



Australian
Human Rights
Commission

Ms BK, Ms CO and Mr DE
on behalf of themselves
and their families v
Commonwealth of Australia
(Department of Home Affairs)

[2018] AusHRC 128

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families v Commonwealth of
Australia (Department of Home
Affairs)**

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Report into the practice of the Australian
Government of sending to Nauru families
with young children who arrived in
Australia seeking asylum

Australian Human Rights Commission 2018



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Commission**

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**Australian
Human Rights
Commission**

The Hon Christian Porter MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed a report pursuant to ss 11(1)(f) and 19(1) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaints made by Ms BK, Ms CO and Mr DE on behalf of themselves and on behalf of their families (**the complainants**), against the Commonwealth of Australia, represented by Department of Home Affairs, formerly the Department of Immigration and Border Protection (**department**). The complaints arose from the practice of the Australian Government of sending to Nauru families with young children who arrived in Australia seeking asylum.

The complainants are the members of three Iranian families, which each had a child who was under six years old when they were taken to Nauru. They complain about the conditions and facilities in the regional processing centre on Nauru and also say that families with babies or young children should not have been sent to Nauru, given the nature of the conditions there.

The complaints raise human rights issues under articles 7, 9(1), 10(1) and 17(1) of the *International Covenant on Civil and Political Rights* and articles 3, 6(2), 16(1), 24, 27(1) and 37 of the *Convention on the Rights of the Child*.

As a result of this inquiry, I have found that the regional processing centre on Nauru was not an appropriate place to send families with young children. By engaging in this practice, and by other conduct identified in this report, the Commonwealth breached the human rights of Ms BK, Ms CO and Mr DE and their families. This inquiry and report also considered the conditions facing families at the Nauru regional processing centre more generally.

The department provided a response to my findings and recommendations on 4 December 2018. That response can be found in section 9 of this report.

I enclose a copy of the report.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Richard Lancaster'.

Richard Lancaster SC
Delegate of the President
Australian Human Rights Commission

December 2018

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1 Introduction and summary

1. The Australian Human Rights Commission has conducted an inquiry into three complaints arising from the practice of the Australian Government of sending to Nauru families with young children who arrived in Australia seeking asylum. The primary finding of the inquiry is that the regional processing centre on Nauru was not an appropriate place to send families with young children. By engaging in this practice, and by other conduct identified in this report, the Commonwealth breached the human rights of the members of those families.
2. The inquiry has investigated and assessed the claims made by three Iranian asylum seekers, Ms BK, Ms CO and Mr DE on behalf of themselves and their families (**the complainants**). Each family had a child who was under six years old when they were taken to Nauru. The claims made by those families are considered in detail. The report also considers the conditions facing families at the Nauru regional processing centre more generally.
3. The inquiry was undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**).
4. The complainants arrived in Australia by boat between 22 and 26 July 2013. They were initially detained at Christmas Island Immigration Detention Centre before being taken to Nauru pursuant to Australia's regional processing arrangements. They complain that they were detained in the regional processing centre on Nauru arbitrarily. They complain about the conditions in the centre and the impact that detention has had on their physical and mental health. They also say that families with babies or young children should not have been sent to Nauru, given the nature of the conditions there.
5. The complaints raise human rights issues under articles 7, 9(1), 10(1) and 17(1) of the *International Covenant on Civil and Political Rights (ICCPR)* and articles 3, 6(2), 16(1), 24, 27(1) and 37 of the *Convention on the Rights of the Child (CRC)*. I reproduce the text of each of those articles in **Annexure A** to this report.
6. The complainants have asked that I make a direction under s 14(2) of the AHRC Act, prohibiting the disclosure of the identity of each of them and their family members in relation to the complaints. I have made a direction to that effect because I am satisfied that such a direction is necessary to protect the privacy and human rights of the complainants. In particular, this report contains personal details of the complainants, including sensitive information about their medical history. Further, two of the families have not yet been permitted to make applications for refugee status. Disclosure of their identities may place them at risk if their applications for refugee status are not successful.
7. Throughout this report, I have referred to the complainants using the following pseudonyms: Ms BK, her husband Mr BL and their daughter Miss BM; Ms CO, her husband Mr CP and their son Master CQ; and Mr DE, his wife Ms DF and their son Master DG.

1.1 Decision on jurisdiction

8. At the request of the Commonwealth, I agreed to consider as a preliminary question the scope of the Commission's jurisdiction to conduct this inquiry.
9. On 4 November 2016 I provided the parties with my decision in relation to jurisdiction. A copy of my decision in relation to jurisdiction is reproduced in **Annexure C** to this report.
10. In summary of my decision on jurisdiction in November 2016, I found that Australia has human rights obligations under the ICCPR and the CRC outside of its territory when it is exercising 'effective control' over people or territory. I found that the Commission has jurisdiction to inquire into allegations that the Commonwealth has acted in a way that is inconsistent with or contrary to Australia's obligations under the ICCPR or the CRC, including where the relevant acts occurred outside of Australia's territory. I found in November 2016 that the alleged acts or practices raised by the complaints are ones that, after allowing for as yet undiscovered facts, Australia could be responsible for under a relevant international instrument.
11. In the course of making the decision about jurisdiction, I also decided to continue to inquire into three categories of complaints, namely complaints about:
 - arbitrary detention at the regional processing centre on Nauru
 - treatment in detention that was inconsistent with humanity and with respect for the inherent dignity of the human person
 - the decision to send families with young children to Nauru given the conditions in which they would be detained.
12. In relation to the complaints of arbitrary detention, on the basis of the material available to me at the time of the decision on jurisdiction, and based on the findings of the High Court in *Plaintiff M68/2015 v Minister for Immigration and Border Protection (Plaintiff M68)*,¹ I was not satisfied that the detention of the complainants was an act done directly by the Commonwealth or by organs of the Government of Nauru that were placed at the disposal of the Commonwealth, or under the direction or control of the Commonwealth. I said that unless new information comes to light in the course of the inquiry, I was minded to find that the detention of the complainants was not an act done by or on behalf of the Commonwealth and was not an act for which the Commonwealth was responsible under international law.
13. In relation to the complaints about treatment in detention, I found that the Commonwealth, including through its contract with Transfield, was exercising a sufficient degree of control over the regional processing centre and over the people within the centre (including the complainants) for its human rights obligations to be engaged with respect to the treatment of people within the centre on Nauru.

14. In relation to the complaints about the transfer to Nauru, I found that there were relevant discretionary acts (and failures to act) made in Australia both by officers of the department and by the Minister into which the Commission has jurisdiction to inquire. Further, I found that a *non-refoulement* claim based on a real risk of conduct in another country that would be in breach of articles 9(1) or 10(1) of the ICCPR is a legitimate contention and a complaint into which I may inquire, and that (as the department appeared to acknowledge before November 2016) there are real issues about whether the department's Best Interests Assessment for children liable to transfer to Nauru is consistent with the CRC.
15. Although the then Department of Immigration and Border Protection, now the Department of Home Affairs (**the department**), initially said that it did not agree with my decision in relation to jurisdiction, no party has sought to challenge the correctness of that decision.
16. I do not repeat in this report all of the background leading to the making of my decision in relation to jurisdiction. I set out briefly in section 2.2 below some of steps taken between making that decision and issuing this report in relation to the substance of the complaints.

1.2 Findings on the substance of the complaints

17. This section of the report provides a short summary of my findings on the substance of the complaints. It should be read together with the findings, and the reasons for those findings, that are set out in the body of the report. In **Annexure B** to this report, I set out a table that identifies the key breaches of human rights that I have found in respect of each of the complainants and their family members, along with the paragraphs of this report in which those findings are made.
18. As a result of this inquiry, I find that the regional processing centre on Nauru was not an appropriate place to send families with young children, such as the complainants.
19. I set out in section 5.4 below my assessment of the general conditions of detention in the centre on Nauru. In relation to the conditions that confronted all of the complainants at the centre, my findings are as follows:
 - a) The accommodation in vinyl marquees was not adequate or appropriate in the circumstances, given the adverse living conditions they faced on the phosphate plateau of central Nauru. This accommodation failed to provide them with sufficient protection from heat, rain and risk of serious disease. As a result, the accommodation did not provide children with an adequate standard of living, contrary to article 27(1) of the CRC; and it negatively affected their right to survival and development, contrary to article 6(2) of the CRC.
 - b) The accommodation of up to five or six families in each marquee with partitions that did not reach the ceiling was contrary to their right to privacy under article 17(1) of the ICCPR and article 16(1) of the CRC.
 - c) The deficiencies in the accommodation and overcrowding in the marquees contributed to poor health outcomes and facilitated the spread of illness, contrary to the right of children under article 24(1) of the CRC.

- d) In particular, sending two of the complainant families to Nauru in the middle of a dengue fever epidemic to live in conditions conducive to the spread of this disease was contrary to the rights of their children to survival and development and to health under articles 6(2) and 24(1) of the CRC.
- e) The failure to address identified issues with the infrastructure of the regional processing centre, which carried a risk of traumatic physical injury to children, was contrary to the duty of the Commonwealth under article 3(2) of the CRC to ensure that children have the protection and care that is necessary for their wellbeing.
- f) Taken together, the matters set out above indicate that the complainants were not treated with humanity and with respect for their inherent dignity, contrary to articles 10(1) of the ICCPR and 37(c) of the CRC.

20. I consider some additional specific allegations made by each of the complainant families in sections 5.5, 5.6 and 5.7 below. In relation to these allegations, my findings are as follows:

- a) The failure to take immediate steps to give effect to the urgent recommendations of treating doctors that Ms BK be transferred to Australia to give birth, as a result of complications in her pregnancy, was contrary to article 10(1) of the ICCPR and 24(2)(d) of the CRC.
- b) Further, the delay in making a decision to transfer Ms BK to Australia to give birth, in light of the advice that this delay was contributing to the development of a psychiatric illness, was contrary to article 7 of the ICCPR.
- c) The combination of the detention environment and the delay in the removal of Ms BK and her family had an adverse impact on the mental health and wellbeing of her daughter Miss BM, contrary to article 10(1) of the ICCPR and article 37(c) of the CRC.
- d) The nature of the environment in which Master DG was detained and his treatment while in detention amounted to a failure to treat him with humanity and with respect for his inherent dignity contrary to article 10(1) of the ICCPR and article 37(c) of the CRC.
- e) The delay in medical treatment for Ms DF's chronic knee condition and her stress related alopecia was contrary to article 10(1) of the ICCPR.
- f) More significantly, the failure to make any report to the department of the serious impact of detention on Ms DF's mental health was contrary to rule 25(2) of the Standard Minimum Rules and to article 10(1) of the ICCPR.

21. I consider in section 6 below a range of acts and practices relating to the taking of the complainants to Nauru. My findings are as follows:
- a) The assessment that there were adequate facilities and services in Nauru for families with children over four months old was a serious misjudgment and a flawed decision that placed the complainants and their young children at serious risk of harm. The assessment was contrary to the rights of the complainants under articles 3(2), 6(2), 16(1), 24(1), 27(1) and 37(c) of the CRC and article 10(1) of the ICCPR.
 - b) The ‘best interests assessment’ conducted by the department prior to sending children to Nauru failed to take the best interests of children into account as a primary consideration and was therefore contrary to article 3(1) of the CRC. Further, a process was adopted by the department in circumstances known to the department to involve a significant inconsistency with article 3(1) of the CRC, and the adoption of it amounts to a deliberate breach of the obligations in article 3(1), based on an inflexible policy decision to send asylum seeker families to Nauru.
 - c) I am not satisfied that a proper assessment was undertaken as to whether appropriate support services were available to either Ms CO or Mr DE in the regional processing centre on Nauru or that it was appropriate for them to be transferred there given that their presentation prior to transfer suggested serious mental health issues. As a result, the pre-transfer assessment that there were no barriers to either Ms CO or Mr DE being taken to Nauru was contrary to article 10(1) of the ICCPR.
 - d) The ‘best interests assessments’ for each of the children of the complainants did not properly assess whether ‘appropriate care, services and support arrangements’ were available for each of them. On the contrary, the sparse materials about the ‘assessment’ show that it was inadequate. Given the conditions in which they would be detained, these decisions, effectively authorising the taking of the children to Nauru, were contrary to the rights of the children under articles 3(2), 6(2), 16(1), 24(1), 27(1) and 37(c) of the CRC and article 10(1) of the ICCPR.
 - e) The Minister’s guidelines in relation to s 198AE of the *Migration Act 1958* (Cth) (**Migration Act**) resulted in the department treating the existence of physical and mental health conditions and other vulnerabilities as of little if any importance in the decision to take a person to a regional processing country. The decisions by respective Ministers to make and issue those guidelines and to maintain those guidelines were contrary to the rights of the children of the complainants under articles 3(2), 6(2), 16(1), 24(1), 27(1) and 37(c) of the CRC and contrary to the rights of each of the complainants under article 10(1) of the ICCPR.
 - f) It was a necessary and foreseeable consequence of taking the complainants to Nauru that they would be arbitrarily detained. As a result, the decision to take them there was contrary to their rights under article 9(1) of the ICCPR and article 37(b) of the CRC.

1.3 Recommendations

22. As a result of this inquiry, I make the following recommendations to the Commonwealth in relation to the individual complainants:

Recommendation 1

In relation to Ms BK, Mr BL and Miss BM (and their baby girl more recently born in Australia), I recommend that:

- (i) The Commonwealth confirm in writing that the family will not be taken back to Nauru.
- (ii) The department make a submission to the Minister recommending that he lift the bar under s 46A of the Migration Act to allow the family members to make applications for protection visas, and the Minister accept that recommendation.
- (iii) Pending the determination of any applications for protection visas, the family be granted bridging visas with work rights.
- (iv) The Commonwealth pay the family an amount to compensate them for the loss and damage they have suffered as a result of the breaches of their human rights identified in this report. Further details of the methods available to the Commonwealth to provide compensation to the complainants are set out in section 8.1(c) below.
- (v) The Commonwealth provide the family with an apology in relation to the breaches of their human rights identified in this report.

Recommendation 2

In relation to Ms CO, Mr CP and Master CQ (and their baby girl more recently born in Australia), I recommend that:

- (i) The Commonwealth confirm in writing that the family will not be taken back to Nauru.
- (ii) The department make a submission to the Minister recommending that he lift the bar under s 46A of the Migration Act to allow the family members to make applications for protection visas, and the Minister accept that recommendation.
- (iii) Pending the determination of any applications for protection visas, the family be granted bridging visas with work rights.
- (iv) The Commonwealth pay the family an amount to compensate them for the loss and damage they have suffered as a result of the breaches of their human rights identified in this report. Further details of the methods available to the Commonwealth to provide compensation to the complainants are set out in section 8.1(c) below.
- (v) The Commonwealth provide the family with an apology in relation to the breaches of their human rights identified in this report.

Recommendation 3

In relation to Mr DE, Ms DF and Master DG (who have been recognised as refugees and, according to the information most recently provided to the Commission, are currently residing in the community on Nauru), I recommend that:

- (i) The Commonwealth allow the family members to apply for protection visas and the opportunity to resettle in Australia.
- (ii) The Commonwealth pay the family an amount to compensate them for the loss and damage they have suffered as a result of the breaches of their human rights identified in this report. Further details of the methods available to the Commonwealth to provide compensation to the complainants are set out in section 8.1(c) below.
- (iii) The Commonwealth provide the family with an apology in relation to the breaches of their human rights identified in this report.

23. I also make the following systemic recommendations, for the purpose of attempting to prevent a repetition of the acts and practices that I have found to be inconsistent with or contrary to the complainants' human rights:

Recommendation 4

The Commonwealth confirm by a formal decision and public announcement that it will not send unaccompanied minors or families with children who arrive in Australia seeking asylum to the regional processing centre on Nauru.

Recommendation 5

The Commonwealth confirm that it has now decommissioned all of the vinyl marquee accommodation in the regional processing centre on Nauru.

Recommendation 6

The Commonwealth offer to resettle in Australia any unaccompanied minors and families with children that it transferred to Nauru who still remain on Nauru, along with any single adult women who were residing in the vinyl marquee accommodation in the regional processing centre on Nauru.

Recommendation 7

The Commonwealth amend its policies and practices to ensure that people taken to a regional processing country who have a significant medical condition that cannot be adequately addressed in that country are transferred promptly to Australia for medical treatment unless there is a medical reason why another destination is more appropriate. Under that policy, the approval process for medical transfers should be led by persons located in regional processing countries with clinical training in emergency medicine.

Recommendation 8

The department amend its policies and practices to ensure that people who require medical transfers are notified at the earliest opportunity of when and where they will be transferred.

Recommendation 9

The department publish its policies in relation to medical transfers.

Recommendation 10

The department amend its policies and practices in relation to the conduct of best interests assessments for children to ensure that it involves a substantive assessment on an individual basis. This will require that:

- (i) the individual circumstances of each child is actively considered, treated as a primary consideration and weighed against other relevant considerations;
- (ii) no consideration other than the best interests of a child is expressly or implicitly regarded as a consideration that necessarily outweighs the interests of that child, prior to such an assessment being carried out.

Recommendation 11

The department amend its policies and practices to ensure that when decisions are made about children's parents which also concern the rights of children, that the best interests of the children are taken into account as a primary consideration.

2 Background

2.1 Complainants

- 24. Each of Ms BK, Ms CO and Mr DE is a parent who was taken to the regional processing centre on Nauru with their spouse and a child under six years old. The families are all from Iran and are Farsi (Persian) speakers.
- 25. Ms BK made her complaint on her own behalf and on behalf of her husband Mr BL and their then four year old daughter Miss BM.

26. Ms CO made her complaint on her own behalf and on behalf of her husband Mr CP and their then one year old son Master CQ.
27. Mr DE made his complaint on his own behalf and on behalf of his wife Ms DF and their then five year old son Master DG.
28. Mr DE and his family arrived in Australia by boat at Christmas Island on 22 July 2013. The other complainants arrived by boat at Christmas Island on 26 July 2013.
29. The previous week, on 19 July 2013, the then Prime Minister Kevin Rudd had announced that people who arrived in Australia by boat after that date would be subject to offshore processing and had no prospect of being resettled in Australia.² After the federal election on 7 September 2013, this position was continued by the incoming government.
30. The complainants were initially detained on Christmas Island.
31. Ms CO and her son were transferred between a number of detention centres in Australia in December 2013 and January 2014 so that they could obtain medical treatment, before being returned to Christmas Island on 15 January 2014.
32. The families were taken to Nauru in the first half of 2014 pursuant to s 198AD of the Migration Act as follows:
 - (a) on 8 January 2014, Mr DE and his family were taken to Nauru;
 - (b) on 3 May 2014, Ms BK and her family were taken to Nauru;
 - (c) on 23 May 2014, Ms CO and her family were taken to Nauru.
33. In general terms, the complainants allege that:
 - their detention at the regional processing centre on Nauru was arbitrary;
 - while detained at the regional processing centre on Nauru they were not treated with humanity and with respect for the inherent dignity of the human person;
 - the regional processing centre on Nauru was not an appropriate place to transfer families with babies and young children.
34. The complainants raise concerns about the impact of detention on their physical and mental health; the nature and quality of the facilities, services and infrastructure provided to them in detention; their treatment by service providers contracted to the Commonwealth; and their exposure to the risk of disease and to traumatic events while in detention including incidents of self harm by other detainees.

35. On 14 February 2015, Ms CO and her family were transferred from Nauru to the 'Bladin Alternative Place of Detention' (**Bladin**), a detention centre previously operated by the Commonwealth in Darwin, so that Mr CP could receive medical treatment. At the time they were transferred, Ms CO was 17 weeks pregnant. Two weeks after arriving in Australia, they were transferred to the 'Wickham Point Alternative Place of Detention' (**Wickham Point**) because Bladin was scheduled to close. On 6 August 2015 Ms CO gave birth to a baby girl. On 12 February 2016 the family was transferred into community detention in Australia. They remain in Australia but are subject to regional processing requirements. That is, they are 'transitory persons' as defined by s 5 of the Migration Act, they have been brought to Australia pursuant to s 198B for a temporary purpose, and they are therefore required by s 198AH to be taken (again) to a regional processing country once they no longer need to be Australia for that purpose (unless the Minister determines under s 198AE that the requirement to take them to a regional processing country does not apply). The department has maintained the position that the family has 'no pathway in Australia and it is expected that they will return to Nauru once all medical treatment is completed'. So far as I am aware that remains the stated position of the department at the date of finalization of this report.
36. On 3 July 2015, Mr DE and his family were recognised by Nauru as being refugees. Since that time, the family was no longer required to reside at the regional processing centre and the family has been living in the community on Nauru.
37. On 9 December 2014, Mr BL was brought back to Australia in order to receive medical treatment not available in Nauru. He was detained at 'Brisbane Immigration Transit Accommodation' before being returned to Nauru on 12 December 2014. On 13 September 2015, Ms BK was brought back to Australia with her family so that she could give birth to a second child. On 7 October 2015 Ms BK gave birth to a baby girl. On 8 February 2016 the family was transferred into community detention in Australia. They remain in Australia. As with Ms CO's family, the members of Ms BK's family are 'transitory persons' and remain subject to regional processing requirements. It appears that they have not been returned to Nauru as a result of ongoing litigation. The department says that the family has ongoing litigation as part of the 'Plaintiff M68 / Plaintiff M80' caseload. The decision in *Plaintiff M68* is referred to above and discussed in more detail in my decision on jurisdiction in **Annexure C** to this report. The department has previously described these two cases as the 'lead High Court of Australia matters' brought by a number of transitory persons who have 'sought to prevent their return to regional processing countries through legal challenges to Australia's role in regional processing arrangements'.³
38. Accordingly, the periods during which the complainants were detained in the centre on Nauru were as follows:
- (a) Mr DE and his family: from 8 January 2014 to 3 July 2015;
 - (b) Ms BK and her family: from 3 May 2014 to 13 September 2015 (noting that Mr BL was brought to Brisbane for medical treatment from 9-12 December 2014);
 - (c) Ms CO and her family: from 23 May 2014 to 14 February 2015.

2.2 Procedural steps

39. I do not repeat here the procedural steps taken in my inquiry in the period from receiving the complaints up to the making of my decision in relation to jurisdiction. Those steps are set out in that decision in paragraphs 37 to 67, reproduced in **Annexure C** to this report.
40. As I said at the time, I am concerned by the time taken by the department to respond to these complaints. The delay warrants particular criticism in the circumstances of this inquiry, given the serious nature of the allegations made and the fact that two of the complainant families were in detention for a lengthy period (until February 2016, when they were moved into community detention) and are said still to be at risk of being returned to Nauru. No explanation has been offered by the department for the significant delays in responding to requests from the Commission.
41. I note briefly here the steps taken since making my decision in relation to jurisdiction on 4 November 2016.
42. When I provided the parties with my decision about jurisdiction on 4 November 2016, I asked the department to provide on a voluntary basis within 28 days information and documents that I considered relevant to the inquiry. The information and documents sought related to the substance of the complaints made by each of the complainants. In large part, this material related to their treatment in the regional processing centre on Nauru. The department had previously refused to provide material of this kind. The material produced by the department to that point had been limited to material about conduct that took place in Australia and material relevant to determining the Commission's jurisdiction to conduct the inquiry.
43. On 1 December 2016 the department replied to that request, stating that: 'The Department respectfully disagrees with your findings on jurisdiction and is considering its options. Accordingly, the Department is not in a position to meet your request for further information and documents to be provided within the timeframe indicated in your letter.'
44. Officers of the Commission spoke with officers of the department and the Attorney-General's Department (**AGD**) in January 2017 to ascertain whether a voluntary response to the request for information and documents would be provided.
45. On 25 January 2017, the department sent me a letter saying that: 'the Department is actively considering its position' and that it 'is working towards finalising that position without undue delay'.
46. By early March I had not received any response from the department. On 16 March 2017 I wrote to the Secretary to express my concern about the delays in providing a response to my request for information and documents. I noted that the department had not said that the documents do not exist, or that production of them was difficult, or that they are not relevant, or identified any ground that might justify a delay in or refusal of production. I indicated that if I did not receive a substantive response by 30 March 2017, I intended to use the statutory powers available to me to require the production of the information and documents.

2 Background

47. On 31 March 2017, the department sent me a letter repeating matters in its previous letters. It said that: 'the Department is actively considering its position and continues to work towards settling that position. ... The Department is consulting with the Attorney-General's Department regarding your findings.'
48. The following week, officers of the AGD said to officers of the Commission that the department had provided a submission to the Minister for Immigration and Border Protection dealing with the request for information and documents. In those circumstances, I decided not to issue a compulsory notice and to wait for a decision from the Minister.
49. Throughout April, May and June 2017, officers of the Commission followed up with AGD regularly in relation to the status of the submission to the Minister for Immigration and Border Protection. During this period, officers of AGD were in contact with officers of the department and the Minister's office. There was no indication as to when a decision may be made by the Minister.
50. On 28 June 2017, I wrote to the department indicating that I intended to issue a compulsory notice. There was no response to that letter.
51. On 21 July 2017, I issued a notice to the department pursuant to s 21 of the AHRC Act, requiring the production of information and documents by 18 August 2017. The department provided a response to the notice on 17 August 2017.
52. The Commission provided copies of the material produced to the complainants and sought submissions from them.
53. On 13 October 2017, the complainants provided the Commission with written submissions in relation to the additional information and documents produced by the department.
54. On 28 November 2017, I issued a further notice to the department pursuant to s 21 of the AHRC Act, requiring the production of information and a small number of additional documents by 19 December 2017. I agreed to an extension of time for production and the department provided a response in accordance with this extension on 5 January 2018 and some additional documents on 18 January 2018.
55. On 16 May 2018, I provided the complainants and the department with my preliminary view on the substance of the complaints. I asked for a response within 28 days. At the request of the department, I extended the time for this response by a further 14 days. The department then sought another extension of an additional 28 days. No reasons were provided in support of this request. I agreed to extend the time for response by an additional 14 days so that each party would have 8 weeks to respond. The complainants provided a response within the extended deadline. The department did not provide a response within the extended deadline, but provided a response almost two weeks later on 24 July 2018. Although the department's response was provided late, I have had regard to it in making the findings and recommendations in this report.

56. On 6 November 2018, I provided the complainants and the department with a notice issued under s 29(2) of the AHRC Act, setting out my findings, and my reasons for those findings, on the substance of the complaints made by the complainants and my recommendations to the Commonwealth. In accordance with s 29(2)(e) of the AHRC Act, I asked the department to indicate what action it proposed to take in response to those findings and recommendations.
57. On 4 December 2018 the department provided a response to my findings and recommendations. A copy of that response is contained in section 9 of this report.

3 Legal framework

3.1 Functions of the Commission

58. Section 11(1) of the AHRC Act identifies the functions of the Commission. At the time that the complaints were made to the Commission, s 11(1)(f) provided that the Commission had the following function:
- (f) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:
 - (i) where the Commission considers it appropriate to do so—to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
 - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement—to report to the Minister in relation to the inquiry.
59. The AHRC Act has subsequently been amended by the *Human Rights Legislation Amendment Act 2017* (Cth). However, the transitional provisions to that Act have the effect that the present inquiry is to be conducted pursuant to the AHRC Act as it was prior to those amendments.
60. Section 20(1)(b) of the AHRC Act requires the Commission to perform the functions referred to in s 11(1)(f) when a complaint in writing is made to the Commission alleging that an act is inconsistent with or contrary to any human right.
61. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President. The former President of the Commission delegated to me certain of her powers, functions and duties for the purposes of inquiring into the present complaints pursuant to s 19(2) of the AHRC Act. When the current President of the Commission was appointed, she also provided me with a delegation in the same terms.
62. The rights and freedoms recognised by the ICCPR and the CRC are ‘human rights’ within the meaning of the AHRC Act.⁴ As indicated above, I set out the text of the relevant articles of the ICCPR and CRC in **Annexure A** to this report.

63. The AHRC Act provides that the Commission shall not furnish a report to the Attorney-General until it has given a reasonable opportunity to the person who did the act or engaged in the practice to make submissions to the Commission (AHRC Act s 27). As set out in paragraph 55 above, I provided the department with a copy of my preliminary views in this matter and gave it an opportunity to make submissions to the Commission. The department took that opportunity and I have taken its submissions into account.

3.2 Scope of ‘act’ and ‘practice’

64. The terms ‘act’ and ‘practice’ in s 11(1)(f) are defined in s 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under an enactment.
65. Section 3(3) provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
66. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged in respect of an act that is not one required by law to be taken;⁵ that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.
67. In their complaints and submissions to the Commission, the complainants raised concerns about their detention at the regional processing centre on Nauru, their treatment while detained, and the decision to send them to Nauru given the conditions that they would face there.
68. These complaints require the consideration of a number of human rights.

3.3 Arbitrary detention

69. Australia has agreed that everyone within its territory and subject to its jurisdiction has the right not to be arbitrarily detained. This right arises under article 9(1) of the ICCPR and under article 37(b) of the CRC.
70. Article 9(1) of the ICCPR provides:
- 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.
71. Article 37(b) of the CRC provides:
- 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.
72. Similarly, s 4AA of the Migration Act confirms that children should only be detained as a measure of last resort.

73. I consider that the following principles relating to arbitrary detention within the meaning of article 9(1) of the ICCPR arise from international human rights jurisprudence:
- (a) 'detention' includes immigration detention;⁶
 - (b) lawful detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to a legitimate aim,⁷ for example the Commonwealth's aim of ensuring the effective operation of Australia's migration system;
 - (c) arbitrariness is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability;⁸ and
 - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁹
74. In *Van Alphen v The Netherlands* the United Nations Human Rights Committee (**UNHRC**) found detention for a period of 2 months to be arbitrary because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.¹⁰ Similarly, the UNHRC considered that detention during the processing of asylum claims for periods of 3 months in Switzerland was 'considerably in excess of what is necessary'.¹¹
75. The UNHRC has held in several cases that there is an obligation on a State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was arbitrary.¹²
76. Relevant decisions of the UNHRC on the right to liberty are collected in a general comment on article 9 of the ICCPR published on 16 December 2014. It makes the following comments about immigration detention, based on previous decisions by the UNHRC:
- 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 the 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 in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a 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.¹³
77. The Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families have published two joint general comments setting out authoritative guidance about the human rights of children in the context of international migration.¹⁴ The Committees emphasized that the obligations of State parties under the relevant conventions, including the CRC, apply to each child within their jurisdiction, including the jurisdiction arising from a State exercising effective control outside its borders.¹⁵

78. In relation to immigration detention, the Committees said:

[T]he detention of any child because of their or their parents' migration status constitutes a child rights violation and contravenes the principle of the best interests of the child. ... Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.¹⁶

79. The Committees also provided clarification about the obligation in article 37(b) of the CRC:

Article 37(b) of the Convention of the Rights of the Child establishes the general principle that a child may be deprived of liberty only as a last resort and for the shortest appropriate period of time. However, offences concerning irregular entry or stay cannot under any circumstances have consequences similar to those derived from the commission of a crime. Therefore, the possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child and the right to development.

Instead, States should adopt solutions that fulfil the best interests of the child, along with their rights to liberty and family life, through legislation, policy and practices that allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved and the children's best interests are assessed, as well as before return.¹⁷

80. The complainants have complained about their detention in the regional processing centre on Nauru.

81. The right not to be arbitrarily detained is potentially relevant in two ways. The first is whether the Commonwealth can be said to be responsible for the detention of the complainants on Nauru. This issue is discussed in section 4 below. The second is whether the decision by the Commonwealth to send the complainants to Nauru involved a breach of this right, given that the Commonwealth was aware that Nauru required them to be detained.¹⁸ This issue is discussed in section 6 below.

3.4 Treatment in detention

82. The second main category of complaint is that, while detained, the complainants were treated in a way that was inconsistent with their human rights.

83. There are a number of human rights that are relevant to these complaints. Article 10(1) of the ICCPR and article 37(c) of the CRC contain obligations about the way in which people who are detained are to be treated.

84. Article 10(1) of the ICCPR provides that:

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

85. Article 37(c) of the CRC relevantly provides that:

Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.

86. General Comment 21 on article 10 of the ICCPR by the UNHRC states:

Article 10, paragraph 1, imposes on State parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of their liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment which is contrary to article 7 ... but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as that of free persons.¹⁹

87. In my view, the above comment supports the conclusions that:

- article 10(1) imposes a positive obligation on State parties to take actions to prevent inhumane treatment of detained persons;
- the threshold for establishing a breach of article 10(1) is lower than the threshold for establishing 'cruel, inhuman or degrading treatment' within the meaning of article 7 of the ICCPR; and
- the article may be breached if the detainees' rights, protected by one of the other articles in the ICCPR, are breached unless that breach is necessitated by the deprivation of liberty.

88. These conclusions about the application of article 10(1) are also supported by decisions of the UNHRC²⁰ that emphasize that there is a difference between the obligation imposed by article 7(1) not to engage in 'inhuman' treatment and the obligation imposed by article 10(1) to treat detainees with humanity and respect for their dignity. In *Christopher Hapimana Ben Mark Taunoa v The Attorney General*,²¹ the Supreme Court of New Zealand explained the difference between these two concepts as follows:

A requirement to treat people with humanity and respect for the inherent dignity of the person imposes a requirement of humane treatment ... the words 'with humanity' are I think properly to be contrasted with the concept of 'inhuman treatment' ... The concepts are not the same, although they overlap because inhuman treatment will always be inhumane. Inhuman treatment is however different in quality. It amounts to denial of humanity. That is I think consistent with modern usage which contrasts 'inhuman' with 'inhumane'.²²

89. That decision considered provisions of the New Zealand Bill of Rights which are expressed in identical terms to articles 10(1) and 7 of the ICCPR.

90. The content of article 10(1) has been developed with the assistance of a number of United Nations instruments that articulate minimum international standards in relation to people deprived of their liberty, including:

- the *Standard Minimum Rules for the Treatment of Prisoners* (**Standard Minimum Rules**);²³ and
- the *Body of Principles for the Protection of all Persons under Any Form of Detention* (**Body of Principles**).²⁴

91. The Standard Minimum Rules also apply to people who are detained as a result of a civil rather than criminal process (see rule 4(1)). The UNHRC has invited State Parties to indicate in their reports the extent to which they are applying the Standard Minimum Rules and the Body of Principles.²⁵ At least some of these principles have been determined to be minimum standards regarding the conditions of detention that must be observed regardless of a State Party's level of development.²⁶
92. Both the ICCPR (article 17) and the CRC (article 16) contain a right to privacy. I consider that this is a significant issue when detaining families in close proximity to each other.
93. There are also a range of human rights that are relevant to the treatment of children. The preamble to the CRC recognises that there are children living in exceptionally difficult conditions who need special consideration. This includes children in asylum-seeker families who are outside their country of origin and are seeking protection.
94. Children have the right to survival and development (CRC article 6(2)). The Committee on the Rights of the Child has reminded State parties that, in early childhood, children's health and well-being may be put at risk by adverse living conditions.²⁷ The right to survival and development can only be implemented in a holistic manner through the enforcement of all the other provisions of the CRC, including rights to health, adequate nutrition, an adequate standard of living and a healthy and safe environment.²⁸ Particular attention should be paid to the most vulnerable groups of young children, including refugee and asylum-seeking children.²⁹ Young children are more vulnerable to disease, trauma, and distorted or disturbed development; they are relatively powerless to avoid or resist difficulties; and they are dependent on others to offer protection and to promote their best interests.³⁰
95. Children have the right to health and access to healthcare services, including appropriate pre- and post-natal healthcare for their mothers (CRC article 24). In terms of pre-natal healthcare, the Committee on the Rights of the Child has emphasized the importance of early recognition and management of complications in pregnancy, noting that there are a range of known health risks that are susceptible to both prevention and therapeutic responses, if identified early.³¹ In 2002 the United Nations General Assembly adopted an outcome document titled *A World Fit for Children* detailing the following specific actions referable to the obligations of State parties under article 24 of the CRC:
- Ensure that the reduction of maternal and neonatal morbidity and mortality is a health sector priority and that women ... have ready and affordable access to essential obstetric care, well-equipped and adequately staffed maternal health-care services, skilled attendance at delivery, emergency obstetric care, effective referral and transport to higher levels of care when necessary, post-partum care and family planning in order to, *inter alia*, promote safe motherhood. ...
- Special emphasis must be placed on prenatal and post-natal care, essential obstetric care and care for newborns, particularly for those living in areas without access to services.³²
96. The expression of article 24 was modelled on article 12(2) of the *Convention on the Elimination of All Forms of Discrimination Against Women*, which requires State parties to ensure to women appropriate services in connection with pregnancy.³³ The concept has been described as including the prevention and management of risk factors for low birth weight and premature birth, ensuring a clean environment for birth and the maintenance of thermal control and respiratory support.³⁴

97. Children have the right to a standard of living adequate for their physical, mental, spiritual, moral and social development (CRC article 27(1)). The concept of ‘a standard of living’ is a broad one and incorporates, among other things, adequate nutrition, clothing and housing.³⁵
98. More generally, the Commonwealth has a duty to ensure that children have ‘such protection and care as is necessary’ for their wellbeing (CRC article 3(2)). This requires the Commonwealth to ensure:
- that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.³⁶
99. A number of competent authorities have established standards for the care and protection of children. In particular, the United Nations has adopted *Rules for the Protection of Juveniles Deprived of their Liberty* (**Rules for Protection of Juveniles**).³⁷ These rules relevantly provide:
28. The detention of juveniles should only take place under conditions that take full account of their particular needs ... and which ensure their protection from harmful influences and risk situations. ...
87. In the performance of their duties, personnel of detention facilities should respect and protect the human dignity and fundamental human rights of all juveniles, in particular, as follows: ...
- (d) All personnel should ensure the full protection of the physical and mental health of juveniles, including protection from physical, sexual and emotional abuse and exploitation, and should take immediate action to secure medical attention whenever required.
100. The rights relating to the way in which people detained at the regional processing centre on Nauru were treated are potentially relevant in two ways. The first relates to the actual treatment that the complainants received while detained at the centre. This issue is discussed in section 5 below. The second relates to whether the decision by the Commonwealth to send the complainants to Nauru involved a breach of their rights, given the conditions they could be expected to face in detention. This issue is discussed in section 6 below.

4 Arbitrary detention

101. The complainants allege that they were arbitrarily detained at the regional processing centre on Nauru and that this involved a breach by the Commonwealth of its human rights obligations.
102. I considered this issue in detail at paragraphs 203 to 259 of my decision on jurisdiction, reproduced in **Annexure C** to this report.

103. I found that the complainants were detained at the regional processing centre for the whole of the period from when they were first taken there by the Commonwealth until they were returned to Australia or granted refugee status in Nauru. The immediate legal requirement for their detention arose as a result of Nauruan law and the conditions attached to the complainants' regional processing visas. That is, the requirement for detention arose directly from acts done by Nauru.
104. In *Plaintiff M68* the High Court held that the Commonwealth could not be said to have 'authorised or controlled' the plaintiff's detention in the regional processing centre on Nauru.³⁸ However, it held that the Commonwealth had 'participated' in the plaintiff's detention.³⁹ The plaintiff was in substantially the same circumstances as the complainants in this inquiry. I considered two issues that flowed from this. First, whether the fact of the detention of the complainants is to be attributed to the Commonwealth under international law; secondly, whether the Commonwealth is to be regarded as responsible for aiding or assisting Nauru in breaching Nauru's obligation under the CRC not to detain children arbitrarily.
105. As to the first issue, I was not satisfied that the detention of the complainants was an act done by the Commonwealth, or by organs of the Government of Nauru that were placed at the disposal of the Commonwealth or under the direction or control of the Commonwealth. I have carefully considered the subsequent evidence and submissions provided to me in relation to this issue but my view on this issue remains the same. As a result, I am not satisfied that the act of detaining the complainants was an act done by or on behalf of the Commonwealth, or an act for which it was directly responsible under international law. I have approached the matter on the basis that the conclusion of the majority in *Plaintiff M68* should be regarded by me as concluding the issue that the High Court addressed in that case, and that the information available to me in this inquiry does not disclose circumstances materially different from the basis on which the majority formed its view.
106. As to the second issue, Nauru is a party to the CRC (but not the ICCPR) and, among other things, has an obligation to ensure that children are not deprived of their liberty unlawfully or arbitrarily. Article 37(b) of the CRC provides that detention of children shall be used 'only as a measure of last resort and for the shortest appropriate period of time'. My inquiry does not extend to whether there has been a breach by the Government of Nauru of its obligations under the CRC.
107. In order for the Commonwealth to be internationally responsible for 'aiding or assisting' Nauru in a breach of its obligations under the CRC (as described in Article 16 of the ILC Articles), it is necessary to establish that the Commonwealth was aware of and intended to facilitate the commission of an internationally wrongful act by Nauru.
108. There is insufficient information for me to be satisfied that the aid and assistance provided by the Commonwealth to Nauru in relation to the establishment and operation of the regional processing centre on Nauru was provided with the intention to facilitate the arbitrary detention of children at the centre, contrary to article 37(b) of the CRC. As a result, I am not satisfied that the Commonwealth was internationally responsible for aiding or assisting Nauru in the commission of an act (namely, acts of arbitrary detention of children) contrary to Nauru's obligations under article 37(b) of the CRC.

5 Treatment in detention

109. Notwithstanding that, on the basis of the material available to me, the complainants were not detained by or as a result of a requirement of the Commonwealth, I find that the Commonwealth was responsible for the treatment of the complainants while they were detained on Nauru because of the extent of the Commonwealth's participation in their detention. As I have previously found, the Commonwealth exercised control and authority over the circumstances of the detention of the complainants and their families.
110. The European Court of Human Rights observed in *Al-Skeini* that:
- It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 [of the European Convention on Human Rights] to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of the individual. In this sense, therefore, the Convention rights can be “divided and tailored”.
111. I consider that the Commonwealth's responsibility for the treatment of the complainants in the centre on Nauru extends to ensuring that they were treated in accordance with articles 7 and 10(1) of the ICCPR, and also to ensuring that relevant rights under the CRC were fulfilled. The Commonwealth's obligations under the ICCPR apply to ‘all individuals within its territory and subject to its jurisdiction’ (ICCPR, article 2(1)). Similarly, the Commonwealth's obligations under the CRC apply to ‘each child within [its] jurisdiction’ (CRC, article 2(1)).
112. My decision on jurisdiction described the way in which the Commonwealth exercised control and authority over the day to day operation of the regional processing centre through its contracts with Transfield Services (Australia) Pty Limited (**Transfield**) in relation to garrison and welfare services, International Health and Medical Services (**IHMS**) in relation to health and medical services, and Save the Children Australia (**Save the Children**) in relation to the welfare and engagement of particular groups of transferees relevantly including families with children (until 31 October 2015 when these responsibilities were adopted by Transfield).
113. In my decision on jurisdiction, reproduced in **Annexure C** to this report, I found that:
- The conduct of Transfield pursuant to its contract with the Commonwealth is attributable to Australia under international law on the basis that Transfield was acting on the instructions of, or under the direction and control of, the Commonwealth.
 - Transfield was acting on behalf of the Commonwealth in carrying out its role under the Regional Processing Centre Guidelines and the Commonwealth's Performance Management Framework to, among other things, ensure the well-being of transferees.
 - The Commonwealth, including through its contract with Transfield, was exercising a sufficient degree of control over the regional processing centre and over the people within the centre (including the complainants) for its human rights obligations to be engaged with respect to the treatment of people within the centre.

114. At that stage I did not make similar findings in relation to Wilson Parking Australia (1992) Pty Ltd (**Wilson Security**). Transfield entered into subcontracts with Wilson Security on 2 September 2013 and 28 March 2014 to provide ‘a range of Services to promote the welfare and well-being of Transferees and create an environment that supports security and safety at the Site’.⁴⁰ In terms of governance, Wilson Security is required to:
- comply with the governance framework developed by Transfield and/or the department, which may change from time to time
 - cooperate with Transfield, the department, other service providers, and stakeholders, to meet the needs of transferees and assist Transfield and the department to meet their obligations
 - attend local management meetings with Transfield and the department on a daily, weekly and monthly basis
 - action agreed items resulting from such meetings at the request of Transfield.⁴¹
115. These subcontracts were made pursuant to Transfield’s power to subcontract and were made with the prior written approval of the Commonwealth.⁴² Since my decision in relation to jurisdiction, the department has provided me with copies of these subcontracts. Having regard to the terms of those subcontracts, the approval given by the Commonwealth for Transfield to enter into those subcontracts, and the reasoning in paragraphs 311 to 331 of my decision on jurisdiction, I find that the conduct by Wilson Security pursuant to those subcontracts is attributable to the Commonwealth and that Wilson Security was acting on behalf of the Commonwealth in carrying out its functions under those subcontracts.
116. I consider below a number of aspects of the management of the Nauru regional processing centre that are relevant when considering the Commonwealth’s human rights obligations to people detained there. In particular, I consider:
- the living conditions for people detained at the centre including the nature of the accommodation and whether it was appropriate for the conditions and the cohort of people required to live there;
 - the level of hygiene in the centre and its impact on the health of detainees;
 - particular risks faced by children as a result of infrastructure problems;
 - the risk of serious disease including dengue fever;
 - the impact of prolonged and uncertain detention in these conditions on detainees’ mental health.
117. I also consider a number of specific issues raised on behalf of each of the complainants. I deal with these issues in separate sections for each family group. Many of these issues relate to the impact of the detention environment on particular health conditions, the adequacy of medical treatment received by the complainants, and incidents involving officers contracted to the department.

118. Of particular note is the treatment of Ms BK after she became pregnant on Nauru. Among other things, I deal with the inadequacy of facilities on Nauru for her to deliver her baby safely, the poor quality of information given to her about where she would give birth, and the delays in making a decision to return her to Australia to give birth.

5.1 Living conditions

(a) Regional processing centre

119. The regional processing centre on Nauru is comprised of facilities at three locations on Nauru, known as RPC1, RPC2 and RPC3. In some records, these locations are referred to as OPC1, OPC2 and OPC3.⁴³ RPC1 is the administrative and logistics hub, with a medical centre operated by IHMS, interview rooms, managed transferee accommodation units and some staff accommodation. RPC2 provides accommodation in marquees for single adult males. Families, including the complainants, and single adult females were accommodated in marquees in RPC3. All three RPC sites are in the centre of Nauru on the phosphate plateau, some distance away from the main population centres of the community living on Nauru.⁴⁴

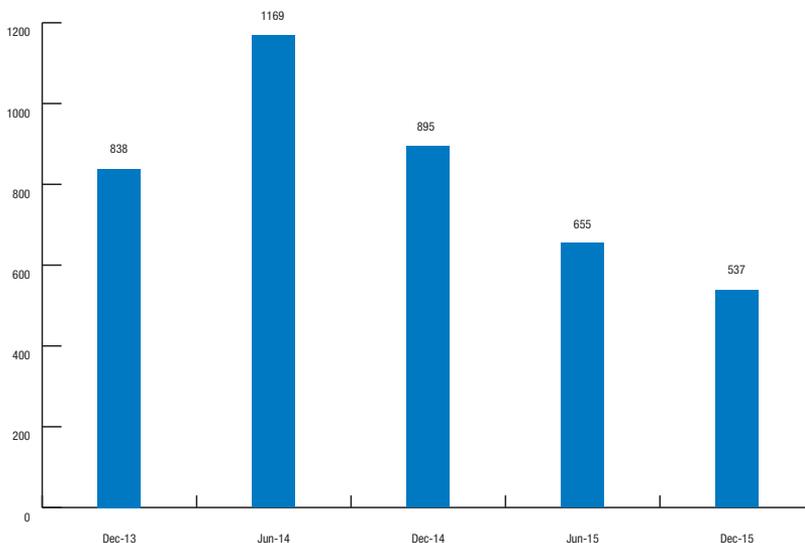
Map of Nauru, May 2015



Source: Department of Immigration and Border Protection⁴⁵

120. When the regional processing centre was re-established in September 2012, asylum seekers transferred to Nauru were accommodated in tents installed by the Australian Defence Force. From January to July 2013, asylum seekers were progressively accommodated in permanent modular accommodation block in RPC1 (then called ‘Topside’).⁴⁶ On 19 July 2013, there was a riot and a subsequent fire that destroyed the accommodation block.⁴⁷ Since that time, asylum seekers have primarily been accommodated in vinyl marquees in RPC2 and RPC3. Accommodation blocks were rebuilt in RPC1, but these were used to house staff and service providers rather than asylum seekers.⁴⁸ A small amount of respite accommodation was available in RPC1 for asylum seekers on a temporary basis, for example in the Restricted Access Accommodation (**RAA**) (used for pregnant women and mothers with babies up to 4 months old) and the Supported Accommodation Area (**SAA**) (used for people with mental health conditions).
121. When the United Nations High Commissioner for Refugees (**UNHCR**) visited the regional processing centre in October 2013, it noted that the conditions at the centre ‘were harsh, with little natural shelter from the heat during the day, which is exacerbated by all the challenges arising from residing in a construction zone, including significant noise and dust, as well as the proximity to phosphate mining, which causes a high level of dust’.⁴⁹ Among other things, UNHCR recommended, as a matter of urgency, that conditions at the centre be reviewed with a view to alleviate the cramped conditions and exposure to heat, as well as to enhance the privacy for all asylum seekers.⁵⁰
122. Some or all of the complainants were detained from January 2014 to September 2015. During this period, the numbers of people detained at the regional processing centre fluctuated. The chart below shows the population of the centre during the relevant period.

Nauru RPC Population



Source: Department of Immigration and Border Protection⁵¹

(b) Heat and overcrowding

123. Each of the complainant families raised issues about the living conditions that they faced on Nauru. They all complained about the oppressiveness of the heat. When contracting with the providers of welfare services to children detained on Nauru, the department recognised that the climate in Nauru 'is consistently hot and humid throughout the year'.⁵² Families on Nauru were accommodated in marquees, with five or six families to a marquee at the time of the complaints to the Commission.
124. When UNHCR inspected the facilities for families in October 2013, there was no air-conditioning in any of the marquees.⁵³ The department says that, after receiving advice from IHMS, families with children under four years of age were accommodated in air-conditioned marquees. The department says that it is unable to provide a copy of this advice and unable to say when this advice was first acted upon.
125. Mr DE's son was five years old and his family did not qualify for accommodation in an air-conditioned marquee. He says that the tent that his family lived in did not have air conditioning, that it had only one small fan and that temperatures inside the tent were up to 40 degrees Celsius. These estimates appear conservative. A report by the department's Chief Medical Officer in May 2014 said that the heat in the tents was 'a major health issue' and that '[t]emperatures have been monitored to be in excess of 50 degrees Celsius, especially in the single adult female area'.⁵⁴
126. According to a report by a psychologist, the age of Ms BK's daughter Miss BM was 'reduced 1 year to enable the family to stay in the air-conditioned unit in RPC3 area 9 because of [Ms BK's] advancing pregnancy'. However, once Miss BM turned 5 (but was considered to be only 4) Mr BL was then concerned that she would not be able to attend school full time and sought to have her age corrected. (There is some circumstantial material that tends to support this report. For example, according to notes by Save the Children, Miss BM was initially permitted to attend school for a few weeks when she was considered to be only 3 and a half years old and she performed strongly with 5 and 6 year olds. Save the Children also received an information report from another family 'complaining that this child is older than her ID says'. Throughout this report, I have referred to Miss BM's age as a year older than the record held by the department.)
127. The Chief Medical Officer of the department visited Nauru from 3 to 7 May 2014, the same week that Ms BK and her family arrived. At the time, there were 1,179 people being detained at the centre. Just under two thirds of these (736 people) were being detained in the family compound at RPC3.⁵⁵

128. The department describes the accommodation for families as being in hard-walled vinyl marquees 10 meters by 12 meters segregated by vinyl walls. According to Ms BK, her family shared a tent with four other families. She says that the space allocated to each family was approximately 3 meters by 4 meters. She says that the living areas for each of the families was separated by a partition that did not reach the ceiling. As a result, there was a lack of privacy. Ms BK felt that her family could not talk with each other without everyone else in the tent hearing what they were saying. Similar concerns were raised by Ms CO. She said that her family shared a tent with five other families and that '[i]t feels like we are animals living in a stable'. The Moss Review commissioned by the Australian Government highlighted examples of the adverse impact of the high-density accommodation in soft walled marquees on both personal safety and privacy of detainees.⁵⁶
129. The department provided the Commission with a document prepared by Broadspectrum Limited (formerly known as Transfield) in April 2016 titled 'Nauru Relocation Plan'. The document collected recommendations made by a number of third parties who had inspected the regional processing centre and it considered the relevance of those recommendations for the infrastructure arrangements at the centre. One of the third parties that had inspected the centre was the Commonwealth Ombudsman, who visited once in 2014, twice in 2015 and once in 2016.⁵⁷ The following comments appear (from their context) to have been made by the Commonwealth Ombudsman in a report to the department in 2015:

We did not note any substantive change to the accommodation and facilities within the RPC and we remain concerned that in RPC2 and 3 respectively:

- (a) Asylum seekers continue to be housed for extended periods of time (more than 90 days) in marquee accommodation that is poorly ventilated with fans failing to work and internal partitions blocking air flow. In many instances marquee walls and ceilings are covered in mould and damp and show signs of leakage and water inundation. With the exception of accommodation for newborns and children up to the age of four years the marquees are not air conditioned nor fitted with insulation leaving pregnant women, young children and the elderly to live in accommodation that does not provide any significant relief from the heat or humidity.

...

- (e) There is evidence of ongoing vermin and large swarms of mosquitoes continue to be present in all compounds backing onto scrub/bush areas.

130. The observations made in the Moss Report and by the Commonwealth Ombudsman support the complaints about the nature of the accommodation.

(c) Hygiene

131. Each of the families complained about a lack of hygiene. Among other things, they all complained about cockroaches entering the tent and Ms BK also complained about rats. Ms CO said that sometimes her tent was sprayed with cockroach spray but that the cockroaches returned soon afterwards. Mr DE said that the ceilings of the tents were covered in a black mould.

132. These concerns were also reflected in reports prepared by Comcare and the department's Chief Medical Officer. A report by Comcare in October 2014 noted that there was 'significant mould on the accommodation tents' in RPC2 and that the tents in RPC3 'were also mould-affected'.⁵⁸ The Chief Medical Officer's January 2015 report noted that rats and mice were a 'significant problem', that there was significant mould build up on a number of the tents and that it was 'unclear whose responsibility it was to clean this'.⁵⁹
133. The Australian National Audit Office (**ANAO**) also highlighted the issue of mould.⁶⁰ It observed that mould management had not been specified in Transfield's 2013 or 2014 contracts. It noted that in February 2015, Transfield commissioned a report that concluded:
- air quality testing and associated microbiology has found that all accommodation tent environments fail to meet the *Australian Mould Guideline* by each having >10m² of visible mould growth. Therefore all the accommodation tents require disposal and replacement with new or decontamination.
134. Almost two years later, in December 2016, the department advised ANAO that mould remediation works had been completed for four of the 13 marquees in the single adult males' compound (RPC2) and that remediation was continuing in the families and single adult females' compound (RPC3).
135. The Chief Medical Officer raised a number of other issues related to the hygiene of the centre. For example, he noted in May 2014 that sewage treatment did not comply with the basic requirements of the 'Grade C' treatment standard – the least restrictive standard in use in Australia. The Chief Medical Officer said that the standard of sewage treatment posed a number of health risks including gastrointestinal disease. He recommended that sewage disposal be reviewed to ensure that it is meeting the minimal standards of waste treatment.⁶¹ By January 2015, the plant at RPC3 was considered to be 'adequate', while the sewage system at RPC1 was 'clearly not working' and test reports 'essentially indicate that the system here is pumping out untreated sewage' with suspended solids 'nearly 20 times the maximum recommendation design limits and e. coli (bacteria) levels 2.5 times the recommended maximum'.⁶²
136. The ANAO noted the attention drawn by the department's Chief Medical Officer (**CMO**) to a range of work, health and safety issues including: 'increased risk of infections and disease due to vermin and pests, water pooling, excessive mould and inadequate cleaning of wet areas, inadequate food hygiene, and overcrowded accommodation'.⁶³ The ANAO concluded that the department 'has often been slow to respond to issues raised by the CMO and service providers' and that when service providers were directed to address issues 'there is limited evidence of DIBP following-up to ensure that works have been undertaken to an acceptable standard'.
137. In the context of this environment, the complainants developed a range of medical conditions that appear to have been caused or, at the least, exacerbated by their living conditions.

