



UNHCR
The UN Refugee Agency

UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013

UNHCR undertook a visit to the Republic of Nauru from 7 to 9 October 2013 to assess the progress by Australia and Nauru in implementing their commitments under the 1951 Refugee Convention since UNHCR's December 2012 and March 2013 visits and to review the reception conditions at the Regional Processing Centre (RPC).

Summary of key findings

UNHCR acknowledges a number of positive developments since its previous report, notably in relation to the establishment of the legal framework and implementation of refugee status determination (RSD) processing, and the considerable efforts made by officials and service providers to ameliorate the harsh conditions for asylum-seekers.

Notwithstanding these efforts, significant setbacks in RSD processing, reception conditions and the prospect of realizing a durable solution for refugees have taken place, including the 19 July riot and announcement that no refugees arriving by boat to Australia after 19 July will be settled in Australia.

In assessing the transfer arrangements in their totality, including the legal framework, operational approaches and the harsh physical conditions at the RPC, UNHCR was disappointed to observe that the current policies, conditions and operational approaches at the RPC do not comply with international standards and in particular:

- a) constitute arbitrary and mandatory detention under international law;
- b) despite a sound legal framework, do not provide a fair, efficient and expeditious system for assessing refugee claims;
- c) do not provide safe and humane conditions of treatment in detention; and
- d) do not provide for adequate and timely solutions for refugees.

UNHCR has the following serious concerns about the current transfer arrangements relating to:

I. Refugee status determination

Despite the recent implementation of a sound legal framework, there remain long delays in the processing of claims, with only one claim for refugee status having been finally determined and handed down in the 14-month period since the transfer of asylum-seekers from Australia to Nauru commenced in September 2012.

Delays in processing claims for international protection and the handing down of decisions are to the detriment of people seeking a fair, fast and efficient assessment of their refugee protection claims.



II. Legal and physical conditions of detention

The current Nauru policy and practice of detaining all asylum-seekers at the closed RPC, on a mandatory and open-ended basis, without an individualized assessment as to the necessity, reasonableness and proportionality of the purpose of such detention amounts to arbitrary detention that is inconsistent with international law.

The legal framework and physical conditions for the detention and treatment of asylum-seekers remain below international standards and, overall, do not provide for a safe, fair and humane standard of treatment for asylum-seekers transferred under the bilateral arrangements to the RPC.

Cumulatively, the conditions for asylum-seekers at the RPC, the slowness of RSD processing, the lack of clarity regarding RSD processes and the approximate timeframes for durable solutions for refugees create a deterrent effect that is punitive in nature for those affected.

III. Children

Overall, the harsh and unsuitable environment at the closed RPC is particularly inappropriate for the care and support of child asylum-seekers. UNHCR is also concerned that children do not have access to adequate educational and recreational facilities.

In light of the overall shortcomings in the arrangements, highlighted in this and earlier reports, UNHCR is of the view that no child, whether an unaccompanied child or within a family group, should be transferred from Australia to Nauru.

IV. Mental and physical health

UNHCR is very concerned about the physical and mental health of the asylum-seekers at the RPC.

Overall, the conditions of mandatory and arbitrary detention within a 'return-orientated environment', delays in RSD processing and the absence of clear durable solutions, if left unaddressed, will inevitably have a detrimental impact on the physical and psycho-social health of asylum-seekers, particularly vulnerable individuals.

V. Oversight and monitoring

The Interim Joint Advisory Committee, Nauru's accession to the Optional Protocol to the Convention against Torture, and the access provided to UNHCR and other international organizations are important oversight mechanisms. However, these mechanisms are no substitute for an independent national oversight body in Nauru that has the statutory power to monitor and oversee compliance with Nauru's international obligations.

VI. Durable solutions

UNHCR is deeply concerned that recognized refugees, including unaccompanied and separated children, will have little or no prospect of settlement in Australia, notwithstanding the shared responsibility of both Australia and Nauru to provide durable solutions. This is a particularly acute issue given that Nauru will be unlikely to provide long term and sustainable solutions for refugees in accordance with the 1951 Refugee Convention.

VII. Assisted voluntary returns

UNHCR supports programmes for assisted voluntary return of asylum-seekers, if decisions by asylum-seekers to return are fully informed and voluntary.

It is clear that some asylum-seekers at the RPC, who may be *bona fide* refugees or in need of complementary protection, may contemplate a return to their country of origin as a result of the uncertainty around RSD processing, the prospect of lengthy delays in accessing a durable solution and the harsh conditions at the RPC.

Taken together, these conditions create an environment which clearly encourages returns, rather than identifying and protecting refugees in accordance with the 1951 Refugee Convention.

VIII. Pre-transfer assessments

Due to the specific vulnerabilities of some of the transferred asylum-seekers observed by UNHCR at the RPC and the very fast turnaround for pre-transfer assessments, UNHCR's view is that the current pre-transfer assessments that are conducted in Australia within a targeted '48 hour' timeframe do not appear to adequately or thoroughly assess the individual needs of asylum-seekers, including children. Nor do they provide a considered assessment as to whether the nature of the facilities and services available at the RPC would be appropriate for the individual concerned or whether transfer should occur at all.

At the time of its visit, UNHCR was particularly concerned by the presence of unaccompanied children who had been transferred inadvertently. This highlights the need for, and importance of, accurate and effective pre-transfer assessments.

I. Introduction

1. From 6 to 9 October 2013, a two person UNHCR team undertook a visit to the “Regional Processing Centre” (RPC)¹ at Nauru. This visit followed two earlier visits by UNHCR in December 2012 and March 2013.
2. UNHCR undertook these visits pursuant to its supervisory role under Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of the *1967 Protocol relating to the Status of Refugees* (together the ‘1951 Refugee Convention’), to which both Nauru and Australia are parties.
3. The core objectives of UNHCR’s visit were to: assess the extent to which Australia and Nauru are implementing their obligations under the 1951 Refugee Convention and other international human rights instruments; review reception conditions for asylum-seekers at the RPC; and meet with Nauruan officials to discuss the legal and operational implications of the transfer arrangements, with particular reference to Nauru’s commitments under the 1951 Refugee Convention.
4. During its visit, UNHCR met with senior officials from the Governments of Nauru (Department of Justice and Border Control) and Australia (Department of Immigration and Border Protection – DIBP), as well as senior staff of the key service providers: Transfield (logistics), Wilsons Security (security); International Health and Medical Services (IHMS) (health and medical services); The Salvation Army (case management and welfare); and Save the Children (education and child welfare). The team also met with a representative of the International Organization for Migration (IOM). The team did not have the opportunity to meet with staff of the Survivors of Torture and Trauma Assistance and Rehabilitation Service (STTARS), who are providing counselling to asylum-seekers, but were not located at the RPC.
5. UNHCR wishes to express its appreciation to the Government of Nauru for facilitating the visit, for the open and constructive spirit of discussions, and for its commitment to care for asylum-seekers transferred to Nauru, particularly in light of the considerable constraints imposed by its limited capacities and resources.
6. UNHCR appreciates the progress made by Nauru to develop an appropriate legal framework for refugee status determination (RSD), including detailed guidance for officials undertaking such assessments.²
7. UNHCR welcomes Nauru’s commitment to ensuring asylum-seekers have access to legal assistance in lodging their claims for asylum and access to an independent merit review process in case of a negative first instance decision, both of which UNHCR considers to be essential safeguards in an asylum procedure.

