prime Minister Julia Gillard]

- 13 August 2012 - system of third country processing introduced, initially only for asylum seekers who arrived in Australia at an 'excised offshore place' (such as Christmas Island).
- September 2012- Australian Government commences transferring asylum seekers who had arrived in Australia by boat to the Nauru ODC.
- 14 September 2012 – Transfield Contract begins at Nauru ODC
- 10 October 2012 – G4S Contract begins at Manus ODC.
- November 2012 - Australian Government commences transferring asylum seekers to Manus ODC in PNG.
- May 2013 - the third country processing system extended to apply to all asylum seekers who arrive (without authorisation) by boat anywhere in Australia (that is, including the mainland).

[June 2013 – ALP Government – Prime Minister Kevin Rudd]

- 19 July 2013 - Australian Government announced a Regional Resettlement Arrangement (RRA)<sup>xxxv</sup> with the Government of PNG, and on 6 August 2013 the Australian Government entered into a new Memorandum of Understanding (MOU)<sup>xxxvi</sup> with PNG to support the RRA. Under the RRA and MOU, asylum seekers arriving unauthorised by boat to Australia after 19 July 2013 will be transferred to PNG for processing under PNG law, and if found to be refugees they will be resettled in PNG, rather than Australia. If found not to be refugees they will be returned to their country of origin or a country where they have a right of residence.
- 3 August 2013 - Australian Government signed a new MOU with Nauru which provides that the Nauruan Government will enable individuals whom it has determined are in need of international protection to settle in Nauru, 'subject to agreement between Participants on arrangements and numbers'.<sup>xxxvii</sup>

[Sept 2013 - Liberal/National Coalition Government – Prime Minister Tony Abbott]

- 24 March 2014 – Transfield takes over from G4S at Manus ODC, holding lead contractor position in both ODCs.
- September 2014 - Australian Government signs a Memorandum of Understanding<sup>xxxviii</sup> with the Government of Cambodia that would allow asylum seekers who have been transferred by Australia to Nauru and recognised by the Nauruan Government as refugees to be resettled in Cambodia.

It is important to note that the current incarnation of the offshore detention regime has the support of both of Australia's major political parties – the Australian Labor Party (ALP) and the Liberal/National Party Coalition – and both major parties have been instrumental in supporting this regime during their respective times in Government under current and previous leadership.

### **3.2.1 Manus Island, PNG**

Papua New Guinea (PNG) is situated directly to the north of Australia and east of Indonesia. Manus Island is one of the approximately six hundred islands that make up Papua New Guinea,<sup>xxxix</sup> and is the site of the Manus ODC and the Lorengau Transit Facility.

PNG has a population of around 7 million people, and an economy based largely on subsistence farming and mining.<sup>xl</sup> PNG is heavily dependent on Australia, both in terms of trade activity and as one of the largest beneficiaries of the Australian aid program.

Manus Island has an area of 2,100 square kilometres, and is covered with lowland tropical rainforest.<sup>xli</sup> The island has a population of around 60,000 people and is the smallest economy of all PNG's provinces. According to one economic analysis, the Manus economy bears similar

characteristics to those of other Pacific island nations.<sup>xlii</sup> The same analysis shows that the ODC on Manus Island has increased employment by 70 per cent, adding around 1,000 new jobs, and has increased trade for local firms, making it a central feature of the local economy.

PNG has a poor record on corruption, law and justice, and promoting good governance is a key target of Australia's aid spending in the country.<sup>xliii</sup> For an analysis of PNG's legal framework and rule of law as it applies to the asylum seekers and refugees within the offshore detention regime, see section **Error! Reference source not found.**.

### **The Manus ODC and Lorengau Transit Facility**

The Manus ODC is located at the Lombrum Naval Base on Los Negros Island, commonly referred to as Manus Island, although it is actually immediately adjacent to Manus Island, separated by a narrow stretch of water the width of a small river.<sup>xliv</sup> The ODC is under the control of an Administrator appointed by the PNG Government.<sup>xlv</sup> The Australian Department of Immigration and Border Protection (ADIBP) has a small team (as at September 2013 – 6 officers) on short-term deployment to the centre, led by an Executive officer.<sup>xlvi</sup> The ADIBP engages the private contractors who deliver welfare, medical and garrison (including security, catering, detainee management, cleaning transport and guarding) services at the ODC, and the Australian Government bears all of the ODC's capital and recurrent costs.<sup>xlvii</sup>

Though it long predates the detention of asylum seekers, the name Lombrum in local language refers to the bottom of a canoe where captives are kept.<sup>xlviii</sup> At the reopening of the ODC on the Lombrum base in November 2012, the ODC detained men, women and children, including unaccompanied children, and was described as a 'temporary facility'.<sup>xlix</sup> When in June 2013 the Australian Government bowed to pressure and removed all families, women and children from the ODC, the ODC was still being referred to by the ADIBP as a temporary facility.<sup>l</sup>

On 19 July 2013, the then Prime Minister Kevin Rudd announced that detainees sent to Manus Island would be resettled in PNG, not Australia, if they were determined to be refugees. Following that announcement, the detainees then at the Manus ODC were taken elsewhere,<sup>li</sup> (it is not entirely clear whether they were taken to Australia or the Nauru ODC or a combination of the two). New single male detainees (no women, children or families) then began arriving at the Manus ODC. By February 2014, the male detainees were accommodated in four compounds (known as Delta, Foxtrot, Mike and Oscar).<sup>lii</sup>

The last available independent evidence from the UNHCR was dated November 2013, and stated that despite earlier advice that the ODC at Lombrum Naval Base was intended as a temporary measure only, the construction of a permanent facility (the now Lorengau Transit Facility) was not going to be made available to current ODC detainees, and instead would be used to provide capacity for families and children and/or recognized refugees.<sup>liii</sup> The same report detailed that some detainees at the temporary facility in the Manus ODC were still accommodated in dongas (similar to shipping containers), while some were in built structures.

In July 2014, Mr Kenneth Douglas, First Assistant Secretary, Department of Immigration and Border Protection gave evidence before a Senate Committee stating:

*It was originally envisaged that the centre would accommodate families, as well as single adult males. With the introduction of RRA [in July 2013] —in fact, just prior to that—the government decided to change the mix, and families were taken out of the centre while construction work was progressing towards building the permanent centre much closer to the township of Lorengau. What was there at Lombrum was only ever intended to be a temporary centre. With the introduction of RRA, however, the government, given the commitments that it had made there, effectively transformed Lombrum*

*into a centre which was going to have a longer lifespan and a significant increase in its capacity to its current numbers, which are around 1,200.<sup>liv</sup>*

In January 2015, detainees whose asylum claims had been processed and who had been recognized as refugees by the PNG Government were given the opportunity to move into the new permanent facility with built accommodation (not dongas or tents) – the Lorengau Transit Facility (also built and operated by Australia's private contractors including Transfield and its subcontractor). By February 2015, 11 refugees had moved into the Lorengau facility. In July 2015, a joint Human Rights Watch and Human Rights Legal Centre found refugees at the Lorengau facility now have freedom to move outside the facility but are prevented from leaving Manus Island and denied opportunities to work and study.<sup>lv</sup>

Neither the Government nor Transfield have stated that all the detainees in the Manus ODC at the Lombrum Naval Base have been moved to the permanent Lorengau Transit Facility, and therefore it is reasonable to assume, as per the UNHCR report in November 2013, that these detainees remain in the temporary facility at the Manus ODC.

This report will include consideration of both the Manus ODC, and the Lorengau facility.

### **3.2.2 Nauru**

Nauru is a tiny island nation in the Pacific Ocean, with a population of approximately 10,000 people. Situated very close to the equator, and around halfway between Australia and Hawaii, Nauru is a fossilised coral atoll of only 21 kilometres squared, roughly the size of Melbourne's airport.<sup>lvi</sup>

After occupation by various nations, Nauru achieved independence in 1968 and joined the United Nations in 1999.<sup>lvii</sup> Nauru's executive government is comprised of its President and Cabinet, who are drawn from and collectively responsible to an elected parliament of 19 members. Nauru's judiciary consists of a Supreme Court, subordinate District Court, and Family Court.

The Nauruan economy is frail, and prior to the offshore detention regime, based largely on phosphate mining, fishing and foreign aid. Phosphate mining continues today, but reserves have largely been exhausted.<sup>lviii</sup> The country has not established its own fishing industry, but instead derives income from the sale of fishing licenses. Unemployment in Nauru was very high, officially 25% in 2012 but locals stated the real figures were almost double.<sup>lix</sup> Since the first incarnation of Australia's offshore detention regime, Nauru has obtained a large income from the Australian Government for hosting mandatory detention camps. The Australian Department of Foreign Affairs and Trade (DFAT) reports that revenue associated with running the Nauru ODC for asylum seekers is currently Nauru's largest source of income.<sup>lx</sup>

Nauru has had a rocky recent legal and political history. In January 2014 Nauru's president Baron Waqa fired the country's resident Magistrate, Australian Mr Peter Law, and demanded he leave the country. Nauru's Chief Justice Eames (also Australian) intervened by issuing an injunction against Mr Waqa's deportation of Mr Law, but that was ignored. The president then cancelled Justice Eames' visa, and he was prevented from returning to the country. Both judicial figures say the move was a politically motivated attempt to change the outcome of cases that were due to come before courts.<sup>lxi</sup> In May 2015, Nauru was criticised by the United Nations for laws restricting freedom of expression, freedom of the press, and for restrictions on access to the internet and social media. The UN found that these laws could be used to undermine human rights advocates, particularly with respect to the rights of asylum seekers.<sup>lxii</sup> In September 2015, New Zealand suspended its regular yearly aid of \$1.1 million to Nauru's justice sector citing concerns regarding rule of law in the country as the reason for the suspension.<sup>lxiii</sup>



For an analysis of Nauru's legal framework and rule of law as it applies to the asylum seekers and refugees within the offshore detention regime, see section **Error! Reference source not found..**

### Nauru ODC

A large part of the central area of the tiny island of Nauru is known as 'Topside', as it is the site of a current and former phosphate mine.<sup>lxiv</sup> The Nauru ODC is located on 'Topside' and comprises three sites: RPC 1, RPC 2 and RPC 3.<sup>lxv</sup> Site RPC1 consists of accommodation for staff and service providers in permanent air-conditioned built structures, as well as some facilities used by both staff and asylum seekers. RPC 2 houses single adult male asylum seekers in tents (referred to by the Australian Government and Transfield as 'vinyl marquees') with dormitory style sleeping arrangements, and various communal facilities. RPC 3 is located some distance away from RPC 1, according to one government contractor in a "geographic depression that receives minimal breeze and has limited shade"<sup>lxvi</sup>, and accommodates single adult female asylum seekers and families in tents internally divided for family groups, as well as a number of communal facilities.<sup>lxvii</sup>

An Australian Senate Committee report in August 2015 characterised the ADIBP's jurisdiction over the ODC as follows:<sup>lxviii</sup>

*[1.38] Nauru owns and administers the Nauru Regional Processing Centre, under Nauruan law. Australia provides capacity building and funding for Government of Nauru's operation of the centre and coordinates the contract administration process.*

*[1.39] The department advises that under the terms of the two Memoranda of Understanding and related arrangements between the Governments of Australia and Nauru, Nauru's Secretary of Justice is responsible for the 'security, good order and management of the centre, including the care and welfare of persons residing in the centre'. The RPC is managed by three Operational Managers appointed by the Government of Nauru, assisted by Deputy Operational Managers.*

*[1.40] According to the department, it and its contracted service providers support Nauru's Secretary of Justice and the Operational Managers in fulfilling their roles, as agreed between the two parties.*

Since February 2015, some asylum seekers recognised as refugees by the Nauruan Government have been released from the Nauru ODC and placed in refugee accommodation elsewhere on Nauru.<sup>lxix</sup> The situation of these refugees is not a focus of this report, as it is unclear the connection (if any) between Transfield and provision of services to these refugees.

### 3.2.3 A static population cohort for a prolonged period

In a striking similarity to the first incarnation of the offshore detention regime, the numbers of people within the current regime remain fairly static, and since its inception in 2012, consist of largely the same population cohort, for a prolonged period of time. One significant difference between the first and current offshore detention regimes however is that given the change in 'resettlement' to resettlement in the States of PNG and Nauru themselves there is now substantial numbers existing as 'resettled' refugees in the 'Lorengau Transit Facility' on Manus Island, and in the community in Nauru.

It is difficult to establish a total picture of the numbers of asylum seekers who have been detained in the ODCs since their reopening in August 2012, due to an initial period (Aug 2012 – Sept 2013) without clear and consistent reporting on population numbers by the Australian Government. However, using the Department of Immigration and Border Protection's (DIBP) Monthly Operational Updates<sup>lxx</sup>, and official government statistics provided to the UNHCR, the following table can be drawn to provide an outline of population movements relating to the ODCs.

Date	Nauru ODC	Manus ODC	Sent to NODC	Sent to MODC	Removed to home country	Outside MODC in Lorengau Transit Centre	Outside NODC in community
Sept 2015	631 (92 children <sup>lxxi</sup> )	934	0		2	47	563 (87 children <sup>lxxii</sup> )
Aug 2015	653	936	0		6	45	540
Jul 2015	637	942	0		0	44	536
Jun 2015	655	945	0*		8 (4 from Nauru to Cambodia)	40	506
May 2015	634	943	0*		8	39	487
Apr 2015	677	971	0*		12	20	488
Mar 2015	718	989	0*		9	11	485
Feb 2015	742	1004	0*		17	11	456
Jan 2015	802	1023	0*		4		
Dec 2014	895	1035	0*	1	9		
Nov 2014	996	1044	0*	0	14		
Oct 2014	1095	1056	0*	0	7		
Sept 2014	1167	1060	5*	0	26		
Aug 2014	1233	1084	189		48		
Jul 2014	1146	1127	41		62		
Jun 2014	1191	1202	*				
May 2014	1152	1230	*				
Apr 2014	1177	1281	*				
Mar 2014	1136	1296	*				
Feb 2014	1120	1319	*				
Jan 2014	1012	1353	*				
Dec 2013	804	1234	*				
Nov 2013	668	1140	751*		124		
Oct 2013	682	1101	*				
Sep 2013	770	825	*				
July 2013	All detainees at the Manus ODC taken elsewhere, unclear if Australia or Nauru ODC or both. <sup>lxxiii</sup>						
Jan 2013		221 <sup>lxxiv</sup>	*				
Dec 2012	396 <sup>lxxv</sup>		*				

Table 1 – Population movement in the ODCs Dec 2012 – Sep 2015

\*From Dec 2012 to June 2015, a total of 2,238 persons were transferred to NODC<sup>lxxvi</sup>

As at 30 September 2015, the detained population in the Nauru ODC and the Manus ODC is as follows:<sup>lxxvii</sup>

Offshore Detention Centre	Men	Women	Children	TOTAL
Nauru ODC	425	114	92	631
Manus Island ODC	934	0	0	934
Total Offshore Detention Centre	1,359	114	92	1,565

Table 2 – Population in the Nauru and Manus ODCs at 30 September 2015

A Senate Inquiry report, quoted the DIBP statement that the average length of time for asylum seekers to be in the NODC as was 402 days as at 30 April 2015.<sup>lxxviii</sup> The Australian Government has

not released figures in relation to the average length of time for those detained in the MODC. However, a review of the figures outlined in the tables above indicates relatively static movement into and out of the MODC since July 2014. Given this, it is reasonable to assume a similar average length of stay for asylum seekers detained in the MODC as the NODC – being 402 days as at 30 April 2015, and therefore potentially a further 5 months to the date of this report.

Even for the NODC, figures were not provided as to each asylum seeker's length of stay, nor the length of stay by timed cohort (for instance, how many asylum seekers by 6 month length of stay), but the table above indicates relatively small numbers actually leaving Nauru and Manus Island altogether. We also do know that only 4 refugees have been resettled elsewhere, and they are the 4 refugees that were sent to Cambodia in June 2015. No refugees have been resettled in Australia or any other country apart from PNG and Nauru.<sup>lxxxix</sup> The cohort of those initially detained in the MODC and NODC has remained relatively static since December 2013, with the largest movement occurring on Nauru, where considerable numbers have been placed into the Nauruan community outside the NDC itself from February 2015 (according to these figures provided by the Australian Government), following assessment as a refugee and provision of a 10-year refugee visa by the Government of Nauru.<sup>lxxx</sup>

### 3.2.4 Contested States of Responsibility

The issue of which state or states (being the states of Australia, Nauru and PNG) hold responsibility for the protection of the rights of the asylum seekers detained in the ODCs has been a centrally contentious issue.

The two MOUs signed by the Australian Government with the Governments of Nauru and PNG do not specify details as to how the respective governments understand the apportionment of legal responsibilities.<sup>lxxxi</sup>

The view of successive Australian Governments has consistently been that responsibility for the rights, welfare and security of the asylum seekers transferred to the ODCs rests solely with the ODC host states of Nauru and PNG.<sup>lxxxii</sup> The Australian Government argues that it therefore holds no legal responsibility under domestic or international law over these asylum seekers, and its human rights obligations do not extend to violations that occur within the ODCs in Nauru and PNG.<sup>lxxxiii</sup>

The Australian Government's view is contested by many civil society experts and UN bodies.<sup>lxxxiv</sup> They argue that the asylum seekers detained offshore are sufficiently within the effective 'power and control' of the Australian Government, such that the Government still owes them a responsibility under international law to protect their human rights. These findings have pointed to a range of factors indicating the Australian Government's power and control including that:

- Australian authorities intercept and apprehend asylum seekers who arrive in Australia by boat;
- Asylum seekers are detained on Australian territory before they are transferred to PNG or Nauru by security guards acting under the direction of ADIBP;
- ADIBP contracts the security guards, health providers, and other private contractors who work in the ODCs;
- Under the terms of the agreement between Australia and Nauru and Papua New Guinea, Australia bears all the costs of implementing the Regional Resettlement Arrangements in both countries;
- Australian government policy determines the circumstances surrounding assessment of claims and resettlement – for example, the arrangements around resettlement of those who arrived by boat after 19 July 2013; and

- Australian government officials work closely with counterparts from PNG/Nauru on the day to day running of the ODCs , and deal with particular issues (for instance, according to the contracts between Transfield and the Australian Government, there is a daily morning meeting with an ADIBP representative<sup>lxxxv</sup>).

The result of these arrangements are clear to the UNHCR, which has stated that:

*"Australia may choose to transfer physically people to other jurisdictions, but we believe that under international law very clearly Australia is not absolved of its legal responsibilities to protect people through all aspects of the processing and solutions."<sup>lxxxvi</sup>*

In a letter to Amnesty International in June 2014, the Australian Government responded to the 'power and control' argument stating that:

*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.*

The Australian Government did not provide any further evidence or argument in support of its position other than this statement of view.

However, for the purposes of this report, the issue of which state is responsible is a side issue, as regardless of the ultimate state/s responsibility, this report is concerned with the responsibility of Transfield, the lead private contractor for the Australian Government administering the ODCs in Nauru and PNG. The responsibility of business enterprises to respect human rights remain constant across the globe, regardless of which state holds the responsibility to protect such rights (see section 5 below for further details).<sup>lxxxvii</sup> Therefore, the one constant in the contested responsibility of the offshore detention regime is the private contractors who provide the essential services, and hold the responsibility for operation of the ODCs.

## 4 The role of Transfield in Australia's offshore detention regime

Since 1998, corporations have played a role in Australia's onshore detention regime.<sup>lxxxviii</sup> Whilst at various times, the Australian Government has toyed with the notion of itself providing the services inside its onshore detention centres, the operation of the offshore detention regime has always been provided by a party other than the Australian Government. Indeed there is a threshold question whether the Australian Government itself could provide the operational services at the ODCs and still maintain its thesis put at 3.2.4 above: that responsibility for the rights, welfare and security of the asylum seekers transferred to the ODCs rests solely with the ODC host states of Nauru and PNG.

This section briefly outlines the role of all the private contractors providing ongoing services to the ODC before focusing in depth on the role and responsibility of Transfield. The focus on Transfield is because at the time of writing and publishing this report in 2015, it is the lead private contractor at both the Manus and Nauru ODCs, and has been the lead private contractor at the Nauru ODC since its opening in 2012. Whilst other private contractors have provided or do provide services, Transfield has been selected as the sole preferred tenderer to provide 'Garrison and Welfare' (an expansion of its current role in Nauru) services for a further 5 years.<sup>lxxxix</sup>

### 4.1 The role of private contractors for the offshore detention regime

As outlined in 3.2 above, both the Manus and Nauru ODCs are established under arrangements set out in MOUs between the Australian Government and the Governments of PNG and Nauru respectively. The Australian Government provides funding and operational support for the ODCs. The ADIBP, on behalf of the Australian Government, contracts separately with various private service providers for the provision of different services to the ODCs.

The following table provides a basic outline of the major private contractors and their provision of services to the ODCs over time. This is not a comprehensive list of service providers to the ODCs (for instance it excludes the many providers of assets, project management and capital work), and excludes one-off service provision. However, it provides a sufficient basis on which to broadly conceptualise the primary private contractor responsibilities within the ODCs. For further information on additional private contractors, and specific dates for contracts, the Australian Government tender and contract notice database can be accessed at [www.tenders.gov.au](http://www.tenders.gov.au).

Nauru ODC	Garrison and Operational Services	Security Services	Health Services	Welfare Services
2012	Transfield	Transfield subcontractor – Wilson Security	IHMS	TSA
2013			IHMS	TSA
2014			IHMS	Transfield + SCA
2015			IHMS	Transfield + SCA

<i>Preferred tenderer 2016+</i>		Transfield		Transfield
<b>Manus ODC</b>	<b>Garrison and Operational Services</b>	<b>Security Services</b>	<b>Health Services</b>	<b>Welfare Services</b>
2012	G4S		IHMS	TSA + SCA
2013			IHMS	TSA + SCA (until June 2013)
2014	[Feb 2014] Transfield	[Feb 2014] Transfield subcontractor – Wilson Security	IHMS	[Feb 2014] Transfield
2015			IHMS	
<i>Preferred tenderer 2016+</i>		Transfield		Transfield

Table 3 – Major private contractors Nauru and Manus ODCs (all data drawn from [www.tenders.gov.au](http://www.tenders.gov.au))

TSA – The Salvation Army  
SCA – Save the Children Australia

As this table illustrates, Transfield's role has been, and continues to be the lead private contractor in the ODCs.

## 4.2 The Role of Transfield

*Since September 2012, Transfield Services has played a significant role in delivering services at the Regional Processing Centre at Nauru and from February 2014 at Manus Province.*

*Supplementary Letter to Shareholders, 'Update regarding Transfield Services' work in the Regional Processing Centres' 25 September 2015<sup>xc</sup>*

Given the substantial criticism levied at the first incarnation of the offshore detention regime 'the Pacific Solution', as outlined at 3.1.2 above, an initial question may arise as to why any company would choose to be involved in the renewal of the offshore detention regime. Transfield's May 2015 submission to the 'Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru' established on 25 March 2015 ('the 2015 Nauru Senate Inquiry') provides some insight into the circumstances of its original decision to commence involvement in the offshore detention regime and is worth quoting in full:<sup>xc</sup>

*The circumstances leading to Transfield Services' initial engagement from September 2012 in respect of the [Nauru] Centre were as follows:*

*(i) Our expedited mobilisation to Nauru*

*(A) Transfield Services was invited by DIBP to submit a proposal for garrison services in about September 2012 because of our contracted requirement with the Department of Defence to be able to "surge". That is, to mobilise additional resources at short notice to provide services in additional locations or additional quantities. Transfield Services has an established track record in 'surging',*

including for the Kosovo refugees that were housed at Leeuwin Barracks in WA, but also after major events such as Black Saturday and the Queensland floods.

(B) Transfield Services sent an advance party 48 hours after receiving advice of the requirement to mobilise.

(C) The lead operational group (made up of about 70 personnel, a mixture of Transfield Services and Wilson Security) was mobilised days after notification that our proposal had been accepted. IHMS, Save the Children<sup>xcii</sup> and the Salvation Army, providing respectively health and welfare services, mobilised at the same time. (D) Days after the lead operational group arrived at Nauru, the first group of Transferees from Christmas Island arrived.

(E) From September 2012, the Transferees accommodated in the Centre included single adult males, families with children and single adult females.

(F) From that point, Transfield Services has methodically developed the infrastructure, systems and processes that now apply at the offshore processing centre.

#### **4.2.1 The Transfield Contracts for Nauru ODC**

Transfield's 2015 submission to the 2015 Nauru Senate Inquiry goes on to provide a comprehensive overview of its contracts and categories of service provision at the Nauru ODC:<sup>xciii</sup>

(ii) *First Contract (no welfare services provided by Transfield Services)*

(A) In September 2012, Transfield Services entered into heads of agreement with the Department for the provision of interim operational and maintenance services at the Centre in Nauru (interim agreement).

(B) In January 2013 Transfield Services entered into a further contract with the Department to continue to provide such services at the Centre (First Contract). A related company of Wilson Security was also engaged from on or about September 2012 as Transfield Services' subcontractor to provide security and escort services in connection with the Centre.

(C) Under the interim agreement and the First Contract, Transfield Services was not initially contracted to provide welfare services at the Centre and all welfare services were provided by the Salvation Army with the exception of welfare services provided to children, which were provided by Save the Children. Similarly during this period until about March 2014, the Salvation Army was responsible for managing and administering the request and complaints process at the Centre (as further described in section 4 below) which was the process by which Transferees, Service Providers and others at the Centre could make or report complaints confidentially (or by name) and they would then be translated and investigated as required. Transfield Services only became responsible for administering and managing the request and complaints process under the arrangements of the current contract from March 2014.

(iii) *Current Contract (garrison services and welfare only to single adult males)*

On about 21 February 2014, Transfield Services commenced providing welfare services at Nauru for the first time. From that date, we have provided welfare services to the Transferees located in RPC2 of the Centre. All Transferees located in RPC2 are single adult males.

On 24 March 2014, Transfield Services entered into the current contract with the Department for provision of garrison and welfare services at sites including the Centre at Nauru (Current Contract). Under the Current Contract, Transfield Services provides welfare services (still to adult males in RPC2 only) and garrison services (comprising management and maintenance of assets, cleaning, security, catering, environmental management, work health and safety, management of emergencies, logistics, personnel accommodation and transport and escort services). Around the same date, Transfield Services entered into a subcontract with Wilson Security to provide security and escort services and other ancillary services at sites including the Centre at Nauru.

#### **4.2.2 The Transfield Contract for Manus Island**

Transfield's contract for Manus Island is the same 'Current Contract' as referred to in its evidence above, as the contract is for Garrison and Welfare services at "[both] regional processing countries."<sup>xciv</sup>

Therefore under the contract, for the Manus ODC Transfield provides:

*welfare services and garrison services (comprising management and maintenance of assets, cleaning, security, catering, environmental management, work health and safety, management of emergencies, logistics, personnel accommodation and transport and escort services....Transfield Services entered into a subcontract with Wilson Security to provide security and escort services and other ancillary services*

However, at the Manus ODC, Transfield currently has responsibility for all welfare services, as there are no women or children located in that ODC.

The Contract does not specify provision of services to the Lorengau Transit Facility (at least in the redacted version submitted to the 2015 Nauru Senate Inquiry), but page 5 outlines that the definition of 'Site' includes "any new site established by the Department on the RPCs [Regional Processing Countries]."<sup>xcv</sup> Therefore it is likely that Transfield or its subcontractors are involved in provision of services to the Lorengau Transit Facility, however NBIA has no conclusive information in this regard.