138. For example, in November 2014 Ms CO was diagnosed with chronic fungal Otitis Externa (also called ‘tropical ear’ or ‘swimmer’s ear’).⁶⁴ She says that this condition is known to be caused by environmental factors such as humidity. It appears that Ms CO was also suffering from this condition while detained on Christmas Island shortly before her transfer to Nauru. The same condition also affected Ms BK and her son Master CQ when he was around 2 years old while they were both detained on Nauru.
139. All of the children of the complainants contracted a range of illnesses that I consider were likely to have been caused or contributed to by environmental factors. Master CQ and Miss BM contracted acute bronchitis. Miss BM and Master DG contracted upper respiratory tract infections. All three children contracted tonsillitis. Miss BM contracted a fungal infection which affected her fingernails and had protracted issues with head lice. As discussed in more detail below, Miss BM contracted hand, foot and mouth disease and Master CQ appears to have contracted a coxsackievirus infection, which can cause hand, foot and mouth disease.
140. These conditions appear typical of those detained at the centre. IHMS staff reported that the most frequent conditions they saw were skin infections, ear infections including fungal external ear infections, allergic conjunctivitis (typically due to the combination of fans and the dusty environment), upper respiratory tract infections, thrush, pain and dental issues.⁶⁵
141. Ms BK said that in the mess her family was sometimes given food that was past its expiry date. She said that her daughter Miss BM became sick from eating expired yoghurt and spent two days with IHMS recovering. These complaints are supported by documents produced by the department. Medical records suggest that Miss BM came to RPC1 early in the morning of 21 July 2014 due to vomiting of previously ingested food and abdominal pain. This was followed by 9 more vomiting episodes. She spent 21 and 22 July 2014 at IHMS in RPC1 with her parents and was administered IV fluids. Two months later, on 20 September 2014, Ms BK and another detainee made a further complaint to Wilson Security about the mess providing mothers with milk for their babies that had expired three days previously.
142. In October 2016, the United Nations Committee on the Rights of the Child identified a ‘lack of health services for asylum-seeking and refugee children [in Nauru], many of whom have developed chronic conditions as a result of living in overcrowded and unsanitary conditions’. The Committee also expressed concern that ‘the main medical provider in the Regional Processing Centre has no paediatrician’.⁶⁶

(d) Infrastructure issues affecting children

143. Ms CO said that the living conditions at the regional processing centre were not suitable for babies. She said that there was only one room for the babies to play (the playgroup) but that there were not enough toys for all the babies. She said that often all the children have to play with are the rocks on the ground. Ms BK also complained about the lack of facilities for children. She said that there was nowhere appropriate for her daughter to play and that she would play with a stone near the toilets.

144. When the department's Chief Medical Officer visited Nauru in May 2014, he identified a range of infrastructure issues that were contributing to poor population health outcomes.⁶⁷ Many of these issues directly affected children. A number of these issues remained unaddressed by the time of the Chief Medical Officer's second report in January 2015.⁶⁸
145. First, the Chief Medical Officer noted that there was a significant risk of young children falling and injuring themselves on the gravel surface in the infants and toddlers compound. He said that the gravel surface inhibits the normal physical development of infants who are unable to move around in an easy fashion. He recommended removal of the gravel to prevent traumatic injuries. Eight months later, in January 2015, this recommendation had not been acted on or implemented. In his second report, the Chief Medical Officer noted that while a new early learning centre had been constructed with a small shaded and astroturfed area, this did not address the underlying problem. He said that footpaths needed to be put in place to the ablutions and other recreational areas to minimise the risk of traumatic injuries and assist in appropriate child development.
146. Secondly, the Chief Medical Officer noted that construction involving the use of heavy machinery directly backed onto the children's areas 'just metres away' and that there was inadequate fencing and barricades. There was a significant potential that machinery could fall and injure children or that more adventurous children could climb the barriers. This issue was addressed by the time of the second report in January 2015.
147. Thirdly, the Chief Medical Officer noted that there was a lack of accessible sinks in the recreation area in the families' compound. Children were observed standing on chairs or climbing to access hand-washing facilities. The Chief Medical Officer recommended that child sinks be installed in the recreational area. There had been no progress in relation to this recommendation by the time of the second report.
148. Fourthly, the Chief Medical Officer identified the need for a shade cloth over the children's play area. A shade cloth was subsequently installed.
149. The Chief Medical Officer noted that the size of RPC3, accommodating more than 100 children, was not just a public health risk for disease transmission but also for injuries.
150. More generally in relation to infrastructure, the Chief Medical Officer noted that accommodation tents were not elevated off the ground, leading to frequent flooding and tent flaps lying on the ground, encouraging pooling of water and encouraging breeding of mosquitos able to carry dengue fever. The uncontrolled spread of dengue fever in the centre during 2014 is dealt with in more detail below. The Chief Medical Officer recommended that tents be elevated 30cm off the ground and that tent flaps be placed under side walls. The first recommendation was not adopted but there was some improvement in relation to tent flaps by January 2015.
151. Two further issues were identified in the Chief Medical Officer's 2015 report: a pit in section 9 of RPC3 in the toddlers' area needed to be filled in or better barricaded, and running water needed to be provided to the toddlers' accommodation in section 9 to meet basic hygiene standards.

5.2 Risk of disease

(a) Tuberculosis

152. Two of the complainants, Ms BK and Ms CO, raised concerns about the presence of tuberculosis in the regional processing centre on Nauru. They said that they had become aware that nine people, including a child, had the disease. They said that the people with tuberculosis had not been separated from the other people in the centre. They said that the child with tuberculosis was removed to Australia. Ms CO said that she was worried that the disease could spread and harm her family, including her unborn child.
153. The Commission asked the department whether any of the detainees at the regional processing centre had tuberculosis during the period from January 2014 to September 2015 when one or more of the complainant families were at the centre. The department said that during this period 29 people transferred to Nauru were investigated for possible tuberculosis: 22 adults and seven children. As described in more detail below it appears that, despite several recommendations from visiting paediatricians, testing of all children for latent tuberculosis only commenced in January 2015. The department said that once people were identified by IHMS as possibly having tuberculosis they were placed on a Tuberculosis Register and were treated according to need. As at October 2015, the status of these cases was as follows:

TB Status	Number
Chronic TB – receiving monitoring/treatment	4
Chronic TB – no ongoing monitoring/treatment	14
Active non-infectious TB – receiving monitoring/treatment	1
Resolved	3
Ongoing investigations	7
Total	29

154. The department's Chief Medical Officer reported in January 2015 that in the previous year there had been eight notifications of tuberculosis on Nauru and three of those had been in the transferee population.⁶⁹ In submissions to the Commission, the department said that generally IHMS will notify the Government of Nauru Public Health in cases of confirmed active, as well as latent, tuberculosis.
155. The department said that in December 2014 one child returned a positive Mantoux test with the possibility of non-infectious extra pulmonary tuberculosis. It said that the family was notified of treatment options and the parents were scheduled to have chest x-rays. The child and the family were subsequently transferred to Australia for further care.
156. On 3 December 2014, a Transfield cultural advisor attended area 9 at RPC3 and spoke with a detainee father. In an incident report, the cultural advisor noted that the father complained that his child had had 'lumps under his lower chin' for more than 6 months. The report continued: 'He said that IHMS has told him that this is nothing and then 6 months later IHMS has now told him that it's TB'. Mr BL and another detainee was also present during this interview. The cultural advisor said that the three men:

raised concerns about TB and said they are worried about it spreading through the camp. They want someone from IHMS to come and explain to them what is going on about TB in the camp, and they want everyone tested.

157. It appears that screening for latent tuberculosis among the detainee population on Nauru was first recommended in February 2014 by the Physical and Mental Health Subcommittee of the Joint Advisory Committee for Nauru Regional Processing Arrangements (**JAC Health Subcommittee**).⁷⁰ The subcommittee comprised five experienced Australian medical practitioners appointed by the Governments of Australia and Nauru with expertise in mental health, psychiatry, children, and infectious diseases. They visited the regional processing centre from 16 to 19 February 2014 and provided the Joint Advisory Committee for the regional processing centre with a report of their observations.
158. Following this, two visiting paediatricians and a visiting registered nurse from the Children's Hospital at Westmead, Sydney who were contracted by IHMS to provide a visiting specialist paediatric service to the regional processing centre also recommended that all children on Nauru be screened for tuberculosis, whether or not they were symptomatic. A recommendation was made in September 2014 by paediatrician Dr Hasantha Gunasekera (currently the Sub-Dean (Education) at CHW Clinical School, Sydney University). Three months later, a report in December 2014 by paediatrician Professor David Isaacs and Ms Alanna Maycock, a registered nurse with over 12 years experience in refugee health, noted that no action had been taken in relation to this recommendation. Their report said:

We saw a boy with extra-pulmonary tuberculosis (TB) which might have been diagnosed 3 months earlier if a Mantoux had been placed. There is no routine Mantoux screening on Nauru. One benefit of performing a Mantoux tuberculin skin test (TST) on all children is to identify children with latent TB, who are completely well, have a normal chest x-ray, but who can be given chemoprophylaxis with a single anti-TB drug (isoniazid).

Such chemoprophylaxis halves their risk of developing pulmonary TB and is even more effective against TB meningitis. A further benefit is that all children with a positive Mantoux test will have a chest x-ray; this will identify children with pulmonary TB who need more intensive treatment with 3 or 4 anti-tuberculosis drugs. Although most children with TB are not infectious at all, older children with pulmonary TB can be infectious which would pose a risk to others.⁷¹

159. This last recommendation was accepted by IHMS.⁷² The department said that extensive screening of residents for latent tuberculosis was undertaken in January 2015. A 'small number' of children were found to have latent tuberculosis. The department says that preventative or clinical screening was offered for these children and that no isolation was required.
160. The testing of children for latent tuberculosis is described in the report of the Chief Medical Officer of his visit to Nauru from 11-15 January 2015:
- IHMS had pleasingly introduced LTBI testing for all children and had just completed this. However every child had a negative result which is statistically impossible and given the cohort incorrect. Surprisingly IHMS were not concerned about these results. Either the testing batch of PPD was incorrectly prepared (which does occur), incorrectly stored or results misread. Whatever the cause the results are clearly incorrect and must be repeated.⁷³
161. I take it that the 'small number' of children found to have latent tuberculosis were discovered following this recommended retesting.
162. Master CQ, the son of Ms CO, was given a Mantoux screening test for tuberculosis on 2 January 2015 shortly before his second birthday. The tuberculin skin test reading was 4mm on 5 January 2015.
163. Master DG, the then six year old son of Mr DE, was also given a Mantoux screening for tuberculosis on 2 January 2015. The tuberculin skin test reading was 7mm on 5 January 2015. Master DG's parents reported that he had previously received the BCG vaccine for tuberculosis.
164. Miss BM, the then four year old daughter of Ms BK, was given a Mantoux screening test for tuberculosis on 7 January 2015. The medical records note that the tuberculin skin test reading was 3mm on 11 January 2015. A subsequent reading on 14 August 2015 (possibly after the retesting recommended by the department's Chief Medical Officer) was 7mm.
165. Results for a tuberculin skin test need to be interpreted in light of factors that increase the probability that a patient has been infected with tuberculosis and interpretation should be done by a physician.⁷⁴ It appears that generally, for children under four years of age without any identified risk factors, for people born in countries with a high prevalence of tuberculosis, and for people who live or spend time in high risk congregate settings such as prisons, a tuberculin skin test reading of 10mm or greater should be considered indicative of infection.⁷⁵

(b) Dengue fever

166. During the period that the complainants were detained at the regional processing centre, there was a dengue fever epidemic across the island of Nauru. Poor sanitation at the regional processing centre contributed to the spread of this virus. The Chief Medical Officer of the department concluded that there was a 'significant risk' of disease transmission to detainees.⁷⁶

167. In a report prepared by the department's Chief Medical Officer in May 2014, he noted that:

Litter is another factor within the centres. Plastic and paper is literally strewn throughout the sites not only creating a haven for mosquito vector to spread the dengue virus but also enabling rodent infestation.⁷⁷

168. The Chief Medical Officer said that from January 2014 (when Mr DE and his family were taken to Nauru) to May 2014 (when Ms BK, Ms CO and their families were taken to Nauru), there had been six cases of Dengue Haemorrhagic Fever (**DHF**) identified in 'staff or stakeholders'. The JAC Health Subcommittee said that DHF has a high mortality rate, ranging from 1 to 20% depending on the specialised medical care available.⁷⁸ Around 20 local people had also tested positive to DHF and were awaiting serotyping from Australia. One case had been identified as Serotype 3.⁷⁹

169. In early May 2014, during the week of the inspection of the centre by the Chief Medical Officer, a number of additional cases were diagnosed with the availability of rapid diagnostic tests (**RDT**). The Chief Medical Officer said that:

Since reviewing the lab, earlier this week and with better use of the RDT kits, a further report has identified that there have been approximately 40 positive symptomatic cases over the last month that have tested positive of which 10 were in the last 8 days. Additionally a new serotype was identified, Serotype 2 in the last couple of days.

What this indicates is a significant under-reporting on the island, which in fact has an epidemic. A number of cases have required blood transfusions due to falling platelet counts that identifies a significant threat. Dr Bangs indicates that for every symptomatic case there is potentially 20 other infections that contribute to the infection pool. The island is rife with the vector, *aedes aegypti* [the yellow fever mosquito], that bites mostly through the day and is found all across the island. It can also carry other disease such as Chikungunya and zika virus. While both of these do not have the mortality of DHF, they can be quite debilitating.

The vector is rife due to a number of factors but mostly due to the huge amount of litter across the island and old water cisterns. There needs to be an intensive remediation programme to clean this up and treatment with pesticide in those areas that cannot. Discussions were held with local authorities who were keen to see what could be done.

In the RPCs and "Village" there is a regular fogging programme once-twice per week. Unfortunately they are using a single agent which is almost certainly leading to resistance against these pesticides. ...

Within the RPCs, the mosquito volume was not as bad as elsewhere on the island but it was certainly present. The irregular use of mosquito nets, while providing some general protection could be improved, but the issue of stagnant water under some tents, as well as the litter throughout and very overcrowded tents mean that disease transmission through the vector is a significant risk.⁸⁰

170. In the January 2015 report, the Chief Medical Officer referred to 'the major Dengue outbreak of 2014 with all four substrains'.⁸¹ The department says that four people had to be medically evacuated to Australia as a result of contracting dengue fever.⁸²

171. The dengue outbreak was both predictable and predicted. In February 2014, the JAC Health Subcommittee had said:

The combination of mosquito vector, open tent accommodation, high recent rainfall with poor drainage and multiple areas of surface water, and high population density creates conditions for a dengue outbreak.⁸³

172. As a result of reporting by the subcommittee, the department agreed to a vector control study in March 2014.⁸⁴ By the time of the second report of the Chief Medical Officer in January 2015, it appears that vector control efforts had improved:

On the previous visit [in May 2014] concerns were raised over inadequate vector control strategies where the contractor used only one agent, fogged a maximum of twice a week and not in all areas. Significant improvements in this area have occurred and TSL should be acknowledged for this response. Currently they are fogging 2-3 times per week (depending on location) at all centres. ... Now they use two agents ... and once in every five foggings a different agent. ... This process would appear to be adequate with little mosquito activity seen and no breeding sites near the centres.

173. Ms BK and her family were taken to Nauru on 3 May 2014 and Ms CO and her family were taken to Nauru on 23 May 2014 during the period in which the department's Chief Medical Officer was writing about the dengue fever epidemic, control efforts were assessed as inadequate, and six people in the centre had contracted DHF. In their first interactions with IHMS Ms BK and her husband were informed that there was dengue fever on Nauru and provided with advice about how to use insect repellent. Ms CO and her husband were given initial advice about 'sun and insect protection' but their medical notes of this induction do not make reference to dengue fever.

174. When Mr DE and his family arrived in Nauru in January 2014, they were provided with some initial advice about 'prevention of mosquito and other insect bites'. Again, their medical notes of this induction do not make reference to dengue fever.

175. The Department of Health provides the following information about dengue fever:

Dengue causes illness that can range from a mild fever to a severe, even fatal condition. Some people, particularly young children, may have no symptoms; however most adults and older children get sick. The disease lasts about a week.

Typical symptoms include:

- sudden onset of fever
- intense headache (especially behind the eyes)
- muscle and joint pain (ankles, knees and elbows)
- loss of appetite, vomiting, diarrhoea, abdominal pain, a metallic taste in the mouth
- flushed skin on face and neck, fine red skin rash as fever subsides
- rash on arms and legs, severe itching, peeling of skin and hair loss
- minor bleeding (nose or gums) and heavy menstrual periods
- extreme fatigue

A small proportion of cases can progress to severe dengue (sometimes called dengue haemorrhagic fever and dengue shock syndrome), which can occur in both adults and children. A rapid deterioration can occur 2-5 days after onset of fever. The complications of severe dengue can lead to collapse and sometimes death.⁸⁵

176. In response to my preliminary view in this inquiry, the Department of Home Affairs said that it understood that the following mitigation strategies had been adopted by contracted service providers to guard against the spread of dengue fever:

- engaging an entomologist to conduct vector risk assessments and surveys to determine the need for a full vector control programme
- commencing fogging and insecticide spraying around the RPC
- issuing all transferees and staff with an insect repellent, namely RID. Reissuing of RID occurred monthly thereafter
- implementing messaging and communication strategies to educate transferees and staff regarding the need to cover up and use RID to prevent mosquito bites
- issuing mosquito nets to cover their beds and provide protection while sleeping
- use of air conditioned accommodation for families with small children
- use of screens on windows and doors.

(c) Zika virus

177. In March 2016, the department told a Senate inquiry that it was aware that cases of the Zika virus had been confirmed in Nauru.⁸⁶ The department did not say when it first became aware of these cases.

178. The Department of Health says that Zika is a virus that is closely related to dengue and is spread by mosquitoes.⁸⁷ It says that between 2013 and 2015 there were large outbreaks of Zika virus in the Pacific Islands. Zika virus in adults causes symptoms that are similar to those caused by the flu, including fever, skin rashes, joint and muscle pain, headache, conjunctivitis and lack of energy. However, pregnant women and their unborn babies are at ‘particular risk of serious consequences of Zika virus infection’. Zika virus infection in pregnant women ‘may cause severe birth defects’. The Department of Health says:

it is now known that Zika virus may be passed from a woman to her unborn baby. This can cause potentially serious consequences for the baby, in particular a condition called microcephaly (a small head and brain). Microcephaly is just one of the signs and symptoms of congenital Zika virus syndrome (CZVS) that can be present at birth or appear later in infancy such as seizures (fits), irritability, swallowing problems, hearing and sight abnormalities.

179. Both the Department of Health⁸⁸ and the Department of Foreign Affairs and Trade⁸⁹ say that pregnant women should consider deferring travel to a Zika affected country.

180. Both Ms BK and Ms CO became pregnant while detained on Nauru.

(d) Hand, foot and mouth disease

181. During October and November 2014 there was an outbreak of hand, foot and mouth disease among young children detained in the regional processing centre. Two of the complainants’ three children were affected. It appears that early childhood education was suspended for a number of weeks as a result.

182. On 19 October 2014 Master CQ developed a ‘maculo-papular rash all over [his] body’ along with a low grade fever. He was diagnosed the following day with a coxsackievirus infection (a cause of hand, foot and mouth disease). The family’s medical records referred to ‘an outbreak’ of hand, foot and mouth disease in the camp. Initially, Wilson Security sought to have Master CQ’s family transferred to an isolation tent, but they were eventually permitted to remain in their existing tent and isolate Master CQ from contact with other children. Master CQ’s parents were provided with calamine lotion (and later loratadine syrup) and advised to isolate him until the rash improved. It appears that the rash had cleared up in about 2 weeks. Two subsequent high fevers with possible accompanying infections in early 2015 were treated with paracetamol and antibiotics.
183. Miss BM was diagnosed with hand foot and mouth disease on 29 October 2014. She had vesicles on her hands and around her nappy region which progressed to her nose and lip. Her parents also refused to have her put into an isolation tent and were advised to isolate her in their tent until she fully recovered.
184. According to notes from Save the Children on 25 October 2014, there was no playgroup that week ‘due to the Cocksackie [sic] virus spreading around’. On 4 November 2014, Master CQ’s father Mr CP said to a Save the Children caseworker that Master CQ was getting bored given that there was ‘no playgroup’ and that they had little break. Weekly schedules of activities conducted by Save the Children refer to an ‘intensive playgroup’ being provided for children up to five years old during the six week period from 13 October 2014 to 23 November 2014 rather than the usual playgroup and pre-school activities. During this period, the timetable suggests that Save the Children would provide a ‘developmental appropriate program according to observations and previous days program evaluations’. It appears that some children were not provided with early childhood education for some or all of this time. It is not clear from the records and timetables provided to me precisely what activities were provided or to whom.

5.3 Impact of detention on health and welfare

(a) Mental health

185. There is a significant body of medical evidence which shows that prolonged and uncertain periods of detention both causes and exacerbates mental illness.⁹⁰ This is accepted by the department. In evidence given to the Commission during its national inquiry into children in immigration detention, the Deputy Secretary of the department said: ‘it is clear ... , from well-established medical evidence, that mental illness and mental health does suffer through extended periods of time in detention’.⁹¹ Similar evidence was given by the former Director of Mental Health at IHMS who said it was ‘clearly established’ that detention is causing mental ill health among detainees.⁹²
186. IHMS uses a mental health screening tool called the Kessler Psychological Distress Scale (**K10**). This is a self-rated instrument that is widely used in Australia and other countries. IHMS says that the K10 ‘is well validated for use in clinically and linguistically diverse populations and research using the instrument has shown a strong association with high scores on the K10 and clinically validated psychiatric diagnoses for anxiety and depression’.⁹³

187. IHMS reported that in the fourth quarter of 2015, shortly after the complainants were removed from detention in the regional processing centre, 45.7% of people detained in the regional processing centres on Nauru and Manus Island reported high to very high levels of distress on the K10.⁹⁴ By comparison, 17.7% of adults living in the areas of most disadvantage across Australia in 2014-15 reported high to very high levels of psychological distress using the K10; and 7.3% of adults living in the areas of least disadvantage across Australia in 2014-15 reported this level of distress.⁹⁵
188. IHMS staff conducted mental health assessments of 243 children aged between 5 and 17 years in detention centres in Australia and on Christmas Island from April 2014 to June 2014. They found that 34% of children had mental health disorders that would be comparable in seriousness to children referred to hospital-based child mental health out-patient services for psychiatric treatment. Less than two percent of children in the Australian population have mental health disorders at this level.⁹⁶
189. Available evidence suggests that the impact on children’s mental health of detention in the regional processing centre on Nauru is likely to be similar to the impact on children’s mental health of immigration detention elsewhere. Paediatricians at The Royal Children’s Hospital Melbourne gave evidence to a Senate inquiry in April 2016 about their experience of treating children who had been detained on Nauru. They said:
- We have seen evidence of mental health pathology in **all** of our patients who have been on Nauru. Symptoms include features of post-traumatic stress disorder (PTSD), depression, anxiety, learning difficulties, bedwetting in previously continent children, nightmares, behavioural regression, memory loss, separation issues, and/or somatization in the form of stomach aches and/or headaches. We have seen suicidal ideation and thoughts of self-harm expressed by young children, which is extremely rare clinically. Infants are dysthymic and withdrawn, with severely disordered attachment, and we have seen developmental delay and multifactorial learning problems in older children. Our patients, who are often young children, report witnessing adults express suicidal thoughts and self-harming, sometimes through violent means such as attempted hanging or through lacerations with significant blood spill. These accounts, and other descriptions by children and families suggest the Nauru RPC is an environment characterised by insecurity and fear. These children are the most traumatised cohort of patients with whom we have worked.⁹⁷
- (emphasis in original)
190. Ms BK and Ms CO both became pregnant while on Nauru. Pregnant women on Nauru were screened with the Edinburgh postnatal depression scale, which the JAC Health Subcommittee noted had also been validated for use during pregnancy in different cultural groups.⁹⁸ The majority of women had consistently high (that is, adverse) scores. IHMS staff told the subcommittee that most women scored around 24 – significant depression is indicated by a score of or above 10. This issue was discussed in a meeting of the subcommittee that included the Assistant Secretary of the department and the Regional Medical Director of IHMS a month after the subcommittee visited Nauru.⁹⁹

The version of the minutes of this meeting provided to the Commission has the names of contributors redacted. The minutes record (in an unattributed comment) that the fact that most pregnant women had been found to be depressed ‘raises questions about the screening tool’. Someone was then asked ‘whether there was a better screening tool’. Someone else responded that they ‘did not think there was, but ... that the tool may need to be recalibrated’. Those three comments are surprising, since there is nothing in the materials that I have seen to suggest to me that the screening tool was poorly designed or incapable of application. A third person noted that ‘there is a need to improve physical conditions on the island and this will in turn improve mental health’. That appears to me to have been a more appropriate response.

191. The impact of detention in Nauru on post-natal depression is supported by other sources. For example, a clinical psychologist working at the Victorian Foundation for the Survivors of Torture gave evidence to the Commission’s national inquiry into children in immigration detention in 2014. He said that among the women transferred to Melbourne from Christmas Island and Nauru in order to receive antenatal care and have their child, he understood that around half required post-natal inpatient treatment in a mother-baby unit for post-natal depression.¹⁰⁰

(b) Physical health and welfare

192. At the time the complainants were detained at the regional processing centre, Save the Children Australia were contracted by the department to provide welfare services to children.¹⁰¹
193. Notes prepared by Save the Children caseworkers indicate that they had contact with Miss BM two or three times a week on average. A welfare report by Save the Children in November 2014, about 6 months after the family had arrived in Nauru, assessed Miss BM as ‘at risk of significant harm in relation to her mental and physical health, deterioration within the family unit and adverse developmental outcomes’. At that time, Miss BM was 4 years and 3 months old. The report provided the following reasons for this assessment:

- Indefinite detention in Nauru
- Multiple daily stressors in OPC3 such as poor food quality and cramped living quarters
- Lack of appropriate nutrition
- Incidences of community violence within the camp
- High noise levels
- Environmentally harsh conditions
- Living within a construction zone
- Lack of privacy
- Lack of resources (eg. Games, art supplies, sporting equipment to use her time constructively and to practice positive coping skills in this accommodation)
- Minor status
- Lack of important resources (eg. Water)
- Exposure to self-harm and suicidal ideation within the camp
- Uncertainty of her family’s refugee status

More recently there has been increased community violence and self-harm within OPC3 over the last 3 weeks due to messaging being delivered by the Immigration Minister Scott Morrison regarding TPV's. As a result this family has been at increased risk due to witnessing an amount of community violence.

194. Similar reports were prepared in relation to Miss BM over the following 4 months.

195. In December 2014, after more than 6 months in detention, Save the Children provided the following assessment of the risks to the development of Master CQ:

[Master CQ] is 1 year old boy and as such is placed at significant risk of developing trauma by remaining in detention. [Master CQ] is placed at high risk of developing psychological, emotional and behavioural issues due to a number of risk factors including but not limited to:

- their indefinite detention in Nauru and the multiple daily stressors present in OPC3 such as: poor food quality and lack of appropriate nutrition, cramped living quarters including a lack of privacy, incidences of community violence within the camp, high noise levels, environmentally harsh conditions, living within a construction zone, the experience of bullying by other children
- lack of important resources including but not limited to: access to clean water, games, art supplies, sporting equipment and clothes
- the minor status of her child, and
- their exposure to self-harm and suicidal ideations within the camp.

If [Master CQ] remains in detention, it will be likely that he will not meet his developmental milestones due to the risk of trauma. Young children require stable, sensitive, loving, stimulating relationships and environments in order to reach their potential. The detention centre is an unstable environment that lacks positive stimulation.

Whilst [Master CQ's] parents are nurturing and responsive to his needs, they are unable to provide emotional stability for him due to their detention fatigue.

196. The department submits that the notes made by Save the Children case workers 'do not necessarily reflect the Department's views'. That submission is unhelpful because it suggests that some of the notes may reflect the department's views, and others may not, but does not identify the category in which any of the views fall.

197. Save the Children provided evidence to a Senate inquiry in April 2015 in which Save the Children identified particular concerns about the facilities provided in the regional processing centre for pregnant women and infants. It said:

The detention environment is not one in which any parent would chose to raise a child. Infants and young children are forced to live in cramped accommodation which can give rise to an increased risk of infection, and mean that children bear witness to acts of violence or unrest. In addition, the stress of such an environment can place strain on parents which leads to increased risk for children.

...

Save the Children does not consider that the Nauru RPC is an appropriate place for infants, and we recommend that no further transfer of infants to Nauru occur.¹⁰²

5.4 Assessment of general conditions of detention

198. The department submits that the facilities and services within the regional processing centre on Nauru were 'considered adequate for babies and young children'.¹⁰³ The materials that I have obtained and reviewed (described in summary form below) make it impossible to accept that submission. On the contrary, I do not accept that any reasonable person acting for or on behalf of the Commonwealth could have considered that the facilities and services on Nauru between July 2013 (when detainees were first accommodated in vinyl marquees) and at least July 2015 (when the last of the complainants in this inquiry were released from the centre) to be 'adequate for babies and young children'.
199. A number of United Nations bodies and Australian Senate committees have concluded that the Nauru was not an appropriate place to transfer families with young children.
200. Following its second inspection of the Nauru regional processing centre in October 2013, UNHCR said that it was inappropriate to send asylum seeker children to offshore processing centres in remote locations, including Nauru. It considered that children had been transferred to Nauru without adequate services in place to ensure their mental and physical well-being. On the basis of the harsh conditions at the centre, UNHCR's view was that the facilities and arrangements in place were inappropriate for the support and protection of children and that any transfers of children to Nauru would be highly inappropriate.¹⁰⁴
201. In December 2014, the United Nations Committee Against Torture expressed its concern about the Australian Government's policy of transferring asylum seekers to Nauru and PNG 'despite reports on the harsh conditions prevailing in those centres, such as mandatory detention, including for children, overcrowding, inadequate health care, and even allegations of sexual abuse and ill treatment'.¹⁰⁵ The Committee said that '[t]he combination of the harsh conditions, the protracted periods of closed detention and the uncertainty about the future reportedly creates serious physical and mental pain and suffering'.
202. In May 2015, the United Nations Subcommittee on the Prevention of Torture, which monitors how States that have ratified the *Optional Protocol to the Convention against Torture (OPCAT)* are meeting their treaty obligations, spent three days in Nauru monitoring places of detention including the regional processing centre. The subcommittee reported to the Government of Nauru in December 2015 but this report has not been made public.¹⁰⁶ The subcommittee urged Nauru to set up a detention monitoring mechanism.¹⁰⁷
203. In August 2015, a Senate Select Committee inquiring into the conditions in the regional processing centre concluded that 'the Nauru RPC is neither a safe nor an appropriate environment for children and that they should no longer be held there'.¹⁰⁸ Similar conclusions were reached by the Senate Legal and Constitutional Affairs References Committee in April 2017.¹⁰⁹

204. In conducting my inquiry, I have assessed the complaints made by each of the complainant families against the evidence of conditions of detention reported in first-hand accounts by officers of the department, Commonwealth agencies and other independent bodies that have inspected those conditions. In particular, I have had regard to accounts of conditions by the department's Chief Medical Officer; by the Commonwealth Ombudsman, Comcare and the Australian National Audit Office (which reviewed other first-hand accounts); by doctors engaged by IHMS to provide a visiting specialist paediatric service; and by the JAC Health Subcommittee appointed by the Governments of Australia and Nauru. I have also considered records created by service providers contracted to the department: Transfield, IHMS, Wilson Security and Save the Children.
205. Having considered the complaints and all the other information from multiple sources referred to above, I find that the centre on Nauru was not an appropriate place to send families with young children such as the complainants. My view aligns with that of other independent observers and assessments of conditions in the regional processing centre.
206. The complainants were provided with accommodation that was not adequate or appropriate in the circumstances, given the adverse living conditions that they faced on the phosphate plateau of central Nauru. The vinyl marquee accommodation at RPC3 failed to provide sufficient protection from heat, rain and risk of serious disease. I find that it did not provide children with an adequate standard of living, contrary to article 27(1) of the CRC; and it negatively affected their right to survival and development, contrary to article 6(2) of the CRC. While families with children under 4 are said to have been provided with air conditioning, this was of no benefit to families such as Mr DE's. His 6 year old son had to endure temperatures of up to 50 degrees Celsius in their living quarters. The makeshift accommodation meant that this experience was significantly more arduous for them than for families ordinarily resident on the coast of Nauru with permanent housing and access to shade.
207. I find that the accommodation of up to five or six families in each marquee with partitions that did not reach the ceiling was contrary to their right to privacy under article 17(1) of the ICCPR and article 16(1) of the CRC.
208. As described by the Chief Medical Officer, the marquees were also unable to cope effectively with rain and high levels of humidity. Stagnant pools of water accumulated under the tents, creating breeding grounds for mosquitos and increased risk of serious disease, and the surfaces of the tents became covered in mould. There was no action taken to raise the level of the tents, contrary to the Chief Medical Officer's recommendation. Action taken to remediate the issue of mould was not complete two years after the issue was first raised.
209. The deficiencies in the accommodation and overcrowding in the marquees contributed to poor health outcomes and facilitated the spread of illness among all detainees. I find that this was contrary to the right of children under article 24(1) of the CRC to the highest attainable standard of health. All of the children of the complainants suffered from regular illnesses such as fungal infections, respiratory infections and other skin conditions caused or exacerbated by environmental factors including heat, humidity, phosphate dust and close quarters living.

210. The significant and ongoing problems with substandard treatment of sewage identified by the Chief Medical Officer over the course of his two reports was also contrary to the right to health under article 24(1) of the CRC.
211. Two of the complainant families were transferred to Nauru in the middle of a dengue fever epidemic, which was reported to the department by its Chief Medical Officer. Six people at the centre had already contracted DHF, which has a high mortality rate. In response to my preliminary view on this issue, the department acknowledged that it was 'aware of a slight increase in dengue fever cases' at the time that the two families were sent to Nauru but said that it understood at the time that mitigation strategies had been implemented 'in order to guard against the spread of dengue fever' in the Nauru regional processing centre. I find that sending families with young children to Nauru at that time to live in conditions that were conducive to the spread of the disease was contrary to both the right to survival and development and the right to health in articles 6(2) and 24(1) of the CRC.
212. I am also concerned about the inappropriate accommodation of pregnant women in vinyl marquees while there were reports of Zika virus on Nauru, creating serious risks for the unborn children.
213. The Chief Medical Officer identified a range of specific risks to children arising from the infrastructure at the regional processing centre. Most of these related to risks of traumatic physical injury. Several of these risks remained unaddressed at the time of his second report 9 months later. I find that the accommodation of children in an environment with these risks and the failure to rectify them was contrary to the duty of the Commonwealth under article 3(2) of the CRC to ensure that children have the protection and care that is necessary for their wellbeing, including by ensuring that institutions responsible for their care conform with relevant safety standards.
214. The Standard Minimum Rules for the Treatment of Prisoners relevantly provide that:
- All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation (rule 10).
 - All parts of an institution regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times (rule 14).
215. As noted above, these rules are relevant to an assessment of compliance with article 10(1) of the ICCPR and article 37(c) of the CRC.
216. In response to my preliminary view, the department did not seek to controvert or otherwise challenge any of the findings about the conditions in which people were detained, other than making some comments about the mitigation strategies that were adopted in an attempt to prevent the spread of dengue fever (see paragraphs 176 and 211 above). The only substantive comment made by the department about the conditions of detention was that this was 'a matter for the Nauruan Government'. I do not accept that response. The Commonwealth's responsibility under international law for the conditions of detention at the regional processing centre was comprehensively dealt with in my decision on jurisdiction, reproduced in **Annexure C** to this report.

217. The issues discussed above and summarised in this section 5.4, taken together, lead me to the conclusion that the complainants, both adults and children, were not treated with humanity and with respect for their inherent dignity, contrary to articles 10(1) of the ICCPR and 37(c) of the CRC.
218. Up to this point in the report, I have focused on factors that affected all people detained at the regional processing centre on Nauru with a particular focus on the conditions in RPC3 that accommodated families and single adult females. The following sections examine a number of specific complaints by each of the complainant families.

5.5 Treatment of Ms BK's family

219. Ms BK made her complaint on her own behalf and on behalf of her husband Mr BL and their then four year old daughter Miss BM.
220. The family had travelled from Iran to Australia to seek asylum. According to notes made by a Save the Children caseworker, Mr BL became involved with the Catholic church in Iran and had attended secret church services. He said that he was at risk of persecution as an apostate, which I understand to mean treatment as an apostate from the dominant and official religion of the Islamic Republic. He said that he left Iran with his family after his friend and fellow congregation member was arrested by the police for his religious activities associated with Catholicism.
221. Ms BK and her family were detained at the Nauru regional processing centre for 16 months between 3 May 2014 and 13 September 2015. During their detention, they were assessed by Wilson Security as being low risk.
222. Ms BK made the following complaints about her family's treatment while in detention at the regional processing centre:
- Her daughter faced risks from a lack of hygiene, the risk of disease and in particular from exposure to acts of violence and self-harm.
 - Detention had a detrimental impact on the mental health of her husband, who deliberately ate a screw in an attempt to have the family transferred to Australia.
 - There was a significant delay in medical treatment for an impact injury to Mr BL's finger which required surgery.
 - There was a significant delay in making the decision to transfer Ms BK from Nauru to Australia to give birth, and she was given conflicting information about the potential transfer, both of which had an impact on her mental health.

(a) Risks to daughter Miss BM

223. Ms BK's daughter Miss BM was four years old at the time of the making of the complaint to the Commission. Her mother said that the lack of hygiene, lack of nutritious food, risks to safety and the risk of disease were harmful to Miss BM's health.
224. Her mother claimed that Miss BM was regularly frustrated and uncomfortable from itching on her skin. She said that Miss BM had a fungal growth and discolouring that spread from one to three of her fingernails. Ms BK said that they had asked IHMS to treat the infection but that nothing had been done. Medical records suggest that Miss BM was seen by a GP at the IHMS clinic on 28 July 2014 due to lesions on her nails on both hands. The GP diagnosed this as onychomycosis (a fungal infection) and prescribed Lamisil and Bactroban. On the basis of those records, I am satisfied that appropriate treatment was provided for this condition at that time.
225. Ms BK was particularly concerned about the exposure of her daughter to distressing conduct by other people detained at the centre, including fights and arguments and attempts at self-harm. In her complaint to the Commission, Ms BK said:
- It's so awful that my daughter is [exposed to] evidence of the suicide of the people, fighting and hard discussing ... between the people who ... are so nervous and have lots of problems ... mentally and spiritually.
226. This complaint is supported by notes taken by a Save the Children case worker who reported a conversation with Mr BL on 20 July 2015. Mr BL told the case worker that Miss BM had previously seen detainees with their lips stitched together during a peaceful protest. He said that he had attempted to shield Miss BM from the protest but that it was unavoidable as the protest was in an area the family had to travel through to get to the mess. There have been media reports including video of detainees sewing their lips together during a protest in the Nauru regional processing centre in October 2014.¹¹⁰ Mr BL also told the case worker that while the family were accommodated in the RAA, another family was present that was experiencing considerable distress and regularly fighting, screaming and talking about self-harm.
227. The previous year the JAC Health Subcommittee had also raised concerns about the exposure of children to acts of self-harm by other detainees, noting that there had been 102 incidents of self-harm in the first 14 months of the operation of the Nauru regional processing centre including 28 attempted hangings or asphyxiations, 5 people who had cut their neck or throat and 9 people who had sewn their lips together.¹¹¹
228. According to a psychologist report on 22 July 2015, several people had reported that Miss BM had changed in mood and behaviour since February 2015. In subsequent sessions with a psychologist on 1 and 18 August 2015, the psychologist attempted to use a play therapy approach 'to explore the possibility that [Miss BM] had seen, heard and learned negative experiences from [another child] while the families were together in the RAA [Restricted Access Accommodation]'. It appears that this other child had a 'trauma experience' that the psychologist thought might have had a 'possible impact on [Miss BM's] subsequent troubling behaviours' as reported by her parents and teachers. Miss BM refused to be drawn into discussion on this topic.

229. It appears that Miss BM was also affected by the distress caused to her parents by the uncertainty over whether they would be transferred to Australia for Ms BK to give birth to her second child. On 26 July 2015, Miss BM was referred for monitoring and discussion as part of a weekly Vulnerable Children's Meeting conducted by Save the Children. The following reasons for referral were given:

[Miss BM] is highly vulnerable due to her young age and exposure to her parents deteriorating mental health. [Miss BM] is nearly completely reliant on her parents for her physical and emotional needs to be met. [Miss BM's] mother, [Ms BK] is currently accommodated in the RAA due to ongoing physical and mental health issues, including reported suicidal ideation. [Miss BM's] primary caregiver, [Mr BL] is reporting rapidly deteriorating mental health which is impacting upon his ability to parent [Miss BM].

230. At this time, Miss BM's mother was in the 28th week of her pregnancy and her mental health was rapidly deteriorating. The impact on her mental health of the delays in decisions about where she was going to give birth are dealt with in more detail below.

231. The Save the Children report on 26 July 2015 set out observations of early childhood educators responsible for Miss BM. The report said:

EE [Early Education] stated they are very concerned about [Miss BM] and reported observing a decline in her behaviours over the last few weeks. EE stated [Miss BM] has gone from articulate considerate child to moody defiant, hysterically cry[ing], tired and limited resilience. EE staff continue to have a positive relationship with the father, although he is presenting as detention fatigued. EE staff stated [Miss BM] is experiencing a lot of transition in her life at present and is very aware of her family's situation.

232. Miss BM continued to be discussed at the Vulnerable Children's Meeting each week for seven weeks until the family was removed to Australia on 13 September 2015.

(b) Medical care for husband Mr BL

233. According to Ms BK's complaint to the Commission, at the end of 2014 her husband Mr BL deliberately ate a screw. She said her husband was becoming increasingly scared and anxious about their future and that this act of self-harm was a desperate attempt to leave Nauru. She said that the reason that Mr BL considered that this might result in a transfer was because he was aware that a ten year old who had been detained on Nauru had previously eaten a screw and was transferred to Australia.

234. Medical records for Mr BL show that he attended the IHMS clinic in the afternoon of 7 December 2014 after ingesting a screw two hours previously. According to the notes, Mr BL initially said that he did not do it deliberately and it happened while he was playing with the screw and holding it in his mouth. An x-ray was conducted and identified the screw on the level of the duodenum (the first section of the small intestine). Mr BL was admitted to the SAA for observation. The initial plan was to repeat x-rays every 1-2 days until the foreign body was eliminated or at least had moved to the colon.

235. At 5.00pm on 7 December 2014, a caseworker from Save the Children Australia met with Mr BL. The caseworker's report said:

I asked [Mr BL] why he was placed in the SAA facility today.

[Mr BL] said 'I trust you, so I'll tell you that I told IHMS that I accidentally swallowed a screw, but it was not an accident.'

I asked him why he swallowed a screw.

[Mr BL] said 'because I want it to stab into my stomach so they have to cut me open, and operate on me. So they take me away from here, out of Nauru.'

I asked [Mr BL] if his choice to swallow the screw was 'to suicide, to end your life?'

[Mr BL] said 'No, I want to be alive, for my family, for [BM]. I did it so they could take me away from here, anywhere but here'.

236. As a result of this report, Mr BL was referred for a Mental Health Review on 8 December 2014. According to notes by the Mental Health Nurse, Mr BL said: 'I swallowed the nail so that I go to Australia with my family. I don't want to kill myself at all. I love my family. If [I] swallow a nail they send me to Australia and they will operate [on] me and I get to be there with my family'.

237. In the afternoon of 8 December 2014, Mr BL complained of a belly pain and blood in his urine and in his stool. He was given treatment by a GP including intravenous medication. Early in the morning of 9 December 2014 a decision was taken to medevac Mr BL to Australia as a result of possible (but at that stage considered unlikely) bowel or bladder perforation.

238. Early in the morning of 9 December 2014 Mr BL pulled out his IV fluids and asked a nurse to remove an indwelling foley catheter 'due to refusal to go on Medivac without his family'. The nurse was able to convince him to continue with treatment. The issue was raised with his GP who made the following notes:

Currently client is refusing to be transferred to mainland if we cannot guarantee him that his family is going to join him. Discussed the problem with SMO and HMS and we informed his case manager and DIBP. Explained to the client and to his wife the medical risk of his refusal for treatment and if he has a bowel perforation it is life threatening situation. He says that he understands well but still he does not want to go if his family is not able to join him.

239. Following a session with psychologist, Mr BL agreed to be transferred without his family. Ms BK remained on Nauru with their daughter. Mr BL was seen at a hospital in Brisbane on 10 December 2014. They took an abdominal x-ray and computed tomography (CT) scan with contrast which revealed no perforation to the bowel and no bladder wall damage. The screw was seen in the ascending colon. The plan was to wait to see if it was passed. A further abdominal x-ray on 12 December 2014 showed no screw in his abdomen.

240. On 13 December 2014 Mr BL was returned to Nauru.

241. Ms BK says that during the four days that her husband was away she was not allowed to speak with him. She said that her husband was not on any medication for his mental health but that he remained very sad and stressed.

242. The Commission asked the department whether it was aware of any deterioration in Mr BL's mental state while he was detained on Nauru and, if so, what action the department took to address it. The department submitted that: 'IHMS advised that the Department were notified of [Mr BL's] mental health status through IHMS food and fluid refusal and incident reports'. The department also provided general information about the staffing of IHMS, saying that 'mental health care services at the Nauru RPC are provided by general practitioners, mental health nurses, a mental health team leader, psychologists, psychiatrists and counsellors, including counsellors with torture and trauma counselling experience'.
243. On 25 January 2015, Mr BL sustained an injury to the fourth finger on his right hand after a piece of furniture that he was moving fell on it. There is no suggestion that this was anything other than an accidental injury. Mr BL said that he worked as a mechanic in Iran and was concerned about the ability to use the hand in the future. An x-ray identified a potentially fractured bone in his finger and a possible tendon injury. A follow up x-ray on 14 February 2015 did not identify any fractures. On 23 April 2015 a hand surgeon advised that Mr BL had sustained an extensor tendon injury. The surgeon recommended either splinting for eight weeks or surgical intervention. Given that the finger had already been splinted for ten weeks without signs of improvement, an IHMS GP recommended that Mr BL be transferred for consideration of surgery to repair his tendon. A Recommendation for Medical Movement form was submitted by IHMS to the department on 6 May 2015. No action was taken in relation to this request. More than four months later, Mr BL accompanied his wife Ms BK when they were transferred to Australia for the birth of their second child. The department said that 'an appointment and approval remained pending upon [Mr BL's] departure from Nauru on 13 September 2015'.

(c) Medical care for Ms BK

244. Ms BK's statement to the Commission records her anxiety for the safety of her family on Nauru. She was concerned about the living conditions in the camp and about regular fighting and shouting in the camp. Equally, she feared the prospect of being sent to Cambodia or released into the Nauruan community. She claimed that detainees who settled in the Nauruan community were exposed to violence.
245. Ms BK complained about the impact of detention and an unsafe environment on her mental health. In her complaint to the Commission she said:

I as a woman and a mother [am] not able to sleep during the night till the sun coming and any psychologist or doctors cannot understand this problem and I wish now for my family that we sleep for ever because I have no [hope for] the future and [to] have a good life. IHMS and psychologists [are] not able to help anybody ... mentally and physically. ... The psychologist make me worse not better mentally and I and my family are depressed and we are in a very bad situation.

246. In February 2015, Ms BK found out that she was pregnant. I deal below with two issues related to this: first, her request to be transferred to accommodation closer to the medical centre; and secondly, the significant delay in transferring her to Australia to give birth when it became clear that she had a complicated pregnancy that could not be safely dealt with on Nauru. As dealt with in more detail below, there was a failure by the department to communicate appropriately with Ms BK about whether she would be transferred off Nauru and when and where she would be transferred. I find that this conduct directly contributed to a deterioration in her mental health leading to a diagnosis of a major depressive disorder.

Request to be transferred to RPC1

247. Ms BK says that after becoming pregnant on Nauru she asked that her family be transferred from the family compound of RPC3 to the compound at RPC1, which is closer to the medical facilities, but that this request was refused. The department says that it is unaware of any such request. Ms BK's allegation is supported by the medical records produced by the department which describe multiple requests to move to the SAA within RPC1.
248. When her husband was in Brisbane in December 2014 for medical treatment Ms BK told a psychologist that she was able to stay in the SAA because it was closer to the medical facilities in RPC1 and they could keep her updated with news about her husband. After she became pregnant, she asked a GP during a consultation on 26 February 2015 whether she could again stay in the SAA because this was a better environment for her while pregnant and was closer to the medical facilities. The GP noted in the medical report that '[a]t the time of examination there is no indication for her to stay in SAA'. The following day, Ms BK again asked a nurse whether she could stay in the SAA. She was advised that 'staying in SAA is not an option at this time'. On 1 March 2015, she said to a mental health nurse that she wanted to move to the SAA. She was advised that 'SAA was only used for respite but in her case it was best for her to adjust in her current accommodation with help from existing support networks'. There does not appear to be any record of a consideration of these requests by Transfield – they appear to have been dealt with by medical staff. As discussed in more detail below, once Ms BK began to exhibit symptoms of a major depressive disorder, she was transferred to supported accommodation in RPC1 with her family.

Pregnancy and issues relating to transfer to Australia

249. When UNHCR inspected facilities at the regional processing centre in October 2013, it noted that there were a number of pregnant asylum seekers but no gynaecologist. It recommended that all pregnant asylum seekers be removed from Nauru until such time as adequate medical facilities are available, together with appropriate accommodation.¹¹²
250. There was no obstetrician available to women detained in the regional processing centre when Ms BK and her family arrived in May 2014.¹¹³ The department's Chief Medical Officer reported in May 2014 that the Nauruan government had 'made little progress in recruitment of the obstetrician required to establish maternity services in the RPC'. The CMO described this as 'a significant weakness in the current model and needs to be prioritised'.¹¹⁴

251. In its response to questions from the Commission, the department confirmed that there were no policy or planning documents about the provision of medical care to pregnant women in the regional processing centre for any part of the time that the complainants were detained there. The only relevant document identified by the department was its contract with IHMS.
252. Ms BK returned a positive pregnancy test in a consultation with IHMS on 6 February 2015. She was first added to a medical transfer list on 17 February 2015, however, as discussed in more detail below, she was then provided with conflicting information about whether she would be transferred off Nauru to give birth and, if so, when she would be transferred and where she would be transferred.
253. On 8 March 2015, Ms BK reported to a mental health nurse that she had feelings of wanting to die and that nothing made her happy anymore. She said that her worries and stress worsened when she was told that pregnant women will no longer be travelling to Australia to give birth. She made a similar report on 13 March 2015 and said that she did not feel safe in Nauru.
254. Ms BK had been diagnosed with gestational diabetes mellitus (GDM) after her first pregnancy in Iran. From 14 to 17 March 2015 she was accommodated in the RAA and her blood sugar levels were monitored. On 20 March 2015, an obstetrician in Sydney confirmed a positive diagnosis for GDM and she was prescribed Metformin and put on a diabetic diet. Her treating doctors considered that her GDM was a complication to her pregnancy that required her to be transferred off Nauru.
255. In May 2015, the department told a Senate inquiry that IHMS has recommended that pregnant transferees not give birth on Nauru because there were no ongoing obstetric and paediatric staff at the Republic of Nauru Hospital (**RON Hospital**). The department said that pending confirmation of suitable obstetric and paediatric arrangements by the RON Hospital, pregnant asylum seekers would continue to be transferred to Australia to give birth.¹¹⁵ Departmental policy at that time was that pregnant women 'are currently moved to Australia before 28 weeks gestation'.¹¹⁶
256. On 2 June 2015, IHMS Assistance submitted a Request for Medical Movement form to the department recommending that Ms BK be transferred to Australia at 28 weeks gestation for delivery of her baby. The department submits that this recommendation was made 'to mitigate risk and to be able to manage preterm labour or maternal complications at a tertiary centre if they were to arise'. IHMS Assistance noted that Ms BK had gestational diabetes and that uncontrolled diabetes can cause complications in pregnancy. The form was authorised by the OPC Medical Director at IHMS. IHMS Assistance said:
- As per the visiting Obstetrician's recommendations, the client requires transfer to mainland from Nauru at 28 weeks gestation to facilitate ongoing obstetric management and delivery planning. [Ms BK] will be 28 weeks gestation on the 27/07/2015. IHMS Assistance recommends the client transfer to Darwin prior to this date.
257. The form indicated that consideration had been given to the following options which were each rejected:
- Local treatment options (Republic of Nauru Hospital or Manus Medical Clinic)
 - Pacific International Hospital treatment options
 - Possibility of local treatment options currently not available but which might be feasible (eg visiting surgical/specialist team).

258. The department's Chief Medical Officer and the Medical Officer of the Commonwealth (**MOC**) were engaged to provide advice regarding Ms BK's transfer.
259. On 25 June 2015, when Ms BK was '23 + 3 weeks pregnant EDC', the Senior Medical Officer at IHMS completed an IHMS Assistance Activation Form advising that Ms BK required transfer off Nauru for 'ongoing antenatal care of her pregnancy, GGT, management of labour and birth, and post-partum care'.
260. On 9 July 2015, the primary health nurse included the following comment in Ms BK's notes:
- Both [Ms BK] and her husband have asked me WHY they have not been transferred off already because of her GDM which complicates their pregnancy. They believed that other families have been flown off earlier than 28 weeks and feel this should occur for them. I explained that the current policy is to transfer at or before 28 weeks unless suggested otherwise by the medical specialists. The visiting obstetrician did explain fully to both [Ms BK] and her husband that this pregnancy is progressing normally at this stage and that he had no concerns when he saw her that she required earlier transfer.
261. The same day, a GP noted that Ms BK had been offered two options for delivery: Darwin or the RON Hospital. The doctor noted that she had agreed to be transferred to Darwin.
262. On 15 July 2015, IHMS Assistance submitted an updated Request for Medial Movement form to the department. The update said:
- As stated above, [Ms BK] has been diagnosed with gestational diabetes, which places her at increased risk of fetal and delivery complications. As per the OPC MD ... [Ms BK] is classified as a high risk pregnancy and is not recommended for delivery on Nauru. The recommendation remains for transfer to Darwin before 28 weeks gestation, 27/07/2015.
263. On 18 July 2015, there was a report that Ms BK had threatened to hang herself. The medical notes say that she had seen a doctor at RPC1 and was told that she may have to give birth to her baby in the RON Hospital. An assessment by a mental health nurse concluded that Ms BK was 'genuinely concerned that she would have to give birth to her baby at the Ron hospital here on Nauru and that death would be better than this'. At this stage, she was 27 weeks pregnant. The mental health nurse said that:
- I was able to inform the client that pregnant asylum seekers are transferred to Australia to give birth around the 28 week mark, give or take a few days or perhaps a week either side. At first she wasn't totally convinced that this would happen based on what the doctor at RPC1 had told her. I reassured her several times that she would soon be transferred to Australia around the 28 week mark, give or take a week either side of this date. Once she realized that this was the case her outlook changed completely and she was very reassured and happy at this news.
264. The department submits that as at 18 July 2015, 'IHMS was awaiting approval for transfer'. As discussed below, approval needed to be given by an officer of the department.

265. On 23 July 2015, the family was moved into RAA for respite care due to the dramatic decline in Ms BK's mental health. She was visited by a psychologist on 25 July 2015. According to the psychologist's notes:
- [Ms BK] reported she is feeling very bad. She is sorry that she became pregnant and cannot see a positive future for the baby or her family. She reported she wakes frequently through the night with thoughts of how bad her situation is at present. She stated that when she wakes she feels as if she can't breathe.
266. On 25 July 2015, Mr BL saw a GP and said that Ms BK was depressed 'after hearing news that IHMS will bring her to PNG instead of Australia as promised previously'.
267. By the 28 week mark of her pregnancy on 27 July 2015, Ms BK had not been transferred to Australia. The following day, a Save the Children case worker reported on a conversation with Ms BK, saying that 'the doctors and midwife had informed her that the request for transfer was currently sitting with Canberra'.
268. On 30 July 2015, Ms BK had another appointment with a psychologist and was diagnosed with a major depressive disorder. The psychiatrist emphasized the need for clarity about her transfer to Australia. The psychiatrist's medical notes said:
- In the last few weeks she has become very depressed. ... Factors in her decline are the general level of stress in the camp environment, period of time in detention, being away from extended family, and uncertainty over where she will be delivering her baby. ...
- My impression is that this lady has become very depressed and her mood has been steadily worsening in recent weeks. ...
- At this point she needs a clear plan and transfer to an environment which is less stressful and where she has access to more mental health care both in the remainder of her pregnancy and in the post-natal period. This may prevent further decline in her depression. If her situation is not improved and her depression worsens she will need admission to a Psychiatric Hospital. She is very close to needing that now.
269. The same day, Ms BK's husband Mr BL also had an appointment with a psychologist who noted that Mr BL 'became tearful while telling how his wife has "shut down" from him. Whereas previous to today his wife would not speak to him and then become very angry and blame him for their current conditions, now she will not speak at all.'
270. On 31 July 2015, Ms BK was placed on IHMS's Psychological Support Program. IHMS documents the steps taken as part of a Supportive Monitoring and Engagement (**SME**) program – a joint stakeholder program involving IHMS, the department and the detention service provider designed to assist in the management of risk of self-harm and suicide.¹¹⁷ Ms BK was assessed as 'SME Moderate' which involved daily visits from a midwife and mental health team and checks on her wellbeing every 30 minutes. The Management Strategy included a recommendation to: 'Elevate concerns to ensure a definite plan for where she is giving birth is made as soon as possible'.