¹ During UNHCR’s visit, the RPC was referred to as the “Offshore Processing Centre” (OPC) by Australian immigration staff and service providers, notwithstanding that the Nauruan Government refers to it as the RPC, which is also the terminology used in Nauruan legislation and regulations, as well as in the bilateral MOU. For the purposes of this report, the term RPC will be used.

² Republic of Nauru, *Refugee Status Determination Handbook*, August 2013.

8. UNHCR acknowledges the significant efforts made by individual officials and service provider staff to ensure the treatment of asylum-seekers is as humane as it can be within extremely challenging conditions, in a remote and isolated location, and despite the legal and policy limitations.
9. As at 6 October 2013, there were 801 transferees on Nauru. All were detained at the RPC. There were 305 people in various family groups, with 125 women (some of them single) and 95 minors. Countries of origin of the asylum-seekers were as follows: Islamic Republic of Iran (291), Sri Lanka (186), Pakistan (107), Afghanistan (65), Iraq (40), Lebanon (31), Palestine (24), Somalia (17), Myanmar (16), Viet Nam (8), Malaysia (5), Sudan (5), Kuwait (3), Nepal (2), Egypt (1).
10. UNHCR reviewed progress in relation to recommendations it made following visits in December 2012, which were the subject of a public report, and March 2013, at which time UNHCR did not issue a public report.

II. Developments since UNHCR's visit in March 2013

11. Since UNHCR's visit in March 2013, the Government of Australia announced on 19 July 2013 that any asylum-seekers who arrived by boat to Australia on or after 19 July 2013 without prior authorization would not be settled in Australia if found to be refugees.
12. On 3 August 2013, the Australian and Nauruan Governments signed a new Memorandum of Understanding to supersede the Memorandum of Understanding dated 29 August 2012.³ Under the new MOU, Nauru undertakes to enable individuals found to be in need of international protection to settle in Nauru, "subject to agreement between the Participants on arrangements and numbers." This new MOU is subject to review on a 12-monthly basis.
13. Like the previous MOU, the 3 August 2013 MOU contains commitments on the part of Nauru in relation to *non-refoulement* obligations under international refugee law and international human rights law. Nauru commits to making a refugee status assessment or permitting such an assessment to be made. The Governments jointly commit to treating asylum-seekers with dignity and respect and in accordance with relevant human rights standards. The Governments further commit to developing special arrangements for vulnerable cases, including unaccompanied minors.
14. At the time of its visit in March 2013, UNHCR had noted a significant improvement to conditions as a result of the construction of the more permanent purpose-built accommodation which was more suitable for the climatic conditions, and which replaced the original tents seen at the time of UNHCR's December 2012 visit.
15. However, since UNHCR's visit in March 2013, a riot took place at the RPC on 19 July 2013 causing substantial damage to the buildings. At the time of the

³ *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.

visit, over 150 asylum-seekers were under suspicion in relation to the riot, with 75 individuals formally charged with offences under Nauru's criminal law.

16. The 19 July riot had a significant and negative impact on detention conditions in Nauru. According to Nauruan officials at the time of the visit, the general population of Nauru is now, as a result of the riot, less open to hosting single adult men or allowing them any degree of freedom of movement.
17. UNHCR understands that DIBP is undertaking an inquiry into the lead-up to the riot as well as to establish the facts of what happened.
18. UNHCR acknowledges and affirms the need for asylum-seekers to respect the local laws of Nauru,⁴ but welcomes assurances from the Government of Nauru that it intends to keep the RSD processing separate from any criminal charges arising from the riot, and from the conduct of an inquiry by the DIBP. UNHCR welcomes the commitment by Nauru to ensure a fair trial, including with legal representation for the asylum-seekers involved.
19. UNHCR understands that some of the charged individuals have received *pro bono* legal advice (from Australian lawyers), but there was no access to comprehensive legal advice at the time of UNHCR's visit.

III. Legal requirements for transfer arrangements

20. UNHCR acknowledges the complex challenges of irregular maritime movements faced by States. In particular, UNHCR has long advocated for stronger regional and international cooperation to address irregular maritime movements in a way that respects the legitimate concerns of States, but also the individual protection and humanitarian needs of those who resort to dangerous travel by sea, and who may be exploited by people smugglers.
21. In addressing these challenges, UNHCR's general position is that asylum-seekers and refugees should ordinarily be processed in the territory of the State where they arrive, or which otherwise has jurisdiction over them.⁵ All cooperation arrangements should build on and strengthen national asylum systems, not undermine or deflect responsibilities onto other States.
22. With these general observations in mind, UNHCR maintains its position that the physical transfer of asylum-seekers from Australia to Nauru, as an arrangement agreed by two 1951 Refugee Convention States, does not extinguish the legal responsibility of the transferring State (Australia) for the protection of the asylum-seekers affected by the arrangements. In short, both Australia and Nauru have shared and joint responsibility to ensure that the treatment of all transferred asylum-seekers is fully compatible with their respective obligations under the 1951 Convention and other applicable international instruments.

⁴ See Article 2 of the 1951 Refugee Convention.

⁵ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 1.

23. Where transfers take place nonetheless, UNHCR considers that the transfer arrangement needs to guarantee that each asylum-seeker:
- a) is individually assessed as to the appropriateness of the transfer, subject to procedural safeguards, prior to transfer. Pre-transfer assessments are particularly important for vulnerable groups, including unaccompanied and separated children. The best interests of the child must be a primary consideration;
 - b) is admitted to the proposed receiving State;
 - c) is protected against *refoulement*;
 - d) has access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection;
 - e) is treated in accordance with applicable international refugee and human rights law standards, for example, appropriate reception arrangements; access to health, education and basic services; safeguards against arbitrary detention; identification and assistance of persons with specific needs; and
 - f) if recognized as being in need of international protection, be able to enjoy asylum and/or access a durable solution within a reasonable time.⁶
24. As with other visits to the processing facilities in Nauru and PNG (Manus Island), for the purposes of this report, UNHCR assessed the conditions and treatment of asylum-seekers in Nauru against these criteria.
25. In addition, UNHCR has taken into account the terms of the bilateral MOU relating to the transfer of asylum-seekers which, as noted in paragraph 14 above, included the commitment by Nauru to make an assessment, or allow an assessment to be made, of claims for refugee status, and the commitment by both Governments to ensure that relevant human rights standards would be met.⁷

IV. Refugee status determination and other international protection obligations

i) Legal and regulatory framework

26. Nauru acceded to the 1951 Refugee Convention on 28 June 2011.
27. The Nauru *Refugees Convention Act 2012* establishes: a national legal framework for RSD under Nauruan law; an independent merit review tribunal; access to judicial review; and the requirement for natural justice and confidentiality in relation to refugee claims. The Secretary for Justice and Border Control is empowered to make the determination on the basis of recommendations made by Refugee Status Determination Officers (RSDOs) working under the Secretary.
28. UNHCR considers the legal framework established for RSD in Nauru to be sound and acknowledges the commitment and efforts of officials who were involved in drafting the relevant laws and regulations.