#### 4.2.3 The specific roles and responsibilities of Transfield

Following Questions on Notice from the 2015 Nauru Senate Inquiry, the ADIPB tabled redacted versions of all its contracts with Transfield for provision of services to the ODCs [attached to this report as Appendix **Error! Reference source not found..**] This shed some light on the comprehensive nature of the services provided by Transfield to the ODCs, and indeed Transfield's evidence quoted at 4.2 above in regards to the establishment of its services in the Nauru ODC in 2012 is instructive for its final line which states, "[F]rom that point, Transfield Services **has methodically developed the infrastructure, systems and processes that now apply at the offshore processing centre.**"<sup>xcvi</sup>

The primary objectives of the contracts between Transfield and ADIBP are to [see page 11, 2014 Contract]:

*provide open, accountable and transparent Services (identified in Schedule 1 [Statement of Work] to this Contract) to Transferees and Personnel at the Sites on the RPCs; and provide Services that is the best available in the circumstances, and utilising facilities and Personnel on the Sites and that as far as possible (but recognising any unavoidable limitations deriving from the circumstances of the Sites) **is broadly comparable with services available within the Australian community.** [emphasis added]*

Broadly speaking, Transfield's services to the ODCs are listed in the following categories in its contracts:

- **Transferee Services** which includes Communication Management, Programmes and Activities, Reception, Transfer and Discharge (including return to home countries) of Transferees, Individual Management, Property of Transferees;
- **Management and Maintenance of Assets and the Site**, which includes maintenance of Assets, Infrastructure and Grounds, Cleaning Services, Environmental Management including



energy, water, waste management and pest control, Work Health and Safety, Management of Emergencies;

- **Transport and Escort**, which includes vehicles for both Transferees and Personnel, while 'escort' services are only for Transferees
- **Security Services**, which includes Entry Control, Integrity of the Site, Safety and Security Plan, Identification, Incidents, Checks to verify all Transferees are present and safe, Searches, Use of Force, Visitor Escorts, Perimeter Security, Contingency Plans and Procedures;
- **Catering**, which includes Nutritional and Food Safety, Quantity of food and beverages, Dining Room;
- **Personnel accommodation**;
- **Governance**, which includes attendance at a variety of meetings including daily morning meetings with the Department and other Services Providers,
- **Logistics**, which includes development of a logistics plan and requirement that logistics are completed in a timely manner
- **Welfare Services**, which includes activities such as Education and Recreation.

Without quoting the entire statement of services provided by Transfield (interested readers can peruse the contracts in the Appendix in detail), below is extracted some specific services provided by Transfield, to provide a more tangible understanding of Transfield's responsibility under the contracts for:

- Encouraging interaction between Transferees and enhancing ongoing emotional and mental health [e.g. pg 28, 2012 Contract]
- Supervising access to communication services, and informing Transferees that their access to communications may be recorded or monitored [e.g. pg 28, 2012 Contract]
- Allowing Transferees to have a mobile phone, but not one with audio or video recording possibilities [e.g. pg 28, 2012 Contract]
- Provision of Bedding, Clothing and Footwear [e.g. pg 32, 2012 Contract]
- Conducting the Individual Management of Transferees including
  - conducting Transferees' Individual security risk assessments [e.g. pg 33, 2012 Contract]
  - Placement Review - notifying the Department, where Transfield believes that existing placement is inappropriate for the Transferee and include reasons why they have formed this view [e.g. pg 33, 2012 Contract]
  - assisting the Department to facilitate the return of Transferees to their home countries [e.g. pg 36, 2012 Contract]
  - establishing processes to prevent Transferees being subjected to illegal and anti-social behaviour [e.g. pg 36, 2012 Contract]
  - delivering a healthy environment [e.g. pg 36, 2012 Contract]
  - taking all reasonable steps to ensure that the best interests of the child are taken into account [e.g. pg 36, 2012 Contract]
  - referral of a Transferee identity issue including management of the Transferee if they are under 18 [e.g. pg 36, 2012 Contract]
  - ensuring that an Transferee who requests, or appears to be in need of medical attention is referred for appropriate medical attention [e.g. pg 37, 2012 Contract]
  - responsible for the decision to place or remove a Transferee in Managed Accommodation [e.g. pg 48, 2014 Contract]
  - attending weekly Individual and Behavioural Management Committee meetings with the Department and other Service Providers to review Transferee Individual

Management Plans, Behavioural Management Plans and to identify Transferees at risk [e.g. pg 83, 2014 Contract]

- Managing and Maintaining the assets and the site (including Transferee accommodation) as a “safe secure and healthy environment” [e.g. pg 43, 2012 Contract]
- Responsibility for vermin and pest control [e.g. pg 45, 2012 Contract]
- [52] escorting Transferees when they are off-site [e.g. pg 52, 2012 Contract]
- Security systems including
  - maintaining and testing security systems [e.g. pg 44, 2012 Contract]
  - taking reasonable steps to ensure Transferees behave in accordance with the laws and notify authorities if they do not return to the site [e.g. pg 53, 2012 Contract]
  - a Transferee head check twice each day [e.g. pg 59, 2012 Contract]
  - managing and maintaining fences [e.g. pg 44, 2012 Contract]
  - perimeter security [e.g. pg 59, 2012 Contract]
  - use of force [e.g. pg 73, 2014 Contract]
  - discreetly monitoring the movement and location of all people on the Site. [e.g. pg 71, 2014 Contract]

The contracts also set out Transfield’s extensive responsibility for all Personnel (see 1.4.4. of the 2014 Contract), including that Transfield must ensure that all Personnel:

- *are, and remain, of good character and good conduct;*
- *have a current 'working with children' check or certificate, where required from an Australian jurisdiction or equivalent from the Australian Federal Police or, in the case of any local Personnel, where any similar check or certificate is required by local law taking into account the nature of their involvement in the Services, such check or certificate;*
- *are considered suitable by the Department having regard to any issues identified in an Australian Federal Police background check and brought to the attention of the Department;*
- *undergo induction and orientation training that complies with the Department requirements when commencing employment with the Service Provider or starting work in relation to the Services;*
- *are appropriately skilled, trained and qualified to provide the Services described in this Statement of Work;*
- *are authorised, registered or licensed in accordance with any applicable regulatory requirements for the purposes of or incidental to the performance of the Services;*
- *possess all relevant industry body, supplier, manufacturer accreditation or scheme memberships and professional association membership that might be reasonably expected of providers of the Services, and produce evidence of such authorisation, registration, license, accreditation or membership to the Department upon request at any time during the term of this Agreement; and*
- *will be subject to internal disciplinary processes.*

#### 4.2.4 The role of Transfield subcontractors

Transfield has the capacity to fulfil its contractual obligations by engaging subcontractors to perform specified functions. Transfield’s longstanding subcontractor is Wilson Security. A Senate Committee referred to other Transfield subcontractors in December 2014, but NBIA was not able to confirm the identities of any additional contractors.

##### Wilson Security

Wilson Security has been Transfield’s sub-contractor for Security Services in the ODCs since Transfield’s first contract. According to the 2015 Nauru Senate Inquiry Report, “...contracting arrangements mean that the Department is unable to deal directly with Wilson Security.”<sup>xvii</sup> Indeed,

it appears quite clear from the relevant contracts<sup>xcviii</sup> that as head contractor, Transfield holds the responsibility for its sub-contractor Wilson Security's fulfilment or otherwise of its roles and responsibilities. Under clause 6.4.2 of Transfield's 2014 Contract, the actions of Transfield's subcontractors such as Wilson Security are treated, for liability purposes, as acts of Transfield. The indemnity provisions in the Transfield-Wilson subcontract have been redacted, so NBIA are unable to shed further light on this particular issue. Nevertheless it appears appropriate, and in accordance with the visible contractual provisions, and the evidence given before the 2015 Nauru Senate Inquiry to assert that Transfield has significant responsibility for the actions or otherwise of its subcontractor.

#### **Other Transfield subcontractors**

According a report by the Senate in December 2014:

*Transfield stated that it has a 'comprehensive list' of subcontractors providing services on Manus Island, but declined to provide the committee with information regarding the identities of other subcontractors it has engaged at the centre.<sup>xcix</sup>*

NBIA has no further evidence in relation to any other subcontractors employed by Transfield in the course of its provision of services.

#### **4.2.5 Transfield's contractual indemnities**

A further important provision in all of Transfield's contracts is the extent of the indemnification Transfield provides to the ADIBP. It is worth outlining this provision in full as it does indicate the level of responsibility Transfield holds for the operation of and impacts at the ODCs.

##### *[12.2] Indemnity*

*The Service Provider indemnifies the Department from and against any:*

- a. cost or liability incurred by the Department (including but not limited to any claim made by, or liability to, a third party); or*
- b. loss or expense incurred by the Department in dealing with any claim against it including legal costs and expenses on a solicitor/own client basis and the cost of time spent, resources used or disbursements paid by the Department,*  
*arising from either:*
  - c. any breach of this Contract;*
  - d. any negligent act or omission, fraudulent, criminal actions, or wilful default of the Services Provider in connection with this Contract;*
  - e. loss or damage to any real or personal property, including property of the Department;*
  - f. personal injury, disease, illness or death or any person; or*
  - g. infringement of any third party's Intellectual Property rights.*

*The Service Provider's liability to indemnify the Department under clause 12.2.1 will be reduced proportionately to the extent that any act or omission involving fault on the part of the Department or its Personnel contributed to the relevant cost, liability, loss, damage or expense.*

*The right of the Department to be indemnified under this clause 12.2 is in addition to, and not exclusive of, any other right, power or remedy provided by law, but the Department is not entitled to be compensated in excess of the amount of the relevant cost, liability, loss, damage or expense.*

#### **4.2.6 How might the day-to-day operation of the ODCs work?**

Given the lack of access to the ODCs (detailed further at 6 below), it is still difficult to obtain a completely clear picture of what the day-to-day operation of the ODCs looks like. However, the Cornall Review (commissioned and released by the Australian Government itself) into the period at the Manus ODC before Transfield's contract articulated the day-to-day management of the Manus ODC and the interactions between the PNG and Australian Governments and the private contractors thus:

*The outcome of these arrangements is that the day-to-day management and operation of the Manus Processing Centre fell on PNG, Australia, G4S, the Salvation Army and IHMS as a shared responsibility. Their officers worked very closely together in a small space in an otherwise sparsely populated area. The Review formed the view that it would not have been possibly for any significant event – such as mistreatment of a detainee – to occur without it becoming common knowledge.<sup>c</sup>*

Whilst Transfield was not referred to in the Cornall Report, it is reasonable to conclude that these observations may apply to the ODCs as a whole, given the alternative likelihood is of a breakdown in governance and working relationships between the governments and companies operating and servicing the centres. The one plausible difference may be that given Transfield's service provision to the Manus ODC no longer included the Salvation Army, Transfield takes a more leading role than may have been that as assigned to G4S, which did not have responsibility for Welfare services at the Manus ODC.

### 4.3 Commercial arrangements

A significant amount of money has been paid to Transfield for its service provision to the offshore detention regime. According to the AusTender website, the amounts are:

Contract ID	Contract Period	Value	Description
CN2163702-A1	24-Mar-2014 to 31-Oct-2015	\$1,200,000,000.00	Operational, Maintenance and Welfare support services for the Manus and Nauru RPCs
CN1210852	1-Feb-2013 to 28-Feb-2014	\$302,263,702.00	Operational and Maintenance Support Services for Nauru Regional Processing Centre
CN1108692	14-Sep-2012 to 31-Jan-2013	\$9,500,000.00	Operational and Maintenance Support Services for Nauru Regional Processing Centre
CN1684721	22-Jul-2013 to 31-Jan-2014	\$1,000,000.00	Staff Accommodation Management Services on Nauru
CN1883391	5-Aug-2013 to 30-Nov-2013	\$16,239,010.75	Provision of accommodation for Nauru Regional Centre 3.
CN1015841	31-Oct-2012 to 31-Oct-2012	\$6,100,000.00	Operational & Maint support services for Nauru RPC
Total		\$1,535,102,712.75	

The total amount paid to Transfield amounts to \$1.4million per day since it started providing services to the offshore detention regime on 31 October 2012.

Neither Transfield nor the Australian Government have disclosed the likely value of the forthcoming 5 year contract for which Transfield has been selected as a preferred tenderer. Media reports indicate a figure of \$2.7bn but cite no public source.<sup>ci</sup>

In summary, Transfield clearly plays the current leading private contractor role in the ODCs, with lead responsibility for operational, garrison, security, detainee management, currently (but not previously) for welfare and even with some small responsibility for health. Transfield makes decisions about detainee welfare, placement, movement, communication, accommodation, food, clothing, water, security and environment on a daily basis. Transfield can make recommendations as to whether the placement of detainees is appropriate, and whether detainees are put into 'managed accommodation'. Those decisions are sometimes made in concert with other service providers, and with the states involved (although there appears clear contractual provision for the ADIBP to make the final decision in many provisions). Transfield's responsibility under the contracts include indemnifying the ADIBP for any personal injury, disease, illness or death or any person, reduced proportionately to the extent that any act or omission involved fault on the part of the ADIBP. Whilst the ADIBP seems to have ultimate authority for some decisions under the terms of the contracts, there can be no doubt that without Transfield and its subcontractors the operation of the ODCs would be impossible.

## 5 Transfield's responsibility to respect human rights

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*Your Board is proud of the work our staff is doing. We respect human rights in every aspect of our operations and use the International Human Rights Standards as a framework to guide our activities*  
*Transfield Services, Letter to Shareholders, September 2015*

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The preamble to the Universal Declaration of Human Rights (UDHR) calls on “every individual and every organ of society” to promote and respect human rights. Leading international law scholar Louis Henkin noted in 1999 that “every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.”<sup>cii</sup>

Allegations of corporate involvement in human rights abuses predictably invokes two defences, both of which have been invoked in Transfield's case.<sup>ciii</sup> Firstly, that international human rights standards are only applicable to governments, not corporations. Secondly, and this defence is deployed by Transfield itself, that a corporation's sole obligation is to respect national laws, even where those laws fail to meet international human rights standards.<sup>civ</sup>

As outlined in this section, neither of these defences apply. Foreshadowed by the UDHR preamble, the responsibility specifically of corporations to respect human rights has been anchored in various international and domestic laws and policy frameworks. It is now widely accepted that corporations have a responsibility to respect human rights in their operations, products and services, and through their business relationships. This means, at a minimum, that corporations should not cause or be complicit in human rights abuses. This responsibility is not subject to any exception for actions that are domestically legal, and applies to activities carried out by entities of any size, operating in any jurisdiction, and with any business partners, including national governments.

### 5.1 The authoritative global standard - The UN Guiding Principles Framework

In 2005, Professor John Ruggie was appointed as the Special Representative of the UN Secretary-General on human rights and transnational corporations and other business enterprises, with the objective of establishing a consensus on and clarifying the corporate responsibility for human rights. Building on previous business-facing UN initiatives such as the voluntary UN Global Compact launched in 2000, as well as the disparate international and domestic law and policy frameworks addressing issues of corporate responsibility for human rights, the drafting of the UN Guiding Principles framework began.

The UN Guiding Principles framework itself was endorsed unanimously by the UN Human Rights Council in 2011, and is now the authoritative global standard for assessing, preventing and addressing the human rights impact of business. Since their adoption, the normative value of the UN Guiding Principles has been demonstrated by the fact that other global standards and initiatives relevant to business and human rights, such as the OECD Guidelines for Multinational Enterprises, have converged around the UN Guiding Principles and continue to do so.<sup>cv</sup>

#### **What obligations do the UN Guiding Principles set out for companies?**

The UN Guiding Principles consist of three important principles:

(1) the State duty to **protect** against human rights abuses;

- (2) the corporate responsibility to **respect** human rights; and
- (3) the shared responsibility of states and companies to ensure access by victims to effective **remedy**, where abuses have occurred.

The UN Guiding Principles are therefore also referred to as the ‘Protect, Respect, Remedy’ framework.

The corporate responsibility to respect human rights is explicit under the Guiding Principles, “[b]usiness enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved (Guiding Principle 11).”<sup>cvii</sup> An “adverse human rights impact” occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights.<sup>cviii</sup>

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***‘The State Made Me Do It’ – why domestic legality and state-sanctioned involvement don’t allow companies to evade their responsibility to respect human rights***

*The Company is concerned that statements made this week by the activist group GetUp and the No Business in Abuse (NBIA) campaign are clearly a political attack directed at an Australian Company undertaking work to fulfil a Government policy that has bipartisan political support.*  
**Transfield Services, September 2015**

The very notion of international human rights was born from a situation of state-sanctioned (and ostensibly domestically legal) gross human rights abuses having occurred in various areas of the world prior to the adoption of the UN Universal Declaration of Human Rights in 1948. Historically, state-sanctioned, domestically ‘legal’ human rights abuse is a feature of, rather than an exception to, human rights case law. The UN Guiding Principles acknowledge this, and simply reiterate the longstanding position that a State’s permission, support and even direct order, provides no defence for individual or corporate involvement in human rights abuses.

The UN Guiding Principles define ‘avoiding infringing on the human rights of others’ as being that “enterprises can go about their activities, within the law, so long as they do not cause harm to individuals’ human rights in the process.”<sup>cviii</sup> Domestic legality therefore does not make human rights abuses permissible. The UN Guiding Principles Implementation guide instructs companies operating in multiple jurisdictions with multiple different domestic legal frameworks that: “The responsibility to respect human rights is not, however, limited to compliance with...domestic law provisions. It exists over and above legal compliance, constituting a global standard of expected conduct applicable to all businesses in all situations.”<sup>cix</sup>

The Frequently Asked Questions about the Guiding Principles on Business and Human Rights (The UN GP FAQ<sup>cx</sup>), published by the UN Office of the High Commissioner for Human Rights in 2014, provides further elaboration for companies facing a conflict between national law and international human rights standards as follows:

*Typically, some of the most challenging situations for companies arise when national law directly conflicts with international human rights standards or does not fully comply with them. For example, a State’s national legislation may not provide for equal rights of men and women or may restrict the rights to freedom of expression and freedom of association. If the national legislative environment makes it impossible for a company to fully meet its responsibility to respect human rights, the company is expected to seek ways to honour the principles of internationally recognized human rights and to continually demonstrate its efforts to do so. This could mean, for example, protesting against government demands, seeking to enter into a dialogue with the government on human rights issues, or seeking exemptions from legal provisions that could result in adverse human rights impact. But if over time the national context makes it impossible to prevent or mitigate adverse human rights impact, the company may need to consider ending its operations there, taking into account credible assessments about the human rights impact of doing so.*<sup>cxii</sup>

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**Is the responsibility to respect human rights voluntary?**

While the UN Guiding Principles are not ‘legally binding’ in nature, neither are they optional. Rather, they elaborate on the implications of existing standards and practices for States and businesses, and include points covered variously in international and domestic law. The Interpretive Guide to the UN Guiding Principles, prepared by the UN Office of the High Commissioner for Human Rights, provides the following:

*Q 7. Is the responsibility to respect human rights optional for business enterprises?*

*No. In many cases the responsibility of enterprises to respect human rights is reflected at least in part in domestic law or regulations corresponding to international human rights standards. For instance, laws that protect people against contaminated food or polluted water, or that mandate workplace standards in line with the ILO [International Labour Organization] conventions and safeguards against discrimination, or that require individuals’ informed consent before they take part in drug trials, are all different ways in which domestic laws can regulate the behaviour of enterprises to help ensure that they respect human rights. The responsibility to respect human rights is not, however, limited to compliance with such domestic law provisions. It exists over and above legal compliance, constituting a global standard of expected conduct applicable to all businesses in all situations. It therefore also exists independently of an enterprise’s own commitment to human rights. It is reflected in soft law instruments such as the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD). There can be legal, financial and reputational consequences if enterprises fail to meet the responsibility to respect. Such failure may also hamper an enterprise’s ability to recruit and retain staff, to gain permits, investment, new project opportunities or similar benefits essential to a successful, sustainable business. As a result, where business poses a risk to human rights, it increasingly also poses a risk to its own long-term interests.<sup>cxii</sup>*

### **What is Transfield’s Responsibility under the UN Guiding Principles?**

Under the UN Guiding Principles, Transfield’s responsibility is clear, it must respect human rights, and this obligation is not voluntary. Further, Transfield’s specific and independent responsibility to respect human rights exists over and above any compliance it owes to the laws of PNG, Nauru or Australia, and independently of any limited commitment it may make to human rights itself.

Finally, the state-sanctioned and domestic legality of the offshore detention regime (under Australian, Nauruan or PNG domestic law) does not make complicity in its human rights abuses permissible for Transfield or any business enterprise.

## **5.2 Corporate specific Guidelines, Complaint Mechanisms and Voluntary Standards**

Whilst the UN Guiding Principles is the authoritative global standard on the corporate responsibility to respect human rights, it is not the only mechanism or expression of the corporate commitment to human rights. For Transfield, which is domiciled in an OECD nation (Australia), and which contracts with many other corporate entities including large listed entities, two of the most important additional standards to the UN Guiding Principles are the OECD Guidelines for Multinational Enterprises and the UN Global Compact.

### **5.2.1 The OECD Guidelines for Multinational Enterprises**

The OECD Guidelines for Multinational Enterprises are a unique, government-backed international corporate accountability mechanism aimed at encouraging responsible business behaviour around the world. These guidelines define standards for socially and environmentally responsible corporate behaviour and proscribe procedures for resolving disputes between corporations and the communities or individuals negatively affected by corporate activities. The corporate responsibility to respect human rights outlined in the UN Guiding Principles is mirrored in the human rights chapter of the OECD Guidelines for Multinational Enterprises, which “define[s] standards for socially



and environmentally responsible corporate behaviour and proscribe procedures for resolving disputes between corporations and the communities or individuals negatively affected by corporate activities.”<sup>cxiii</sup> The OECD Guidelines are applicable to corporations domiciled or operating in States that adhere to the OECD Declaration on International Investment and Multinational Enterprises (including Australia), and are backed by the governments of OECD nations as well as non-OECD countries that have chosen to adhere to them. The OECD Guidelines are therefore applicable to Transfield, as a corporation domiciled in Australia, and reinforce the obligations outlined under the UN Guiding Principles.

The OECD Guidelines also have a unique requirement establishing a complaints mechanism by requiring adhering states “to undertake to establish National Contact Points (NCPs), which promote the understanding and application of the Guidelines by business, and provide a mediation and conciliation platform in specific instances where companies are alleged to not observe the Guidelines.”<sup>cxiv</sup> Australia has a National Contact Point, a fact acknowledged by Transfield when it stated in its response to NBIA’s views that:

*While OECD guidelines allow for complaints to be made to the Australian government, in the unlikely event the Australian government recognised a complaint about the Company, it has no power to enforce any finding.*<sup>cxv</sup>

Regardless of the prudence of relying upon a current government’s view to deliver longer-term protection from negative decisions regarding complicity in human rights abuses, the value of the decisions of National Contact Points are not that they enforce a domestic criminal or civil penalty. The value of the OECD Guidelines and the NCP process is that they are increasingly referred to by government, global finance and investment as authoritative and credible statements of individual corporate responsibility, and utilised in regulatory, financial and investment decision-making.<sup>cxvi</sup>

## 5.2.2 The UN Global Compact

The UN launched the UN Global Compact in 2000, as a “policy initiative for businesses that are committed to aligning their operations and strategies with... [nine] universally accepted principles in the areas of human rights, labour [and] environment”. (A tenth principle on anti-corruption was added in 2004.) An indication of the growing global corporate consensus on the responsibility to reflect human rights is reflected in the membership list to the UN Global Compact, which now includes 8,000 companies across the world and many of the world’s major multinational enterprises.<sup>cxvii</sup> Companies include founding member Rio Tinto, an important contractual partner for Transfield.

Companies participating in the Global Compact report publicly on steps they take to comply with the ten principles. Whilst the Global Compact is not legally binding or a performance and assessment tool, its value again is in the membership-led consensus and corporate peer pressure emphasising the responsibility to respect human rights.

In respect of the specific corporate responsibility to respect human rights, Principles 1 and 2 of the UN Global Compact state:

*Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and*

*Principle 2: make sure that they are not complicit in human rights abuses.*

The UN Global Compact’s reference to complicity in Principle 2 is a particularly apt illustration of the widespread acceptance of the notion that corporate involvement in human rights abuses often

occurs with the support or at the behest of third parties including states. Hence the notion of ‘complicity’ as opposed to direct or sole attribution for human rights abuses as the appropriate categorisation.

The UN Global Compact has also reaffirmed the normative value of the UN Guiding Principles by stating that the UN Guiding Principles provide the extended content of the first two principles.<sup>cxviii</sup>

In a *Human Rights Statement* Transfield adopted in June 2015 the company publicly stated its commitment to the ten principles of the UN Global Compact.<sup>cxix</sup> However Transfield does not appear to be a current member of the organisation, and therefore is not required to report publicly on its steps to comply with the 10 Principles.

### 5.3 Legal compliance requirements

While the dearth of reliable enforcement options for the application of international law to corporations makes human rights a functionally ambiguous area of strict ‘legal compliance’ for companies, guidance is available in respect of the most serious violations: human rights violations constituting international crimes, and gross human rights violations or abuses.

#### Gross human rights abuses

Arbitrary and prolonged detention, a feature of the offshore detention regime, is widely considered to constitute a “gross human rights abuse”, a matter further outlined in [SECTION C BELOW]

The *Interpretive Guide to the Guiding Principles* addresses the situation of complicity in gross human rights abuses as follows.<sup>cxx</sup>

If enterprises are at risk of being involved in gross human rights abuses, prudence suggests that they should treat this risk in the same manner as the risk of involvement in a serious crime, whether or not it is clear that they would be held legally liable. This is so both because of the severity of the human rights abuses at stake and also because of the growing legal risks to companies as a result of involvement in such abuses. Enterprises can cause gross human rights abuses through their own activities, for example if they use slave labour or treat workers in a manner that amounts to cruel, inhuman or degrading treatment. They may also contribute to gross human rights abuses that are committed by other parties, for example security forces. Such indirect contribution to gross human rights abuse can give rise to allegations of either legal or non-legal complicity. The commentary to Guiding Principle 17 states that “as a legal matter, most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of enterprises in such cases. Typically, civil actions can also be based on an enterprise’s alleged contribution to a harm, although these may not be framed in human rights terms. The weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.”

For example, enterprises have faced charges of legal complicity based on allegations that they provided chemicals to another party that then uses them to commit acts of genocide or that they provided logistical support to Government forces engaged in war crimes.

The recent history of legal action—mostly in the form of civil liability lawsuits—against multinational corporations for involvement in gross human rights abuse reveals an uneven, yet expanding web of potential corporate legal liability. Because of the nature of the human rights risks involved, but also because of the expanding legal boundaries, including territorial boundaries in some instances, enterprises should treat all cases of risk of involvement in gross human rights abuses as a matter of legal compliance, irrespective of the status of the law where the business activity is taking place.

Given this analysis, it is reasonable to suggest that Transfield should also treat the risk of involvement in gross human rights abuses as a matter of legal compliance, irrespective of any domestic legality for the offshore detention regime in Nauru, PNG or Australia.

### International Criminal Jurisdiction

Natural persons, rather than legal persons (including companies), can be prosecuted under the Rome Statute of the International Criminal Court (ICC) for committing or aiding and abetting the commission of an international crime including crimes against humanity.<sup>cxix</sup> Therefore, under the Rome Statute while a company itself (like Transfield) could not be prosecuted under its provisions, company directors, executives or employees could.<sup>cxix</sup> An analysis of the offshore detention regime against the standards for international crimes is provided at SECTION REFERENCE.

Furthermore, many jurisdictions have executed Rome Statute obligations in domestic law (allowing for domestic prosecution), and some of these jurisdictions (including Australia) have extended the applicability of international crimes to companies. Therefore in the Australian jurisdiction under the *Criminal Code Act 1995*, a company can be prosecuted (with the assent of the Attorney General), for international crimes.

Finally, at least 17 UN Member States have implemented ‘universal jurisdiction’ and used it for international crimes.<sup>cxix</sup> The term ‘universal jurisdiction’ refers to the idea that a national court may prosecute individuals for any serious crime against international law — such as crimes against humanity, war crimes, genocide, and torture — even where traditional bases of criminal jurisdiction do not exist, for example: the defendant is not a national of the State, the defendant did not commit a crime in that State’s territory or against its nationals, or the State’s own national interests are not adversely affected.<sup>cxix</sup> The implementation of universal jurisdiction is designed to deal with the potential impunity of individuals who commit, aid or abet international crimes but are protected by the states in which they reside, or in which the crimes are committed.<sup>cxix</sup>

Clearly, despite any domestic legality, or protection of a particular state, the corporate responsibility to respect human rights and avoid complicity in international crimes is one that should be treated as a matter of legal compliance for any prudent corporation, including Transfield.

### 5.4 Australian Securities Exchange (ASX) Principles and Recommendations

The notion that corporations have a responsibility towards ethics or human rights, and that ignoring this responsibility can translate into financial impacts is outlined in the 2005 update to the Australian Securities Exchange (ASX) Corporate Governance Council’s *Corporate Governance Principles and Recommendations* (CGPR). Principle 3 of the CGPR is “Act ethically and honestly.”<sup>cxix</sup> The commentary to this section states:

*A listed entity’s reputation is one of its most valuable assets and, if damaged, can be one of the most difficult to restore. Investors and other stakeholders expect listed entities to act ethically and responsibly. **Anything less is likely to destroy value over the longer term.** Acting ethically and responsibly goes well beyond mere compliance with legal obligations and involves acting with honesty, integrity and in a manner that is consistent with the reasonable expectations of investors and the broader community. It includes being, and being seen to be, a “good corporate citizen.”* (emphasis added)

The commentary to Principle 3 goes onto explicitly canvass the requirement for ethics to guide behaviour, even in jurisdictions where contravention of human rights may be domestically legal, when it gives an example of “...respecting the human rights of its employees (for instance, by not employing forced or compulsory labour or young children **even where that may be legally permitted**)” [emphasis added].