271. On 2 August 2015, Ms BK's SME Level was raised to 'High Imminent' as a result of a further deterioration in her mental state and a risk of self harm. This required constant one-on-one monitoring during any period that she was not accompanied by her husband. A psychologist reported that: 'Given that she is approximately 29 weeks pregnant and has not been given any indication when she will be moved from the island, or where she is going for the birth and her frequent mood swings, there is a high risk of unpredictable behaviour which could result in self harm'.
272. According to notes by a Save the Children worker of a meeting with other stakeholders on 2 August 2015, IHMS said that they were 'still awaiting advice re possible transfer' and ABF said that they 'have escalated [Ms BK's] case via the HLO [Health Liaison Officer]'.
273. On 3 August 2015, Ms BK was seen by a visiting obstetrician. She reported to her psychiatrist the following day that the obstetrician informed her that Australian policy had changed, with births being offered in Nauru or Papua New Guinea rather than pregnant women being automatically transferred to Australia as had happened in the past.
274. As a result of the consultation, the obstetrician observed that Ms BK required a range of treatments that were not available in Nauru. In particular, the obstetrician recommended close monitoring of blood sugar levels and noted a potential requirement (considered likely) for insulin therapy if levels continued to be raised. If insulin therapy was required, an endocrinology consultation was advised to guide dosing, and ongoing endocrinology input would be required to guide dose adjustments. Close fetal surveillance with regular ultrasound assessments was also required as the fetus was already macrosomic (significantly larger than average) as a result of the gestational diabetes. The obstetrician noted that:
- All of the above would be available if [Ms BK] were transferred to a mainland site with access to tertiary clinical services. Additionally as she is now 29+1 weeks she is now 8 days over the previously agreed threshold for transfer and following my departure on 5/8/15 there will be a period of time before the arrival of the next IHMS employed obstetrician on island. This period of time represents a hiatus during which should preterm delivery occur, a low but not inconceivable possibility, there would be a high risk of poor neonatal outcome. This statement is made in view of the presently available neonatal capability of the RON Hospital.
275. The lack of capacity of the RON Hospital to provide neonatal care is discussed in more detail below in the context of a report from an expert in obstetrics and gynaecology engaged by the department.
276. Later on 3 August 2015, Ms BK saw a mental health nurse. Her primary concern was the prospect of not being transferred to Australia to give birth. The plan from the mental health nurse included: 'Elevate concerns to ensure a definite plan for where she is giving birth is made as soon as possible'. Ms BK remained on High Imminent SME.

277. It appears that the concerns expressed by the visiting obstetrician were elevated through a further update to the Request for Medical Movement form that was provided to the department on 3 August 2015. That updated request said:

[Ms BK] is now 29 weeks gestation. The recommended transfer to Darwin was prior to 28 weeks gestation, 27/07/2015, which has now passed. This lady has a high risk pregnancy and is not recommended to deliver on Nauru. [Ms BK] has also been reviewed by the psychiatrist on Nauru who advises she is now very depressed and her risk of self harm is beginning to increase. He advises that if her depression worsens that she will need acute psychiatric admission. **IHMS recommend urgent transfer to Australia.** The client has a risk of preterm labour and maternal complications requiring tertiary care. These risk factors are also exacerbated by limited access to appropriate transport for immediate neonatal evacuation if required from Nauru.

(emphasis added)

278. Another update to the Request for Medical Movement form was provided to the department on 4 August 2015 and included detail from the visiting obstetrician's report.

279. According to the department's submissions, Ms BK was advised on 4 August 2015 'that the DIBP policy regarding transfer to Australia for delivery had recently changed and if DIBP did not approve the transfer, IHMS would work with her to develop a safe birthing plan at the Republic of Nauru (RON) Hospital or the Pacific International Hospital (PIH)'. It appears from Ms BK's medical records discussed above that this was not the first time that she had been advised of the change of policy.

280. The SME Level for Ms BK was reduced to 'Moderate' (again requiring monitoring every 30 minutes) on 4 August 2015 and was discontinued on 6 August 2015.

281. Save the Children records of a stakeholder meeting on 6 August 2015 record: 'IHMS advise highly unlikely that [Ms BK] will be transferred to Australia for birth and that preparations for delivery at RON were underway'.

282. On 19 August 2015, the IHMS obstetrician advised that Ms BK 'remains a high risk pregnancy due to previous caesarean section, gestational diabetes and depression'. The obstetrician noted that Ms BK's first caesarean section was required as a result of a cephalopelvic disproportion, that is, the baby's head or body was too large to fit through the mother's pelvis. As a result, the obstetrician advised that a planned caesarean section in Australia was advisable. Further, there was a potential requirement for insulin therapy to deal with the GDM, an endocrinology consultation, and close surveillance of the newborn by a neonatologist and trained NICU staff.

283. The department said that on 24 August 2015 it received advice from the CMO that Pacific International Hospital (**PIH**) in Port Moresby was 'a viable option' for Ms BK to give birth. The department said that, after receiving this advice, it pursued PIH as a treatment option.

284. On 25 August 2015, Ms BK had another appointment with the psychiatrist she saw three weeks earlier. The psychiatrist concluded that there was 'a definite risk of post-natal depression' and continued to recommend that 'she be transferred to mainland for rest of pregnancy'. Similar recommendations were contained in a psychiatrist report on 29 August 2015: 'Emphasise with higher powers the need for mental health support peri-natally not just obstetric care'.

285. The department said that on 3 September 2015, it directed IHMS to make the necessary pregnancy appointments for Ms BK at PIH and to book a charter flight for Ms BK and her husband.
286. On 5 September 2015, Ms BK and her husband were notified by the Health Services Manager (**HSM**) that they were to be transferred to Papua New Guinea for delivery of their baby by caesarean section. At this stage, Ms BK was 34 weeks pregnant – 6 weeks after the date that her obstetrician recommended that she be transferred to Australia. Ms BK was very distressed by this news.
287. According to notes by a Save the Children worker of a meeting with other stakeholders on 8 September 2015, the Australian Border Force reported that they were ‘awaiting advice from National Office’ and that they would ‘continue liaising with National Office for outcome re birthing options’.
288. On 9 September 2015, Ms BK reported to a Primary Health Nurse that Mr BL had refused to eat or drink for five days as a protest against the decision to send the family to Papua New Guinea. Ms BK did not want her husband to continue refusing food and water. Mr BL agreed to recommence eating and drinking as he did not want to continue to upset his wife.
289. On 10 September 2015, a psychologist informed Mr BL that a charter flight to Papua New Guinea had been booked for two days’ time. Mr BL said that he and his wife refused to go to Papua New Guinea and in protest had made a decision to have their baby in Nauru. He said that he and his wife had lost trust in everyone and felt helpless. The inadequacy of the RON Hospital for dealing with high risk pregnancies is discussed below.
290. On 11 September 2015, Mr BL met with the psychologist again. The psychologist had previously met with the HSM and confirmed to Mr BL that his family would not be forced onto the charter flight to Papua New Guinea the next day. They discussed the need for Mr BL to meet with the HSM to discuss what would happen now in relation to the planning and continuing medical care for Ms BK and the baby.
291. On 12 September 2015, IHMS informed Ms BK that she and her family would be transferred to Brisbane the next day. There is no explanation in the medical notes for this change of plan. On 13 September 2015, she and her family were moved to Brisbane.
292. On 27 September 2015, IHMS administered the K10 mental health screening tool to Ms BK. This tool is referred to in paragraph 186 above. The minimum possible score is 10 and the maximum possible score is 50. Ms BK’s score was 42. This is a very high score indicating that Ms BK may have been experiencing severe levels of distress consistent with a diagnosis of severe depression and/or an anxiety disorder.¹¹⁸ Ms BK’s K10 score in September 2015 was dramatically different to her score of 11 in May 2014 shortly after arriving in Nauru and her score of 14 in October 2014. The change indicates a stark worsening of her psychological distress.
293. On 7 October 2015, Ms BK gave birth to a baby girl in Brisbane. The family remained in closed immigration detention for four months until they were transferred into community detention on 8 February 2016. They remain in Australia.

294. On 9 October 2015, two days after Ms BK had given birth, the Minister for Immigration and Border Protection held a press conference during which he said:¹¹⁹

There have been a couple of hundred people who have come back from Nauru either to themselves seek medical attention because the medical assistance wasn't available on Nauru, or they have come back as part of a family unit.

So if there was a complicated pregnancy, for example, or an assault where that person couldn't be given appropriate medical attention on Nauru – we bring those people back all the time and we've done that over a long period of time. ...

We have increased the level of support in terms of the medical assistance provided on Nauru. So people can receive significant levels of medical assistance, quite a high level of acuity.

But in some cases they have to come back to Australia and we have accommodated that in the past and all I would say is that if you have a look at the way in which we have been able to provide a judgement based on the medical advice in relation to individuals, about whether they can get the assistance on Nauru or whether they need to come to Australia, there's not been a case where the doctors have said to me that this person needs to come to Australia for medical assistance and we haven't provided that support. ...

I have made my position very clear. If people require medical assistance, they will receive it. Whether it is on Nauru or in Australia, they will receive it.

But I have been very clear also about the fact that people aren't going to settle in Australia if they have sought to come by boat.

So people at the appropriate time will return back to Nauru – that is Government's policy.

But if they can't receive medical assistance on Nauru or on Manus then we will look at what options are available to them, including coming to Australia. ...

I will do what is in the best interests of the individual person based on the medical advice available to me.

295. In the case of Ms BK, while it is accurate to say that eventually she was transferred to Australia for medical assistance that she required in respect of her pregnancy and the birth of her daughter (which was not available to her at the regional processing centre or at RON Hospital), that occurred only after a very substantial delay of about 6 weeks after receipt by the department of advice from medical and health professionals recommending urgent transfer to Australia because of the significant deterioration of, and risks to, the physical and mental health of Ms BK and the risks to the physical health of her unborn child.

296. On 15 October 2015, the Minister was interviewed by Ray Hadley on 2GB. The position articulated to Mr Hadley was different from that put forward by the Minister in his press conference the previous week. The following exchange took place:¹²⁰

Journalist: Back to your portfolio.

Seven pregnant asylum seekers on Nauru are refusing medical attention at health facilities. They demand they come back to Australia. The Australian reports four of the seven women have been assessed as having possible problems.

Will you bring these women to Australia?

Peter Dutton: No we won't, Ray. I've been very clear about this.

There are 350 births on Nauru each year and people are able to access the hospital services up there.

The Australian taxpayer should know that they've provided \$11 million for a hospital within the Regional Processing Centre and we've provided \$26 million to help refurbish the Nauruan hospital.

Now, the circumstance is where people can't get the medical services that they need on Nauru they can go to the international hospital in PNG. We, again, pay for that.

The racket that's been going on here is that people, at the margins, come to Australia from Nauru, the Government's then injuncted and we can't send them back to Nauru and there are over 200 people in that category.

Now, as I say, we want to provide support to the Nauruans. We want to provide a safe environment, a humane environment for people, but we aren't going to be taken for mugs.

The medical services, the obstetrician, all the nursing staff and whatnot have been provided to these women on Nauru.

But if people believe that they're going to somehow try and blackmail us into an outcome to come to Australia by saying we're not going to have medical assistance and therefore we put our babies at risk, well that's a judgement for people to make, but we aren't going to bend to that pressure.

I believe very strongly that we need to take a firm stance, provide the medical support that's required, but if people think that they're going to force our hand to come to Australia that is not going to happen.

297. Departmental records indicate that as at 14 May 2015, there were 131 people in immigration detention in Australia who had been transferred from Nauru for medical treatment. Twenty of these people (15% of the cohort) had been transferred for reasons of pregnancy, childbearing or family planning.
298. Media reports suggest that from January to June 2015 there were 225 people who were transferred from Nauru to Australia for medical treatment, but that from July to mid-October 2015 only 12 people were transferred.¹²¹ I infer from those facts that there was a significant change in the department's approach to transfer for medical treatment in the middle of 2015. Generally consistent with that conclusion is that a departmental officer told the Federal Court of Australia that by at least April 2016, the department had a policy of 'ensuring that IMAs [Irregular Maritime Arrivals] are treated in a third country outside Australia for medical support' other than in 'exceptional circumstances'.¹²²

Capacity of RON Hospital to provide neonatal care

299. In 2015, Nauru's neonatal mortality rate (that is, the mortality rate for children in their first 28 days of life) was 22.8 per 1,000 live births.¹²³ That is, one baby in every 44 dies in the neonatal period in Nauru. This was approximately 10 times higher than Australia's neonatal mortality rate at the same time (2.3 per 1,000 live births). Some local Nauruans reportedly travel to Australia or Fiji to give birth if it is expected that they will have a complicated pregnancy.¹²⁴

300. The department engaged a Senior Staff Specialist in obstetrics and gynaecology at a leading Queensland hospital to provide a report on the capability of the RON Hospital to provide neonatal and maternity services. The assessment was made using the Queensland Government's Clinical Services Capability Framework (**CSCF**) for Maternity and Neonatal services.¹²⁵ A report was provided to the department on 27 February 2016.
301. There are six levels of service in the Queensland CSCF, with level 1 being a level of service sufficient to manage the least complex patients (low risk ambulatory care clinical services only, delivered predominantly by registered nurses or health workers) and level 6 being the highest level of service (generally provided at large metropolitan hospitals).¹²⁶ Using the CSCF criteria, the report rated the RON Hospital as a level 0 service for neonatal services and level 2 for maternity services. The maternity facilities were described as 'very substandard, even for third world countries'.
302. In relation to neonatal services, the report noted that:
- RoN Hospital has one neonatology trained paediatrician ... appointed on a three month locum, but is not supported by necessary clinical services capability in all other aspects, including trained neonatal nurses, nursery, equipment, and ability to perform basic life support and resuscitation for babies, infants and children.
- There is limited capability to commence mechanical ventilation by bag and mask ventilation but this would constitute merely basic life support, and not any level of advanced life support, or sustainability of life support until suitable air ambulance transfer could happen, for both adults and neonates. ...
- RoN Hospital can care for infants above 37 weeks gestational age provided these infants do not require acute resuscitation beyond basic bag and mask resuscitation. Consequently in the event of a term infant requiring advanced life support, including airway and respiratory support, their capability is severely limited. A functional laryngoscope is not available, making endotracheal intubation, laryngeal suctioning and ventilation impossible. There is no capacity for CPAP. Surfactant is not available. ...
- There is a need for an additional neonatal resuscitator, as the only one at the hospital is needing to be wheeled around between the operating theatre and the delivery rooms, compromising care if needed concurrently.
- There is currently no incubator for sick babies. This could be part of immediate purchase of much needed basic equipment. ...
- RoN Hospital in conjunction with IHMS current does not meet requirements to be able to safely and reliably provide neonatal services at the present time. As a direct consequence of this it is my recommendation that all pregnant women be transferred out of Nauru in advanced gestation, ideally by 36 weeks for low risk women, and earlier for high risk women, to avoid risking the onset of labour and its attendant risks to the neonate who needs advanced life support.
303. This was not the first time that the inadequacy of the RON Hospital's neonatal facilities had been brought to the department's attention. On 20 November 2013, IHMS provided advice to the department about the risks of birthing in Nauru.¹²⁷ IHMS strongly recommended that births only take place on Nauru once there is a blood supply available at the Nauru Hospital because of the risks of infant and maternal mortality. IHMS advised that the rate of maternal mortality in Nauru was 30 times higher than in Australia.

304. More generally, IHMS recommended in November 2013 that 'in accordance with local practice in Nauru women who have risk factors are managed in Australia past the 1st trimester'. IHMS was clear about the risks involved in delivering babies in Nauru where there are complicated pregnancies. It said:
- Almost all pre-term babies in Nauru die. In Australia babies born at 24 weeks have a 40% chance of survival and those born at 25 weeks >60% chance of survival. Unfortunately the length of time it takes for a medical evacuation from Nauru to a specialist mainland unit to give these preterm babies a chance of survival is far too long.
305. In February 2014, the JAC Health Subcommittee considered the availability of child health services on Nauru, including at the RON Hospital. It found that:
- There is no MOU [Memorandum of Understanding] in place with the RoN hospital [for the provision of services to people held in detention or to stakeholder staff]. There is a single paediatrician from Cuba with minimal English providing local paediatric services. The RoN hospital has a single working neonatal incubator and three infant warmers. There is an oxygen supply, and there is capacity to provide nasal prong oxygen, nasogastric feeds, gain intravenous access, and provide intravenous antibiotics, however there are not facilities for neonatal intubation or ventilation. We did not see a bag and mask ventilation facility, although it is possible this is available. It is unclear how resources are allocated if there is more than one sick baby. ...
- From a medical care perspective, there are significant risks in this environment for children. The standard is not in keeping with an Australian community standard of care, including the standard for remote or regional Australia. The standard is not adequate for children of asylum seeker/ refugee background who carry significant vulnerabilities and who essentially have no screening prior to transfer.¹²⁸
306. A blood bank was established at the RON Hospital by 1 April 2014. However, in March 2014 the RON Hospital ceased to have a resident obstetrician and later a paediatrician due to staff departures. IHMS advised the department that with the absence of such staff onsite the risk to newborns was increased further. The department agreed to IHMS' recommendation that all pregnant women at the RPC be transferred to Australia to give birth and that newborns not be returned to Nauru until at least three months of age, pending Nauru's recruitment of a resident obstetrician and paediatrician. This was still the position in March 2015.¹²⁹
307. Even with a blood bank and experienced staff members, the risks involved in complicated pregnancies remained significantly higher in Nauru than in Australia. IHMS said that:
- Increased availability of experienced staff able to operate appropriate equipment and availability of blood products is likely to make a substantial improvement to the rate of maternal deaths. However given the large differential between Australia and Nauru it would be unrealistic to suggest that this could be reduced to a level that was similar to Australia.
308. In April 2015, the department advised the Minister for Immigration and Border Protection that '[u]nlike Australian rural hospitals, the RON Hospital lacks the option of accessing a large well-equipped domestic metropolitan hospital for more complex diagnoses and surgeries'.

309. By May 2015, there was still no full time permanent obstetrician at the RON Hospital. Around this time, the Secretary of the department agreed to place a full time obstetrician at the RON Hospital in order to reduce the need for medical transfers. The department noted in a submission to the Minister on 29 May 2015 that this would ‘enable the delivery of low risk births on Nauru (estimated to be approximately 80% of the caseload / 10 babies in the current antenatal case load), but high risk births would still need to be transferred to Australia’.
310. Comcare visited the RON Hospital in November 2015 as part of an inspection of the Nauru regional processing centre and found that ‘the facilities that are there are very basic and generally in a state of poor repair’.¹³⁰

Medical transfer decisions

311. IHMS policy notes that detainees or transferees will sometimes be located at a detention facility where the onsite and local facilities are not adequate to manage their ongoing health needs.¹³¹ In these situations, IHMS may recommend to the department that the person be transferred for an upgrade in care. The IHMS policy provides that, in the case of transfers from regional processing centres:

It is expected that transfers for an upgrade in care will be effected either to hospitals in Nauru or Papua New Guinea in the first instance, if clinically appropriate. A transfer to the Australian mainland for an upgrade in care may occur on a case-by-case basis ...¹³²

312. Requests are typically initiated by the Health Services Manger at the regional processing centre and escalated to the Area Medical Director of IHMS who forwards them to the department.¹³³
313. IHMS has said that the transfer policy is ‘outside the control of IHMS’.¹³⁴ In 2015, any request for medical movement had to be approved by the First Assistant Secretary, Infrastructure and Services Division of the department after considering the clinical recommendation by IHMS.¹³⁵ The department has said that transfers to Australia ‘only occur for compelling medical reasons including situations involving the risk of life-long injury or disability’.¹³⁶ IHMS reported in early 2014 that there had been referrals where there had been a difference of opinion on the need for evacuation (typically where the transfer was recommended for mental health reasons). A report by the JAC Health Subcommittee said that it was not clear how such disputes were resolved, especially where the treating clinician has ongoing concerns about an individual’s risk and condition.¹³⁷

(d) Assessment of claims made by Ms BK

314. Ms BK had a complicated pregnancy that required her to be transferred off Nauru to give birth. There were two factors that complicated her pregnancy. The first factor was gestational diabetes, which was identified early in her pregnancy. The second factor was cephalopelvic disproportion. This had been an issue with her first pregnancy when she needed a caesarean section and it was identified as an issue with this pregnancy by at least 29 weeks gestation.

315. The RON Hospital was not equipped to deal with Ms BK's pregnancy. IHMS made frequent, repeated recommendations to the department for Ms BK to be transferred to Australia. The view of the medical officers treating her, including her visiting obstetrician and her psychologist, was that her physical and mental health would be at grave risk unless she was transferred. The department's stated policy at the time was that all women detained at the regional processing centre on Nauru would be transferred to Australia to give birth before 28 weeks gestation. By 29 weeks gestation, IHMS told the department that the need for a transfer was urgent. Her treating psychologist warned of the prospect of acute psychiatric admission.
316. Despite all of these factors, the department delayed the decision to transfer Ms BK until she was almost 35 weeks pregnant. The delay in decision making prolonged the period that Ms BK was detained at the regional processing centre on Nauru. Ms BK was given conflicting information from a number of sources about where she would give birth up until the day before she was transferred off the island. The uncertainty directly contributed to a deterioration in her mental health leading to a diagnosis of a major depressive disorder.
317. In response to my preliminary view, the department said the time taken to transfer Ms BK to Australia was reasonable in the circumstances. It also said that the conduct of Ms BK and her husband in refusing to be transferred to the Pacific International Hospital in Port Moresby had the effect of 'extending the time taken to transfer to a location equipped to deliver [Ms BK's] baby'. However, at the time Ms BK was informed that the department intended to take her to PIH, she was 34 weeks pregnant – 6 weeks after the date that her obstetrician recommended that she be transferred to Australia. I consider that the vast majority of the delay in arranging a transfer is attributable to the failure of the department to act promptly on the advice of Ms BK's treating doctors.
318. The Standard Minimum Rules for the Treatment of Prisoners relevantly provide that:
- At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry (rule 22(1)).
 - The medical officer shall report to the director [of the institution] whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment (rule 25(2)).
 - The director [of the institution] shall take into consideration the reports and advice that the medical officer submits according to rules 25(2) and 26 and, in case he concurs with the recommendations made, shall take immediate steps to give effect to those recommendations; if they are not within his competence or if he does not concur with them, he shall immediately submit his own report and the advice of the medical officer to higher authority (rule 26(2)).
319. As I have explained above, the Standard Minimum Rules are relevant to assessing compliance with article 10(1) of the ICCPR.
320. I find that the failure to take immediate steps to give effect to the urgent recommendations of treating doctors in early August 2015 that Ms BK be removed from the detention environment on Nauru was a contravention of rule 26(2) of the Standard Minimum Rules for the Treatment of Prisoners and of article 10(1) of the ICCPR.

321. In *C v Australia*, the UNHRC concluded that the continued detention of the complainant in immigration detention (in total for over two years) when the Australian Government was aware that his detention was contributing to his development of a psychiatric illness, constituted a violation of article 7 of the ICCPR.¹³⁸ There had been a series of increasingly serious assessments provided to the relevant department over a number of months which had not been acted on, along with a suicide attempt by the complainant. The Committee said that: ‘the continued detention of the author when the State party was aware of the author’s mental condition and failed to take the steps necessary to ameliorate the author’s mental deterioration constituted a violation of his rights under article 7 of the Covenant’.¹³⁹
322. In the present case, there had been regular recommendations by both treating obstetricians and treating psychologists that Ms BK required transfer for her physical and mental wellbeing. In July 2015, her psychologist advised that if her situation is not improved and her depression worsens she would need admission to a psychiatric hospital. Warnings about the dangers to her and her unborn child continued over the next six weeks until she was eventually transferred. Ms BK was transferred to Australia seven weeks later than called for under the department’s own policy.
323. I find that the delay in making a decision to transfer Ms BK to Australia to give birth, in the context of knowledge of (i) the hopelessly inadequate facilities on Nauru for neonatal care; and (ii) the severe distress caused to Ms BK by reason of the uncertainty and delay, amounted to inhuman treatment, contrary to article 7 of the ICCPR.
324. Article 24(2)(d) of the CRC guarantees the right to appropriate pre-natal and post-natal health care for mothers. As noted in section 3.4 above, this includes the early recognition and management of complications in pregnancy and effective referral and transport to higher levels of care when necessary. I find that the delay in transferring Ms BK to Australia to give birth was contrary to her rights under article 24(2)(d) of the CRC given the inadequacy of facilities on Nauru for her to give birth.
325. The available medical evidence indicates that over the 16 month period that they were detained on Nauru, there was a marked deterioration in the mental health and wellbeing of Ms BK’s young daughter Miss BM. There were a number of factors that contributed to this deterioration. One significant factor was the detention environment in which Miss BM was exposed to acts of violence and incidents of self-harm by other detainees. Another significant factor was the delay in removing Ms BK from Nauru and the consequent deterioration in her mother’s mental health. From the point at which Ms BK should have been removed from Nauru, Miss BM showed a sharp decline in wellbeing and was the subject of weekly monitoring by welfare officers at Save the Children. In response to my preliminary view on these issues, the department said that ‘the conditions in Nauru are a matter for the Government of Nauru’ and that in any event it ‘considers the time taken [to remove the family from Nauru] was reasonable in the circumstances’. I reject those submissions. I find that the combination of the detention environment in RPC3 on Nauru and the delay in the removal of the family amounted to a failure to treat Miss BM with humanity and with respect for her inherent dignity contrary to article 10(1) of the ICCPR and article 37(c) of the CRC.

326. I find that the prolonged detention of Mr BL contributed to a marked deterioration of his mental health, prompting him to engage in self-harm in an attempt to leave Nauru. Since I consider that his condition arose primarily from the decision to detain him rather than the specifics of the conditions of his detention, I do not make any additional findings about Mr BL beyond those that apply to all people detained at the Nauru regional processing centre discussed in section 5.4 above.

5.6 Treatment of Ms CO's family

327. Ms CO made her complaint on her own behalf and on behalf of her husband Mr CP and their then one year old son Master CQ.

328. Ms CO and her family were detained at the Nauru regional processing centre for almost 9 months between 23 May 2014 and 14 February 2015. During their detention, they were assessed by Wilson Security as being low risk.

329. Ms CO made the following complaints about her family's treatment while in detention at the regional processing centre:

- She received inadequate gynaecological care after transfer to Nauru and inadequate antenatal care after becoming pregnant.
- Detention had a detrimental impact on her mental health.
- She was subjected to harassment by a Wilson Security officer.
- Her son Master CQ developed a range of health problems including a fever, diarrhoea, a swelling in his leg and rashes all over his body.
- Her husband Mr CP did not receive appropriate treatment for an injury to his foot.

(a) Medical care for Ms CO and alleged harassment

330. While Ms CO was on Christmas Island, she made a decision to terminate a pregnancy. She subsequently had some significant mental health problems and was prescribed medication. I consider these issues in more detail in section 6 below, dealing with transfers to Nauru.

331. Ms CO claims that she was not given adequate gynaecological care while on Nauru. She says that after the termination of her pregnancy in December 2013 she did not have a regular period for a year (amenorrhoea). She said that in about November 2014 she asked doctors at IHMS whether they could look into this for her but was told that they would not look at it again for another six months.

332. Ms CO's medical records indicate that she raised this issue with a GP on 14 August 2014. The doctor noted that Ms CO's termination involved a surgical procedure, followed by hormone injections for 3 months and she was advised that she would not have her usual menstruation. The last time that she received an injection was March 2014, but she was still experiencing amenorrhoea in August 2014. She was given a trial of the oral contraceptive pill for a month and had spotting. In September 2014, a number of blood tests were undertaken including for prolactin, a thyroid function test and a follicle stimulating hormone test. Ms CO followed up in relation to these blood tests on a number of occasions. By 22 November 2014 the lab results were still not available. She saw a GP who noted that Ms CO 'was surprised to have seen another doctor and telling the same problem again of not retrieving lab results'. She asked to see a team leader for an explanation of what had happened to her lab results. The results were provided the following day but were inconclusive. On 23 November 2014 IHMS sought external advice about Ms CO's amenorrhoea.
333. On 26 November 2014, Ms CO had an appointment with a gynaecologist who conducted an ultrasound and determined that she was around 2 weeks pregnant. After becoming pregnant, Ms CO had regular problems with vaginal bleeding until 8 February 2015 when she and her family were transferred to Australia so that her husband could receive medical treatment.
334. Ms CO claimed that there were not sufficient gynaecologists on Nauru. There is support for this claim in the material set out in paragraphs 249 to 251 above. The department says that during 2014 an obstetrics and gynaecology specialist from Australia would visit the regional processing centre on Nauru every 4 to 6 weeks. It says that there was a midwife permanently present at the centre throughout the period and one obstetrics and gynaecology specialist at the RON Hospital (who would deal with both asylum seekers and the rest of the population of Nauru).
335. It appears that Ms CO saw each of these three practitioners. After the initial consultation with a gynaecologist on 26 November 2014, Ms CO had an antenatal check with an IHMS midwife on 29 November 2014 and a further appointment with a midwife on 16 December 2014. She had appointment with a gynaecologist at the RON Hospital on 16 January 2015. She had an appointment with a visiting obstetrician in the regional processing centre on 29 January 2015. On 14 February 2015 the family was transferred to Australia, so that Mr CP could have surgery on his foot.
336. While it is true that there was a scarcity of obstetric and gynaecological specialists on or visiting Nauru during 2014, I am not satisfied that this resulted in Ms CO receiving insufficient antenatal care in the first trimester of her pregnancy. The appointments that Ms CO had were not out of line with IHMS standards for the detention network in Australia, which it says are based on other Australian standards such as those of the King Edward Memorial Hospital Perth Antenatal Shared Care Guidelines.¹⁴⁰
337. There are two other significant issues that Ms CO faced while on Nauru.

338. The first issue concerns her mental health. The department submits that Ms CO 'had clinical indicators of depression' prior to being transferred to Nauru. The day that she arrived on Nauru, a GP suggested that anti-depressant medication be considered for her but she did not want it. As noted in section 6 below, within 3 weeks of the transfer she recorded very high K10 scores indicating that she may have been experiencing severe levels of distress consistent with a diagnosis of severe depression and/or an anxiety disorder. In her complaint to the Commission, Ms CO said that it was very stressful being pregnant as a result of the living conditions her family faced on Nauru and the difficulties her husband faced in assisting with the care of their young son because of his foot injury. Her medical records regularly refer to her as suffering from 'detention fatigue'.
339. The Commission asked the department whether it was aware of any deterioration in Ms CO's mental state while she was detained on Nauru and, if so, what action the department took to address it. The department submitted that '[d]espite [Ms CO] displaying intermittent episodes of frustration and situational stress, IHMS was able to manage these issues locally' and that 'IHMS advised that there was no clinical indication to provide further advice to the Department of her issues'.
340. I find that the prolonged detention of Ms CO contributed to a marked deterioration of her mental health. Since the adverse effect on her mental health arises primarily from the fact of her detention rather than the specifics of the conditions of detention, and as the effects on her mental health of her detention were apparent prior to her transfer to Nauru, I deal with it in section 6 below in the context of the decision to send her and her family to Nauru.
341. Ms CO also complains about her treatment by security guards at the centre. She claims that some of the Nauruan guards were regularly drunk or using drugs. Ms BK also complained about apparent drinking and use of drugs by officers employed as guards in the camp. Ms CO said:
- They look at the women in the camp very bad and make us feel uncomfortable and not safe. They told me and other women that they are waiting for the beautiful ladies to come outside the camp. So now we are scared about the Nauruan men on the outside of the camp.
342. She said that a particular Nauruan officer consistently called out to her 'hey, sexy lady' when she walked past and that this made her feel uncomfortable and unsafe.
343. The department said that it was unaware of this alleged conduct. It was unable to locate any incident report. I note that Ms CO's complaints are similar to complaints recorded in the Moss Report.¹⁴¹ That report provided the following example as one that raised concerns about personal safety and privacy in relation to contract service provider staff members:
- One night I was going back to my room. I went to the bathroom and on the way back, I noticed that one of the Nauruan officers was standing right in front of our tent. He called me and he summoned me to just get closer to him and it was absolutely clear that he was [either] drunk or on drugs because he could not keep his balance properly. Then he suddenly grabbed my arm and he said, "You are so sexy and you're so beautiful." Then I was so petrified that I just pulled my arm and I ran into my tent. Then ever since, whenever he sees me he addresses me as Sexy Lady.
344. The Moss Report concluded that the supervision of contract service provider staff members particularly at RPC 3 needs to focus on the personal safety and privacy of transferees.

345. I acknowledge the limited information that I have in respect of the alleged conduct, but such information as I have does not provide any reason to doubt that the conduct complained of (noted in paragraphs 341 to 342 above) occurred as Ms CO describes.

(b) Medical care for son Master CQ

346. Ms CO says that a lack of proper hygiene in the camp led to her one year old son Master CQ developing a range of health problems including a fever, diarrhoea, a swelling in his leg and rashes all over his body.
347. Medical records for Master CQ support the claims by Ms CO in relation to the particular ailments that Master CQ faced. Master CQ had diarrhoea on and off for two weeks in late June and early July 2014. This appears to me to have been dealt with appropriately by medical staff through oral rehydration and encouraging proper hand washing and hygiene. On 19 October 2014 Master CQ developed a ‘maculo-papular rash all over [his] body’ along with a low grade fever. As described in paragraph 182 above, he was diagnosed the following day with a coxsackievirus infection (a cause of hand, foot and mouth disease).
348. Ms CO says that she was also concerned for her son’s psychological health. She says that there are very limited opportunities for development of young children on Nauru.
349. In section 5.4 above, I noted that the deficiencies in the accommodation for families in RPC3 and the overcrowding in the marquees contributed to poor health outcomes and facilitated the spread of illness among all detainees. In particular, children suffered from regular illnesses and infections caused or exacerbated by environmental factors including heat, humidity and close quarters living. While Master CQ was given appropriate treatment for these conditions I have referred to above once they had arisen, I find that the conditions in which Master CQ and his parents were detained caused or exacerbated Master CQ’s medical conditions, contrary to the right to health under article 24(1) of the CRC.
350. In her complaint, Ms CO also makes a complaint of a specific incident in which she alleges she was prevented from obtaining treatment for her son. She describes an incident that took place at 9.00pm one evening when she thought that her son needed to see a doctor immediately. She said that she asked one of the security guards to call IHMS to come and examine her son. She said that the guard told her she would need to get the bus to go to IHMS but that there were no more buses that evening. She said that she became very agitated, she screamed and scratched her face, but the guard said that there was nothing he could do. Ms CO said that Master CQ was not treated until the next day.
351. This incident appears to have taken place on 25 June 2014. A note by Wilson Security on that date said that Ms CO had approached the station to request IHMS come and collect her as her son had ‘gastro type bowel motions’. The note says that Ms CO was ‘informed ... of the new rules – that she must go to Echo station and wait like other transferees do’. It appears that the reference to ‘Echo station’ is a reference to a bus stop within RPC3. Ms CO became angry. According to the note, a Client Service Officer (CSO) ‘tried explaining that many others in the camp are sick and if she was so concerned then she may need to walk to Echo’.

352. A report by Save the Children about the same incident said that Ms CO spoke with a case worker the next day and said that Master CQ was sick and had diarrhoea and that ‘the guards would not let her go to IHMS and seek medical attention for him’ and that ‘they said she had to wait until the next day’. A Save the Children caseworker then spoke with members of the Wilson Security team. The Wilson Security officers said that they had informed Ms CO that ‘she could take [Master CQ] to IHMS but would have to walk to the bus stop herself with [Master CQ]’. The department submits that buses were running between RPC and the IHMS medical services in RPC1 and produced a copy of a bus timetable.
353. According to a Save the Children worker who had spent time working in the regional processing centre on Nauru, the family compound at RPC3 was located about a 15 minute bus ride away from the medical facilities in RPC1, via a rough dirt road. Asylum seekers had to be transported by bus to RPC1 for medical appointments. The worker said that movement was ‘severely restricted’ between RPC3 and RPC1. Asylum seekers required a ‘slip’ to attend the IHMS Medical Clinic at RPC1.¹⁴²
354. The available incident reports do not support Ms CO’s allegation that she was told that there were no buses available. I accept that she was told that she would need to ‘walk to Echo station’, and I understand that this was a reference to walking to the bus stop. I do not discount the possibility that there was a miscommunication between the Wilson officer and Ms CO about where she would need to walk in order to obtain treatment for her son. However, on the material available to me I am not satisfied that Ms CO was told that there were no buses available to take her and Master CQ to IHMS.
355. Save the Children Reports dealing with Master CQ in August and November 2014 noted that: ‘Waiting times for the IHMS bus coming to area nine continue to put children at risk who are seeking medical attention due to illness’. I do not have enough information to reach a concluded view about whether the buses from RPC3 to RPC1 ran according to the timetable provided by the department.
356. I also note that in some instances detainees requiring medical treatment would be taken to IHMS by car rather than by the bus. One example of this relates to Master CQ’s father Mr CP, discussed below. I have not been provided with an explanation from the department as to how decisions were made about whether a car would be provided or whether detainees would be required to travel to IHMS by bus.

(c) Medical care for husband Mr CP

357. When Mr CP was in Iran, he had a motorcycle accident that resulted in a number of injuries including a fracture of two of the long bones in his right foot (the 4th and 5th metatarsal bones) which had not healed properly, resulting in a bone spur. This has caused him longstanding pain in the right foot. In Ms CO’s complaint to the Commission, she said that as a result of the rough gravel surfaces in the regional processing centre her husband’s pain and discomfort had increased. This complaint is also reflected in Mr CP’s medical records. On 1 October 2014, a GP notes: ‘Patient complaining of forefoot pain for the past few months – pain on walking on gravel’. There are several subsequent medical records of complaints about pain in his foot.

358. On 6 November 2014, Mr CP had an x-ray taken of his foot. Following a review of the x-ray, a GP diagnosed chronic plantar fasciitis as a result of the bone spur. IHMS recommended a referral for a second opinion by an orthopaedic surgeon. One option for treatment was surgery to remove the bone spur. On 10 November 2014, Mr CP was added to a medical transfer list.
359. On 23 December 2014, Mr CP was looking after his young son Master CQ near the football oval when he slipped on the gravel that bordered the oval. He asked for assistance and an officer arranged for a car to take him to the IHMS medical centre. Medical records show that IHMS suspected that his 4th metatarsal may be fractured. He was given an anti-inflammatory analgesic (Ketorolac) and IHMS told him that they would check up on the injury at 10.00am the next day. The intention was to take an x-ray of the foot which could not be done the same day as the x-ray processor was not working. Mr CP says that IHMS told him they would send a car to pick him up from area 9 at RPC3 the next morning to take him back to IHMS for the follow up appointment.
360. Mr CP says that the next day IHMS sent a car to the door of area 9 at RPC3 and picked him up but that he was then asked to get out of the car at the bus stop and go by bus on his own. Mr CP was frustrated and angry about this, particularly as he was still in pain. He argued with IHMS about having to take the bus. A Transfield Client Service Officer attended the site. In her report she said:
- On Wednesday 24 December 2014 I was performing duty at RPC3. At approximately 1055 hours I was contacted by Echo to attend their location. On arrival I saw asylum seeker [Mr CP] in the bus stop area adjacent to Foxtrot 21, he was arguing with members of IHMS and a couple of CSOs. ...
- I was aware from speaking to him earlier, that he had a broken toe and that he had requested further medical attention. He was advised at the time that he would have to get a bus to RPC1 and present at IHMS.
- I requested IHMS to contact their supervisor as to whether he was able to go on a bus or should he be transported via a private vehicle. They did this and then told me their instructions, from their supervisor was, for asylum seeker [Mr CP] to be transported via the bus.
361. According to that CSO report, Mr CP waved his crutch around and banged it against the post of a marquee before throwing it away. By this stage, there were eight to ten CSOs present. A second CSO said that Mr CP grabbed his left hand and caused the middle finger to bend backwards causing him 'extreme pain'. Two CSOs reported that Mr CP 'lunged' towards them. He was then grabbed by his arms and wrestled to the ground. Mr CP says that this exacerbated his foot injury and that he grazed his elbow and knee. These alleged injuries are not recorded in the Transfield incident reports. The incident is reported as an 'assault' by Mr CP of the Transfield officers. A CSO reported that while wrestling Mr CP to the ground the CSO's hat and glasses were knocked off his head and he received a 'thin scratch mark' above his left ear.
362. Mr CP did not get on the bus. Ms CO says that when her husband returned to their tent he was muddy and bleeding. The first CSO referred to above reported that: 'Some twenty minutes later I was in Area 9 and I saw [another detainee] putting the crutch back into shape. He then walked over and handed it to his friend [Mr CP].'

363. According to a Wilson Security report, around 9.00pm that evening a CSO spoke with Mr CP. Mr CP showed his injuries. His toes appeared swollen. The CSO noted that Mr CP was angry but 'doesn't want to complain because no one is listening, he said that unless someone die in MRPC nobody will listen'.
364. An IHMS report on 26 December 2014 says that Mr CP had been recalled for review of his recent foot trauma twice since being seen on 23 December 'but he did not show up'. The IHMS report continued: 'Today he comes to the OPC1 clinic after he was recalled for third time. Client was aggressive, shouting ... and not willing to collaborate'.
365. Ms CO says that when they attended IHMS on 26 December 2014 they were questioned by medical staff about the events two days earlier. She said that: 'we were accused of assaulting an officer ... and were told that we were being investigated'. An IHMS incident report says that she was told by the Health Services Manager and the Senior Medical Officer that 'IHMS will not tolerate any aggressive behaviour against staff'. She says that she became upset and angry. Mr CP could see that she was getting upset and so he left without getting an x-ray.
366. An x-ray of Mr CP's right foot was taken on 30 December 2014. It did not show a new fracture, but it did reveal a bone spur or overgrowth which usually causes inflammation in the surrounding areas resulting in pain and discomfort. Mr CP's injury was managed by prescribing analgesia and immobilising his right foot with a plaster cast to avoid further injury.
367. On 8 January 2015, IHMS made a recommendation that Mr CP be transferred to Darwin for a CT scan and a review by an orthopaedic surgeon. IHMS noted that the risks of not referring included ongoing pain and the risk of permanent disability from limited or total loss of motion related to the bone injury.
368. On 14 February 2015, the family was transferred to Blaydin APOD in Darwin so that Mr CP could have surgery on his foot. This transfer took place more than three months after he had first been placed on a medical transfer list.
369. On the basis of the material available to me, I am satisfied that Mr CP was taken by car to IHMS on 23 December 2014 after injuring his foot. I am satisfied that there were not facilities available for him to have an x-ray that day and that IHMS asked him to return the following day. I am satisfied that Mr CP reasonably expected that he would be taken back to IHMS by car again and that it was possible for this to occur. I do not consider that a satisfactory explanation has been provided for the refusal by IHMS to allow him to travel by car or the requirement that he take the bus, particularly given the nature of his injury and the fact that it still required a proper assessment. I consider that the conduct of IHMS and the Wilson Security officers contributed to the situation escalating into a physical confrontation.
370. It appears that this situation could have been handled better by service providers so that Mr CP could attend his scheduled medical appointment. While the incident is regrettable, I consider that the seriousness of the incident does not rise to the level required to establish a contravention of article 10(1) of the ICCPR.

5.7 Treatment of Mr DE's family

371. Mr DE made his complaint on his own behalf and on behalf of his wife Ms DF and their then five year old son Master DG.
372. Mr DE and his family were detained at the Nauru regional processing centre for around 18 months between 8 January 2014 and July 2015. During their detention, they were assessed by Wilson Security as being low risk.
373. Ms DF said that she had been detained in Iran as a result of her practice of Christianity and that this was the reason that she and her family had left Iran to come to Australia.
374. Mr DE made the following complaints about his family's treatment while in detention at the regional processing centre:
- His son Master DG experienced a number of traumatic events which, along with the detention environment, contributed to a deterioration of his mental health.
 - His wife, Ms DF did not receive adequate treatment for an injured knee, for her alopecia and for her serious mental health condition.
 - Detention on Nauru contributed to a deterioration of his mental health.

(a) Medical care for son Master DG

375. On 5 February 2014, around a month after being transferred to Nauru, Master DG complained of toothache. He was examined by a nurse who noticed decay in two of his lower molars. He was given paracetamol and his parents were advised to fill in a medical request form to get a dental assessment. On 23 February, Master DG was again seen by a primary health nurse who noted that Master DG was crying and complaining of toothache and 'had been presenting at the clinic with the same problem'. He had been missing meals due to toothache. The following day a nurse filled out a Dental Assessment form noting Master DG had 'black front teeth coming in' and scheduled an appointment with a dentist. On 26 February 2014, Master DG saw a dentist at the RON Hospital who removed three of his teeth. On 13 April 2014, a paramedic noted that 'following recent dental extractions this child has very few teeth remaining'. A Transfield Special Meal Request form was filled out asking for a soft diet to be provided. It appears that this request was not acted upon. Twelve days later, on 25 April 2014, a nurse noted that 'a second request for a special diet [was] written and hand delivered to Transfield catering manager for action'. On 15 June 2014, Master DG's parents again raised with a nurse his inability to eat firm foods as a result of dental decays. They requested a letter for the kitchen at RPC3. The nurse 'explained that this was not possible and that we would place the family on the catering register for additional foods'.

376. In a session with a mental health nurse on 28 June 2014, Master DG's parents reported that he 'has become quite aggressive'. A mental health screening tool called the Health of the Nation Outcome Scales for Children and Adolescents (**HoNOSCA**) was applied and Master DG was given a total score of 13. The HoNOSCA has a five point scale that measures mental health against 13 'items'. The items are grouped into four domains: behaviour items, impairment items, symptom items and social items. For example, one of the behaviour items is 'disruptive, anti-social behaviour'. The items are scored by a mental health professional. The number of points allocated to each item have the following meanings: 0 means no problem, 1 means minor problem requiring no action, 2 means mild problem but definitely present, 3 means moderately severe problem, and 4 means severe to very severe problem. The Commission has not been provided with the details of Master DG's scores against particular items. The use of HoNOSCA on children in immigration detention is described in the Commission's *Forgotten Children* report.¹⁴³ Master DG was referred to a psychologist.
377. On 6 July 2014, Master DG's mother reported to a psychologist that since arriving on Nauru Master DG had 'completely changed his behaviour, losing [his] temper'. She said that if he was with other children he would 'disengage' and that he now had a tendency 'to hit me or hit himself'. She reported that he is 'so nervous that he grips his arms [and] says "Mum, look what I do" and then points to the marks left behind'.
378. Master DG's mother also reported to the psychologist some of the distress that she experienced in travelling to Australia. She said they had travelled through Indonesia and that as they were travelling in a van from their accommodation to a boat organised by a people smuggler she had fallen asleep. She woke to find that her son was missing and as they were about to board the boat 'I was hitting myself, saying where is my son?'. She was told to be quiet or the police would hear them. Eventually she found her son, but the memory of almost losing him was still with her.
379. Mr DE says that for three or four months his son Master DG would wake at night with nightmares. He says that his son would sit up and yell in a loud voice as if in a state of delirium before going back to sleep.
380. Mr DE says that on one occasion Master DG woke from a nightmare and fell out of his camp bed onto the hard floor. He was injured and started bleeding. Mr DE and his wife sought medical attention for Master DG in the morning and also made a request for a bunk bed with a railing to stop Master DG from falling out of bed. He says that this request was not granted. He says that the case manager told him that such arrangements were only made for children who were at least 9 years old and that there was nothing that could be done for Master DG who was 5 years old. Notes by Save the Children caseworkers on 28 June 2014 show that they made a request to Transfield for a bunk bed. The Commission has been unable to identify relevant medical records about this alleged incident or any records about whether, and if so how, this request was dealt with.
381. Master DG's nightmares were discussed with a psychologist on 1 August 2014. On 10 August 2014, Master DG and his mother attended a further session with a psychologist. They again discussed the nightmares that Master DG had been having. The psychologist's report said:

[Master DG] was happy to draw a picture of his dream and he drew a plane crashing into the ground. The plane had the Nauru flag on it. When asked if he was on board he said yes. When asked whether his family were on board “yes”.

382. The psychologist noted that there was significant anxiety present in all of the family members. The psychologist suggested that Master DG’s anxiety was related to his parents’ anxiety and the family’s current situation.
383. In around October 2014, a report by Save the Children caseworkers about Master DG noted:
- Research suggests that living in a detention centre can adversely impact upon all aspects of a child’s development. In addition to this [Master DG] is regularly exposed to violence, incidents of self harm and unfamiliar adults. His parents have good insight into the risks posed by detention and try to protect [Master DG] from it, however they cannot fully protect him from this environment. They are concerned about [Master DG’s] future and fear that he may become institutionalized.
- [Master DG] appears to be coping fairly well at this time, CSPW has seen little evidence of stress in [Master DG]. His parents report that he cries everyday and often has nightmares.
384. These concerns were repeated monthly in substantially the same form for the rest of the period that Master DG and his parents were detained at the regional processing centre.
385. Master DG continued to have nightmares. In March 2015 he reported to a psychologist dreams in which a robber would steal his mother or both of his parents. During the same session his parents reported that Master DG was refusing to attend the mess for meals after seeing a fight in the mess. Master DG’s parents reported the same incident to Save the Children: that Master DG had witnessed a fight in the mess between two adult asylum seekers in which one of them was injured and there was ‘a lot of blood’. A Save the Children report said:
- After seeing this fight [Master DG] is reporting to his parents that he is fearful of attending the mess and that he shakes when he gets near the mess. [Ms DF] explained that he is currently reluctant to leave the tent and states when he gets near the mess he states “no mess, no”. His parents also reported that he has begun to wet the bed.
386. On 3 July 2015 the family were assessed as refugees and resettled in the Nauruan community.
387. The Commission asked the department whether it was aware of any deterioration in Master DG’s mental state while he was detained on Nauru and, if so, what action the department took to address it. The department submitted that: ‘IHMS advised that there was no requirement for them to escalate any deterioration of [Master DG] to the Department’.

388. The available medical evidence indicates that over the 18 month period that they were detained on Nauru, there was a deterioration in the mental health and wellbeing of Mr DE's young son Master DG. In this period, he had 25 psychology appointments and five psychiatrist appointments. There were a number of factors that contributed to his deterioration. One significant factor was the detention environment, which had led to a noticeable change in Master DG's behaviour. He was also required to endure a number of traumatic events including delay in dental treatment for several weeks while he was in pain, the extraction of a number of teeth, and difficulties in obtaining an appropriate soft diet following the extractions. Another significant factor was the deterioration of the mental health of his parents, discussed in more detail below. I find that the nature of the environment in which Master DG was detained on Nauru and his treatment while in detention amounted to a failure to treat him with humanity and with respect for his inherent dignity contrary to article 10(1) of the ICCPR and article 37(c) of the CRC.
389. The department did not seek to controvert or otherwise challenge any of my findings about the impact of detention on the mental health of Master DG, after being provided with notice of my preliminary views. In response to my preliminary view, the only substantive comment made by the department was a claim that it did not exercise effective control over people in the regional processing centre on Nauru. Again, I reject that contention. The Commonwealth's responsibility under international law for the conditions of detention at the regional processing centre was comprehensively dealt with in my decision on jurisdiction, reproduced in **Annexure C** to this report.

(b) Medical care for wife Ms DF

390. In his complaint to the Commission, Mr DE said that his wife Ms DF received inadequate medical treatment for three conditions.
391. The first condition involved an injury to Ms DF's knee that she developed after her transfer to Nauru. They suspected that the injury was the result of having to walk on hard and uneven gravel surfaces in the camp. The pain in her knee increased over time and at one point it locked up and she was unable to stand. Mr DE says that the only treatment she received was paracetamol. He says that they asked for an x-ray of the knee but this was refused.
392. Medical records for Ms DF indicate that on 6 May 2014 she first complained of pain in her right knee and that it had locked up. She was given paracetamol and ibuprofen. Ms DF continued to have pain in her knee as set out in her complaint and submissions to the Commission, each of which were provided to the department. On 4 April 2015, almost a year after her first presentation, Ms DF again presented at IHMS with a swollen right knee. The GP suspected tendinitis and referred her for an x-ray. On 15 April 2015, an officer from Wilson Security approached a Save the Children caseworker about Ms DF's knee. The Wilson Security officer said that 'guards have noticed [Ms DF] struggling at times to walk around the camp and that she has nearly fallen over coming out [of] the shower or toilet blocks'. The officer asked about the process for obtaining a walking stick.

393. An x-ray was eventually carried out on 27 May 2015, more than 7 weeks after the referral from IHMS. No medical records were provided to the Commission about the outcome of this x-ray. On 6 June 2015 Ms DF was provided with strengthening exercises by a physiotherapist. It appears that this was her first and only appointment with a physiotherapist while in detention.
394. The second condition is alopecia. This caused Ms DF hair loss, discomfort and pain to her scalp. Mr DE says that this condition was exacerbated by the stressful conditions they were living under. This complaint is supported by Ms DF's medical records. On 18 September 2014, she complained of hair loss in three patches on her scalp and was diagnosed with alopecia areata, which a GP considered was probably a result of stress. She was given Nizoral shampoo and a topical cream of betamethasone. Three weeks later, on 11 October 2014, the largest patch of hair loss had increased in size. She asked for an injection of cortisone but was not given one. By 26 October 2014, all three patches had significantly increased in size (4cm x 3cm on the top of her scalp, 4.5cm x 3cm on her left temporal area, and 2cm x 2cm at back of her scalp over her neck). A GP observed that previous treatments had been ineffective. Photographs were taken and sent to a dermatologist in Australia. On 9 November 2014, Ms DF was given Minoxidil 5% cream to be used topically but she had an adverse reaction to it. By 16 November 2014, advice had not been received from the dermatologist. Ms DF was becoming increasingly distressed and angry in her interactions with IHMS about her alopecia. A fourth bald patch had developed on her scalp. On 25 November 2014, a telemedicine consultation was conducted with a dermatologist in Sydney who confirmed the diagnosis of alopecia areata and suggested some alternative treatments but these were not available on Nauru. The prescribed medication was ordered but did not arrive until 9 February 2015. This was almost 5 months after Ms DF's condition was first diagnosed. During that period of time she had been without any effective treatment. She was told that the treatment would take around 3 months to work.
395. On 17 February 2015, a GP administering medication for alopecia noted:
- It is highly likely that the underlying cause/precipitate for [Ms DF's] hair loss is stress/anxiety related to the difficult circumstances she finds herself in ... I have encouraged her to engage fully with mental health as I believe this is far more likely to be of benefit than the creams that we are trialling etc.
396. By March 2015, a GP observed that some new hair was growing, but it was 'very thin [and] thus not compensating for further loss of hair, thus hair loss patches are getting bigger and conglomerating into one big patch'. It does not appear that any effective treatment was provided for Ms DF's alopecia before the family were assessed as refugees in July 2015 and resettled in the Nauru community.
397. The third issue raised in Mr DE's complaint to the Commission relates Ms DF's mental health. He said that she has experienced panic attacks. Mr DE says that she underwent a psychological assessment and was prescribed with anti-depressant medication. The medication led to her feeling very tired.