⁶ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3 (vi).

⁷ Clauses 17 to 19 of the *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.

ii) Processing of claims

29. Nauru has appointed a number of RSDOs as well as members of its Refugee Status Review Tribunal. The Nauruan RSDOs have received some technical training and receive mentoring from experienced Australian decision makers seconded to the Government of Nauru.
30. Processing of refugee claims commenced in March 2013. To date, eligibility interviews and RSD processing have been undertaken by Australian decision makers seconded to Nauru. At the time of UNHCR's visit in October 2013, the Nauruan RSDOs themselves had not undertaken any eligibility interviews or assessments. As a result of the riot, RSD interviews were suspended. No processing has taken place since 19 July 2013.
31. Given the relative inexperience of Nauruan officials, and the likely complexity of the claims present in Nauru, it is essential that experienced decision makers continue to provide close mentoring, supervision and support to ensure the fairness and accuracy of assessments, and overall quality control and assurance.
32. UNHCR's assessment is that the current expertise and experience of the Nauruan officials is not at a level where they are able to conduct fair and accurate assessments of refugee claims without substantial input from Australian officials.
33. UNHCR understands from a number of independent sources that as at 19 July several hundreds of RSD recommendations were in the process of being finalized, and that a significant number of these were to be positive determinations on refugee status.
34. UNHCR notes that the delays in finalizing and handing down decisions may have been as a result of a number of factors, including the 19 July riot, the change of government in both countries, and operational decisions to return asylum-seekers who had arrived before 19 July 2013 back to Australia, ostensibly to accommodate the transfer of future arrivals from the post-19 July period.
35. It is unclear how and when the asylum-seekers who are transferred back to Australia will receive an RSD, or the extent to which recommendations – both positive and negative – made pursuant to Nauruan law, will be managed in Australia.
36. During meetings UNHCR held with the asylum-seekers, they expressed significant concerns about processing, including in relation to:
 - a) delays in processing and finalization of claims;
 - b) broken commitments in relation to time frames for finalization of claims; and
 - c) confusion about who was responsible for the process in view of the fact that Australian immigration officers were conducting the interviews, even though they had repeatedly been told it was a Nauruan process.

37. It is an essential procedural safeguard that asylum-seekers should be informed of the procedure at the earliest possible stage and be kept well-informed throughout the procedure.⁸
38. UNHCR notes that the overarching purpose of the bilateral transfer arrangement is for the “processing” of asylum claims.⁹ In this regard, UNHCR considers the delays in processing and handing down decisions for asylum-seekers, some who have been on Nauru since September 2012, to be unacceptable. It is of deep concern that only one claim for refugee status has been finally determined in the 14 months since asylum-seekers were initially transferred to the RPC, and this was in an exceptional case of an unaccompanied minor who was being transferred back to Australia.
39. UNHCR has been advised by the Government of Nauru that it will be assessing claims for international protection in order of eligibility interview, which in principle is held in order of date arrival in Nauru, unless a particular vulnerability is identified which requires prioritized processing.
- iii) Complementary protection and statelessness
40. Nauru is a party to the *1989 Convention on the Rights of the Child*; the *1979 Convention on the Elimination of All Forms of Discrimination against Women*; and the *1989 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (and its *Optional Protocol*). Nauru has signed but not ratified the *1966 International Covenant on Civil and Political Rights*. Nauru is not a party to the *1954 Convention relating to the Status of Stateless Persons* or the *1961 Convention on the Reduction of Statelessness* (together, the ‘Statelessness Conventions’).
41. Nauru has not yet codified its complementary human rights obligations, nor introduced a statelessness status determination procedure.
42. The Nauru Refugee Status Determination Handbook provides decision makers with comprehensive guidance in relation to refugee status, and allows for the provision of complementary protection on a discretionary basis.
43. As noted above, UNHCR is of the view that Australia’s responsibilities under applicable international instruments to which it is a party remain engaged and cannot be extinguished by the physical transfer of asylum-seekers to Nauru.
44. On this basis, UNHCR recommends that the Governments of Nauru and Australia clarify how the question of statelessness persons will be dealt with and resolved. In the meantime, Australia’s obligations to such persons in accordance with the Statelessness Conventions remain extant.
45. Although Nauru has provided its assurance to Australia under the MOU that it will not return an asylum-seeker to a country where he or she will be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty, Nauru has not codified

⁸ Global Consultations on International Protection/Third Track: *Asylum Processes (Fair and Efficient Asylum Procedures)*, para. 50 (G).

⁹ See *MOU 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, paras. 9, 19 (b).

these complementary international human rights law obligations into its domestic law or set out a process for determining whether an individual is in need of complementary protection.

46. UNHCR recommends that Nauru takes the necessary action to implement complementary protection covering all asylum-seekers who are found not to be refugees, but are in need of international protection.

Recommendations: Refugee status determination and other international protection obligations

- A. RSD processing needs to be undertaken as expeditiously as possible and asylum-seekers advised of the outcome of their claim.**
- B. The Government of Nauru needs to recommence RSD processing as soon as possible at the RPC.**
- C. The Government of Nauru should not withhold the outcome of RSD processes from individuals on criminal charges, notwithstanding that these individuals remain subject to the criminal law of Nauru.**
- D. Regarding RSD for individuals who are returned to Australia from Nauru, the Government of Australia should take into account any assessments and recommendations made by the Government of Nauru to ensure that subsequent RSD in Australia is completed as efficiently and effectively as possible, taking into account findings made by Nauru.**
- E. The Governments of Nauru and Australia should both respectively finalize and disseminate as a matter of priority clear information to asylum-seekers about their legal rights and entitlements, and provide counselling on the procedures which will be followed to assess their claims for refugee status, including the legal basis, the decision-making authority and the indicative time frame for these various steps.**
- F. Additional and specific support should be provided to vulnerable persons, including children, to ensure they are able to fully understand and benefit from RSD processes and procedures.**

V. Legal and physical conditions of detention

i) International legal standards

47. The right to liberty and security of person¹⁰ and freedom of movement¹¹ are fundamental rights enshrined under international human rights law, including

¹⁰ See Articles 3 and 9 of the UDHR and Article 9 of the ICCPR.

¹¹ See Article 12 of ICCPR, which covers the right to freedom of movement and choice of residence for persons lawfully staying in the territory, as well as the right to leave any country, including one's own.

under the *1966 International Covenant on Civil and Political Rights* (which Nauru has signed and Australia is a party to) and the *1948 Universal Declaration of Human Rights*.