Clearly the notion that a corporation like Transfield should respect human rights, independent of the domestic legality of any human rights violations, is one that not only emanates from international

obligations and guidelines, but is echoed in the principles recommended by Australia's own Securities Exchange.

## 5.5 Transfield's Stated Commitments

In its Human Rights Statement, adopted in June 2015, Transfield itself sets out its commitment to 'International Human Rights Standards'.<sup>cxvii</sup> It states that:

*Transfield Services is committed to responsible corporate governance and corporate social responsibility. Accordingly, the Board has endorsed this Human Rights Statement to support the Transfield Services Code of Business Conduct and compliance and governance framework.*

According to the Statement, Transfield's respect for human rights is its 'global standard' and therefore presumably should be applied to its operations on Nauru and PNG.

The International Human Rights Standards are defined by Transfield as:

*The United Nations Universal Declaration of Human Rights (UNHCHR) 1948 and the International Bill of Human Rights [which includes the International Covenant on Civil and Political Rights - ICCPR];  
The 10 Principles of the United Nations Global Compact;  
The United Nations Guiding Principles on Business and Human Rights; and  
The International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work.*

It therefore appears that Transfield understands and itself acknowledges it has a responsibility to respect human rights as outlined in the UN Guiding Principles, and it furthermore is aware of the content of its responsibility as outlined in the various Conventions and Covenants which make up the International Bill of Human Rights.

However, further into its Human Rights Statement Transfield makes comments which deviate from the UN Guiding Principles such as:

*Human rights are fundamental rights, freedoms and standards of treatment to which people are entitled. While sovereign states have the primary duty to protect and uphold human rights, Transfield Services recognises that **where possible and within their sphere of influence**, companies should strive to respect human rights by seeking to avoid infringements arising from the conduct of business activities. Transfield Services is committed to respecting human rights in its operations **even though none of the International Human Rights Standards are binding on or enforceable against it**. Instead, Transfield Services uses the International Human Rights Standards as a framework to guide its decision-making and constructive engagement within its sphere of influence, while **respecting the responsibility of government to ensure the protection of human rights**. In that sense, Transfield Services recognises its **own limitations and ability to influence change when it comes to government policy and other matters outside its control**. Transfield Services focuses its efforts on those areas which are within its own direct influence.<sup>cxviii</sup> [emphasis added]*

Regardless of the deficiencies in Transfield's Human Rights Statement, it appears that the company has accepted that it does have some form of corporate responsibility to respect human rights. Which is important for internal cultural policy and practice change, but not required for a corporation to be bound by its responsibility to respect. In fact the UN Guiding Principles Interpretative Guide explicitly outlines that business enterprise's responsibility to respect, "...exists independently of an enterprise's own commitment to human rights."<sup>cxix</sup> Therefore the obligations set out under the UN Guiding Principles still apply to Transfield (see section 5.1 above) despite any attempt to constrain the company's sphere of responsibility through parameter setting in internal policies.

## 5.6 Transfield's contractual obligations

For all the commentary by the Australian Government in regards to its view that it does not hold any responsibility for the human rights of asylum seekers detained through the offshore detention regime (see 3.2.4 above), the contracts between Transfield and the Australian Government do refer to the human rights parameters within which Transfield must provide services.

From Transfield's earliest contract in 2012 to the most recent contract in 2014, the obligation on the company is that:

[p.53] *The Site needs to provide a safe and secure environment for Transferees, Service Provider Personnel, Department Personnel and all other people at the Site, **ensuring that each individual's human rights, dignity and well-being is preserved.***<sup>cxxx</sup>

Transfield's Contract with the Australian Government from March 2014<sup>cxxxi</sup>, explicitly acknowledges the parameters of human rights:

[1.1.5.] *The parameters within which Offshore Processing will operate include Australian and Host country legislation, Ministerial directions, Joint Agency Task Force (JATF) arrangements, Regional Resettlement Arrangement Memoranda of Understanding and Regional Resettlement Arrangement Administrative Arrangements. **Australia's international obligations, such as the United Nations Refugee Convention and Convention on the Rights of a Child, also provide parameters.***

The circularity between State and Company that these provisions represent in relation the responsibility for the human rights of asylum seekers is immaterial. What they demonstrate is that the spectre of human rights shadows even the contractual agreements between Transfield and the Australian Government.

As this section 5 has demonstrated, the sources of Transfield's independent and specific responsibility to respect the human rights of those within the offshore detention regime stretch from non-voluntary international obligations to voluntary global corporate compacts, to its internal company policy through to the very provisions of the contracts establishing Transfield's provision of services to the offshore detention regime. Transfield clearly has a responsibility to respect human rights in its provision of services to the Offshore Detention Centres. This responsibility is an overarching obligation for the company, despite the claimed domestic legality of the offshore detention regime under Australian, Papua New Guinean and Nauruan law, and despite the fact that the company's actions may be as a result of a contract with the Australian Government and in accordance with Australian, Nauruan or PNG Government policy or support. A prudent company would treat the risk of complicity in gross human rights abuses as an issue of legal compliance.

Finally, Transfield's responsibility to respect human rights is not voluntary, and as such carries with it the legal, financial and reputational consequences of a failure to respect human rights as set out in the UN Guiding Principles.<sup>cxxxii</sup> As both the UN and Australia's ASX<sup>cxxxiii</sup> warn, where business ignores ethics and human rights, it increasingly also poses a risk to its own long-term interests.<sup>cxxxiv</sup>

## 6 Overview of the gross human rights abuses within Australia's offshore detention regime during Transfield's provision of services

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*"Human rights are not reserved for citizens only, or for people with visas. They are the inalienable rights of every individual, regardless of his or her location and migration status."*  
*United Nations High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, 8 September 2014.<sup>xxxxv</sup>*

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This section and the following outline the gross human rights abuses in the ODCs during Transfield's provision of services. According to this analysis, gross human rights abuses are occurring on a massive scale, violating 47 international laws. The table of violations is outlined at Appendix 11.2 below, and the outline of findings and evidence for each international law violation is contained at section 7 below.

A threshold question is in relation to the use of the preceding term 'gross' to categorise the human rights abuses occurring in the ODCs. According to the FAQ on the UN Guiding Principles:

*"Gross human rights violations*

*"There is no uniform definition of gross human rights violations in international law, but the following practices would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, **arbitrary and prolonged detention**, and systematic discrimination. Other kinds of human rights violations, including of economic, social and cultural rights, can also count as gross violations if they are **grave and systematic**, for example violations taking place **on a large scale or targeted at particular population groups**." (emphasis added)<sup>xxxxvi</sup>*

NBIA's thesis, strongly supported by the findings of bodies such as the UNHCR, the UN Special Rapporteur on Torture and the Australian Human Rights Commission (AHRC) (see section 7 below) is that the treatment of the asylum seekers and refugees within the ODCs amounts to arbitrary and prolonged detention and torture or cruel, inhuman and degrading treatment taking place on a large scale (more than 2000 people) and/or targeted at a particular group, being asylum seekers. This treatment therefore meets the test of "gross" human rights violations (termed 'gross human rights abuses' when discussed in relation to Transfield as a non-State entity see section 1.3 above for further detail).

### 6.1 The Evidence Base establishing gross human rights abuses

The issue of the evidence base establishing gross human rights abuses at the ODCs is heavily contested, and over a substantial period. On one front, the overwhelming weight of international and domestic expert findings are that the offshore detention centres are systemically abusive, and violate international law. On the other front, the Australian, Nauruan and PNG Governments, together with the centres private contractors like Transfield, view the situation as far different. Together with serious and rapidly accumulating restrictions on public and independent monitoring of the ODCs, the situation presents an impasse. To address this issue, this report takes a very conservative approach in relation to its sources for findings, which is explained below.

#### 6.1.1 The historical weight of evidence regarding abuses

The political consensus in Australia regarding Australia's system of mandatory detention of asylum seekers belies the substantial and longstanding evidence base demonstrating that the system breaches international law and unequivocally causes harm.

More than a decade ago, in July 2002, after visiting Australia's immigration detention centres, the Special Envoy of the UN High Commissioner for Human Rights, his Honour Justice P. N. Bhagwati, handed down a damning report. The former Chief Justice of India wrote that:

*"[He] was considerably distressed by what he saw and heard in Woomera IRPC. He met men, women and children who had been in detention for several months, some of them even for one or two years. They were prisoners without having committed any offence. Their only fault was that they had left their native home and sought to find refuge or a better life on the Australian soil. In virtual prison-like conditions in the detention centre, they lived initially in the hope that soon their incarceration will come to an end but with the passage of time, the hope gave way to despair. When Justice Bhagwati met the detainees, some of them broke down. He could see despair on their faces. He felt that he was in front of a great human tragedy. He saw young boys and girls, who instead of breathing the fresh air of freedom, were confined behind spiked iron bars with gates barred and locked preventing them from going out and playing and running in the open fields. He saw gloom on their faces instead of the joy of youth. These children were growing up in an environment, which affected their physical and mental growth and many of them were traumatized and led to harm themselves in utter despair."*<sup>cxxxvii</sup>

In October 2002 the UN Working Group on Arbitrary Detention reported on its visit to the immigration detention centres. The group's report observed that *'a system combining mandatory, automatic, indiscriminate and indefinite detention without real access to court challenge is not practised by any other country in the world'*.<sup>cxxxviii</sup>

Following these and many other comments, in 2004, *A last resort*, a major report of the then-Human Rights and Equal Opportunity Commission into children in detention, was published. In the introduction to the report, Dr Sev Ozdowski, the Australian Human Rights Commissioner, wrote *"I hope that A last resort? removes, once and for all, any doubts about the harmful effects of long term immigration detention on children"*.<sup>cxxxix</sup> His successor Australian Human Rights Commissioner Gillian Triggs, 10 years later, published an almost identical report in relation to the harms described to children subjected to immigration detention.

The UN Human Rights Committee has considered submissions of both Government and asylum seeker or refugee applicants, and found Australia's practice of mandatory indefinite detention to be arbitrary (and therefore in violation of international law) on at least seven different occasions.<sup>cxl</sup>

At some points, even the Australian Government has conceded the weight of evidence of harm, the Secretary of the Australian Department of Immigration (ADIBP) stated in 2014, "...there is a reasonably solid literature base which we're not contesting at all which associates a length of detention with a whole range of adverse health conditions."<sup>cxli</sup>

### 6.1.2 Methodology of evidence used in this report

This report has taken a deliberately very conservative approach to establishing the violations of international law to which Transfield is contributing. In a context of minimal public scrutiny of the ODCs, media reports have become one of the few ways to receive any public information. However, NBIA has not used media reports in establishing its evidence base. Instead, the report's findings are limited to verifiable public information provided by expert independent third parties, or evidence adopted by findings from multi-party Parliamentary committees which have review and assessment

processes. This choice has been made in order to establish at least the minimum complicity for Transfield. That the minimum complicity in human rights abuses violates 47 international laws, and constitutes the significant abuse of 1000s of people should be a cause of significant concern for Transfield, and its stakeholders.

### 6.1.3 Increasing secrecy rendering evidence and verification almost impossible

There has been no public, independent monitoring of the offshore detention centres by a UN body since Transfield began services to the Manus ODC in February 2014. Prior to that date, the UNHCR had conducted somewhat regular public monitoring. Journalists,<sup>cxlii</sup> lawyers,<sup>cxliii</sup> leading NGOs and even the Australian Human Rights Commission<sup>cxliv</sup> have since been denied entry to the centres.

Last month, the UN Special Rapporteur on the Human Rights of Migrants decided to cancel a planned visit to the Nauru ODC because the Australian Government would not provide the written assurances required by the official terms of reference for fact-finding missions by special rapporteurs that people he interviewed would not be prosecuted under the Border Force Act 2015 (Cth).<sup>cxlv</sup> This is the same Border Force Act which Transfield characterised as being:

*“factually incorrect to assert that the new legislation in any way prevents service providers (including medical practitioners) from reporting any suspected wrongdoings. The pre-existing channels remain in place and are effective. Claims to the contrary by news outlets, social media, NGOs and some politicians are baseless.”<sup>cxlvi</sup>*

While some independent bodies have made private visits, this does not justify the secrecy and lack of public, independent monitoring that characterises the centres at present.

There are no shortage of international experts willing to review the centres, between 3 and 14 March 2014, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, who visited Manus Island, was not allowed to enter the camp itself or to speak to any of the detainees.<sup>cxlvii</sup>

In addition to this, the UN Working Group on Arbitrary Detention has requested to visit Australia’s immigration detention centre on Nauru twice – in both April and May 2014 – and was told that this was not an appropriate time.

### 6.1.4 The Australian Government and Transfield consistently contest findings

In the space of extremely limited public monitoring and review of the ODCs by credible independent third parties, the Governments of Nauru, PNG and Australia, together with Transfield are in a strong position to dispute each and every piece of evidence put forward by detainees, former staff and other individuals regarding the conditions and events at the ODCs.

In reviewing the evidence compiled by this report, a striking difference is evident between the official statements and evidence provided by the department and Transfield or the other private contractors, and the first-hand testimony of individuals who have worked at and observed the centre.<sup>cxlviii</sup> To quote the Senate Committee on the Manus Incident discussing this issue:

*On issues including the provision of healthcare services to transferees, the adequacy of accommodation and facilities, and access to legal advice and other assistance for transferees, there are massive contradictions between the 'official' evidence given by the Australian Government and its contractors, and the evidence of other observers.”<sup>cxlix</sup>*



A further factor in this space is the proliferation of ex-staff ‘whistleblowers’ who come forward to give evidence of their experience. One such is Dr David Isaacs, a professor of Paediatric infectious diseases at University of Sydney, who returned from working with IHMS on Nauru in early December 2014 and has since decided to use his experience offshore to advocate against current detention policies.

*“People have often said if you ignore things and don’t speak out when there’s undue trauma being caused to people than you’re in a way colluding with it,” Isaacs says.  
“And, after being there, I feel that to not speak out would be appalling.”<sup>cl</sup>*

In the context of this contestation, NBIA’s review of the evidence base does not seek to editorialise sources and findings. It would be almost impossible to adopt or dispute individual pieces of evidence even when wildly differing. Instead, we have provided a comprehensive, chronological overview. In that chronology a few trends are visible, and the foremost is that the first-hand experience of ex-staff and detainees is consistent across disparate and different sources. Generally a trend in this manner increases the probative value of the evidence.

## 6.2 The nature of the gross human rights abuses

Despite the increasing secrecy of the ODCs, and the conservative evidentiary approach of NBIA, the overwhelming weight of international and domestic evidence still outlines gross human rights abuses occurring at the Manus and Nauru ODCs with severe mental and physical impacts upon detainees. In July 2014, more young men had died at the Manus ODC than been resettled. Sexual abuse and major incidents of self harm occur regularly. Behind these abuses however sits the insidious mental harm, that worsens inexorably over time for any man, woman or child held in arbitrary and indefinite detention.<sup>cli</sup>

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*“Going to the islands where the centres are is a very powerful experience. Refugees and asylum-seekers by their very nature are very vulnerable people and most of the people there have taken a very challenging journey to get there.”  
Transfield Chairman, 2015<sup>clii</sup>*

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These impacts have been inflicted on a population of asylum seekers, all of whom took a very risky boat journey in an attempt to reach safety, including pregnant women, children (even children detained on their own without any family), and men who have survived torture. It is difficult to imagine a more vulnerable cohort than the roughly 2000 asylum seekers and refugees to whom these abuses are an ongoing and prolonged trauma.

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*“If we take the definition of torture to be the deliberate harming of people in order to coerce them into a desired outcome, I think it does fulfil that definition.”  
Dr Peter Young, former chief psychiatrist responsible for the mental health of all asylum seekers detained by Australia, Aug 2014*

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The issue of detention for deterrence is discussed in greater detail in Section 7 below. But it is the overriding context, without which it is difficult to understand the predictable nature of the harm caused. In an attempt to deter other asylum seekers from making the risky boat journey to Australia, the asylum seekers that do arrive, are detained. In that calculus, arbitrarily detaining asylum seekers in remote islands in the Pacific: difficult to get to, difficult to create infrastructure upon, difficult to ship in food, makes sense. The consequence however is that the inevitable harms caused are justified and normalized.

## 7 Specific Human Rights Abuses within Australia's offshore detention regime during Transfield's provision of services

### 7.1 Asylum seekers are subjected to deprivation of liberty and arbitrary detention

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*"Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law."  
Lord Nicholls of Birkenhead in his ruling of 16 December 2004<sup>cliii</sup>*

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The Australian Government policy under which asylum seekers are detained is in accordance with the Australian legal framework of mandatory detention of asylum seekers both on the Australian mainland and in the States of PNG and Nauru.

That Australia's policy and practice of mandatory detention of asylum seekers violates the prohibition on arbitrary detention is incontrovertible. The UN Human Rights Committee has judged this practice to constitute arbitrary detention on at least seven occasions since the policy was implemented.<sup>cliv</sup> Acknowledging this long established consensus in its 2014 *The Forgotten Children* report, the Australian Human Rights Commission (AHRC) remarked, "[t]here is nothing new in the finding that mandatory immigration detention is contrary to Australia's international obligations. The Australian Human Rights Commission and respective Presidents and Commissioners over the last 25 years have been unanimous in reporting that such detention, especially of children, breaches the right not to be detained arbitrarily".<sup>clv</sup>

#### 7.1.1 Relevant Rights

*Article 9, UDHR*

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

*Article 13(1) UDHR*

*Everyone has the right to freedom of movement and residence within the borders of each state.*

*Article 9, ICCPR*

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

*4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*

*Article 37(b), CRC*

*States Parties shall ensure that:*

*...*

*(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;*

#### 7.1.2 General interpretation of the prohibition against arbitrary detention in immigration detention

In order to be compatible with international law, detention must be reasonable, necessary and proportionate in the circumstances. In its Draft General Comment on Article 9 of the ICCPR, the UNHRC discussed the prohibition of arbitrary detention in the context of immigration detention:

*Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in light of the circumstances, and reassessed as it extends in time. Asylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security. The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties, or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review. The decision must also take into account the needs of children and the mental health condition of those detained. Any necessary detention should take place in appropriate, sanitary, non-punitive facilities, and should not take place in prisons. Individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion.<sup>clvi</sup>*

The detention guidelines of the UN High Commissioner for Refugees (UNHCR) provide the following:

*Detention must not be arbitrary, and any decision to detain must be based on an assessment of the individual's particular circumstances. Detention in the migration context is neither prohibited under international law per se, nor is the right to liberty of person absolute.*

*35 However, international law provides substantive safeguards against unlawful (see Guideline 3) as well as arbitrary detention. 'Arbitrariness' is to be interpreted broadly to include not only unlawfulness, but also elements of inappropriateness, injustice and lack of predictability.*

*36 To guard against arbitrariness, any detention needs to be necessary in the individual case, reasonable in all the circumstances and proportionate to a legitimate purpose (see Guidelines 4.1 and 4.2).*

*37 Further, failure to consider less coercive or intrusive means could also render detention arbitrary (Guideline 4.3). As a fundamental right, decisions to detain are to be based on a detailed and individualised assessment of the necessity to detain in line with a legitimate purpose. Appropriate screening or assessment tools can guide decision-makers in this regard, and should take into account the special circumstances or needs of particular categories of asylum-seekers (see Guideline 9). Factors to guide such decisions can include the stage of the asylum process, the intended final destination, family and/or community ties, past behaviour of compliance and character, and risk of absconding or articulation of a willingness and understanding of the need to comply. In relation to alternatives to detention (Guideline 4.3 and Annex A), the level and appropriateness of placement in the community need to balance the circumstances of the individual with any risks to the community. Matching an individual and/or his/her family to the appropriate community should also be part of any assessment, including the level of support services needed and available. Mandatory or automatic detention is arbitrary as it is not based on an examination of the necessity of the detention in the individual case.<sup>clvii</sup>*

The UN Human Rights Committee (UNHRC) has made clear that an arrest or detention may be permissible under domestic law, but may nevertheless be arbitrary. The Committee has stated that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.<sup>clviii</sup>

The UNHCR Detention Guidelines define immigration detention as:

the same as that contained in article 4(2) of OPCAT, which is applicable in the immigration context. This definition is “any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority”. As noted by the United Nations High Commissioner for Refugees, “detention can take place in a range of locations, including at land and sea borders, in the ‘international zones’ at airports, on islands, on boats, as well as in closed refugee camps, in one’s own home (house arrest) and even extraterritorially”.<sup>clix</sup>

### 7.1.3 Detention as Deterrence – a violation of international law

The consistent refrain from successive Australian Governments, as well as the Australian Department of Immigration and Border Protection is that the offshore detention regime is essential policy and practice to deter future asylum seekers from making risky boat journeys to Australia and people smugglers from facilitating that journey.

This intention is reflected in the foundational documents for the offshore detention regime, including in the 2013 Regional Resettlement Agreement with PNG, where the (then-ALP led) Australian Government states:

*Existing cooperation between Australia and Papua New Guinea, in particular through the Manus Island Regional Processing Centre, represents a **significant element of the regional response to people smuggling**. Australia warmly welcomes Papua New Guinea’s offer to adopt additional measures which build on the Manus Island Regional Processing Centre. These measures will make a significant further contribution to **encouraging potential unauthorized arrivals to avail themselves of lawful channels to seek asylum and to abandon the practice of perilous sea journeys which has led to the deaths of so many.***<sup>clx</sup> [emphasis added]

In July 2013, the Coalition Party released its ‘Operation Sovereign Borders Policy’, which it subsequently enacted after its election to Government in September 2013. This document states:

*For years the Coalition has advocated a strong and consistent policy stance that focuses single-mindedly on deterrence. These policies are well known and include.... **third country offshore processing on Nauru and Manus Island.***<sup>clxi</sup>

The Policy goes on to term the proposal a “Comprehensive ‘Regional Deterrence Framework’” which has 4 parts, with part 3 being the explicit “detention” of people at third country locations.<sup>clxii</sup> This rationale has continued to date, with the new Coalition Prime Minister Malcolm Turnbull remaining committed to Operation Sovereign Borders.<sup>clxiii</sup>

As pointed out by the International Detention Coalition in their report *Captured Childhood*, however, immigration detention for deterrence is clearly in contravention of international law.<sup>clxiv</sup> It thwarts claims that individuals have rights because of their individual circumstances (like asylum seekers) by suggesting they can be detained anyway, so as to send a message to others. As Michael Kagan writes:

*“When a government argues that an asylum seeker should be detained in order to deter other asylum seekers, the detention becomes divorced from the conduct and characteristics of the person who is actually detained. The government may concede, explicitly or implicitly, that the detained person poses no threat to anyone. The government may even concede that she is likely to eventually be granted refugee status. The purpose of deterrence is not tied to the person detained, but rather to send a message to other people who are not even present. The more that government is able to claim that the arrival of asylum-seekers is a bad thing, the stronger will be its case for deterrence. But by the same token, deterrence-based measures do not have a built*

*in limit. In fact, the theory of deterrence is that the more severe the measure, the better. Thus, it can be difficult to strike a balance that achieves proportionality. In short, how far can a government go to infringe the rights of person A in order to send a message to person B?*<sup>clxv</sup>

With this context, the following section outlines specific findings and evidence in relation to the ODCs under Transfield's provision of services. For the background of readers, sources of findings and evidence outlined below include sources relating to the period of the Manus ODC before Transfield commenced providing services in March 2014. They are relayed here for background and context for later findings, but not relied upon to establish any violation.

#### 7.1.4 Findings and Evidence of Violations - MODC

- October 2013: The UNHCR noted in its report on its monitoring visit to the Lombrum facility in Papua New Guinea: "While the ongoing development of excursions and activities available to asylum- seekers is welcomed, freedom of movement remains extremely limited."
- The report concluded: "The current PNG policy and practice of detaining all asylum seekers at the closed RPC, on a mandatory and open-ended basis, without an individualized assessment as to the necessity, reasonableness and proportionality of the purpose of such detention, amounts to arbitrary detention that is inconsistent with international law."<sup>clxvi</sup>
- December 2013: In its visit to the Manus Island Offshore Detention Centre in December 2013, Amnesty International describes the centre as:
- "A closed detention centre, resembling a combination of a prison and a military camp. Detainees are prevented from leaving by locked gates and security guards at the exits to each compound and the main entrance to the facility."<sup>clxvii</sup>
- July 2015: The Human Rights Law Centre (HRLC) and Human Rights Watch (HRW) reported that as at 15 July 2015, there were over 850 asylum seekers detained at the Lombrum RPC, 87 of whom had been found to be refugees.<sup>clxviii</sup> The fact of their status determination having taken place does not alter the fact of their detention. According to the HRLC/HRW report: 'With refugees unable to leave the transit center [due to a lack of resettlement options], PNG has responded with a de facto "turn off the tap" policy, which prevents new refugees from moving to the center, officials said.'<sup>clxix</sup>
- July 2015: The HRLC/HRW report provides the following in relation to the Lorengau Transit Centre:
  - Although refugees living in the transit center can move around the island, they cannot leave Manus. Since 2013, PNG immigration officials have only issued eight proper PNG identity documents to refugees in the transit center. The PNG certificate of identity states they are permitted to work in PNG, but PNG immigration has prevented one refugee from leaving Manus Island to pursue employment opportunities in Port Moresby, the capital. Several refugees have sought paid or volunteer opportunities on Manus Island, but PNG immigration denied their requests.<sup>clxx</sup>
  - PNG immigration officials have told all refugees staying at the transit center they are not allowed to leave Manus Island. The prohibition on refugees moving within PNG violates their rights to freedom of movement under the International Covenant on Civil and Political Rights (article

12(1)) and is inconsistent with freedom of movement protections in the Refugee Convention (articles 26 and 31(2)).

- One refugee said, “My main problem is this is still like being in detention, just a big island detention. I’m still stuck on this island. I want to start my real life.” He added, “The process is not clear. They need to clearly tell us what are the steps to resettlement, how can we move on with our lives?”

### 7.1.5 Findings and Evidence of Violations - NODC

- June 2013: Australia’s Parliamentary Joint Committee on Human Rights examined the offshore detention regime in 2013 and stated that the: “... failure to put in place such [adequate procedures for individualized assessment of refugee claims] for persons held in detention for such periods appears to the committee to constitute arbitrary detention of those who have been held for an extended period.”<sup>clxxi</sup>
- October 2013: The UNHCR reported that: “The current Nauru policy and practice of detaining all asylum seekers at the closed RPC, on a mandatory and open-ended basis, without an individualized assessment as to the necessity, reasonableness and proportionality of the purpose of such detention, amounts to arbitrary detention that is inconsistent with international law.”<sup>clxxii</sup>

“When viewing the legal parameters and practical realities of the RPC in their totality, UNHCR is of the view that the mandatory detention of asylum-seekers in Nauru amounts to arbitrary detention. The absence of appropriate safeguards renders the detention arbitrary, which is inconsistent with international law. This is a very serious shortcoming that needs urgent attention by both Australia and Nauru.”<sup>clxxiii</sup>

- February 2014: The Physical and Mental Health Subcommittee of the Joint Advisory Committee for Nauru Regional Processing Arrangements found that the perimeter of the centre was fenced and there were security checkpoints at the entry.<sup>clxxiv</sup>
- April 2015: The UNHCR’s submission to the Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru restated its earlier conclusion that the circumstances at the NODC constitutes arbitrary detention.<sup>clxxv</sup>
- August 2015: The Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru reported that:

[3.127] A number of submitters and witnesses offered the observation that the overall living conditions and environment at the RPC were analogous to those of a prison.

[3.128] Ms Samantha Betts, who had some experience of working in prisons in Australia, told the committee that:

From a standard prison experience of what I have experienced here in Australia, they are very similar. I found the points system used for the canteen strikingly similar to an incarceration, as was the physical nature of the standardised mealtimes and standardised shower times—that sort of regimented living, I guess you would call it.

3.129 Ms Betts observed that the one key respect in which the RPC was unlike a prison was that the detainees had no knowledge of the length of their stay.