398. Around two weeks after arriving on Nauru, during a mental health screening on 23 January 2014, Ms DF was administered a standardised mental health tool: the Depression, Anxiety and Stress Score (**DASS21**).¹⁴⁴ The department says that the DASS21 tool is used 'to assess the severity and ongoing response to treatment of depression, anxiety and stress in adults'.¹⁴⁵ IHMS describes it as 'a reliable and valid instrument for the detection of depression, anxiety and stress symptoms, which are the most common mental health complaints for people in immigration detention'.¹⁴⁶ The DASS21 tool provides different scores for depression, anxiety and stress and ranks the scores according to whether they are normal, mild, moderate, severe or extremely severe.¹⁴⁷ In relation to depression, a score of 28 or more is considered to be extremely severe and the maximum possible score is 42. Ms DF's score was 42 – the highest score possible. In relation to anxiety, a score of 20 or more is considered to be extremely severe. Ms DF's score was 28. In relation to stress, a score of 26 to 33 is considered to be severe. Ms DF's score was 30.
399. On 9 October 2014 a Child Support and Protection Worker (**CSPW**) reported a conversation she had had with Ms DF about recent 'messaging' by the department. It appears that this messaging related to the proposal announced on 25 September 2014 by the Australian Government to allow a number of asylum seekers on Christmas Island to apply for temporary protection visas in Australia if they had not already been transferred to Nauru or Manus Island.¹⁴⁸ This change in arrangements did not apply to asylum seekers who had already been transferred to Nauru. A video message from the Hon Scott Morrison MP, then Minister for Immigration and Border Protection, was shown to detainees in Nauru on that date.¹⁴⁹ The messaging may have also related to the agreement between Australia and Cambodia announced on 26 September 2014 to resettle refugees in Cambodia¹⁵⁰ which resulted in protests in the regional processing centre on Nauru.¹⁵¹
- Transfield said that the 'reaction to the reintroduction of TPVs and the non-eligibility of those in the offshore detention network to them was met on Nauru with increased incidents in the way of peaceful protests, self-harm and threats of voluntary starvation'.¹⁵² Ms DF said that she was angry about the new information. The CSPW asked Ms DF if she was okay and she said that she wasn't. When the CSPW said to Ms DF that she would see her tomorrow, she replied 'maybe not as I might be dead'. The CSPW asked about her son Master DG and she said that the Australian Government can look after him. Ms DF was placed on mental health watch by Wilson Security and seen by a nurse the following day.
400. On 10 October 2014 a mental health nurse reported that Ms DF was hypervigilant about her son Master DG's whereabouts due to rumours that children have been sexually abused on the island. This was a week after the then Minister for Immigration and Border Protection announced a review into allegations of sexual and physical assault of people detained at the regional processing centre on Nauru.¹⁵³
401. Ms DF met with a counsellor from the Overseas Services to Survivors of Torture and Trauma (**OSSTT**) on 16 October 2014. She was assessed as being at risk level 3 on a scale of 1 to 4. This level indicates significant symptomatology and limited coping strategies. The counsellor noted that Ms DF was hyper-vigilant and expressed feelings of fear during the session. She reported hallucinations.

402. On 14 November 2014, a mental health nurse made the following note of their consultation:
- [Ms DF] states that mentally she feels like she's at the bottom of a well. 'So if you want to know how I am, I'm still breathing'. Asked to explain, [Ms DF] reports that she is tired of detention life.
403. In a session with a psychologist on 20 November 2014, Ms DF reported visual hallucinations nightly for the previous month involving a menacing dark man or woman with big eyes that terrify her. She is afraid that they may take her son. The psychologist reported that Ms DF had neuro-vegetative symptoms of depression with poor sleep. The psychologist noted that Ms DF had an incident of past trauma related to 'a threat of rape' when the family was still in Iran but that she denied that her hallucinations were related to this trauma. Ms DF was diagnosed with a 'toxic confusional state' or a 'mood disorder major depression, psychotic'.
404. On 2 December 2014, a psychologist confirmed that Ms DF met diagnostic criteria for major depression. She was prescribed antidepressant medication but later reported that she was not happy taking it and wanted to be alert to look after her son.
405. On 29 December 2014, IHMS administered the K10 mental health screening tool to Ms DF. As noted in paragraph 292 above, the minimum score is 10 and the maximum possible score is 50. Ms DF's score was 36. This is a very high score indicating that Ms DF may have been experiencing severe levels of distress consistent with a diagnosis of severe depression and/or an anxiety disorder.¹⁵⁴
406. On 7 January 2015, the impressions of her psychologist were of some Post Traumatic Stress Disorder and more recent feelings of panic, social withdrawal and resulting depression.
407. In a session on 20 February 2015, Ms DF reported that she could not sleep because of the overwhelming feeling that someone will kill or rape her in her sleep and someone will steal her son from her. This had gotten worse for her 'since the alleged rapes and assaults in the camp'. This may have been a reference to the allegations of 'sexual and other physical assault of transferees' that were the subject of an inquiry by Mr Philip Moss at the request of the Australian Government.¹⁵⁵ Mr Moss visited Nauru twice in October and November 2014 to obtain relevant information about these allegations and reported to the Government on 6 February 2015. His report was released by the Government on 20 March 2015.¹⁵⁶ The review found that there was 'a level of under-reporting by transferees of sexual and other physical assault' and that in relation to minors 'there were both reported and unreported allegations of sexual and other physical assault'.¹⁵⁷
408. On 23 March 2015, a psychiatrist considered that Ms DF had a mixed anxiety and depressive disorder.
409. I am satisfied that Ms DF had persistent problems with her knee while detained on Nauru. Her medical records suggest that she only presented to IHMS twice with this issue. It seems that after the first interaction she considered that she would not receive appropriate treatment. After she presented again, an x-ray was arranged. The most concerning aspect of her treatment was the significant delay of more than 7 weeks in arranging an x-ray after it seemed clear that she had a chronic problem. I find that this delay in treatment was inconsistent with Ms DF's right to be treated with humanity and with respect for the inherent dignity of the human person, contrary to article 10(1) of the ICCPR.

410. The treatment that Ms DF received for her alopecia was also characterised by delay. Several treatments were attempted without success and when she was eventually able to have a remote consultation with a dermatologist the prescribed medication took months to arrive in Nauru. I find that this delay in treatment was also inconsistent with Ms DF's right to be treated with humanity and with respect for the inherent dignity of the human person, contrary to article 10(1) of the ICCPR.
411. The most significant issue that Ms DF faced was the impact of detention in Nauru on her mental health. She and her family were detained at the regional processing centre for 18 months. Within two weeks, mental health screening tools indicated that she had very severe symptoms of depression and anxiety. She was at risk of self harm. Experts with experience in identifying and evaluating the effects of torture and trauma considered that she had significant symptomology and limited coping strategies. She had hallucinations and a psychiatrist eventually diagnosed with a mixed anxiety and depressive disorder.
412. The Commission asked the department whether it was aware of any deterioration in Ms DF's mental state while she was detained on Nauru and, if so, what action the department took to address it. The department submitted that: 'IHMS advised that there was no requirement for them to escalate any deterioration of [Ms DF] to the Department'.
413. I have earlier considered the Standard Minimum Rules for the Treatment of Prisoners. They relevantly provide that:
- At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry (rule 22(1)).
 - The medical officer shall report to the director [of the institution] whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment (rule 25(2)).
414. As I found in my decision on jurisdiction, the Commonwealth had effective control over the conditions of the Nauru regional processing centre. I consider that the failure to make any report to the department of the serious impact of detention on Ms DF's mental health was contrary to rule 25(2) of the Standard Minimum Rules. I consider that the inattention to the marked deterioration in her mental health was contrary to her right under article 10(1) of the ICCPR to be treated with humanity and with respect for the inherent dignity of the human person.
415. The department did not seek to controvert or otherwise challenge any of my findings about the impact of detention on the mental health of Ms DF. In response to my preliminary view, the only substantive comment made by the department was a claim that it did not exercise effective control over people in the regional processing centre on Nauru. Again, I reject that contention. The Commonwealth's responsibility under international law for the conditions of detention at the regional processing centre was comprehensively dealt with in my decision on jurisdiction, reproduced in **Annexure C** to this report.

(c) Mental health of Mr DE

416. Mr DE said in his complaint to the Commission that his mental health was deteriorating. He says that in Iran he was an IT security network expert with fifteen years' experience but that after being in detention for 15 months his mind had gone numb. He was frustrated and depressed and was unable to do anything.
417. Mr DE disclosed a history of torture and trauma on 5 August 2013, around two weeks after arriving in Australia at Christmas Island. On 29 September 2013, he advised an IHMS GP that he was waking at night feeling anxious and fearful. He engaged with the mental health team and was prescribed short term medication to deal with his symptoms. He also had two appointments with an IHMS psychologist.
418. Despite his mental health issues, on 7 January 2014 Mr DE was assessed by IHMS as fit to transfer to Nauru. This issue is also considered below in section 6 on transfer to Nauru.
419. Around two weeks after arriving on Nauru, during a mental health screening on 22 January 2014, Mr DE was administered the DASS21 mental health tool. He advised the mental health practitioners that he had a history of depression. As noted in paragraph 398 above, the DASS21 tool provides different scores for depression, anxiety and stress and ranks the scores according to whether they are normal, mild, moderate, severe or extremely severe. In relation to depression, a score of 28 or more is considered to be extremely severe and the maximum possible score is 42. Mr DE's score was 40. In relation to anxiety, a score of 20 or more is considered to be extremely severe. Mr DE's score was 28. In relation to stress, a score of 26 to 33 is considered to be severe. Mr DE's score was 30.
420. Mr DE and his family were detained at in the regional processing centre on Nauru for around 18 months. Every six months or so, IHMS administered the K10 mental health screening tool to Mr DE. In July 2014, he had a score of 24, indicating he may be experiencing mild levels of distress consistent with a diagnosis of mild depression and/or anxiety disorder.¹⁵⁸ By December 2014, he had a very high score of 33, indicating that he may have been experiencing severe levels of distress consistent with a diagnosis of severe depression and/or an anxiety disorder.
421. In January 2015, a Mental Health Nurse reported a session in which Mr DE 'reports to have been feeling low in mood, no motivation in doing anything, has lost hope for the future'.
422. At the end of June 2015, less than two weeks prior to their release into the Nauruan community, Mr DE met with a psychologist and 'explained the difficulties he had encountered (as a professional man being treated as though he didn't have a brain; needing to shield his son from unhelpful influences in the camp; being continually frustrated by unanswered questions and ineffective treatments)'. During this session he said that attending the 'open camp' over the previous month and being allowed outside of the centre had made a big difference. During this session, Mr DE's K10 score was 23.
423. The Commission asked the department whether it was aware of any deterioration in Mr DE's mental state while he was detained on Nauru and, if so, what action the department took to address it. The department submitted that: 'IHMS advised that there was no requirement for them to escalate any deterioration of [Mr DE] to the Department'.

424. I find that the prolonged detention of Mr DE contributed to a marked deterioration of his mental health. Since I consider that consequence to arise primarily from the fact of his detention rather than the specifics of the conditions of detention, and as this issue was apparent prior to his transfer to Nauru, I deal with it in section 6 below in the context of the decision to send him and his family to Nauru.

6 Taking the complainants to Nauru

425. In this section of the report I address the third broad category of complaint made by the complainants, which relates to the decision to send families with young children to Nauru given the conditions in which they would be detained. In addition, two of the adult complainants, Ms CO and Mr DE, had significant mental health issues prior to being transferred to Nauru. The complaints raise questions about whether the likely impact of prolonged detention at the regional processing centre on their mental health was adequately addressed prior to the decision to take them there.
426. Although taking the complainants to Nauru involved them entering another country, the Commonwealth retained effective control and authority (and therefore jurisdiction) over the circumstances of their detention. As a result, I consider that the Commonwealth continued to have human rights obligations to the complainants in relation to their treatment while detained. This means that in considering the decision to take the complainants to Nauru, it is not necessary to consider whether the Commonwealth had separate *non-refoulement* obligations that applied to the rights under article 10(1) of the ICCPR and rights under the CRC that were relevant to the treatment of families and children in detention. Such issues would only arise if the complainants were no longer relevantly within the territory or jurisdiction of Australia.¹⁵⁹
427. The Committee on the Rights of the Child has emphasized that the obligations of State parties under the CRC apply to each child within their jurisdiction, including the jurisdiction arising from a State exercising effective control outside its borders.¹⁶⁰
428. As set out in section 4 above, I am not satisfied that the act of detaining the complainants was an act done by or on behalf of the Commonwealth, or an act for which it was directly responsible under international law. As a result, in section 7 below I consider the separate question of whether the Commonwealth had *non-refoulement* obligations that required it not to send the complainants to Nauru in circumstances in which the Commonwealth knew that the complainants would be arbitrarily detained by Nauru.
429. In my decision on jurisdiction I considered a range of discretionary decisions that were involved in determining whether families would be sent to Nauru. These decisions involve an act or practice into which the Commission is able to inquire. In broad terms, the types of decisions made for and on behalf of the Commonwealth were:
- First, the decision about the regional processing country to which a person is to be taken. This involves consideration of the direction given by the Minister under s 198AD(5) of the Migration Act. In particular, it involves a consideration of whether there were adequate facilities and services available on Nauru for families with young children.

- Secondly, the decision about whether it is reasonably practicable to take a particular person to that country. This involves consideration of the guidelines issued by the Minister to officers of the department in relation to the conduct of a ‘pre-transfer assessment’ and, in the case of children, a ‘best interests assessment’. In particular, it involves an assessment of whether it is ‘practical’ to take the person to Nauru bearing in mind the person’s physical and mental health and their vulnerabilities.
- Thirdly, the decision about whether to exempt individuals or groups under s 198AE from the requirement that they be transferred to a regional processing country under s 198AD. This also involves consideration of the guidelines issued by the Minister to officers of the department in relation to the referral of cases to the Minister under s 198AE.

430. These issues are dealt with in detail in paragraphs 346 to 399 of my decision on jurisdiction, reproduced in **Annexure C** to this report, and I adopt those paragraphs for the purposes of this report. I consider below some additional factual material in the context of that discussion of my views.

6.1 Whether there were adequate facilities and services for families on Nauru

431. Where there are two or more regional processing countries, the Minister must give a written direction under s 198AD(5) specifying the regional processing country to which an unauthorised maritime arrival, or a class of unauthorised maritime arrivals, is to be taken.

432. On 29 July 2013, the Minister made a direction under s 198AD(5) specifying the regional processing countries to which particular classes of unauthorised maritime arrivals were to be taken. This direction was in force at the time the complainants were taken to Nauru. The identified classes were: family groups, single adult females, single adult males and unaccompanied minors. The direction provided that, unless the Minister otherwise directed, unauthorised maritime arrivals were to be taken to Nauru if:

- facilities and services are available for the class of persons of which the person is a member; and
- there is vacant accommodation designated for the class of persons of which the person is a member and that vacant accommodation is greater than that available in Papua New Guinea; and
- this does not result in any family group that all arrived together on or after 19 July 2013 from being split.

433. Equivalent conditions were imposed in relation to the taking of unauthorised maritime arrivals to Papua New Guinea.

434. The first transfers of asylum seekers from Australia to Manus Island in Papua New Guinea for 'regional processing' took place in November 2012. In the early months of the operation of the Manus Island centre, families with children were transferred there along with single adult males. In May 2013, concerns were raised about the risk of malaria on Manus Island and the appropriateness of the facilities for families.¹⁶¹ In June 2013, families with children on Manus Island were returned to Australia, and since that time government policy has been not to transfer unaccompanied children or children in family groups to Papua New Guinea.¹⁶² The explanation given by the department to remove families from Manus Island was that accommodation at the centre was unsuitable for families.¹⁶³ In particular, families had been accommodated in tents in close proximity to single adult males.¹⁶⁴ The department said at the time that when families were taken off Manus Island, the only accommodation available in the Nauru regional processing centre was dormitory style accommodation, which was not suitable for families.¹⁶⁵
435. Ms CO and her family first arrived in Australia on 26 July 2013. At the time her son Master CQ was 6 months old. While Ms CO and her family were on Christmas Island, she claims that the detainees were initially told that families with children under 5 years old would not be transferred to Nauru because the conditions there were not good and there were no facilities for babies. Ms CO says that after eight months on Christmas Island (that is, around March 2014), she noticed that families with children who were eight months old were being transferred to Nauru. She says that she was shocked by this and feared for the well-being of her young son if her family was also transferred.
436. The Commission asked the department to provide details of any policy dealing with the circumstances in which children would be transferred to the Nauru regional processing centre. In an initial response, the department said that there are 'no departmental communication guides that contain the information Ms CO alleges she received about children under 5 years of age'. This response was, to say the least, incomplete. In May 2015, the department provided the following evidence to a Senate inquiry:
- The first group of transferee families arrived in the Nauru Regional Processing Centre on 21 August 2013. This group was made up of 14 adults and 12 children aged between five and 15 years of age. ...
- The Department takes advice regarding a person's medical suitability to be transferred to a Regional Processing Centre from IHMS.
- In November 2013, IHMS provided confirmation that appropriate primary care was available [in the Nauru regional processing centre] for children four months and over. Prior to this, IHMS had recommended that children under the age of four not be transferred. The first child under four was transferred on 13 February 2014 as part of a family group.¹⁶⁶
437. This evidence is consistent with the claims made by Ms CO about what she was told about transfers to Nauru.
438. Ms CO and her family were taken to Nauru in May 2014. Her son Master CQ was 16 months old at the time they were transferred. Ms BK and her family were also taken to Nauru in May 2014. Ms BK's daughter Miss BM was 3 years and 9 months old at the time they were transferred.

439. For the purposes of the direction under s 198AD(5), in order for the department to transfer children with young families to Nauru, it had to be satisfied that facilities and services were available for this group. The department says that it made this assessment based on advice from IHMS.
440. I issued a compulsory notice to the Commonwealth requiring the production of the advice that IHMS provided to the department in November 2013 referred to above. It is clear from the IHMS advice that it was not endorsing the suitability of health care available at the Nauru RPC for children. The letter from IHMS to the department begins with a warning in the following terms:
- IHMS notes that prominent medical bodies in Australia have made strong statements which recommend against placement of children in OPCs [offshore processing centres] and recommends the Department seeks further independent expert advice from relevant individuals and organisations in Australia, particularly from the Immigration Health Advisory Group.
441. What follows are recommendations by IHMS for the procurement of infrastructure, the purchase of medical equipment and the employment of qualified staff that would be the minimum necessary to attempt to mitigate the risks to children. For example, in relation to infrastructure, IHMS recommended as a minimum standard:
- A living environment which is temperature controlled and with adequate air flow, air conditioned and safe from rain. Infants and children are especially vulnerable to dehydration because of their relatively small body weights and high turnover of water and electrolytes. They're also the group most likely to experience diarrhoea. Therefore hardwalled accommodation with appropriate cooling devices is essential to decrease the risk of dehydration in hot and humid climates in children, especially children under the age of 4.
442. As noted above, IHMS strongly recommended that births only take place on Nauru once there was a blood supply available at the Nauru Hospital due to the increased risk of infant and maternal mortality. It appears from departmental documents that a blood bank was established by 1 April 2014. Until that time, IHMS recommended that all births take place in Australia. In relation to the return of families with young babies to Nauru, IHMS made the following recommendations:
- IHMS recommends that babies born in Australia should only be sent to Nauru following clinical review by a paediatrician and certification that they are well with no increased risk factors that may give rise to significant problems in the OPC.
 - This would require a period for initial bonding and establishment of sleep and feeding routines and establishment of weight gain and normal developmental milestones.
 - Expectation is that the level of risk in sending an infant to Nauru will be reduced substantially if it occurs after the above have been achieved and the child is at least 3 months of age.

443. The advice from IHMS was attached to a departmental submission to the Minister dated 27 November 2013 about managing health issues at offshore processing centres. Another attachment to that submission sought to summarise the key risks. That attachment provided:

Key health risks for both Nauru and Manus include:

- a. diseases associated with poor sanitation such as diarrhoea, cholera and typhoid;
- b. tuberculosis;
- c. lack of tertiary level obstetric and advanced paediatric services in remote locations;
- d. lack of facilities (infrastructure and early intervention services) necessary for the psychosocial development of children;
- e. lack of facilities for people with disabilities or other complex health needs including mental health issues; and
- f. heat related illness.

These risks can be exacerbated by lack of infrastructure and generally poor standards of infection control in local hospitals.

Risks are heightened for infants and very young children as their condition can deteriorate much more rapidly than older children and adults once symptoms appear and they have less compensatory mechanisms.

444. The departmental submission to the Minister claimed that many of these health risks were already mitigated through 'health screening on arrival ... rigorous hygiene and sanitation procedures and a well-structured health service'. It claimed that other risks to children could be mitigated by 'providing appropriate facilities and early childhood intervention services for the psychosocial development of children, such as playgrounds and specialised services'.
445. In response to my preliminary view in this inquiry, the department pointed to contractual obligations by IHMS to provide health care to detainees 'to a level, standard and timeliness broadly comparable with that available in the Australian community, taking into account the health needs of transferees, including children'. The department said that IHMS had a contractual obligation to 'ensure that children receive appropriate and individual care' and that the department considered this contractual obligation as part of the pre-transfer assessment process.
446. Earlier in this report, I discussed the inadequacy of the accommodation provided to the complainants at the Nauru regional processing centre given the living conditions that they faced there, problems with hygiene and a range of physical risks to children as a result of the infrastructure at the centre (section 5.1); the risk of disease at the centre including the significant risk of dengue fever (section 5.2) and the impact of detention on the health and welfare of detainees (section 5.3). I concluded that the centre was not an appropriate place to send families with young children (section 5.4).

447. I find that, for the same reasons, the department's assessment that it was appropriate for families with children over four months to be taken to Nauru was a serious misjudgment and a flawed decision that placed the complainants and their young children at serious risk of harm. I find that the assessment was contrary to the rights of the complainants under articles 3(2), 6(2), 16(1), 24(1), 27(1) and 37(c) of the CRC and article 10(1) of the ICCPR for the same reasons.

6.2 Whether it was 'reasonably practicable' to take the complainants to Nauru

448. Asylum seekers who arrive in Australia by boat on or after 13 August 2012 are subject to s 198AD of the Migration Act which requires them to be taken 'as soon as reasonably practicable' to a regional processing country.¹⁶⁷
449. The department has published guidelines for conducting 'pre-transfer assessments'. The purpose of these assessments is to determine, for the purposes of s 198AD(2) of the Migration Act, whether it is reasonably practicable to take a person to a particular regional processing country. In addition, the pre-transfer assessment forms are designed to identify cases that may need to be referred to the Minister so that he can consider whether to exercise his power under s 198AE(1) to determine that s 198AD does not apply to a person.
450. At the time that pre-transfer assessments were conducted for Mr DE and his family, the relevant guidelines were those issued on 24 November 2012 (**2012 guidelines**). Replacement guidelines were subsequently issued on 14 February 2014 (**2014 guidelines**), which were the guidelines that were in place at the time that pre-transfer assessments were conducted for Ms BK and Ms CO and their families.
451. The 2012 guidelines described the assessment to be undertaken pursuant to s 198AD(2) in the following way (section 7):

A reasonably practicable assessment is essentially one of whether it is 'practical' to take the person to an RPC bearing in mind their physical and mental characteristics and logistical considerations including but not limited to:

- the physical or mental health of the person to be taken
- special needs that are identified including torture and trauma history
- their fitness to travel assessment
- vulnerabilities the person may have, including their age
- the resources and facilities available in the RPC to receive the person and to respond to any health issues, vulnerabilities or special needs the person may present (now and in the future)
- capacity to accommodate additional persons at any centre in an RPC
- the person having family members in Australia who need to be contacted for the purposes of possible application of s 199.

452. A similar list of criteria is included in the 2014 guidelines (section 6).
453. The 2012 guidelines provided (section 11) that minors who are part of a family unit should be considered as part of the pre-transfer assessment for that family unit. Further, it provided that unless there are unusual circumstances an officer can consider that the best interests of a child who is part of a family will be to remain with that family group. The 2014 guidelines provide (section 9) that all minors, including accompanied and unaccompanied minors, require a 'best interests assessment' (**BIA**) to be conducted as part of the pre-transfer assessment. The reference to 'best interests' is to article 3(1) of the CRC which requires that in all actions concerning children (including by administrative authorities) the best interests of the child shall be a primary consideration.
454. It seems that BIAs were also conducted prior to the promulgation of the 2014 guidelines. The BIA involved completing a form produced by the department titled 'Best Interests Assessment for Transferring Minors to an RPC'. In the case of Master DG, his BIA was conducted on 7 January 2014 using version 1.2 of the BIA form. In the cases of Miss BM and Master CQ, their BIAs were conducted on 2 and 23 May 2014 respectively using version 1.4 of the BIA form. Version 1.4 of the BIA form had been modified in accordance with a decision by the then Minister recorded in a submission signed by him on 12 December 2014.¹⁶⁸
455. The way in which the pre-transfer assessments and BIAs were conducted raises three human rights issues:
- first, whether the BIAs involved any substantive assessment on an individualised basis about whether it was in the best interests of a child to be taken to the Nauru regional processing centre
 - secondly, whether the pre-transfer assessments adequately considered whether it was appropriate to take the person to Nauru bearing in mind the person's physical and mental health and their vulnerabilities
 - thirdly, whether the decision to transfer families with young children to Nauru involved other breaches of their rights, given the conditions in which they would be detained.

(a) No consideration of the best interests of individual children

456. I find that, at least for the period from July 2013 to July 2015, there was no substantive assessment on an individualised basis about whether it was in the best interests of a child to be taken to the Nauru regional processing centre.
457. In reaching this conclusion, I have considered both the decisions to take children to Nauru as part of family groups and the decisions to take unaccompanied children to Nauru. The first children to be taken to Nauru were in family groups. From the materials available to me, it is apparent that the decision making process by the department in these cases was as follows:
- it is in the best interests of children to remain with their family (consistent with article 9 of the CRC and section 11 of the 2012 guidelines dealing with pre-transfer assessments discussed in paragraph 453 above)

- the children's parents are being taken to Nauru
- therefore, it is in the best interests of the children to be taken to Nauru with their parents.¹⁶⁹

458. The obvious lacuna in this reasoning is that no consideration was given to whether it was in the best interests of the child for the whole family not to be taken to Nauru. Clearly, decisions that are made about whether a parent is to be removed from Australia can affect the rights of children.¹⁷⁰ The fact that a child is part of a family group does not mean that his or her best interests are not engaged by a decision to take the family to Nauru. It must have been clear to any reasonable person considering the issue that a decision making process as described in the paragraph above was flawed and inconsistent with the rights of the children. Under the guise of compliance with one aspect of the children's interests (to remain in their family unit) the assessment process in fact subverted and denied those interests because the decision to remove the parents to Nauru had been made without consideration of the children's interests.

459. This lacuna was exposed shortly before the first unaccompanied children were scheduled to be taken to Nauru in February 2014. As the department explained at that time:

With the imminent transfer of unaccompanied minors to Nauru, the Department has been considering how our obligations under Article 3 of the CRC might be addressed in relation to this group of children. In the absence of accompanying family members, the approach taken in relation to accompanied minors is not available. While consideration of the availability of appropriate services at the OPC will continue to be a key element of the BIA, these, or more extensive services, would also be available in Australia. Given this and the likely absence of other factors suggesting that transfer of a minor to an OPC is in their best interests, it is unlikely that it could be found to be in the best interests of an unaccompanied minor to be transferred to an OPC.¹⁷¹

460. The department considered three options to deal with this issue. The first involved a 'full consideration of the child's best interests' as a primary consideration that would be weighed against other primary considerations including national security. As discussed below, this is the approach required by human rights law. The department considered that such an approach 'is likely to result in recommendations against the transfer of a significant proportion of unaccompanied minors and would appear to be inconsistent with government policy objectives'.¹⁷² As a result, this option was rejected by the department and not put forward as an option for consideration by the Minister.

461. The two other options that were put forward were: the option of not considering the best interests of children at all in relation to transfer decisions; and the option of deciding in advance that in every case 'Australia's national interests outweigh the best interests of the child in any consideration of whether a minor is transferred to an OPC'.¹⁷³ The second of these options was recommended by the department and endorsed by the Minister. The department recognised that this approach 'is likely to be subject to criticism as [it does] not provide for the full consideration of an individual minor's best interests'.¹⁷⁴

462. The result of this decision was that the preamble to the BIA for all children (not just unaccompanied minors) was amended to read as follows:

Australia has an obligation under Article 3 of the Convention on the Rights of the Child to treat the best interests of the child as a primary consideration in all actions concerning children. The obligation is to treat the best interests of the child as a primary consideration, not the only, or the primary, consideration.

In so far as the requirement under s 198AD of the Migration Act 1958 to take unauthorised maritime arrivals to a regional processing country extends to UMAs who are children, the Australian Government's view is that in making the transfer decision, the best interests of such children are outweighed by other primary considerations, including the need to preserve the integrity of Australia's migration system and the need to discourage children taking, or being taken on, dangerous illegal boat journeys to Australia.

Accordingly, while this assessment considers a range of factors to ensure that care, services and support arrangements are available to meet the needs of the individual child, it does not consider whether the best interests of the child would be served by the individual child being transferred to an OPC.¹⁷⁵

463. In response to my preliminary view, the department acknowledged that '[t]he "Best Interests Assessment" form was not an assessment of Australia's obligations under Article 3'.
464. Article 3(1) of the CRC provides that in all actions concerning children—including a decision to send a child to a regional processing country—the best interests of the child must be a primary consideration.
465. The United Nations Children's Fund (**UNICEF**) Implementation Handbook for the Convention on the Rights of the Child provides the following guidance on article 3:¹⁷⁶
- The wording of article 3 indicates that the best interests of the child will not always be the single, overriding factor to be considered; there may be competing or conflicting human rights interests ...
- The child's interests, however, must be the subject of active consideration; it needs to be demonstrated that children's interests have been explored and taken into account as a primary consideration.
466. Article 45 of the CRC recognises the special competence of UNICEF and other United Nations organs to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates.
467. In *Wan v Minister for Immigration & Multicultural Affairs*, the Full Court of the Federal Court considered the way in which a decision maker should assess the requirements of article 3(1) of the CRC when determining whether to make a decision that would lead to a child's parents being removed from Australia.¹⁷⁷

468. The Court said that the starting point is to identify what the best interests of the child indicate that the decision maker should decide.¹⁷⁸ As noted above, the standard consideration of this issue by the department was limited to identifying that it was in the best interests of a child to remain with his or her parents. However, it appears that no consideration was given to whether it was in the best interests of the child for the family to be taken to Nauru. The department considers that it was ‘unlikely that it could be found to be in the best interests of an unaccompanied minor to be transferred to an OPC’. There is no reason to think that this assessment would be different for children who are part of a family group.
469. It is legally open to a decision maker to make a decision that does not accord with the best interests of the child. However, in order to do so there are two requirements:
- the decision maker must not treat any other factor as inherently more significant than the best interests of the child; and
 - the strength of other relevant considerations must outweigh the consideration of the best interests of the child, understood as a primary consideration.¹⁷⁹
470. It is clear from the terms of the BIA that this type of analysis or assessment was not carried out for any of the complainant families or for any other family groups taken to Nauru. The BIA acknowledges that it ‘does not consider whether the best interests of the child would be served by the individual child being transferred to an OPC’. That is, it does not take the first step of working out what the best interests of the child require. Further, the BIA asserts that ‘the best interests of such children are outweighed by other primary considerations’. However, this *a priori* assertion fails the other requirements of the best interests analysis by assuming that in all cases, and without examination of any particular case, other considerations will outweigh the best interests of any child. This treats the other identified interests as inherently more significant than the best interests of the child and avoids the necessary evaluation required by article 3(1) of the CRC. The policy position is treated as paramount and unable to be displaced by other considerations.¹⁸⁰
471. The BIA process conducted by the department is also contrary to authoritative guidance given by relevant UN Committees as to what such a process requires in the context of migration-related decisions affecting migrant children:
- A “best-interests assessment” involves evaluating and balancing all the elements necessary to make a decision in the specific situation for a specific individual child or group of children. A “best-interests determination” is a formal process with strict procedural safeguards designed to determine the child’s best interests on the basis of the best-interests assessment. In addition, assessing the child’s best interests is a unique activity that should be undertaken in each individual case and in the light of the specific circumstances of each child or group of children, including age, sex, level of maturity, whether the child or children belong to a minority group and the social and cultural context in which the child or children find themselves. ...
- Considerations such as those relating to general migration control cannot override best-interest considerations.¹⁸¹

472. I find that the ‘best interests assessment’ conducted by the department prior to sending children to Nauru was contrary to the requirement in article 3(1) of the CRC to take the best interests of children into account as a primary consideration. Further, I find that the BIA process was adopted by the department in circumstances known to the department to involve a significant inconsistency with article 3(1) of the CRC, and the adoption of that process amounts to a deliberate breach of the obligations in article 3(1), based on an inflexible policy decision to send asylum seeker families to Nauru.

(b) Adequacy of pre-transfer assessment process

473. The department says that pre-transfer assessments are used to consider whether appropriate support services are available in the regional processing centre and to confirm that there are no barriers to the transfer occurring. It also says that a BIA is conducted as part of the pre-transfer assessment for all children to consider the needs and circumstances of the individual child to ensure that appropriate care, services and support arrangements are available following their transfer to Nauru.¹⁸²

474. The pre-transfer assessment form invites departmental officers to check boxes under a number of headings and, if applicable, insert relevant comments. The assessments to be made by the officer are:

- (a) whether the person is exempt from transfer because of a decision made by the Minister under s 198AE
- (b) whether IHMS has assessed the person as fit to transfer and the person has no apparent special needs that cannot be managed in a regional processing country
- (c) whether there are any capacity or logistical reasons indicating it is not reasonably practicable to take the person to a regional processing country
- (d) if the person is a minor, whether a best interests assessment has identified any ‘exceptional circumstances’ indicating that the minor should not be transferred to the regional processing country at this time
- (e) whether transfer would result in a family group that arrived together on or after 19 July 2013 being split.

475. If it appears that transfer is reasonably practicable based on these assessments, the departmental officer is required to ask the person whether they have any other health issues, special needs or protection claims against the regional processing country. After receiving these responses, a final decision is made by the departmental officer as to whether it is reasonably practicable to take the person to the regional processing country. This decision is then assessed by a supervisor.

476. I have been provided with the forms completed for the complainants. Those forms have a bare minimum of information in them. In most cases, no additional information is inserted other than responses to the questions about whether they have any other issues that would prevent transfer.

477. Ms CO's form records that she was assessed by IHMS as fit to fly. The assessment placed her in 'Category 1' – I identify the various categories and their meanings in paragraphs 488 to 491 below. No additional information was included in the space provided to describe her health or any other special needs. When she was asked whether she had any other relevant health issues, her form notes: 'On medication – spoken to mental health'. As to the question whether she had any other reason to fear being transferred to Nauru, her form notes: 'Worried for child's welfare on Nauru'. A spreadsheet prepared by IHMS noted that Ms CO had a 'Recent TOP [termination of pregnancy]' but concluded that she had 'Nil Significant Mental Health Issues'. In order to understand these records in proper context, it is necessary to describe briefly some of the experiences that Ms CO had while detained on Christmas Island.
478. While she was on Christmas Island, Ms CO became pregnant. Her pregnancy was not planned. She said that because of the hard situation in which she was living and the uncertainty about whether her family would be transferred to Nauru, into an environment that would be difficult for children, she decided to terminate her pregnancy. In her submission to the Commission, she described this as a 'very, very hard decision but I did [it] because of my little son ... because [there were] not facilities for babies, and I still feel guilty'. Ms CO's son was 16 months old when the family were transferred to Nauru.
479. The pre-transfer assessment form indicates that following the termination of her pregnancy Ms CO was experiencing mental health problems that required medication. On 12 June 2014, around 3 weeks after her transfer to Nauru, IHMS administered the K10 mental health screening tool to Ms CO. As noted in paragraph 292 above, the minimum possible score is 10 and the maximum possible score is 50. Ms BK's score was 38. This is a very high score indicating that Ms CO may have been experiencing severe levels of distress consistent with a diagnosis of severe depression and/or an anxiety disorder.¹⁸³
480. Both the 2012 guidelines and 2014 guidelines dealing with pre-transfer assessments envisaged that it may not be reasonably practicable to take a person to Nauru as a result of a mental health condition. Section 10 of the 2012 guidelines provided that: '[i]t may not be reasonably practicable for a person to be taken to an RPC in the foreseeable future if the person has ... mental impairments that are permanent or acute'. In those circumstances, officers were directed to bring the person's case to the Minister's attention so that he could consider whether to exempt the person from transfer pursuant to s 198AE of the Migration Act. However, the equivalent section of the 2014 guidelines (section 15) provided that: '[f]or the post-19 July 2013 cohort, the only circumstances in which the Minister has indicated that he will consider exempting a person from being taken to an RPC [is] if the person has raised credible protection claims against the country'.
481. The records produced by the department in relation to the decision to transfer Ms CO and her family to Nauru suggest at best a cursory examination of the impact that this was likely to have on her and her family. I am not satisfied, based on these records, that an appropriate assessment was undertaken as to whether adequate support services were available to her in the regional processing centre on Nauru or whether it was appropriate for her to be transferred there.

482. Mr DE's pre-transfer assessment form also recorded that he was assessed by IHMS as fit to fly (Category 1). It appears that this assessment involved a desk review of his file by a nurse on 8 November 2013, two months before he was taken to Nauru. The IHMS assessment said that there was 'Nil Significant Medical History of note'. As described above, Mr DE disclosed a history of torture and trauma around two weeks after arriving in Australia at Christmas Island. On 29 September 2013, he advised an IHMS GP that he was waking at night feeling anxious and fearful. He engaged with the mental health team and was prescribed short term medication to deal with his symptoms. He also had two appointments with an IHMS psychologist while on Christmas Island.
483. Despite his mental health issues, Mr DE was assessed by IHMS as fit to fly to Nauru. On the pre-transfer assessment form dated 7 January 2014, a case manager ticked a box next to the following statement:
- The Detention Health Services Provider has assessed the person as fit to transfer and the person has no apparent special needs or the special needs identified can be managed in the RPC.
484. There was space available on the form below this question to set out additional information, for example, details of the special needs of the proposed transferee. No additional information was provided for Mr DE's assessment.
485. Around two weeks after arriving on Nauru, during a mental health screening on 22 January 2014, Mr DE was administered the DASS21 mental health tool. As described above, his scores for depression and anxiety were 'extremely severe' and his score for stress was 'severe'. He continued to display symptoms of anxiety and depression throughout his detention in the regional processing centre. Mr DE's wife was also administered the DASS21 at the same time and, as described in paragraph 398 above, her scores for depression and anxiety were also extremely severe.
486. As with Ms CO, the records produced by the department in relation to the decision to transfer Mr DE and his family to Nauru suggest at best a cursory examination of the impact that this was likely to have on him and his family. I am not satisfied, based on these records, that an appropriate assessment was undertaken as to whether adequate support services were available to him in the regional processing centre on Nauru or whether it was appropriate for him to be transferred there.
487. In relation to both Ms CO and Mr DE, I find that the pre-transfer assessment that there were no barriers to them being taken to Nauru was seriously inadequate and contrary to their rights under article 10(1) of the ICCPR. In response to my preliminary view on this issue, the department did not seek to controvert or otherwise challenge my findings about the deficiencies in the assessment of Ms CO and Mr DE. The only substantive comment made by the department was that it considers that 'there were adequate services in place during this time period in the form of mental health and medical support'. I do not accept that proposition.
488. In considering whether IHMS has assessed the person as fit to transfer and has no apparent special needs, the departmental officer had regard to a spreadsheet prepared by IHMS. IHMS were required to put each person into one of the following categories:

- Category 1: Fit to fly to an OPC site
Category 2: Short-term NOT Fit to fly (anywhere)

Category 3: Fit to fly, not recommended for OPC site medium term
Category 4: Fit to fly, not recommended for an OPC site long-term.¹⁸⁴

489. A general practitioner at IHMS who was responsible for categorising asylum seekers using this system gave evidence to the Commission during its national inquiry into children in immigration detention.¹⁸⁵ The doctor said that a person would be placed into Category 1 if they had no outstanding medical conditions, or if they had a medical condition that could be managed in a remote area. For this purpose, the doctor would consider a remote area to be an Australian town like Broome in Western Australia. He was asked whether the quality of health care available on Nauru was comparable to a remote centre in Australia and said that ‘having never worked in Nauru’ he could not make that assessment himself.
490. I infer that the act of placing a person into Category 1 reflects an assessment by IHMS the person is physically fit to fly to Nauru, but does not reflect any assessment by IHMS that the conditions on Nauru are an appropriate for the person’s ongoing physical and mental health. It appears that the categorisation as ‘fit to fly’ was not, and was not intended to be, an endorsement by IHMS of the decision to send the person to Nauru.
491. The same doctor said that a person would be placed into Category 2 if they were temporarily not fit to travel. This would include women who were more than 30 weeks pregnant and people who had significant blood tests or pathology tests outstanding. A person would be placed into Category 3 if they were fit to fly but had conditions that Nauru was not prepared to accept. This included blood borne illness such as Hepatitis B or C, HIV or tuberculosis. A person would be placed into Category 4 if they had a condition that could not be adequately managed in a remote area.
492. In February 2014, after Master DG was transferred but before Master CQ and Miss BM were transferred, the JAC Health Subcommittee raised concerns about the lack of rigor involved in pre-transfer health assessments for children. In particular, the subcommittee said that there was extremely limited screening for communicable and infectious diseases in children. In its report to the Joint Advisory Committee for the regional processing centre, the subcommittee noted that there was:

a lack of health screening in children which is not appropriate in the situation of transfer to an offshore processing environment. While the screening protocols described in the DIBP detention screening protocol are sound, these are not implemented within IHMS procedures, meaning there is only a limited history and examination for children aged under eleven years, and no blood screening for children aged under fifteen years. These age delineations are based on offshore health screening protocols intended to exclude active tuberculosis disease and establish ‘fitness to fly’, however they are not appropriate for a held detention setting.

Based 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% 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.¹⁸⁶

493. The JAC Health Subcommittee also said that there were no criteria for excluding children from transfer to Nauru, although IHMS staff reported that they would not accept transfer of children (or adults) with a disability.¹⁸⁷ The subcommittee recommended that exclusion criteria be clarified.¹⁸⁸
494. It is not clear whether these recommendations were accepted or implemented by the Commonwealth. The department gave evidence to a Senate Estimates committee in February 2015, one year after receiving the report of the JAC Health Subcommittee, that 38 of 43 recommendations made by the subcommittee had been agreed to either in full or in part and that 20 of them had been completed.¹⁸⁹
495. As with the pre-transfer assessment forms, the BIA forms completed for each of the children of the complainants and the supporting information provided to officers completing these forms were also very light on detail. I asked the department to provide me with copies of any documents created by or for the department from August 2012 to July 2015 that relate to whether or not children or families with children should be taken to Nauru pursuant to the regional processing provisions of the Migration Act. The department provided me with a one-page guidance note it provided to its officers for completing BIAs. The guidance note said that, in considering whether appropriate arrangements, support and services are available at the regional processing centre on Nauru, officers should take into account the following things:
- the obligations of both Australia and Nauru's under the Memorandum of Understanding signed on 3 August 2014 to make special arrangements for vulnerable cases
 - the fact that Nauru is a party to the CRC
 - there are governance arrangements in place to provide advice to Australia and Nauru about minors in the regional processing centre
 - 'specific arrangements have been made for minors, including in relation to the provision of accommodation'
 - 'Save the Children Australia has been contracted to provide child welfare services on Nauru, including in relation to: specialist care and support for children and families with children; programmes and activities; and educational activities'. (I note that this was the only reference to education in the guidance note.)
 - IHMS provides 'a range of health and medical services ... including access to doctors, nurses, psychologists, psychiatrists and counsellors'
 - 'the Government of Nauru has guardianship arrangements in place for unaccompanied minors who are transferred there'.

496. Each of the BIA forms for the children of the complainants contains the following statements:

Education requirements

What is the highest level of education that the minor has completed:

No schooling Pre-school Junior primary Senior primary High school

I have considered advice from relevant areas in DIBP about the education services available at the RPC and think that these services will be appropriate for this minor.

Accommodation requirements

I have considered advice from the relevant areas in DIBP about the accommodation available at the RPC and think that this will be appropriate for this minor.

Services and activities

I have considered advice from the relevant areas in DIBP about the services and activities available at the RPC and think that this will be appropriate for this minor.

497. The later BIAs that were completed for Master CQ and Miss BM in May 2014 also contained the following statement:

Care and welfare

I have considered advice from the relevant areas in DIBP about the care and welfare arrangements at the RPC and think that this will be appropriate for this minor.

498. In each of the forms, the declarations set out above had been 'pre-ticked'. Not only was the information provided to the relevant officers limited to a one-page guidance sheet describing at the highest level of generality the matters they were asked to 'take into account', the officers were also saved the effort of placing a tick or check mark next to each declaration to indicate that they were satisfied of the relevant matters. I am not satisfied that this pro-forma exercise amounted to a substantive consideration by the officer completing the BIA that 'appropriate care, services and support arrangements' were available for each of these children. I consider that matters relevant to the purported 'best interest assessment' were not taken into account and that there was no proper assessment of – and, indeed, no genuine attempt to assess – the best interests of the children.

499. The next things that the departmental officers completing the BIAs were asked to consider were:

- whether an IHMS assessment had been completed and no health or vulnerability concerns were evident that would result in a delay to transfer
- whether they were aware of any other matter, including evidence of abuse and/or neglect by an accompanying adult that would suggest it is not in the best interests of the child to remain with their family

and in the case of the later BIAs that were completed for Master CQ and Miss BM in May 2014:

- whether they were aware of any other matter to suggest that the child should not be transferred to Nauru at this stage.

500. The BIAs did not require the officers completing the forms to conclude that taking the subject children to Nauru was in their best interests, or even that it was consistent with their best interests. At the end of the forms, officers were asked to state whether or not the BIA had identified any reasons why the minor *should not* be transferred to Nauru and to summarise the reasons for this conclusion. The summaries recorded for each of the children were as follows.

501. In respect of Master CQ:

Minor is transferring with both parents who are his primary care givers. There have been no identified issues that suggest this family group should not transfer together.

502. In respect of Miss BM:

[Miss BM] is travelling with her parents together to Nauru. No vulnerabilities identified. Suitable for transfer.

503. In the BIA completed for Master DG, the officer did not provide a summary of reasons for concluding that there were no reasons why he should not be transferred to Nauru. However, in the accompanying pre-transfer assessment the officer wrote: 'Transferee is a minor who will transfer with his parents'.

504. The statements made in the three paragraphs above are consistent with the departmental policy identified in paragraph 457 above namely, that when assessing whether it is in the best interests of children who are part of a family to be taken to Nauru, the assessment should start with the assumption that the parents will be taken and then ask whether it is in the children's best interests to remain with their parents. As previously discussed, this line of reasoning fails to engage with the question of whether it was in the best interests of the child that the whole family be taken to Nauru.

(c) Whether transfer of families with young children to Nauru was contrary to or inconsistent with their rights

505. The decision made by the departmental officers in relation to each of the children of the complainants was that there were no reasons why the children should not be transferred to a regional processing centre. The complainants submit that these decisions were inconsistent with or contrary to their human rights, and in particular the rights of their children.
506. I find that the BIAs for each of the children did not indicate an adequate assessment of whether ‘appropriate care, services and support arrangements’ were available for each of them. On the contrary, the sparse materials about the ‘assessment’ show that it was inadequate. I find that there was no proper assessment of—and, indeed, no genuine attempt to assess—the best interests of the children. Given the conditions in which they would be detained, I find that these transfer assessment decisions, which had the practical effect of authorising the taking of the children to Nauru, were contrary to the rights of the children of the complainants under articles 3(2), 6(2), 16(1), 24(1), 27(1) and 37(c) of the CRC and article 10(1) of the ICCPR.

6.3 Whether families with young children should be exempt from transfer

507. The Minister has the power under s 198AE(1) of the Migration Act to determine that the requirement in s 198AD to take a person to a regional processing country does not apply to a person or a class of people. The Minister may exercise this power if he thinks that it is in the public interest to do so.
508. The present complainants say that they are part of an identifiable class of people who were particularly vulnerable to being taken to a regional processing centre, namely, families with young children.
509. I asked the department for copies of any submissions it had made to the Minister in the period from August 2012 until July 2015 that the Minister consider making a determination under s 198AE in favour of children or families with children. The department said that it had searched for but not identified any such submissions.
510. As set out in my decision on jurisdiction at paragraphs 385 to 397 (reproduced in **Annexure C** to this report), on 28 July 2013 the then Minister had issued guidelines to the department in which he decided, in advance, not to consider the exercise of his power under s 198AE in relation to people who arrived after 19 July 2013 unless they have made a credible claim for protection against the regional processing country. These guidelines remained in force following the change in government in September 2013.

511. The relevant parts of the s 198AE guidelines in force at the time that the complainants were sent to Nauru were as follows:

17. [M]y overarching position is that unauthorised maritime arrivals liable to be taken to a regional processing country should be so taken unless there are good reasons in the public interest for this not to be the case.

...

20. It is my expectation that individuals to whom section 198AD otherwise applies will have their individual circumstances considered by an officer for the purposes of determining whether it is reasonably practicable for the person to be taken to a regional processing country.

21. In accordance with the Government announcement of 19 July 2013, I do not expect to have unauthorised maritime arrivals who arrive after this announcement referred to me for consideration, unless they are persons who:

- in the opinion of the officer (whether or not the opinion is legally or factually correct), have made a credible claim that:
 - his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; or
 - there is a real risk that he or she will be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or have the death penalty carried out on him or her

against the regional processing country, or each regional processing country if there is more than one.

22. For other individuals, those who have arrived after 13 August 2012 and before the announcement on 19 July 2013, the following cases should be referred to me:

- a. it is not considered reasonably practicable to take a person to a regional processing country in the foreseeable future because of the personal circumstances of that person (including, without limitation, physical or mental impairments that are permanent and acute) and where there is written advice from a medical specialist appointed by the department; or
- b. persons who, in the opinion of the relevant officer (whether or not the opinion is legally or factually correct), have made a credible claim that:
 - i. his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; or
 - ii. there is a real risk that he or she will be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or have the death penalty carried out on him or her

against the processing country, or each regional processing country if there is more than one;

- c. persons who, are an unaccompanied minor in respect of whom, as a primary consideration, it is in his or her best interests to remain in Australia and that consideration is not outweighed by other primary considerations; and
- d. persons who, in the opinion of the relevant officer (whether or not the opinion is legally or factually correct) have a spouse/partner, minor child, or are the parent of a minor child in Australia who will not be taken to a regional processing country with the unauthorised maritime arrival.

23. Independently of any circumstance pertaining to any individual offshore entry person, if the Department considers that operational reasons (including capacity constraints) in a RPC mean that it will not be reasonably practicable to take certain classes of offshore entry people to any RPC in the foreseeable future, it may bring that matter to my attention.

24. I have decided, in advance, not to consider the exercise of my power under section 198AE in relation to any other classes of case.¹⁹⁰

512. The 2014 guidelines in relation to pre-transfer assessments summarised the s 198AE guidelines in the following way:

For the post-19 July 2013 cohort, the only circumstances in which the Minister has indicated that he will consider exempting a person from being taken to an RPC [is] if the person has raised credible protection claims against the country.

513. Those guidelines issued by the Minister indicate that for people like the complainants who arrived in Australia after 19 July 2013, even if a pre-transfer assessment were to find that it was not 'reasonably practicable' to take them to a regional processing country because they had a physical or mental health condition or other vulnerabilities that could not be adequately provided for in that country, this could only delay their departure until it was 'reasonably practicable' to take them there. The Minister would not consider exempting such a person from transfer.

514. In response to my preliminary view, the department confirmed that: '[i]n the event that the pre-transfer assessment found that it was not reasonably practicable [to take a person to a regional processing country] this may result in the delay of taking a person to a regional processing country but would not exempt them from that requirement under s 198AD'.

515. In my view, the Minister's guidelines were intended to, and did, indicate to the department that an assessment of physical and mental health conditions and other vulnerabilities as part of a pre-transfer assessment was a matter of subsidiary concern as the executive government pursued an approach in which, regardless of the existence of such conditions and vulnerabilities, asylum seekers with physical and mental health conditions and other vulnerabilities would be taken to a regional processing country.

516. I find that the Minister's s 198AE guidelines resulted in the department treating the existence of physical and mental health conditions and other vulnerabilities as of little if any importance in the decision to take a person to a regional processing country. I find that the decisions by respective Ministers to make and issue those guidelines, and to maintain those guidelines, were contrary to the rights of the children of the complainants under articles 3(2), 6(2), 16(1), 24(1), 27(1) and 37(c) of the CRC and contrary to the rights of each of the complainants under article 10(1) of the ICCPR.

7 *Non-refoulement* and arbitrary detention

517. The Commonwealth has an obligation not to send a person from Australia to another country where there is a real risk that the person would suffer irreparable harm in that country. This obligation is referred to as *non-refoulement*. Under the ICCPR, the *non-refoulement* obligation arises as a result of the obligation under article 2 to ensure the rights set out to 'all individuals within the State's territory and subject to its jurisdiction'. The UNHRC has said:

the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.¹⁹¹

518. In a series of cases, the UNHRC has found that the *non-refoulement* obligation applies in the context of a potential breach of articles 6 (right to life) or 7 (freedom from torture and cruel, inhuman or degrading treatment or punishment) of the ICCPR.¹⁹² In *Nakrash and Qifen v Sweden* the Committee put the relevant test for breach in the following way:

whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his removal ... there is a real risk that the author would be subjected to treatment prohibited by article 7.¹⁹³

519. This formulation has been applied in other cases.¹⁹⁴

520. Australia has said that the obligation not to expose a person to a potential violation of rights in a second country extends to 'only the most fundamental rights relating to the physical and mental integrity of the person'. It said that these were the rights under articles 6 and 7 of the ICCPR.¹⁹⁵

521. Other treaty bodies have emphasized that the relevant rights are not limited to those particular articles or their equivalents. For example, the Committee on the Rights of the Child has said:

States shall not reject a child at a border or return him or her to a country where there are substantial grounds for believing that he or she is at real risk of irreparable harm, such as, **but by no means limited to**, those contemplated under articles 6(1) and 37 of the Convention on the Rights of the Child, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed.¹⁹⁶

(emphasis added)

522. In two cases, the UNHRC has held admissible claims that a person removed to a second country would be subject to a violation of article 9(1) of the ICCPR (arbitrary detention).¹⁹⁷ These two cases were not upheld on the merits, but they indicate that it has been accepted in principle that the *non-refoulement* obligation may attach to those rights.
523. One of these cases was *GT v Australia*. The author of the communication was an Australian woman married to a Malaysian man. Her husband, referred to as 'T', had been convicted of importing heroin into Australia. Following his release on parole, he applied for a protection visa, which was refused. The author claimed that if her husband was deported to Malaysia there was a real chance that he would face the death penalty, contrary to article 6 of the ICCPR. She claimed that there was a real chance that he would be caned, contrary to article 7 of the ICCPR. She also claimed that people suspected of having committed drug offences could be detained for up to two years in preventative detention under Malaysia's *Dangerous Drugs (Special Preventative Measures) Act 1985 (Malaysian Dangerous Drugs Act)* and that this would amount to arbitrary detention, contrary to article 9(1) of the ICCPR.
524. The UNHRC unanimously found that there were no obstacles to the admissibility of the claims under articles 6, 7 and 9(1) of the ICCPR.¹⁹⁸ Ultimately, each of these claims failed on the merits as a result of a lack of certainty about the anticipated treatment. In relation to the claim under article 9(1), Australia accepted that the Malaysian Dangerous Drugs Act provided for preventative detention for up to two years for the purpose of questioning and investigation of offences, and that it was likely that T would be questioned on return to Malaysia about his conviction in Australia.¹⁹⁹ However, Australia argued that preventative detention was not automatic and, in the particular circumstances, it was not likely that T would be kept in preventative detention. Accordingly, Australia argued that 'detention in violation of article 9 is not a necessary and foreseeable consequence of Australia's decision to return T to Malaysia'.²⁰⁰ The author did not challenge the factual information put forward by Australia about the likelihood of detention. As a result, the UNHRC said that it could not conclude that T's deportation to Malaysia would amount to a violation by Australia of his rights under article 9(1) of the ICCPR.²⁰¹
525. The factual circumstances in the present complaint are different to those faced by the UNHRC in *GT v Australia*. In *Plaintiff M68*, the High Court considered the circumstances of a person in substantially the same position as the present complainants. The plurality judges found that the Commonwealth did not itself detain the plaintiff, but said:
- It may be accepted that the Commonwealth was aware that Nauru required the plaintiff to be detained. In order to obtain Nauru's agreement to receive the plaintiff, the Commonwealth funded the Centre and the services provided there in accordance with the Administrative Arrangements. The Commonwealth concedes the causal connection between its conduct and the plaintiff's detention.²⁰²
526. In *Plaintiff M68*, the plaintiff's detention in the regional processing centre on Nauru was a necessary and foreseeable consequence of the conduct of the Commonwealth.