48. In addition to these rights, the 1951 Refugee Convention provides for the non-penalisation of refugees and asylum-seekers¹² and for the freedom of movement and choice of residence for refugees lawfully in the territory, which includes asylum-seekers.¹³ The applicable legal framework and standards are found in UNHCR's *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012*¹⁴ (Detention Guidelines).
 49. In relation to the detention of asylum-seekers, 'detention' refers to the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.¹⁵
 50. Although UNHCR acknowledges that detention of asylum-seekers is not prohibited under international law *per se*, it is only lawful if it is:
 - a) pursued for a legitimate purpose of protecting public order, public health or national security;
 - b) necessary in the individual case (requiring an individualized assessment of the asylum-seeker);
 - c) reasonable in all the circumstances (requiring an assessment of any special needs of the individual); and
 - d) proportionate to a legitimate purpose.
 51. Further, it is noted that consideration of alternatives to detention forms part of the overall assessment of the necessity, reasonableness and proportionality of detention in any given situation.
 52. In relation to reception conditions put in place by States for asylum-seekers, UNHCR's Executive Committee of the High Commissioner's Programme has recommended, among other things, that reception arrangements be guided by respect for 'human dignity and applicable international human rights law and standards'.¹⁶
- ii) National regulatory framework
53. The *Asylum Seekers (Regional Processing Centre) Act 2012* ('RPC Act') is the relevant Nauruan law regulating the operation of centres at which asylum-seekers are required to reside. The RPC Act establishes certain protections for

¹² See Article 31 of the 1951 Refugee Convention, in particular Article 31(2) which provides that restrictions on movement shall not be applied to refugees (or asylum-seekers) who have entered irregularly, other than restrictions which are necessary, and such restrictions shall only be applied until the individuals status is regularized or they gain admission to another country.

¹³ See Article 26 of the 1951 Refugee Convention.

¹⁴ See UNHCR's *Detention Guidelines: guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012*.

¹⁵ See UNHCR's *Detention Guidelines: guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012*.

¹⁶ *Conclusion on reception of asylum-seekers in the context of individual asylum systems*, 8 October 2002, No. 93 (LIII) - 2002, available at: <http://www.refworld.org/docid/3dafdd344.html>. See generally UNHCR, *Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, 4 September 2001, EC/GC/01/17.

transferred asylum-seekers; sets out obligations of transferred asylum-seekers; imposes duties on the person managing operations at a centre; and appoints the Minister for Justice as guardian of certain children.

54. The *Immigration Regulations 2013* provide that asylum-seekers transferred to Nauru are issued with 'regional processing centre visas' and are required to reside and remain at premises specified in the visa or at areas notified by a service provider.¹⁷
55. Upon being granted refugee status, the *Immigration Regulations 2013* require the person to reside (but not remain) in 'premises notified to the holder by a service provider as being premises set aside for the holder'.¹⁸
56. The Government of Nauru has indicated that, in principle, it hopes to establish open reception centres for all refugees.
57. UNHCR understands the Australian Government has agreed to commence the planning and consultation process in Nauru to establish post-processing accommodation for families who are found to be refugees. At the time of the visit, it was not clear to UNHCR what the situation for single adult male refugees would be.
58. The question of post-processing conditions, including any settlement services (which are addressed under Part IX of this report below), is a significant one for both Governments, and needs to be clearly articulated in a policy and operational framework to ensure all refugees receive the rights to which they are entitled under the 1951 Refugee Convention as well as other applicable international laws and standards.
59. UNHCR welcomes efforts made to ensure asylum-seekers are provided with excursions outside the RPC. However, while these excursions may ameliorate some of the serious consequences of prolonged detention, they do not alter UNHCR's primary assessment of the detention character of the RPC facilities themselves.
60. International legal standards require that decisions to detain, or to extend detention of, asylum-seekers at the RPC be in accordance with national laws.
61. In particular, those laws must prescribe minimum procedural safeguards, which are compatible with international human rights law including, but not limited to:
 - a) following an initial individualised decision to detain an asylum-seeker, asylum-seekers are given reasons for their detention in writing and receive regular periodic reviews of the necessity for the continuation of detention before a judicial or other independent authority to have the detention decision reviewed;
 - b) a maximum period for detention of asylum-seekers ought to be prescribed;

¹⁷ See *Immigration Regulations 2013*, sub-paragraph 9 (6). The *Immigration Regulations 2013* replace earlier regulations which allowed for limited freedom of movement after health and security clearances, and freedom of movement and work rights for asylum-seekers upon recognition as refugees without adverse security assessments, with requirement to reside in notified premises (see *Immigration Regulations 2000* (Nauru), reg 9A).

¹⁸ *Immigration Regulations 2013*, paragraph 6A.

- c) right to challenge the lawfulness of detention before a court of law at any time;¹⁹ and
 - d) persons in detention must be given access to asylum procedures and be provided with accurate legal information about the asylum process and their rights.²⁰
62. At the time of UNHCR's visit, asylum-seekers were subject to deprivation of their liberty, on a mandatory basis, in a closed place without an assessment as to the necessity and proportionality of the purpose of such detention in the individual case, and without being brought promptly before a judicial or other independent authority. This amounts to "detention" as defined in UNHCR's Detention Guidelines 2012.²¹ Some asylum-seekers had been there since September 2012, some 14 months, with only limited excursions.
63. When viewing the legal parameters and practical realities of the RPC in their totality, UNHCR is of the view that the mandatory detention of asylum-seekers in Nauru amounts to arbitrary detention. The absence of appropriate safeguards renders the detention arbitrary, which is inconsistent with international law. This is a very serious shortcoming that needs urgent attention by both Australia and Nauru.
- iii) Conditions at the RPC and lines of responsibility
64. At the time of UNHCR's visit, there were 801 asylum-seekers at the RPC, in three different locations, known respectively as RPC1, RPC2 and RPC 3.
65. All three RPC sites are in the centre of Nauru on the phosphate plateau, some distance away from the main population areas of Nauru,²² and surrounded by phosphate mining and construction work.
66. RPC1 is the site of the original RPC, which was largely destroyed during a riot and subsequent fire which took place on 19 July. Reconstruction of the purpose-built accommodation is well under way. The Australian Government has indicated that the new accommodation blocks at RPC1 will be used for staff rather than for asylum-seekers. A small number of asylum-seekers (2 men, 4 women and 4 children) were at the time of the visit housed at RPC1 in the medical facilities.

¹⁹ Article 9(4) ICCPR.

²⁰ See UNHCR Excom Standing Committee Conference Room Paper, *Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice*, June 1999, EC/49/SC/CRP.13, Figure 2; and UNHCR's *Detention Guidelines: guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, 28.

²¹ UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), [5]: 'For the purposes of these Guidelines, "**detention**" refers to the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.'

²² The Republic of Nauru is 21 square kilometers, with a population of around 10,000, most of whom live along a narrow coastal strip where the land is fertile.