3.130 In a similar vein, former Chief Justice Eames said that:

I have seen plenty of prisons and as much as they have physical constraints they have an atmosphere about them of control and removal of entitlements, and certainly in my walking around the camp, seeing the demeanour and the interaction between the security guards and the people detained in the centre, it just struck me like any number of prisons I have seen.<sup>clxxvi</sup>

### 7.1.6 'Open Centre' arrangements at the NODC

On 4 October 2015, the Government of Nauru announced via Government Gazette that:

*"Open Centre arrangements of the Regional Processing Centre will be expanded to allow for freedom of movement of asylum seekers 24 hours per day, seven days per week. It is the intent of the Government of Nauru that these arrangements are enshrined in legislation at the next sitting of Parliament."*

In legal submissions filed on 6 October 2015 by the Human Rights Law Centre in *M68/2015 v Commonwealth & Ors*, the uncertain nature of the "expanded open centre arrangements" is taken up:

*"As to the 'open centre arrangements' three things should be said. First, the statutory basis for those arrangements is opaque. ... Secondly, it is by no means clear that it is a valid 'exercise of discretion': what is seemingly there involved is what has been described by the Nauruan authorities in as an 'approval in a general way', such that there will no longer be any eligibility criteria for participation in the arrangements. It is, at the least, highly doubtful that it would be a valid exercise of the power of 'prior approval'... to prospectively declare that the prohibition on leaving or attempting to leave the RPC in fact apply to no-one. Thirdly, those 'arrangements' are not the subject of legislation or delegated legislation, enacted or even in draft form. Nor has there been any written change to the Centre Rules... That a Government Gazette was issued stating that the Government of Nauru's future intention to implement the expanded arrangements was issued does not detract from their transience or their fragility."*

*"Given the diaphanous nature of the expanded open centre arrangements, it is entirely possible that there will be a reversion to the past arrangements or a version thereof."*<sup>clxxvii</sup>

In addition to the uncertain legal basis of the "expanded open centre arrangements", several important practical questions are unable to be resolved on presently available, verifiable information. For example, it is not known:

- who holds asylum seekers' identity documents;
- whether the Centre Rules continue to apply;
- whether asylum seekers can be returned by force to the RPC and, if so, who has decision-making power over such return; and
- whether there is any surveillance/monitoring of behaviour inside or outside the RPC.

Additionally, arguably any 'Open Centre' arrangements on the tiny 21km<sup>2</sup> island of Nauru, without any legal right to leave the island and with significant safety concerns still constitutes detention. For example the UNHCR Guidelines note that:

*"[d]etention can take place in a range of locations, including... on islands (Guzzardi v Italy (1980) ECtHR, App. No. 7367/76)... as well as in closed refugee camps,... and even extraterritorially."*

The Guidelines equate "detention" with "deprivation of liberty," as distinct from "restrictions on liberty," the distinction between which is "one of degree or intensity, and not one of nature or substance."<sup>clxxviii</sup> However without a clear legal basis for the practice of an 'Open Centre', any judgment is premature.

## 7.2 Asylum seekers are subjected to conditions in detention which violate international standards

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*"As soon as people are locked up, whether for justified or less justified reasons, society loses interest in their fate." UN Special Rapporteur on Torture, 2010<sup>clxxxix</sup>*

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This section provides sources and evidence regarding the conditions in detention in reference to specific violations of international law. For the background of readers, sources of findings and evidence outlined below include sources relating to the period of the Manus ODC before Transfield commenced providing services in March 2014. They are relayed here for background and context for later findings, but not relied upon to establish any violation.

### **7.2.1 Relevant Rights**

#### **Torture and Cruel, Inhuman or Degrading Treatment or Punishment**

##### **Article 5, UDHR**

*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*

##### **Article 2, CAT**

- 1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.*
- 2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.*
- 3. An order from a superior officer or a public authority may not be invoked as a justification of torture.*

##### **Article 16, CAT**

- 1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.*
- 2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.*

**And: Article 7, ICCPR**  
**Article 15, CRPD**  
**Article 37(a), CRC**

#### **Humane Treatment in Detention**

##### **Article 10(1), ICCPR**

*All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*

##### **Article 11(1), ICESCR**

*The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*

### **7.2.2 General interpretation of torture, cruel inhuman and degrading treatment and inhumane treatment in detention**



The following section outlines the different bases for interpreting violations of the relevant rights relating to torture, cruel inhuman and degrading treatment and inhumane treatment in detention.

### **Torture and cruel inhuman and degrading treatment**

The difference between torture and 'cruel, inhuman and degrading' treatment is one of intent. Torture is always a deliberate and purposeful act; 'cruel, inhumane and degrading treatment' may arise through neglect.

#### *Article 1, CAT*

*For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*

Torture is predominantly inflicted on people in detention who are in a position of powerlessness.<sup>clxxx</sup> The findings and evidence of conditions in detention outlined below may also constitute torture as defined under CAT where the treatment in question:

- a) causes severe pain and suffering;
- b) is intentional;
- c) is engaged in for a specific purpose (i.e. is "related to the interests and policies of the State"); and
- d) the State is involved, or at least acquiesces, to the conduct.

Some of the harm inflicted on asylum seekers and refugees in Australia's offshore centres may be characterised as intentional and instigated or acquiesced to by the Australian Government and its contractors for the purpose of:

- a) deterring asylum seekers from coming to Australia by boat; or
- b) coercing asylum seekers to return to their country of origin.

Further findings in relation to the issue of torture are outlined in the 'Findings and Evidence of Violations' below.

### **Cruel inhuman and degrading treatment**

In October 2014, The Association for the Prevention of Torture provided a considered interpretation of the elements of cruel, inhuman and degrading treatment, as applied to Australia's offshore detention regime. It is best quoted in full:

*"It is our considered view that Australia's offshore detention of asylum seekers is likely to constitute a prima facie regime of cruel, inhuman or degrading treatment, and may even constitute torture. This assessment is based on the deliberate provision of only extremely basic conditions as part of a systematic policy in order to deter others, and the severity of suffering caused to detainees. The suffering is aggravated by the mental anguish that asylum seekers face caused by lengthy delays in processing and assessing claims, and uncertainty as to their status or future prospects, including where they will be settled if their claims are successful. For those with family members that already legally reside in Australia, they have been told they will never be able to permanently live with these family members in Australia even if they are found to be genuine refugees. Off-shore immigration detainees also have to face severe challenges of an extreme tropical climate and the consequences of the remoteness of the camps, including lack of access to appropriate or specialist medical care, lack of access to lawyers and other support services."*<sup>clxxxix</sup>

### The right to humane treatment in detention

The right to humane treatment in detention requires that persons deprived of their liberty be treated humanely and with dignity. This right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment, but is engaged by a wider range of less serious mistreatment. Mistreatment may amount to a violation of Article 10 even if it does not rise to the level of torture or cruel, inhuman or degrading treatment or punishment.

### 7.2.3 Findings and Findings and Evidence of Violations at the MODC

- October 2013 (pre-Transfield): Following its visit to the Manus Island Offshore Detention Centre, the UNHRC findings concluded overall conditions at the centre remained “harsh and unsatisfactory, particularly when viewed against the mandatory detention environment, slowness of processing and lack of clarity and certainty surrounding the process as a whole”.<sup>clxxxii</sup>
- November 2013 (pre-Transfield): Following an inspection of the MODC, Amnesty International Australia released a report, “This is Breaking People,” and concluded that the poor conditions of detention at the Centre, combined with the mandatory and indefinite nature of that detention, amounted to ill-treatment under Article 7 of the ICCPR, and that conditions in the P-dorm were sufficiently bad in and of themselves to amount to violations of the prohibitions of ill-treatment under the Convention on Torture (CAT) and the ICCPR.<sup>clxxxiii</sup>

In evidence useful to understand the existing infrastructure conditions prior to Transfield’s service provision period to MODC in February 2014, Amnesty also described the centre as ‘resembling a combination of a prison and a military camp’ comprising: ...a network of single-storey buildings, staff facilities and “compounds” that house asylum seekers, all divided by fences of about 2.4 metres in height and connected by uneven dirt tracks. The structures are a combination of World War II-era buildings with concrete walls and corrugated iron roofs, temporary structures such as marquees and “dismountables” (similar to shipping containers), and basic buildings used as offices by staff.”<sup>clxxxiv</sup>

- March 2014: Amnesty International released a follow-up report, ‘This is Still Breaking People’, which detailed the following concerns:

“Amnesty International remains concerned about overcrowding, particularly in relation to sleeping areas which house more than 40 detainees, and the lack of space for activities, privacy and freedom of movement. During the March visit, Amnesty International observed that P Dorm (a WWII hangar-shaped dormitory containing 112 bunk beds with little or no space between them) is still being used to accommodate asylum seekers, even though conditions within the dormitory amount to ill treatment.

Overcrowding and the number of detainees sleeping within confined spaces continue to be problems which were also acknowledged by Dr Crouch-Chivers, the Papua New Guinea National Court-appointed medical expert. Some living areas – including an area for mental health patients – no longer have beds, but just thin mattresses on the floor. Security officers claimed this was because some detainees ‘prefer to sleep on the floor.’ However, there are some reports that suggest bunk beds were dismantled by either guards or asylum seekers and used as weapons against asylum seekers in the February violence.

Further shade for Oscar compound has not been provided. In fact, the shaded area outside the dining area, where detainees complained in November 2013 that they wait up to three hours in the direct sun for meals, has been reduced in size. No explanation was offered by officials for this alteration.

Since the violence on 16 and 17 February 2014, Papua New Guinean nationals no longer enter the compounds for catering or cleaning purposes. Asylum seekers are delivered meals in take-away packs for self-distribution and also bear sole responsibility for cleaning the ablution blocks. It is not clear if asylum seekers have been given appropriate cleaning equipment and products for this purpose. At the time of our site visit on 21 March 2014, ablution blocks in all compounds were dilapidated, dirty, mouldy, and several were broken or did not have running water.

Delta compound was by far the worst, with many latrines broken and without running water. Katrina Nuess, the centre’s Operations Manager from DIBP, claimed that Australian nationals are currently being recruited as cleaners to clean and maintain ablution blocks.

Likewise, other aspects of the detention centre have not improved. It is not clear whether asylum seekers have appropriate access to shoes and sufficient clothing. For example, as we walked around the compound, some asylum seekers called out that they do not have more than one shirt. Amnesty International reported in December 2013 that detainees were provided with little more than one or two pairs of shorts and t-shirts and a pair of flip flops. Personal possessions were generally confiscated prior to transfer to Manus Island and not returned. The DIBP's Katrina Nuess said that detainees now have access to shoes. When asked for clarification, she said, "I have seen where they keep all the shoes. There are plenty there." Consistent with our previous findings, detainees confirmed that shoes continue to be a 'special request' which is not always granted. Moreover, asylum seekers continued to complain about the poor quality of the food, and Dr Crouch-Chivers noted that basic hygiene standards in the kitchens, such as wearing gloves, are not consistently applied."<sup>clxxxv</sup>

- June 2014: The Australian Government wrote a letter to Amnesty International entitled "Australian Government's Response to Amnesty International Reports arising from visits to Manus Offshore Processing Centre." In this letter, the Australian Government states the following: [in relation to Amnesty International's recommendation to cease the use of P Dorm as Housing] "While there are no plans to cease using P Block, there are plans to update the block and improve the air circulation."
- November 2014: The UN Committee Against Torture issues its Concluding Observations on Australia, including the following paragraph on Australia's offshore detention regime:  

"The Committee is concerned at the State party's policy of transferring asylum seekers to the regional processing centres located in Papua New Guinea (Manus Island) and Nauru for the processing of their claims, despite reports on the harsh conditions prevailing at the centres, including mandatory detention, including for children; overcrowding, inadequate health care; and even allegations of sexual abuse and ill-treatment. The combination of these harsh conditions, the protracted periods of closed detention and the uncertainty about the future reportedly created serious physical and mental pain and suffering."<sup>clxxxvi</sup>
- December 2014: The Legal and Constitutional Affairs Committee's Report into the violence at the MODC stated:  

"The conditions and facilities at Manus Island RPC were variously described to the committee as harsh, inadequate and inhumane. Submitters and witnesses who had been employed at the RPC identified numerous concerns, and in some cases expressed their shock, about the poor living conditions including cramped and over-heated sleeping quarters, exposure to the weather, poor sanitation and sewage blockages, unhygienic meals and poorly managed service of meals."<sup>clxxxvii</sup>
- March 2015: the Special Rapporteur on Torture, Juan Mendez, found 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 the asylum seekers, including children, to be free from torture or cruel, inhuman or degrading treatment, as provided by Articles 1 and 16 of the CAT."<sup>clxxxviii</sup>
- In May 2015 UN High Commissioner on Human Rights, Mr Zeid Ra'ad Al Hussein expressed 'dismay' that in Australia, people on boats intercepted at sea are sent to detention centres where conditions are inadequate."<sup>clxxxix</sup>

#### 7.2.4 Findings and Evidence of Violations at the NODC

- October 2013: The UNHCR reported following its visit to the NODC:  

"Viewed as a whole, UNHCR considers that the conditions at the [Nauru] RPC, coupled with the protracted period spent there by some asylum-seekers, raise serious issues about their compatibility with international human rights law, including the prohibition against torture and cruel, inhuman or degrading treatment (article 7, ICCPR), the right to humane conditions in detention (article 10, ICCPR) and the right to family life and privacy (article 17, ICCPR). These are matters that fall to the consideration of expert human rights bodies for closer assessment.

In light of UNHCR's findings, UNHCR notes with serious concern the intention to expand the [Nauru] RPC's capacity to 2,000. UNHCR is of the view that the Governments of Australia and Nauru should not expand capacity at the RPC, given the harsh conditions at the RPC and the failure to meet international law standards."<sup>CXC</sup>

- October 2013: Following its visit to the centre in October 2013, the UNHCR reported concerns about the adequacy of toilets and showers:

UNHCR observed with concern that Alpha compound contains only eight toilets and two urinals for 411 asylum-seekers. Ten outdoor showers, without doors, are available. Water restrictions mean that showers are limited to four minutes per day. UNHCR was informed that water is trucked to the RPC daily.<sup>cxci</sup>

- November 2014: The AHRC reported in 'Forgotten Children:

"Nearly every first-hand account of Nauru makes reference to its overwhelming heat. The average temperature on Nauru is 31 degrees Celsius. Inside the detention centre tents, temperatures regularly reach 45–50 degrees Celsius."<sup>cxcii</sup> One child living in detention reports that "the weather here is so hot that if you sit outside in the sun for a period of time you lose consciousness".<sup>cxci</sup>

"Nauruan climate is also distinctly tropical. Humidity ranges between 75–90 per cent. Rainfall is irregular and annual figures vary from less than 300 mm to more than 4000 mm per year."<sup>cxci</sup> This means that for most of the year the environment is sparse, dusty and without grass or greenery. When it rains it pours, with flooding and leaking roofs common."<sup>cxci</sup>

"Offshore Processing Centre 3 is the name of the camp where children and families are housed on Nauru. It is a gravel construction site. The tent accommodation is situated on loose and uneven rocks. Parents expressed concern that thongs wear out "almost immediately on the gravel" and children described walking and running in the centre as 'painful'.<sup>cxci</sup> A former doctor who worked at the Regional Processing Centre said she could barely walk from her car to the detention centre without risking a sprained ankle.<sup>cxci</sup> These rocks also reflect the harsh glare of the sun. According to a former employee of Save the Children, staff need to wear strong eye protection and hats. Neither of these are readily available for children on Nauru."<sup>cxci</sup>

- "The Island of Nauru is the site of heavy open-pit mining for phosphate. Paediatrician, Professor Elizabeth Elliott, expressed concerns about the 'causal effect of atmospheric phosphate' on "recurrent asthma and irritation of the eyes and skin".<sup>cxci</sup>
- November 2014: The UN Committee Against Torture issues its Concluding Observations on Australia, including the following paragraph on Australia's offshore detention regime:

"The Committee is concerned at the State party's policy of transferring asylum seekers to the regional processing centres located in Papua New Guinea (Manus Island) and Nauru for the processing of their claims, despite reports on the harsh conditions prevailing at the centres, including mandatory detention, including for children; overcrowding, inadequate health care; and even allegations of sexual abuse and ill-treatment. The combination of these harsh conditions, the protracted periods of closed detention and the uncertainty about the future reportedly created serious physical and mental pain and suffering."<sup>cc</sup>

- March 2015: the Special Rapporteur on Torture, Juan Mendez, found that:

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- May 2015: UN High Commissioner on Human Rights, Mr Zeid Ra'ad Al Hussein expressed 'dismay' that in Australia, people on boats intercepted at sea are sent to detention centres where conditions are inadequate.<sup>ccii</sup>
- June 2015: According to evidence given by Transfield Services to the Select Committee investigating conditions on Nauru, all the marquees on Nauru have been affected by mould. Mould was not present in the previous army-issued canvas tents.<sup>cciii</sup> At the time of evidence, 91 marquees had been treated for mould and declared mould free, leaving an unknown number still mouldy. Transfield services admitted that there was a potential for mould to return. The tents were sourced by Transfield Services, in accordance with specifications provided by the Australian Government. In submission to the Select Committee Transfield Services state that they do not have specific instructions as to whether the "marquees were recommended to be used as dwellings".<sup>cciv</sup>
- July 2015: The following exchange took place in the public hearings of the Select Committee on Circumstances and Conditions in the NODC:

*Senator HANSON-YOUNG: What would be the response if you said, 'This child needs new shoes'? Ms Blucher: 'We will put them on the list for an appointment. It could take several weeks.' Then they might*

*get to that appointment in several weeks and they might be issued with a pair of shoes that do not fit them again.*

*Ms Betts: My understanding was, as well, that we had to fill in a request form or assist the asylum seeker to complete a request form for Transfield to obtain these items. On several occasions—and this is just the feeling that I got from the situation—it seemed to be that they did not want to be seen to be giving preferential treatment to certain asylum seekers, so, if there was a pair of shoes that were able to fit, they were hesitant to hand them out because—*

*Ms Blucher: Unless they had 10 of them. Ms Betts: Yes, unless they had 10 of them—unless they had a full amount of shoes or well-fitting clothes. It was all or none.*

*CHAIR: For goodness sake! How many children were on Nauru?*

*Ms Betts: While I was there, the capacity reached 129 children.*

*CHAIR: So you are saying that there was expenditure of \$1.2 billion in logistics services and we could not get 120 pairs of shoes to fit those children on Nauru?*

*Ms Betts: Yes.*

*CHAIR: That it took months and appointments and requisitions for 120 pairs of shoes?*

*Ms Betts: Yes.*

*Ms Blucher: And that is when there were planes arriving frequently during the week. Why couldn't they put a bunch of shoes on a plane? This is what I do not understand.<sup>ccv</sup>*

- July 2015: Geoffrey Eames, former Chief Justice of Nauru provided evidence to the Senate Committee inquiry into circumstances and conditions at the Nauru RRC:<sup>ccvi</sup>

*Senator KIM CARR: How would you describe conditions?*

*Mr Eames: I thought they were absolutely appalling. I said so in very emphatic terms to the secretary of justice, who went to the camps with me, and I said so to President Waqa when I saw him in late November. I was particularly concerned about the children. It has been described by witnesses you have just heard and others. The conditions there were really quite intolerable. The heat in Nauru was unbearable at the best of times, and certainly everyone who can uses air conditioning. In the camps, the heat was just overwhelming, and I was struck by seeing small children. There was so little shade. As the day wore on, a shadow would fall from the tents, so there would be a little triangle of shade alongside the tents, and I saw all these children huddling in the shade. That was apparently the only shady place that they could find. There seemed to be no facilities for playing. Most of the kids seemed to be in thongs, and it was a rock-hard, stony surface which was really quite difficult to walk on. I would hate to be trying to walk on it in thongs. I just came away thoroughly depressed and thinking, 'Really, is that the best we can do?'*

*Senator KIM CARR: Do you think it is the best we can do? Are the conditions part of the so-called deterrent of the policy?*

*Mr Eames: I heard you ask the question of the previous witnesses, Senator, and I must say I was drawn to that conclusion. If you ask what hard evidence is there for that, well, it is difficult to point to it, except to say: why else would you not correct this? There are hundreds of air conditioners brought into Nauru. There were huts going up everywhere for the workers who were working on Nauru. Everyone had air conditioning. They were spending billions of dollars on this detention centre. Why would you not have air conditioning?*

- August 2015: The Senate Committee Report on Circumstances and Conditions in the NODC found that:
  - 3.1 The committee received substantial evidence during its inquiry concerning living conditions in the RPC. Asylum seekers presently or formerly in the RPC related their concerns at the low standard of conditions afforded to them. Submissions received from former contractors also detailed concerns over the living conditions.
  - 3.5 A series of questions asked of the department regarding the facilities, amenities and accommodation at the RPC failed to elicit informative responses. The committee considers the answers provided to these questions to be inadequate.
  - 3.6 For example, the department was asked by the committee to provide information on the accommodation at the RPC, including specific data relating to type and size. The department's response

did not provide any information to the committee: Asked: Please provide the following information: The accommodation capacity at the Nauru Detention Centre and any subsequent changes to that capacity since 1 January 2014, including accommodation type and average square metre allocation for each asylum seeker. Answer: There is sufficient accommodation capacity at the Regional Processing Centre on Nauru.

3.18 Much of the evidence received by the committee related to the conditions in RPC 3, which currently houses families and single adult female asylum seekers in white vinyl marquees measuring 10m x 12m in six compounds. The marquees are divided using vinyl walls. Families with children under the age of four are accommodated in air-conditioned marquees. According to a submission received by the committee, RPC 3 is located in a depression “much lower in elevation than any of the surrounding areas”. Ms Natasha Blucher, a former Save the Children Australia employee, described the physical environment of RPC 3: The effect of the topography of the area is such that heat is contained in the depressed area where the client accommodation is located. There is limited wind and breeze due to surrounding raised pinnacled areas. The result is a very intense and persistent heat with little reprieve.

3.19 The committee sought clarification as to why children over the age of four were not able to be placed in accommodation with air-conditioning. The department provided the following response: “With advice from service providers, the Government of Nauru determines operational matters”. The committee considers this to be an entirely inadequate response to the question.

3.20 The committee received a large volume of evidence that the living conditions in the RPC on Nauru were of a lower standard than would be accepted in Australia, and had an unacceptable lack of privacy and poor hygiene. For example, letters written by asylum seekers which were received by the committee referred to respiratory complaints arising from exposure to high levels of phosphate dust.

3.21 The living conditions were noted by a number of submitters to be hot, humid and crowded. The Darwin Asylum Seeker Support and Advocacy Network (DASSAN) informed the committee that asylum seekers were concerned about high levels of heat inside the marquees, and a lack of privacy and cleanliness. The presence of mice, rats and other pests such as mosquitos was also noted by submitters.

3.22 Transfield Services administers both scheduled and responsive cleaning programs. They noted that the maintenance of the vinyl marquees and monitoring of mosquitoes is challenging owing to the tropical conditions experienced on the island.

3.23 Several submitters raised concerns that low standards of maintenance and hygiene in the accommodation areas were having a detrimental impact on physical and mental wellbeing. The Refugee Action Collective of Queensland (RAC-Q) told the committee that substandard living conditions, stress and anxiety were leading to poor health, with high rates of “diarrhoea, mosquito related illnesses, vaginal fungal infections, coughs [and] dizziness”.

3.24 Mr Lee Gordon, Head of Nauru Programs from Save the Children Australia, told the committee that the environment was a factor for physical and mental health: “I think it would be fair to say that, in the regional processing centre, we are dealing with a range of incredibly traumatised people who are often extremely stressed. I think conditions of hardship where tent conditions are hot, where there is a lack of privacy and where you may not be able to sleep contribute to stress and I think makes a situation where self-harm or other types of antisocial behaviours are very possible. So I do think it is a contributing factor”.

- Presence of mould

3.27 The presence of mould on the inside of the white vinyl marquees used for accommodation was raised by submitters, some of whom linked its presence with eye infections and skin complaints. One submitter said that: Throughout the time that I was employed at the Nauru RPC, I observed large quantities of mould on tents, including the tents that asylum seekers lived in. The mould was black and so pronounced that people would actually write things on the outside of the tent in the mould, similar to the manner that some people write on dusty cars in Australia.

3.28 Transfield Services advised the committee that all marquees in the RPC are affected by mould to varying degrees, which for a period was treated with ‘bleach wash downs’: This improved the situation for a period though mould typically reappeared within a few months. In or about May–June 2014, it became clear that bleach wash downs were not a viable permanent solution.

3.29 Installation of air-conditioning units, improvements to ventilation and a more thorough cleaning regime are being carried out by Transfield Services and the department.

...

5.64 The committee is nevertheless deeply concerned at the evidence provided which suggests that standards of living for asylum seekers in the Regional Processing Centre (RPC) are unacceptably low in a range of areas, including exposure to the elements, lack of privacy, poor hygiene and insufficient access to water and sanitation.

5.65 These matters are of concern in and of themselves, but the committee is also cognisant of the connection drawn by many submitters, including health and welfare workers with direct experience of the RPC, between the very poor living conditions at the RPC and the high level of physical and mental health problems experienced by the asylum seekers resident there.

- August 2015: In relation to access to water, the Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru found that:

"3.31 Access to water was raised as an area of concern by submitters, who noted that there is no running water in the accommodation marquees and that obtaining water was difficult for some asylum seekers. 3.32 The Nauruan Government have said that access to water and sanitation on the island is 'challenging', and noted that most households rely on rainwater storage. The Ministry for Commerce, Industry and Environment in Nauru said that the ability to sustain water demand during times of drought is an important goal. 3.33 The department advised that RPC 2 and RPC 3 are self-sufficient in water storage, and that a major upgrade of water infrastructure on Nauru has been funded by the department: In June 2014 the Department and the Government of Nauru reached agreement to enable the upgrade of the Nauruan Utilities Corporation water production infrastructure. The Department committed significant capital costs to upgrade the Nauru water supply to ensure water security for the Regional Processing Centre. The arrangement includes the upgrade of infrastructure and the ongoing payment of all operational costs for the new units. As part of the scope, two new reverse osmosis water production units, a decant standpipe, new sea water intake pumps and backup generators were installed. 3.34 Submissions from asylum seekers formerly or presently in the RPC on Nauru referred to water restrictions impacting on their health and wellbeing through restricting access to drinking water and water for showers. The committee received letters from asylum seekers formerly or currently in the RPC which referred to short shower times of two minutes or less, water restrictions, and a lack of warm water. 3.35 A submission from Ms Alanna Maycock and Professor David Isaacs highlighted the health risks involved when drinking water cannot be accessed: Gastroenteritis is common and potentially dangerous. Parents complain they have been unable to access water at night when their children have vomiting and diarrhoea. They are rightly concerned about the risks of dehydration. 3.36 Ms Cindy Briscoe, Deputy Secretary, Immigration Status Resolution Group, Department of Immigration and Border Protection, acknowledged that restrictions on water had happened when machine maintenance was occurring: There are occasions where restrictions are placed on the water when maintenance is happening with those machines. At all times, there is ample bottled water made available... We have recently upgraded the water capacity from 300 kilolitres to 2.2 megalitres per day. 3.37 While the committee heard that bottled water was not allowed or provided inside the RPC, the department has advised that bottled water is available every day to asylum seekers."

## 7.2.5 Relevant Rights

### Rights to Education and Recreation

#### **Article 13 (1) and (2), ICESCR**

1. *The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.*

2. *The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:*

*(a) Primary education shall be compulsory and available free to all;*

*(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;*

*(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;*

*(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;*

*(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.*

**Article 26(1), UDHR**

*Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.*

**7.2.6 Findings and Evidence of Violations MODC**

- December 2013 (Pre-Transfield): Amnesty International Australia reported:
  - In one bedroom in the Oscar compound we were led by an asylum seeker to the back of the room. He jumped over a bed into a small space covered by sheets between two sets of bunk beds. On the inside of the sheet the two men had drawn a large television, DVD player and games console. Using strips of bed sheet, they had made two mock electrical cords, at the end of which were two mock games controllers made from cardboard, with buttons drawn on them. "We use this to pass the time. It is no laughing matter. We pretend to play and it brings back memories of home. We sit here and cry for three hours every day." <sup>ccvii</sup>

**7.2.7 Findings and Evidence of Violations NODC**

- October 2013: Following its visit to the NODC, the UNHCR reported: Recreational areas within Alpha compound include some vacant, uncovered spaces, and at least one marquee-style roof covering an area with two backgammon tables and a table tennis table. A television is brought into the compound periodically by The Salvation Army staff in order to screen films.

UNHCR notes with concern that Alpha compound provides no opportunity for solitude and very little privacy. UNHCR did not observe any other sporting or recreational equipment in use by asylum-seekers at the time of the visit. <sup>ccviii</sup>

- August 2015: The Select Committee on the Recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru reported that:

3.91 The department advised that various recreation facilities are available in the three RPC sites. RPC 2 has "multi-use recreational facilities such as multi-faith rooms, telecommunications, education spaces, a gymnasium and volleyball areas". RPC 3 includes: [a] children's playground and multi-use recreation facilities including multi-faith rooms, telecommunications, education spaces, gymnasium and synthetic playing field (soccer).