527. I find that the detention of each the complainants and their families in the present case was also a necessary and foreseeable consequence of the conduct of the Commonwealth. In response to my preliminary view, the department did not seek to challenge this finding. Instead, it reiterated its view that ‘arrangements in Nauru are a matter for the Government of Nauru’ and pointed to the legislative requirements on it to send unauthorised maritime arrivals to Nauru.
528. I find that there was a real risk of irreparable harm to both the adult and child complainants upon their transfer to Nauru, arising from their detention at the regional processing centre and the likely adverse consequences for families with young children from being required to live in the conditions that existed at the centre.
529. A related question is whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of being taken to Nauru, there is a real risk that the complainants would be detained arbitrarily. As noted above, the UNHRC has found that:

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 in the absence of particular reasons specific to the individual.²⁰³

530. At the time that the complainants were taken to Nauru in January and May 2014, Australia and Nauru had discussed the possibility of the regional processing centre operating as an ‘open centre’, but the Commonwealth was aware that this was not how the centre was then operating. The open centre arrangements did not fully take effect until October 2015, a time by which the complainants were no longer detained. In the meantime, there was no requirement that particular reasons specific to the individual be shown in order for them to be detained. Detention was required for all people taken to Nauru unless and until they were found to be refugees. I find that the Commonwealth was aware that the complainants would be detained—not only for a brief initial period in order to document their entry, record their claims and determine their identity—but for a significant additional period during which:

- the complainants would have a refugee status determination (**RSD**) interview;
- their claims would be assessed and determined – according to the RSD Handbook, the Nauruan Secretary for Justice and Border Control would endeavour to notify applicants of the outcome of the decision within 4 to 6 months from the date of the RSD interview;²⁰⁴
- if they were found not to be refugees, the assessment of their claims could be reviewed by a Refugee Status Review Tribunal (**RSRT**), which would not begin sitting until July 2014;²⁰⁵
- if the RSRT upheld a decision to refuse refugee status, those decisions could be subject to judicial review.

531. As at February 2014, there were 1,093 people detained on Nauru, 53 people had had a RSD interview and it was expected that approximately 60 RSD decisions would be ready for determination every 8 weeks.²⁰⁶ At that rate, it would take approximately 2.5 years for all of the initial RSD decisions to be completed. It was expected that the RSRT would hear 18 cases in each two-week sitting period.²⁰⁷ The anticipated time until a decision that may result in a person being released from detention is of the same order of magnitude as the potential period of preventative detention considered by the UNHRC in *GT v Australia*.
532. The experience of the complainants was that Mr DE and his family were detained for 18 months before they received a positive RSD decision and were released into the Nauruan community. Ms BK and Ms CO and their families were detained for 16 months and almost 9 months respectively and were removed from Nauru prior to receiving an RSD decision. All of the families were assessed by Wilson Security as being low risk. There were no particular reasons specific to them that meant that they needed to be detained.
533. I find that it was a necessary consequence, foreseeable by the Commonwealth, of taking the complainants to Nauru that they would be arbitrarily detained. Thus, I find that the Commonwealth's decision to take them to Nauru was contrary to their rights under article 9(1) of the ICCPR and the equivalent rights under article 37(b) of the CRC.

8 Recommendations

534. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and the reasons for those findings.²⁰⁸ The Commission may include any recommendation for preventing a repetition of the act or a continuation of the practice.²⁰⁹
535. The Commission may also recommend:
- the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
 - the taking of other action to remedy or reduce the loss or damage suffered by a person.²¹⁰
536. I have found that numerous breaches by the Commonwealth of the human rights of the complainants have occurred, by decisions and actions of the department and of successive Ministers of the Commonwealth. I set out in **Annexure B** to this report a summary table of my findings of breaches of the human rights of each of the complainants.
537. I consider that it is appropriate to make recommendations directed at remedying or reducing the loss and damage suffered by the individual complainants and their families, and also at preventing a repetition of the acts or a continuation of the practices that are described in my findings.

8.1 Recommendations in relation to the complainants

(a) Settlement in Australia

538. The families of Ms BK and Ms CO are currently in community detention in Australia. Both Ms BK and Ms CO have recently given birth in Australia. As I have found that these families should not have been taken to Nauru, I recommend that they not be returned to Nauru. In order to provide some level of security to these families, I recommend that the Commonwealth provide them with confirmation in writing that they will not be returned to Nauru.
539. Further, I recommend that the families of Ms BK and Ms CO be permitted to make applications for protection visas in Australia. This requires the Minister to lift the bar under s 46A of the Migration Act. I recommend that the department make a submission to the Minister recommending that he lift the bar under s 46A to allow applications for protection visas to be made, and that the Minister accept that recommendation.
540. While any applications by Ms BK, Ms CO and their families for protection are being considered, they should be at liberty and the adults should be able to work to support their families. As noted above, they are currently in community detention. While they were on Nauru each family was assessed as being low risk. I recommend that pending the determination of any applications for protection visas, the families be granted bridging visas with work rights.
541. Mr DE and his family have had their claims for protection assessed through a refugee status determination process on Nauru and have been recognised as refugees. The last information provided to the Commission indicated that they were residing in the community on Nauru. This family arrived initially in Australia as refugees and sought protection here before being taken to Nauru. Again, as I have found that they should not have been taken to Nauru, I recommend that the Commonwealth allow them to apply for protection visas and the opportunity of resettling in Australia.

(b) Compensation

542. I find that each of the complainant families has suffered significant loss and damage as a result of the breaches of their human rights identified in this report. They have asked the Commission to recommend that the Commonwealth compensate them for the immediate and continuing impact that their detention has had on them.
543. The complainants were sent to Nauru in circumstances where it was a necessary consequence, foreseeable by the Commonwealth, that they would be arbitrarily detained. Ms BK and her family were detained at the Nauru regional processing centre for 16 months between 3 May 2014 and 13 September 2015. Ms CO and her family were detained there for almost 9 months between 23 May 2014 and 14 February 2015. Mr DE and his family were detained there for around 18 months between 8 January 2014 and July 2015.

544. The conditions in which they were detained, which were within the effective control of the Commonwealth, were contrary to their rights to be treated with humanity and with respect for their inherent dignity. The accommodation in vinyl marquees failed to provide them with sufficient protection from heat, rain and risk of serious disease. As a result, the accommodation did not provide children with an adequate standard of living and it negatively affected their right to survival and development.
545. In addition to the findings I have made that relate to all detainees, I have made a number of specific findings of breaches of human rights in relation to individual complainants, and I consider that these breaches have resulted in loss and damage to them.
546. In the case of the young children in each of the families, there was a failure to provide them with an adequate standard of living and there were breaches of their rights to privacy, health, and survival and development. Taken together, the children were not treated with humanity and with respect for their inherent dignity.
547. Further, there were specific breaches of the rights of Ms BK to appropriate pre-natal health care and to be free from inhuman or degrading treatment, and the rights of Miss BM, Master DG and Ms DF to be treated with humanity and with respect for their inherent dignity. There were also specific breaches of the rights of Ms CO and Mr DE in relation to the decisions to send them to Nauru.
548. While this loss and damage suffered by the complainants will not be able to be fully addressed by the payment of money, it is important that they be provided compensation to acknowledge the severe adverse impact that their treatment by the Commonwealth has had on them.
549. I note that in considering the assessment of a recommendation for compensation under s 35 of the AHRC Act (relating to discrimination matters under Part II, Division 4 of the AHRC Act), the Federal Court has indicated that tort principles for the assessment of damages should be applied.²¹¹ I am of the view that this is the appropriate approach to take to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.²¹²
550. I recommend that the Commonwealth pay to the complainants an appropriate amount of compensation to reflect the loss and damage they have suffered as a result of the conditions in which they were detained.

(c) No requirement to also establish a breach of domestic law

551. In a number of previous inquiries where the Commission has found that acts or practices of the department were inconsistent with or contrary to human rights and recommended that compensation be paid, the department has submitted that claims for compensation 'can only be considered' when there has also been a breach of Australian domestic law. This submission misunderstands the power of the Commission to make recommendations for the payment of compensation and the range of options available to Commonwealth agencies to provide compensation for detriment caused by defective administration.

552. This inquiry was conducted pursuant to s 11(1)(f) of the AHRC Act. That section gives the Commission the function of inquiring into any act or practice that may be inconsistent with or contrary to any human right. Once an inquiry is concluded, if the Commission finds that acts or practices were inconsistent with or contrary to human rights, the Commission is specifically empowered to make recommendations for the payment of compensation (s 29(2)(c)(i)). If compensation is recommended, it is compensation: ‘to, or in respect of, a person who has suffered loss or damage as a result of the act or practice’.
553. Parliament has determined that the Commission is to have the power to make recommendations for compensation when there has been a breach of human rights. The loss or damage need only be a result of the act or practice that was inconsistent with or contrary to any human right. The power to make such recommendations is not contingent on another breach of domestic law being demonstrated. Indeed, the Commission’s inquiry function is typically used in situations where there is no other domestic remedy available.
554. Non-corporate Commonwealth entities such as the department are subject to the *Public Governance, Performance and Accountability Act 2013* (Cth) and have a number of avenues pursuant to which they may consider payments of compensation.²¹³ These include:
- settlement of monetary claims against the Commonwealth (‘legal liability’);²¹⁴
 - compensation for detriment caused by defective administration;²¹⁵
 - act of grace payments;²¹⁶ and
 - ex gratia payments.²¹⁷
555. Some previous submissions of the department have focused on the first of these options and have not properly engaged with the other three.
556. Of the other three, the most relevant for present purposes is the *Scheme for Compensation for Detriment caused by Defective Public Administration (CDDA)*. The CDDA is an administrative scheme that was established by the Australian Government in 1995 and is currently described in Resource Management Guide No. 409 published by the Department of Finance.
557. The CDDA scheme provides a means of compensating people who have suffered because of defective government administration. Importantly, the scheme is intended to compensate those to whom there is no legal obligation to pay compensation. Decisions to compensate under the scheme are approved on the basis that there is a moral rather than a legal obligation to pay compensation.²¹⁸
558. The Commonwealth Ombudsman has produced two detailed reports on compensation schemes in general and the CDDA in particular. One of the key recommendations in the Ombudsman’s most recent report is that there is a need for ‘less defensive and legalistic approaches to CDDA decision-making by agencies’.²¹⁹ The Ombudsman notes that the CDDA scheme is premised on a distinction between legal and moral claims and that, once a decision is made to evaluate the claim as a CDDA claim rather than as a legal claim, it is inappropriate to retain a legal frame of reference in the further processing of the claim.

559. The CDDA scheme permits payments to be made where an official has caused detriment to a person because of:²²⁰
- a specific and unreasonable lapse in complying with existing administrative procedures that would normally have applied to the person's circumstances; or
 - an unreasonable failure to institute appropriate administrative procedures to cover the person's circumstances.
560. In the present circumstances, it appears to me that the complainants, as families with young children, would be entitled to seek and obtain compensation pursuant to the CDDA for the detriment caused to them as a result of, at least, the unreasonable failure to institute appropriate administrative procedures to adequately assess whether they should have been taken to Nauru.

(d) Apology

561. The complainants have asked that the Commonwealth provide them with a formal written apology in relation to the breaches of their human rights.
562. In litigated cases dealing with remedies for discrimination, courts have taken different views about whether it is appropriate to order a respondent found to have engaged in discrimination to apologise. In *Creek v Cairns Post Pty Ltd*, Kiefel J (as her Honour then was) noted that a short apology would have been ordered had the discrimination complaint been made out.²²¹ Apologies have been ordered in a number of cases in the then Federal Magistrates Court.²²²
563. A different approach was taken by Branson J in *Jones v Toben*, in which her Honour considered that it was not appropriate to 'seek to compel a respondent to articulate a sentiment that he plainly enough does not feel'.²²³ The circumstances of that matter are very different to the present circumstances.
564. I note that under the Legal Services Directions 2017 (Cth), the Commonwealth is expected to behave as a model litigant in the conduct of litigation. This obligation extends to apologising where the Commonwealth is aware that it has acted wrongly or improperly.²²⁴
565. This inquiry is not litigation, and I do not have power to compel an apology by the Commonwealth. But I consider that an apology is a remedy that I may recommend.
566. In this case, I consider that an apology by the Commonwealth to each of the complainants is necessary and appropriate. In my view, given my findings of breaches of human rights by the Commonwealth in respect of the complainants, it would be unreasonable not to provide a formal apology. Apologies are important remedies to address wrongful conduct, and I consider that they have particular importance as a mechanism to acknowledge and redress breaches of human rights. They can, at least to some extent, alleviate the suffering of those who have been wronged.²²⁵ To maximise the potential beneficial effect of an apology, it should be given by a person of very high seniority within the Commonwealth, such as the relevant Minister or Secretary of the department.

Recommendation 1

In relation to Ms BK, Mr BL and Miss BM (and their baby girl more recently born in Australia), I recommend that:

- (i) The Commonwealth confirm in writing that the family will not be taken back to Nauru.
- (ii) The department make a submission to the Minister recommending that he lift the bar under s 46A of the Migration Act to allow the family members to make applications for protection visas, and the Minister accept that recommendation.
- (iii) Pending the determination of any applications for protection visas, the family be granted bridging visas with work rights.
- (iv) The Commonwealth pay the family an amount to compensate them for the loss and damage they have suffered as a result of the breaches of their human rights identified in this report.
- (v) The Commonwealth provide the family with an apology in relation to the breaches of their human rights identified in this report.

Recommendation 2

In relation to Ms CO, Mr CP and Master CQ (and their baby girl more recently born in Australia), I recommend that:

- (i) The Commonwealth confirm in writing that the family will not be taken back to Nauru.
- (ii) The department make a submission to the Minister recommending that he lift the bar under s 46A of the Migration Act to allow the family members to make applications for protection visas, and the Minister accept that recommendation.
- (iii) Pending the determination of any applications for protection visas, the family be granted bridging visas with work rights.
- (iv) The Commonwealth pay the family an amount to compensate them for the loss and damage they have suffered as a result of the breaches of their human rights identified in this report.
- (v) The Commonwealth provide the family with an apology in relation to the breaches of their human rights identified in this report.

Recommendation 3

In relation to Mr DE, Ms DF and Master DG (who have been recognised as refugees and, according to the information most recently provided to the Commission, are currently residing in the community on Nauru), I recommend that:

- (i) The Commonwealth allow the family members to apply for protection visas and the opportunity to resettle in Australia.

- (ii) The Commonwealth pay the family an amount to compensate them for the loss and damage they have suffered as a result of the breaches of their human rights identified in this report.
- (iii) The Commonwealth provide the family with an apology in relation to the breaches of their human rights identified in this report.

8.2 Regional processing and resettlement of asylum seekers

567. As a result of the findings that I have made about the general conditions of detention in the regional processing centre, I consider that it is also appropriate to make some broader, more systemic recommendations.
568. The primary finding of the inquiry is that the regional processing centre on Nauru was not an appropriate place to send families with young children. As a result, I recommend that children, whether accompanied or unaccompanied, no longer be sent there.

Recommendation 4

The Commonwealth confirm by formal decision and public announcement that it will not send unaccompanied minors or families with children who arrive in Australia seeking asylum to the regional processing centre on Nauru.

569. I have also found that the vinyl marquee accommodation provided to detainees was not adequate or appropriate in the circumstances, given the adverse living conditions on the phosphate plateau of central Nauru. This accommodation failed to provide detainees with sufficient protection from heat, rain and risk of serious disease. As a result, it was and is my view that this accommodation should be decommissioned. Since I provided the department with my preliminary views in relation to this inquiry, including the inadequacy of the vinyl marquee accommodation, there have been media reports suggesting that the accommodation has been decommissioned.

Recommendation 5

The Commonwealth confirm that it has now decommissioned all of the vinyl marquee accommodation in the regional processing centre on Nauru.

570. Given my primary finding that Nauru was not an appropriate place to send families with young children, I recommend that all children taken to Nauru (whether accompanied or unaccompanied) be resettled in Australia. Similarly, any other person currently residing in the inadequate accommodation provided at the centre should also be resettled in Australia. This recommendation extends not only to families but also to single adult women residing in the conditions that I have considered and addressed in this report.

Recommendation 6

The Commonwealth offer to resettle in Australia any unaccompanied minors and families with children that it transferred to Nauru who still remain on Nauru, along with any single adult women who were residing in the vinyl marquee accommodation in the regional processing centre on Nauru.

8.3 Medical transfers

571. The findings that I have made in relation to the circumstances of Ms BK highlight inadequate procedures in relation to transfers of detainees from regional processing centres to Australia to obtain medical treatment. As described in paragraphs 299 to 310 above, the RON Hospital was not equipped to deal with Ms BK's pregnancy. She should have been transferred to Australia to give birth before 28 weeks gestation, as provided in the department's policy at the time.
572. Given Australia's responsibility for the health and wellbeing of people detained at its regional processing centres, Australia should be the primary destination for medical transfers unless there is a medical reason why another destination is more appropriate.
573. In Ms BK's case, while the general policy of transferring women to Australia to give birth was appropriate, a transfer could not take place unless it had been approved by the First Assistant Secretary, Infrastructure and Services Division (see paragraph 313 above). Despite frequent, repeated recommendations by Ms BK's doctors to the department for her to be transferred, this did not occur until she was almost 35 weeks pregnant.
574. Addressing this issue will require changes to both the policies governing the approval of medical transfers and how those policies are implemented in practice. Both the policies and practices must ensure that people taken to a regional processing country who have a significant medical condition that cannot be adequately addressed in that country are transferred promptly to Australia for medical treatment.
575. I note that the issue of medical transfers from regional processing countries was recently considered by the Queensland Coroner in the inquest into the death of Hamid Khazaei.²²⁶ The Coroner made the following findings:

The evidence highlighted a transfer process which allowed for inconsistent information to be passed on through multiple persons and channels. Each person asserted they had an important part to play in the transfer process but each had fundamentally different perspectives and differing imperatives.

It appeared that the medical staff were working primarily to clinical imperatives while the DIBP officers were working primarily to bureaucratic and political imperatives to keep transferees on Manus Island, or in PNG.²²⁷

576. Dr Paul Douglas, the Chief Medical Officer of the department at the relevant time for that inquest, gave evidence about the changes that had been made to medical transfer processes. Dr Douglas identified that IHMS would now identify three timeframes in which they wanted patients moved:

“Emergency” means someone needs to move within 24 hours. “Urgent” cases are those requiring movement within 48 to 72 hours, where they have some time to actually engage and involve other people, and “semi-urgent” cases are to 14 days. ...

Dr Douglas’ evidence was that the Chief Medical Officer is now involved in certain transfers but that no clinician from DIBP needs to get involved in emergency transfers. If IHMS says a person needs to move off and they need a medevac that is arranged administratively. However, he said that “medical contestability” was involved in urgent transfers, where people need to move within the next two to five days. Those cases are referred to the Chief Medical Officer and then a transitory persons committee at First Assistant Secretary level looks at facilitating transport if care cannot be provided on site. This committee was established because of the government directive that people should not come to Australia if the service can be provided elsewhere.²²⁸

577. IHMS provided evidence to the inquest that the process for medical transfer of a patient should be led by clinicians and approved by clinicians.²²⁹ The Coroner concluded that clinical considerations should prevail over all other factors when a recommendation for urgent medical movement is made.²³⁰

Recommendation 7

The Commonwealth amend its policies and practices to ensure that people taken to a regional processing country who have a significant medical condition that cannot be adequately addressed in that country are transferred promptly to Australia for medical treatment unless there is a medical reason why another destination is more appropriate. Under that policy, the approval process for medical transfers should be led by persons located in regional processing countries with clinical training in emergency medicine.

578. A significant factor in the deteriorating mental health of Ms BK was the fact that she was not given timely and accurate information about when and where she would be transferred. I consider that this also requires a change in policies and practices.

Recommendation 8

The department amend its policies and practices to ensure that people who require medical transfers are notified at the earliest opportunity of when and where they will be transferred.

579. In order to increase transparency and confidence in decision-making by the department in relation to medical transfers, it should publish its policies in relation to medical transfers.

Recommendation 9

The department publish its policies in relation to medical transfers.

8.4 Best interests assessments for children

580. I have found that the ‘Best Interests Assessment’ conducted by the department prior to taking children to Nauru failed to take the best interests of children into account as a primary consideration. The department has acknowledged that these assessments did not consider whether the best interests of the children were served by transferring them to Nauru. The assessments did not meet Australia’s obligations under article 3(1) of the CRC. The breach of article 3(1) of the CRC by the Commonwealth was deliberate.
581. Significant decisions in relation to children, such as whether to transfer a child to a regional processing centre, require a proper best interests assessment to be carried out. This requires the active consideration of the individual circumstances of the child and a decision making process that treats those interests as a primary consideration. No other consideration should be deemed to outweigh the interests of children prior to such an assessment being carried out.
582. I recommend that the department amend its policies and practices in relation to the conduct of best interests assessments for children to meet these requirements.

Recommendation 10

The department amend its policies and practices in relation to the conduct of best interests assessments for children to ensure that it involves a substantive assessment on an individual basis. This will require that:

- (i) the individual circumstances of each child is actively considered, treated as a primary consideration and weighed against other relevant considerations;
 - (ii) no consideration other than the best interests of a child is expressly or implicitly regarded as a consideration that necessarily outweighs the interests of that child, prior to such an assessment being carried out.
583. I have found that when decisions were made about parents that also had implications for children, the best interests of children were not taken into account as a primary consideration. For example, if a decision was made to send parents to a regional processing centre, the impact of this decision on their children was not a factor that was taken into account. When decisions were then made about whether children were to be taken to a regional processing centre, the fact that their parents were being taken there was assumed. This allowed the department to reach the conclusion that it was in the best interests of children to be taken to regional processing centres because that is where their parents were being taken.
584. Article 3(1) of the CRC requires the best interests of children to be taken into account ‘in all actions concerning children’. This includes decisions made about their parents that also affect the children’s rights. I recommend that the department amend its policies and practices to ensure that when decisions are made about children’s parents which also concern the rights of children, that the best interests of the children are taken into account as a primary consideration.

Recommendation 11

The department amend its policies and practices to ensure that when decisions are made about children's parents which also concern the rights of children, that the best interests of the children are taken into account as a primary consideration.

9 The department's response to my findings and recommendations

585. On 6 November 2018, I provided the department with a notice of my findings and recommendations in respect of Ms BK, Ms CO and Mr DE's complaints.
586. On 4 December 2018, the department provided the following response to my findings and recommendations:

Recommendation 1

In relation to Ms BK, Mr BL and Miss BM (and their baby girl more recently born in Australia), I recommend that:

- (i) *The Commonwealth confirm in writing that the family will not be taken back to Nauru.*
- (ii) *The department make a submission to the Minister recommending that he lift the bar under s 46A of the Migration Act to allow the family members to make applications for protection visas, and the Minister accept that recommendation.*
- (iii) *Pending the determination of any applications for protection visas, the family be granted bridging visas with work rights.*
- (iv) *The Commonwealth pay the family an amount to compensate them for the loss and damage they have suffered as a result of the breaches of their human rights identified in this report. Further details of the methods available to the Commonwealth to provide compensation to the complainants are set out in section 8.1(c) below.*
- (v) *The Commonwealth provide the family with an apology in relation to the breaches of their human rights identified in this report.*

Transitory persons are brought to Australia for a temporary purpose under s198B of the *Migration Act 1958* (the Act). The Act (sections 198AD and 198AH) requires the Department to return transitory persons to a regional processing country as soon as reasonably practicable once they no longer need to be in Australia for the temporary purpose.

Current Government policy does not support the settlement of persons who travel to Australia illegally by boat in Australia. This family has been brought to Australia for a temporary purpose, and is expected to return to a regional processing country at the conclusion of that purpose. The family has access to the following durable migration outcomes: stay in Nauru for up to 20 years; engage in United States (US) resettlement; or voluntarily return to their home country or to a country [to] which they have a right of entry. Settlement in Australia is not an option, therefore Home Affairs does not support recommendations 1(i), 1(ii) and 1(iii).

The Commonwealth can only pay the family compensation to settle a monetary claim against the Department if there is a meaningful prospect of legal liability within the meaning of the Legal Services Directions 2017 and it would be within legal principle and practice to resolve this matter on those terms.

In cases where there is no legal liability to pay compensation, the Compensation for Detriment Caused by Defective Administration (CDDA) Scheme is a discretionary compensation scheme, which provides a mechanism for the Commonwealth to compensate persons who have experienced financial detriment as a result of the defective administration of certain Commonwealth entities, as outlined in Resource Management Guide 409 (the guide). The CDDA Scheme is generally an avenue of last resort and is not used where there is another viable avenue available to provide redress. It is open for the family to make a claim for discretionary compensation and their claim will be assessed in accordance with the guide. Making a claim does not guarantee that compensation will be paid.

Regional processing arrangements, and the management of individuals under those arrangements in Nauru, are the responsibility of the Government of Nauru. Regional processing arrangements are implemented in accordance with international law and with respect for human rights. The Department of Home Affairs does not contend there has been any human rights breach by Australia in relation to this family and therefore does not support recommendation 1(iv).

Recommendation 2

In relation to Ms CO, Mr CP and Master CQ (and their baby girl more recently born in Australia), I recommend that:

- (i) The Commonwealth confirm in writing that the family will not be taken back to Nauru.*
- (ii) The department make a submission to the Minister recommending that he lift the bar under s 46A of the Migration Act to allow the family members to make applications for protection visas, and the Minister accept that recommendation.*
- (iii) Pending the determination of any applications for protection visas, the family be granted bridging visas with work rights.*
- (iv) The Commonwealth pay the family an amount to compensate them for the loss and damage they have suffered as a result of the breaches of their human rights identified in this report. Further details of the methods available to the Commonwealth to provide compensation to the complainants are set out in section 8.1(c) below.*
- (v) The Commonwealth provide the family with an apology in relation to the breaches of their human rights identified in this report.*

See Response to Recommendation 1.

Recommendation 3

In relation to Mr DE, Ms DF and Master DG (who have been recognised as refugees and, according to the information most recently provided to the Commission, are currently residing in the community on Nauru), I recommend that:

- (i) The Commonwealth allow the family members to apply for protection visas and the opportunity to resettle in Australia.*
- (ii) The Commonwealth pay the family an amount to compensate them for the loss and damage they have suffered as a result of the breaches of their human rights identified in this report. Further details of the methods available to the Commonwealth to provide compensation to the complainants are set out in section 8.1(c) below.*
- (iii) The Commonwealth provide the family with an apology in relation to the breaches of their human rights identified in this report.*

Current Government policy does not support the settlement of persons who travel to Australia illegally by boat in Australia. The family remains in Nauru and has access to the following durable migration outcomes: stay in Nauru for up to 20 years; continue to engage in United States (US) resettlement; or voluntarily return to their home country or to a country [to] which they have a right of entry. Settlement in Australia is not an option, therefore Home Affairs does not support recommendation 3(i).

The Commonwealth can only pay the family compensation to settle a monetary claim against the Department if there is a meaningful prospect of legal liability within the meaning of the Legal Services Directions 2017 and it would be within legal principle and practice to resolve this matter on those terms.

In cases where there is no legal liability to pay compensation, the Compensation for Detriment Caused by Defective Administration (CDDA) Scheme is a discretionary compensation scheme, which provides a mechanism for the Commonwealth to compensate persons who have experienced financial detriment as a result of the defective administration of certain Commonwealth entities, as outlined in Resource Management Guide 409 (the guide). The CDDA Scheme is generally an avenue of last resort and is not used where there is another viable avenue available to provide redress. It is open for the family to make a claim for discretionary compensation and their claim will be assessed in accordance with the guide. Making a claim does not guarantee that compensation will be paid.

Regional processing arrangements, and the management of individuals under those arrangements in Nauru, are the responsibility of the Government of Nauru. Regional processing arrangements are implemented in accordance with international law and with respect for human rights. The Department of Home Affairs does not contend there has been any human rights breach by Australia in relation to this family and therefore does not support recommendation 3(ii).

Recommendation 4

The Commonwealth confirm by a formal decision and public announcement that it will not send unaccompanied minors or families with children who arrive in Australia seeking asylum to the regional processing centre on Nauru.

Current Government policy does not support the settlement of persons who travel to Australia illegally by boat in Australia. The Government is committed to regional processing as a policy option to manage illegal maritime arrivals. The transfer of unauthorised maritime arrivals (UMAs) is required in accordance with s198AD(2) of the Act, unless the Minister makes a determination that s198AD does not apply, pursuant to s198AE.

Recommendation 5

The Commonwealth confirm that it has now decommissioned all of the vinyl marquee accommodation in the regional processing centre on Nauru.

The Department is supporting the Government of Nauru to relocate all refugees and asylum seekers from the RPC into community accommodation including dismantling vinyl marquee accommodation as it becomes vacant. All marquees in RPC3 have been dismantled and the site is now decommissioned. The Government of Nauru is in the final stages of settling the remaining residents from RPC2 into the community, which will result in no transferees permanently residing in RPCs on Nauru.

Recommendation 6

The Commonwealth offer to resettle in Australia any unaccompanied minors and families with children that it transferred to Nauru who still remain on Nauru, along with any single adult women who were residing in the vinyl marquee accommodation in the regional processing centre on Nauru.

There are no unaccompanied minors in Nauru and there are no children or single women residing in regional processing centre marquee accommodation. Australian Government policy does not support the resettlement of persons who travel to Australia illegally by boat in Australia. Notwithstanding, the Government is transferring children and their families off Nauru to Australia; conducting this activity quietly and sensibly, in accordance with our border protection policies. In taking this action, we are balancing the need to maintain our strong border protection measures, with humanitarian considerations. Regional processing remains integral to our strong border policies. Under current regional processing arrangements, refugees have permanent resettlement options and are being resettled. People found to be refugees by the Government of Nauru can stay in Nauru for 20 years. The United States resettlement remains a robust resettlement opportunity for many refugees.

Recommendation 7

The Commonwealth amend its policies and practices to ensure that people taken to a regional processing country who have a significant medical condition that cannot be adequately addressed in that country are transferred promptly to Australia for medical treatment unless there is a medical reason why another destination is more appropriate. Under that policy, the approval process for medical transfers should be led by persons located in regional processing countries with clinical training in emergency medicine.

The Australian Government provides support to the governments of Papua New Guinea (PNG) and Nauru for the provision of health services to transferees. This includes primary healthcare and mental healthcare services. Health services are provided by a range of healthcare professionals including general practitioners, psychiatrists, counsellors, mental health nurses and specialists who provide clinical assessment and treatment.

Where the health service provider in either regional processing country considers that the health needs of a particular transferee cannot be met within the existing infrastructure, the provider considers whether additional services or clinicians can be brought to the regional processing country to deliver the required healthcare to the individual, without requiring them to travel. The treating clinician also considers whether the individual can be provided with the required health care by the Pacific International Hospital in Port Moresby, PNG or the Taiwan Adventist Hospital in Taipei, Taiwan.

Where a person has a medical condition that cannot be adequately treated by the provision of additional equipment or clinicians or the transfer of the person to Port Moresby or Taiwan, the treating clinician in the regional processing country may recommend that the person be brought to Australia for health services. On receipt of that recommendation, the Transitory Person's Committee is convened and advice on the way forward is provided by the Department's Chief Medical Officer and a Medical Officer of the Commonwealth.

Recommendation 8

The department amend its policies and practices to ensure that people who require medical transfers are notified at the earliest opportunity of when and where they will be transferred.

Transferees in regional processing countries are given advice about offers for transfer to PNG, Taiwan or Australia for medical services as soon as is reasonably practicable. There are a range of legal, administrative, logistical and clinical issues that need to be resolved prior to transfer, including acceptance of the patient at the healthcare treating facility, the availability of flights and approval for travel from the regional processing country.

Recommendation 9

The department publish its policies in relation to medical transfers.

The Minister and Departmental officials have publicly stated that where required medical treatment is unavailable in a regional processing country, a transferee may be offered treatment in Port Moresby, Taiwan or Australia.

Recommendation 10

The department amend its policies and practices in relation to the conduct of best interests assessments for children to ensure that it involves a substantive assessment on an individual basis. This will require that:

- (i) the individual circumstances of each child is actively considered, treated as a primary consideration and weighed against other relevant considerations;*
- (ii) no consideration other than the best interests of a child is expressly or implicitly regarded as a consideration that necessarily outweighs the interests of that child, prior to such an assessment being carried out.*

Noting the requirement to transfer persons (including children) who have illegally arrived in Australia by boat, to a regional processing country under s198AD of the Act, the best interests of the child (BIC) form was used to consider health and support services when determining whether there are barriers to a child being transferred and whether the exemption under s198AE of the Act applies.

As stated previously to the Commission, the circumstances of the children who are the subject of these complaints, were considered as part of the Pre-Transfer Assessment, which is not an Article 3 assessment under the Convention on the Rights of the Child. Under s198AD all persons must be transferred unless the Minister intervenes. Therefore the purpose of the BIC was to examine whether the Minister would consider under s198AE Guidelines or whether it was reasonably practicable to take the child to a regional processing country.

The Department's policies and practices already incorporate, where possible, the best interests of children into any decision that involves minor children within a family unit or unaccompanied minors.

The Department is currently reviewing all policies and practices to ensure that they reflect that the best interests of a child are treated as primary consideration in all actions that affect a child, including decisions about an adult that affect a child, where there is scope to do so.

Recommendation 11

The department amend its policies and practices to ensure that when decisions are made about children's parents which also concern the rights of children, that the best interests of the children are taken into account as a primary consideration.

As noted above, it is the Department's policy that the best interests of a child are treated as primary consideration in all actions that affect a child, including decisions about an adult that affect a child, where there is scope to do so.

587. I have set out in paragraph 586 above the whole of the department's response to my findings and recommendations. I do not propose to address those brief responses. I note that the provision to the department of my findings and recommendations for its formal response was a distinct statutory requirement, separate from and additional to the opportunity I gave the department to consider and respond to a preliminary version of the whole of this report, as set out in paragraphs 55 and 63 above.

588. I report accordingly to the Attorney-General.



Richard Lancaster SC
Delegate of the President
Australian Human Rights Commission

December 2018

Endnotes

- 1 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42.
- 2 The Hon Kevin Rudd MP, Prime Minister, 'Transcript of broadcast on the Regional Resettlement Arrangement between Australia and PNG' Media Release, 19 July 2013. At <http://pandora.nla.gov.au/pan/79983/20130830-1433/www.pm.gov.au/press-office/transcript-broadcast-regional-resettlement-arrangement-between-australia-and-png.html> (accessed 9 September 2015).
- 3 Commonwealth, Department of Immigration and Border Protection, *Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Conditions of Treatment of Asylum Seekers and Refugees at the Regional Processing Centres in the Republic of Nauru and Papua New Guinea*, March 2016, p 7. At <https://www.aph.gov.au/DocumentStore.ashx?id=fabbe9e5-2ed3-47cd-86c2-f313a6f1b7e8&subld=411483> (accessed 3 November 2017).
- 4 The rights and freedoms recognized in the ICCPR are referred to in the definition of 'human rights' in s 3(1) of the AHRC Act. The CRC is an international instrument that has been declared under s 47 for the purposes of the AHRC Act.
- 5 See *Secretary, Department of Defence v HREOC, Burgess* (1997) 78 FCR 208.
- 6 United Nations Human Rights Committee, General Comment 8 (1982) *Right to liberty and security of persons (Article 9)*. See also:
A v Australia, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997);
C v Australia, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); and
Baban v Australia, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003).
- 7 United Nations Human Rights Committee, General Comment 31 (2004) at [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) p 308, at [11.10].
- 8 *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42], (Hammond J). See also the views of the United Nations Human Rights Committee in *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990); *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *Spakmo v Norway*, Communication No. 631/1995, UN Doc CCPR/C/67/D/631/1995 (1999).
- 9 *A v Australia*, Communication No. 900/1993, UN Doc CCPR/C/76/D/900/1993 (1997) (the fact that the author may abscond if released into the community was not a sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).
- 10 United Nations Human Rights Committee, *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990).
- 11 United Nations Human Rights Committee, concluding Observations on Switzerland, UN Doc CCPR/A/52/40 (1997) at [100].
- 12 United Nations Human Rights Committee, *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Shams v Australia*, Communication No. 1255/2004, UN Doc CCPR/C/90/D/1255/2004 (2007); *Baban v Australia*, Communication No. 1014/2001, CCPR/C/78/D/1014/2001 (2003); *D and E v Australia*, Communication No. 1050/2002, UN Doc CCPR/C/87/D/1050/2002 (2006).
- 13 United Nations Human Rights Committee, General Comment 35 (2014), *Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 at [18].
- 14 United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and United Nations Committee on the Rights of the Child, *Joint general comment No. 3 (2017) on the general principles regarding the human rights of children in the context of international migration*, UN Doc CMW/C/GC/3-CRC/C/GC/22 (16 November 2017), at [10]. At http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/1_Global/CMW_C_GC_3_CRC_C_GC_22_8363_E.pdf (accessed 5 December 2017).
- 15 *Ibid* at [12].
- 16 United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and United Nations Committee on the Rights of the Child, *Joint general comment No. 4 (2017) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, UN Doc CMW/C/GC/4-CRC/C/GC/23 (16 November 2017) at [5]. At http://tbinternet.ohchr.org/Treaties/CMW/Shared%20Documents/1_Global/CMW_C_GC_4-CRC_C_GC_23_8362_E.pdf (accessed 5 December 2017).
- 17 *Ibid* at [10]-[11].
- 18 My finding is noted in paragraph [533]. See an equivalent finding made by the High Court in *Plaintiff M68* at [39] (French CJ, Kiefel and Nettle JJ).
- 19 United Nations Human Rights Committee, *General comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)*, at [3]. See also UN Human Rights Committee, *Jensen v Australia*, Communication No. 762/1997, UN Doc CCPR/C/71/D/762/1997 (2001) at [6.2].
- 20 United Nations Human Rights Committee, *Walker and Richards v Jamaica*, Communication No 529/1993, UN Doc CCPR/C/60/D/639/1995; *Kennedy v Trinidad and Tobago*, Communication No 845/1998, UN Doc CCPR/C/74/D/845/1998; *R.S. v Trinidad and Tobago*, Communication No 684/1996, UN Doc CCPR/C/74/D/684/1996.
- 21 [2007] NZSC 70.
- 22 [2007] NZSC 70, [79].
- 23 The Standard Minimum Rules were approved by the UN Economic and Social Council by its resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. They were adopted by the UN General Assembly in resolutions 2858 of 1971 and 3144 of 1983: UN Doc A/COMF/611, Annex 1. At <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx> (accessed 15 November 2017).
- 24 The Body of Principles were adopted by the UN General Assembly in resolution 43/173 of 9 December 1988 Annex: UN Doc A/43/49 (1988). At <http://www.un.org/documents/ga/res/43/a43r173.htm> (accessed 15 November 2017).

- 25 United Nations Human Rights Committee, *General Comment 21 (Replaces general comment 9 concerning humane treatment of persons deprived of liberty)* (10 April 1992) at [5]. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f4731&Lang=en (accessed 23 November 2017).
- 26 United Nations Human Rights Committee, *Mukong v Cameroon*, Communication No. 458/1991, UN Doc CCPR/C/51/458/1991 (1994) at [9.3]; *Potter v New Zealand*, Communication No. 632/1995, UN Doc CCPR/C/60/D/632/1995 (1997) at [6.3]. See also, United Nations Human Rights Committee, *Concluding Observations on the United States*, UN Doc A/50/40 (3 October 1995) at [285] and [299].
- 27 United Nations Committee on the Rights of the Child, *General Comment No. 7: Implementing child rights in early childhood* (20 September 2006) UN Doc CRC/C/GC/7/Rev.1 at [10]. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f7%2fRev.1&Lang=en (accessed 9 November 2017).
- 28 Ibid.
- 29 Ibid at [24].
- 30 Ibid at [36].
- 31 United Nations Committee on the Rights of the Child, *General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health* (17 April 2013) UN Doc CRC/C/GC/15 at [51], [54]. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f15&Lang=en (accessed 9 November 2017).
- 32 *A World Fit for Children*, outcome document of the 2002 United Nations General Assembly's special session on children, Report of the Ad Hoc Committee of the Whole on the twenty-seventh special session of the General Assembly, UN Doc A/S-27/19/Rev.1 (2002), paragraphs 37(1) and (6). At <https://www.unicef.org/specialsession/documentation/documents/A-S27-19-Rev1E.pdf> (accessed 10 November 2017).
- 33 S Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (1999), p 142.
- 34 G van Bueren, *The International Law on the Rights of the Child* (1995), p 305.
- 35 G van Bueren, *The International Law on the Rights of the Child* (1995), p 317; see also CRC article 27(3).
- 36 CRC, article 3(3).
- 37 The Rules for Protection of Juveniles were adopted by the UN General Assembly in resolution 45/113 of 14 December 1990: UN Doc A/RES/45/113.
- 38 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 69 [39] (French CJ, Kiefel and Nettle JJ) and 115 [199] (Keane J).
- 39 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 70 [41] (French CJ, Kiefel and Nettle JJ); see also 114 [196], 115 [199] and 124 [239] (Keane J). The two other majority Justices (Bell J at 84-85 [92]-[93] and Gageler J at 108-109 [172]-[175]), along with Gordon J in dissent (at 134 [276] and 152 [352]), considered that the Commonwealth was responsible for the detention of the plaintiff.
- 40 Transfield Services (Australia) Pty Limited subcontract with Wilson Parking Australia (1992) Pty Ltd trading as Wilson Security, 2 September 2013, Annexure 8, clause 2.1, at <http://www.border.gov.au/AccessandAccountability/Documents/FOI/FA140300149.pdf> (accessed 7 November 2017); Transfield Services (Australia) Pty Limited subcontract with Wilson Security Pty Limited, 28 March 2014, Annexure 8, Part 2, clause 1.1.1.
- 41 Transfield Services (Australia) Pty Limited subcontract with Wilson Security Pty Limited, 28 March 2014, Annexure 8, Part 4, clauses 1.1.1 to 1.1.4.
- 42 Commonwealth (DIBP) contract with Transfield Services (Australia) Pty Limited, 1 February 2013, clause 6; Commonwealth (DIBP) contract with Transfield Services (Australia) Pty Limited, 24 March 2014, clause 6; as to approvals by the Commonwealth, see [319] of my decision on jurisdiction.
- 43 Commonwealth, Department of Immigration and Border Protection, *Submission to the Inquiry into serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre* (undated), p 35. At <https://www.aph.gov.au/DocumentStore.ashx?id=107c3dac-1767-4dd4-b8fc-a110df0aec11&subId=459736> (accessed 30 October 2017).
- 44 United Nations High Commissioner for Refugees, *UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013*, 26 November 2013 at [64]. At <http://www.refworld.org/country,,UNHCR,,NRU,,5294a6534,0.html> (accessed 30 October 2017).
- 45 Commonwealth, Department of Immigration and Border Protection, *Submission to the Select Committee on the Recent Allegations relating to the Conditions and Circumstances at the Regional Processing Centre in Nauru*, May 2015, Attachment L. At <https://www.aph.gov.au/DocumentStore.ashx?id=5ffbf9-f782-4307-af2c-9d0125c602a4&subId=351269> (accessed 3 November 2017).
- 46 Commonwealth, Department of Immigration and Border Protection, *Submission to the Select Committee on the Recent Allegations relating to the Conditions and Circumstances at the Regional Processing Centre in Nauru*, May 2015, p 32. At <https://www.aph.gov.au/DocumentStore.ashx?id=5ffbf9-f782-4307-af2c-9d0125c602a4&subId=351269> (accessed 3 November 2017).
- 47 Keith Hamburger AM, *Executive Report of the Review into the 19 July 2013 Incident at the Nauru Regional Processing Centre*, 8 November 2013. At <https://www.border.gov.au/about/reports-publications/reviews-inquiries/offshore-regional-processing/nauru-centre/2013-executive-report-19-july-2013-incident> (accessed 30 October 2017).
- 48 United Nations High Commissioner for Refugees, *UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013*, 26 November 2013 at [65]. At <http://www.refworld.org/country,,UNHCR,,NRU,,5294a6534,0.html> (accessed 30 October 2017).
- 49 United Nations High Commissioner for Refugees, *UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013*, 26 November 2013 at [89]. At <http://www.refworld.org/country,,UNHCR,,NRU,,5294a6534,0.html> (accessed 30 October 2017).

- 50 United Nations High Commissioner for Refugees, *UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013*, 26 November 2013, p 17 recommendation K. At <http://www.refworld.org/country,,UNHCR,,NRU,,5294a6534,0.html> (accessed 30 October 2017).
- 51 Commonwealth, Department of Immigration and Border Protection, *Submission to the Inquiry into serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre* (undated), Annex E. At <https://www.aph.gov.au/DocumentStore.ashx?id=107c3dac-1767-4dd4-b8fc-a110df0aec11&subld=459736> (accessed 30 October 2017).
- 52 Commonwealth of Australia (DIBP) contract with Save The Children Australia, Sch 1 – Statement of Work, clause 1.3.1, August 2013.
- 53 United Nations High Commissioner for Refugees, *UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013*, 26 November 2013 at [85]. At <http://www.refworld.org/country,,UNHCR,,NRU,,5294a6534,0.html> (accessed 30 October 2017).
- 54 Chief Medical Officer, Department of Immigration and Border Protection, *Report of Nauru visit: 3-7th May 2014*, p 5.
- 55 Chief Medical Officer, Department of Immigration and Border Protection, *Report of Nauru visit: 3-7th May 2014*, p 1.
- 56 Philip Moss, *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, Final Report*, 6 February 2015, at [3.141]-[3.152]. At <https://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-conditions-circumstances-nauru.pdf> (accessed 30 October 2017).
- 57 Commonwealth, Department of Immigration and Border Protection, *Submission to the Senate Legal and Constitutional Affairs References Committee inquiry into Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre*, undated, p 25. At <https://www.aph.gov.au/DocumentStore.ashx?id=107c3dac-1767-4dd4-b8fc-a110df0aec11&subld=459736> (accessed 2 November 2017).
- 58 Comcare Inspector Report of Nauru Regional Processing Centre between 27 and 29 October 2014, produced to the Senate Legal and Constitutional Affairs References Committee inquiry into Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre in answers to questions on notice on 15 March 2017. At https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Additional_Documents (accessed 2 November 2017).
- 59 Chief Medical Officer, Department of Immigration and Border Protection, *Report of Nauru visit: 11-15 January 2015*, p 7.
- 60 Australian National Audit Office, *Offshore Processing Centres in Nauru and Papua New Guinea – Contract Management of Garrison Support and Welfare Services*, January 2017, ANAO Report No 32 201617, p 53. At https://www.anao.gov.au/sites/g/files/net3416/f/ANAO_Report_2016-2017_32.pdf (accessed 1 November 2017).
- 61 Chief Medical Officer, Department of Immigration and Border Protection, *Report of Nauru visit: 3-7th May 2014*, pp 3 and 8.
- 62 Chief Medical Officer, Department of Immigration and Border Protection, *Report of Nauru visit: 11-15 January 2015*, p 3.
- 63 Australian National Audit Office, *Offshore Processing Centres in Nauru and Papua New Guinea – Contract Management of Garrison Support and Welfare Services*, January 2017, ANAO Report No 32 201617, p 52. At https://www.anao.gov.au/sites/g/files/net3416/f/ANAO_Report_2016-2017_32.pdf (accessed 1 November 2017).
- 64 Commonwealth, Department of Health, Health Direct, *Swimmer's ear (otitis externa)*, at <https://www.healthdirect.gov.au/swimmers-ear> (accessed 26 October 2017).
- 65 Physical and Mental Health Subcommittee, Joint Advisory Committee for Nauru Regional Processing Arrangements, *Nauru Site Visit Report, 16-19 February 2014*, p 21. At <https://www.theguardian.com/world/interactive/2014/may/29/nauru-family-health-risks-report-in-full> (accessed 6 November 2017).
- 66 United Nations Committee on the Rights of the Child, *Concluding observations on the initial report of Nauru*, 28 October 2016, CRC/C/NRU/CO/1, p 11. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/NRU/CO/1&Lang=En (accessed 1 November 2017).
- 67 Chief Medical Officer, Department of Immigration and Border Protection, *Report of Nauru visit: 3-7th May 2014*, pp 5 and 9.
- 68 Chief Medical Officer, Department of Immigration and Border Protection, *Report of Nauru visit: 11-15 January 2015*, p 17.
- 69 Chief Medical Officer, Department of Immigration and Border Protection, *Report of Nauru visit: 11-15 January 2015*, p 5.
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- 219 Commonwealth Ombudsman, *Putting things right: compensating for defective administration* (2009) pp 1 and 24-27.
- 220 Resource Management Guide No. 409 at [16].
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Annexure A: Relevant human rights

International Covenant on Civil and Political Rights

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 9

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.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
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.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 17

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.

Convention on the Rights of the Child

Article 3

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.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 6

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

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.
2. The child has the right to the protection of the law against such interference or attacks.

Article 24

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.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
 - (a) To diminish infant and child mortality;
 - (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
 - (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
 - (d) To ensure appropriate pre-natal and post-natal health care for mothers;
 - (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
 - (f) To develop preventive health care, guidance for parents and family planning education and services.
3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.
4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 27

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.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's 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.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 37

States Parties shall ensure that:

- (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;
- (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;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Annexure B: Findings of breaches of human rights

The following table sets out the findings of breaches of human rights for each of the complainants and their family members and the paragraph numbers of the report in which those findings are made.

Complainant	Human rights	Paragraphs of Report
Ms BK	ICCPR articles 7, 9(1), 10(1), 17(1) CRC article 24(2)(d)	207, 217, 320, 323, 324, 447, 516, 533
Mr BL	ICCPR articles 9(1), 10(1), 17(1)	207, 217, 447, 516, 533
Miss BM	ICCPR articles 9(1), 10(1), 17(1) CRC articles 3(1), 3(2), 6(2), 16(1), 24(1), 27(1), 37(b), 37(c)	206, 207, 209-211, 213, 217, 325, 447, 472, 506, 516, 533
Ms CO	ICCPR articles 9(1), 10(1), 17(1)	207, 217, 447, 487, 516, 533
Mr CP	ICCPR articles 9(1), 10(1), 17(1)	207, 217, 447, 516, 533
Master CQ	ICCPR articles 9(1), 10(1), 17(1) CRC articles 3(1), 3(2), 6(2), 16(1), 24(1), 27(1), 37(b), 37(c)	206, 207, 209-211, 213, 217, 349, 447, 472, 506, 516, 533
Mr DE	ICCPR articles 9(1), 10(1), 17(1)	207, 217, 447, 487, 516, 533
Ms DF	ICCPR articles 9(1), 10(1), 17(1)	207, 217, 409, 410, 414, 447, 516, 533
Master DG	ICCPR articles 9(1), 10(1), 17(1) CRC articles 3(1), 3(2), 6(2), 16(1), 24(1), 27(1), 37(b), 37(c)	206, 207, 209-211, 213, 217, 388, 447, 472, 506, 516, 533

Annexure C: Findings on jurisdiction

Findings on jurisdiction to conduct an inquiry under s 11(1)(f) of *Australian Human Rights Commission Act 1986* (Cth)

Complainants: Ms BK, Ms CO and Mr DE on behalf of themselves and their families

Respondent: Commonwealth of Australia (Department of Immigration and Border Protection)

Date: 4 November 2016

Richard Lancaster SC

Delegate of the President, AHRC

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1 Introduction and Summary

1. The Australian Human Rights Commission is conducting an inquiry into complaints by Ms BK, Ms CO and Mr DE for themselves and on behalf of their immediate family members (**the complainants**).
2. This inquiry is being undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**).
3. The complainants are asylum seekers who arrived in Australia by boat between 22 and 26 July 2013. They were initially detained at Christmas Island Immigration Detention Centre before being taken to Nauru pursuant to Australia's regional processing arrangements. They complain that they were detained in the regional processing centre on Nauru arbitrarily. They complain about the conditions in the centre and the impact that detention has had on their physical and mental health. They also say that families with babies or young children should not have been sent to Nauru, given the nature of the conditions there.
4. These complaints potentially raise issues under at least articles 9 and 10 of the *International Covenant on Civil and Political Rights* (**ICCPR**) and articles 3 and 37 of the *Convention on the Rights of the Child* (**CRC**). The written submissions of the complainants also make allegations under articles 7 and 17 of the ICCPR and articles 16, 19, 24 and 27 of the CRC.
5. The Commonwealth disputes that the Commission has jurisdiction to conduct an inquiry into these complaints under s 11(1)(f) of the AHRC Act. The way in which the objection is put by the Department of Immigration and Border Protection (**the department**) is that 'the Commission does not have jurisdiction to inquire into the treatment of persons taken to Nauru under the regional processing provisions of the *Migration Act 1958* (Cth)'. At least part of the department's reasoning appears to be that Australia does not have human rights obligations under the ICCPR and the CRC in respect of people who have been taken to Nauru pursuant to Australia's regional processing arrangements. The department says that 'this cannot properly be regarded as one of those "exceptional circumstances" ... where persons located outside Australia could be said to be under Australia's effective control and subject to its jurisdiction'.
6. At the request of the Commonwealth, I have agreed to consider as a preliminary question the scope of the Commission's jurisdiction to conduct this inquiry.
7. Australia has human rights obligations under the ICCPR and the CRC outside of its territory when it is exercising 'effective control' over people or territory. Based on an analysis of the text and context of relevant provisions of the AHRC Act, I find that the Commission has jurisdiction to inquire into allegations that the Commonwealth has acted in a way that is inconsistent with or contrary to Australia's obligations under the ICCPR or the CRC, including where relevant acts occurred outside of Australia's territory. I find that these complaints each involve a complaint in writing, by a person aggrieved by an act or practice, alleging that the act or practice is inconsistent with or contrary to Australia's human rights obligations under the ICCPR or the CRC. The alleged acts or practices raised by the complaints are ones that, after allowing for as yet undiscovered facts, Australia could be responsible for under a relevant international instrument.

8. I find that since each of those jurisdictional requirements have been met the Commission has jurisdiction to conduct an inquiry into the present complaints.
9. Prior to me providing the parties with my preliminary view on jurisdiction on 3 June 2016, the department had not provided the Commission with any detailed submissions setting out its views on the Commission's jurisdiction. It appeared from some references in the department's correspondence that it considered that conduct that occurs in the regional processing centre in Nauru could not amount to conduct that is inconsistent with or contrary to the Commonwealth's human rights obligations, either because:
- it is not done under an enactment or by or on behalf of the Commonwealth; or
 - the Commonwealth does not have effective control over either the regional processing centre or the people within the centre.
10. Following my preliminary view on jurisdiction on 3 June 2016, the department and the complainants provided submissions about my preliminary view in July, August and September 2016. The department submitted that the Commission did not have jurisdiction to conduct the inquiry because the complainants were not within the power or effective control of Australia while in detention at the Nauru regional processing centre. The department said that this was because:
- the asylum seekers detained at the regional processing centre on Nauru were not detained by Australian authorities (relying on the High Court's decision in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1); and
 - Australia's involvement in the detention of those people was not sufficient to establish that those people were subject to Australia's jurisdiction for the purpose of enlivening Australia's obligations under the ICCPR.
11. I consider that these matters, particularly the extent of Australia's involvement in the detention of the complainants, are matters that go to the substance of the complaints rather than matters that go to the threshold question of whether or not the Commission has jurisdiction to conduct an inquiry. However, given that the department has raised them as issues going to jurisdiction, and given the Commission's agreement to deal with jurisdictional issues as a preliminary question, I have considered whether I should decide not to continue to inquire into the acts and practices which are the subject of the complaints to the extent to which they deal with conduct that occurred on Nauru.
12. The department submits that if I find that I have jurisdiction to conduct the inquiry, then I should decide not to continue to inquire into the complaints as they relate to the treatment of the complainants while in detention at the Nauru regional processing centre. The department relies on the points referred to in paragraph 10 above in support of this submission. That is, the department submits that the people detained in the centre were not detained by Australia and that Australia's involvement in their detention was not sufficient to establish that they were subject to Australia's jurisdiction. The department submits that, as a result, I should decide not to continue to inquire into the complaints on the grounds in s 20(2)(a) or (c)(ii) of the AHRC Act.

