

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

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Acknowledgements

Law Institute of Victoria

Law Society of South Australia

NSW Bar Association

Victorian Bar Inc

Law Society of New South Wales

Executive Summary

1. The Law Council welcomes the opportunity to provide the following comments to the Select Committee.
2. The Select Committee was established following the report of the *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru* (Moss Review)¹ which was conducted by Mr Philip Moss at the request of the then Acting Secretary of the Department of Immigration and Border Protection (DIBP), Mr Mark Cormack in October 2014. The Moss Review identified allegations of sexual and physical assault on asylum seekers, including children, at the Nauru Regional Processing Centre (RPC).
3. The Law Council's submission will respond to the following Terms of Reference for this inquiry.
 - (c) the Commonwealth Government's duty of care obligations and responsibilities with respect to the Centre;
 - ...
 - (g) any related matters.
4. The Law Council and its contributing Constituent Bodies, the Law Institute of Victoria (LIV), the Law Society of South Australia (LSSA), the Victorian Bar Inc, the NSW Bar Association (NSW Bar) and the Law Society of New South Wales (LSNSW), consider that the Commonwealth retains responsibility, either wholly or in part, for the health and safety of asylum seekers transferred to other countries for offshore processing and assessment under the *Convention relating to the Status of Refugees* (Refugee Convention).² This includes asylum seekers and refugees held at the Nauru RPC.
5. Australia's responsibility, identified by the Law Council, derives from the following channels:
 - (a) the Commonwealth's potential common law duty of care; and
 - (b) international law under the joint and several responsibility for internationally wrongful acts and Australia's effective control of its regional processing centres in relation to the extraterritorial application of human rights treaties to which it is party.
6. To address the related issue of preventing or lessening the future risk of physical and/or sexual abuse, the Law Council considers that:
 - (a) effective independent monitoring and review of detention centres, including those offshore, should be established; and
 - (b) asylum seekers and detainees applying for protection and those subject to physical and/or sexual abuse are provided with legal advice and representation.

¹ Philip Moss, *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru*, 2015 ('Moss Review').

² *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) and the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (collectively, 'the Refugee Convention').

Duty of care obligations and Responsibilities

7. Australia's duty of care obligations and responsibilities for the health and safety of asylum seekers at the Nauru RPC can derive from:
 - (a) contract;
 - (b) statute;
 - (c) common law; and/ or
 - (d) international law.
8. The Law Council notes that Australia's responsibility for asylum seekers at RPCs have been examined previously by Parliamentary and Departmental reviews and inquiries.
9. Most recently, in addition to the Moss Review, the former Secretary of the DIBP, Mr Martin Bowles PSM, initiated an independent review into the events of 16 - 18 February 2014 at the Manus Island RPC (Cornall Report).³ The events were subsequently examined in a Senate Legal and Constitutional Affairs References Committee Inquiry (Manus Island Inquiry).⁴
10. Despite the frequency of reviews and the commonality of the observations and recommendations, assaults and disturbances in immigration detention continue to take place. The Law Council considers that to minimise the occurrence of future incidents of sexual and/ or physical abuse and violence, detention centres should adhere to those standards of protection that are found in international law, rule of law principles and procedural fairness guarantees.
11. One of the Law Council's Constituent Bodies, the LSSA, considers that it would be appropriate to examine the following issues in relation to Australia's responsibility over the Nauru RPC:
 - (a) what legal and other measures are in place to ensure the rights of detainees are protected (whether under Australian law, through contractual or treaty arrangements with Nauru, or contractual arrangements with other relevant parties)?
 - (b) what measures are in place to ensure independent oversight and scrutiny of whether the Australia's obligations are being met?
 - (c) what measures are in place to ensure independent oversight and scrutiny of the obligations placed on Nauru and on third parties through agreements with the Commonwealth Government and under relevant international human rights principles?
 - (d) what process (if any) is available to ensure independent oversight and scrutiny of the Commonwealth Government's agreements and arrangements with Nauru and relevant third parties?