Single adult men

67. RPC2 is divided into separate tent compounds known as Alpha, Bravo, Charlie and Delta. At the time of the visit, no asylum-seekers were being detained at RPC2 Charlie and Delta compounds.
68. Alpha compound is currently used to detain a significant number of single adult male asylum-seekers (including some UNHCR mandated refugees). At the time of UNHCR's visit, there were 411 detainees living in Alpha compound, including a mix of persons who arrived in Australia before and after the 19 July policy changes.
69. The perimeter of Alpha compound is marked by temporary fencing such as is characteristically used on construction sites. Within the compound, the ground surface is predominantly crushed white gravel, mixed with some areas of dark topsoil. There is no grass and very little, if any, vegetation of any other type inside the compound. The site is very hot, though it does receive some breeze, and reflection from the light coloured stones produces glare during the majority of the day. There is no natural shade in the compound.
70. Structures within Alpha compound include medium sized and large open-ended canvas tents sleeping between 7-10 individuals and approximately 50 individuals, respectively, on camp stretchers with minimal bedding. There is little privacy and few if any screens or divisions within tents.
71. Detainees are allowed some choice to decide their sleeping configurations and, accordingly, some tents are crowded with friendship groups seeking to be together, whilst some only house a few individuals. UNHCR observed that at least one tent had been substantially cleared as a prayer space.
72. While electricity and fans were available within most tents in the other compounds, there were no fans provided in Alpha compound.
73. UNHCR observed with concern that Alpha compound contains only eight toilets and two urinals for 411 asylum-seekers. Ten outdoor showers, without doors, are available. Water restrictions mean that showers are limited to four minutes per day. UNHCR was informed that water is trucked to the RPC daily.
74. Recreational areas within Alpha compound include some vacant, uncovered spaces, and at least one marquee-style roof covering an area with two backgammon tables and a table tennis table. A television is brought into the compound periodically by The Salvation Army staff in order to screen films.
75. UNHCR notes with concern that Alpha compound provides no opportunity for solitude and very little privacy. UNHCR did not observe any other sporting or recreational equipment in use by asylum-seekers at the time of the visit.
76. At the time of the visit, asylum-seekers were allowed one telephone call every four days and asylum-seekers in RPC2 had had no internet access since 19 July 2013, though the Government of Nauru advised internet access was going to be available again from mid-October.

77. Asylum-seekers raised the following issues of concern with UNHCR:
- a) a sense of hopelessness about the lack of finalization of their refugee claims;
 - b) confusion and lack of information about the RSD process and their future;
 - c) a sense of injustice that they were still in Nauru when others had been taken back to Australia;
 - d) cramped conditions, with little privacy;
 - e) lack of meaningful activities; and
 - f) lack of contact with family members at home.
78. As at the time of UNHCR's visit, Bravo compound housed 75 asylum-seekers (including some UNHCR mandated refugees), all of whom had been charged by the Nauruan authorities with various offences arising from the riot of 19 July.
79. At least six different culture and language groups are represented within Bravo compound.
80. On a smaller scale, Bravo compound has similar conditions to those present in Alpha compound. Recreational spaces and opportunities for meaningful activities are more limited than in the larger compound. There were no fans in the tents.
81. In addition to the broad concerns raised by the asylum-seekers in RPC2 (Alpha), asylum-seekers in RPC2 (Bravo), were despondent about their criminal charges, and raised the following concerns:
- a) lack of understanding of the criminal process (there had only been one public meeting about the process for those charged);
 - b) slowness of criminal process (less than 10 of those charged had to date given statements at the police station);
 - c) lack of legal advice (although some had received legal advice);
 - d) confusion about what was best for them to do, in face of advice from Australian refugee advocates not to speak to police;
 - e) treatment of some in prison after the riot, who claimed to have had their clothes removed, to have been beaten and to have had to sleep on the floor;
 - f) fear of Nauruan security guards in view of their anger at the riot;
 - g) stigmatization through separation from the balance of the asylum-seeker population despite no adverse findings or convictions having been reached; and
 - h) the failure of authorities to protect the RPC and the asylum-seekers during the riot.
82. These allegations relating to the criminal proceedings in paragraph 81 were not substantiated by UNHCR and lie beyond the scope of this report. However, they do raise significant issues that require further investigation by the relevant authorities.

Families, children and single adult women

83. RPC3 houses 305 individuals who are part of family groups or who are adult single women. There were 91 children, with the youngest four years old. All

the families had arrived in Australia after 19 July and then been transferred to Nauru.

84. Accommodation was being purpose-built for single adult females in dongas with double bunks, though was not ready at the time of the UNHCR visit.
85. At the time of UNHCR's visit, families were accommodated in large vinyl marquees, with individual family areas separated by vinyl partitions. There were several families in each marquee. There was wooden flooring and ceiling fans. There was no air conditioning.
86. UNHCR was shown an area with some vegetation that was being prepared as a recreational area for children.
87. UNHCR observed cramped conditions, with very little privacy, in very hot conditions, with some asylum-seekers sleeping on mattresses on the ground.
88. Asylum-seekers expressed the following concerns about the living conditions:
 - a) very cramped and hot conditions with no privacy;
 - b) presence of rats (which the UNHCR team witnessed first-hand);
 - c) the prevalence of family break-ups as a result of recriminations in relation to finding themselves in Nauru rather than Australia, with the men taking the blame for the transfers;
 - d) insufficient water; and
 - e) insufficient access to telephones and internet.
89. UNHCR noted that the conditions at the RPC 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.
90. Viewed as a whole, UNHCR considers that the conditions at the RPC, coupled with the protracted period spent there by some asylum-seekers, raise serious issues about their compatibility with international human rights law, including the prohibition against torture and cruel, inhuman or degrading treatment (article 7, ICCPR), the right to humane conditions in detention (article 10, ICCPR) and the right to family life and privacy (article 17, ICCPR).²³ These are matters that fall to the consideration of expert human rights bodies for closer assessment.
91. In light of UNHCR's findings, UNHCR notes with serious concern the intention to expand the RPC's capacity to 2,000.²⁴ UNHCR is of the view that the Governments of Australia and Nauru should not expand capacity at the RPC, given the harsh conditions at the RPC and the failure to meet international law standards.

²³ See Guideline 8: Conditions of detention must be humane and dignified, *UNHCR Detention Guidelines*, 2012, para. 48. See also the Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Ninth Report of 2013: Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation (2013)*, note 150, para. 2, and Australian Human Rights Commission, *Asylum seekers, refugees and human rights: snapshot report 2013*, page 17.

²⁴ See Media Release *Coalition's plan to increase offshore processing capacity at Nauru*, dated 30 July 2013.

92. UNHCR also notes that the RPC Act envisages the appointment of an RPC 'Operational Manager' who is given responsibility for managing operations at the RPC. The 'Operational Manager' has a statutory duty to ensure that each person at the RPC is 'treated in a fair and humane manner consistent with the law of Nauru' and provides detailed guidance on what is required for each asylum-seeker in the RPC, including, but not limited to, information about procedures, access to education for children, access to facilities for sending and receiving written correspondence in electronic form, access to an area where legal advice can be obtained in confidence and privacy. The list reflects a rights-based approach, consistent with international human rights law.²⁵
93. At the time of UNHCR's visit, there was no Operational Manager at the RPC. The Government of Nauru at the time advised it was in the process of recruiting a Nauruan Centre Manager. In the meantime, the senior DIBP official was the *de facto* Centre Manager.
94. UNHCR considers that the appointment of an Operational Manager is an important step to give greater accountability and transparency to the transfer arrangements.