13. Section 20(2) of the AHRC Act sets out a number of bases upon which the Commission could decide not to continue to inquire an act or practice. The most relevant for present purposes are if:
- the Commission is satisfied that the act or practice is not inconsistent with or contrary to any human right (s 20(2)(a)); or
 - the Commission is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance (s 20(2)(c)(ii)).
14. I have considered whether the Commission should decide not to continue to inquire into the acts and practices alleged by the complainants. The complaints fall into the following broad categories:
- arbitrary detention at the regional processing centre on Nauru;
 - treatment in detention that was inconsistent with humanity and with respect for the inherent dignity of the human person;
 - the decision to send families with young children to Nauru given the conditions in which they would be detained.
15. Based on the information available to me at this stage of the inquiry, my decision about whether to continue to inquire into these acts and practices is as follows.
16. In relation to the complaint of arbitrary detention: it appears to me that it would be consistent with the findings of a majority of the High Court in *Plaintiff M68* for me to take the view that the imposition of the requirement that the complainants be detained on Nauru was not an act done by the Commonwealth. As set out in more detail below, this may not be a complete answer to the question of whether there was an act or practice of the Commonwealth which was inconsistent with or contrary to the rights of the complainants not to be arbitrarily detained. For example, Australia's human rights obligations could be engaged if there were sufficient information for me to find that the imposition of the requirement that the complainants be detained was an act done by organs of the Government of Nauru that were placed at the disposal of the Commonwealth, or under the direction or control, of the Commonwealth.
17. On the basis of the material available to me *at present*, and based on the findings in *Plaintiff M68*, I am not satisfied that the detention of the complainants in the present complaints was an act done by organs of the Government of Nauru that were placed at the disposal of the Commonwealth, or under the direction or control of the Commonwealth. For the reasons given in sections 5.3 and 5.4 below, I have decided to continue to inquire into the complaints made by the complainants. However, unless new information comes to light in the course of that inquiry, I indicate to the parties that I am presently minded to find that the detention of the complainants was not an act done by or on behalf of the Commonwealth and was not an act for which the Commonwealth was responsible under international law.

18. Further, based on the material currently available to me, I consider that there is insufficient information for me to be satisfied that the aid and assistance provided by the Commonwealth to Nauru in relation to the establishment and operation of the regional processing centre on Nauru was provided with the intention to facilitate the arbitrary detention of children at the centre, contrary to article 37(b) of the CRC. Again, unless new information comes to light in the course of that inquiry, I indicate to the parties that I am presently minded to find that the Commonwealth did not satisfy the conditions in Article 16 of the ILC Articles necessary for a finding to be made that it was internationally responsible for aiding or assisting Nauru in the commission of an act contrary to Nauru's obligations under article 37(b) of the CRC.
19. In relation to the complaint about treatment in detention: I find that the Commonwealth, including through its contract with Transfield, was exercising a sufficient degree of control over the regional processing centre and over the people within the centre (including the complainants) for its human rights obligations to be engaged with respect to the treatment of people within the centre on Nauru.
20. In relation to the complaint about the transfer to Nauru: I find that there were relevant discretionary acts (and failures to act) made in Australia both by officers of the department and by the Minister into which the Commission has jurisdiction to inquire. Further, I find that a *non-refoulement* claim based on a real risk of conduct in another country that would be in breach of articles 9 or 10 of the ICCPR is a legitimate contention and a complaint into which I may inquire, and that (as the department appears to acknowledge) there are real issues about whether the department's Best Interests Assessment for children liable to transfer to Nauru is consistent with the CRC.
21. In this document, I do not express any view about the substantive merits of the allegations by the complainants that the Commonwealth has breached their human rights. This is not a preliminary view under s 27 of the AHRC Act. As a result of the findings set out above, I conclude that I have jurisdiction to conduct an inquiry into these complaints. I will separately provide to the parties directions on the next steps in this inquiry.

2 Background

2.1 Complainants

22. Each of the complainants is a parent who was taken to the regional processing centre on Nauru with their spouse and a child under six years old. The families are all from Iran and are Farsi (Persian) speakers.
23. Ms BK made her complaint on her own behalf and on behalf of her husband Mr BL and their then three year old daughter Miss BM.
24. Ms CO made her complaint on her own behalf and on behalf of her husband Mr CP and their then one year old son Master CQ.

25. Mr DE made his complaint on his own behalf and on behalf of his wife Ms DF and their then five year old son Master DG.
26. Mr DE and his family arrived in Australia by boat at Christmas Island on 22 July 2013. The other complainants arrived by boat at Christmas Island on 26 July 2013.
27. The previous week, on 19 July 2013, the then Prime Minister Kevin Rudd had announced that people who arrived in Australia by boat after that date would be subject to offshore processing and had no prospect of being resettled in Australia.¹ After the federal election on 7 September 2013, this position was continued by the incoming government.
28. The complainants were initially detained on Christmas Island.
29. Ms CO and her son were transferred between a number of detention centres in Australia in December 2013 and January 2014 so that they could obtain medical treatment, before being returned to Christmas Island on 15 January 2014.
30. On 8 January 2014, Mr DG and his family were taken to Nauru pursuant to s 198AD of the *Migration Act 1958* (Cth) (**Migration Act**). On 3 May 2014, Ms BK and her family were taken to Nauru. On 23 May 2014, Ms CO and her family were taken to Nauru.
31. In general terms, the complainants allege that:
 - their detention at the regional processing centre on Nauru was arbitrary;
 - while detained at the regional processing centre on Nauru they were not treated with humanity and with respect for the inherent dignity of the human person;
 - the regional processing centre on Nauru was not an appropriate place to transfer families with babies and young children.
32. The complainants raise concerns about the impact of detention on their physical and mental health; the nature and quality of the facilities, services and infrastructure provided to them in detention; their treatment by service providers contracted to the Commonwealth; and their exposure to the risk of disease and to traumatic events while in detention including incidents of self harm by other detainees.
33. As noted above, in this document I do not express any view about the substantive merits of the allegations by the complainants that the Commonwealth has breached their human rights. Instead, this document addresses the preliminary question of the Commission's jurisdiction to conduct an inquiry into these complaints.
34. On 14 February 2015, Ms CO and her family were transferred to the "Bladin Alternative Place of Detention" (**Bladin**), a detention centre previously operated by the Commonwealth in Darwin, so that Mr CP could receive medical treatment. At the time they were transferred, Ms CO was 17 weeks pregnant. Two weeks after arriving in Australia, they were transferred to the "Wickham Point Alternative Place of Detention" (**Wickham Point**) as Bladin was scheduled to close. The Commission understands that on 6 August 2015 Ms CO gave birth to a baby girl and that the family are still in Australia.

35. In or around July 2015, Mr DE and his family were recognised by Nauru as being refugees. Since that time, the family was no longer required to reside at the regional processing centre and have been living in the community on Nauru.
36. On 9 December 2014, Mr BL was brought back to Australia in order to receive medical treatment not available in Nauru. He was detained at Brisbane Immigration Transit Accommodation before being returned to Nauru on 12 December 2014. On 13 September 2015, Ms BK was brought back to Australia with her family so that she could give birth to a second child. The Commission understands that the family is currently being held in Brisbane Immigration Transit Accommodation.

2.2 Procedural steps

37. In August 2014, the Commission received complaints in writing from Ms BK, Ms CO and Mr DE for themselves and on behalf of their immediate family members alleging that the Commonwealth had breached their human rights.
38. On 17 November 2014, pursuant to s 19(2) of the AHRC Act, the President of the Commission, Professor Gillian Triggs, delegated to me certain powers, functions and duties for the purposes of inquiring into these complaints.
39. In January 2015, the complainants provided more detailed written statements to the Commission.
40. On 10 February 2015, I sent a letter to the Secretary of the department notifying him that the Commission had received these complaints. A key purpose of the letter was to determine whether the department maintained jurisdictional objections to the Commission inquiring into complaints received from people detained on Nauru.
41. In the letter, I noted that over the previous two years the Commission had inquired into a number of complaints from people detained at the regional processing centre on Nauru. After the first of these complaints was received, the department had raised a concern about whether the Commission had jurisdiction to receive complaints from people transferred to Nauru. Legal advice was sought from the Solicitor-General. On 6 March 2013, following receipt of this advice, the Commission published a notice on its website in terms agreed with the Attorney-General's Department (**AGD**). The notice was in the following form:²

The Solicitor-General of Australia has recently provided advice on the jurisdiction of the Commission in relation to complaints from asylum seekers detained on Nauru and Manus Island, Papua New Guinea. Accordingly, the Commission wishes to clarify its practice in relation to such complaints.

The Commission will inquire into complaints received from asylum seekers detained on Nauru and Manus Island, Papua New Guinea.

However, the President will not travel to Nauru or Manus Island for this purpose, as the powers of the Commission in relation to complaints cannot be exercised outside of Australia.

Complaints can be lodged with the Commission from Nauru or Manus Island by phone, email, in writing or via a third party.

The complaints will be dealt with in the same manner as if they had been brought to the Commission in Australia.

42. In my letter of 10 February 2015, I sought a response to four preliminary questions within 14 days. The first two questions were in the following terms:
- Whether the department, on behalf of the Commonwealth, is prepared to engage in a process of conciliation with the complainants?
 - Whether the department will voluntarily provide the Commission with responses to information and document requests for the purposes of my present inquiry?
43. The other two questions related to whether the department objected to the use by the Commission of information that the department had voluntarily provided to the Commission in the course of a previous inquiry which had been terminated after the complainants withdrew their complaints. My letter enclosed schedules setting out lists of information and documents that the Commission proposed to seek. At that stage, I did not make a request for the information and documents described in the schedule. The preliminary questions were limited to whether the department was willing to engage with the inquiry on a voluntary basis.
44. On 19 February 2015, the department sent an email to the Commission saying that a response to these four questions could not be provided within 14 days but that a response was being drafted and the department expected to have the response finalised by 10 March 2015.
45. When the Commission makes requests for information and documents in the course of an inquiry under s 11(1)(f) of the AHRC Act, it typically seeks a response within 28 days. Given that the department indicated that it would take a month to answer the four preliminary questions, the Commission sent an email in reply to the department asking for a substantive response to the requests for information and documents along with the response to the preliminary questions on 10 March 2015.
46. On 3 March 2015, the complainants provided written submissions to the Commission in support of their complaints.
47. By 10 March 2015, the Commission had not received any response from the department to the preliminary questions in my letter of 10 February 2015.
48. On 2 April 2015, I sent a letter to the department seeking a response to the four questions by 10 April 2015 along with either a complete or a partial response to the substantive request for information and documents. I also sought an indication, if more time was required to provide a complete response, as to how long was required and the reasons why that time was required. I indicated that if the department was unable to deal with the requests for information and documents efficiently on an informal basis, I would invoke the Commission's compulsory information gathering powers.

49. On 10 April 2015, the department provided a one page response to the four initial questions. In response to the first question, the department said that it was not prepared to engage in a process of conciliation with the complainants. In response to the second question, the department said:

While the Department is normally happy to respond to requests from the Commission for information and documents relevant to an inquiry, in this instance the Department is still considering the jurisdictional issues raised in the delegate's letter of 10 February 2015. The Department will be in a position to respond to these issues by 10 May 2015.

The department objected to the Commission relying on material the department had voluntarily provided in the course of the previous inquiry. The department did not provide any of the information or documents sought in the present inquiry on a voluntary basis.

50. On 1 May 2015, I sent a letter to the department enclosing a compulsory notice to produce pursuant to s 21 of the AHRC Act requiring the production of certain information and documents. In the letter, I noted that it had been more than 9 weeks since I made the request for the department to provide the Commission with certain information and documents, that a request for a partial response had been made in my letter of 10 April 2015 and that to date the Commission had not received any of the information or documents sought.
51. The notice required the production by 18 May 2015 of the information and documents previously sought on a voluntary basis, along with some additional material in light of the department's objection to the Commission relying on material the department had previously produced (in other inquiries).
52. On 5 May 2015, the department sought an extension of time to 1 June 2015 to respond to the notice. I granted the extension sought.
53. On 1 June 2015, the department provided a partial response to the notice. The response was limited to information and documents relating to conduct that occurred in Australia. Further documents were provided progressively up until 16 June 2015 which were again limited to documents relating to conduct that occurred in Australia. The department did not provide information or documents about conduct that occurred in Nauru. The department said it was 'of the view that the Commission does not have jurisdiction to inquire into the treatment of persons taken to Nauru under the regional processing provisions of the *Migration Act 1958* (Cth)'.
54. During the course of July 2015, officers of the Commission had a number of discussions with officers of the AGD about the question of the Commission's jurisdiction to conduct an inquiry into complaints received from people detained on Nauru. I understand that officers of the AGD were also in contact with the department in relation to this question.
55. On 5 August 2015, the AGD proposed a way forward 'by which the Commission considers the question of jurisdiction first and reaches a formal preliminary view on this issue alone, prior to undertaking any other aspects of the inquiry'. The AGD noted that 'DIBP is happy to work with the Commission to voluntarily provide any further documents or information which will enable the Commission to form a view on this discrete issue'. I agreed to this proposal.

56. On 12 August 2015, I sent a letter to the Secretary of the Department of Immigration and Border Protection with a request for voluntary production of information and documents I considered relevant to assessing the preliminary question of the Commission's jurisdiction. I asked for a response within 28 days.
57. On 8 September 2015, the department indicated that it could not meet this deadline, but that it hoped to have the response finalised within a further 2 weeks.
58. On 2 October 2015, the department provided a response to the information request and four documents in response to the request for documents. The department indicated that it was still considering its response to 10 of the categories of documents requested.
59. By 10 November 2015, no further documents had been produced. On that day I wrote to the Secretary noting that it had been more than 12 weeks since my request for information and documents. I expressed concern about the time taken to respond to the request for documents and asked for documents being reviewed by a lawyer within the department to be provided by the end of that week.
60. On 18 November 2015, the department produced 13 further documents and on 7 December 2015 another 12 documents.
61. The final tranche of documents requested for this preliminary view on jurisdiction was provided on 3 February 2016, more than five and a half months after my request of 12 August 2015 and almost a year after the original notification of the complaints to the department.
62. The documents produced on 3 February 2016 included documents prepared for the Joint Advisory Committee (**JAC**) between Australia and Nauru. The JAC is a body established pursuant to the Memoranda of Understanding between Australia and Nauru with responsibility for the oversight of practical arrangements required to implement the MOUs. At the time the JAC documents were produced, the department asked the Commission to make a direction that the contents of these documents not be published, having regard to the need to avoid prejudicing Australia's international relations.
63. I note that on 3 February 2016, the High Court of Australia delivered its decision in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1, (2016) 327 ALR 369.
64. On 10 February 2016, the Commission asked whether the department was content for the JAC documents to be provided to the complainants if such a direction were made. The department said that it could not respond immediately as it would be necessary to consult again with relevant officers in Nauru.
65. On 26 May 2016, the department said that it 'cannot confirm that it does not object to the documents being provided to the complainants'. The department repeated the same matters it had raised on 3 February 2016. The department did not suggest that it had engaged in any further consultation with relevant officers in Nauru.
66. In the circumstances, these findings on jurisdiction do not include any references to the documents prepared for or in respect of the JAC. I have dealt separately with the request for a non-publication order in relation to these documents.

67. I am concerned by the time taken by the department to respond to these complaints, particularly given the serious nature of the allegations made and the fact that two of the complainant families have been in detention throughout the course of the inquiry. No explanation has been offered by the department for the significant delays in responding to requests from the Commission. Other than the (overly optimistic) estimate on 8 September 2015, at no stage was the department prepared to provide any estimate of the time that it expected to take to produce the remainder of the outstanding documents it had undertaken to voluntarily produce. It appears that a significant proportion of the delay in production has been taken up with a legal review of documents eventually produced. I recommend that the department examine its process for legal review in cases such as this to eliminate what appears to be a high degree of inefficiency and unwarranted delays.

2.3 Undertakings sought

68. On 23 November 2015, I wrote to the Secretary of the Department of Immigration and Border Protection noting that Ms CO and Ms BK had both recently given birth in Australia and were still in Australia with their respective families.
69. I said that I was concerned that removal of Ms CO and Ms BK and their families from Australia to Nauru may frustrate their ability to participate properly in my investigation of their complaints. I said that I considered that removal of Ms CO and Ms BK and their families before I had the opportunity to conclude my investigation may prevent them and their children from attaining an effective remedy in this matter, should I find that there has been a breach of the human rights of any of them.
70. The families have complained that the regional processing centre on Nauru is not an appropriate place to send families with young children. To the extent that these complaints are justified, they are likely to apply with more force given that each family is now caring for a newborn child.
71. As a result, I asked that Ms CO and Ms BK and their families not be removed from Australia pending the completion of my investigation of their complaints.
72. On 1 February 2016, I send a further letter to the Secretary again seeking an undertaking not to remove Ms CO and Ms BK and their families from Australia pending the completion of my investigation of their complaints.
73. On 30 May 2016, the department sent me a letter stating that it had previously advised lawyers acting for Ms CO and Ms BK and their immediate family members that their clients were 'not scheduled' to be taken to a regional processing country and that they would be given at least 72 hours' notice of any scheduled transfer. The department said to me that it was 'not in a position to give any further undertakings in respect of the two families'.

3 Jurisdiction to inquire into complaints of extraterritorial conduct

74. In dealing with the scope of the Commission’s jurisdiction to conduct an inquiry into complaints that the Commonwealth has engaged in an act or practice outside of Australia that is inconsistent with or contrary to any human right, there are three key issues to be addressed.
75. The first issue is whether the Commonwealth can be said to have human rights obligations in relation to conduct outside of Australia’s territory.
76. The second issue is whether the Commission has jurisdiction to inquire into conduct by the Commonwealth outside of Australia’s territory that may be in breach of the Commonwealth’s human rights obligations.
77. The third issue is whether the statutory criteria for the Commission commencing an inquiry are satisfied.
78. Each of these issues is considered in more detail below.

3.1 The Commonwealth’s extraterritorial obligations

79. The International Court of Justice (**ICJ**) considered the extraterritorial application of the ICCPR and the CRC (and also the *International Covenant on Economic Social and Cultural Rights (ICESCR)*) in its advisory opinion dealing with the building of a wall by Israel in the Occupied Palestinian Territory.³ Israel had ratified each of these three instruments.
80. Article 2(1) of the ICCPR provides:
- 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 Convention, 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.
- (emphasis added)
81. The ICJ considered whether the phrase ‘and subject to its jurisdiction’ was conjunctive or disjunctive. That is, does the ICCPR apply:
- only to individuals in the territory of a member State who are also subject to the jurisdiction of that State (conjunctive); or
 - both to individuals in the territory of a member State and to individuals outside the territory of a member State who are subject to that State’s jurisdiction (disjunctive)?
82. The ICJ held that the phrase was disjunctive and that the ICCPR is applicable to acts done by a State Party in the exercise of its jurisdiction outside its own territory.⁴

83. At [109] of its advisory opinion, the ICJ said:

while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

84. After observing that the constant practice of the UN Human Rights Committee is consistent with this interpretation of article 2, the ICJ stated that:⁵

The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence

85. The same result was reached in relation to the ICESCR and the CRC.⁶ In relation to the CRC, this result was reached by a reading of article 2 which is not territorially limited and relevantly provides:

States Parties shall respect and ensure the rights set forth in the present Convention to each child *within their jurisdiction* without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

(emphasis added)

86. A person outside the territory of the State will be regarded nonetheless as 'subject to its jurisdiction' if the person is within the power or effective control of the State.

87. Thus, in General Comment 31 of the UN Human Rights Committee on the nature of the legal obligations imposed on parties to the ICCPR, the Committee explained that:⁷

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.

88. In *Al-Skeini v the United Kingdom*,⁸ the European Court of Human Rights considered the extraterritorial application of the European Convention on Human Rights.⁹ The Court noted previous cases that had held, in a similar fashion to the International Court of Justice, that a State's jurisdictional competence under the European Convention is primarily territorial. However, in exceptional cases 'acts of States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction' within the meaning of the Convention.¹⁰

89. Importantly, the European Court of Human Rights noted that the question of whether exceptional circumstances exist must be determined with reference to the particular facts.¹¹

90. The Court in *Al-Skeini* identified a number of circumstances in which a State will be held responsible for acts of its authorities that produce effects outside of its own territory. These include:
- acts of diplomatic and consular agents on foreign territory that involve exerting authority and control over others;¹²
 - conduct on board craft and vessels registered in, or flying the flag of, a State;¹³
 - circumstances where ‘through the consent, invitation or acquiescence of the Government of that territory, [a State] exercises some or all of the public powers normally to be exercised by that Government’;¹⁴
 - in particular, where, ‘in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State’ the Contracting State may be responsible for breaches (as long as the acts in question are attributable to it rather than to the territorial State);¹⁵ and
 - where an individual is taken into the custody of State agents abroad (and there is an exercise of physical power or control over the person in question).¹⁶
91. The Court in *Al-Skeini* summarised these principles in the following way:¹⁷
- It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 [of the European Convention] to secure to that individual the rights and freedoms ... that are relevant to the situation of that individual.
92. Again, this requires an assessment of the particular factual circumstances. The Court confirmed that the Convention rights can be ‘divided and tailored’ in accordance with the particular circumstances of the extraterritorial act in question.¹⁸ It may be that only some rights are applicable in the given circumstances.
93. A State will also be under an obligation to secure the rights and freedoms set out in the Convention to persons within an area outside the territory of the State over which the State exercises effective control.¹⁹
94. Australia accepts that the ICCPR applies extraterritorially and its description of the relevant international law principles is broadly consistent with the cases discussed above. In 2009, in response to formal questions from the UN Human Rights Committee, it said:²⁰
- Australia accepts that there may be exceptional circumstances in which the rights and freedoms set out under the Covenant may be relevant beyond the territory of a State party (although notes that the jurisdictional scope of the Covenant is unsettled as a matter of international law). Although Australia believes that the obligations in the Covenant are essentially territorial in nature, Australia has taken into account the Committee’s views in general comment No. 31 on the circumstances in which the Covenant may be relevant extraterritorially.

Australia believes that a high standard needs to be met before a State could be considered as effectively controlling territory abroad. It is not satisfied in all, or necessarily any, cases in which Australian officials may be operating beyond Australia's territory from time to time. The rights under the Covenant that a State party should apply beyond its territory will be informed by the particular circumstances. *Relevant factors include the degree of authority and degree of control the State party exercises, and what would amount to reasonable and appropriate measures in those circumstances.*

(emphasis added)

95. Below are three examples of where a State has been found to have a sufficient degree of authority and control over persons outside its territory to engage its human rights obligations.
96. First, in *JHA v Spain*, the UN Committee Against Torture considered a complaint made on behalf of a number of Indian citizens who were part of a group of 369 immigrants rescued in international waters by Spanish maritime rescue authorities after the vessel they were travelling on, *Marine I*, capsized.²¹ Pursuant to an agreement between Spain and Mauritania, the passengers disembarked in the port of Nouadhibou, Mauritania. Spanish authorities conducted an identification and repatriation process and some immigrants were permitted to make asylum applications. The complaint alleged that during and after this process, the Indian citizens were detained in a former fish-processing plant for an extended period and that the conditions of their detention were contrary to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
97. The Committee referred to its General Comment No. 2 which provided that 'the jurisdiction of a State party refers to any territory in which it exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law'.²² The Committee held that:
- such jurisdiction must also include situations where a State party exercises, directly or indirectly, *de facto* or *de jure* control over persons in detention. ... In the present case, the Committee observes that the State party maintained control over the persons on board the *Marine I* from the time the vessel was rescued and throughout the identification and repatriation process that took place at Nouadhibou. In particular, the State party exercised, by virtue of a diplomatic agreement concluded with Mauritania, constant *de facto* control over the alleged victims during their detention in Nouadhibou.²³
98. Secondly, in *Al-Saadoon and Mufdhi v United Kingdom*, the European Court of Human Rights considered a complaint on behalf of two Iraqi citizens who were arrested by British armed forces in 2003 while the United Kingdom was an occupying power in Iraq.²⁴ The applicants were held in a detention facility run by the UK. Initially, the UK exercised only *de facto* control and authority over the applicants. Subsequently, this *de facto* control was reflected in law (by order of the Coalition Provisional Authority as a 'caretaker administration' prior to the establishment of a new Iraqi government). The Court held that at all times that the applicants were detained in the UK-run detention facility, they were within the jurisdiction of the UK.²⁵ In the later case of *Al-Skeini*, the Court noted that the decisive factor in finding that the UK had jurisdiction was the physical power and control that the UK had over the applicants.²⁶

99. Thirdly, five holders of mandates of special procedures from the United Nations Human Rights Council (Special Rapporteurs) reported on the situation of detainees at the United States of America Naval Base at Guantánamo Bay, Cuba. The authors considered that the particular status of Guantánamo Bay under the international lease agreement between the United States and Cuba and under United States domestic law did not limit the obligations of the United States under international human rights law towards those detained there. They found that the obligations of the United States under international human rights law extended to the persons detained at Guantánamo Bay.²⁷
100. The department accepts that in each of the above cases the detainees were under the jurisdiction of Spain, the United Kingdom and the United States respectively. However, it says that these cases can be distinguished from the situation of the regional processing centre on Nauru on the basis that in those cases the detainees' detention 'could rightly be said to be detention in the custody of the relevant state' and that the Spanish, United Kingdom and United States authorities were exercising 'exclusive control' over the detainees.
101. The complainants submit that that the examples given above do not represent an exhaustive list of the circumstances in which a State's human rights obligations will extend extraterritorially. They point to the range of circumstances identified in *Al-Skeini* and note the preliminary view of Dr Melissa Perry QC acting as a delegate of the President in another matter in which she said of that case:
- ... the importance attributed by the Court to assessing each case by reference to its individual circumstances makes it plain, in my opinion, that the Court was not intending exhaustively to define the cases in which jurisdiction over individuals outside the territory of the State for relevant purposes might exist.²⁸
102. The complainants say that the present case is properly described as one of the 'exceptional cases' where acts of a State outside of its territory constitute an exercise of its jurisdiction.²⁹
103. In response to the department's submission that the cases described above where jurisdiction was found were all examples of States exercising 'exclusive control', two comments can be made.
104. First, this submission is not borne out by a consideration of the reasoning in *JHA v Spain*. At no point in the published view of the Committee Against Torture does it find that Spain had 'exclusive control' over the fish-processing plant in Mauritania where the Indian citizens were allegedly detained. In fact, the Committee's view of jurisdiction was expressed in much broader terms, namely:³⁰
- the jurisdiction of a State party refers to any territory in which it exercises, *directly or indirectly, in whole or in part, de jure or de facto effective control*, in accordance with international law.
- (emphasis added)

105. Secondly, in *Al-Skeini*, the European Court of Human Rights considered cases, including *Al-Saadoon*, where States had exercised ‘total and exclusive control over [British military controlled] prisons and the individuals detained in them’³¹ and ‘full and exclusive control over a ship and its crew’.³² However, the test developed by the Court to establish jurisdiction did not contain a requirement that the State in question was responsible for detention or had the exclusive control of the place where people were detained. The Court said:³³

The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.

106. As noted above, whether a State is exercising sufficient physical power and control over a person for the person to be subject to the jurisdiction of the State will be a question of fact.

3.2 The Commission’s jurisdiction to inquire into extraterritorial conduct by the Commonwealth

107. At common law, there is a general presumption that legislation is not intended to have extraterritorial effect.³⁴ This presumption may be displaced by contrary intention.³⁵

108. Similarly, s 21 of the *Acts Interpretation Act 1901* (Cth) provides that:

(1) In any Act:

...

(b) references to localities jurisdictions and other matters and things shall be construed as references to such localities jurisdictions and other matters and things in and of the Commonwealth.

109. However, s 2 provides that ‘the application of this Act or a provision of this Act to an Act or a provision of an Act is subject to a contrary intention’.

110. It is necessary then to examine whether the text or context of the AHRC Act indicates that Parliament intended that the Commission have jurisdiction to inquire into alleged breaches by the Commonwealth of its human rights obligations outside of its geographic territory.³⁶

111. For the reasons set out below, both the text and context of the AHRC Act support the view that the Commission can inquire into extraterritorial conduct by or on behalf of the Commonwealth in the regional processing centre on Nauru. In particular:

- the definition of ‘human rights’ in the AHRC Act applies to the rights in the ICCPR and the CRC ‘as they apply to Australia’;
- two of the four limbs of the definition of an ‘act’ or ‘practice’ of the Commonwealth that the Commission may inquire into are not territorially limited;
- the functions of the Commission as a whole (unlike, for example, the functions of the National Children’s Commissioner) are not territorially limited;

- the purpose of the complaints function under the AHRC Act is to give individuals an effective remedy in relation to a breach of their rights under the ICCPR and the CRC and this should be given an expansive interpretation;
- there is specific legislative authority for the Commonwealth to engage in extraterritorial conduct in regional processing countries, including authority for the Commonwealth to exercise restraint over the liberty of a person in a regional processing centre;
- an interpretation of the AHRC Act which recognised the ability of the Commission to inquire into the Commonwealth’s international law obligations outside the territory of Australia would not be inconsistent with the comity of nations or established rules of international law.

(a) Text: meaning of ‘human rights’

112. Dealing first with the text of the AHRC Act, the Commission has the function of inquiring into any act or practice that may be inconsistent with or contrary to any human right (s 11(1)(f) of the AHRC Act).
113. The terms ‘act’ and ‘practice’ are defined in s 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under a Commonwealth enactment.
114. Section 3(3) provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
115. The rights and freedoms recognised in the ICCPR and the CRC are ‘human rights’ within the meaning of the AHRC Act.³⁷ The reference to rights and freedoms recognised in the ICCPR and the CRC is to be read as a reference to the rights and freedoms recognised by those instruments as they apply to Australia.³⁸ This means that any reservations or amendments by Australia will be relevant in determining the scope of the relevant rights.
116. In my opinion it is apparent from the ordinary meaning of the definition of ‘human rights’ as being the rights and freedoms recognised by particular instruments *as they apply to Australia* also indicates a legislative intention that ‘human rights’ include the extraterritorial obligations that Australia has under these instruments to people outside of its territory but still subject to its jurisdiction.

(b) Text: scope of ‘act or practice’

117. There are four limbs to the definition of each of the terms ‘act’ and ‘practice’ in s 3(1) of the AHRC Act. The terms are defined by reference to an act done or a practice engaged in:
- (a) by or on behalf of the Commonwealth or an authority of the Commonwealth;
 - (b) under an enactment;
 - (c) wholly within a Territory; or
 - (d) partly within a Territory, to the extent to which the act was done within a Territory.

118. The third and fourth limbs contain an express territorial limitation, but the first and second limbs do not. The legislative intention appears to be that if an act is done or a practice is engaged in by or on behalf of the Commonwealth or under a Commonwealth enactment, it will fall within the definition wherever the act or practice occurs.
119. Paragraphs 128 to 131 below deal with particular authority given to the Commonwealth under an enactment to engage in acts in regional processing countries.

(c) Text: scope of functions of the Commission as a whole

120. The functions of the Commission in s 11 in relation to human rights apply to the full spectrum of Australia's human rights obligations. For example, pursuant to s 11(1)(k), the Commission has the function of reporting on action that needs to be taken by Australia in order to comply with the ICCPR or any other relevant international instrument.
121. Unlike, for example, the functions imposed on the National Children's Commissioner under s 46MB of the AHRC Act (which relate to the human rights of children in Australia), the Commission's functions under s 11 are not geographically limited.
122. There is no textual basis for reading down the inquiry function in s 11(1)(f) to apply only to acts or practices in Australia that may be inconsistent with or contrary to any human right.

(d) Context: purpose of AHRC Act

123. A significant purpose for the establishment of the Commission was to ensure compliance with article 2 of the ICCPR. That is, to provide an effective administrative remedy to any person whose rights or freedoms recognised by the ICCPR had been violated. When the first Human Rights Commission Bill was introduced in 1977, the then Attorney General said:³⁹

The purpose of this Bill is to establish a Human Rights Commission in Australia. The major purpose of the Commission is to ensure that Commonwealth and Territory laws, acts and practices conform with the International Covenant on Civil and Political Rights. The Bill will give individuals a specific right to complain. ...

It is clear, I think, from the provisions of Article 2 of the Covenant that, while States Parties must provide effective and enforceable remedies for violations of rights recognised by the International Covenant, appropriate measures, other than legislative measures, may be taken. ... Article 2 of the Covenant makes it clear, I think, that an emphasis should be placed on the development of processes to respond to individual complaints. These processes may be provided not only by legislative measures and common law and procedural remedies, but also by remedies of an administrative and executive character.

124. The Government reintroduced the Human Rights Commission Bill in 1981 following the ratification of the ICCPR. The reintroduced Bill expanded the scope of 'human rights' to include the declarations at Schedules 3, 4 and 5 of the AHRC Act, and to include other international instruments declared for the purposes of that Act. This has since included the CRC. The Bill was passed in the form reintroduced in 1981.

125. The successor to the Human Rights Commission was the Human Rights and Equal Opportunity Commission (HREOC, now called the Australian Human Rights Commission). HREOC took on the Human Rights Commission's role of investigating complaints of breaches of human rights.
126. Given the focus of the Commission's inquiry function is on conciliating complaints about breaches of human rights, it is properly described as remedial. There is a general principle of statutory construction that remedial legislation is to be construed beneficially. This principle is of particular significance in the case of legislation which protects or enforces human rights.⁴⁰ As Isaacs J noted in *Bull v Attorney-General (NSW)*:

In the first place, this is a remedial Act, and therefore, if any ambiguity existed, like all such Acts should be construed beneficially ... This means, of course, not that the true signification of the provision should be strained or exceeded, but that it should be construed so as to give the fullest relief which the fair meaning of its language will allow.⁴¹

127. In my opinion, a fair reading of the AHRC Act is that it allows the Commission to conduct an inquiry into any breach by or on behalf of the Commonwealth of its human rights obligations, and not merely those breaches that occur within the territory of Australia. I consider that view to be consistent with the purpose of providing an effective administrative remedy to all those affected by such breaches.

(e) Context: legislative authority for Commonwealth to do acts in regional processing countries

128. There is further support for the view that the Commission has jurisdiction to inquire into acts and practices by the Commonwealth that occur in a regional processing country in the terms of the Migration Act.
129. Section 198AHA of the Migration Act was inserted into the Act on 30 June 2015 and took effect retrospectively from 18 August 2012. It provides that the Commonwealth may take, or cause to be taken, any action in relation to:
- an arrangement with a person or body in relation to the regional processing functions of a country, or
 - the regional processing functions of the country.
130. 'Regional processing functions' is defined as including 'the implementation of any law or policy, or the taking of any action, by a country in connection with the role of the country as a regional processing country, whether the implementation or the taking of action occurs in that country or another country'. 'Action' is defined as including '(a) exercising restraint over the liberty of a person; and (b) action in a regional processing country or another country'.
131. The section expressly authorizes extraterritorial action by the Commonwealth in a regional processing country. Acts engaged in by the Commonwealth that are covered by this section will be acts done under an enactment for the purposes of s 3(1) of the AHRC Act. An ordinary reading of the AHRC Act and the Migration Act suggest that such conduct is amenable to inquiry under s 11(1)(f) of the AHRC Act.

(f) Context: rationale for the presumption at common law

132. The rationale for the presumption that, in general, statutes are not to have extraterritorial effect is founded in international law. In *Barcelo v Electrolytic Zinc Co of Australasia Ltd*,⁴² Dixon J referred to two relevant principles. The first was that every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law. The second was the presumption that the legislature of a country is not intending to deal with persons or matters over which, according to the comity of nations, the jurisdiction properly belongs to some other sovereign or State.
133. The jurisdiction of the Commission to inquire into alleged breaches of human rights by the Commonwealth outside of its territory fits easily within these principles. The circumstances in which the Commonwealth has human rights obligations outside of its territory will be those in which international law recognizes the Commonwealth to be exercising jurisdiction (whether over territory or over people). They will not be circumstances where jurisdiction properly belongs to some other sovereign or State. A reading of the AHRC Act which permits the Commission to inquire into such conduct by the Commonwealth and to make findings about whether the conduct was inconsistent with or contrary to Australia's human rights obligations would not be inconsistent with the comity of nations.
134. That is, where the Commonwealth is alleged to have engaged in an act or practice in whole or in part overseas, the purpose of an inquiry by the Commission is not to regulate, prohibit or sanction things or persons which are properly the subject of an overseas jurisdiction. Rather, the purpose of the inquiry is to uphold legal standards imposed upon the Commonwealth in relation to its own conduct.
135. Different questions may arise if it were proposed that the Commission exercise its powers outside of Australia, for example by issuing a notice to a person outside Australia requiring the giving of information or the production of documents. It is unnecessary to deal with that issue here.

3.3 Criteria for the Commission to commence an inquiry

136. As noted above, the Commission has the function of inquiring into any act or practice that may be inconsistent with or contrary to any human right (s 11(1)(f) of the AHRC Act). It also has the function, where it considers it appropriate to do so, of endeavouring to effect a settlement of the matters that gave rise to the inquiry through a process of conciliation. If conciliation is either inappropriate or unsuccessful, and if as a result of the inquiry the Commission considers that the complaint has been made out, the Commission has the function of reporting to the Attorney-General.
137. Section 20(1)(b) of the AHRC Act requires the Commission to perform the inquiry functions referred to in s 11(1)(f) when a complaint in writing is made to the Commission alleging that an act or practice is inconsistent with or contrary to any human right.

138. There is a low threshold for the Commission’s jurisdiction to conduct an inquiry to be engaged. The Commission will have the jurisdiction to conduct an inquiry where the following criteria are satisfied:

- it receives a complaint in writing;
- the complaint is by or on behalf of one or more persons aggrieved by an act or practice; and
- the complaint alleges that the act or practice is inconsistent with or contrary to any human right.

139. As to the first and third criteria, two cases in the Federal Court considered the level of detail required to be included in a complaint under the then s 50 of the *Sex Discrimination Act 1984* (Cth) (**SDA**). The language is substantially similar to that used in s 20(1) of the AHRC Act. At the relevant time, s 50 of the SDA provided:

A complaint in writing alleging that a person has done an act that is unlawful by virtue of a provision of Part II may be lodged with the Commission by:

- (a) a person aggrieved by the act

140. Justice Merkel in *Simplot Australia Pty Ltd v HREOC* held that:⁴³

Section 50 of the Commonwealth Act does not require that any details of the alleged act be set out in the complaint. The section merely provides for a complaint in writing which alleges that a person has done an act that is unlawful under Pt II of the Act. If such an allegation is made in the complaint it will comply with the section. ...

The specificity of the legislature’s requirements as to the obligation of HREOC to inquire and not to inquire in respect of a complaint or a matter referred to it, supports the conclusion that the jurisdiction and power to inquire can be invoked upon the lodging of a complaint which merely alleges an act is unlawful under the Act, notwithstanding that subsequently it may be determined that the act alleged in the complaint is not unlawful. The power expressly conferred on the Commissioner and HREOC to make that determination in the course of an inquiry makes it clear that that matter cannot be a precondition for invoking the jurisdiction or power to inquire.

141. This passage was considered by Branson J in *Commonwealth v Sex Discrimination Commissioner*.⁴⁴ Her Honour referred to the passage from Merkel J’s judgment in *Simplot* and said:

In the *Simplot Australia* case at 93-94 Merkel J took the view that s 50 of the Act does not require the complaint in writing to include any details of the allegedly unlawful act. In my view, s 50 is open to the construction that the complaint in writing must allege some conduct by a person which is alleged to be unlawful by virtue of a provision of Part II. However, as I am not satisfied that the construction of the section adopted by Merkel J was plainly wrong, I adopt his Honour’s construction of the section.

142. In *Travers v State of New South Wales*, a case involving a complaint made under the *Disability Discrimination Act 1992* (Cth), Lehane J noted that a complaint ‘may be in quite brief and general terms, the detail being elicited in the course of inquiries by the relevant Commissioner’.⁴⁵

143. As to the second criterion, an assessment of whether a person is a ‘person aggrieved’ by an act is a mixed question of fact and law.⁴⁶ It is an objective test: a person does not qualify merely because he or she feels an intellectual or emotional concern with the conduct. Rather, the person must be someone who can show a grievance which will be or has been suffered as a result of the act or practice complained of beyond that which he or she has as an ordinary member of the public.⁴⁷ However, the term ‘person aggrieved’ should not be interpreted narrowly.⁴⁸ A person need not be directly affected by the conduct. It is at least arguable that derivative or relational interests will support the claim of a person to be ‘aggrieved’.⁴⁹ The categories of eligible interest to support standing as a person aggrieved are not closed.⁵⁰
144. If the three criteria set out above are satisfied, then the Commission has a duty, subject to s 20(2) of the AHRC Act, to commence an inquiry into the act or practice. The question of whether or not the act or practice complained of in fact amounts to a breach of human rights is not to be determined at the threshold by the person within the Commission responsible for accepting complaints.⁵¹ Rather, it is an issue to be determined by the President or his or her delegate during the course of the inquiry.⁵²
145. Once the Commission’s jurisdiction to conduct an inquiry is engaged, it has the power to serve a notice requiring the giving of information or the production of documents relevant to the inquiry (AHRC Act, s 21).
146. Pursuant to s 20(2) of the AHRC Act, the Commission may decide not to inquire into an act or practice or decide not to continue to inquire into the act or practice in a number of circumstances. These include where:
- the Commission is satisfied that the act or practice is not inconsistent with or contrary to any human right; or
 - the Commission is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance.

4 Whether the Commission has jurisdiction to conduct an inquiry into the present complaints

147. The complainants agreed that the determination of the three issues identified in paragraphs 74 to 77 above was the correct approach in assessing whether the Commission has jurisdiction to conduct an inquiry into the present complaints. By contrast, the department focussed only on the third issue and submitted that if jurisdiction depended only on the satisfaction of the statutory criteria set out in the AHRC Act then it would ‘turn merely on the language used by the complainant in the complaint’ and that ‘the limits on the Commission’s jurisdiction in this sort of case would be reduced virtually to nothing’.

148. The question of the Commission's jurisdiction is a matter of substance and not merely a matter of form. As noted above, in order for the Commission's jurisdiction to commence an inquiry to be engaged, the criteria in s 20(1) of the AHRC Act must be satisfied. One of these criteria is that the complaint alleges that the act or practice is inconsistent with or contrary to any human right.
149. The relevant function of the Commission is to inquire into any act or practice 'that may be inconsistent with or contrary to any human right' (AHRC Act s 11(1)(f)). In assessing whether an act or practice 'may be' inconsistent with or contrary to any human right, the Commission must take into account the potential for the inquiry to reveal as yet undiscovered facts.⁵³ The act or practice must be one that Australia could be responsible for under a relevant international instrument. It is for that reason that where there are allegations of extra-territorial conduct by Australia in breach of its human rights obligations it is necessary to consider, first, whether Australia has extra-territorial human rights obligations and, secondly, whether the Commission has jurisdiction to inquire into breaches by Australia of its extraterritorial obligations. If the answer to either of those questions had been 'no', then the Commission would not have had jurisdiction to inquire into the complaints to the extent that they relate to extra-territorial conduct, regardless of the form of words chosen by the complainants.
150. The department did not submit that either of those questions should be answered 'no'. Instead, the department sought to raise, as a jurisdictional question, an issue that is fact dependent: namely, whether Australia exercised effective control over the regional processing centre on Nauru or the people detained at that centre. In order for such a submission to be successful it must have been clear to the Commission, at the time the complaint was made, there was no prospect of a finding that Australia exercised effective control over the centre. As the process of the Commission's inquiry to date has demonstrated, such a conclusion was not reasonably open when the complaints were made. I deal in more detail below with the same question based on information and documents provided by the department, in response to a request by the department that the Commission decide not to continue to inquire into the complaints.
151. Returning to the question of jurisdiction and turning to the statutory criteria, each of the complainants has made a complaint in writing to the Commission. Written complaints were given to the Commission in August 2014. These complaints were supplemented with further written statements in January 2015 and with written submissions in March 2015. Accordingly, the first criterion in s 20(1) of the AHRC Act is satisfied.
152. Broadly, the acts and practices alleged by the complainants fall into three categories:
- arbitrary detention at the regional processing centre on Nauru;
 - treatment in detention that was inconsistent with humanity and with respect for the inherent dignity of the human person;
 - the decision to send families with young children to Nauru given the conditions in which they would be detained.

153. The department has correctly observed that the alleged act or practice must be one that is done under an enactment or by or on behalf of the Commonwealth. Similarly, the functions of the Commission to inquire into an act or practice are only engaged where the act complained of is not one required by law to be taken; that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents. I consider that issue in more detail below in relation to the decisions to send families with young children to Nauru.
154. As will be described in more detail below, the substance of the complaints is that the Commonwealth has engaged in acts or practices that are inconsistent with or contrary to the human rights of the complainants. In particular, the allegations engage the rights of the complainants under at least articles 9 and 10 of the ICCPR and articles 3 and 37 of the CRC. The written submissions of the complainants also make allegations under articles 7 and 17 of the ICCPR and articles 16, 19, 24 and 27 of the CRC. On the basis of the analysis of these complaints in the following section, I find that the third criterion in s 20(1) of the AHRC Act is satisfied.
155. Further, the complainants claim to be individually affected by the alleged acts and practices of the Commonwealth. They are not merely members of the public who have an intellectual or emotional concern with the subject matter of the regional processing of asylum seekers and their treatment. They are directly affected by the conduct and have a grievance which has been or will be suffered as a result of the act or practice complained of. As a result, I find that they are persons aggrieved for the purposes of the second criterion in s 20(1) of the AHRC Act.
156. In reaching these findings about the satisfaction of the second and third criteria in s 20(1), I have taken into account the allegations by the complainants in relation to the three main categories of complaint as summarised in the following sections of this opinion. As agreed with the AGD and the department, this document does not examine the merits of these complaints. It merely assesses whether a complaint has been made about relevant acts or practices of the Commonwealth by people who could be described as 'persons aggrieved' so as to give rise to the jurisdiction of the Commission to conduct an inquiry. The analysis below is not a comprehensive review of all of the allegations made by the complainants.

4.1 Arbitrary detention

157. The first main category of complaint is that the complainants have been arbitrarily detained. The initial written complaints included the following allegations:
- Ms CO's complaint: 'I have been living in Nauru Detention Centre for three months with my one year old baby and my husband. ... We need to be free [for] our mental and physical health but not in Nauru'.
 - Ms BK's complaint: 'Even the bigger criminals people have not this situation like us. ... But still after 13 month we are living in the camp and our hands are closed to do everything best for our life and now we are suffering from gradual death'.

- Mr DE's complaint: 'I feel that I die here and bury here and never taste freedom. ... I was imprisoned in my country for committing no crime. ... Now I am in Australia's prison for 13 months and history repeat for me again'.
158. Each of the written statements provided to the Commission in January 2015 complain about the conduct of the department and contain an allegation that the complainants are detained at the regional processing centre on Nauru.
159. Each of the written submissions complains about the detention of all of the complainants. The written submissions on behalf of each of the complainants refer to a breach by the Commonwealth of article 37(b) of the CRC in relation to the detention of the children and Mr DE's written submission also makes specific reference to a breach by the Commonwealth of article 9 of the ICCPR.
160. Article 9(1) of the ICCPR provides:
- 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.
161. Article 37(b) of the CRC provides:
- 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.
162. In my opinion, the following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:
- (a) 'detention' includes immigration detention;⁵⁴
 - (b) lawful detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system;⁵⁵
 - (c) arbitrariness is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability;⁵⁶ and
 - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁵⁷
163. I find that the complaints about arbitrary detention amount to allegations of acts or practices by the Commonwealth that are inconsistent with or contrary to relevant human rights. They are allegations made by persons aggrieved by those acts or practices.

4.2 Treatment in detention

164. The second main category of complaint is that, while detained, the complainants have been treated in a way that is inconsistent with humanity and with respect for the inherent dignity of the human person. The initial written complaints included the following allegations:

- Adverse impacts of detention on the physical health of the complaints.
 - i. For example, Ms CO's complaint: 'My son was sick with fevers, diarrhoea and rashes on his body. These sicknesses have continued for three months because of the living conditions, exposure to lots of other sick people and the heat'.
- Adverse impacts of detention on the mental health of the complaints and lack of adequate medical facilities.
 - i. For example, Ms BK's complaint: 'IHMS and psychologists are not able to help anybody as mentally and physically, and as your information that the psychologist make me worse not better as mentally, and I and my family are depressed and we are in very bad situation.'
 - ii. For example, Mr DE's complaint: 'There has been a period of 3 months my son almost every night has woken up and sits in his bed and begins delirium and shouts with loud voice for a few minutes and then goes to sleep.'
- Mistreatment by staff at the regional processing centre.
 - i. For example, Ms CO's complaint: 'Most of [the Nauruans employed as Wilsons Security officers] are always using drugs or are drunk. They look at women in the camp very bad and make us feel uncomfortable and not safe. They told me and other women that they are waiting for the beautiful ladies to come outside the camp. So now we are scared about the Nauruan men on the outside of the camp'.
 - ii. For example, Ms BK's complaint: The officers 'behave as army people which they work inside the camp because most of the Nauruan officers use drug and drink and the other officers are from the war of the Iraq and Afghanistan ... who they attended in the past and they have lots of experience of killing people in the war.'
- Exposure to incidents of self-harm.
 - i. For example, Ms CO's complaint: 'Every day we see evidence in the camp of people trying to commit suicide. All of the people in the camp are nervous, tired and fighting each other. Our children see all of this.'
 - ii. For example, Ms BK's complaint: '[I]t's so awful that my daughter is evidence of the suicide of the people, fighting and hard discussing of between the people who they are so nervous and have lots of problem as mentally and spiritually.'

- Lack of privacy.
 - i. For example, Ms CO's complaint: 'We live in a tent with five other families. In the tent we have no privacy in the plastic walls as they are only plastic and do not reach to the roof.'
 - ii. For example, Ms BK's complaint: 'In every tent are living five families which our life are public not privacy and it's so hard.'

165. The written statements of the complainants also:

- included more detail about particular physical and mental conditions allegedly caused by, exacerbated by or insufficiently treated in the regional processing centre;
- raised the risk of exposure to tuberculosis in the centre, alleging that there were a number of people in the centre who were suffering from the disease;
- alleged that there were insufficient and unhygienic facilities for babies and young children in the centre.

166. Article 10(1) of the ICCPR provides that:

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

167. Article 37(c) of the CRC is in substantially similar terms and relates to treatment of children.

168. Article 10(1) of the ICCPR imposes a positive obligation on State parties to take actions to prevent inhumane treatment of detained persons. The article recognises that people deprived of their liberty are a particularly vulnerable group who are entitled to special protection.⁵⁸

169. I find that the complaints about the conditions of detention and treatment in detention amount to allegations of acts or practices by the Commonwealth that are inconsistent with or contrary to relevant human rights. They are allegations made by persons aggrieved by those acts or practices.

4.3 Taking the complainants to Nauru

170. The third main category of complaint is that the Commonwealth made a decision to send families with young children to Nauru knowing the conditions in which they would be detained. Significantly, this complaint involves conduct that occurred in Australia. It does not rely on any extraterritorial application of either the ICCPR or the Commission's inquiry function under s 11(1)(f) of the AHRC Act.

171. In her original written complaint, Ms CO alleges that 'we were told by immigration that families who have under five years old babies wouldn't be transferred to Nauru as the conditions were not good and there were no facilities for babies in the country of Nauru or in the detention centre'. This issue was expanded on in her written statement of 15 January 2014.

172. This allegation potentially raises issues under articles 9 and 10 of the ICCPR and article 37 of the CRC discussed above.
173. In addition, article 3 of the CRC requires that in any decision about the detention of a child their best interests must be a primary consideration.
174. The United Nations Children’s Fund (**UNICEF**) Implementation Handbook for the Convention on the Rights of the Child provides the following guidance on article 3:⁵⁹
- The wording of article 3 indicates that the best interests of the child will not always be the single, overriding factor to be considered; there may be competing or conflicting human rights interests
... .
- The child’s interests, however, must be the subject of active consideration; it needs to be demonstrated that children’s interests have been explored and taken into account as a primary consideration.
175. Article 45 of the CRC recognises the special competence of UNICEF and other United Nations organs to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates.
176. I find that the complaints about the taking of the complainants to Nauru amount to allegations of acts or practices by the Commonwealth that are inconsistent with or contrary to relevant human rights. They are allegations made by persons aggrieved by those acts or practices.

4.4 Conclusions about the Commission’s jurisdiction to conduct an inquiry

177. As noted above, Australia’s human rights obligations apply in relation to people outside its territory who are subject to its jurisdiction. The Commission has jurisdiction to inquire into acts or practices that may be inconsistent with or contrary to those obligations.
178. I find that each of the criteria in s 20(1) of the AHRC has been satisfied in relation to the present complaints. The Commission has received complaints in writing. The complaints allege that the Commonwealth has engaged in acts or practices that are inconsistent with or contrary to human rights under the ICCPR and the CRC. The complaints are by persons aggrieved by those acts or practices.
179. As a result, I find that the Commission has a duty to conduct an inquiry into the complaints.
180. In seeking to inquire into those complaints, I sought voluntary production of certain information and documents (as set out in the schedule to my letter dated 10 February 2015 and in subsequent correspondence). When documents were not produced voluntarily in a timely way, I issued a compulsory notice on 1 May 2015 to the Secretary of the department requiring production of information and documents.

181. As noted above, the department refused to provide information and documents about conduct that occurred in Nauru on the basis that it was ‘of the view that the Commission does not have jurisdiction to inquire into the treatment of persons taken to Nauru under the regional processing provisions of the *Migration Act 1958* (Cth)’.
182. Prior to me providing the parties with my preliminary view on jurisdiction on 3 June 2016, the department had not provided the Commission with any detailed submissions setting out its views on the Commission’s jurisdiction. It appeared from some references in the department’s correspondence that it considered that conduct that occurs in the regional processing centre in Nauru could not amount to conduct that is inconsistent with or contrary to the Commonwealth’s human rights obligations, either because:
- it is not done under an enactment or by or on behalf of the Commonwealth; or
 - the Commonwealth does not have effective control over either the regional processing centre or the people within the centre.
183. Following my preliminary view on jurisdiction on 3 June 2016, the department submitted that the Commission did not have jurisdiction to conduct the inquiry because the complainants were not within the power or effective control of Australia while in detention at the Nauru regional processing centre. The department said that this was because:
- the asylum seekers detained at the regional processing centre on Nauru were not detained by Australian authorities (relying on the High Court’s decision in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1); and
 - Australia’s involvement in the detention of those people was not sufficient to establish that those people were subject to Australia’s jurisdiction for the purpose of enlivening Australia’s obligations under the ICCPR.
184. I consider that these matters, particularly the extent of Australia’s involvement in the detention of the complainants, are matters that go to the substance of the complaints rather than matters that go to the threshold question of whether or not the Commission has jurisdiction to conduct an inquiry. However, given that the department has raised them as issues going to jurisdiction, and given the Commission’s agreement to deal with jurisdictional issues as a preliminary question, I have considered whether I should decide not to continue to inquire into the acts and practices which are the subject of the complaints to the extent to which they deal with conduct that occurred on Nauru.

185. The department submits that if I find that I have jurisdiction to conduct the inquiry, then I should decide not to continue to inquire into the complaints as they relate to the treatment of the complainants while in detention at the Nauru regional processing centre. It submits that I should decide not to continue to inquire into the complaints on the grounds in s 20(2)(a) or (c)(ii) of the AHRC Act: broadly, that the alleged acts or practices are either not inconsistent with or contrary to any human right or are misconceived or lacking in substance. In support of this submission, the department says that the people detained in the centre were not detained by Australia and that Australia's involvement in their detention was not sufficient to establish that they were subject to Australia's jurisdiction.
186. I will deal with these submissions by the department in the following section of this opinion.

5 Whether the Commission should decide not to continue to inquire into the present complaints

187. Section 20(2) of the AHRC Act sets out a number of bases upon which the Commission could decide not to continue to inquire into a complaint. The most relevant for present purposes are if:
- the Commission is satisfied that the act or practice is not inconsistent with or contrary to any human right (s 20(2)(a)); or
 - the Commission is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance (s 20(2)(c)(ii)).
188. In this section, I briefly address Australia's regional processing arrangements and then deal with whether, based on the nature of the complaints and the information and documents provided by the department, I should exercise this power to decide not to continue to inquire into the acts and practices alleged by the complainants. The complaints fall into the following broad categories:
- arbitrary detention at the regional processing centre on Nauru;
 - treatment in detention that was inconsistent with humanity and with respect for the inherent dignity of the human person;
 - the decision to send families with young children to Nauru given the conditions in which they would be detained.