³ Robert Cornall AO, *Review by Robert Cornall AO into the events of 16-18 February 2014*, 23 May 2014.

⁴ Senate Legal and Constitutional Affairs References Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, 11 December 2014 ('Manus Island Inquiry').

- (e) what legal rights of access have been created to allow detainees, their representatives and representative organisations access to relevant information regarding conditions on Nauru, both generally and in respect of specific individuals?
- (f) what action has been taken (by way of contractual penalties or other responses) where the Commonwealth Government is aware that any of the obligations placed upon Nauru or third parties by relevant agreements have been breached?

12. The Law Council's *Asylum Seeker Policy*⁵ and *Principles Applying to the Detention of Asylum Seekers*⁶ identify rule of law principles and standards that may assist in addressing such issues. The Law Council also notes the following instructive guidelines issued by the United Nations:

- the *Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment*;⁷
- the *Standard Minimum Rules for the Treatment of Prisoners*;⁸
- the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*;⁹
- the United Nations High Commissioner for Refugees *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (UNHCR Detention Guidelines);¹⁰
- the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*;¹¹
- the *Basic Principles on the Role of Lawyers*;¹² and
- the *Basic Principles on the Independence of the Judiciary*.¹³

13. The NSW Bar considers that relevant to the conditions of detention identified by the Moss Review, the international standards that are being breached at the RPC include

⁵ Law Council of Australia, *Asylum Seeker Policy*, (6 September 2014) ('LCA Policy'), available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker_Policy_web.pdf

⁶ Law Council of Australia, *Policy Statement: Principles Applying to the Detention of Asylum Seekers*, 22 June 2013, available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Final_PDF_18_Oct_Asylum_Seekers_Principles.pdf

⁷ *Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment*, A/RES/43/173, 76th plen mtg, (9 December 1988), available at: <http://www.un.org/documents/ga/res/43/a43r173.htm>

⁸ *Standard Minimum Rules for the Treatment of Prisoners*, (30 August 1955), available at: <http://www.refworld.org/docid/3ae6b36e8.html>.

⁹ *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, A/RES/45/113, 68th plen mtg (14 December 1990), available at: <http://www.un.org/documents/ga/res/45/a45r113.htm>

¹⁰ Office of the United Nations High Commissioner for Refugees, 'Detention Guidelines: guidelines on the Applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention' (2012), available at: <http://www.unhcr.org/505b10ee9.html>

¹¹ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, E/CN.15/2012/L.14/Rev.1, (25 April 2012), available at: www.un.org/Docs/journal/asp/ws.asp?m=E/CN.15/2012/L.14/Rev.1

¹² *Basic Principles on the Role of Lawyers*, (7 September 1990), available at: www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx

¹³ *Basic Principles on the Independence of the Judiciary*, (26 August to 6 September 1985), available at: www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx

the requirement that detention be humane and dignified (UNHCR *Detention Guideline* 8); that indefinite detention is arbitrary and maximum limits on detention should be established in law (UNHCR *Detention Guideline* 6); and that the special circumstances and needs of particular asylum-seekers must be taken into account, relevantly children and women (UNHCR *Detention Guidelines* 9.2 and 9.3). The LSNSW also considers that the findings in the Moss Review, if substantiated, would give rise to a breach of:

- Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR)¹⁴ relating to right to security protection;
- the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)¹⁵ and Article 7 of the ICCPR which protect against torture or other cruel, inhuman or degrading treatment; and
- the *Convention on the Rights of the Child* (CRC).¹⁶

Contract

14. The Law Council notes that the contracts between the Australian Government and service providers to work at the Nauru RPC are not publicly available. While they may detail whether or not Australia bears contractual responsibility for what takes place at the Nauru RPC, the Law Council is not in a position to assess duty of care obligations and responsibilities under these agreements.