Recommendations: Legal and physical conditions of detention

- G. Reception arrangements for asylum-seekers should respect human dignity and applicable international human rights law and standards.²⁶**
- H. The detention of asylum-seekers needs to respect international legal standards, including that the necessity to detain is assessed in each individual case according to the applicable criteria.**
- I. In the absence of necessary, reasonable and proportionate limitations arising from each individual case, asylum-seekers are entitled to, and should be provided with, freedom of movement and the RPC on Nauru should be made an open centre.**
- J. As to procedural standards, asylum-seekers need to be given reasons for their detention in writing and in a language they understand, and be allowed to challenge the decision to detain, with periodic reviews thereafter to ensure no one is detained longer than necessary, with express maximum periods for such detention.**
- K. UNHCR considers, as a matter of urgency, that conditions at the RPC 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.**

²⁵ *Asylum Seekers (Regional Processing Centre) Act 2012*, clauses 5 and 6.

²⁶ *ExCom Conclusion on reception of asylum-seekers in the context of individual asylum systems*, 8 October 2002, NO. 93 (LIII) – 2002, and the Global Consultations on International Protection/Third Track: *Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, 4 September 2001.

- L. In the case of families living together in marquees separated only by vinyl partitions, UNHCR recommends that accommodation be provided which allows for families to live with a higher degree of separation and privacy from others.**

VI. Children

95. As a matter of general principle, child asylum-seekers should not be held in closed detention. More particularly, and as noted above, Nauru is a party to the *1989 Convention on the Rights of the Child* (CRC) which sets out specific international legal obligations in relation to children and a number of guiding principles regarding the protection of children including, but not limited to, the following.²⁷
- a) the best interests of the child shall be a primary consideration in all actions affecting children, including asylum-seeking and refugee children (see Article 3 in conjunction with Article 22, CRC);
 - b) each child has a fundamental right to life, survival and development to the maximum extent possible (Article 6, CRC);
 - c) children should be assured the right to express their views freely and their views should be given “due weight” in accordance with the child’s age and level of maturity (Article 12, CRC);²⁸
 - d) children have the right to family unity (inter alia, Articles 5, 8 and 16, CRC) and the right not to be separated from their parents against their will (Article 9, CRC);
 - e) Article 22 of the CRC requires that States Parties take appropriate measures to ensure that children who are seeking refugee status or who are recognised refugees, whether accompanied or not, receive appropriate protection and assistance; and
 - f) Article 37 of the CRC requires States Parties to ensure that the detention of children be used only as a measure of last resort and for the shortest appropriate period of time.²⁹
96. At the time of UNHCR’s visit, there were 95 children detained at the RPC, including 91 children at RPC3.
97. Two asylum-seekers had been found to be below the age of 18 and were classified as unaccompanied children, one female and one male. UNHCR understands from Australian officials that they had not been taken knowingly to Nauru, and were going to be returned to Australia. Since UNHCR’s visit, the Government of Australia has announced that 3 unaccompanied minors are present on Nauru.³⁰

²⁷ See UNHCR’s *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 34-35.

²⁸ UNHCR, *Best Interests Determination Children – Protection and Care Information Sheet*, June 2008. UNHCR, *Guidelines on Determining the Best Interests of the Child*, May 2008, para. 20. UNHCR, *Field Handbook for the Implementation of UNHCR BID Guidelines*, November 2011. UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08 (UNHCR *Guidelines on International Protection on Child Asylum Claims*) para. 5. CRC *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6.

²⁹ CRC, art. 37 (b); *UNHCR Detention Guidelines*, guideline 9.2.

³⁰ Operation Sovereign Borders briefing, 15 November 2013. Transcript available at:

http://www.customs.gov.au/site/131115_osb_transcript.asp

98. UNHCR met with a number of the child asylum-seekers at RPC3 during the family group sessions. The children provided UNHCR with a number of drawings which expressed their distress at being detained in Nauru as a result of events and decisions outside their control.
99. Asylum-seekers expressed particular concerns about:
- a) the unnecessary and arbitrary detention of children;
 - b) the deteriorating mental health of children in the RPC, which was impacting on their ability to engage in educational activities;
 - c) the trauma caused to the children by being in detention;
 - d) the health and hygiene issues associated with the RPC, including skin and other infections, and lice infestations;
 - e) inadequacy of educational facilities;
 - f) the lack of suitable playing areas for children; and
 - g) lack of access to human rights institutions and lawyers.
100. UNHCR notes that educational and child welfare services were provided by Save the Children Australia to the best of their abilities, within the obvious constraints of space and detention policies. However, parents of the children advised that the children had not been going to school. A room had been set up for educational purposes, but it was too hot for the children to remain in it for any length of time. Outings to local schools had taken place, and negotiations were under way to secure access at the local schools for the asylum-seeker children.
101. While the children's rights to education,³¹ to rest and leisure, to engage in play and recreational activities are actively promoted at the Centre, UNHCR is deeply concerned by the transfer of children to a closed detention facility with no time limit for when freedom of movement may be achieved. An overall ethic of care – and not of enforcement – is the appropriate response for all interactions with asylum-seeking children.³²
102. During the visit, UNHCR was advised that the Governments of Nauru and Australia intend to transfer unaccompanied children to Nauru in the near future and that scoping work was being undertaken in this regard.
103. UNHCR shares the concerns of a number of organizations, including the Australian Human Rights Commission³³ and the Royal Australasian College of Physicians,³⁴ that it is inappropriate to send asylum-seeker children to offshore processing centres in remote locations, and that their mandatory and prolonged detention may be in breach of the CRC and other international human rights instruments.
104. UNHCR found that families with children were living in cramped, hot conditions, with little privacy.

³¹ See Article 22 of the 1951 Refugee Convention.

³² UNHCR *Detention Guidelines*, guideline 9.2.

³³ Australian Human Rights Commission, *Asylum seekers, refugees and human rights: snapshot report 2013*, p. 17.

³⁴ The Royal Australasian College of Physicians, *Statement on the health of people seeking asylum*, 23 August 2013.

105. Children have been transferred without an assessment of their best interests and without adequate services in place to ensure their mental and physical well-being.
106. At the time of UNHCR's visit, children were in closed detention, in difficult conditions, without access to adequate educational and recreational facilities, and with a lack of a durable solution within a reasonable timeframe.
107. On the basis of the harsh conditions at the RPC, UNHCR's view is that the current facilities and arrangements in place are inappropriate for the support and protection of children. Any transfer of UASCs would be highly inappropriate.