5.1 Regional processing

189. Australia has been engaged in what it refers to as the ‘regional processing’ of people who arrive in Australia by boat seeking asylum since August 2012. Regional processing was one of a number of recommendations made by an expert panel tasked by the then Prime Minister and the Minister for Immigration and Citizenship to advise on ‘how best to prevent asylum seekers risking their lives by travelling to Australia by boat’.⁶⁰
190. The panel reported on 13 August 2012 and made recommendations at two levels.⁶¹ The first level aimed at promoting incentives to encourage greater use of regular humanitarian pathways. The second level aimed at creating disincentives to irregular and dangerous maritime voyages. Regional processing was part of the second level of measures. It was designed to ‘reduce the attractiveness of Australia as a destination point for irregular migration’.⁶²
191. The panel recommended that Australia should move immediately to establish facilities in Nauru and Papua New Guinea for the processing of protection claims by irregular maritime arrivals to Australia⁶³ and that legislation be introduced to support regional processing as a matter of urgency.⁶⁴
192. While the panel considered that regional processing would be a ‘disincentive’ to asylum seekers travelling to Australia by boat, it claimed that the purpose of the disincentive was not to ‘punish’ people seeking Australia’s protection. In support of this distinction, it noted that if its recommendations were adopted:
- Asylum seekers who have their claims processed in Nauru would be provided with welfare arrangements consistent with Australian and Nauruan responsibilities under international law, including the Refugees Convention. Those protections and welfare arrangements would include:
- treatment consistent with human rights standards (including no arbitrary detention) ...⁶⁵
193. In response to the recommendations in the expert panel report, a new subdivision titled ‘Regional processing’ was inserted into the Migration Act, with effect from 18 August 2012.⁶⁶
194. Regional processing applies to ‘unauthorised maritime arrivals’.⁶⁷ In most cases, an unauthorised maritime arrival will be a person who entered Australia by sea without a valid visa and became an ‘unlawful non-citizen’ as a result of that entry.
195. Unlawful non-citizens in Australia’s migration zone are required to be detained under s 189 of the Migration Act. Unauthorised maritime arrivals who are detained under s 189 are required to be taken, as soon as reasonably practicable, from Australia to a regional processing country,⁶⁸ unless:
- there is no regional processing country;⁶⁹
 - each regional processing country advises in writing that they will not accept the person;⁷⁰ or
 - the Minister determines that a person or a class of persons is not subject to regional processing.⁷¹

196. On 29 August 2012, the Commonwealth signed a Memorandum of Understanding with the Republic of Nauru (**first MOU**).⁷² The preamble to the first MOU noted that Nauru had accepted a request by the Commonwealth to host a regional processing centre for asylum seekers. Pursuant to the first MOU:
- Nauru agreed to accept certain people transferred from Australia to Nauru (clause 7);
 - the people to be transferred were people who:
 - i. have travelled irregularly by sea to Australia; or
 - ii. have been intercepted or rescued at sea by Australia in the course of trying to reach Australia by irregular means; and
 - iii. are required by Australian law to be transferred to Nauru (clause 9);
 - the parties agreed to establish a processing centre at a site to be jointly determined (the regional processing centre) (clause 10);
 - the parties agreed to ensure that people transferred to Nauru will be treated with dignity and respect and that relevant human rights standards are met (clause 12).
197. On 10 September 2012, the Minister designated Nauru as a ‘regional processing country’ under s 198AB(1) of the Migration Act. The Minister tabled in Parliament a copy of the documents prescribed by s 198AC of the Migration Act in relation to the designation of Nauru as a regional processing country.
198. On 29 July 2013, the Minister made a direction under s 198AD(5) of the Migration Act specifying the regional processing countries to which particular classes of unauthorised maritime arrivals were to be taken. The identified classes were: family groups, single adult females, single adult males and unaccompanied minors. The direction provided that, unless the Minister otherwise directed, unauthorised maritime arrivals were to be taken to Nauru if:
- facilities and services are available for the class of persons of which the person is a member; and
 - there is vacant accommodation designated for the class of persons of which the person is a member and that vacant accommodation is greater than that available in Papua New Guinea; and
 - this does not result in any family group that all arrived together on or after 19 July 2013 from being split.
199. The 29 July 2013 direction was in force at the time each of the complainants was taken to Nauru.
200. On 3 August 2013, the Commonwealth signed a second Memorandum of Understanding with the Republic of Nauru (**second MOU**), which superseded the first MOU.⁷³ Relevant changes in the second MOU from the first MOU included:
- people to be transferred to Nauru should first have undergone short health, security and identity checks in Australia (clause 9(d));

- Nauru will host one or more Regional Processing Centres for the purposes of the MOU and may also host people transferred to Nauru under other arrangements, such as community-based arrangements (clauses 10 and 11).

201. The second MOU (as had the first MOU) provided that administrative measures giving effect to the MOU will be settled between the parties.
202. On 11 April 2014, the Secretary of the Department of Immigration and Border Protection of the Commonwealth and the Secretary of the Department of Justice and Border Control of Nauru signed a document titled 'Administrative Arrangements for Regional Processing and Settlement Arrangements in Nauru' (**Administrative Arrangements**).

5.2 Arbitrary detention

203. The complainants allege that they were arbitrarily detained at the regional processing centre on Nauru and that this involved a breach by the Commonwealth of its human rights obligations.
204. This involves a consideration of a number of matters. In particular:
- the source of the legal requirement to reside and remain at the regional processing centre;
 - whether people residing at the regional processing centre on Nauru can be described as being detained there;
 - the extent of participation by the Commonwealth in practice in any detention;
 - whether the Commonwealth is responsible for the detention of the complainants.
205. It may also be necessary to consider whether the Commonwealth could be said to have aided or assisted Nauru in a relevant breach of human rights.

(a) Legal requirement to reside and remain at the regional processing centre

206. The complainants were taken to Nauru in January 2014 and May 2014.
207. A person who is not a Nauruan citizen is required to hold a valid visa in order to enter and remain in Nauru.⁷⁴ Classes of visas are provided for by regulation, and include a 'regional processing centre visa'.⁷⁵ At the time the complainants were taken to Nauru, a regional processing centre visa was subject to a number of conditions including that the holder must reside in premises specified in the visa and must remain at those premises except in cases of emergency or when under the care and control or in the company of a service provider or another approved person.⁷⁶

208. In the course of proceedings in the High Court of Australia in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1 (***Plaintiff M68***), the Commonwealth confirmed that it has been the invariable practice in Nauru for regional processing centre visas to specify the regional processing centre as the place where visa holders must reside.⁷⁷ I understand that the visas granted to the complainants were subject to the following conditions which reflected the requirements of the regulations in force at the time:⁷⁸
- (a) the holder must reside at the Regional Processing Centre, Topside, in Menang District; and
 - (b) until a health and security clearance certificate is granted to the holder, the holder must remain at those premises or at common areas notified to the holder by a service provider, except:
 - (i) in case of emergency or other extraordinary circumstances; or
 - (ii) in circumstances where the absence is organized by a service provider and the holder is under the care and control of a service provider or of another person
 - (c) after a health and security clearance certificate is granted to the holder, the holder must remain at those premises or at common areas notified to the holder by a service provider, except:
 - (i) in case of emergency or other extraordinary circumstances; or
 - (ii) in circumstances where the absence is organized or permitted by a service provider and the holder is in the company of a service provider.
209. Since 21 May 2014, it has been a criminal offence under the laws of Nauru for a person brought to Nauru under ss 198AD or 199 of the Migration Act to leave, or attempt to leave the regional processing centre without prior approval from an authorised officer, an Operational Manager or other authorised persons.⁷⁹ A person committing such an offence is liable upon conviction to imprisonment for a period of up to six months. An equivalent obligation is imposed by rule 3.1.3 of the Nauru Regional Processing Centre Rules made under s 7 of the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nauru).⁸⁰
210. The regional processing centre is divided into a number of sites known as RPC1, RPC2 and RPC3. RPC3 contained accommodation facilities for single adult females and families. I understand that from 25 February 2015 the Operational Managers at RPC3 exercised their discretion to provide for ‘open centre arrangements’.⁸¹ Pursuant to these arrangements, people residing at the regional processing centre who were eligible to participate in the arrangements could be granted permission to leave the centre each Monday, Wednesday, Friday, Saturday and Sunday, unescorted, between 9.00am and 9.00pm.
211. In February 2015, Ms CO and her family were transferred to Australia for medical reasons and are currently still in Australia. In or around July 2015, Mr DE and his family were recognised by Nauru as being refugees and were no longer required to reside at the regional processing centre. In September 2015, Ms BK and her family were brought back to Australia so that Ms BK could give birth to a second child and they are currently still in Australia.

212. On 2 October 2015, the Acting Minister for Justice and Border Control of Nauru announced extended open centre arrangements to take effect from 5 October 2015.⁸² Pursuant to these arrangements, the existing arrangements ‘will be expanded to allow for freedom of movement of asylum seekers 24 hours per day, seven days per week’. All asylum seekers residing in RPC2 and RPC3 were approved to be eligible to participate in these arrangements.
213. In *Plaintiff M68*, the Commonwealth submitted that the change to open centre arrangements, combined with the removal of regs 9(6)(b) and (c) from the Immigration Regulations 2014 (Nauru) meant that from 5 October 2015 people residing at the regional processing centre could not be described as being detained there.⁸³
214. A majority of the High Court of Australia agreed with this submission. The plaintiff in that case was an asylum seeker who had previously been detained in the regional processing centre before being returned to Australia for medical treatment. In that sense, the plaintiff was in the same position as Ms CO and her family and Ms BK and her family. The complainants note that they and their families were all detained at the regional processing centre for various periods between January 2014 and September 2015 and that the plaintiff in *Plaintiff M68* was also detained during this period (from January to August 2014). The Court in *Plaintiff M68* considered that it was ‘unlikely’ that the plaintiff would be detained at the regional processing centre if and when she was returned to Nauru because of the operation of the new open centre arrangements.⁸⁴
215. As is clear from the facts set out above, all the complainants in the present inquiry had left the regional processing centre before the commencement of the open centre arrangements.

(b) Whether the complainants were detained at the regional processing centre

216. From the date that they were taken to Nauru until they were either returned to Australia (Ms CO and her family and Ms BK and her family) or granted refugee status in Nauru (Mr DE and his family), it appears to me that the complainants were detained at the regional processing centre.
217. This issue was considered by von Doussa J in the Supreme Court of the Republic of Nauru in *AG v Secretary for Justice* in which writs of *habeas corpus* were sought for release of a number of people residing at the regional processing centre.⁸⁵ In finding that the applicants were detained, von Doussa J had regard to the conditions attaching to their visas and to the physical conditions faced by them.
218. The visa conditions applying to the visas of the applicants in *AG v Secretary for Justice* were the same as those that applied to the visas of the complainants.⁸⁶ None of the applicants had received security clearances at the time their application was heard. As noted above, at the time the regulations and relevant visa conditions provided for the potential for some greater freedom of movement once a security clearance has been obtained, although this was at the discretion of the relevant service providers.⁸⁷

219. In holding that the applicants were being detained under the visa restrictions set out in reg 9(6) (b), von Doussa J found that:

The applicants have been brought to Nauru against their will for the sole purpose of processing their claims for refugee status. They are required to live in a location that effectively confines them in a limited and finite area that is isolated from the residential and urban areas of Nauru, and their lives are closely regulated and monitored 24 hours of each day. At all times they are effectively being guarded and watched to prevent their escape. Whilst the restrictions fall short of those to be found in the close environment of a prison, they are very extensive in their impact on the daily lives and movement of the applicants.⁸⁸

220. The High Court of Australia in *Plaintiff M68* came to the same conclusion as von Doussa J about the status of individuals held at the regional processing centre before October 2015. There was no disagreement among the Justices that the plaintiff had been detained at the regional processing centre on Nauru during her time there. However, there was a difference of opinion between the majority Justices as to who was responsible for her detention.

221. The three plurality Justices and Keane J held that, while in the regional processing centre, the plaintiff was detained in custody under the laws of Nauru, administered by the Executive government of Nauru.⁸⁹ The *Immigration Act 2014* (Nauru) requires that non-citizens must have a valid visa to enter or remain in Nauru. The visa granted to the plaintiff by Nauru required her to reside at the regional processing centre. The restrictions on her liberty applied as a result of the independent exercise of the sovereign legislative power of Nauru.⁹⁰

222. However, although the plaintiff was detained by Nauru, the Commonwealth ‘participated’ in this detention.⁹¹ Therefore, the relevant question for the High Court in that case was whether the Commonwealth had the power to participate in Nauru’s detention of the plaintiff to the extent that it did.⁹²

223. By contrast, two of the majority Justices (Bell and Gageler JJ), along with Gordon J in dissent, considered that the Commonwealth was responsible for the detention of the plaintiff. For these three Justices, it was necessary to consider the detail of the Commonwealth’s involvement in the regional processing regime. This included:

- the respective obligations of Australia and Nauru under their Memorandum of Understanding and subsequent Administrative Arrangements in relation to regional processing;
- the detail of the regime under Nauruan law, including the fact that an application for a regional processing visa could only be made by an officer of the Commonwealth;
- the contractual arrangements between the Commonwealth and Transfield in relation to the operation of the regional processing centre (and particularly the security services provided by its subcontractor Wilson Security).

224. Justice Bell said:

The Commonwealth did not seek to have Nauru detain persons taken to it for regional processing. Nonetheless, by applying for an RPC visa in the plaintiff’s name and by taking the plaintiff to Nauru, in a practical sense the Commonwealth brought about her detention under the regime that applied in Nauru.⁹³

225. Further, her Honour considered that:

The Commonwealth funded the RPC and exercised effective control over the detention of the transferees through the contractual obligations it imposed on Transfield.⁹⁴

226. Justice Gageler considered that Wilson Security exercised physical control over the plaintiff so as to confine her to the regional processing centre. In doing so, Wilson Security was acting as a *de facto* agent of the Commonwealth. This was because the Commonwealth had procured these security services to be performed under the terms of its contract with Transfield.⁹⁵

227. Justice Gordon (in dissent) found that the Commonwealth was responsible for the detention of the plaintiff at the regional processing centre on Nauru.⁹⁶

228. In line with the judgments of the High Court of Australia in *Plaintiff M68* and von Doussa J in the Supreme Court of Nauru, I consider that the complainants were detained at the regional processing centre during the period described in paragraph 216 above. The immediate legal reason for their detention was that it was required by Nauruan law and the conditions attaching to their visas.

229. The complainants accept that the decision in *Plaintiff M68* precludes a finding by me that their detention in Nauru was an act done directly by the Commonwealth.

230. However, the complainants were detained at the regional processing centre as a result of a regional processing scheme designed by Australia and put in place pursuant to an understanding between Australia and Nauru. It is therefore necessary to consider first whether the detention of the complainants could be attributed to the Commonwealth under international law and secondly whether the extent of the Commonwealth's participation in those arrangements gave rise to human rights obligations to people detained at the regional processing centre.

(c) Extent of participation by the Commonwealth in detention of people at the regional processing centre

231. The Commonwealth contracted for the construction of the regional processing centre and bears all of the costs associated with its construction and maintenance in accordance with clauses 6 and 10 of the first MOU.

232. The only people detained at the regional processing centre are people who are taken from Australia to Nauru pursuant to the Commonwealth's regional processing arrangements. This means that the Commonwealth is responsible for determining which people will be detained at the regional processing centre.

233. When it was first introduced, the regional processing centre visa was called an 'Australian regional processing visa'.⁹⁷ A regional processing centre visa may only be granted to someone brought to Nauru under ss 198AD or 199 of the Migration Act.⁹⁸ An application for a regional processing centre visa may only be made by an officer of the Commonwealth of Australia.⁹⁹ If a person holds a regional processing centre visa, a further regional processing visa may be granted to the person on the request of an officer of the Commonwealth without submitting an application in the prescribed form.¹⁰⁰

234. According to statements made by the Commonwealth in the *Plaintiff M68* proceedings, from the designation of Nauru as a regional processing country on 10 September 2012 until (at least) 13 July 2015:¹⁰¹

- an officer of the Commonwealth has made an application to the Secretary of the Department of Justice and Border Control for a regional processing visa for each person taken to Nauru pursuant to the regional processing provisions of the Migration Act;
- officers of the Commonwealth did not seek the consent of the people transferred to make the visa applications;
- it has been the invariable practice for regional processing visas to specify that the person must reside at the regional processing centre;
- the Commonwealth has paid all of the fees associated with the grant of regional processing centre visas, which totalled \$27,893,633 as at 30 March 2015;
- following arrival in Nauru, all of the people transferred have resided at the regional processing centre.

235. The Commonwealth was involved in developing the open centre arrangements. On 26 February 2015, the day after the arrangements commenced, there was a regular monthly meeting of the OPC Garrison and Welfare Committee in Canberra involving nine senior officers of the department and four senior officers of Transfield. Transfield tabled a Business Services Update which read in part:

At the time of writing there is a number of a significant risk and operational details that the Department and Transfield Services should address and agree to resolve to ensure the Open Centre arrangements can commence as planned on Wednesday 25 February 2015. Issues include emergency and incident response requirements, finalisation and confirmation of all Open Centre documentation and processes including eligibility, visa conditions and revocation.

(d) Whether the Commonwealth is responsible for the detention of the complainants

236. The general principles of state responsibility are set out in the International Law Commission Draft Articles on State Responsibility (**ILC Articles**).¹⁰² Article 2 provides that there is an internationally wrongful act of a State when conduct consisting of an act or omission:

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.

237. Articles 4 to 11 of the ILC Articles set out the ways in which it is justifiable to attribute conduct to a particular state. This includes: conduct by organs or officials of a state acting in their official capacity,¹⁰³ conduct by other people empowered to exercise elements of governmental authority,¹⁰⁴ conduct by organs or officials of a second state placed at the disposal of the first state,¹⁰⁵ and conduct by persons acting on the instructions of, or under the direction or control of a state.¹⁰⁶

238. The Commonwealth has legislative authority to detain people in the Nauru regional processing centre. Section 198AHA of the Migration Act authorises the Commonwealth to take action, including exercising restraint over the liberty of a person, in relation to the regional processing functions of a country. However, this section provides that the grant of legislative authority does not make action taken by the Commonwealth (including detention) lawful.

239. Although the Commonwealth has authority to detain people, it claims that it does not use this authority. It also claims that, even if it did use this authority, this would not amount to a breach of Australia's human rights obligations because Australia does not exercise a sufficient degree of control in Nauru to enliven these obligations. In the Explanatory Memorandum accompanying the Bill that introduced s 198AHA, the Minister said:

Subsection 198AHA(5) provides that "action" includes exercising restraint over the liberty of a person, which restraint may engage the right to security of the person and freedom from arbitrary detention contained in Article 9 of the International Covenant on Civil and Political Rights (ICCPR). Article 9(1) of the ICCPR provides that

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.

The Australian Government's long-standing view is that Australia's human rights obligations are essentially territorial. Persons in regional processing countries are outside Australia's territory. Australia has accepted that there may be exceptional circumstances in which the rights and freedoms set out under the ICCPR may apply to persons beyond the territory of a State party, and the extent of the obligations that a State may owe under international human rights law where it is operating extraterritorially will be informed by the degree of control exercised by the State. The Government's position is that Australia does not exercise the degree of control necessary in regional processing countries to enliven Australia's international obligations.

Australia does not restrain the liberty of persons in regional processing countries. To the extent that the liberty of persons taken to regional processing countries is restrained in those countries, this is done under the laws of that country. The Bill confirms the ability of Australian officials, acting on behalf of the Commonwealth, to take action to assist the foreign government in the regional processing country. These amendments do not otherwise provide authority for any restraint over the liberty of persons. The lawful authority for any restraint over liberty arises under the law of the relevant regional processing country.¹⁰⁷

240. It appears that the detention of the complainants in the regional processing centre was a predictable (indeed, until recently an invariable) part of Australia's regional processing arrangements with Nauru and was, in a practical sense, facilitated by Australia. According to the majority in *Plaintiff M68*:

- the involvement of the Commonwealth 'was materially supportive, if not a necessary condition, of Nauru's physical capacity to detain' the plaintiff and the other asylum seekers in the regional processing centre (French CJ, Kiefel and Nettle JJ at [39]); and
- the Commonwealth's arrangements with Nauru might be said to have 'procured or funded or caused restraints over the plaintiff's liberty' and that of the other asylum seekers in the regional processing centre (Keane J at [239]).

241. It also appears that the immediate legal requirement for detention arose as a result of Nauruan law and the conditions attached to the complainants' regional processing centre visas. However, in an international law sense the question is whether or not the detention was conduct attributable to the Commonwealth – that is, whether these were acts taken by organs of the Government of Nauru, rather than acts taken (i) by organs or officials of the Commonwealth; or (ii) by organs of the Government of Nauru that were placed at the disposal of the Commonwealth; or (iii) by organs or officials of the Government of Nauru that were acting on the instructions of, or under the direction or control of, the Commonwealth.
242. It appears to me that it would be consistent with the findings of a majority of the High Court in *Plaintiff M68* for me to take the view that the imposition of the requirement that the complainants be detained on Nauru was not an act done by the Commonwealth. The complainants accept that the decision in *Plaintiff M68* precludes a finding by me that their detention in Nauru was an act done directly by the Commonwealth.
243. However, the plaintiffs submit that *Plaintiff M68* supports a finding that their detention was an act done by organs of the Government of Nauru that were placed at the disposal of the Commonwealth, or under the direction or control of the Commonwealth.
244. The complainants rely on the following factual findings by the three plurality Justices (French CJ, Kiefel and Nettle JJ) in *Plaintiff M68* at [39]:
- the Commonwealth sought the assistance of Nauru with respect to the processing of persons such as the plaintiff (who was an unauthorised maritime arrival claiming to be a refugee);
 - it may be accepted that the Commonwealth was aware that Nauru required the plaintiff to be detained;
 - in order to obtain Nauru's agreement to receive the plaintiff, the Commonwealth funded the regional processing centre and the services provided there in accordance with the Administrative Arrangements;
 - the Commonwealth conceded the causal connection between its conduct and the plaintiff's detention; and
 - it may be accepted that the Commonwealth's involvement was materially supportive, if not a necessary condition, of Nauru's physical capacity to detain the plaintiff.
245. Despite these factors, the plurality found that the Commonwealth could not be said to have 'authorised or controlled' the plaintiff's detention in the sense discussed in in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 19. However, *Lim* did not say anything about the validity of actions of the Commonwealth in participating in the detention of an alien by another State. It was 'indisputable' that the Commonwealth was participating in the detention of the plaintiff on Nauru, so it was therefore necessary to determine whether this participation was authorised by law. Ultimately, the plurality found that s 198AHA of the Migration Act provided the Commonwealth with the statutory authority to participate in the plaintiff's detention (see also Keane J at [196] and [199]).

246. The department disputes that the detention of the complainants was an act done by organs of the Government of Nauru that were placed at the disposal of the Commonwealth, or under the direction or control of the Commonwealth. The department relies on the following statement by Keane J who was part of the majority in *Plaintiff M68* (at [240]):

There was no suggestion in the Special Case that the Commonwealth requested or required that the Nauruan regime of detention in custody be put in place. Indeed, to the contrary, the parties agreed that it was the fact that, if Nauru had not sought to impose these restrictions on the plaintiff, none of the Commonwealth, the Minister, Transfield or its subcontractors would have sought to impose such restraints over the plaintiff's liberty in Nauru or asserted any right to impose such restraints.

247. It is worth noting that, as observed by Keane J, the Court was confined to considering the factual background agreed between the plaintiff and the Commonwealth which was set out in the Special Case. The Court was not conducting a more general inquisitorial process.

248. The department notes that the three plurality Justices who made up the rest of the majority also referred (at [35]) to this passage in the Special Case which recognised that 'if Nauru had not detained the plaintiff, the Commonwealth could not itself do so'. The plurality found that the Commonwealth 'did not and could not compel or authorise Nauru to make or enforce the laws that required that the plaintiff be detained' (at [36]). Similarly, Keane J held that the Commonwealth had 'no legal power to compel Nauru to make, vary or maintain the laws of Nauru or the administrative arrangements made pursuant to those laws' (at [196]).

249. Based on the facts agreed in the Special Case, the distinction drawn by the majority in *Plaintiff M68* was between: on the one hand, action taken by the Commonwealth which in a practical sense materially facilitated the detention of the plaintiff; and on the other hand, the inability of the Commonwealth to compel Nauru, as a sovereign State, to make laws providing for the detention of the plaintiff.

250. On the basis of the material available to me at present, and based on the findings in *Plaintiff M68*, I am not satisfied that the detention of the complainants in the present complaints was an act done by organs of the Government of Nauru that were placed at the disposal of the Commonwealth, or under the direction or control of the Commonwealth. For the reasons given in sections 5.3 and 5.4 below, I have decided to continue to inquire into the complaints made by the complainants. However, unless new information comes to light in the course of that inquiry, I indicate to the parties that I am presently minded to find that the detention of the complainants was not an act done by or on behalf of the Commonwealth and was not an act for which the Commonwealth was responsible under international law.

(e) Assisting in a breach of human rights obligations by Nauru?

251. A state can be internationally responsible for aiding or assisting another state in the commission of an internationally wrongful act. This will be the case if the state does so with the knowledge of the circumstances of the internationally wrongful act and if the act would be internationally wrongful if committed by the first state (ILC Articles, article 16).

252. The second of these criteria means that both states must share the relevant international obligations.

253. Nauru signed the ICCPR on 12 November 2001 but has not ratified it. Nauru acceded to the CRC on 27 July 1994. If the Commonwealth aided or assisted Nauru to breach its obligations under the CRC, the Commonwealth would be internationally responsible for this conduct if it did so with the knowledge of the circumstances of the internationally wrongful act and if the act would have been wrongful if committed by Australia.
254. Both states must share the relevant international obligations in order for the act by one state, of aiding or assisting the commission of an internationally wrongful act by a second state, to also be wrongful.¹⁰⁸ The state providing aid or assistance is internationally responsible for its own conduct.¹⁰⁹ This suggests that the act of aiding or assisting amounts to a breach of its own primary obligations.¹¹⁰ That is, if Australia were to aid or assist Nauru to breach Nauru's obligations under the CRC, this would amount to a breach by Australia of its own obligations under the CRC. The Commission would have jurisdiction to inquire into any such breach by Australia of its own obligations.
255. However, in order to demonstrate a breach of an obligation through the operation of Article 16, the commentary to the ILC Articles suggest that it must be established that the aid or assistance was given 'with a view to facilitating the commission of that act, and must actually do so'.¹¹¹ Further:
- Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.¹¹²
256. The complainants accept that this is the appropriate test to apply. The complainants submit that the requisite awareness and intention on the part of the Commonwealth is made out on the basis of the findings of fact made by the High Court in *Plaintiff M68*. In particular, the complainants submit that these findings indicate that:
- the Commonwealth was aware that Nauruan law required transferees to be detained;
 - the Commonwealth funded the regional processing centre and the services provided there in order to gain Nauru's agreement to receive the transferees; and
 - by applying for regional processing centre visas for transferees, the Commonwealth arguably brought about their detention in Nauru pursuant to the laws of Nauru.
257. For the reasons described earlier, I consider that the complainants were detained at the regional processing centre during the period described in paragraph 216 above. The Commonwealth was aware that Nauru required the complainants to be detained. Significant assistance was provided by Australia in establishing and operating the regional processing centre (see the findings of the High Court set out in paragraph 244 above). This assistance was a necessary condition of Nauru's physical capacity to detain the complainants. However, it is not clear that Australia intended to facilitate the arbitrary detention of people taken to Nauru pursuant to the regional processing arrangements.

258. At the time that Nauru was designated as a regional processing country in September 2012, one of the statements tabled by the Minister in Parliament said that the Nauruan Government had advised the Commonwealth that: ‘transferees will have freedom of movement throughout Nauru. It is anticipated, but not legally required, that they will ordinarily return to their accommodation by sunset’.¹¹³ In the course of a previous inquiry by the Commission, the Commonwealth submitted in May 2013 that it was continuing discussions with the Government of Nauru about practical arrangements for the operation of the regional processing centre as an ‘open facility’. During the course of the *Plaintiff M68* proceedings, the Commonwealth submitted that if Nauru had not sought to impose restrictions on the liberty of asylum seekers at the regional processing centre then the Commonwealth would not have sought to impose such restrictions.¹¹⁴
259. I consider, based on the material currently available to me, that there is insufficient information for me to be satisfied that the aid and assistance provided by the Commonwealth to Nauru in relation to the establishment and operation of the regional processing centre on Nauru was provided with the intention to facilitate the arbitrary detention of children at the centre, contrary to article 37(b) of the CRC. For the reasons given in sections 5.3 and 5.4 below, I have decided to continue to inquire into the complaints made by the complainants. However, unless new information comes to light in the course of that inquiry, I indicate to the parties that I am presently minded to find that the Commonwealth did not satisfy the conditions in Article 16 of the ILC Articles necessary for a finding to be made that it was internationally responsible for aiding or assisting Nauru in the commission of an act contrary to Nauru’s obligations under article 37(b) of the CRC.

5.3 Treatment in detention

260. Even if the complainants were not detained as a result of a requirement of the Commonwealth, it may be that the Commonwealth was responsible for the treatment of the complainants while they were detained because of the extent of its participation in their detention. This would be the case if the Commonwealth exercised control and authority over the circumstances of the complainants’ detention.
261. As the European Court of Human Rights observed in *Al-Skeini*:
- It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 [of the European Convention on Human Rights] to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of the individual. In this sense, therefore, the Convention rights can be “divided and tailored”.
262. The question of whether the Commonwealth exercises effective control over the conditions in the regional processing centre is a mixed question of fact and law. These reasons will consider:
- the legal structure in Nauru in relation to the regional processing centre;
 - the contractual arrangements between the Commonwealth and service providers at the regional processing centre;

- the extent to which officers of the department work at the regional processing centre;
- the practical involvement of the Commonwealth in the day to day operation of the regional processing centre; and
- the legal character of the Commonwealth's involvement in the operation of the regional processing centre.

(a) Legal structure in Nauru in relation to the regional processing centre

263. Australia commenced taking people to the regional processing centre in Nauru pursuant to the regional processing provisions in the Migration Act in August 2012.

264. The *Asylum Seekers (Regional Processing Centre) Act 2012 (Nauru) (the RPC Act (N))* came into effect on 15 March 2013.¹¹⁵ The purpose of the RPC Act (N) is described in its long title, namely:

An Act to regulate the operation of centres at which asylum seekers and certain other persons brought to Nauru under the Migration Act 1958 of the Commonwealth of Australia are required to reside; to establish certain protections for those persons and set out their obligations; to impose duties on the person managing operations at a centre and confer powers on certain persons in relation to a centre or persons residing there

265. The RPC Act (N) provides for an Operational Manager to be appointed with responsibility for managing operations at the centre. The term is defined in s 3(1) which provides that:

‘Operational Manager’, in relation to a regional processing centre, means the person (however described) who has been given responsibility by the Commonwealth of Australia or by the Minister for managing operations at the centre and who is declared under subsection (2)

266. On 22 November 2013, one Operational Manager was appointed for each of the three sites within the regional processing centre.¹¹⁶ The department has confirmed that the persons appointed are the persons who held these positions at all relevant times. The Operational Managers are:

- | | |
|------------------------|--------------------------------|
| • Mrs Berilyn Jeremiah | Operational Manager for RPC 1 |
| • Mr Brene Karl | Operational Manager for RPC 2 |
| • Ms Bervena Adeang | Operational Manager for RPC 3. |

267. The role of the Operational Manager under s 5 of the RPC Act (N) is a pivotal one. Among other duties, the Operational Manager ‘has a duty to ensure that each protected person residing at the centre is treated in a fair and humane manner consistent with the law of Nauru’. A ‘protected person’ is a person brought to Nauru under either s 198AD or s 199 of the Migration Act.

268. Section 6 of the RPC Act (N) provides that the duty in s 5 includes duties to ensure that each protected person residing at the regional processing centre is provided with adequate food, clothing, bedding and other essential items, access to medical care and treatment, education for children, interpretation facilities, counselling facilities, facilities for the conduct of religious ceremonies, facilities for exercise and recreation, opportunities to associate with other residents, facilities for the sending and receipt of correspondence, access to an area where legal advice can be obtained in confidence, and anything else that might need to be provided because of a person's special needs.
269. The Operational Manager must also make rules for the security, good order and management of the centre and the care and welfare of protected persons residing there. On 16 July 2014, the Regional Processing Centre Rules (**RPC Rules**) were published in the Government Gazette of Nauru.¹¹⁷ Among other things, the RPC Rules provide that asylum seekers residing at the centre must at all times comply with all reasonable orders and directions from a service provider that are in the interests of the safety, good order and maintenance of the centre.¹¹⁸

(b) Contractual arrangements between the Commonwealth and service providers at the regional processing centre

270. The Administrative Arrangements between the Commonwealth and Nauru provide that the Government of Australia will appoint an officer as a Programme Coordinator who will be responsible for managing all Australian officers and services contracts in relation to the regional processing centre.¹¹⁹ This includes ensuring all contractors deliver services to standards outlined in their contracts.¹²⁰ In the course of the *Plaintiff M68* proceedings, the Commonwealth confirmed that the role of Programme Coordinator under the Administrative Arrangements has at all times been filled by an officer of the Department of Immigration and Border Protection of the Commonwealth.¹²¹ The Administrative Arrangements provide that the management by the Program Coordinator of service providers will be done 'in close liaison' with the Operational Manager.¹²²
271. The Commonwealth has relevantly entered into contracts with the following service providers on the following dates to provide services at the regional processing centre:
- Transfield Services (Australia) Pty Limited (Transfield) dated 1 February 2013¹²³ and 24 March 2014;¹²⁴
 - Save the Children Australia (Save the Children) dated 5 August 2013¹²⁵ and 1 September 2014;¹²⁶
 - International Health and Medical Services Pty Limited (IHMS).¹²⁷
272. Each of the above contracts is between the Commonwealth and corporate entities registered in Australia. Each of the contracts is governed by the law of the Australian Capital Territory.¹²⁸ The Republic of Nauru is not a party to any of these contracts.
273. Transfield is responsible for providing garrison and welfare services at the regional processing centre.¹²⁹ Garrison services include management and maintenance of assets, cleaning, security, catering, environmental management, work health and safety, management of emergencies, logistics, personnel accommodation and transport and escort.¹³⁰

274. The primary security obligation imposed on Transfield by the Commonwealth is that the regional processing centre must provide a safe and secure environment for transferees and personnel, 'ensuring that each individual's human rights, dignity and well-being are preserved'.¹³¹ This obligation on Transfield reflects the Commonwealth's own obligation under the first MOU with Nauru to 'ensure that transferees will be treated with dignity and respect and that relevant human rights standards are met'.¹³² Transfield is required not to permit any act or omission that may cause the Commonwealth to be in breach of its MOU with Nauru or the Administrative Arrangements.¹³³
275. The importance of the well-being of transferees is further emphasised in the Performance Management Framework in the Transfield contracts. At the top of the Performance Pyramid in the 2013 Transfield Contract is the 'well-being' of the transferees within the regional processing centre. The contract provides that the well-being of transferees is a priority for the department and Transfield and that the well-being of transferees 'will be heavily scrutinised in terms of Performance Measurement'.¹³⁴ This was reflected in the Regional Processing Centres Performance Management Framework provided by the department to Transfield on 18 December 2012.¹³⁵ The department said that the framework was structured to 'ensure that the provision of services and the management of performance align with the vision and outcomes of the Department pertaining to the well-being of transferees offshore'.¹³⁶ The reporting requirements on Transfield are discussed in more detail below.
276. Until 31 October 2015, Save the Children was responsible for providing services which relate to the welfare and engagement of transferees and particularly families with children, families without children, unaccompanied minors and single adult females.¹³⁷ After that date, these responsibilities were adopted by Transfield.¹³⁸
277. IHMS is responsible for providing health and medical services to transferees.

(c) Departmental staff working at the regional processing centre

278. In the period from 1 January 2014 to 31 July 2015, 135 officers of the department worked in Nauru. The clear majority (95 officers) were deployed as protection claims assessors to provide support to Nauru in implementing and managing its refugee status determination process.
279. Within the regional processing centre, there was a departmental team comprising 12-18 staff at any one time. The department provided the following description of roles undertaken by executive level departmental staff (EL 1 and EL2) at the centre:
- Program Coordinator – this role provides overarching support to the Government of Nauru (GoN) Operational Managers in coordinating the daily operations of the Regional Processing Centre (RPC).
 - Operations Lead – this role leads a small team who support the operations of the RPC, in partnership with the GoN and service providers. Operations include incoming and outgoing transfers or medical transfers, complex case management, incident reporting and interpreter coordination.
 - Infrastructure Lead – this role coordinates approved infrastructure projects being fund[ed] by the Department within the RPC and broader community.

- Service Delivery Lead – this role leads a small team who manage service provider contracts (Transfield Services, Save the Children, International Health and Medical Services) at the RPC.
- Community Liaison Officer – this role supports the GoN to communicate the benefits of the RPC and refugee settlement to the local community and to facilitate community engagement activities between transferees, refugees and the local community.
- Settlement Lead – this role leads a small team who support the GoN settlement team to implement settlement arrangement[s] and also contract manages the settlement service provider (Connect Settlement Services).

280. Supporting these managers at the regional processing centre were up to 12 additional departmental staff. As at 31 July 2015, these staff performed the following roles: two Service Delivery Support, Settlement Support Officer, Interpreter Coordination Liaison, Interpreter Support Officer, Intelligence/Welfare Officer, two Status Resolution, Security Liaison Lead, Infrastructure/CLO Support, Operations Support Officer, Admin Support Officer.

281. In the course of the *Plaintiff M68* proceedings, the Commonwealth confirmed that the departmental team in the regional processing centre occupies an office in RPC1. The officers wear official clothing bearing the insignia of the Australian Border Force of the Commonwealth and the coat of arms of the Government of Australia.¹³⁹

282. Further, as at 31 July 2015, there were twenty additional departmental staff who were working directly on Nauru regional processing and settlement matters in Australia.

(d) Practical involvement of the Commonwealth in the day to day operation of the regional processing centre

283. The contractual arrangements between the Commonwealth and service providers give the Commonwealth a high degree of involvement in, and supervision of, the day to day operation of the regional processing centre.

284. Focussing in particular on the Transfield contracts, Transfield is required to comply with the governance arrangements described in Schedule 1 to those contracts and with the performance management arrangements described in Schedule 6 to those contracts.¹⁴⁰ Those governance and performance management arrangements include the following:

Regular meetings in the regional processing centre between Transfield and the department

- Every day Transfield must attend a morning meeting with the department and other service providers.¹⁴¹
- Once a week, Transfield must attend a departmental review meeting with the department and other service providers to review the performance and service delivery in the regional processing centre.¹⁴²
- Once a week, Transfield must attend a meeting with the department and other service providers to identify transferees at risk.¹⁴³

- Once a month, Transfield must attend a consultative committee meeting with the department and other service providers.¹⁴⁴
- Once a month, Transfield must attend a facility level board meeting with the department and other service providers to review the effectiveness of governance arrangements, risks and issues affecting the facility.¹⁴⁵
- Transfield must also attend regular meetings with the department in relation to Work Health and Safety and security issues.¹⁴⁶

Direction and control by the department

- Transfield is required to cooperate with the department by actively participating in the meetings described above, by taking action to meet the needs of transferees and by assisting the department to meet its obligations.¹⁴⁷
- Transfield must provide updates, reports and briefings for these meetings, at the request of the department.¹⁴⁸
- Transfield must participate in these meetings, and must action agreed items resulting from all meetings, at the request of the department.¹⁴⁹
- Transfield is required to comply with directions of the Contract Administrator appointed by the Commonwealth that are consistent with the contract.¹⁵⁰ This will include directions by the Contract Administrator that are consistent with ensuring that each individual's human rights, dignity and well-being are preserved.¹⁵¹
- The Commonwealth may, in its absolute discretion, require Transfield to remove Key Personnel or Service Provider Personnel from work in respect of the services provided under the contract.¹⁵²

Performance reporting by Transfield to the department

- Every month, Transfield must submit a Monthly Performance Report to the department.¹⁵³ The report includes:¹⁵⁴
 - i. risk ratings, assessing the risk of non-compliance with each of Transfield's contract responsibilities
 - ii. performance ratings, assessing Transfield's performance against its contract responsibilities
 - iii. abatements (if applicable), for identified performance failures.
- The performance assessment process is designed to measure the extent to which Transfield's performance has contributed to the achievement of the department's Key Performance Indicators (KPIs).¹⁵⁵

- The KPIs and the department's expected outcomes include:¹⁵⁶
 - i. Welfare: The cultural, spiritual, social, mental and emotional wellbeing of transferees and transferee community is maintained and positively influenced by Transfield involvement where practical.
 - ii. Care: The physical wellbeing of transferees and the overall transferee community is maintained and positively influenced by Transfield involvement.
 - iii. Security: The safety, integrity and good order of the facility, its people and its operations are maintained.
- Transfield's performance for each KPI is assessed in the Monthly Performance Report against its particular contract responsibilities.¹⁵⁷ Failure to comply with contract responsibilities can result in financial abatements.¹⁵⁸

285. The Transfield contract also specifies that the department has 'management and control' of all dealings with the media, and with stakeholders and external parties such as industry groups, special interest groups, lobby groups and the community in relation to the delivery of services at the regional processing centre.¹⁵⁹

286. Transfield is prohibited from providing any information to any third party about a range of matters including the health or wellbeing of an individual or group of transferees other than:

- to direct any such inquiry to the department;
- as is specifically authorised by and to the minimum extent necessary to fulfil Transfield's obligation under the contract or to comply with the law; or
- as may be otherwise specifically authorised in writing by the department.¹⁶⁰

287. These provisions are not directed merely to the department being responsible for communicating what happens in the centre on Transfield's behalf. An implication from the previous two paragraphs appears to me to be that the department takes responsibility for all communications with external stakeholders because it considers that it is ultimately responsible for what happens within the centre.

288. I asked the department to provide copies of the minutes and documents tabled at the monthly board meetings between the department and Transfield from January 2014 to July 2015. The department provided the Commission with minutes of seven meetings between September 2014 and June 2015 described as meetings of the Offshore Processing Centre Garrison and Welfare Committee. These meetings take place in the department's premises in Canberra and involve between 6 and 10 senior officers of the department and between 4 and 6 senior officers of Transfield. Six of these meetings were chaired by the First Assistant Secretary, Infrastructure and Services Division of the department or a person acting in this role. The last of these meetings, following a restructure of the department, was chaired by the First Assistant Secretary, Detention Services Division.

289. The Operational Managers for the sites in the Nauru regional processing centre do not participate in these meetings. There are no representatives in these meetings from the Government of Nauru. The minutes and documents tabled at these meetings are almost entirely silent about the role of the Operational Managers. The only reference to an Operational Manager that the Commission could find is in Transfield's Business Services Update for November 2014 which described what appeared to be an exceptional circumstance in the following terms:

Engagement from the Government of Nauru Operations Managers in relation to staffing issues in Nauru presented as an issue during the month. Removal orders were imposed on four security staff by the Government of Nauru prior to the outcome of an investigation into allegations made.

290. The Terms of Reference for these meetings describe them as 'a tactical governance forum to analyse and respond to current and emerging issues on Nauru and Manus Island in relation to the management of the service provider contract'. The Committee monitors and evaluates the delivery of services. It also resolves issues escalated from the delivery level and associated committees.

291. Each meeting, Transfield presents a Garrison Services Update or a Security Update, which contains a security risk rating for each of the regional processing centres at Nauru and Manus Island. In the minutes of the first meeting for which the Commission has documents (September 2014), the security risk was described as 'green' (low) and continued: 'however it was noted that a number of transferees have been accommodated at the centres for close to 12 months and that anecdotally this is known as a point when transferees behaviour can be affected by prolonged detention'. The Garrison Services Update for that month notes that:

The key stressors at both centres continue to include:

- A. Close communal living
- B. Infrastructure space constraints
- C. Availability of water and required water restrictions in Nauru
- D. RSD [Refugee Status Determination] Processing Time
- E. Settlement Policies
- F. Mental illness as the average length of stay approached 365 days
- G. 19 July 2013 Trials.

292. The present complaints made to the Commission deal with some of these issues. The minutes relating to this report included items setting out action to be taken by the department in relation to the stressors identified as A, B and E above.

293. In the documents tabled at the second meeting for which the Commission has documents (October 2014), Transfield's Garrison Services Update described the reaction by detainees to announcements by the Commonwealth about changes to Australian immigration law, saying:

The underlying reaction to the reintroduction of TPVs and the non-eligibility of those in the offshore network to them was met on Nauru with increased incidents in the way of peaceful protests, self-harm and threats of voluntary starvation. These were only on Nauru and predominantly in the family centre (OPC3). ...

In response to the increased incidents in Nauru, Transfield Services has implemented a number of de-escalation strategies, contingency plans and resources to immediately respond and support Nauru and these can be categorised as welfare, intelligence and security led strategies. These strategies will continue to evolve as the mood and circumstances of the Nauru OPC do. Further, an additional 60 Security personnel were mobilised.

Tensions remain in Nauru however the likelihood of a violent incident occurring has decreased as at the writing of this report.

294. At the time the above report was made, all of the complainants were detained in the family centre (OPC3).
295. Transfield notes in the report that the department asked Transfield to respond to an emergency on 9 October 2014 and assist local Nauruan authorities. Transfield asked for clarification from the department as to how to reconcile its obligations to the department under the contract and additional obligations that may be imposed on its officers or subcontractors if they are appointed as Reserve Police Officers in Nauru. The clear implication from these minutes was that Transfield was concerned about its officers and subcontractors being subject to instructions from Nauruan authorities as well as the department. Transfield said:
- We are concerned that these appointments expose these individuals to act as police officers and to exercise powers over and above those contemplated by our contract with the DIBP and that the use of these powers to the full extent permitted or directed under Nauruan law would not necessarily be in line with our obligations to persons under Australian laws.
296. The department undertook to provide advice to Transfield ‘on reconciling the use of force as set out in the Contract, obligations to comply with Australian laws and standards and the requirement to comply with lawful directions from Nauruan authorities’.
297. Each meeting, Transfield presents a Welfare Services Update that, among other things, contains statistics dealing with the number of complaints and requests received each month and the number of complaints and requests ‘closed’ each month. In the report of the first meeting for which the Commission has documents (September 2014) there were 626 new complaints and requests received. The report notes that ‘Key C&R [Complaints and Requests] relates to property, complaints against other Asylum Seekers and complaints against staff (which are investigated and dealt with accordingly)’. The present complaints made to the Commission include complaints against staff.
298. I asked the department to provide copies of the Performance Management Framework and monthly performance reports submitted by Transfield to the department from January 2014 to July 2015. The department produced a joint service provider report, which was submitted in January 2014, and noted that this was the only report produced under clause 2.2.2 of the Transfield contract. It appears that reporting by individual service providers commenced in August 2014. The department produced 10 monthly reports from August 2014 to May 2015 (9 by Transfield and one by Save the Children).

299. On 18 December 2012, the department provided Transfield with a copy of the Regional Processing Centres Performance Management Framework. The Framework emphasised the importance of measuring outcomes to the management by the department of its regional processing centres:

To assist DIAC with effectively managing and understanding activities at its RPCs, the development of key measures regarding client and operational management are critical.¹⁶¹

300. In the Framework, there was a warning to the department to be cognisant that different service providers were likely to be motivated by different outcomes. For example, for NGO service providers a 'possible key motivation is a focus on client welfare' whereas for logistics service providers a 'possible key motivation is some form of financial based return, be it revenue/gross profit'. As a result, the Framework would include an incentive regime to 'encourage providers to set their performance goals beyond the minimum expectations of the contract and focus on the key outcomes for transferees'.¹⁶²

301. A Performance Pyramid prioritised 'DIAC's main client and operational objectives'.¹⁶³ At the top of the Performance Pyramid was client well-being.

302. The department has developed a reporting tool to facilitate the production of Individual Service Provider Reports.¹⁶⁴

303. At the October 2014 meeting, the month after reporting by individual service providers commenced, the department raised the issue of freedom of information requests and the potential public release of the performance metrics under the performance management framework. No action items are recorded in response to this issue.

304. Many of the performance metrics in these monthly reports are quantitative rather than qualitative. For example, in relation to incident management and reporting, Transfield is assessed on the percentage of critical, major and minor incidents that are reported within the timeframe set in the guidelines. In the first monthly report produced to the Commission (for August 2014), there were 54 major incidents reported and 222 minor incidents reported within contractual timeframes (100% and 97% respectively) giving Transfield a performance rating of 'meets expectations' in dealing with these incidents. Transfield does not appear to be measured in these metrics on the nature of its response (as opposed to the speed of closure).

305. It appears that other, possibly more detailed, reporting is done by Transfield. For example, in the monthly reports under 'collaboration and continuous improvement' Transfield is measured against the requirement to be 'responsive to external and departmental scrutiny in implementing DIBP-approved action items which are agreed between DIBP and the Service Provider in response to an external reports / reviews [sic]'. Under this metric, Transfield is measured on the proportion of 'open' action items which are either 'on track' or subject to a 'minor delay'. Each month under this metric, Transfield is described as having responded to 100% of its action items. Similarly, each month Transfield is described as having submitted 100% of its monthly reports on time to the department and attended 100% of its monthly meetings with the department.

306. I asked the department to provide a copy of the Offshore Processing Guidelines described in the Transfield contract.¹⁶⁵ The department provided a copy of the Guidelines dated 11 June 2013 (some parts of which included later updates). The department said that these Guidelines were ‘no longer in operation having regard to the adoption of open centre arrangements at the Nauru RPC’. I infer that the Guidelines were in operation up until the adoption of those open centre arrangements. The department asked that the Guidelines be treated in confidence ‘given their nature’. I am prepared to consider any more detailed submissions that the department would like to make about the identification and non-publication of confidential material in these Guidelines. The following material I do not consider could reasonably be regarded as being confidential.
307. The first part of the Guidelines confirms that the purpose of the Guidelines is to facilitate the operation of the regional processing centre and that the department’s contract administrator is responsible for endorsing all guidelines prior to their implementation. It says:
- Regional Processing Guidelines can be issued by the Department of Immigration and Citizenship (DIAC), as well as by any contracted service provider. The relevant Department Contract Administrator must endorse the guidelines prior to implementation.
- The aim of the guidelines is to facilitate the seamless operation of all Regional Processing Centres (RPCs), by outlining expected procedures for service provider staff, transferees, Departmental and other stakeholders in relation to operational and procedural requirements.
308. In relation to the management and reporting of incidents that occur within the regional processing centre, the Guidelines provide:
- Incident reporting is a vital communication tool to ensure that the respective Department and service provider Executive are kept fully informed of specific activities at service provider managed RPCs. ...
- A key component of the management of incidents will be the reporting to the Department by service provider personnel.
309. In relation to record keeping about the welfare of those detained at the regional processing centre, the Guidelines provide:
- The Department holds all service providers accountable for the provision of individual transferee records. The records must capture sufficient commentary and facts to support the analysis and tracking of the individual management of services for each transferee accommodated in a Regional Processing Centre (RPC). ...
- The Department requires that all service providers contribute to the creation and ongoing development of transferee records. Accurate transferee records help to ensure that service providers are responsive to the individual needs, wellbeing and rights of transferees, and that all interactions are conducted in a fair and reasonable manner.
310. In my opinion, the Guidelines reinforce the picture that emerges from the terms of the contract between the department and Transfield and the reporting documents described above, that the department is in practice primarily responsible for what occurs within the regional processing centre.

(e) Legal character of the Commonwealth's involvement in the operation of the regional processing centre

311. There are a number of legal issues that need to be resolved in order for any finding to be made by the Commission that the Commonwealth's human rights obligations extend to the treatment of people in the regional processing centre. These issues are:
- whether the Commonwealth is responsible for conduct by officers of the department and for conduct by Transfield under its contract with the Commonwealth (for the purposes of international law);
 - whether Transfield is acting 'on behalf of' the Commonwealth providing services to transferees at the regional processing centre (for the purposes of the AHRC Act);
 - whether the Commonwealth, through its contract with Transfield, exercises a sufficient degree of control over the regional processing centre or the people within the centre for the Commonwealth's human rights obligations to be engaged in relation to the treatment of people within the centre.
312. These issues are interrelated and depend to some extent on the examination of a similar range of factors.
313. The first issue is: what conduct is attributable to the Commonwealth as a matter of international law? Relevantly, the Commonwealth is responsible for conduct of State organs and for conduct by a person acting on the instructions of, or under the direction or control of the Commonwealth.
314. Under Article 4 of the ILC Articles, the conduct of any State organ shall be considered an act of that State under international law. A State organ includes an organ of the central Government of the State that exercises executive functions. On this basis, a federal government department is clearly an organ of the State. The Commonwealth will be responsible in international law for the acts of officers of the department acting in their official capacity,¹⁶⁶ including those officers posted in the regional processing centre who are responsible for the day to day management of contract with Transfield. For example, the Commonwealth is responsible for the actions of the Program Coordinator, the Operations Lead, the Operations Support Officer, the Service Delivery Lead and the Service Delivery Support Officers in carrying out their responsibilities within the centre in managing the contract with Transfield. These officers are based within the centre at RPC1 and are identifiable as Commonwealth officers by their Australian Border Force uniforms.
315. Generally, the conduct of private persons or entities is not attributable to a State under international law.¹⁶⁷ However, under Article 8 of the ILC Articles, the conduct of a person shall be considered an act of a State under international law if the person is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct. The terms 'instructions', 'direction' and 'control' are disjunctive. It is sufficient to establish any one of them.¹⁶⁸ In general, a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way. However, where private persons have committed acts under the effective control of a State, the condition for attribution will still be met even if particular instructions may have been ignored.¹⁶⁹

316. Transfield is accountable to the department to fulfil the obligations under its contract and is at risk of financial penalties if it fails to comply with these obligations. In practice, the department exercises a high degree of direction and control over the actions of Transfield. The department is involved with Transfield on the ground on a daily basis to ensure that Transfield is complying with the terms of its contract. It also exercises direction and control through regular reporting and monitoring of Transfield's compliance and through the issuing of the Regional Processing Centre Guidelines. Transfield is required to comply with instructions and directions from the department and performance reporting suggests that it invariably does so.
317. The matters raised in the present complaints are matters in respect of which the Commonwealth is able to, and does, instruct, direct and control Transfield.
318. I find that the conduct of Transfield pursuant to its contract with the Commonwealth is attributable to Australia under international law on the basis that Transfield is acting on the instructions of, or under the direction and control of, the Commonwealth.
319. The complainants submit that a similar finding should also be made in respect of Wilson Security staff acting pursuant to subcontracts with Transfield. The Special Case in the *Plaintiff M68* proceeding records that on 2 September 2013 and 28 March 2014, Transfield entered into agreements with Wilson Parking Australia (1992) Pty Ltd (**Wilson Security**) each entitled 'Subcontract Agreement General Terms and Conditions in relation to the Provision of Services on the Republic of Nauru'.¹⁷⁰ The Commonwealth gave approval for entry into these subcontracts on 26 July 2013 and 28 March 2014 respectively, as required by clause 6.1 of the Transfield Contract.¹⁷¹ The role of Wilson Security staff under their subcontracts with Transfield was described by Gageler J in his Honour's judgment in *Plaintiff M68* at [169]-[173] and by Gordon J in her Honour's judgment in *Plaintiff M68* at [333]-[337].
320. I consider that it may be open for me to find that the conduct of Wilson Security and its staff pursuant to the Wilson Security subcontracts with Transfield is attributable to Australia under international law. However, I have not been provided with a copy of the subcontracts and I do not make such a finding at this stage. I intend to ask the department for a copy of these subcontracts.
321. The second issue is whether Transfield (or Wilson Security) is acting 'on behalf of' the Commonwealth in providing services to transferees at the regional processing centre. The definition of 'act' and 'practice' in s 3(1) of the AHRC Act includes an act done or a practice engaged in 'by or on behalf of the Commonwealth or an authority of the Commonwealth'. If Transfield is acting 'on behalf of' the Commonwealth, then its acts (or failures to act) can be the subject of an inquiry under s 11(1)(f) of the AHRC Act.
322. Clearly acts by officers of the department at the regional processing centre in the course of their official duties are acts done by the Commonwealth. Transfield's contract with the Commonwealth provides that it is not, by virtue of the contract, an officer, employee, partner or agent of the department and that it does not have any power or authority to bind or represent the department.¹⁷² However, this is not a complete answer to the question about whether Transfield is acting 'on behalf of' the Commonwealth. In *Plaintiff M68*, for example, Gageler J described officers of Wilson Security contracted by Transfield as the 'de facto agents' of the Australian Government.¹⁷³

323. The phrase ‘by or on behalf of’ does not have a fixed legal meaning; rather it must be interpreted in the context of the Act or instrument in which the phrase appears. In particular, the phrase ‘on behalf of’ is capable of being used to refer to a wide range of relationships in which one person is ‘auxiliary to or representative of’ another person and the extent of that range in a particular case will depend on the context and subject matter of the relevant Act or instrument: *R v Toohey; Ex parte Attorney General (NT)* (1980) 145 CLR 374 at 386.
324. In *Burwood Area Community Housing Ltd v Sutherland Shire Council* [2006] NSWLEC 313, (2006) 146 LGERA 91, Preston J said at [27] that where the composite expression ‘by or on behalf of’ is used, ‘by’ will usually include an agency relationship and hence ‘on behalf of’ extends beyond an agency relationship. Preston J also referred (at [28]) to the decision of the New South Wales Court of Appeal in *Citizens Airport Environment Assn Inc v Maritime Services Board (NSW)* (1993) 30 NSWLR 207 in which the majority indicated (in the context of that case) that work may be considered to be done on behalf of another entity if it is done for that entity or in the interests of that entity (at least if the entity for whom the work is done maintains some control of or supervision over the activity).
325. In the decision in *R v Portus; Ex parte Federated Clerks Union of Australia* (1949) 79 CLR 428, it was held that Qantas was acting ‘on behalf of’ the Commonwealth in circumstances in which its function was to act ‘in the interests of’ the Commonwealth.
326. In *Ace Woollahra Pty Ltd v The Owners – Strata Plan No. 61424* (2010) 77 NSWLR 613, the NSW Court of Appeal decided that the expression ‘on whose behalf’ in ss 3A and 99 of the *Home Building Act 1989* (NSW) should be confined to cases where residential building work was undertaken by one party on a contractual basis for another party.
327. In my opinion, acts are carried out ‘by’ the Commonwealth if the officers or employees of the Commonwealth carry them out, or if they are carried out by agents of the Commonwealth. There is, in my opinion, a little more uncertainty about the types of relationship that a court would regard as circumstances in which an act is done ‘on behalf of’ the Commonwealth.
328. Notwithstanding the absence of a clear line in the characterisation of acts for the purposes of determining whether the acts were done on behalf of the Commonwealth, I consider that in the context of the AHRC Act, just as the conduct of Transfield is attributable to the Commonwealth under international law (on the basis that Transfield is subject to the instruction, direction or control of the Commonwealth), Transfield can be said to be acting ‘on behalf of’ the Commonwealth for the purpose of acts the subject of this inquiry under the AHRC Act into whether the Commonwealth has breached its international human rights obligations.
329. In a number of previous inquiries, the Commission has held that an act or practice undertaken by private service providers in detention centres pursuant to contractual arrangements with the Commonwealth were acts or practices taken on behalf of the Commonwealth for the purposes of the AHRC Act.¹⁷⁴ In each of those cases, the operators of the detention centres had been contracted to carry out public functions, namely the detention of unlawful non-citizens under the Migration Act. As the International Law Commission observed: ‘in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention’.¹⁷⁵ This may be sufficient for their conduct to be attributable to the State and regarded as done on behalf of the State.