15. The Law Council notes, however, that 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* (MOU)¹⁷ is not a legally binding document. However, the LSNSW notes that under the MOU:

- the Commonwealth of Australia bears all costs incurred under and incidental to the MOU;¹⁸
- the Republic of Nauru has agreed to 'host' one or more RPCs for the purpose of the MOU;¹⁹
- the Commonwealth of Australia will assist Nauru to settle transferees found to be owed protection in safe third countries;²⁰
- the Commonwealth of Australia will assist Nauru remove transferees found not to be owed protection to their country of origin or to third countries;²¹

¹⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 277 (entered into force 23 March 1976).

¹⁵ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

¹⁶ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 3 (entered into force 2 September 1990). ¹⁷ *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, available at: <http://dfat.gov.au/geo/nauru/Documents/nauru-mou-20130803.pdf>.

¹⁷ *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, available at: <http://dfat.gov.au/geo/nauru/Documents/nauru-mou-20130803.pdf>.

¹⁸ *Ibid*, item 6 under 'Guiding Principles'.

¹⁹ *Ibid*, item 10 under 'The Sites'.

²⁰ *Ibid*, item 13 under 'Outcomes for persons Transferred to Nauru'.

²¹ *Ibid*, item 14.

- the Commonwealth of Australia is required under the MOU to agree to the development of special arrangements for vulnerable cases, including unaccompanied minors; and
- both participants have agreed to treat transferees with dignity and respect and in accordance with relevant human rights standards.²²

Statutory provisions

16. Under the provisions of the *Migration Act 1958* (Cth), Australia bears no responsibility towards asylum seekers or refugees once they have been transferred offshore for processing and assessment.
17. As the LSNSW has noted that the power to transfer asylum seekers to Nauru is found in Part 2, Division 8, Subdivision B of the Act. Subsection 198AB(2) of the Act identifies that the only condition for the designation of a country as a regional processing country is that the Minister thinks that the designation is in the national interest. While the term 'national interest' is not defined, subsection 198AB(3) of the Act provides that in considering the 'national interest' the Minister must take certain considerations into account which do not appear to include the personal safety or conditions of detention of detainees or whether the conditions of detention meet any benchmarks standards. It is recommended that these provisions include these and similar considerations.
18. Further, section 198B of the Act empowers an officer to return a transferee back to Australia for a temporary purpose. Whilst in Australia that person clearly falls under Australia's domestic duty of care obligations and responsibilities.

Common law

19. The Law Council considers that there is a compelling argument that domestic case law supports the existence of a duty of care owed by the Commonwealth to detainees in OPCs.
20. As noted by the Victorian Bar, it is a well-established principle of Australian tort law that Australian correctional authorities owe a duty of care to persons under their care or control, and that breach of that duty gives rise to liability in negligence.²³ As stated by Gleeson CJ in *York v The Queen*:²⁴

For some offenders, prisons are dangerous places. It is the responsibility of the executive branch of government, in whose custody prisoners are placed, to take reasonable steps to minimise the danger

21. The Victorian Bar notes that there is no relevant distinction between the duty of care owed to a prisoner under sentence for a criminal offence, or a charged person held on remand, or a person detained in police custody, or a person involuntarily detained

²² Ibid, item 17 under 'Commitments'.

²³ *Howard v Jarvis* (1958) 98 CLR 177 ; *Dixon v Western Australia* [1974] WAR 65; *L v Commonwealth* (1976) 10 ALR 269; *Cekan v Haines* (1990) 21 NSWLR 296; *York v The Queen* (2005) 79 ALJR 1919 at [5]; *NSW v Bujdoso* (2005) 227 CLR 1 at 13-15 [44]-[47].