Recommendations: Children

- M. UNHCR recommends that the Government of Australia ceases to transfer children and their families to Nauru under current conditions.**
- N. UNHCR further recommends that no unaccompanied or separated child be transferred to Nauru.**
- O. If children are transferred, the Governments of Australia and Nauru should: (i) ensure they are treated in full respect of their rights under the CRC and other applicable instruments; (ii) prioritize their claims for international protection, which should be carried out by suitably qualified officials who are also able to conduct best interests determinations; and (iii) appoint an independent and qualified guardian as well as a legal adviser in the case of any unaccompanied or separated children.**

VII. Mental and physical health

108. In meeting with asylum-seekers, UNHCR heard many concerns about the perceived unfairness and discrimination by which approximately 33,000 asylum-seekers who had arrived by boat to Australia after 13 August 2012 (the date on which the Australian Government adopted a policy of 'offshore' processing) were eligible to be released into the community on Bridging Visas in Australia while they had been transferred to Nauru and were being held in closed detention.
109. This sense of injustice was exacerbated by the recent transfer of some asylum-seekers from Nauru back to Australia. Asylum-seekers did not understand the basis for transfer to Nauru, or transfer back to Australia. In particular, families in RPC3 expressed concerns for their mental health, especially in regard to their children) and one family group included a 72 year old man and a 64 year old woman, with a daughter with mental health issues.
110. According to medical and security staff, the sense of injustice, along with the hot and crowded detention conditions, a sense of isolation and abandonment, and a lack of information and clarity about their processing and future prospects, has led to widespread depression.

111. UNHCR found the morale of asylum-seekers extremely low as a result of uncertainty over and delays in processing and their futures, combined with the harsh conditions within the mandatory detention framework currently prevailing.
112. Staff advised UNHCR that there had not been any significant incidences of self-harm since 19 July 2013. However, in light of experience in Nauru, of processing in detention environments in other countries, including Australia, both States need to be vigilant about the rapid deterioration of psycho-social health of detainees as prolonged uncertainty continues.
113. UNHCR heard a number of accounts from asylum-seekers who appeared to be particularly vulnerable, such as a Rohingya woman who raised her concern that she was seven months' pregnant with what she believed to be twins, and was suffering from diabetes.³⁵
114. UNHCR understands that there are currently a number of pregnant asylum-seekers at the RPC.³⁶ The management of these cases will lead to challenges given the current limited capacities and resources at the RPC.
115. Asylum-seekers also raised a number of concerns with UNHCR, including:
- a) lack of adequate medical facilities, including for heart conditions, dental issues and, in one case, to address a metal plate embedded in one person's leg;
 - b) hygiene issues – many complained of skin conditions and other infections, including parasites and lice;
 - c) lack of a gynaecologist for the women;
 - d) lack of access to x-rays and other medical equipment; and
 - e) limited access to medication.

Recommendation: Mental and physical health

- P. All findings outlined in this report need to be addressed as a matter of priority, to ensure that the physical health and psycho-social well-being of asylum-seekers does not deteriorate further, which may reasonably be predicted if processing delays and uncertainty within the harsh conditions at the RPC remain.**
- Q. UNHCR recommends that all pregnant asylum-seekers be removed from Nauru, until such time as adequate medical facilities are available, together with appropriate accommodation.**

³⁵ According to media reporting on 8 November 2013, confirmed by the Minister for Immigration and Border Protection at the Operation Sovereign Borders press briefing on 8 November, this woman was subsequently transferred to Australia for scans and medical treatment, and gave birth to a single child by caesarean section in Brisbane on 6 November.

³⁶ See Legal and Constitutional Affairs Legislation Committee, 19 November 2013, Estimates, Immigration and Border Protection Portfolio, Australian Customs and Border Protection Service.

VII. Oversight and monitoring

116. UNHCR welcomes the existence of the Interim Joint Advisory Committee, which consists of representatives from both Governments and the Australian Immigration Minister's Council on Asylum Seekers and Detention as well as, more recently, the inclusion of the Australian Immigration Ombudsman.
117. UNHCR also welcomes Nauru's accession to the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) on 24 January 2013. The OPCAT commits the Government to establishing or designating an independent body to visit and review places in Nauru where people are deprived of their liberty and provides the UN Sub-Committee on the Prevention of Torture with unrestricted access to places of detention in Nauru. UNHCR urges the Government of Nauru to establish an independent body as a matter of urgency, so that a Nauruan independent oversight body is in place to monitor detention at the RPC.
118. The Government of Nauru has provided the International Red Cross and Red Crescent Movement, Amnesty International, UNHCR and other independent bodies with access to the RPC, which reinforces the principles of transparency and accountability of the transfer arrangements and reassures refugees and asylum-seekers that there are independent organizations monitoring their well-being and progress.
119. These developments are positive and welcome. Nonetheless, these are not a substitute for an appropriate national oversight body in Nauru that has the statutory power and independence to monitor and oversee compliance with international standards to which Nauru has committed.

Recommendations: Oversight and monitoring

- R. UNHCR encourages the Government of Nauru to establish or designate an independent national oversight body to monitor compliance with human rights obligations including, *inter alia*, under the OPCAT.**

IX. Durable Solutions

i) Pre-19 July asylum-seekers

120. Asylum-seekers who arrived in Australia prior to 19 July 2013 and who were transferred to Nauru, with the exception of those charged with criminal offenses under Nauruan law, were progressively being transferred from Nauru back to Australia. UNHCR understands such persons will be allowed to apply for Temporary Protection Visas and receive a refugee status determination in accordance with current Australian law.
121. As noted earlier, it is not clear to what extent refugee assessments and recommendations already undertaken in accordance with Nauruan law will be taken into account in Australia. It would be unsatisfactory if such claimants were required to have their claims reassessed *de novo* in view of the

substantial and substantive involvement of Australian officials in all aspects of the Nauruan asylum system.

ii) Post-19 July asylum-seekers

122. As noted above, the Australian Government's policy is that asylum-seekers who arrived to Australia after 19 July 2013 will not be able to settle in Australia. The 3 August 2013 MOU with Nauru envisages that some refugees may be able to settle in Nauru, although it is not clear from the formal arrangements whether Nauru is committed, or even capable of, offering long term and durable solutions to those to whom it owes protection under the 1951 Refugee Convention.³⁷
123. At the time of UNHCR's visit, Nauruan officials confirmed that the Government of Australia had advised asylum-seekers in Nauru that if they were found to be refugees, they would wait where they were until a resettlement place was found for them, and that if they were found not to be refugees, they would be required to return home.
124. In accordance with the 3 August 2013 MOU, Australia agrees to assist Nauru with settlement in a third safe country those found to be in need of international protection, and to assist with the removal of those who are found not to be in need of international protection. Overall, Australia commits to 'make all efforts to ensure that all *Transferees* depart the Republic of Nauru within as short a time as is reasonably necessary for the implementation of this MOU'.³⁸
125. There is, currently, considerable ambiguity about the options available to both States in offering protection to refugees.

iii) The international position

126. In its *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, UNHCR stipulates the need for States to guarantee that each asylum-seeker: '...if recognized as being in need of international protection, will be able to enjoy asylum and/or access a durable solution'.³⁹
127. The *Guidance Note* further stipulates that in addition to the *non-refoulement* obligation, the 'transferring State may retain responsibility for other obligations arising under international and/or regional refugee and human rights law. This would be the case, for example, where the reception and/or processing of asylum-seekers in the receiving State is effectively under the control or direction of the transferring State'.⁴⁰
128. For reasons stated in this and earlier reports, it is clear that Australia has retained a high degree of control and direction in almost all aspects of the bilateral transfer arrangements. The Government of Australia funds the

³⁷ P. Maley, *Coalition rules out end point of Nauru*, The Australian, 16 October 2013.