3.92 Transfield Services advised that a range of programs and activities were being developed and run: Since being engaged to provide welfare services, we have undertaken a number of enhancements to programs and activities including an increase in frequency, incorporation of asylum seeker feedback in the design and delivery of programs and activities, new educational curriculums, the introduction of asylum seeker led activities (including, for example, 'open mic' poetry night) and more vocationally relevant programs and activities.

3.96 However, submitters told the committee that recreation activities had been conducted in unsafe levels of heat, with Mr Tobias Gunn, a former Save the Children Australia employee, telling the committee: "The heat inside the recreation tent was of an unsafe level, this was brought to the attention of managers who then, according to Senior SCA management in Melbourne took the issue to Canberra, however it was rejected". 3.97 Mr Gunn further submitted that "the department were knowingly putting children at extreme risk of heat related illness" and that "no follow up to further investigate...the primary evidence the recreation team put forward was ever requested". Another submitter also told the



committee that “[t]his was reported to DIBP and recommendations were made to DIBP to install air-conditioning in the tent however this was never resolved and air-conditioning [was] never installed”. The effect of heat on the ability of asylum seekers to participate in recreation activities was noted by Save the Children Australia. that single adult female asylum seekers were not able to access recreation space.<sup>ccix</sup>

### 7.2.8 Relevant rights

#### Right to Privacy

##### Article 17, ICCPR

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

##### Article 16, CRC

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

### 7.2.9 Findings and Evidence of Violations – MODC

- October 2013 (pre-Transfield): The UNHCR reported that: ‘UNHCR also observed that in the compounds at the RPC, the only real opportunity for privacy for asylum-seekers is in the ablution blocks, many of which were, according to asylum-seekers and supported by UNHCR’s first hand observations, not cleaned and maintained regularly enough.’<sup>ccx</sup>
- December 2013 (pre-Transfield): Amnesty reported in ‘This is Breaking People’ ‘The cramped conditions result in a lack of privacy or private space. Several detainees interviewed cited privacy as a problem, particularly in the dormitories, many of which have 50 beds in one room with no partitions. Mental health staff at the facility also expressed concern at the lack of privacy, stating that the men find it difficult to find time and space to be alone. This lack of privacy and personal space can also exacerbate symptoms of anxiety or Post-Traumatic Stress Disorder’<sup>ccxi</sup>
- March 2014 (pre-Transfield): Amnesty reported in ‘This is Still Breaking People’ ‘Amnesty International remains concerned about overcrowding, particularly in relation to sleeping areas which house more than 40 detainees, and the lack of space for activities, privacy and freedom of movement.’<sup>ccxii</sup>

### 7.2.10 Findings and Evidence of Violations – NODC

- October 2013: The UNHRC reported: ‘Viewed as a whole, UNHCR considers that the conditions at the [Nauru] RPC, coupled with the protracted period spent there by some asylum-seekers, raise serious issues about their compatibility with international human rights law, including the prohibition against torture and cruel, inhuman or degrading treatment (article 7, ICCPR), the right to humane conditions in detention (article 10, ICCPR) and the right to family life and privacy (article 17, ICCPR)’.<sup>23</sup>
- March 2015: The Moss Review found that ‘there were both reported and unreported allegations of sexual and other physical assault’ in relation to children. It also found that the ‘marquee accommodation’ in Nauru presents ‘significant personal safety and privacy issues’ and the ‘lack of privacy may be a factor in the sexualised behaviours of some children in the Centre through observing adult sexual activity.’<sup>ccxiii</sup>
- April 2015 : The UNCHR made a submission to the Senate Select Committee Inquiry. The submission states that, “UNHCR has conducted subsequent visits to the Centre and although there have been some improvements, the harsh conditions, lack of privacy for individuals, uncertainty regarding durable solutions remain largely unchanged...Indeed, UNHCR shared its view, which it maintains, that due to the significant shortcomings at the Centre, no child, whether unaccompanied/separated or accompanied, should be transferred to Nauru from Australia.”<sup>ccxiv</sup>
- August 2015: The Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru found that ‘The committee is nevertheless deeply concerned at the evidence provided which suggests that standards of living for asylum seekers in the Regional

Processing Centre are unacceptably low in a range of areas, including exposure to the elements, lack of privacy, poor hygiene and insufficient access to water and sanitation.<sup>ccxv</sup> (at 5.64)

### **7.3 Asylum seeker children are subjected to child abuse and other violations of their rights as a child**

Outlined in this section are the relevant rights, and sources of findings and evidence establishing the violations of child asylum seekers' rights under the provisions of the UN Convention on the Rights of the Child (CRC). For the background of readers, sources of findings and evidence outlined below include sources relating to the period of the Manus ODC before Transfield commenced providing services in March 2014. They are relayed here for background and context for later findings, but not relied upon to establish any violation.

Australia is unique in its treatment of asylum seeker children. No other country allows asylum seeker children to be detained indefinitely and arbitrarily.<sup>ccxvi</sup> Successive inquiries by the Australian Human Rights Commission has found that the indefinite and arbitrary detention of asylum seeker children is inconsistent with Australia's human rights obligations under the *Convention on the Rights of the Child*.<sup>ccxvii</sup>

#### **7.3.1 Relevant rights**

*Article 3, CRC*

1. *In 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.*
2. *States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*

*Article 6, CRC*

1. *States Parties recognize that every child has the inherent right to life.*
2. *States Parties shall ensure to the maximum extent possible the survival and development of the child.*

*Article 16, CRC*

1. *No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.*

*Article 19, CRC*

1. *States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*
2. *Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.*

*Article 20, CRC*

*A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.*

*Article 24, CRC*

*1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.*

*Article 27, CRC*

*1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.*

*3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.*

*Article 28, CRC*

*1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:*

*(a) Make primary education compulsory and available free to all;*

*(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;*

*(c) Make higher education accessible to all on the basis of capacity by every appropriate means;*

*(d) Make educational and vocational information and guidance available and accessible to all children;*

*(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.*

*Article 31, CRC*

*States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.*

## **Evidence of violations – MODC**

- [Pre-Transfield] October 2013: The UNHCR reported that “the pre-transfer assessments that are conducted in Australia within a targeted ‘48 hour’ timeframe do not permit an adequate individualized assessment of health concerns or vulnerabilities (particularly for torture and trauma survivors), nor a considered assessment as to whether the nature of the facilities and services available at the RPC would be appropriate for the individual concerned or whether transfer should occur at all. At the time of UNHCR’s visit, it was particularly concerned by the presence of at least two unaccompanied children and, subsequent to the visit, more recent reports of others who claim to be under 18 years of age. This highlights the need for, and importance of, accurate and effective pre-transfer assessments.”<sup>”CCXVIII</sup>
- [Pre-Transfield] November 2013: Amnesty International in This is Breaking People reported that they: “interviewed three other asylum seekers who gave their ages as between 15 and 17. When we raised their cases with Australian senior immigration officials, they told us that each had been determined to be above the age of 18. The treatment of their cases raises serious concerns about the age assessment procedures employed by Australia’s Department of Immigration and Border Protection (DIBP). Particularly since early September, with the introduction of a new rule that asylum seekers must be transferred to Papua New Guinea within 48 hours of arrival on Christmas Island, initial assessments are made within a short time frame and thus appear to rely heavily on observations of physical appearance. Additionally, age determination interviews on Manus Island are carried out by teleconference with age determination officers in Australia. DIBP officials on Manus Island take part in those interviews even though they are not themselves trained in age assessment procedures. Manus Island - based DIBP officials may in practice weigh discrepancies in children’s accounts heavily against them and appear to treat proffered identity documents as presumptively fraudulent. As a consequence, in practice DIBP may not give children the benefit of the doubt, as required by its own procedures and international standards.”<sup>”CCXIX</sup>
- May 2014: ADIBP reported that as of 4th April 2014 “there were 15 transferees accommodated at the Manus OPC who had personally raised claims they were under the age of 18. In each case, transferees were given the opportunity to provide further information or documentation to support their age related claims.”<sup>”CCXX</sup>

## Evidence of violations – NODC

- October 2013: the UNHCR reported that children at the Nauru detention centre “do not have access to adequate educational and recreational facilities” ... “with a lack of a durable solution within a reasonable timeframe”.<sup>CCXXI</sup>
- October 2013: the UNHCR concluded that “children have been transferred [to the Nauru Offshore Detention Centre] without an assessment of their best interests and without adequate services in place to ensure their mental and physical wellbeing.” It also stated: [T]he harsh and unsuitable environment at the closed RPC is particularly inappropriate for the care and support of child asylum-seekers. [...] UNHCR is of the view that no child, whether an unaccompanied child or within a family group, should be transferred from Australia to Nauru.<sup>CCXXII</sup>
- February 2014: the Physical and Mental Health Subcommittee of the Joint Advisory Committee for Nauru Regional Processing Arrangements reported that: “There are no toys, including no soccer or volleyballs; parents reported all they can play with is the white stones and running, there is nothing to do. Excursions are limited, they do not have freedom of movement, and so are not able to engage or play in the natural environment. Crowded living conditions are of significant concern from a public health perspective, particularly if there are concerns over sanitation and water, and where individuals have not had adequate health screening or vaccination. Children are particularly vulnerable to the negative consequences of detention on mental health, and detention adversely affects families and parenting. Many children will have been exposed to cumulative risk factors in their countries of origin and during their migration journey, and will have physical and mental health issues making them more vulnerable to the effects of detention. The length of detention is an additive factor. Children are likely to have adverse developmental and mental health outcomes, but as there is currently no developmental surveillance, it will not be possible to quantify the impact.”<sup>CCXXIII</sup>
- February 2014: the Physical and Mental Health Subcommittee of the Joint Advisory Committee for Nauru Regional Processing Arrangements reported that: “There is a significant and ongoing risk of child abuse, including physical and sexual abuse, in the detention environment where large numbers of children and adults are held in crowded conditions without normal social structure or meaningful activities. There is a lack of staff experience in child protection and there is a lack of clarity on the IHMS, stakeholder, and local processes for managing and investigating child protection issues. Nauru does not currently have a child protection framework.”<sup>CCXXIV</sup>
- November 2014: the Australian Human Rights Commission reported in *The Forgotten Children*, that:

Current detention law, policy and practice does not address the particular vulnerabilities of asylum seeker children nor does it afford them special assistance and protection. Mandatory detention does not consider the individual circumstances of children nor does it address the best interests of the child as a primary consideration (article 3(1)). Detention for a period that is longer than is strictly necessary to conduct health, identity and security checks breaches Australia’s obligations to:

- detain children as a measure of last resort and for the shortest appropriate period of time (article 37(b))
- ensure that children are not arbitrarily detained (article 37(b))
- ensure prompt and effective review of the legality of their detention (article 37(d)).

Given the profound negative impacts on the mental and emotional health of children which result from prolonged detention, the mandatory and prolonged detention of children breaches Australia’s obligation under article 24(1) of the Convention on the Rights of the Child.

At various times children in immigration detention were not in a position to fully enjoy their rights under articles 6(2), 19(1), 24(1), 27 and 37(c) of the Convention on the Rights of the Child.<sup>CCXXV</sup>

- November 2014: the Australian Human Rights Commission reported in *The Forgotten Children*, that:

The failure of the Commonwealth to remove unaccompanied children from detention environments which inhibit recovery from past trauma is a breach of the Convention on the Rights of the Child, article: 39: States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

The failure of the Minister for Immigration and Border Protection to release unaccompanied children from detention breaches the Convention on the Rights of the Child, articles 3(1) and 18(1): ...Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

Current guardianship arrangements do not afford unaccompanied children special protection and assistance as required by the Convention on the Rights of the Child. This breaches article: 20(1): A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. 20(2): States Parties shall in accordance with their national laws ensure alternative care for such a child.

The failure of the Commonwealth to appoint an independent guardian for unaccompanied children in immigration detention breaches the Convention on the Rights of the Child, article 20(1).<sup>CCXXVI</sup>

- November 2014: the Australian Human Rights Commission reported in *The Forgotten Children*, that:  

The Commission finds that the inevitable and foreseeable consequence of Australia's transfer of children to Nauru is that they would be detained in breach of article 37(b) of the Convention on the Rights of the Child.

The Commission finds that Australia transferred children to Nauru regardless of whether this was in their best interests, in breach of article 3(1) of the Convention on the Rights of the Child.

The Commission has serious concerns that the conditions in which children are detained on Nauru are in breach of the Convention on the Rights of the Child, articles 19(1), 20(1), 24(1), 27(1), 27(3), 28, 31 and:

16(1): No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

34: States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.

37(a): No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.<sup>CCXXVII</sup>
- November 2014: the Australian Human Rights Commission reported in *The Forgotten Children*, found a failure to: "document any individualised assessment of the unaccompanied child's educational, care, welfare and service related needs. There is also no information provided about the quality of the facilities and services on Nauru to support the findings that these facilities and services are appropriate to support that child's needs".<sup>CCXXVIII</sup>
- March 2015: The Moss Review reported an "absence of a specific child protection framework or mandatory reporting requirements of all abuse allegations involving minors under Nauruan law. As such, the Review notes that once the avenues in the Centre have been exhausted, issues involving child protection may not be escalated or actioned appropriately or in a timely manner and that there is limited expertise to conduct investigations into child protection issues."<sup>CCXXIX</sup>
- March 2015: the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stated that: "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, [Australia] has violated the right of the asylum seekers, including children, to be free from torture or cruel, inhuman or degrading treatment".<sup>CCXXX</sup>

- August 2015: the AHRC told the Senate Select Committee that “the pre-transfer assessments which are undertaken by the department before asylum seekers are transferred were ‘inadequate’: The Commission reviewed a number of the pre-transfer assessments conducted in relation to children as part of the Inquiry. The Commission concluded that Departmental officers do not assess the care and welfare needs of an individual child and consider whether those needs can be met in the RPC in Nauru before recommending the child’s transfer.”<sup>CCXXXI</sup>
- August 2015: the Senate Select Inquiry reported that: “More than one submission provided the example of an incident reported in April 2014 in which two adolescent female asylum seekers had been subjected to sexual innuendo and harassment from male security guards, including attempts to hug and kiss them and inviting them to a “sexy party”. Wilson Security responded that the incident was “thoroughly investigated”, but the matter was closed in the absence of further evidence when the asylum seekers declined to make a formal complaint.”<sup>CCXXXII</sup>
- August 2015: the Senate Select Inquiry relayed the evidence of a former Save the Children staffer Samantha Betts who said that: “The issue of clothing is absolutely horrendous. There were parents who actually had to cut holes in their children's sneakers because their feet were growing too much and the shoes were too small. Children would often ask us to help fix their thongs, which we tried to do on several occasions—we got a bit ingenious with bread ties and bits of string.”<sup>CCXXXIII</sup>
- August 2015: the Senate Select Inquiry reported that: “The committee was provided with letters written by asylum seekers formerly or currently in the RPC on Nauru which detailed the effect of extreme stress and mental health issues on parenting. One asylum seeker wrote that they had attempted suicide because they were not fully able to care for their two children in the RPC.”<sup>CCXXXIV</sup>
- August 2015: the Senate Select Inquiry stated: “Based on the evidence received by this inquiry, the committee has reached the conclusion that the RPC in Nauru is not a safe environment for asylum seekers. This assessment is particularly acute in relation to women, children and other vulnerable persons. Children 5.72 The committee is particularly disturbed by the evidence it has received about abuse of children, traumatisation and mental illness among children, and the impact of the persistent, indefinite detention of children in the poor conditions which prevail at the RPC. These children are not only denied a reasonable approximation of childhood in the RPC, but often do not feel safe, and in fact often are not safe. Their extreme vulnerability is further exacerbated by their location in a country which lacks an adequate legal or policy framework for their protection. 5.73 The committee accepts the evidence provided by legal experts that the continued transfer of children to Nauru, and detention of them in the RPC, is likely to breach Australia’s obligations under the Convention on the Rights of the Child.”<sup>CCXXXV</sup> **The Inquiry then “concludes that the RPC Nauru is neither a safe nor an appropriate environment for children and that they should no longer be held there. Recommendation 5.76 The committee recommends that the government extend its current policy commitment to remove children from immigration detention to the maximum extent possible, to include the removal of children from the Regional Processing Centre in Nauru. The government should develop a plan for the removal of children from the Nauru RPC as soon as possible, with their families where they have them, to appropriate arrangements in the community.”**<sup>CCXXXVI</sup>

## 7.4 Asylum seekers are denied their right to health

Outlined in this section are the relevant rights, and sources of findings and evidence establishing the violations of the right to health, and specifically the right to health of women and children. For the background of readers, sources of findings and evidence outlined below include sources relating to the period of the Manus ODC before Transfield commenced providing services in March 2014. They are relayed here for background and context for later findings, but not relied upon to establish any violation.

### 7.4.1 Relevant rights

Right to Health

ICESCR

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - (b) The improvement of all aspects of environmental and industrial hygiene;
  - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

## 7.4.2 Findings and Evidence of Violations - MODC

[Pre-Transfield]

- August 2012, the Human Rights Law Centre reported the absence of adequate mental health care facilities in offshore detention centres, and the harsh conditions in excised off-shore detention centres which may exacerbate pre-existing trauma, distress and mental illness.<sup>ccxxxvii</sup>
- [Month unknown] 2013, the AHRC reported that “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 ... 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”.<sup>ccxxxviii</sup>
- [Month unknown] 2013, the AHRC noted that the UNHCR has condemned the Australian Government for continuing to detain people in the knowledge that it was contributing to mental illness.<sup>ccxxxix</sup>
- [Month unknown] 2013, the AHRC noted “the strong link between prolonged detention and the development (or exacerbation) of mental health problems”.<sup>ccxl</sup>
- [Month unknown] 2013, the AHRC reported that the mental health impacts of detention are a combination of “remote, climatically harsh, overcrowded” living conditions in detention centres, inadequate health care services, and the effects of “bringing together groups of people in the same situation, experiencing frustration, distress and/or mental illness”, which can lead to “a ‘contagion’ effect”.<sup>ccxli</sup> The AHRC stated that “[i]t has been clearly established that detention for prolonged and uncertain periods of time both causes and exacerbates mental illness”.<sup>ccxlii</sup>
- July 2013, UNHCR found that medical services at MODC were limited, that asylum seekers were forced to wait for a long time for treatment, that supplies of medication were restricted and resources for specialised medical treatment were inadequate.<sup>ccxlili</sup> A further UNHCR report in October 2013 found many of those concerns persisting, and worsening. The October report stated that detainee numbers at the Offshore Detention Centre had increased from 302 in June to 1,093 in October, with almost no increase in accommodation or site area for the Offshore Detention Centre.
- October 2013, the UNHCR reported from Manus Island Offshore Detention Centre that all asylum seeker groups “expressed deep anxiety” and that their mental health was “deteriorating”.<sup>ccxliv</sup> The UNHCR made various recommendations as a matter of urgency to address this problem.<sup>ccxlv</sup> In a follow up report in October 2013, the UNHCR found some improvements, but that the policy settings and the physical environment on Manus Island continued to contribute to mental and physical health risks.<sup>ccxlvi</sup> The October report stated “the conditions of detention are already aggravating symptoms caused from pre-existing torture and trauma” and “[i]t can reasonably be anticipated that the mental health of asylum-seekers will deteriorate rapidly if these underlying factors are not addressed as a matter of priority. Experience with processing in PNG, Nauru and Australia in earlier years lends weight to this as a factor that will require very close attention”.<sup>ccxlvii</sup>
- October 2013, the UNHCR observed at the Manus Island Offshore Detention Centre: “The pre-transfer assessments that are conducted within Australia within a targeted ‘48-hour’ timeframe do not permit an adequate individualized assessment of health concerns or vulnerabilities (particularly for torture and

trauma survivors), nor a considered assessment as to whether the nature of the facilities and services available at the Offshore Detention Centre would be appropriate for the individual concerned or whether transfer should occur at all.”<sup>ccxlviii</sup> The AHRC also said that “[t]he pre-transfer assessments do appear to include procedures to identify vulnerable individuals, including unaccompanied minors, families with children, pregnant women, people with serious health issues, and survivors of torture and trauma”.<sup>ccxlix</sup>

- October 2013, the UNHCR observed on Manus Island that “the ablution blocks, many of which were ... not cleaned and maintained regularly enough. In the Delta compound, UNHCR was particularly concerned to observe one of the blocks that smelt putrid and had blocked shower drains with several inches of filthy water flooding the floor, was badly lit and not adequately ventilated”.<sup>cccl</sup>
- October 2013, the UNHCR found in Manus Island Offshore Detention Centre that population density had increased, and that recreational space had been lost to more accommodation for increased numbers. UNHCR described the conditions as “cramped, hot and confined”.<sup>cccli</sup>
- October 2013, UNHCR observed that there was limited dental care on Manus Island, which was being provided by the local dentist in Lorengau. The dentist had recently acquired a drill, meaning that he would be able to do fillings rather than just extractions of teeth. Asylum-seekers’ teeth were extracted when less invasive procedures may have been performed, perhaps if more adequate equipment had been available. UNHCR reported that asylum-seekers were very distressed at having had their teeth extracted, rather than receiving fillings.<sup>ccclii</sup>
- On 4 November 2013, the APNA stated:

conditions in off-shore detention centres do not promote adequate health care: “Main concerns surrounding the provision of adequate health services, particularly on Nauru and Manus Island, include a lack of mental health care and engaging activity, increased risks of communicable diseases, the threat of malaria (particularly on PNG, where there is a 94 per cent risk of infection), inadequate supply of vaccinations, lack of medical accountability and measurement of the standards of care, and the inability of professionals to act autonomously.”<sup>cccliii</sup>

conditions in remote detention centres are unacceptable, noting their concerns about the “lack of mental healthcare and engaging activity” on Manus Island and Nauru Offshore Detention Centres.<sup>cccliv</sup>

that “[e]xperience shows us that off-shore detention and regional processing facilities expose asylum seekers to environmental and infrastructure deficiencies. Having detainees live in such close proximity presents significant risks to health, particularly the transference of disease and infection”.<sup>ccclv</sup>

- May 2014, Daniel Webb, Director of the HRLC, gave evidence to the parliamentary inquiry that: “[w]e were also taken to one area where security staff advised ‘psych patients’ were kept. The area included two shipping containers split into four rooms, each room containing one mattress on the floor, and was sealed off from the rest of the centre by a tall fence. The men detained therein were visibly distressed.”<sup>ccclvi</sup>
- In May 2014, the Human Rights Law Centre described sanitation conditions on Manus Island as follows: “[w]ater is limited, health care and sanitation facilities are grossly inadequate, and asylum seekers are exposed to the elements.”<sup>ccclvii</sup>

#### [Post-Transfield]

- In September 2014, in Manus Island Offshore Detention Centre, Hamid Kehazaei contracted cellulitis after cutting his foot. The 24-year-old asylum seeker from Iran made several requests for treatment which were denied. Within days, the cellulitis developed into septicaemia. He was transferred back to Australia, but died soon after his arrival. Mr Kehazaei was reportedly kept on Manus Island for a week waiting for approval to be medically transferred to Port Moresby, despite showing signs of septicaemia. Dr Peter Young, the former director of mental health services at detention centre service provider International Health and Mental Services (IHMS) has explained: “whenever people are placed in a remote place like this, where there aren’t access to local services on the ground, it inevitably creates a situation in which there are going to be delays when people have deteriorating conditions and when higher level, tertiary care is required.”<sup>ccclviii</sup>
- October 2014, psychiatrist, Dr Peter Young, the former director of mental health services with IHMS, the organisation which was contracted to provide health care services in immigration detention centres, gave



evidence to the AHRC The Forgotten Children inquiry stating that the immigration detention environment is ‘inherently toxic’ and akin to torture.<sup>cclix</sup>

- The UN’s Committee Against Torture (CAT) observed in December 2014 “harsh conditions prevailing in [Australia’s offshore detention] centres, including ... inadequate health care”. The CAT found that in many places of detention mental health care services are inadequate. The CAT also found that Australia “should strengthen its efforts to bring the conditions of detention in all places of deprivation of liberty in line with relevant international norms and standards, including the Standard Minimum Rules for the Treatment of Prisoners and the Bangkok rules, in particular by: a) continuing to reduce overcrowding, particularly through the wider application of non-custodial measures as an alternative to imprisonment, in the light of the Tokyo Rules; and b) ensuring that adequate somatic and mental health care is provided for all persons deprived of their liberty, including those in immigration detention”.<sup>cclx</sup>
- In 2015, Transfield submitted, in questions on notice that between the period September 2012 – 30 April 2015 the outline of all critical or major incidents which required Transfield or its subcontractors to report the incident to the Department;<sup>cclxi</sup> (note: excluding incidents which were reported by Save or IHMS)

There were 253 cases of Actual Self-Harm (with 10 deemed critical), and 10 cases of attempted serious self-harm (an incident of Actual self-harm every four days serious enough to require reporting to the Department)

### 7.4.3 Findings and Evidence of Violations - NODC

- August 2012, the Human Rights Law Centre reported the absence of adequate mental health care facilities in offshore detention centres, and the harsh conditions in excised off-shore detention centres which may exacerbate pre-existing trauma, distress and mental illness.<sup>cclxii</sup>
- [month unknown] 2013, the AHRC, citing an investigation by Amnesty International, reported “the capacity of essential services in Nauru such as specialist health care, and law enforcement to ensure safety, will not be able to cope with the needs of asylum seekers on the island, especially if 1500 are placed there. There are currently 56 beds in the Nauruan hospital and it relies heavily on specialists that fly in several times a year.”<sup>cclxiii</sup>
- [month unknown] 2013, AHRC reported that “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 ... 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”.<sup>cclxiv</sup>
- [month unknown] 2013 AHRC noted in 2013, that the UNHCR has condemned the Australian Government for continuing to detain people in the knowledge that it was contributing to mental illness.<sup>cclxv</sup>
- [month unknown] 2013, the AHRC reported that the mental health impacts of detention are a combination of “remote, climatically harsh, overcrowded” living conditions in detention centres, inadequate health care services, and the effects of “bringing together groups of people in the same situation, experiencing frustration, distress and/or mental illness”, which can lead to “a ‘contagion’ effect”.<sup>cclxvi</sup> The AHRC stated that “[i]t has been clearly established that detention for prolonged and uncertain periods of time both causes and exacerbates mental illness”.<sup>cclxvii</sup>
- October 2013, the UNHCR reported from Nauru:<sup>cclxviii</sup>

the majority of asylum seekers were living in cramped, overcrowded and oppressive conditions; recreational space had been built over; and ablution blocks were unhygienic, with blocked drains, dim lighting, a putrid smell and “several inches of filthy water flooding the floor”. Extreme heat and humidity, as well as insects and parasites (especially malaria from mosquitoes) created health concerns, and there were food hygiene issues. The UNHCR found that conditions in the Offshore Detention Centre were “harsh and unsatisfactory”.<sup>cclxix</sup> On Nauru, the UNHCR identified a range of health and hygiene issues including skin and other infections, and lice infestations.

“the harsh and unsuitable environment at the closed [Centre on Nauru] is particularly inappropriate for the care and support of child asylum-seekers...no child, whether an unaccompanied child or within a family group, should be transferred from Australia to Nauru”. The UNHCR noted, in particular, lack of

access to “adequate educational and recreational facilities”. UNHCR made similar findings in Manus Island Offshore Detention Centre . The UNHCR noted “deteriorating mental health of children in the RPC, which was impacting on their ability to engage in educational activities” and “unsuitability of the terrain for children to play (including areas of rocky ground, with glass shards and other debris)”, along with other general health risks including exposure to trauma and diseases such as malaria.

- November 2013, the Australian Primary Health Care Nurses Association stated:<sup>cclxx</sup>

conditions in off-shore detention centres do not promote adequate health care: “Main concerns surrounding the provision of adequate health services, particularly on Nauru and Manus Island, include a lack of mental health care and engaging activity, increased risks of communicable diseases, the threat of malaria (particularly on PNG, where there is a 94 per cent risk of infection), inadequate supply of vaccinations, lack of medical accountability and measurement of the standards of care, and the inability of professionals to act autonomously.”

“[e]xperience shows us that off-shore detention and regional processing facilities expose asylum seekers to environmental and infrastructure deficiencies. Having detainees live in such close proximity presents significant risks to health, particularly the transference of disease and infection”.