330. Here, the Commonwealth has undertaken obligations under the first MOU with Nauru to establish a regional processing centre and to ensure that people transferred to Nauru will be treated with dignity and respect and that relevant human rights standards are met. While this undertaking may not be enforceable by Nauru, the Commonwealth gave the undertaking with the intention of acting on it. (Similarly, in his statement to Parliament of his reasons for thinking that it is in the national interest to designate Nauru to be a regional processing country, the then Minister said: '[w]hether or not the assurances [given by Nauru in the first MOU about *non-refoulement* of asylum seekers and assessing their claims to be a refugee] are legally binding, I expect that Nauru will act in accordance with them'.)¹⁷⁶ In furtherance of the undertakings it gave in the MOU, the Commonwealth established the regional processing centre and engaged Transfield to, among other things, provide a safe and secure environment for transferees and personnel, 'ensuring that each individual's human rights, dignity and well-being are preserved'.¹⁷⁷ This obligation imposed by the Commonwealth on Transfield reflects the Commonwealth's undertaking under the first MOU with Nauru to 'ensure that transferees will be treated with dignity and respect and that relevant human rights standards are met'.¹⁷⁸ Further, Transfield is required not to permit any act or omission that may cause the Commonwealth to be in breach of its MOU with Nauru or the Administrative Arrangements.¹⁷⁹
331. It appears that Transfield has been engaged by the Commonwealth to fulfil the Commonwealth's undertaking in the MOU to ensure that the human rights of transferees within the regional processing centre are protected. As noted above, the Commonwealth's Performance Management Framework provides that it is the role of service providers at the regional processing centre to 'implement [the department's] main client and operational objectives'. The first among these departmental objectives is ensuring the well-being of transferees. Similarly, pursuant to the Regional Processing Centre Guidelines, the department holds Transfield accountable for the provision of individual transferee records to ensure that Transfield is responsive to the individual needs, wellbeing and rights of transferees. I find that Transfield is acting on behalf of the Commonwealth in carrying out this role. Again, I consider that it may be open for me to find that Wilson Security was also acting 'on behalf of' the Commonwealth in carrying out its duties under the subcontracts with Transfield. However, I have not been provided with a copy of the subcontracts and I do not make such a finding at this stage.
332. The third issue is whether the Commonwealth, including through its contract with Transfield, exercises a sufficient degree of control over the centre or the people within the centre for the Commonwealth's human rights obligations to be engaged in relation to the treatment of people within the centre.
333. These issues have previously been considered by the Parliamentary Joint Committee on Human Rights (**PJCHR**) and the Senate Legal and Constitutional Affairs References Committee.
334. The PJCHR considered in detail the package of legislation which re-established offshore processing for asylum seekers who arrived in Australia after 13 August 2012. On the question of effective control, the PJCHR concluded as follows:

The committee notes that the evidence demonstrates that Australia could be viewed as exercising 'effective control' of the arrangements relating to the treatment of persons transferred to Manus Island or Nauru.¹⁸⁰

335. The Senate Committee considered whether the Commonwealth had effective control of the regional processing centre on Manus Island, Papua New Guinea.¹⁸¹ It concluded as follows:
- The committee considers that the degree of involvement by the Australian Government in the establishment, use, operation and provision of total funding for the centre clearly satisfies the test of effective control in international law ...¹⁸²
336. Australia has human rights obligations under the ICCPR (and, by extension, the CRC) in respect of anyone within its power or effective control.¹⁸³ The concept of effective control has been considered by a wide range of international bodies. In each case, whether a state is exercising effective control over a person will depend on the particular facts.¹⁸⁴
337. One situation, recognised in *Al-Skeini*, in which a State will exercise extra-territorial jurisdiction in the territory of another State is where, through the consent, invitation or acquiescence of the government of the territory, the first State exercises some or all of the public powers normally to be exercised by the government of the territorial State.¹⁸⁵ The management and operation of the regional processing centre is a public function. It is regulated by the RPC Act (N). It is clear from the terms of the legislation that it was intended that the Commonwealth would be involved in the exercise of this public function. The person responsible for managing the operations at the centre is the Operational Manager. The Act envisages that the Operational Manager can be given that responsibility either by the Commonwealth or by the relevant Nauruan Minister.¹⁸⁶
338. The RPC Act (N) provides that ‘service providers’ will be engaged by the Republic of Nauru or the Commonwealth to provide services within the regional processing centre.¹⁸⁷ All of the service providers engaged in the centre are engaged by the Commonwealth.
339. The RPC Act (N) provides that ‘staff members’ in the regional processing centre will be persons employed or engaged to provide services at the centre or to assist in any way in its management or operation.¹⁸⁸ The definition of ‘staff member’ includes any officer of the Republic of Nauru or the Commonwealth who has been assigned duties at the centre. At any time, there are between 12 and 18 officers of the Commonwealth assigned duties as staff members at the centre.
340. The involvement of the Commonwealth in the exercise of the public functions under the RPC Act (N) reflects the understanding between the Commonwealth and Nauru that they would both be responsible for the establishment and operation of the centre.
341. There was no Operational Manager appointed under the RPC Act (N) until November 2013. By that stage, the centre had been operating for more than a year on the basis of contractual arrangements between the Commonwealth and service providers under the supervision of Commonwealth staff members. When Operational Managers were appointed for each of the sites within the RPC, they were appointed by the relevant Nauruan Minister. The Operational Managers have promulgated Rules and, more recently have approved all asylum seekers to be eligible to participate in the open centre arrangements. However, it does not appear that these appointments have materially changed the way in which the centre operates in practice.

Neither the Operational Managers nor any representatives of the Republic of Nauru are involved in the monthly meetings to review and assess the performance of Transfield. Transfield, as the entity responsible for the welfare of transferees, remains directly accountable to the Commonwealth. Indeed, on the one occasion referred to in the minutes of Transfield's meetings with the department where the impact of the Operational Managers on staffing issues was raised, it was raised as a concern by Transfield and appeared to be exceptional.

342. It is clear that the concept of effective control is not limited to whether Australia has *de jure* control over a person or territory. As was noted by the UN Committee Against Torture, a State's jurisdiction will be engaged in 'situations where a State party exercises, directly or indirectly, *de facto* or *de jure* control over persons in detention'.¹⁸⁹ In *Al-Skeini*, the decisive factor in finding that the UK had jurisdiction was the physical power and control that the UK had over the applicants.¹⁹⁰
343. Here, Transfield appears to have exercised *de facto* physical power and control over the regional processing centre and over virtually every aspect of the lives of the complainants while they were detained at the centre. This included their entry to and exit from the centre, their food, their clothing, their accommodation and their security. The Commonwealth, in turn, instructs, directs and controls Transfield in the carrying out each of these obligations under its contract.
344. I find that the Commonwealth, including through its contract with Transfield, was exercising a sufficient degree of control over the regional processing centre and over the people within the centre (including the complainants) for its human rights obligations to be engaged with respect to the treatment of people within the centre.
345. As a result, I do not decide to discontinue the inquiry under s 20(2)(a) or (c)(ii) of the AHRC Act into the treatment of the complainants while they were detained at the regional processing centre.

5.4 Taking the complainants to Nauru

346. The third category of complaint made by the complainants relates to the decision to send families with young children to Nauru given the conditions in which they would be detained.
347. There are three things to consider:
- whether the decision to send the complainants to Nauru involved any discretionary decisions on the part of an officer of the department or the Minister;
 - if so, whether the decision engages Australia's *non-refoulement* obligations;
 - alternatively, whether the decision engages Australia's obligations to treat the best interests of the complainants' children as a primary consideration.

(a) Discretionary decisions

348. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken;¹⁹¹ that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.
349. There is a general statutory duty under s 198AD(2) of the Migration Act for an officer to take unauthorised maritime arrivals in immigration detention to a regional processing country as soon as reasonably practicable.
350. In a previous inquiry under s 11(1)(f) of the AHRC Act, Dr Melissa Perry QC (as she then was) acting as a delegate of the President indicated that it was her preliminary view that the question of whether it was ‘reasonably practicable’ to transfer unauthorised maritime arrivals to a regional processing country did not involve a discretionary decision by an officer about whether sufficient arrangements generally were in place in the country for the treatment of any persons taken to that country.
351. Dr Perry was considering a complaint received on 8 October 2012 on behalf of a number of people who had been taken to Nauru shortly after the designation of Nauru as a regional processing country. In her reasons, she relied on statements made by the Minister that were tabled in Parliament on 10 September 2012 about the arrangements that were in place or were to be put in place in Nauru for the treatment of people taken there.
352. On the question of whether it was ‘reasonably practicable’ to take someone to Nauru, Dr Perry concluded that:
- [W]here the Minister in compliance with s 198AC(2) tabled a statement in Parliament at the time of designating Nauru as a regional processing country which indicated that sufficient arrangements would be in place within three or four days of the date of the designation, an officer acting pursuant to s 198AD(2) was not required to reassess the question of whether it was reasonably practicable to transfer **any** unauthorised maritime arrival to Nauru where there was nothing to indicate that circumstances had materially departed from those described.
- (emphasis in original)
353. Further, Dr Perry noted that there was no complaint in that matter that the Minister had failed to make a determination under s 198AE that s 198AD did not apply to a relevant identifiable class of people (being a subset of all unauthorised maritime arrivals). However, she noted, it may be that a failure to make a determination under s 198AE in relation to a particular class of people could amount to an act or practice into which the Commission could inquire.
354. I do not express any opinion about the preliminary view formed by Dr Perry during the course of that inquiry. Ultimately the complaints were withdrawn and no final conclusions were reached.

355. I note that in respect of the present complaints there are a number of significant differences from the circumstances confronting Dr Perry in assessing that previous complaint. These differences include:
- By the time the present complainants were taken to Nauru, a significant amount of time had passed, which may require consideration of whether 'circumstances had materially departed from those described' in the statement tabled by the Minister when designating Nauru as a regional processing country.
 - On 9 October 2012, Papua New Guinea was designated as a second regional processing country and directions were made under s 198AD(5) about the circumstances in which people or classes of people should be taken either to Nauru or to Papua New Guinea, which required assessments to be made about the suitability of facilities and services in each location. At the time the complainants were transferred to Nauru, the relevant direction was one dated 29 July 2013.
 - In the present matter, the complainants have raised concerns about whether it was appropriate for a particular class of people, namely families with young children, to be taken to Nauru.
356. In the current circumstances, it is necessary to consider the following types of decisions:
- First, the decision about which regional processing country a person is to be taken to. This involves consideration of the direction given by the Minister under s 198AD(5) of the Migration Act.
 - Secondly, the decision about whether it is reasonably practicable to take a person to that country. This involves consideration of the guidelines issued by the Minister to officers of the department in relation to the conduct of a 'pre-transfer assessment' and, in the case of children, a 'best interests assessment'.
 - Thirdly, the decision about whether to exempt individuals or groups under s 198AE from the requirement that they be transferred to a regional processing country under s 198AD. This involves consideration of the guidelines issued by the Minister to officers of the department in relation to the referral of cases to the Minister under s 198AE.
357. There is a limited range of discretionary decisions that are able to be made by officers of the department pursuant to the guidelines issued by the Minister. In addition, there are discretionary decisions by the Minister to:
- give a direction under s 198AD(5) about which regional processing country to take a person to;
 - issue guidelines to departmental staff about how to make a pre-transfer assessment of whether it is reasonably practicable to take a person to that country;

- issue guidelines to departmental staff about whether to refer matters to the Minister for consideration of exempting individuals or groups under s 198AE from the requirement that they be transferred to a regional processing country under s 198AD;
- make determinations under s 198AE(1) about whether the requirement in s 198AD (that a person or class of persons be taken to a regional processing country) applies to a particular person or class of persons.

Deciding which regional processing country to take the complainants to

358. Where there are two or more regional processing countries, the Minister must give a written direction under s 198AD(5) specifying the regional processing country that an unauthorised maritime arrival, or a class of unauthorised maritime arrivals, are to be taken.
359. As noted above, on 29 July 2013, the Minister made a direction under s 198AD(5) specifying the regional processing countries to which particular classes of unauthorised maritime arrivals were to be taken. This direction was in force at the time the complainants were taken to Nauru. The identified classes were: family groups, single adult females, single adult males and unaccompanied minors. The direction provided that, unless the Minister otherwise directed, unauthorised maritime arrivals were to be taken to Nauru if:
- facilities and services are available for the class of persons of which the person is a member; and
 - there is vacant accommodation designated for the class of persons of which the person is a member and that vacant accommodation is greater than that available in Papua New Guinea; and
 - this does not result in any family group that all arrived together on or after 19 July 2013 from being split.
360. Equivalent conditions were imposed in relation to the taking of unauthorised maritime arrivals to Papua New Guinea.
361. In *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 (**Plaintiff S156**), the plaintiff (who had been taken to Papua New Guinea) challenged the validity of this direction. The plaintiff noted that s 198AD(5) of the Migration Act provided that where there were two or more regional processing countries, the Minister was required to direct an officer, in writing, to take an unauthorised maritime arrival (or a class of unauthorised maritime arrivals) 'to the regional processing country specified by the Minister in the direction'. The plaintiff argued that the direction made on 29 July 2013 did not comply with this requirement because it failed to specify only one country to which the plaintiff, or a class of unauthorised maritime arrivals, should be taken. The plaintiff argued that instead of specifying a regional processing country, 'the Minister set out an evaluative process that his officers could determine for themselves' and that the Minister therefore exercised his power in such a way that the result of the exercise was uncertain.¹⁹²

362. The High Court rejected this submission and said:

Given that an officer must comply with a direction, there must be sufficient specification in the direction to enable the officer to comply with it. The three conditions which the direction placed on removal involved simple inquiries, not an evaluative process as the plaintiff contends. In the case of the plaintiff, as a single adult male, the effect of the direction was that he be taken to PNG, *provided that there were facilities and services available for him there and that there was more accommodation for his class of UMAs there than in Nauru.*¹⁹³

(emphasis added)

363. The department refers to the first two sentences of this paragraph and relies on the statement that the role of the officer acting in accordance with the s 198AD(5) direction was not engaged in ‘an evaluative process’. However, as noted above, the High Court was addressing a submission that the direction lacked certainty. It was not considering whether or not there was any discretion vested in the officer acting in accordance with the direction.
364. The complainants submit that their circumstances are different from those of the plaintiff in *Plaintiff S156* who was a single adult male. In particular, they note that the department’s process in considering whether to transfer a minor to a regional processing country required additional assessments to be made by relevant departmental officers. These issues are considered in more detail below in the context of the pre-transfer assessments.
365. Significantly, not everyone who arrived in Australia by boat after 19 July 2013 was taken to a regional processing country. Although this was government policy, according to data provided by the department to the Commission there were 1,663 people who arrived after this date and who were not transferred to a regional processing country. 855 of these people, more than half, were family groups, consisting of 306 men, 250 women and 299 children. Of the children in family groups not transferred to a regional processing country, 239 of them were aged up to 10 years old. Since mid-2013, government policy has been not to transfer unaccompanied children or children in family groups to Papua New Guinea.¹⁹⁴
366. One explanation for these family groups and other arrivals ultimately not being transferred to Nauru is a change in government policy. On 25 September 2014, the then Minister for Immigration and Border Protection, the Hon Scott Morrison MP, announced that government policy would change following the passage of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).¹⁹⁵ After the passage of that Bill, asylum seekers who arrived in Australia by boat on or prior to 31 December 2013 and who had not already been transferred to Nauru or Manus Island would have their claims for protection assessed in Australia.
367. However, this change in policy does not explain why these family groups had not already been taken to Nauru. The data provided by the department suggests that a decision was initially made not to take these family groups to Nauru. One explanation for this may have been that there was either a lack of facilities and services for families or a lack of vacant accommodation designated for families (or both).

368. It is not clear how departmental officers assessed whether there were facilities, services and accommodation available on Nauru or Manus Island for the particular classes of people described in the direction under s 198AD(5). Nor is it clear whether this involved a substantive assessment about whether the facilities, services and accommodation were appropriate. It does not appear that there are specific guidelines published by the department instructing officers as to how to apply the direction. (The 2014 pre-transfer assessment guidelines merely state (at section 2): 'In determining to which RPC a person should be taken, officers should consider the direction made by the Minister under s 198AD(5) of the Act.')
369. It appears that a decision about these matters must have been made at some stage. I consider that it is arguable that such a decision involved a discretionary assessment by either the Minister or an officer of the department about the availability of facilities, services and accommodation for family groups on Nauru. I propose to seek from the department the information and documents relied upon to make the decision that the complainants be taken to Nauru rather than to Manus Island.

Deciding whether it was reasonably practicable to take the complainants to Nauru

370. The department has published guidelines for conducting 'pre-transfer assessments'. The purpose of these assessments is to determine under s 198AD(2) of the Migration Act, whether it is reasonably practicable to take a person to a particular regional processing country. In addition, the pre-transfer assessment forms are designed to identify cases that may need to be referred to the Minister so that he can consider whether to exercise his power under s 198AE(1).
371. At the time that pre-transfer assessments were conducted for Mr DE and his family, the relevant guidelines were those issued on 24 November 2012. Replacement guidelines were subsequently issued on 14 February 2014 which were in place at the time that pre-transfer assessments were conducted for Ms BK, Ms CO and their families.
372. The 2012 guidelines describe the requirement in s 198AD(2) in the following way (at sections 2 and 3):

Under s 198AD(2) of the Act, an officer must, as soon as reasonably practicable, take an offshore entry person to whom s 198AD applies from Australia to a regional processing country.

Although this creates an obligation to take a person without any decision or discretion to be exercised, it does require an assessment of whether it is reasonably practicable to do so.

...

This requires departmental officers to turn their mind to whether it is reasonably practicable in the circumstances of an individual offshore entry person to take that individual to an RPC.

373. The 2014 guidelines deemphasised the 'assessment' to be made by an officer of whether it is reasonably practicable to take a person to a regional processing country. They provide (at section 2):

The power conferred under s 198AD is not discretionary and must be exercised in relation to an UMA to whom s 198AD applies when it becomes reasonably practicable to take the person to an RPC. This instruction provides guidance on determining if and when this requirement has been fulfilled.

...

This requires officers to turn their mind to whether, in the UMA's individual circumstances, it is reasonably practicable to take the UMA to an RPC.

374. The 2012 guidelines described the assessment to be undertaken pursuant to s 198AD(2) in the following way (section 7):

A reasonably practicable assessment is essentially one of whether it is 'practical' to take the person to an RPC bearing in mind their physical and mental characteristics and logistical considerations including but not limited to:

- the physical or mental health of the person to be taken
- special needs that are identified including torture and trauma history
- their fitness to travel assessment
- vulnerabilities the person may have, including their age
- the resources and facilities available in the RPC to receive the person and to respond to any health issues, vulnerabilities or special needs the person may present (now and in the future)
- capacity to accommodate additional persons at any centre in an RPC
- the person having family members in Australia who need to be contacted for the purposes of possible application of s 199.

375. A similar list of criteria is included in the 2014 guidelines.

376. In her preliminary view of 2 August 2013, Dr Perry said (at [66]) that she did not consider that the requirement to assess whether it is 'reasonably practicable' for a person to be taken to a regional processing country for the purposes of s 198AD(2) was intended to undermine the Minister's designation of the country as a regional processing country by requiring that an assessment be made in each case of whether sufficient arrangements *generally* are in place in the country for treatment of any persons taken to that country.

377. Rather, the matters set out in the guidelines address issues 'relating to the individual circumstances of the particular person and operational constraints within the regional processing system which may affect certain classes of person such as women or children' (at [64]).

378. The 2012 guidelines provided (section 11) that minors who are part of a family unit should be considered as part of the pre-transfer assessment for that family group. Further, it provided that unless there are unusual circumstances an officer can consider that the best interests of a child who is part of a family will be to remain with that family group. The 2014 guidelines provide (section 9) that all minors, including accompanied and unaccompanied minors, require a 'best interests assessment' (**BIA**) to be conducted as part of the pre-transfer assessment. The reference to 'best interests' is to article 3(1) of the CRC which requires that in all actions concerning children (including by administrative authorities) the best interests of the child shall be a primary consideration.

379. It seems that BIAs were also conducted prior to the promulgation of the 2014 guidelines. The BIA involved completing a form titled 'Best Interests Assessment for Transferring Minors to an RPC'. In the case of Master DG, his BIA was conducted on 7 January 2014 using version 1.2 of the BIA form. In the cases of Miss BM and Master CQ, their BIAs were conducted on 2 and 23 May 2014 respectively using version 1.4 of the BIA form. Version 1.4 of the BIA form had been modified in accordance with a decision by the Minister recorded in a submission signed by him on 12 December 2014.¹⁹⁶

380. The department said that:

Where accompanied minors in family groups have been subject to transfer this assessment has been used to confirm that there are no barriers to the minor being transferred, including the availability of appropriate services and support arrangements at the OPC [Offshore Processing Centre]. Where it is determined that the minor requires specific services that are not yet in place, a recommendation can be made through the BIA that the minor's transfer be reconsidered at a later date.¹⁹⁷

381. The complainants submit that the departmental officers undertaking the BIAs were engaged in a process that required discretionary decisions to be made about whether or not there were any barriers to a minor being transferred and whether or not there were appropriate services and support arrangements at the regional processing centre. The complainants submit that if the process did not involve any discretionary decision, it would render the best interests process 'entirely colourable'.

382. The decisions made by the departmental officers in relation to each of the child complainants were that there were no reasons why the child should not be transferred to a regional processing centre at the time of the assessment. The complainants submit that these decisions were inconsistent with or contrary to their human rights, and in particular to the human rights of the particular children.

383. I consider that it is arguable that the pre-transfer assessments for the complainants, including the best interests assessments for the young children in each of the families, involved a discretionary assessment of whether particularly vulnerable people should be taken to Nauru. It appears that this assessment included a decision about whether there were barriers to the minor being transferred, including the availability of appropriate services and support arrangements at the regional processing centre on Nauru.

384. At this stage I do not make any findings about whether appropriate decisions were reached, however, I consider that it is arguable that there were discretionary decisions by officers of the department which engaged the human rights of the complainants.

Deciding whether to exempt the complainants from transfer

385. The Minister has the power under s 198AE(1) of the Migration Act to determine that the requirement in s 198AD to take a person to a regional processing country does not apply to a person or a class of people. The Minister may exercise this power if he thinks that it is in the public interest to do so.

386. In her preliminary view of 2 August 2013, Dr Perry said (at [80]) that she considered that it would be inconsistent with the intention of the provisions of the Migration Act dealing with regional processing and in particular the mandatory duty in s 198AD(2) for the Minister to make a determination under s 198AE(1) that applied to all unauthorised maritime arrivals. The particular complaint that she was considering did not raise the issue of whether the Minister had failed to make a determination under s 198AE that s 198AD does not apply to a relevant identifiable class of people (being a subset of all unauthorised maritime arrivals) (see [82]).
387. The present complainants say that they are part of identifiable class of people who were particularly vulnerable to being taken to a regional processing centre, namely, families with young children. The department has confirmed that no referral to the Minister was made for him to consider the exercise of his s 198AE power in favour of the complainants.
388. It is relevant to consider whether such a referral should have been made and whether the Minister should have exercised his discretion to make a determination under s 198AE that the requirement to take people to Nauru should not apply to the complainants in particular or to families with young children more generally.
389. I asked the department for copies of any submissions it had made to the Minister in the period from August 2012 until July 2015 that the Minister consider making a determination under s 198AE in favour of children or families with children. The department said that it had searched for but not identified any such submissions. It identified 43 submissions to the Minister in relation to the exercise of the Minister's powers under s 198AE. Of these, 41 concerned exempting people from transfer to a regional processing country to allow them to be removed from Australia under s 198 of the Migration Act. None of these people were exempted for the purpose of remaining in Australia. Of the remaining two submissions, one relates to a group from a venture that arrived just prior to the regional resettlement arrangement being announced by the government. This group was exempted from the regional processing arrangements. The department said that the final submission 'relates to the operational implementation of the [regional resettlement arrangement] for Papua New Guinea and is not considered relevant' to the question asked by the Commission.
390. The department notes that s 198AE(7) of the Migration Act provides that the Minister does not have a duty to consider whether to exercise the power under s 198AE(1) to determine that s 198AD does not apply to an unauthorised maritime arrival (or a class of unauthorised maritime arrivals), whether the Minister is requested to do so by any person, or in any other circumstances. The department submits that:

It is difficult to see how in these circumstances it could be concluded that the Minister 'should' have exercised his discretion to make a determination under s 198AE that the requirement to take people to Nauru should not apply to the classes of children or families with young children.

391. The department does not dispute that s 198AE gives the Minister a personal discretion to determine that s 198AD does not apply either to a particular unauthorised maritime arrival or to a class of unauthorised maritime arrivals. That is a sufficient basis for the Commission to have jurisdiction to inquire into an allegation that the discretion was not, but should have been, exercised in a particular case. The fact that the Migration Act provides that the discretion is non-compellable is not a sufficient answer to an allegation that a failure to exercise the power was inconsistent with or contrary to the human rights of a particular complainant. The Commission has not been asked to assess whether the Minister's failure to exercise his discretion was lawful under domestic law. Rather, the Commission has been asked to assess whether the Minister's failure to exercise his discretion was inconsistent with or contrary to the human rights of the complainants.
392. Whether there was any relevant discretionary act by the department will be affected by the guidelines given to the department by the Minister on 28 July 2013. The department notes that, pursuant to these guidelines, the Minister determined the circumstances in which he wished to be put in a position to consider exercise of the power under s 198AE(1) by the advice of departmental officers. The department says that those circumstances do not include that a person falls within the class of children or families with young children.
393. Section 1 of the guidelines includes a statement from the Minister confirming that 'I do not wish to consider the exercise of my public interest power in any case other than those set out in these guidelines'. The department submits that:
- The adoption of the guidelines by the Minister represents a decision by the Minister that if a case is assessed as not meeting the guidelines, the Minister does not wish to consider the exercise of the power. It was within the competence of the Minister to do so (see *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31 at [91]). In these circumstances, it is difficult to see how it could reasonably be said that despite the Minister making his position clear in the guidelines, he should nevertheless have exercised his discretion to make a determination under s 198AE in favour of children or families with young children.
394. This submission elides two issues. It was clearly within the competence of the Minister to direct his department about which matters to refer to him for the consideration of the exercise of his powers. The department cannot be criticised for complying with such guidelines. However, the decision by the Minister to issue guidelines in this form is a discretionary decision. It is an act into which the Commission may inquire. The fact that the making of the guidelines was lawful is not a sufficient answer to an allegation that it was an act that was inconsistent with or contrary to the human rights of the complainants.
395. As to the responsibilities of the department, the Minister's guidelines relevantly provide:
17. [M]y overarching position is that unauthorised maritime arrivals liable to be taken to a regional processing country should be so taken unless there are good reasons in the public interest for this not to be the case.
 - ...
 21. In accordance with the Government announcement of 19 July 2013, I do not expect to have unauthorised maritime arrivals who arrive after this announcement referred to me for consideration, unless they are persons who:

- in the opinion of the officer (whether or not the opinion is legally or factually correct), have made a credible claim that:
 - his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; or
 - there is a real risk that he or she will be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or have the death penalty carried out on him or her

against the regional processing country, or each regional processing country if there is more than one.

...

23. Independently of any circumstance pertaining to any individual offshore entry person, if the Department considers that operational reasons (including capacity constraints) in a RPC mean that it will not be reasonably practicable to take certain classes of offshore entry people to any RPC in the foreseeable future, it may bring that matter to my attention.
24. I have decided, in advance, not to consider the exercise of my power under section 198AE in relation to any other classes of case.

396. The decision by the Minister expressed in the guidelines that he will not consider the exercise of his power under s 198AE in relation to any other classes of case is a discretionary decision.

397. As a result, a relevant question for the Commission is likely to be whether, by failing to make a discretionary determination under s 198AE that s 198AD did not apply to the complainants or to a class of people including the complainants such as unauthorised maritime arrivals comprising families with young children, the Minister acted in a way that was inconsistent with or contrary to the human rights of the complainants.

398. For the reasons set out above, I consider that the decisions to send the complainants to Nauru involved:

- discretionary decisions on the part of officers of the Commonwealth responsible for assessing whether there were specific client circumstances or special needs that meant it was not reasonably practicable to transfer the complainants to Nauru;
- a failure by the Minister to make a discretionary determination under s 198AE that s 198AD did not apply to the complainants or to a class of people including the complainants such as unauthorised maritime arrivals comprising families with young children.

399. Whether any of those discretionary acts were inconsistent with or contrary to the human rights of the complainants are questions into which the Commission has jurisdiction to inquire.

(b) Relevant legal principles: non-refoulement under the ICCPR

400. An inquiry into whether there should have been a decision to exempt the complainants (or families with young children more generally) from transfer to Nauru does not engage the extra-territorial issues identified by the department. Any such decision would be an act that occurred in Australia.

401. The Commonwealth has an obligation not to send a person from Australia to another country where there is a real risk that the person would suffer irreparable harm in that country. This obligation is referred to as *non-refoulement*. Under the ICCPR, the *non-refoulement* obligation arises as a result of the obligation under article 2 to ensure the rights set out to 'all individuals within the State's territory and subject to its jurisdiction'. The UN Human Rights Committee has said:

the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.¹⁹⁸

402. In a series of cases, the UN Human Rights Committee has found that the *non-refoulement* obligation applies in the context of a potential breach of articles 6 (right to life) or 7 (freedom from torture and cruel, inhuman or degrading treatment or punishment) of the ICCPR.¹⁹⁹ In *Nakrash and Qifen v Sweden* the Committee put the relevant test for breach in the following way:

whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his removal ... there is a real risk that the author would be subjected to treatment prohibited by article 7.²⁰⁰

403. This formulation has been applied in other cases.²⁰¹

404. The application of this test in the context of a risk of breaches under articles 9 and 10 of the ICCPR (and article 37 of the CRC) is more problematic. The UN Human Rights Committee has held admissible claims that a person removed to a second country would be subject to a violation of articles 9 (arbitrary detention),²⁰² 10 (conditions of detention)²⁰³ and 14(1) and (3) (equality before the law).²⁰⁴ However, in none of these cases were the claims upheld on the merits. Australia has said that the obligation not to expose a person to a potential violation of rights in a second country extends to 'only the most fundamental rights relating to the physical and mental integrity of the person'. It said that these were the rights under articles 6 and 7 of the ICCPR.²⁰⁵

405. At this stage of the inquiry, it appears that a *non-refoulement* claim based on a real risk of conduct in another country that would be in breach of articles 9 or 10 of the ICCPR is arguable, that is, it is a legitimate contention and a complaint into which I may inquire. It is not one that could be characterised as misconceived or lacking in substance. Such claims have been held admissible by the UN Human Rights Committee. Whether such a claim can be made out is likely to involve factual questions about the degree of anticipated harm. As a result, I do not decide to discontinue the inquiry into this aspect of the complaint under s 20(2)(a) or (c)(ii) of the AHRC Act.

(c) Relevant legal principles: best interests of the child under the CRC

406. A related issue is whether in making the decision to send the complainants to Nauru, the Commonwealth treated the best interests of the children as a primary consideration as required by article 3 of the CRC.

407. As noted above, the best interests of the child will not always be the single, overriding factor to be considered. However, the child's interests must be the subject of active consideration. It needs to be demonstrated that children's interests have been explored and taken into account as a primary consideration.

408. Such an assessment is a mixed question of fact and law. This would require an assessment of the pre-transfer assessments for each of the children indicating how their interests were considered in relation to the decision to take them to Nauru. Given that this decision occurred in Australia, it does not raise the kinds of jurisdictional issues that the department considered should be determined on a preliminary basis.

409. I asked the department to provide me with copies of any documents created by or for the department from August 2012 to July 2015 that relate to whether or not children or families with children should be taken to Nauru pursuant to the regional processing provisions of the Migration Act. The department provided me with two submissions from the department to the Minister dealing with the BIAs that are conducted by the department to determine whether there are any reasons why a child should not be transferred to a regional processing country. Those submissions considered whether the BIAs complied with Australia's human rights obligations. One submission noted:

Consistent with the Government's policy in relation to the transfer of IMA minors to an OPC [offshore processing centre], two options for managing Australia's obligations under Article 3 [of the CRC] through the PTA [pre-transfer assessment] process have been identified. Both approaches are likely to be the subject of criticism as they do not provide for the full consideration of an individual minor's best interests in respect of the decision to transfer them to an OPC. A further option, involving full consideration of this factor with the child's best interests given the same weight as other national interests, is likely to result in recommendations against the transfer of a significant proportion of unaccompanied minors and would appear to be inconsistent with government policy objectives.

410. The department also provided me with the template for completing the BIA and guidance notes for officers of the department in completing the BIA. It appears from the documents provided to the Commission that the second of the first two options described in the departmental submission extracted above was adopted by the Minister.
411. These documents clearly link discretionary decisions about whether to send children to Nauru with Australia's human rights obligations under the CRC.
412. As a result, I do not decide to discontinue the inquiry into this aspect of the complaint under s 20(2)(a) or (c)(ii) of the AHRC Act.

6 Next steps

413. On 12 August 2015, I made a request for information and documents from the department that was limited to information and documents necessary to enable me to form a view on the question of the Commission's jurisdiction. I noted in that letter that, if I found that the Commission has jurisdiction to conduct an inquiry, I expected that the next step would be to make a further request for information and documents relevant to the substantive allegations made by the complainants. That is the course that I propose to adopt.
414. Enclosed with this decision on jurisdiction is a letter containing schedules of information and documents which I consider are relevant to my inquiry. I ask that the department provide me with copies of this material within 28 days.



Richard Lancaster SC
Delegate of the President
Australian Human Rights Commission

4 November 2016

Endnotes: Annexure C

- 1 The Hon Kevin Rudd MP, Prime Minister, "Transcript of broadcast on the Regional Resettlement Arrangement between Australia and PNG" Media Release, 19 July 2013. At <http://pandora.nla.gov.au/pan/79983/20130830-1433/www.pm.gov.au/press-office/transcript-broadcast-regional-resettlement-arrangement-between-australia-and-png.html> (viewed 9 September 2015).
- 2 Australian Human Rights Commission, 'Complaints from asylum seekers on Nauru and Manus Island', Media release (6 March 2013). At <https://www.humanrights.gov.au/news/stories/complaints-asylum-seekers-nauru-and-manus-island> (viewed 13 October 2015).
- 3 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136.
- 4 Ibid at [111].
- 5 Ibid at [109].
- 6 Ibid [112]-[113].
- 7 UN Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 at [10] (29 March 2004).
- 8 *Al-Skeini v United Kingdom*, Application no. 55721/07 (7 July 2011).
- 9 *Convention for the Protection of Human Rights and Fundamental Freedoms*, commonly referred to as the European Convention on Human Rights, opened for signature by the member States of the Council of Europe 4 November 1950, entered into force 3 September 1953.
- 10 *Al-Skeini* at [131], citing *Bankovic v Belgium*, Application no. 52207/99 (12 December 2001) at [71].
- 11 Ibid at [132].
- 12 *Al-Skeini* at [134].
- 13 See *Bankovic* at [73].
- 14 *Al-Skeini* at [135].
- 15 *Al-Skeini* at [135].
- 16 *Al-Skeini* at [136].
- 17 *Al-Skeini* at [137].
- 18 *Al-Skeini* at [137], cf *Bankovic* at [75].
- 19 *Al-Skeini* at [138].
- 20 UN Human Rights Committee, *Replies to the List of Issues (CCPR/C/AUS/Q/5) to be taken up in connection with the consideration of the Fifth Periodic Report of the Government of Australia (CCPR/C/AUS/5)*, UN Doc CCPR/C/AUS/Q/5/Add.1 (5 February 2009) at [16]-[17].
- 21 UN Committee Against Torture, *JHA v Spain*, Communication No. 323/2007, UN Doc CAT/C/41/D/323/2007 (10 November 2008). The Committee ultimately held that the complainant lacked competence to make the complaint because it had not obtained authorisation from the complainants.
- 22 UN Committee Against Torture, *General Comment No. 2, Implementation of article 2 by States parties*, UN Doc CAT/C/GC/2 (24 January 2008) at [16].
- 23 *JHA v Spain* at [8.2].
- 24 *Al-Saadoon and Mufdhi v United Kingdom* (dec.), Application no. 61498/08 (30 June 2009).
- 25 Ibid at [86]-[89].
- 26 *Al-Skeini* at [136].
- 27 Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, Situation of detainees at Guantánamo Bay, UN Doc E/CN.4/2006/120 at [11].
- 28 Preliminary View of Dr Melissa Perry QC at [135].
- 29 Referring to *Al-Skeini* at [131].
- 30 *JHA v Spain* at [8.2].
- 31 *Al-Skeini* at [136], referring to *Al-Saadoon and Mufdhi v the United Kingdom* (dec.), no. 61498/08, [86]-[89], 30 June 2009.
- 32 *Al-Skeini* at [136], referring to *Medvedyev and Others v France* [GC], no. 3394/03, [67].
- 33 *Al-Skeini* at [136].
- 34 *Jumbunna Coal Mine NL v The Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363 (O'Connor J).
- 35 *Birmingham University and Epsom College v Commissioner of Taxation (Cth)* (1938) 60 CLR 572.
- 36 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] (McHugh, Gummow, Kirby and Hayne JJ).
- 37 The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act. The CRC has been declared under s 47 of the AHRC Act to be an international instrument relating to human rights and freedoms for the purposes of that Act: *Human Rights and Equal Opportunity Commission Act 1986 - Declaration of the United Nations Convention on the Rights of the Child* (22 October 1992).
- 38 AHRC Act, s 3(4).
- 39 Commonwealth, House of Representatives, *Parliamentary Debates*, 1 June 1977, the Hon Bob Ellicott, Attorney-General, second reading speech for the Human Rights Commission Bill 1977 (Cth).
- 40 *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359 (Mason CJ and Gaudron J); *AB v Western Australia* (2011) 244 CLR 390 at 402 [24] (the Court).
- 41 *Bull v Attorney-General (NSW)* (1913) 17 CLR 370 at 384.

- 42 *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 at 423-424 (Dixon J).
- 43 *Simplot Australia Pty Ltd v Human Rights and Equal Opportunity Commission* (1996) 69 FCR 90 at 93-94 (Merkel J).
- 44 *Commonwealth v Sex Discrimination Commissioner* [1998] FCA 1607 (Branson J).
- 45 *Travers v State of New South Wales* [2000] FCA 1565 at [8] (Lehane J).
- 46 *Cameron v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 509 at 515 (Beaumont and Foster JJ), 519 (French J), considering s 22 of the *Racial Discrimination Act 1975* (Cth) as it then was; *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313 at 327-331 (Neaves J), considering s 46P of the AHRC Act.
- 47 *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 54 FLR 421 (Ellicott J) referring to equivalent terminology in the *Administrative Decisions (Judicial Review) Act 1977* (Cth), cited in *Cameron* above at 516.
- 48 *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313 at 329 [44]-[45] (Neaves J).
- 49 *Cameron v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 509 at 519 (French J).
- 50 *Ibid.*
- 51 *Proudfoot v Human Rights Commission* (1991) 100 ALR 557 at 566 (Neaves J); *Ellenbogen v Human Rights and Equal Opportunity Commission* [1993] FCA 570 (Whitlam J).
- 52 The function of conducting an inquiry under s 11(1)(f) is to be performed by the President: s 8(6) of the AHRC Act. This function may be delegated under s 19 of the AHRC Act to the Human Rights Commissioner or to another person (or body of persons) who is not a member of the Commission.
- 53 For comparison, see the interpretation given to the phrase 'may constitute a contravention' in the *Competition and Consumer Act 2010* (Cth) by the Full Court of the Federal Court in *Seven Network Ltd v Australian Competition and Consumer Commission* (2004) 140 FCR 170 at 182-183 [49(v)-(vi)] (Sackville and Emmett JJ, Tamberlin J agreeing).
- 54 UN Human Rights Committee, General Comment 8 (1982), *Right to liberty and security of persons (Article 9)*. See also *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003).
- 55 UN Human Rights Committee, General Comment 31 (2004) at [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) p 308, at [11.10].
- 56 UN Human Rights Committee, *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990); *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *Spakmo v Norway*, Communication No. 631/1995, UN Doc CCPR/C/67/D/631/1995 (1999).
- 57 UN Human Rights Committee, *A v Australia*, Communication No. 900/1993, UN Doc CCPR/C/76/D/900/1993 (1997) (the fact that the author may abscond if released into the community was not a sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).
- 58 UN Human Rights Committee, *Jensen v Australia*, Communication No. 762/1997, UN Doc CCPR/C/71/D/762/1997 (2001) at [6.2].
- 59 United Nations Children's Fund, *Implementation Handbook for the Convention on the Rights of the Child* (2008), pp 38-39.
- 60 Australian Government, *Report of the Expert Panel on Asylum Seekers*, August 2012, p 9 (Terms of Reference).
- 61 Australian Government, *Report of the Expert Panel on Asylum Seekers*, August 2012, p 11.
- 62 Australian Government, *Report of the Expert Panel on Asylum Seekers*, August 2012, pp 12, 47-49.
- 63 Australian Government, *Report of the Expert Panel on Asylum Seekers*, August 2012, pp 12 (at xviii) and 15 (recommendations 8 and 9).
- 64 Australian Government, *Report of the Expert Panel on Asylum Seekers*, August 2012, p 15 (recommendation 7).
- 65 Australian Government, *Report of the Expert Panel on Asylum Seekers*, August 2012, p 48.
- 66 Migration Act, Part 2, Division 8, Subdivision B, inserted by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth).
- 67 'Unauthorised maritime arrival' is defined in s 5AA of the Migration Act. When the regional processing provisions were first introduced, they applied to 'offshore entry persons'. For details of the change see the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth).
- 68 Migration Act, s 198AD.
- 69 Migration Act, s 198AF.
- 70 Migration Act, s 198AG.
- 71 Migration Act, s 198AE.
- 72 Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues, 29 August 2012.
- 73 Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues, 3 August 2013.
- 74 *Immigration Act 1999* (Nauru), s 9; *Immigration Act 2014* (Nauru), s 10. The *Immigration Act 2014* (Nauru) commenced on 28 January 2014.
- 75 *Immigration Act 1999* (Nauru), s 44 and *Immigration Regulations 2013* (Nauru), reg 4(1)(d); *Immigration Act 2014* (Nauru), s 33 and *Immigration Regulations 2014* (Nauru), reg 4(1)(d).
- 76 *Immigration Regulations 2013* (Nauru), reg 9(6)(a)-(c); *Immigration Regulations 2014* (Nauru), reg 9(6)(a)-(c). Regulation 9(6)(b) and (c) have since been repealed.

- 77 Special Case filed on 24 August 2015 in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, High Court of Australia proceeding M68 of 2015, at [26(dd)].
- 78 These conditions were consistent with the requirements of reg 9(6) of the Immigration Regulations 2014 (Nauru) as they stood at the time.
- 79 *Asylum Seekers (Regional Processing Centre) Act 2012* (Nauru) s 18C, inserted by the *Asylum Seekers (Regional Processing Centre) (Amendment) Act 2014* (Nauru), Schedule, item 7.
- 80 Republic of Nauru, *Government Gazette*, No 95, G.N. No 448/2014, 'Nauru Regional Processing Centre, Centre Rules, July 2014', 16 July 2014, rule 3.1.3.
- 81 Special Case filed on 24 August 2015 in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, High Court of Australia proceeding M68 of 2015, at [88]. I note that the special case was later amended to reflect changes to the open centre arrangements in October 2015: *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, [2015] HCATrans 255, pp 2-4, lines 1-60. See also: Government of the Republic of Nauru, 'Nauru commences open centre arrangements' Media release, 25 February 2015, at <http://www.naurugov.nr/government-information-office/media-release/nauru-commences-open-centre-arrangements.aspx> (viewed 10 December 2015); Department of Immigration and Border Protection, Offshore Processing Centre Garrison and Welfare Committee meeting, 26 February 2015, *Transfield Business Services Update* (agenda item 5), p 2.
- 82 Republic of Nauru, *Government Gazette*, No 142, G.N. No 634/2015, 'Regional Processing – Open Centre', 2 October 2015.
- 83 *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, [2015] HCATrans 255, p 4, lines 73-83.
- 84 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1 at [17]-[19] (French CJ, Kiefel and Nettle JJ) and [63] Bell J.
- 85 *AG v Secretary for Justice* [2013] NRSC 10. See also *Mahdi v Director of Police* [2003] NRSC 3 and *Amiri v Director of Police* [2004] NRSC 1 at [27] in relation to detention under the previous regional processing arrangements between Nauru and Australia.
- 86 *AG v Secretary for Justice* [2013] NRSC 10 at [22].
- 87 Immigration Regulations 2013 (Nauru), reg 9(6)(c); Immigration Regulations 2014 (Nauru), reg 9(6)(c).
- 88 *AG v Secretary for Justice* [2013] NRSC 10 at [54].
- 89 *Plaintiff M68* at [32] (French CJ, Kiefel and Nettle JJ); at [239] (Keane J).
- 90 *Plaintiff M68* at [34] (French CJ, Kiefel and Nettle JJ); at [196] (Keane J).
- 91 *Plaintiff M68* at [41] (French CJ, Kiefel and Nettle JJ); see also at [196], [199] and [239] (Keane J).
- 92 *Plaintiff M68* at [28] (French CJ, Kiefel and Nettle JJ); see also at [196] and [199] (Keane J).
- 93 *Plaintiff M68* at [83] (Bell J), and see also [92].
- 94 *Plaintiff M68* at [93] (Bell J).
- 95 *Plaintiff M68* at [172]-[174] (Gageler J).
- 96 *Plaintiff M68* at [276] and [352] (Gordon J).
- 97 Immigration (Amendment) Regulations 2012 (Nauru).
- 98 Immigration Regulations 2013 (Nauru), reg 9(1); Immigration Regulations 2014 (Nauru), reg 9(1).
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- 102 The International Law Commission Draft Articles on State Responsibility are not in themselves binding but are regarded in most respects as representative of customary international law which is binding upon all States: Triggs, G, *International Law: Contemporary Principles and Practices* (2nd ed) at [9.3] and Crawford, J, *Brownlie's Principles of International Law* (8th ed) p 540. Note also that the General Assembly has commended the ILC Articles on State Responsibility to the attention of governments without prejudice to the question of their future adoption or other appropriate action: GA Res 56/83, UN GAOR, UN Doc A/RES/56/83 (12 December 2001); UNGA Res 59/35, December 2004; UNGA Res 62/61, 8 January 2008 (deciding to examine the question of an international convention or other appropriate action on the basis of the articles), and UNGA Res 65/19, 6 December 2010 (deciding to include the question of a convention or other appropriate action on the basis of the articles).
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- 104 ILC Articles, article 5.
- 105 ILC Articles, article 6.
- 106 ILC Articles, article 8.
- 107 Explanatory Memorandum, Migration Amendment (Regional Processing Arrangements) Bill 2015 (Cth), Statement of Compatibility with Human Rights p 10.
- 108 ILC Articles, commentary to article 16, paragraph (6).
- 109 ILC Articles, commentary to article 16, paragraph (10).
- 110 See, for example, James Crawford, Special Rapporteur, International Law Commission, *Second report on State responsibility*, UN Doc A/CN.4/498/Add.1 at [169]-[170], [181] and [186].
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- 115 Republic of Nauru, *Government Gazette*, No 40, G.N. No 181/2013, 'Asylum Seekers (Regional Processing Centre) Act 2012 Commencement Notice', 12 March 2013.
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- 118 RPC Rules, rule 3.1.2.
- 119 Administrative Arrangements, cl 4.1.4.
- 120 Administrative Arrangements, cl 4.1.4.
- 121 Special Case filed on 24 August 2015 in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, High Court of Australia proceeding M68 of 2015, at [35].
- 122 Administrative Arrangements, cl 4.1.4.
- 123 Contract in relation to the Provision of Services on Nauru between the Commonwealth of Australia (represented by the Department of Immigration and Border Protection) and Transfield Services (Australia) Pty Limited, dated 1 February 2013 (2013 Transfield Contract).
- 124 Contract in relation to the Provision of Garrison and Welfare Services at Regional Processing Countries between the Commonwealth of Australia (represented by the Department of Immigration and Border Protection) and Transfield Services (Australia) Pty Limited, dated 24 March 2014 (2014 Transfield Contract).
- 125 Contract in relation to the Provision of Services at Regional Processing Centres between the Commonwealth of Australia (represented by the Department of Immigration and Citizenship) and Save the Children Australia, dated 5 August 2013 (2013 Save the Children Contract).
- 126 Contract in relation to the Provision of Services in Regional Processing Countries between the Commonwealth of Australia (represented by the Department of Immigration and Border Protection) and Save the Children, dated 1 September 2014 (2014 Save the Children Contract).
- 127 The department has provided me with an undated and unexecuted version of a contract between the Commonwealth and IHMS which I understand was in force throughout the relevant period: Regional Processing Countries Health Services Contract between the Commonwealth of Australia (represented by the Department of Immigration and Citizenship) and International Health and Medical Services Pty Limited (IHMS Contract).
- 128 2013 Transfield Contract, cl 17.12; 2014 Transfield Contract, cl 17.12; 2013 Save the Children Contract, cl 17.12; 2014 Save the Children Contract, cl 17.12; IHMS Contract, cl 66.6.
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- 131 2013 Transfield Contract, Sch 1, Part 5, cl 14.1.1; 2014 Transfield Contract, Sch 1, Part 3, cl 4.1.1.
- 132 First MOU, cl 12. The wording of the Second MOU is that the parties will 'treat transferees with dignity and respect and in accordance with relevant human rights standards', cl 17.
- 133 2013 Transfield Contract, cl 2.3.1; 2014 Transfield Contract, cl 2.3.1.
- 134 2013 Transfield Contract, Sch 6, cl 2.1.3; 2014 Transfield Contract, Sch 6, cl 4.1.1 and Table 1 setting out Key Performance Indicators around welfare, care and security.
- 135 Australian Government, Department of Immigration and Citizenship, *Regional Processing Centres Performance Management Framework*, p 4.
- 136 Letter from Contract Administrator, Detention Services Management Branch, Department of Immigration and Citizenship, to Transfield re Regional Processing Centre Performance Management Framework dated 18 December 2012.
- 137 2013 Save the Children Contract, Sch 1, Part 2, cl 2.1.1; 2014 Save the Children Contract, Sch 1, Part 2, cl 2.1.1.
- 138 Save the Children, 'Save the Children statement on Nauru tender outcome' Media release, 31 August 2015. At <https://www.savethechildren.org.au/about-us/media-and-publications/media-releases/media-release-archive/years/2015/save-the-children-statement-on-nauru-tender-outcome> (viewed 1 March 2016).
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- 141 2013 Transfield Contract, Sch 1, Part 7, cl 18.2.2(a); 2014 Transfield Contract, Sch 1, Part 4, cl 1.2.4(a).
- 142 2014 Transfield Contract, Sch 1, Part 4, cl 1.2.4(e).
- 143 2013 Transfield Contract, Sch 1, Part 7, cl 18.2.2(c); 2014 Transfield Contract, Sch 1, Part 4, cl 1.2.4(c).
- 144 2013 Transfield Contract, Sch 1, Part 7, cl 18.2.2(b); 2014 Transfield Contract, Sch 1, Part 4, cl 1.2.4(b).
- 145 2013 Transfield Contract, Sch 1, Part 7, cl 18.2.2(d); 2014 Transfield Contract, Sch 1, Part 4, cl 1.2.4(g).
- 146 2014 Transfield Contract, Sch 1, Part 4, cl 1.2.4(d) and (f).
- 147 2013 Transfield Contract, Sch 1, Part 7, cl 18.1.2 and 18.1.3; 2014 Transfield Contract, Sch 1, Part 4, cl 1.2.2 and 1.2.3.
- 148 2013 Transfield Contract, Sch 1, Part 7, cl 18.2.5; 2014 Transfield Contract, Sch 1, Part 4, cl 1.2.7.
- 149 2013 Transfield Contract, Sch 1, Part 7, cl 18.2.3; 2014 Transfield Contract, Sch 1, Part 4, cl 1.2.5.
- 150 2013 Transfield Contract, cl 4.3.1; 2014 Transfield Contract, cl 4.3.1.

- 151 See the contractual obligations in 2013 Transfield Contract, Sch 1, Part 5, cl 14.1.1; 2014 Transfield Contract, Sch 1, Part 3, cl 4.1.1.
- 152 2013 Transfield Contract, cll 5.3.1 and 5.7.1; 2014 Transfield Contract, cll 5.3.1 and 5.7.1.
- 153 2014 Transfield Contract, Sch 6, cl 14.1.1.
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- 162 Australian Government, Department of Immigration and Citizenship, *Regional Processing Centres Performance Management Framework*, p 10.
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- 167 ILC Articles, paragraph (1) of the commentary in relation to Article 8.
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- 169 ILC Articles, paragraph (8) of the commentary in relation to Article 8.
- 170 Special Case filed on 24 August 2015 in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, High Court of Australia proceeding M68 of 2015, at [17]-[21].
- 171 Special Case filed on 24 August 2015 in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, High Court of Australia proceeding M68 of 2015, at [22].
- 172 2013 Transfield Contract, cl 17.7.1; 2014 Transfield Contract, cl 17.7.1.
- 173 *Plaintiff M68* at [173] (Gageler J); see also at [323] and [354] (Gordon J).
- 174 Australian Human Rights Commission, *Yousefi family v Commonwealth* [2011] AusHRC 46 at [43]; *El Masri v Commonwealth* [2009] AusHRC 41 at [77]; *Complaints by immigration detainees against the Commonwealth and GSL (Australia) Pty Ltd* [2009] AusHRC 40 at [73]-[75]; *Mr Huong Nguyen and Mr Austin Okoye v Commonwealth and GSL (Australia) Pty Limited* [2007] AusHRC 39 at [48]-[49]; *Report of an inquiry into a complaint by Mr AV of a breach of his human rights while in immigration detention* [2006] AusHRC 35 at [8.2.1]; *Report of an inquiry into a complaint by Ms KJ concerning events at Woomera Immigration Reception and Processing Centre between 29-30 March 2002* [2004] AusHRC 27 at section 12(a)(ii).
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Further Information

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