³⁸ *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*, clause 15.

³⁹ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2012, paras.3 (vi).

⁴⁰ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2012, para. 4

refugee status determination process which takes place in Nauru, seconds Australian immigration officials to undertake the processing and effectively controls most operational management issues. Logically, therefore, Australia's responsibility extends also to finding safe and timely solutions for refugees found to be in need of protection.

129. The current socio-economic and demographic identity in Nauru makes it very unlikely that recognized refugees will be able to find a sustainable, long term solution in Nauru itself.
130. In view of the essentially bilateral nature of the arrangements, and based on past experience, UNHCR believes it will be challenging for Australia and Nauru to secure the resettlement of those found to be in need of international protection to willing safe third countries.
131. In the absence of settlement opportunities in Nauru or in Australia, or an opportunity to resettle in third countries, refugees who are kept in detention or detention-like conditions will be unable to secure the full range of rights to which they are entitled under the 1951 Refugee Convention.
132. For these reasons, a clear strategy and plan needs to be developed by the two States setting out how long term solutions will be implemented in practice.
133. Unless and until resettlement can be found within a reasonable time in a willing third country, the legal responsibility for their protection under the 1951 Refugee Convention remains with both Contracting States.

Recommendation: Durable solutions

- S. The Governments of Nauru and Australia should develop a clear strategy and plan setting out how long term solutions for individuals in need of international protection will be implemented in practice.**
- T. In the absence of any viable resettlement solution, the Government of Australia should assume responsibility for such refugees in Australia.**

X. Assisted voluntary returns

134. As at 2 October 2013, and based on Operation Sovereign Borders press briefing information, 148 individuals had returned to their countries of origin on a voluntary basis, assisted by the Government of Australia. UNHCR notes that at the time of its visit to the RPC in October, IOM was not undertaking assisted voluntary returns as such, though an IOM representative was providing some limited counselling, securing 'consent to return' forms and identification documents, and providing reintegration assistance.
135. UNHCR supports the need for an assisted voluntary return programme to help any asylum-seeker return home at any time if he or she is not in need of international protection and wishes, voluntarily, to return home.

136. However, UNHCR is concerned that some asylum-seekers at the RPC who may be *bona fide* refugees, or in need of complementary protection, may contemplate a return to their country of origin as a result of the combined uncertainty around processes in Nauru, the prospect of lengthy delays in accessing a permanent solution, the harsh conditions, and the lack of the prospect of a durable solution.
137. UNHCR observed that there appears to be a pervasive climate at the RPC which places an overt emphasis on promoting return. Some of the public messaging from the Government of Australia supports this perception.⁴¹
138. UNHCR is deeply concerned that asylum-seekers in Nauru are under significant pressure to return to their countries of origin, including prior to the completion of RSD for the given individuals, which process would clarify the danger or otherwise that might be incurred by doing so. UNHCR also notes that some asylum-seekers are stateless or otherwise without the right to re-enter their countries of former residence.
139. UNHCR considers it essential that any returns be fully informed, truly voluntary, and not prompted by harsh detention conditions or uncertainty and protracted detention. The challenge of determining true 'voluntariness' in the current conditions of the RPC is likely to be increasingly difficult for those involved in assisted voluntary returns.
140. Pressure exerted by persons in authority to return, coupled with poor conditions, and/or the failure to correctly identify the 'voluntariness' of the asylum-seekers return, raises concerns around 'constructive *refoulement*' under Article 33 of the 1951 Refugee Convention.

Recommendation: Voluntary returns

- U. The Governments of Nauru and Australia should take immediate action to address the uncertainty around RSD processing, the prospect of lengthy delays in accessing a durable solution and the harsh conditions at the RPC. Taken together, these conditions create an environment which clearly encourages returns, rather than identifying and protecting refugees in accordance with the 1951 Refugee Convention.**

XII. Pre-transfer assessments

141. UNHCR notes the Australian Government's policy that all unauthorized maritime arrivals after 19 July 2013 to Australia will be transferred to either the RPC in Nauru or on Manus Island in Papua New Guinea, and that there will be

⁴¹ See Minister for Immigration and Border Protection, *Press Conference, Operation Sovereign Borders*, 11 October 2013: *they will not be coming to Australia, they will not be getting what they came for, that the people smugglers had ripped them off and they must now make decisions about what they do next, and the Australian Government will facilitate them returning home if they choose to do so.....Well, they got the message. I was pleased to learn while I was there that there are around 30 people who are already now in the process of looking to go back from where they've come....Offshore processing you know is working when people decide to go home.*

no exceptions, only postponement in cases where individuals are not 'fit to fly'. UNHCR also notes the Australian Government's determination, to effect transfers, where possible, within 48 hours of arrival in Australia.

142. As noted above in the Guidance Note, UNHCR is of the view that if transfers are to take place, the Government of Australia needs to conduct individual assessments:

*'...as to the appropriateness of the transfer, subject to procedural safeguards, prior to transfer. Pre-transfer assessments are particularly important for vulnerable groups, including unaccompanied and separated children. The best interests of the child must be a primary consideration.'*⁴²

143. UNHCR concurs fully with the assessment of the Royal Australian College of Physicians on 27 September 2013 that:

*'...an adequate medical assessment is not possible within 48 hours. Initial health assessments conducted on asylum-seeker arrivals involves taking a detailed history and conducting a thorough examination of the patient, identifying any chronic or acute conditions and ensuring immunisations are up to date. Conducting the health assessment once the person seeking asylum has arrived at the centre is just not acceptable.'*⁴³

144. UNHCR met with a number of apparently vulnerable individuals, including elderly individuals, children, a pregnant woman said to be suffering from diabetes, and survivors of torture and trauma in Nauru.

145. At the time of UNHCR's visit, the presence of two unaccompanied children who had been transferred inadvertently to Nauru raises questions about the thoroughness of the current pre-transfer arrangements.

146. The current rapid pre-transfer assessments period, which DIBP aspires to complete within 48 hours, is unlikely to provide adequate time to conduct proper fair assessments of vulnerable individuals. The current services on Nauru, together with the harsh environment in a mandatory and arbitrary detention environment, raise serious questions as to whether the current 48-hour 'fit to fly' assessment is appropriate to identify and then protect the rights of vulnerable individuals.

Recommendations: Pre-transfer assessments

V. Pre-transfer assessments conducted in Australia need to fully take into account the individualized needs of vulnerable individuals, including children, the elderly, survivors of torture and trauma, disabled persons and persons with specific health needs.

W. Pre-transfer assessments also need to contain a realistic assessment of

⁴² UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3 (vi) (a).

⁴³ The Royal Australasian College of Physicians, *Health of unaccompanied children in detention at risk*, Media Release, 27 September 2013.

the actual quality of support and capacities of service providers in Nauru, based on the individual needs of an asylum-seeker.

- X. All pre-transfer assessments regarding children require particular care and attention by officials, including a best interests determination.**

*UNHCR Regional Representation
Canberra, 26 November 2013*