- February 2014, The Physical and Mental Health Subcommittee reported the following:

that there are limited health care services in Nauru. One hospital serves the local population of 10,000 people. There is a two-bed emergency room, a two bed high dependency unit, 12 acute adult beds, four acute paediatric beds, 16 long stay beds, two delivery rooms, six maternity beds and a single operating theatre. It also has an additional renovated four-bed ward for the use of International Health and Medical Services.<sup>cclxxi</sup> Referrals may be made from the Nauru Offshore Detention Centre to the local hospital for acute clinical care, though there was not (as at February 2014) a Memorandum of Understanding (MOU) between the hospital and the Offshore Detention Centre as to how referrals are handled.<sup>cclxxii</sup> The Physical and Mental Health Subcommittee raised concerns that “conditions at the hospital are difficult, particularly following the 2013 fire”.<sup>cclxxiii</sup> There is a shortage of the most basic equipment: “There is no bed linen (patients families usually provide this when they are admitted), there are limitations with infection control procedures, the medical incinerator has not been functioning for some time, and the buildings have structural issues, including the use of asbestos sheeting. Visiting medical specialists are asked to bring their own equipment and supplies, including drapes.”<sup>cclxxiv</sup>

Certain hospital services are not offered in Nauru, partly due to shortages in resources. As of February 2014, there was no obstetrician at the Nauru hospital and hospital maternity services were provided by midwives.<sup>cclxxv</sup>

there was no blood bank on Nauru. In situations requiring a transfusion, relatives are needed to donate blood at the hospital. There is no facility for antibody testing or blood borne virus screening.<sup>cclxxvi</sup>

provision of medical services at NODC was inadequate in many respects. Gaps in health service access, and system inefficiencies, which may delay presentation and proactive health and mental health care. The IHMS failure to attend appointment rate is 25% to 30% suggesting inefficiency in the appointment booking and support process. There were consistent reports across both Offshore Detention Centres of long waiting times for appointments, and of having to make multiple requests for appointments. There have been 53 medical transfers for mental and physical health issues over the 12 months of November 2012 to November 2013, representing significant cost. Dental service access is identified as an area of particular concern, with 240 people on a waiting list. Other risks include the differential health screening for children and adults, challenges with data management, and that only basic pathology tests are available on Nauru, blood cultures are not available, and any complex tests are sent to Australia.<sup>cclxxvii</sup>

the absence of specialist medical professionals to cater to particular needs, including paediatricians and psychiatrists. There are no staff with acute paediatric life support training, a lack of resuscitation support for infants and children, and no facility for advanced paediatric life support at the Republic of Nauru hospital. The Subcommittee reported that “[c]hildren deteriorate quickly when they are unwell, and the 24–36 hour timeframe for medical evacuation will not allow support during the critical early period of a severe illness ... One baby in 37 dies in the neonatal period in Nauru.”<sup>cclxxviii</sup>

there were various areas in which health services in Nauru were insufficient. IHMS staff interviewed by the Subcommittee “identified the need for optometry/ ophthalmology services, dental services, minor

theatre facilities, a short-stay type ward area, an ambulance with improved resuscitation facilities, improved quality ultrasound and a mental health clubhouse/drop in room.”<sup>cclxxix</sup>

gaps in physical health screening systems including a lack of health screening in children - there are inefficiencies in adult health screening with “rapid turnaround” policies resulting in people being returned to Australia, and there is a lack of health screening in children, which is not appropriate in the situation of transfer to an offshore processing environment” ... It also observed that “there are critical issues with the lack of health screening for children in held detention, including those transferred for offshore processing.”<sup>cclxxx</sup>

people in the Nauru Offshore Detention Centre were not being screened for illnesses like tuberculosis and hepatitis, nor for parasite infections (like Giardia and Strongyloides stercoralis), known to be common among refugee cohorts. The Subcommittee noted that the immigration department protocols for screening are sound, but that they are not implemented. There was also no child developmental surveillance, which is an important component of mental health monitoring. Failure to properly screen means that asylum seekers may not being delivered health care that meets their particular needs, and that health and disability issues can arise after transfer.”<sup>cclxxxi</sup>

“[c]rowded living conditions” which create public health risks. This is especially so given concerns over sanitation and water, and the fact that many people had not been properly screened or vaccinated.”<sup>cclxxxii</sup> Detainees on Nauru also reported problems with vermin, pests and the tent accommodations in which they live, to the Subcommittee: “the tents leaked with rain (wetting bedding), mosquitoes prevented sleep at night, and that there were spiders, rats and scorpions.”<sup>cclxxxiii</sup>

immunisation programs were not being comprehensively delivered on Nauru, generating particular risks for children.”<sup>cclxxxiv</sup> There is only a limited history and examination of children under 11 years, no blood screening under 15 years. The Subcommittee on Physical and Mental Health says that these practices are not sufficient to detect hepatitis B and latent tuberculosis, nor for parasite infections (like Giardia and Strongyloides stercoralis), known to be common among refugee cohorts. The Subcommittee also found that immunisation programs were not being comprehensively delivered.”<sup>cclxxxv</sup> The Subcommittee also noted that “[i]ncomplete immunisation is an avoidable risk factor for outbreaks of vaccine preventable diseases such as measles, mumps, rubella, chicken pox, pertussis and influenza, which are more likely in close living conditions.”<sup>cclxxxvi</sup>

“[b]ased on current prevalence data, there are likely to be multiple children with undiagnosed blood borne virus infections such as hepatitis B, and up to 50 per cent of children will have latent tuberculosis infection with their risk of developing active tuberculosis increased by young age, recent migration and social stressors, all of which are relevant in this setting. Currently there is no child developmental surveillance, which is also an important form of mental health monitoring. The lack of child health screening means health issues and disability are likely to arise after transfer.”<sup>cclxxxvii</sup>

crowded living conditions and the environment of the Nauru Offshore Detention Centre would be likely to lead to outbreaks of communicable diseases.”<sup>cclxxxviii</sup> The Subcommittee made a number of risk management recommendations including comprehensive vaccination, education about hand washing, access to hand sanitisers, and mosquito control and surveillance.

conditions in the Nauru Offshore Detention Centre are likely contributing to poor mental health: “[c]rowded, hot and humid living conditions in an enclosed detention environment with minimal access to meaningful activities, for prolonged periods, with uncertain endpoints. Adults described boredom, hopelessness and helplessness, and very limited access to activities. Many people described an overwhelming sense of uncertainty about progress, and information dissemination was repeatedly identified as an issue ... People spoke of extreme difficulties sleeping due to the heat, and mosquitoes, exacerbating mental health issues.”<sup>cclxxxix</sup>

identified the particular mental health risk factors that apply to asylum seeker populations: “people in held detention have a number of significant risk factors for adverse mental health outcomes, including past trauma and sometimes torture, family separations and loss, disruption of community, education and employment, prolonged uncertainty, a sense of being trapped, a lack of understanding or trust in the RSD process, and feelings of hopelessness.”<sup>ccxc</sup>

reported its concerns about the absence of a full time psychiatrist in Nauru Offshore Detention Centre.”<sup>ccxi</sup>

identified particular concerns regarding children's mental health, given "limited meaningful play and reduced hours of schooling in difficult conditions without monitoring systems".<sup>ccxcii</sup> The Subcommittee found that these conditions are likely to "cause and maintain mental health problems and more generally, lead to widespread hopelessness and boredom with the potential for unrest."

that conditions in the Nauru Offshore Detention Centre were likely to contribute to mental health problems, and that there were low numbers of people in the Psychological Support Program (PSP) despite critical issues with self-harm and suicide.<sup>ccxciii</sup> Between 30 September 2012 and 20 November 2013, there were 102 incidents of self-harm.<sup>ccxciv</sup> These numbers do not include voluntary starvation.

- 18 people tried to hang or asphyxiate themselves on 28 occasions
  - Five people cut their own neck or throat
  - Nine people sewed their lips together
  - Many others took drug overdoses, burned themselves with cigarettes and cut themselves
  - 12 people had made more than one self-harm attempt
  - Nine people had made more than four self-harm attempts<sup>ccxcv</sup>
  - One detainee stabbed himself in the abdomen and trachea, requiring complex surgery. This incident was not recorded as self-harm.<sup>ccxcvi</sup>
  - There was no obstetrician available on Nauru at the time of the Physical and Mental Health Subcommittee's visit in early 2014.<sup>ccxcvii</sup>
  - Very high rates of depression amongst pregnant women and women in the post-partum period.<sup>ccxcviii</sup>
- February 2014, the AMA noted high and rising incidences of psychological illness in detention "almost 45 per cent of detainees were diagnosed with psychological problems in the September 2013 quarter".<sup>ccxcix</sup>
  - December 2014, The United Nations Committee Against Torture stated that there were "harsh conditions prevailing in [Australia's offshore detention] centres, including ... inadequate health care".<sup>ccc</sup>
  - The AHRC observed the following in its 2014 *The Forgotten Children* inquiry:

"[Immigration department] officers do not assess the care and welfare needs of an individual child and consider whether those needs can be met in the Centre in Nauru before recommending the child's transfer. The [AHRC] found that Australia transferred children to Nauru regardless of whether the transfer was in those children's best interests, in breach of Australia's obligations under international law The Commission also found that some asylum seekers, including children, were sent to Nauru despite having physical and mental health problems."<sup>ccci</sup>

many problems with sanitation on Nauru, especially in relation to the toilets and showers. Showers were sometimes restricted to 30 seconds per day.<sup>cccii</sup> At other times, there was no water available for showers. A doctor who had worked on Nauru gave evidence that the state of the toilets contributed to dehydration as many women and children "didn't want to drink water during the day because they didn't want to use the shared toileting facilities".<sup>ccciii</sup>
  - December 2014, The UN's Committee Against Torture (CAT) observed that in many places of detention mental health care services are inadequate. The CAT found that Australia "should strengthen its efforts to bring the conditions of detention in all places of deprivation of liberty in line with relevant international norms and standards, including the Standard Minimum Rules for the Treatment of Prisoners and the Bangkok rules, in particular by: a) continuing to reduce overcrowding, particularly through the wider application of non-custodial measures as an alternative to imprisonment, in the light of the Tokyo Rules; and b) ensuring that adequate somatic and mental health care is provided for all persons deprived of their liberty, including those in immigration detention".<sup>ccciv</sup>
  - April 2015, Transfield submitted, in questions on notice that between the period September 2012 – 30 April 2015 the outline of all critical or major incidents which required Transfield or its subcontractors to report the incident to the Department;<sup>cccv</sup> (note: excluding incidents which were reported by Save or IHMS)

There were 253 cases of Actual Self-Harm (with 10 deemed critical), and 10 cases of attempted serious self-harm

- Aug 2015, the Senate Select Committee on Nauru related: “Ms Alanna Maycock and Professor David Isaacs provided the committee with comments and recommendations made by them to IHMS after their visit to Nauru. In their submission, they referred to a culture of scepticism and mistrust of patients, lack of respect shown to patients, and use of a boat number ID to refer to patients instead of the patient's name.”<sup>cccvi</sup>

## Women's and Children's Right to Health

### CEDAW

#### Article 12

*1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.*

*2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.*

### Article 24, CRC

*1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.*

## 7.4.4 Findings of evidence and violations – NODC

- February 2014, AHRC *The Forgotten Children* report

includes an assessment of conditions for mothers and newborn babies. The AHRC explains that “[p]regnant women and women who have recently given birth are especially vulnerable to their physical and emotional environment ... birthing often occurs in isolation from familiar people, with limited access to interpreters”.<sup>cccvii</sup> Mothers have talked about the challenges of supporting and caring for their newborn babies.

“... three women who have terminated their pregnancy because they believed that their babies would die in detention....”<sup>cccviii</sup> ... at least four requests and that two terminations (at least) have been carried out – all four families were transferred from Nauru to the Australian mainland. In all cases, the motivating factor for exploring the termination option has been that the family cannot perceive how they can raise a baby on Nauru. In all four cases, the women have expressed that if it were not for their immigration detention on Nauru, they would very much want to have these babies.<sup>cccix</sup>

a “pattern of fear” amongst pregnant women about the conditions of detention on Nauru. Dr Sue Packer, a Paediatrician reported that parents of newborns were terrified of being taken to Nauru and that they particularly feared for their babies there. One woman who had recently given birth in Melbourne Detention Centre, had been suicidal on Nauru and since the birth of her baby she had hardly left her room. Serco officers had threatened to separate her from her baby with the words: “Not getting out of the room won't stop you from going back to Nauru”.<sup>cccx</sup> Dr Sanggaran, a General Practitioner gave evidence of seemingly punitive practices concerning pregnant women with particular health needs: “[s]o this is the lady who came to Christmas Island and due to the lack of capabilities in terms of antenatal care we were unable to determine whether or not she had twins. She believed that she had twins and thinking that she did have twins she was sent to Nauru. In the context of a conversation with the medical director about the capabilities of Nauru, the discussion progressed and I was told that she was sent to Nauru as an ‘example’ of how this was to show that even [though] you're pregnant with twins there will be no advantage and you [will] still be sent to Nauru.”<sup>cccx</sup>

February 2014, AHRC The Royal Australasian College of Physicians (RACP) has noted a lack of available weaning foods and lack of flexibility in meals for toddlers and infants, while also having been provided with expired baby food.<sup>cccxi</sup>

Another man tells the story of his son's anger and frustration at abandonment. His mother was transferred from Nauru to Darwin to give birth to another baby. The five -year-old son hated his mother for abandoning him. The boy has serious mental health issues after being abducted in Iran, which have been compounded by his experiences in detention and his separation from his mother.<sup>cccxi</sup>

Dr Jon Jureidini, Child Psychiatrist said to the AHRC *The Forgotten Children* Inquiry: "[a] primary function of a parenting relationship is to protect a child from harm and parents in immigration detention are repeatedly being reminded of their failure to do that".<sup>cccxi</sup>

Elizabeth Elliot, Professor of Pediatrics and Child Health said to the 2014 AHRC *The Forgotten Children* Inquiry: "[f]rom a pediatrician's perspective these delays in treatment – for children with delayed speech, poor hearing, rotten teeth, sleep apnoea and infection – are unacceptable and may have lifelong consequences".<sup>cccxi</sup>

- children describing the impact of detention on their mental health:<sup>cccxi</sup>
  - "I've changed a lot. I'm not fun anymore. I'm just thinking about bad stuff now... I was thinking of become a doctor but not anymore" – 15 year old child, Nauru, May 2014
  - "We are getting crazy in here" - Unaccompanied child, Nauru, May 2014
  - "It affects the people's mind and the children too. They have 10 months on the detention that means they get crazier and upset." - Unaccompanied child, Nauru, May 2014
  - "I have many problems in the camp. I cannot find peace. If I am released from the camp that would be good, if not, I will go crazy in this camp." - Unaccompanied 17 year old, Nauru, May 2014

Parental mental health is crucial in shaping the experience of children. High rates of mental disorder amongst parents is causing distress, anxiety and depression in asylum seeker children.<sup>cccxi</sup>

"Enough is enough. I have had enough torture in my life. I have escaped from my country. Now, I prefer to die, just so my children might have some relief. I have reached the point I want to hand over my kids"<sup>cccxi</sup> – a mother of three in detention.

Dr Sue Packer, paediatrician, gave evidence to the 2014 AHRC *The Forgotten Children* inquiry: "Without exception, every adult, young person and older child I saw was distressed, with a feeling of deep hopelessness".<sup>cccxi</sup>

- Elizabeth Elliot, Professor of Paediatrics and Child Health said to the 2014 AHRC *The Forgotten Children* Inquiry: "[f]rom a paediatrician's perspective these delays in treatment – for children with delayed speech, poor hearing, rotten teeth, sleep apnoea and infection – are unacceptable and may have lifelong consequences".<sup>cccxi</sup>
- The 2014 AHRC *The Forgotten Children* Inquiry heard from pediatricians who also commented on the motor, sensory and language development of babies and children. Detention centres were described as "harsh and uninviting to exploration", with "very little space for a child to walk around and play", and "concrete and stone and unsuitable for babies to crawl".<sup>cccxi</sup> One mother said: "There is no space for my baby, no place to put him down. There are centipedes, insects, worms in the room. Rats run through. We have no eggs, no fruit. We get out of date food. I don't want a visa, I just want somewhere safe and clean for my child."<sup>cccxi</sup>
- February 2014, Physical and Mental Health Subcommittee site visit:<sup>cccxi</sup>
  - There was no obstetrician available on Nauru at the time of the Physical and Mental Health Subcommittee's visit in early 2014.<sup>cccxi</sup>
  - Very high rates of depression amongst pregnant women and women in the post-partum period.<sup>cccxi</sup>

In 2014, the Moss Review reported that between October 2013 and October 2014, 17 children in the Nauru Offshore Detention Centre engaged in self-harm (including one attempted hanging). Ten of the 17

incidents took place between 24 and 27 September 2014. They involved three cases of lip-stitching, six cases of lacerations to arms, and one boy who swallowed detergent. The youngest child involved in self-harm was an 11 year old who swallowed a metal bolt and a rock.<sup>cccxxvi</sup>

- July 2015, AHRC stated that “[C]hildren detained indefinitely in Nauru are suffering from extreme levels of physical, emotional, psychological and developmental distress”.<sup>cccxxvii</sup>
- In 2015, UNHCR stated its concern that Nauru Offshore Detention Centre does not provide “a safe and humane environment for asylum-seekers or refugees”.<sup>cccxxviii</sup> UNHCR has said “that the harsh conditions and lack of privacy, particularly for vulnerable people within the Centre such as women, children and persons with mental and physical health issues, were of grave concern”.<sup>cccxxix</sup>

## **7.5 Asylum seekers are denied their rights to security of their person in unsafe conditions and suffer all forms of violence including sexual violence**

The right to security requires the provision of reasonable and appropriate measures, within the scope of those available to public authorities, to protect a person's physical security, whether or not the person is in detention. This obligation arises when public authorities know or ought to know of the existence of a real and imminent risk to the physical security of an identified individual or group of individuals from the criminal acts of another party.

### **7.5.1 Relevant Rights**

*art 3, UDHR*

*Everyone has the right to life, liberty and security of person.*

*art 6 (1), ICCPR*

*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

### **7.5.2 Findings and Evidence of Violations – MODC**

- Whilst media reports of rape and sexual assault have occurred at the MODC since Transfield's provision of service, as they do not fit within NBIA's strict criteria for inclusion, they have not been included here. Previous to Transfield's provision of services, two issues, the riots and death of Reza Berati, and a September 2013 investigation into sexual and other serious assaults conducted by Robert Cornall, occurred but they are not discussed here.

### **7.5.3 Findings and Evidence of Violations – NODC**

- March 2015, the Moss Review found evidence of rape, threats of rape, indecent assault, sexual harassment and physical assault, including by contract service providers.<sup>cccxxx</sup>
- The Moss Review concluded that:<sup>cccxxxi</sup>

The Review considered the allegation that ‘on occasions women have been forced to expose themselves to sexual exploitation in exchange for access to showers and other facilities’ and concludes that it is likely to be based on one particular incident, which the transferee related to four Save the Children staff members, who all reported it in accordance with Centre guidelines.

The Review became aware of two specific allegations on rape two adult female transferees occurring at the Centre. One allegation has already been reported to the Nauruan Police Force. The other allegation, according to the transferee concerned, was made only to the Review and involved a contract service provider staff member. The transferee requested that, for family and cultural reasons, the Review not reveal her identity or refer the matter to the relevant authorities.

The Review also became aware of allegations of indecent assault, sexual harassment and physical assault occurring in the Centre. Some of these allegations had been reported and the relevant authorities are investigating or have investigated. Contract service provider staff members are/were the subject of some of these allegations.

In relation to 'access to cigarettes being traded for sexual favours', the review concludes that this allegation appears to relate to a time when cigarettes were not openly available in the Centre. The Review was unable to obtain any specific information to substantiate this allegation.

In relation to the allegation "Nauruan guards have been trading marijuana with detainees in exchange for sexual favours", the Review concludes that this activity is possibly occurring. The Review was unable to obtain many specific details because transferees were not prepared to provide them. The details obtained about transferees who allegedly deal in marijuana were referred to the Department for referral to the relevant authorities.

The Review concludes that many transferees are apprehensive about their personal safety and have concerns about their privacy in the Centre. Some transferees expressed their apprehension about other transferees and some about contract service provider staff members. Several married couple transferees raised concerns about their privacy. The perception of a lack of personal safety and privacy is heightened by high density accommodation in mostly un-air-conditioned, soft-walled marquees in a tropical climate.

The Review also concludes that ensuring transferees are, and feel, safe is important and requires consideration of such factors as infrastructure, policing and staffing.

The Review further concludes that the training and supervision of contract service provider staff members, particularly locally engages Nauruans, need to be improved and should focus on the personal safety and privacy of transferees.

Some allegations of sexual and other physical assault of transferees have been formally reported and others, disclosed only to the Review, had not been formally reported. The Review concludes that there is a level of under-reporting by transferees of sexual and other physical assault.

This under-reporting is generally for family or cultural reasons. Transferees also told the Review that they were concerned that making a complaint could result in a negative impact on the resolution of their asylum claims. In some cases, transferees told the Review that they had not reported particular incidents because they had lost confidence that anything would be done about their complaints.

Despite this lack of confidence, the Review concludes that, when formal reports or complaints have been made, contract service providers, in the most part, have acted appropriately in dealing with them and have, when required, referred matters to the Nauruan Police Force. In some instances, the lack of timeliness in reporting and referral or inadequate or inconsistent information have hampered the ability of contract service providers and/or the Nauruan Police Force to investigate. This situation is particularly true in relation to allegations relating to sexual assault.

The Review concludes that the arrangements for identifying, reporting, responding to, mitigating and preventing incidents of sexual and other physical assault at the Centre could be improved. For instance, there are limited resources for sexual assault to be investigated by Nauruan authorities. Work also needs to be done to improve the existing arrangements at the Centre.

The Review became aware of claims that some allegations of abuse have been fabricated or exaggerated by transferees. The Review cannot discount this possibility. The transferees who were interviewed were generally credible and their accounts convincing. Yet, the Review could not establish the veracity of allegations. For this reason, information about some reported incidents was sent to the Department for referral to the relevant authorities for further investigation.

The protection of minors in the Centre is of the highest importance and priority. The Review found that, in relation to this group, there were both reported and unreported allegation of sexual and other physical assault. When the Review obtained information that would assist relevant authorities to investigate these allegations, it was provided to the Department.

- July 2015, during the public hearing of the Senate Inquiry into Nauru (whose focus was on issues of violence and abuse), Transfield Services was questioned in relation to the listed 30 cases of child abuse involving staff:<sup>cccxixii</sup>



*Senator HANSON-YOUNG: Out of the 30 cases of child abuse as outlined in the table given by your own answers to questions, how many incidents involving staff — those 30 cases — have been referred to the police?*

*Mrs Munnings: I will ask Erin via the phone to provide the data. As I said, Save the Children, the lead service provider in the family accommodation, are responsible under the child safeguarding protocol for investigating all matters involving minors. Erin, can you please work through our records as to how many have been referred to the police?*

*Ms O'Sullivan: I can confirm that of the 67 allegations that have been received a total of 12 have been referred to the NPF. I can confirm that 31 have been referred to Save the Children in accordance with the child safeguarding protocol. And a further nine complaints have been withdrawn subsequently.*

*Senator HANSON-YOUNG: Could you tell me whether any Transfield staff members or subcontracted staff members inside the detention centre have been charged for any of these matters?*

*Ms O'Sullivan: I can confirm that, as a result of that, there have been six staff dismissals, two staff removed from sight and one staff member suspended in relation to all 30 of those allegations.*

*Senator HANSON-YOUNG: That is dismissal from working within the facility. Have they been charged with any criminal offence as a result of their abuse of children?*

*Ms O'Sullivan: I am unaware of any charges being laid in relation to those 30 incidents, no.*

- Transfield submitted, in questions on notice that between the period September 2012 – 30 April 2015 an outline of all critical or major incidents which required Transfield or its subcontractors to report the incident to the Department<sup>cccxxxiii</sup> (excluding incidents which were reported by Save or IHMS):

There were 211 incidents of assault of which 2 were deemed critical by Transfield, with 34 of those incidents referred to police

There were 9 cases of sexual assault with 2 deemed critical by Transfield, 4 were referred to police and were 4 are still ongoing

- Aug 2015, the Senate Committee Report states:

“Access and distance to toilet facilities 4.108 During the course of the inquiry, the toilet facilities in the RPC were continually noted by submitters as being unsafe and unhygienic. The toilets were said to be the frequent scene of harassment and assault, as well as a source of concerns over hygiene. In particular, the distance between the accommodation and toilet facilities was raised by submitters as being unsafe. Professor David Isaacs told the committee that the safety and security of asylum seekers was impacted by the distance between accommodation and toilet facilities, which could be between 30 and 120 metres and would mean that '[t]o go to the toilet at night involves crossing dark, open land, often under the gaze of large male guards'.”

“4.111 The committee received evidence in several submissions that toilet facilities were often the scene of harassment and abuse. Inadequate lighting of the exterior of the toilet facilities was also noted. Transfield Services advised the committee that additional lighting was being installed in the toilet facilities. 4.112 The committee heard from Ms Alanna Maycock and Professor David Isaacs that the stress associated with using the toilets in the RPC was having an effect on mental and physical health: Many children had nocturnal enuresis (wetting their beds at night), partly stress-induced and partly due to fear of walking to and from the toilets. Some of the mothers also suffered from nocturnal enuresis rather than run the gauntlet of a night-time visit to the toilets.”

5.29 Despite the likelihood of significant under-reporting of incidents and concerns, which was remarked upon in the Moss Review and endorsed by witnesses before this committee, the internal complaints mechanism managed by Transfield Services recorded 725 complaints about service provider staff over a 14-month period to April 2015.<sup>2</sup> The incidents and complaints recorded by Transfield since 2012 included some 45 allegations of child abuse and sexual assault. The committee is very deeply concerned about a situation in which this level of reported misconduct can occur and, at least until brought to light by the Moss Review, apparently be accepted.

5.32 The evidence provided by Wilson Security representatives regarding the recording of footage of the riot of 19 July 2013 was shown to be incorrect. Wilson Security representatives initially denied the existence of footage and told the committee that body-worn cameras were not in use during that time. Footage which contradicted that statement was, however, provided to the media and reported during the

ABC's 7.30 program on 13 August 2015. At the committee's public hearing on 20 August 2015, after the release of the footage, Mr John Rogers, Executive General Manager, Wilson Security, acknowledged that his earlier evidence was incorrect. The committee is concerned that this error was not brought to the committee's attention earlier and was revealed only during questioning. The committee was also concerned that a representative present at the hearing who knew that the cameras were used during that time said he had not heard the evidence being given. The footage appeared to show security personnel planning to use unreasonable force against asylum seekers, and those visible in the footage used derogatory language to refer to asylum seekers. The footage revealed a workplace culture which is inconsistent with Wilson Security's role to provide safety and security to asylum seekers within the facility.

## **7.6 Asylum seekers are subjected to abuse violating their special circumstances and needs to which protection is owed**

According to UNHCR Guidelines on detention<sup>ccccxiv</sup> the AHRC Standards on Immigration Detention<sup>ccccxv</sup> particularly vulnerable groups require special attention (and sometimes different treatment) to ensure that they are able to access their rights. While this group may be quite large (including the elderly, women etc.), this report limits the assessment to only those individuals or groups for whom our narrow evidence base established their presence in the ODCs. For example, often a particular group that requires special attention is persons with disabilities. However, the only published example NBIA could find was person with a disability that predated Transfield's provision of services in MODC, therefore the relevant rights for persons with disabilities have not been included in this particular review.

Therefore, in this review, these groups include:

- survivors of torture or trauma
- women; and
- lesbian, gay, bisexual, transgender or intersex asylum seekers (LGBTI).

Prior to the review of rights, findings and evidence, it is worthwhile noting that sources have indicated that the ODCs are particularly unsuitable for vulnerable groups as a whole. As illustrated by the two quotes below, these concerns were raised by the UNHCR prior to the opening of the centres on Nauru and Manus, and reiterated following the death of Reza Barati in February 2014.

*... that arrangements to transfer asylum seekers to another country are a 'significant exception' to normal practice, should only be pursued as part of a burden-sharing arrangement to more fairly distribute responsibilities, and should involve countries with appropriate protection safeguards, including [...] special procedures for vulnerable individuals.*<sup>ccccxvi</sup>

*UNHCR considered that, within the policy settings and physical environment at the Centre, the situation of vulnerable people, particularly survivors of torture and trauma, was likely to be an issue of growing concern and that these concerns were heightened due to the uncertainty and delays of RSD [refugee status determination] processing and the arbitrary and mandatory detention framework.*<sup>ccccxvii</sup>

### **7.6.1 Relevant Rights**

Survivors of Torture and Trauma

*Guideline 9.1 UNHCR Guidelines on Detention*

*Victims of torture and other serious physical, psychological or sexual violence also need special attention and should generally not be detained.*

### **7.6.2 Findings and Evidence of Violations – MODC**

[pre-Transfield]

- June 2013 quarter: the last quarter that ADIBP published health statistics on their website, there were 123 detainees on Manus Island who had disclosed that they were a victim of Torture and Trauma<sup>cccxviii</sup>
- October 2013, the UNHCR stated: ... a two-person torture and trauma counselling team from STTARS had been at the RPC for about three weeks. There is an intention to expand the number of trauma and torture counsellors to four by 1 December 2013. UNHCR was advised that asylum-seekers identified by IHMS staff as being survivors of torture and trauma are referred to STTARS. Although currently the STTARS counsellors are able to meet the demands for torture and trauma counselling, both IHMS and STTARS advised that there is a real concern that as the numbers of transferred asylum-seekers at the RPC continue to rise, this may not be possible. UNHCR was advised by some service providers that the conditions of detention are already aggravating symptoms caused from pre-existing torture and trauma. In this regard, UNHCR notes expert advice received that following an altercation that occurred between the PNG police and the PNG army outside of the RPC (but in view of asylum-seekers in the Foxtrot compound) on 18 October 2013, there was a reported increase in post-trauma symptoms. However well-founded that may be, and UNHCR makes no finding on this incident, the majority of asylum-seekers with whom UNHCR met expressed fear for their safety because of the incident. Overall, and despite the current reasonable mental health of the detainees, UNHCR and many of the RPC staff that UNHCR met with agreed that there was no room for complacency.<sup>cccxix</sup>
- February 2014, a case worker deployed to Manus Island reported that: "... there was only one psychologist or mental health nurse available to the 1300 detainees and one STTARS (torture and trauma) counsellor. Given the numbers of traumatised men this was totally inadequate."<sup>cccxl</sup>

[post-Transfield]

- November 2014, the Senate Inquiry into the incidents of February 2014 noted that as of 21 November 2014 there were two subcontracted torture and trauma counselors and one visiting psychiatrist, and an additional 13 mental health clinicians employed through International Health and Medical Services (IHMS)<sup>cccxli</sup>

### 7.6.3 Findings and Evidence of Violations – NODC

- June 2013 quarter: the last quarter that ADIBP published health statistics on their website, there were 115 detainees on Nauru who had disclosed that they were a victim of Torture and Trauma<sup>cccxlii</sup>
- February 2014, the Physical and Mental Health Subcommittee reported: "The pre-transfer assessments that are conducted within Australia within a targeted '48-hour' timeframe do not permit an adequate individualized assessment of health concerns or vulnerabilities (particularly for torture and trauma survivors), nor a considered assessment as to whether the nature of the facilities and services available at the RPC would be appropriate for the individual concerned or whether transfer should occur at all."<sup>cccxliii</sup>

### 7.6.4 Relevant Rights

Women

Art 2, CEDAW

*States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.*

### 7.6.5 Findings and Evidence of Violations – NODC

- Note: see section 7.5 above for findings and evidence of sexual abuse to women and safety concerns
- April 2015, Submissions to the Senate Select Committee on Nauru report that until mid-2014 female asylum seekers had insufficient access to sanitary products for menstruation. Until that time, sanitary pads were only available from guards, who would provide them to women 'as needed', often only two at a time.<sup>cccxliv</sup>
- July 2015, Nurse Alanna Maycock gave evidence to the Senate Inquiry into Nauru stating: "Another woman had been menstruating for over two months; she was using clothes and pieces of material from her tent to hold the bleeding as she had no access to sanitary towels. The bleeding was so bad that one

night she had to brave the journey to the toilet to clean herself. As she walked past the male guards a blood clot fell to the ground. A continual trail of blood followed her all the way to the toilet. She wept as she told me this story.<sup>cccxliv</sup>

There were several occasions where the asylum seekers, particularly the women, would come and ask me or another female worker who was in the camp at the time to go and ask the guards on their behalf because they did not feel comfortable asking a male for such items. [...] I was [able to do that], but I would have to bring the person with me so that the guard could witness me handing it over.”<sup>cccxlv</sup>

### 7.6.6 Relevant Rights

Lesbian, gay, bisexual, transgender or intersex asylum seekers (LGBTI)

Art 2(2) ICCPR

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

It is important context to the findings here that homosexual sex is a criminal offence under PNG law, where the Manus ODC is located, and to which that law applies.

### 7.6.7 Findings and Evidence of Violations – MODC

[Pre-Transfield]

- October 2013, Asylum seekers that Amnesty interviewed expressed fears about disclosing their homosexuality in their asylum claims due to fears of imprisonment and persecution, while some men: “have changed or are considering changing their asylum claim, from persecution on the basis of their sexuality to a political or religious persecution claim. However, as these are false claims, they are less convincing and harder to sustain than their original, genuine claim.”<sup>cccxlvi</sup>
- [Month unknown], 2013, In its *Asylum Seekers, Refugees and Human Rights - Snapshot Report*, the AHRC wrote that it had: “particular concerns about the removal of any lesbian, gay, bisexual, transgender or intersex (LGBTI) asylum seekers to a country in which homosexual activity is criminalised, as it is in PNG.”<sup>cccxlviii</sup>

[post-Transfield]

- June 2014: In a letter written from the Australian Government to Amnesty International, specifically regarding the Amnesty recommendation that the Australian Government “Ensure that consensual sexual conduct between detainees is never a basis for discipline or referral to police,” the Australian Government stated:  
 “The department has been advised that although the act of homosexual sex is a criminal offence under Papua New Guinea (PNG) domestic law, the department does not have a mandatory requirement to report allegations of criminal activity to the police. Service providers provide clear advice to transferees on the legal ramifications of declaring homosexual activity and the department is unaware of any reports of sodomy being investigated by the police at the centre.”<sup>cccclix</sup>

## 7.7 Asylum seekers are subjected to discrimination

Australia’s regional processing regime is targeted at asylum seekers who arrive in Australia by boat on or after 13 August 2012. Asylum seekers who arrive by plane are entitled to have their protection claims assessed while they live in the Australian community. This policy directly discriminates against asylum seekers based on their mode of arrival. The policy also constitutes indirect discrimination

against asylum seekers based on their nationality. Asylum seekers who arrive in Australia by boat are predominantly from countries where it is not possible to access formal refugee resettlement programs due to inadequate administrative systems, or risks associated with applying to leave through official channels. Low levels of ratification of the Refugee Convention within the region also contribute to the overrepresentation of asylum seekers from certain countries arriving in Australia by boat. As a consequence, asylum seekers from countries including Sri Lanka, Iran and Afghanistan are significantly more likely to be subjected to mandatory offshore detention.<sup>cccl</sup>

Prior to the re-opening of the ODCs in 2012, the UN Committee on the Elimination of Racial Discrimination commented on the discriminatory treatment of asylum seekers arriving by boat and called on the Australian Government to “ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin”.<sup>cccli</sup>

### 7.7.1 Relevant Rights

*art 2, UDHR*

*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.*

*art 2(2) ICCPR*

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

*art 26, ICCPR*

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

### 7.7.2 Findings and Evidence of Violations – both ODCs (relates to arrival, not location of ODC)

- April 2013, in its report on the human rights implications of Australia’s offshore detention regime, the Parliamentary Joint Committee on Human Rights noted the discriminatory effects of the policy and expressed concern that:<sup>ccclii</sup>
  - the overall regime which differentiates between asylum seekers on the basis of their mode and date of arrival has a disproportionate impact on asylum seekers (in particular children) who arrive by boat after 13 August 2012, inconsistent with the right to non-discrimination.

## 7.8 Asylum seekers are denied their rights under the Refugee Convention

Outlined in this section are the relevant rights, and sources of findings and evidence establishing the violations of asylum seekers’ rights under the provisions of the 1951 Convention relating to the Status of Refugees (the Refugee Convention). For the background of readers, sources of findings and evidence outlined below include sources relating to the period of the Manus ODC before Transfield commenced providing services in March 2014. They are relayed here for background and context for later findings, but not relied upon to establish any violation.

In summary, asylum seekers are denied their rights to:

- seek asylum without penalty;
- the provision of a fair and expeditious process;
- the prohibition of non-refoulement, including constructive non-refoulement.

### 7.8.1 Relevant rights

#### *Article 26, Refugee Convention*

*Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.*

#### *Article 31, Refugee Convention*

*1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*

#### *Article 33, Refugee Convention*

*1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*

### 7.8.2 Findings and Evidence of Violations – MODC

- November 2012: The Australian Human Rights Commission reported that: "In order to protect against the breach of a person's human rights, pre-transfer assessment procedures should include a thorough assessment of the non-refoulement obligations owed by Australia to each individual under the Refugees Convention, ICCPR, CAT and CRC. The Commission has serious concerns that the published guidelines do not provide the necessary guidance to ensure that a robust assessment is made of any protection claims that may be raised against the processing country. Counter to internationally established processes for the assessment of claims for protection, they indicate that 'assurances given by the RPC' should be taken into account in assessing a claim for protection against this country."<sup>cccliii</sup>
- November 2013: The UNHCR reported: the 'return-orientated environment' observed by UNHCR at the RPC [on Manus Island] is at variance with the primary purpose of the transfer arrangements, which is to identify and protect refugees and other persons in need of international protection."<sup>cccliv</sup>
- November 2013: the UNHCR reported that the Nauru and Manus OPCs "do not provide a fair and efficient 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 recognised refugees."<sup>ccclv</sup>
- April 2015: Amnesty International, in a submission to the Select Committee reports that: "[asylum seekers] forcible removal from Australia, combined with prolonged and arbitrary detention, may also compel asylum seekers to return to their countries of origin, or to other countries where they are at risk of human rights violations, resulting in constructive *refoulement*."<sup>ccclvi</sup>

- January 2015: Human Rights Watch reported that: "Asylum seekers on Manus Island deserve better than to be locked up in squalor and at risk of violence. Both Papua New Guinea and Australia are clearly failing in their commitment to provide safe and humane conditions for asylum seekers. Facilities on Manus Island are overcrowded and dirty, and asylum claims are not processed in a fair, transparent, or expedient manner, contributing to detainees' physical and mental health problems."<sup>ccclvii</sup>

### 7.8.3 Findings and Evidence of Violations – NRPC

- September 2012: The UNHCR reported that: "it is not clear to us [...] that the transfer of responsibilities for asylum-seekers to Nauru is fully appropriate. Whilst the UNHCR welcomes steps taken by the Government of Nauru to accede to the 1951 Refugee convention last year, at present there is no domestic legal framework, nor is there any experience or expertise to undertake the tasks of processing and protecting refugees on the scale and complexity of the arrangements under consideration in Nauru."<sup>ccclviii</sup>
- November 2012: The Australian Human Rights Commission reported that: "In order to protect against the breach of a person's human rights, pre-transfer assessment procedures should include a thorough assessment of the non-refoulement obligations owed by Australia to each individual under the Refugees Convention, ICCPR, CAT and CRC. The Commission has serious concerns that the published guidelines do not provide the necessary guidance to ensure that a robust assessment is made of any protection claims that may be raised against the processing country. Counter to internationally established processes for the assessment of claims for protection, they indicate that 'assurances given by the RPC' should be taken into account in assessing a claim for protection against this country."<sup>ccclix</sup>
- November 2012: The Australian Human Rights Commission reported that: "it is not known when the assessment of asylum seekers' claims will commence, nor the extent of legal assistance that will be provided to them, nor whether the process will include a complementary protection assessment or an adequate approach to determining whether a person is stateless."<sup>ccclx</sup>
- November 2013: the UNHCR reported that the Nauru and Manus OPCs "do not provide a fair and efficient 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 recognised refugees."<sup>ccclxi</sup>
- November 2013: the UNHCR reported that the "current expertise and experience of the Nauruan officials is not at a level where they are able to conduct fair and accurate assessments of refugee claims without substantial input from Australian officials."<sup>ccclxii</sup>
- April 2015: Amnesty International, in a submission to the Select Committee reports that: "[asylum seekers] forcible removal from Australia, combined with prolonged and arbitrary detention, may also compel asylum seekers to return to their countries of origin, or to other countries where they are at risk of human rights violations, resulting in constructive *refoulement*."<sup>ccclxiii</sup>

## 8 Transfield's complicity in Human Rights Abuses

This section applies Transfield's responsibility to respect human rights to the specific situation of the ODCs

### 8.1 Application of Transfield's Responsibility to Respect Human Rights to the ODCs

To apply the UN Guiding Principles to the situation of Transfield and the ODCs:

- (1) the State/s of Nauru, PNG and Australia have a duty to **protect** against human rights abuses;
- (2) Transfield has a responsibility to **respect** human rights; and
- (3) the shared responsibility of Nauru, PNG and Australia and Transfield is to ensure access by victims to effective **remedy**, where abuses have occurred.

As the UN Guiding Principles make clear, Transfield's responsibility to respect human rights exists independently from the State's duty to protect against human rights abuses. Transfield also has a duty to ensure access by victims to effective remedy, where abuses have occurred.

#### 8.1.1 Transfield must respect the all human rights violated

The UN Guiding Principles Interpretative Guide states that:

*"The corporate responsibility to respect human rights applies to all internationally recognized human rights, because business enterprises can have an impact—directly or indirectly—on virtually the entire spectrum of these rights."*<sup>ccclxiv</sup>

UN Guiding Principle 12 also provides a minimum standard when it states that the corporate responsibility to respect human rights extends:

*"At a minimum, [to] those expressed in the International Bill of Human Rights [the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights] and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work".*<sup>ccclxv</sup>

All the human rights violations spelt out in Section 7 are internationally recognized, with the vast majority reflected in the International Bill of Human Rights itself. They are clearly within Transfield's responsibility to respect.

#### 8.1.2 The severity of the impact underlines Transfield's immediate responsibility

Under UN Guiding Principle 14:

*"[t]he responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the **severity** of the enterprise's adverse human rights impacts."*

The Commentary to UN Guiding Principle 14 further states:

*"Severity of impacts will be judged by their **scale, scope and irremediable character**."*<sup>ccclxvi</sup>



*This means that its gravity and the number of individuals that are or will be affected (for instance, from the delayed effects of environmental harm) will both be relevant considerations. “Irremediability” is the third relevant factor, used here to mean any limits on the ability to restore those affected to a situation at least the same as, or equivalent to, their situation before the adverse impact. For these purposes, financial compensation is relevant only to the extent that it can provide for such restoration.*<sup>ccclxvii</sup>

The impacts outlined in Section 7 include death, sexual assault, critical self-harm and child abuse, perpetuated against roughly 2000 asylum seekers including those with particular vulnerability such as a history of torture and trauma. Clearly these impacts are severe in scale, scope and irremediable character.

## 8.2 In what way is Transfield responsible?

Transfield’s public response to its corporate responsibility to respect human rights has fixated on whether “substantiated claims of abuses” by its employees specifically against asylum seekers have been established in a court of law, without which it claims no involvement in any human rights abuses within the ODCs.<sup>ccclxviii</sup> Leaving aside the many issues in relation to the lack of access by asylum seekers to the rule of law for individual acts of sexual abuse or violence (discussed in greater detail in **Error! Reference source not found.**), this is a mischaracterisation of Transfield’s responsibility to respect human rights.

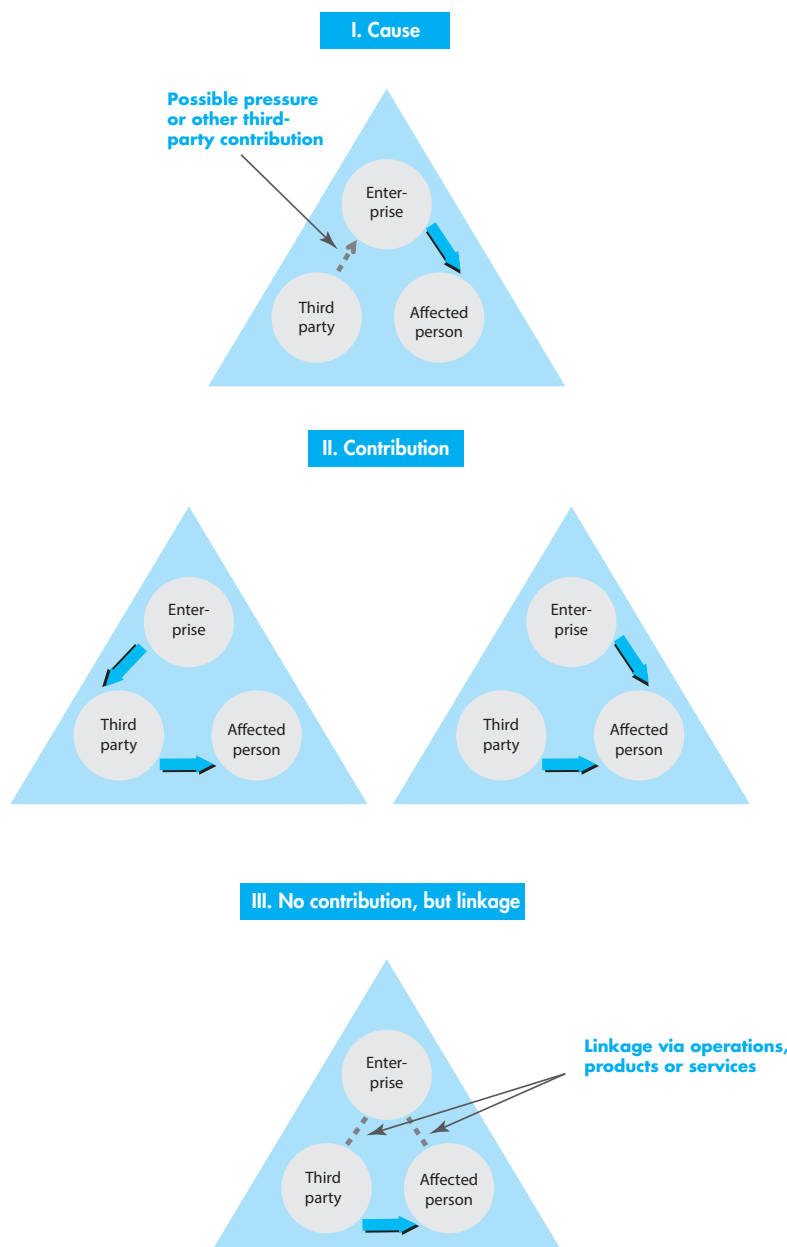
Principle 13 of the UN Guiding Principles outlines three basic ways in which an enterprise can be involved in human rights abuses:

*The responsibility to respect human rights requires that business enterprises:*

- (a) Avoid **causing** or **contributing** to adverse human rights impacts through their own activities, and address such impacts when they occur;*
- (b) Seek to prevent or mitigate adverse human rights impacts that are **directly linked** to their operations, products or services by their business relationships, even if they have not contributed to those impacts.*<sup>ccclxix</sup> (emphasis added)

The three ways are therefore through causing (direct responsibility), contributing to (direct complicity), or being linked to operations, products or services through business relationships (indirect complicity).

The Interpretative Guide to the UN Guiding Principles helpfully provides a visual representation of these three ways.



### 8.2.1 Transfield is providing an essential service to the ODCs

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*"If our work stops, our client's work stops ... if you do that sort of work but you are not prepared to do the hard stuff, you are not stepping up to be an essential services provider."<sup>ccclxx</sup>*  
*Transfield Chair, talking about the company's work in the ODCs, 2015.*

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As the outline of Transfield's role makes clear at Section 4 above, the term 'essential services provider' is an apt one. Without Transfield's provision of services, the ODCs stop. Transfield makes decisions about detainee welfare, movement, communication, behaviour, accommodation, food, clothing, water, security and environment. To a large extent, Transfield Services has responsibility for a significant portion of the matrix of factors that form the basis for the daily lives of detainees living in the ODCs. Transfield can make recommendations as to whether the placement of detainees is appropriate, and is permitted the use of force against detainees. Transfield conducts a twice-daily

headcount. Transfield controls entry and exit, and is responsible for 'discreetly monitoring the movement and location of all people on the Site'.<sup>ccclxxi</sup> Transfield has indemnified the Australian Government for any personal injury, disease, illness or death of any person at the ODCs (a bold acceptance of responsibility given litigation on behalf of injured detainees is an ongoing feature of Australia's mandatory detention regime).

Whilst the Governments of Nauru and PNG are ostensibly in charge, and Australia's Department of Immigration and Border Protection (ADIBP) attends daily morning meetings at the ODCs, there can be no doubt that without Transfield the operation of the ODCs, and with them, the entire system of mandatory, indefinite, offshore detention would be impossible. It is therefore clear that Transfield's responsibility under the UN Guiding Principles is through its own service provision 'activities'<sup>ccclxxii</sup>, with its own staff and subcontractors.

## 8.2.2 Is Transfield directly *causing* abuses?

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*[The Transfield Chair] acknowledges that some of Transfield's staff working at the centres "have not met expectations" but says they have been dealt with. Several hundred staff have been terminated from Nauru since September 2012 for various reasons. "The controls we have in place today, the controls the client has, are very different to at the start of this contract," she says.*

*Transfield Chair, 2015.*<sup>ccclxxiii</sup>

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In some situations, there may be direct causality between Transfield, its subcontractors and adverse human rights impacts or abuses – this would usually occur through the direct actions or omissions of Transfield or its subcontractor staff resulting in a particular human rights abuse.

There is some evidence of potential direct causality of this kind, as outlined at length in the 2015 Senate Select Inquiry:

2.52 A large number of the allegations made to the Forgotten Children and Moss Review inquiries, and to this inquiry, have related to **inadequate conduct and improper behaviour** on the part of staff employed by contractors to the Commonwealth to provide services at the RPC. Evidence received by this committee on the matter of contractor staff has ranged from suggestions of poor training and understanding on the part of staff, inadequate provision of services and lack of responsiveness to the needs of asylum seekers, through to serious allegations of physical and sexual abuse. The latter are discussed further in Chapter 4.

2.53 At the most serious end of the spectrum, in response to queries from the committee, principal contracted service provider Transfield Services reported that 30 formal allegations of child abuse had been made against RPC [Regional Processing Centre] 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 had been dismissed, two removed from the RPC site and one employee was suspended.

2.54 Wilson Security provided details of 11 cases in which staff were terminated for misconduct including inappropriate relationships, alleged sexual assault, sexual harassment, excessive use of force toward an asylum seeker, trading in contraband including for sexual favours, and throwing a rock at an asylum seeker.

2.59 A former employee of The Salvation Army, Save the Children Australia and International Health and Medical Services (IHMS) on Nauru submitted that staff were verbally abusive to asylum seekers at RPC 3, and despite reporting, no staff were disciplined or dismissed for such behaviour. Another former RPC worker described clients reporting to him several cases of sexual and verbal harassment. Ms Charlotte Wilson, a former Save the Children Australia employee, stated her "belief that both Australian and Nauruan security guards frequently abused their positions of power within RPC3", citing verbal abuse, and 'common knowledge' of such misconduct as bartering of sexual favours for

contraband items such as cigarettes. Another former Save the Children Australia employee cited 'multiple allegations' of excessive force and assault by security personnel against minor asylum seekers in RPC3, describing it as the use of 'undue force' to subdue 'normal childhood behaviour'.

2.60 Ms Alanna Maycock, a nurse visiting the RPC as a consultant for IHMS, described the RPC as a place where a cycle of human rights abuse existed and was 'continuing and intensifying'. She reported the assault of the father of a sick child by a security guard in her presence, which was "accepted by all that witnessed it". Transfield Services stated that it "denies that this is a fair representation of the environment at the centre", and that neither Transfield Services nor its subcontractor Wilson Security held any record of the specific incident alleged by Ms Maycock.

2.93 In light of the allegations made to the committee about misconduct by intoxicated staff at the RPC, use of drugs including marijuana and steroids by RPC staff, and trading of contraband for sex, the committee queried key contractors Transfield Services and Wilson Security about drug and alcohol testing of employees at the RPC.

2.101 Transfield Services and Wilson Security both assured the committee that they had rigorous processes in place for the recruitment, training and management of both Australian and Nauruan staff employed at the RPC. Both organisations expressed confidence that their systems and processes were robust enough to ensure competent and appropriate behaviour among their staff, and to respond to incidents of misconduct when they arose.

2.102 Transfield Services advised the committee that since it commenced services in September 2012, it had 'terminated' 289 staff from the RPC Nauru, although these figures included transfers and resignations. Transfield Services observed that abandonment of duty was one of the most frequent reasons for termination of staff. The department had separately advised the Senate's Legal and Constitutional Affairs Legislation Committee that across the Nauru and Manus Island RPCs, Transfield Services had dismissed 179 staff in the first six months of 2015, 13 of those for misconduct.

2.103 Wilson Security reported to the committee that since it commenced services in Nauru, 25 of its expatriate employees had been terminated for misconduct, while 15 disciplinary warnings had been issued to expatriate staff. Wilson Security stated that only two of the terminations arose from matters involving asylum seekers, while the remainder were 'internal disciplinary matters'. Wilson Security's two local subcontractors had terminated 18 staff for misconduct. Transfield Services advised that three staff of Wilson Security had been dismissed at the request of Transfield Services, one for inappropriate behaviour at the Nauru airport, and two for breaches of relevant codes of conduct and policies. It was not clear whether this was additional to, or a subset of, those reported by Wilson Security.

2.114 Transfield Services was unable to inform the committee how many of the 11 staff involved in complaints under investigation by the police remained working at the RPC.

2.123 In its submission, the department drew attention to the establishment of its Detention Assurance Team (DAT) on 1 December 2014, stating that the DAT "provides strengthened assurance of the integrity and management of immigration detention services and the management of contracts in regional processing centres" through such functions as reviewing detention practices and generating recommendations to the Secretary, managing contracts, reviewing incidents and allegations, and leading the department's work to implement the recommendations of the Moss Review.

2.137 While the committee notes the department's evidence in relation to this matter, it is difficult to entirely reconcile this evidence with the public statements of the Prime Minister and the Minister for Immigration and Border Protection on 5 June 2015. It is also of serious concern to the committee that Commonwealth funded contractors did not view it as their primary obligation to support transparency and openness in relation to the visit of an Australian Senator to the Nauru RPC and instead viewed her presence as a potential security threat to be managed. The committee considers that this incident is a striking example of gaps in the discipline and professionalism of contractor staff and their management, indicative of a culture of secrecy, and demonstrates inadequate Commonwealth oversight of the relevant contractors.

5.9 The committee is deeply concerned that without this inquiry, the allegations heard and evidence received would not have been uncovered. There appears to be no other pathway for those affected by what they have seen and experienced in the RPC on Nauru to disclose allegations of mistreatment, abuse or to make complaints. The department has been unaware of serious acts of misconduct by staff of contractors, as those contractors have not adequately fulfilled their reporting obligations. The committee believes that no guarantee can be given by the department that any aspect of the RPC is

*run well, and that no guarantee of transparency and accountability can be given until significant changes are made and accountability systems are put in place.*

*5.28 The high volume of evidence received in relation to the behaviour of staff engaged at the RPC indicated to the committee that there was cause for ongoing concern about the performance and accountability of Commonwealth contracted service providers. While the contractors themselves and the department sought to reassure the committee that the recruitment, training and management of contractors was of an acceptable standard, the weight of evidence submitted to this inquiry strongly suggested that there were significant problems.*

*5.29 Despite the likelihood of significant under-reporting of incidents and concerns, which was remarked upon in the Moss Review and endorsed by witnesses before this committee, the internal complaints mechanism managed by Transfield Services recorded 725 complaints about service provider staff over a 14-month period to April 2015. The incidents and complaints recorded by Transfield since 2012 included some 45 allegations of child abuse and sexual assault. The committee is very deeply concerned about a situation in which this level of reported misconduct can occur and, at least until brought to light by the Moss Review, apparently be accepted.*

Further, in a September 2015 letter to shareholders regarding the ODCs Transfield stated:

*“Instances of unacceptable behaviour*

*In a small number of instances, members of Transfield Services’ staff or sub-contracted staff have acted in a manner that is inconsistent with our expectations. We have taken firm and decisive action to eliminate risk and demonstrate that misconduct will not be tolerated...*

*No act of abuse is acceptable. Not one.*

*Every reported incident is investigated and actioned by Transfield Services in conjunction with the DIBP and other services providers. Incidents are also reported formally to the DIBP, welfare providers and the local law enforcement authorities as required. All allegations of illegal activities or criminal offenses have been referred to the relevant police force and it is important to note that no charges have been laid to date in relation to any of these incidents.*<sup>ccclxxiv</sup>

In the absence of further evidence regarding the what actions Transfield staff took that were ‘unacceptable behaviour’, and whether such actions resulted in human rights abuse, we cannot conclusively determine Transfield’s precise causality. But disturbingly, it does not look improbable, on the company’s own evidence that there were instances of unacceptable behavior, potentially with harm inflicted upon detainees.

### **8.2.3 Is Transfield contributing to and complicit in the abuse?**

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*We agree that there should be zero tolerance for abuse; that the welfare and wellbeing of asylum seekers is paramount; and that human rights are fundamental rights.*

*Transfield Services, September 2015*<sup>ccclxxv</sup>

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It is this report’s central contention that Transfield’s involvement in the system of offshore immigration detention contributes to, and renders the company complicit in adverse human rights abuses with impacts of a serious character and on a large scale. That is, in facilitating the arbitrary detention of persons by the provision of services, staff and equipment essential to the operation of ODCs which fundamentally violate asylum seekers’ human rights, Transfield is in breach of its responsibility to respect human rights by failing to avoid contributing to adverse human rights impacts.

The *Interpretative Guide to the UN Guiding Principles* renders NBIA’s analysis superfluous however, as the document itself outlines as an example of corporate contribution to abuses - “performing construction and maintenance on a detention camp where inmates were allegedly subject to inhumane treatment”<sup>ccclxxvi</sup>.

Contribution to, or direct complicity in, adverse human rights impacts attracts the same type of responsibility as causing them under UN Guiding Principle 13.

The *Implementation Guide to the Guiding Principles* compares this mode of responsibility to the concept of complicity:

*Questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties. Complicity has both non-legal and legal meanings. As a nonlegal matter, business enterprises may be perceived as being ‘complicit’ in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party. As a legal matter, most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of business enterprises in such cases. Typically, civil actions can also be based on an enterprise’s alleged contribution to a harm, although these may not be framed in human rights terms. The weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.*<sup>ccclxxvii</sup>

An example of the daily decisions which also render Transfield complicit, is well illustrated by the example of a baby’s risk assessment undertaken by the company. As outlined in Section 6 above, there has been an almost overwhelming consensus for more than a decade now that children, and most especially babies, should not be in detention, and will suffer serious harm should they be held there. During the period of Transfield’s provision of essential services to the centers, there have been numerous reports, evidence given by medical professionals and findings by international organisations, all of which have urged the removal of children specifically from the Nauru ODC, specifically citing various features of the centre that render it unsafe for children. Yet, in Transfield’s own words delivered to the 2015 Senate Inquiry, this is how the company completed a risk assessment to transfer a baby to Nauru:

*“Whether or not infants are brought to Nauru is a policy decision made by the Australian Government. Transfield Services did not undertake a review in respect of the merits of that decision. The Risk Assessment attached (which is provided to the Committee on a confidential basis) was conducted on the basis that infants would be brought to Nauru and identifies a series of matters that Transfield Services identified that were relevant to services it provided – noting that at the time, welfare and medical services were provided by other service providers and the risks associated with those services were not dealt with in this document. In that regard, it is noted that Transfield Services scope of services relating to the transfer of babies to Nauru comprised procurement of items that would be needed for them at the RPC (including the fit-out of accommodation and bathing rooms and special items at the canteen), transport and escort of the babies and the responsible delegate of Save the Children Australia by car to the RPC after they arrived in Nauru under the direction, advice and consultation with Save the Children Australia and the Department (and any others required by the Department). Save the Children Australia was otherwise responsible for the welfare services of children and IHMS was also responsible for provision of medical and health services”*<sup>ccclxxviii</sup>

In excluding any consideration of the merits, the safety, and the best interests of the child in transferring a child into the centre (refer to section 7.5 regarding the central human rights standard of the ‘best interests of the child’), Transfield has already rendered itself complicit in the child’s predicted (and predictable) abuse. In recent weeks, we have seen medical staff at one of Australia’s major hospitals refuse to discharge children back into detention, citing the inherently abusive nature of it.<sup>ccclxxix</sup> In a context like this, Transfield’s refusal to consider the ‘merits’ looks increasingly tenuous.

#### **8.2.4 Transfield’s shareholders, investors and clients could be linked through a business relationship**

Enterprises in linkage relationships with Transfield, such as its clients, financiers and investors, can share in an ‘indirect complicity’ in adverse human rights impacts and in the responsibility to “seek to prevent or mitigate adverse human rights impacts” occurring in offshore immigration detention centres. The responsibility of enterprises linked to offshore immigration detention contractors will be the subject of a future NBIA report.

### 8.3 Due diligence: the foreseeability of significant harm

The UN Guiding Principles interprets due diligence to mean:

*Due diligence has been defined as “such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case”. In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.*<sup>ccclxxx</sup>

Of grave concern is the predictable nature of the abuses that have occurred, and the obvious foreseeability of serious harm at Transfield’s point of entry - the re-opening of the ODCs in 2012. The history of evidence clearly demonstrated (with particular acuity given the Pacific Solution experience in 2011 – 2008) that mandatory and indefinite detention of asylum seekers on remote islands will cause significant mental and physical harm to those detained. It is very difficult to understand how even the most basic due diligence could have failed to apprehend this risk, given the substantial coverage of the issue across readily accessible media. Yet, Transfield, with no previous involvement in the ODCs, decided within 48 hours in September 2012 that it would mobilise to provide essential services to a re-opened offshore detention regime.

### 8.4 Transfield is complicit in the actions of its subcontractor

According to the Senate Inquiry Report: “Contracting arrangements mean that the department is unable to deal directly with Wilson Security.”<sup>ccclxxxi</sup> This clear chain of command, together with the contractual arrangements outlined in Section 4 above, it is plain that Transfield, as lead contractor, takes final responsibility for the actions of its subcontractor.

### 8.5 Can Transfield prevent or mitigate the harm?

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*“We are making a positive contribution to the lives of asylum seekers. The care and wellbeing of asylum seekers is paramount in our processes, decisions and actions. We also spend a considerable amount of time and effort in analysing our activity in the centres and looking for continuous improvement in outcomes”.*  
*Transfield Services, September 2015*<sup>ccclxxxii</sup>

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As outlined in Section 7 above, arbitrary detention for purposes of deterrence, will inevitably lead to harm. Dr Peter Young, psychiatrist and former director of mental health for IHMS, who supervised the Nauru and Manus ODCs at the time at which Transfield provided services states the impossibility of mitigation most clearly:

*“But you can’t mitigate the harm, because the system is designed to create a negative mental state. It’s designed to produce suffering. If you suffer, then it’s punishment. If you suffer, you’re more likely*

*to agree to go back to where you came from. By reducing the suffering you're reducing the functioning of the system and the system doesn't want you to do that.*

*"Everybody knows that the harm is being caused and the system carries on. Everybody accepts that this is the policy and the policy cannot change. And everybody accepts that the only thing you can do is work within the parameters of the policy.*

The question for Transfield is, does it have any leverage over the Federal Government to prevent the abuses?

The UN Guiding Principles interpret leverage to be:

*Leverage is an advantage that gives power to influence. In the context of the Guiding Principles, it refers to the ability of a business enterprise to effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact.*<sup>ccclxxxiii</sup>

And they go on to say:

*If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage there may be ways for the enterprise to increase it. Leverage may be increased by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors. There are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. **Here, the enterprise should consider ending the relationship**, taking into account credible assessments of potential adverse human rights impacts of doing so. (Art 19)*

At this point, it is also worth noting that, Transfield's activities and commitment to support and promote human rights including through its malarial prevention activities<sup>ccclxxxiv</sup>, may contribute to the enjoyment of these rights. But doing so does not offset a failure to respect human rights through its operations on the Offshore Detention Centres.<sup>ccclxxxv</sup>

The UN Guiding Principles explicitly recognise that companies may undertake commitments or activities to support and promote human rights, which may contribute to the enjoyment of these rights. But "there is no equivalent of a carbon off-set for harm caused to human rights: a failure to respect human rights in one area cannot be cancelled out by a benefit provided in another."<sup>ccclxxxvi</sup>

## 8.6 Can anyone mitigate the harm? The role of NGOs

The Guiding Principles apply to 'business enterprises'. The term 'business enterprise' is not defined, but the Guiding Principles contemplate application to a range of organisational structures and sizes. Guiding Principle 14 states that:

*The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.*

Non-government organisations (NGOs) that engage in business relationships should be regarded as being subject to the Guiding Principles. NGOs contracted to provide services in the RPCs have entered into contracts on commercial terms and receive payments under those contracts. The contracts could equally have been awarded to for-profit companies, as evidenced by Transfield's takeover of the contract to provide welfare services in the MODC from the Salvation Army in February 2014.



It is not unusual for business and human rights standards to apply to both business enterprises and not-for-profits engaged in a business relationship. For example, the Committee on the Rights of the Child's *General Comment 16 on State obligations regarding the impact of the business sector on children's rights* addresses obligations regarding businesses and not-for-profit organisations that play a role in the provision of services that are critical to the enjoyment of children's rights.<sup>ccclxxxvii</sup>

The Swiss National Contact Point for the OECD Guidelines for Multinational Enterprises recently accepted a complaint against The *Fédération Internationale de Football Association (FIFA)*, *arguing that*: 'The key question should therefore be whether an entity is involved in commercial activities, independently of its legal form or its sector of activity.'<sup>ccclxxxviii</sup>

NGOs may be better placed than for-profit companies to meet some of the standards set out in the Guiding Principles. For example, NGOs that take a rights-based approach to their work are more likely to meet their responsibility to adopt a human rights policy (Guiding Principle 16) and conduct human rights due diligence (Guiding Principle 17). However, the Guiding Principles also provide that a business enterprise's commitments or activities that support and promote human rights do not offset a failure to respect human rights throughout their operations.<sup>ccclxxxix</sup>

While the human rights mandate and rights-based operating systems of a not-for-profit organisation are relevant to the organisation's ability to meet its responsibilities, the substance of the Guiding Principles is the same for NGOs and companies. An argument to the contrary would have the implication that a not-for-profit, rights-based organisation could be held to a lower standard of human rights compliance than a traditional business enterprise.

NGOs that contract with the Department of Immigration and Border Protection (DIBP) to provide services at the ODCs therefore have an obligation to take 'appropriate action' to respond to human rights violations (Guiding Principle 19).

Guiding Principle 19 provides that appropriate action will vary according to:

- (a) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;
- (b) The extent of its leverage in addressing the adverse impact.

The official commentary attached to Guiding Principle 19 states that:<sup>cccxc</sup>

*Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.*

The Interpretive Guide also elaborates on the meaning of 'appropriate action' in cases where an enterprise *contributes to* an adverse human rights impact:<sup>cccxi</sup>

*Where it contributes or may contribute to such an impact, it should similarly take action to cease or prevent the contribution, and also use its leverage to mitigate any remaining impact (by other parties involved) to the greatest extent possible. In this context, "leverage" means the ability to effect change in the wrongful practices of the party that is causing or contributing to the impact.*

If a contracting NGO contributes to human rights abuses in the RPCs through its participation in the offshore detention regime, then ceasing or preventing that contribution would involve ending the business relationship with the DIBP.

If the NGO is not contributing to the adverse human rights impact, but is instead *linked to adverse human rights impacts through its business relationship*, the NGO should use its leverage to stop the abuse and, if unsuccessful, consider ending the business relationship. This consideration should take into account the severity of the abuse as well as credible assessments of the human rights impact of exiting. The official commentary to the Guiding Principles provides that:<sup>cccxcii</sup>

*Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity, the situation is more complex. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.*

The Interpretive Guide also provides specific guidance for enterprises that are considering entering into a new relationship with parties that have been involved in human rights abuses in the past:<sup>cccxciii</sup>

*In this case, the enterprise should first assess whether it is likely to be able to use its relationship to mitigate the occurrence of such abuse in connection with its own operations, products or services and try to ensure—through the terms of contract or other means—that it has the leverage to do so. If it assesses that this is possible, then the risks of entering the relationship may be deemed acceptable, provided the enterprise then pursues action to mitigate them. If it assesses that it will not be able to mitigate the risk of human rights abuses by the other party or that the risks to human rights are simply too high, it will be ill-advised to enter the relationship.*

The abuses taking place within the RPCs are severe and, while Australia's policy settings remain the same, the capacity for an NGO to effectively end or mitigate the harm is extremely limited. NGOs that have contracted to provide services at the RPCs in the past have lacked the leverage required to end or substantially mitigate the abuses outlined in this report. As Save the Children Australia stated in its submission to the Senate inquiry into the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru:<sup>cccxciv</sup>

*Save the Children believes that it is the act of prolonged and arbitrary detention that creates the circumstances that give rise to harm. No amount of hard work, collaboration or improvement to process or infrastructure can make up for this fact. Such a conclusion is supported by the Moss Review and other recent inquiries. Accordingly, the only way to guarantee the rights and wellbeing of asylum seekers on Nauru is for the Australian Government to immediately end the practice of prolonged and mandatory detention.*

In these circumstances the approach that is most consistent with the standards set out in the UNGPs is for NGOs to refuse to participate in the abuses taking place within the RPCs.

## 9 Transfield's obligation to Remedy

### 9.1 Right to a Remedy

UN bodies have consistently recognised that for rights to have meaning, effective remedies must be available to redress violations.<sup>cccxcv</sup> The right to an effective remedy is provided for in several human rights instruments.<sup>cccxcvi</sup> Article 2 of the *International Covenant on Civil and Political Rights* requires that:<sup>cccxcvii</sup>

*Each State Party to the present Covenant undertakes:*

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
- (c) To ensure that the competent authorities shall enforce such remedies when granted.*

To be effective, remedies must be capable of leading to a prompt, thorough, and impartial investigation, cessation of the violation and adequate reparation.<sup>cccxcviii</sup> Reparation may include restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition.<sup>cccxcix</sup>

The right to a remedy is the third pillar of the UN Guiding Principles on Business and Human Rights. The foundational principle on access to remedy is contained in Guiding Principle 25:

*As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.*

Operational principles on the right to a remedy are set out in Guiding Principles 26-31:

- 26. States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.*
- 27. States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.*
- 28. States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms*
- 29. To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.*
- 30. Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.*
- 31. In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:*
  - (a) legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;*
  - (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;*
  - (c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;*

- (d) *Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;*
  - (e) *Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;*
  - (f) *Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;*
  - (g) *A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;*
- Operational-level mechanisms should also be:*
- (h) *Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances*

## 9.2 Transfield's obligation to remedy

The corporate responsibility to respect human rights also incorporates the right to a remedy and Guiding Principle 22 provides that 'businesses that have caused or contributed to adverse impacts should provide for or cooperate in their remediation through legitimate processes'.<sup>cd</sup> The interpretative guide to the Guiding Principles specifies that:<sup>cdi</sup>

*an enterprise cannot, by definition, meet its responsibility to respect human rights if it causes or contributes to an adverse human rights impact and then fails to enable its remediation.*

The obligation to provide an effective remedy is not currently being met by the Governments of Australia, Nauru and PNG, or by Transfield, and the human rights abuses set out in this report are not being adequately investigated, addressed or remediated.

## 9.3 The right to remedy unfulfilled - Nauru

The Moss Inquiry found that "the Nauruan authorities have a limited capacity to investigate, record and prosecute incidents of sexual and other physical assault in the Centre and in Nauru."<sup>cdii</sup> The former Chief Justice of Nauru, Geoffrey Eames, supported the view taken by the Moss Inquiry in his submission to the Senate Committee inquiring into conditions and circumstances at the NRPC, which states:<sup>cdiii</sup>

*In the last year there have been many allegations of incidents both inside the Detention Centre, and outside, concerning assaults on refugees or detainees. It is reasonable to assume that the atmosphere of secrecy that is determinably applied by the government has as one purpose the suppression of publicity concerning such complaints. It is also reasonable to assume that secrecy in that regard serves the interests of the Australian government, not just the interests of the Nauru government.*

*The police force shows little appetite for investigating or prosecuting politically unpopular conduct, such as allegations that persons declared refugees had been assaulted upon release into the Nauruan community. Likewise, some members of the police force seem to have little respect for the courts, as exemplified by the officer in charge of Peter Law's deportation, who simply ignored a Supreme Court injunction.*

*If Australia is to take responsibility for the welfare of people transferred by the government to Nauru then the Nauru and Australian public must be assured that allegations of assault and other criminal conduct will be genuinely and thoroughly investigated. Where such thorough investigations might be seen by Nauru police to be unwelcome, so far as the Nauru government is concerned, it is unlikely that they will be undertaken.*

Similarly, the Senate Committee expressed grave concerns about the way in which allegations of abuse and mistreatment are dealt with. The Committee found that these structures were not in

place for abuses within the NRPC to be reported, much less independently investigated and remedied. The Committee's final report states that [emphasis added]:<sup>cdv</sup>

*The committee is deeply concerned that without this inquiry, the allegations heard and evidence received would not have been uncovered. **There appears to be no other pathway for those affected by what they have seen and experienced in the Regional Processing Centre on Nauru to disclose allegations of mistreatment, abuse or to make complaints.** The department has been unaware of serious acts of misconduct by staff of contractors, as those contractors have not adequately fulfilled their reporting obligations. The committee believes that no guarantee can be given by the department that any aspect of the RPC is run well, and that no guarantee of transparency and accountability can be given until significant changes are made and accountability systems are put in place.*

The Senate Committee established that the Nauruan legal system was not capable of adequately addressing the human rights violations taking place within the NRPC:<sup>cdv</sup>

*In the committee's view, the Government of Australia's purported reliance on the sovereignty and legal system of Nauru in the face of allegations of human rights abuses and serious crimes at the RPC is a cynical and unjustifiable attempt to avoid accountability for a situation created by this country. The committee's view in this regard is strengthened by the evidence received about the significant challenges, both logistical and political, under which the law enforcement and justice systems of the Republic of Nauru are currently operating. Given the small size and limited capacity of institutions in Nauru, the present serious concerns about the state of the rule of law there, and the absence of a comprehensive legal and policy framework for child protection, the committee is of the view that Australia must assume greater responsibility for ensuring that the rights of asylum seekers at the RPC are protected and enforced to the standards required by Australian and international law.*

The Committee was also of the view that the Australian Government's oversight and management of contractors is inadequate:<sup>cdvi</sup>

*The committee considers that a system in which contractors are essentially left to manage and report on complaints against their staff is inadequate. The committee recognises that the department receives reporting and is responsible for general oversight of its contractors, but given the pervasive culture of secrecy which cloaks most of the department's activities in relation to the Nauru RPC, the committee believes that a far greater level of scrutiny, transparency and accountability is required.*

#### 9.4 The right to remedy unfulfilled – Manus Island (PNG)

Due to its remote location and restrictions on entry and reporting, regular human rights monitoring of the conditions at the MRPC has been extremely difficult. To date, UNHCR has been permitted to inspect the facility on three occasions in January, June and October 2013, and Amnesty International allowed inspections twice in November 2013 and March 2014. Both organisations found that at the time of their visits, conditions at the Manus Island Offshore Detention Centre breached basic minimum standards of detention under international law and required urgent remediation.<sup>cdvii</sup>

The Senate Standing Committee on Legal and Constitutional Affairs inquiring into the incident at the Manus Island Detention Centre from 16 February to 18 February 2014 requested permission to visit the MRPC in the conduct of its inquiry, but received no response from the prime minister, the foreign affairs minister nor the immigration minister.<sup>cdviii</sup> The Committee noted that access to the Manus Island Offshore Detention Centre had been denied to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, as well as to various lawyers and journalists.<sup>cdix</sup> In its final report, the Committee concluded that the right to a remedy had not been fulfilled:<sup>cdx</sup>

*The committee considers that making reparations to individuals whose rights have been violated in the incident at the Manus Island RPC, and preventing recurrences of human rights violations, is essential from the perspective of Australia's international obligations. In the context of the physical*

*and psychological injuries suffered by asylum seekers during the incidents from 16 to 18 February 2014, the committee is of the view that an effective remedy should include appropriate reparations for wrongs committed, as well as adequate medical treatment including mental health services. The committee is extremely concerned at evidence suggesting that medical treatment for those who were injured has been unsatisfactory in the months subsequent, and considers that this must be rectified as a matter of urgency.*

The Senate Standing Committee also commented on the absence of complaint or grievance mechanisms and the general lack of transparency and accountability at the MRPC:<sup>cdxi</sup>

*Indeed, this inquiry presented the first opportunity for some of these employees to come forward and give evidence, under the protection of parliamentary privilege, without fear of being sued by their former employers for speaking out about the true nature of conditions on Manus Island.*

*The committee is also troubled by reports that UN observers, respected human rights organisations, Australian lawyers, the Australian Human Rights Commission and the media have all been denied access to the Manus Island RPC at various times since its reopening in 2012. Given the government's attempts to cover up or discredit evidence which exposes the true nature of conditions at the Manus Island RPC, the committee considers that it is imperative in the interests of transparency and public accountability that these groups be allowed appropriate access to the Manus Island RPC without interference.*

## 9.5 Improvement doesn't equate to remedy

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*"[m]uch of [NBIA's] source data regarding conditions at Manus and Nauru is based on outdated public information, and is therefore incorrect."  
Transfield Services, September 2015.<sup>cdxii</sup>*

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As the quote above indicates, there does not appear to be an adequate understanding on the part of Transfield that the historical background of evidence regarding its complicity in abuse is relevant. Improvements in services can be welcomed, but they don't fulfil an obligation to remedy for past abuses. Transfield is now facing the reality that, for the roughly 2000 asylum seekers and refugees on Manus Island and Nauru, they are the victims of its historical complicity in abuse. The response required by Transfield under the UN Guiding Principles, is to enable a remedy for these abuses through legitimate processes, not only reduce the likelihood of their reoccurrence.

A woman who has been sexually abused in a dark toilet block is not remedied when lighting is installed, she is remedied when there is a prompt, thorough, and impartial investigation, cessation of the violation and adequate reparation.<sup>cdxiii</sup> Similarly for all those asylum seekers suffering severe mental harm in the Nauru ODC from years of arbitrary detention, being able to take a walk outside the ODC at night does not remedy the situation or prevent ongoing abuse. Specialist medical care and immediate and genuine freedom of movement need to be provided at a minimum. Given the current failure of the legal systems in both PNG and Nauru to deliver any remedy to date, it is hard to see how Transfield could discharge its obligation to remedy in these jurisdictions.

## 10 Recommendation

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*"We do not influence government policy in this area, so we think the activists' attention to us is misplaced," she says. "If they want to change government policy, they should engage directly with the government."  
Transfield Chair, 2015*

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In NBIA's assessment, complicity in the offshore detention regime as laid out in Sections 6 and 7 above could never be considered legitimate and lawful under international law. Our recommendation to Transfield is:

1. Remedy the historical abuses in which you have been complicit
2. End your service provision to the ODCs.

If Transfield chooses to re-contract to the ODCs, it will do so with this report in front of it, with full, prior knowledge of both the practical impossibility of complying with its obligation to respect human rights, and its certain complicity in gross human rights abuses inflicted upon a population already suffering from previous impacts.

No company should sign up to business in abuse.

## 11 Appendix

### 11.1 List of Acronyms

ADIBP – Australian Department of Immigration and Border Protection  
AHRC – Australian Human Rights Commission  
AMA – Australian Medical Association  
ANCP – Australia’s OECD National Contact Point  
APNA – Australian Primary Health Care Nurses Association  
AU – African Union  
ASEAN – Association of Southeast Asian Nations  
ASX – Australian Securities Exchange  
CAT – UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment  
CEDAW – UN Convention on the Elimination of Discrimination against Women  
CERD – UN Convention on the Elimination of All Forms of Racial Discrimination  
CRC – UN Convention on the Rights of the Child  
CoE – Council of Europe  
CPT – European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment  
CRPD – UN Convention on the Rights of Persons with Disabilities  
DAT – Detention Assurance Team  
ECHR – European Convention on Human Rights and Fundamental Freedoms  
EU – European Union  
EC – European Commission  
HRLC – Human Rights Law Centre  
ICC – International Criminal Court  
ICCPR – International Covenant on Civil and Political Rights  
ICERD – International Convention on the Elimination of All Forms of Racial Discrimination  
ICESCR – International Covenant on Economic, Social and Cultural Rights  
IHMS – International Health and Medical Services  
ILO – International Labour Organization  
IOM – International Organization for Migration  
IHAG – Immigration Health Advisory Group  
MIDC – Manus Island Detention Centre  
MRPC – Manus Regional Processing Centre (also referred to as MIDC – Manus Island Detention Centre)  
NCPs – OECD National Contact Points  
NDC – Nauru Detention Centre  
NGOs – Non-government organisations  
NRPC – Nauru Regional Processing Centre (also referred to as NDC – Nauru Detention Centre)  
OAS – Organization of American States  
OECD – Organisation for Economic Co-operation and Development  
ODCs – Offshore Detention Centres  
OSSTT – Overseas Services to Survivors of Torture and Trauma  
PNG – Papua New Guinea  
RACP – Royal Australasian College of Physicians  
RACGP – Royal Australian College of General Practitioners  
RAID – Rights and Accountability in Development



RPCs – Regional Processing Centres (also referred to as ODCs – Offshore Detention Centres)  
RSD - refugee status determination  
UDHR – Universal Declaration of Human Rights  
UN – United Nations  
UNHCR – United Nations High Commissioner for Refugees  
UNHRC – United Nations Human Rights Committee

### **Companies & Organisations (Frequently Mentioned)**

Amnesty International  
G4S  
International Health and Medical Services (IHMS)  
Salvation Army  
Save the Children Australia ('SCA')  
Transfield Services ('Transfield')  
Wilson Security

### **Titles**

*A Last Resort* (AHRC, 2005)  
*Guardian Australia*  
The AHRC 'Forgotten Children' report – *The Forgotten Children: National Inquiry into Children in Immigration Detention* (AHRC) also in quotes – *The Forgotten Children Inquiry*  
*'The Moss Review' – Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru*  
*"The Senate Select Committee" - Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru*  
*Human Rights Standards for Immigration Detention* (AHRC)  
*This is Breaking People* (Amnesty International)  
*This is Still Breaking People* (Amnesty International)  
*UN Guiding Principles Framework*  
*Frequently Asked Questions about the Guiding Principles on Business and Human Rights* (published by the UN Office of the High Commissioner for Human Rights in 2014)  
*'the Interpretive Guide; the Interpretive Guide to the Guiding Principles' - The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (UN)  
*'the Implementation Guide to the Guiding Principles' - Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (UN)  
*UNHCR Detention Guidelines : Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (UNHCR)  
Australian Securities Exchange (ASX) Corporate Governance Council's *Corporate Governance Principles and Recommendations*  
*UNGP Implementation Guide*

(Ed Note: I have decided that the colloquial versions of the titles – Interpretive Guide and Implementation Guide – should be italicised even though it isn't the correct title. This is because they are so frequently referred to.)

### **Treaties & Conventions**

- 10 Principles of the United Nations Global Compact
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- Convention on the Elimination of Discrimination against Women (CEDAW)

- Convention on the Rights of the Child (CRC)
  - Convention on the Rights of Persons with Disabilities (CRPD)
  - Universal Declaration of Human Rights (UDHR)
  - Refugee Convention (1951)
  - International Bill of Human Rights
  - International Covenant on Civil and Political Rights (ICCPR)
  - International Covenant on Economic, Social and Cultural Rights (ICESCR)
  - International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
  - 
  - International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work
  - OECD Guidelines for Multinational Enterprises
- United Nations Guiding Principles on Business and Human Rights;

## 11.2 Table of Violations

Section of report	Relevant rights
Deprivation of liberty and arbitrary detention	art 9 UDHR art 13 UDHR art 9(1) and (4) ICCPR art 37(b) and (d) CRC
Conditions in detention	art 5 UDHR article 7 ICCPR art 2 CAT art 16 CAT art 37(a) CRC art 10 ICCPR art 17 ICCPR art 12 UDHR art 11 ICESCR art 24 UDHR art 13 ICESCR art25 UDHR
Children	art 3(1) and (2) CRC art 6 (1) and (2) CRC art (16) art 19 (1) and (2) CRC art 24(1) CRC 27(1) CRC 27(3) CRC 28 CRC 31 CRC 39 CRC
Right to health	ICESCR art 12 CEDAW art 2
Violence	art 3, UDHR art 6(1) CCPR
Vulnerable people	art 2 CEDAW art 2 ICCPR
Discrimination	art 2 UDHR

	art 26 ICCPR
Right to a remedy	Art 14 CAT Art 2 ICCPR Art 39 CRC art 8 UDHR
Refugee rights	UDHR 14(1) RC 31(1) RC art 33. RC art 26 art 3 CAT

### **11.3 Endnotes**



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NBIA is an independent, non-profit, non-government initiative bringing together a cross-section of Australian society including faith-based groups, unions, lawyers and human rights campaigners. NBIA seeks to end the complicity of corporate entities in human rights abuses perpetuated within Australia's immigration system.

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