²⁴ (2005) 79 ALJR 1919, [2005] HCA 60, at [5]. See also *Juric v Victoria* (2011) 34 VR 347 at 357 [40](CA)

under mental health powers or a person detained in immigration detention. As stated in *Kirkham v Chief Constable of the Greater Manchester Police*:²⁵

When one person is in the lawful custody of another, whether that be voluntarily, as is usually the case in a hospital, or involuntarily, as when a person is detained by the police or by prison authorities ... there is a duty upon the person having custody of another to take all reasonable steps to avoid acts or omissions which he could reasonably foresee would be likely to harm the person for whom he is responsible.

22. In terms of the specific duty of care that the Commonwealth Government owes to asylum seekers, the Federal Court in *S v Secretary, Department of Immigration Multicultural and Indigenous Affairs*²⁶ found that Commonwealth Government owes a non-delegable duty of care to asylum seekers detained by or on behalf of the Government – at a minimum, to take reasonable steps keep the detainees safe. In that case (concerning the onshore Woomera detention centre) Finn J said that this duty is founded on a close analogy to, and draws on elements of the gaoler-prisoner relationship (and in cases involving mental illness, the hospital-patient relationship).²⁷
23. The Victorian Bar also considers that Commonwealth Government continues to owe a duty of care to persons detained at its request by third party entities, including authorities of a foreign country. This is flows under domestic law from the non-delegable nature of the duty and under international law..²⁸ As the Victorian Bar states, international law is consonant with Australian domestic law on the non-delegable nature of the duty of care:

*a State's authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will and cannot shelter behind their inability to ensure that it is respected*²⁹

24. The LIV also considers that the Commonwealth Government owes a non-delegable duty of care to people held by it in immigration detention.³⁰ If the same duty of care is owed to offshore detainees as to onshore detainees, then Australia's obligation towards asylum seekers in its RPCs would be to provide a reasonably equivalent standard of care to that which would be experienced within Australia. The LIV has clarified that this means that the Commonwealth should not make use of lower standards of care by choosing to place detention centres in locations with reduced standards of, for instance, access to services.
25. The Government's stated position in relation to offshore detention arrangements is that the detention is the responsibility of the Nauruan and PNG Governments.³¹ The LIV considers that there appears to be insufficient information at present to test the accuracy of this position. Despite this, LIV believes that Australia may be found to still

²⁵ [1990] 2 WLR 987 at 996; [1990] 3 All ER 246 at 253 (EWCA); *Cekan v Haines* (1990) 21 NSWLR 296 per Kirby P at 297.

²⁶ (2005) 143 FCR 217.

²⁷ *Ibid* at 259, 261 -263 [205], [213] – [219].

²⁸ The ARSIWA represent the consensus of international law.

²⁹ *Ireland v the United Kingdom*, European Court of Human Rights (1978), at [159].

³⁰ *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2005] 143 FCA 549.

³¹ See, for example, the Government's evidence to the Manus Island Inquiry: representatives of the Department of Immigration and Border Protection stated that Australia's obligations under the ICCPR do not extend to asylum seekers detained at the Manus Island RPC: Department of Immigration and Border Protection, Document 14 - answers to questions taken on notice at a public hearing on 11 July 2014 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into the incident at the Manus Island Detention Centre during 16 February to 18 February 2014*, 17 September 2014, 3.

owe a duty of care to people held in RPCs, as a result of the relationship that exists between the Commonwealth and the detainees at common law. The LIV has identified the following relevant factors informing this view:

- (a) Australia maintains control of the RPCs:
 - (i) it provides funding for the operation of the RPCs;
 - (ii) it arranged for the construction and establishment of the RPCs;
 - (iii) it engages contractors to operate the RPCs, who are responsible to the Commonwealth Government under contract; and
 - (iv) its staff, through DIBP, have control over the delivery of services and the provision of infrastructure at the centres, through its powers under the service-provider contracts;
- (b) it maintains a permanent staff presence at the RPCs, and DIBP staff have the power and capacity to cause or prevent effectively any act or decision being made at the centre;
- (c) it provides the detainees who populate the RPCs, and is solely responsible for the decision to place such people at the RPCs; and
- (d) with over 15 years of experience in detention centre operations within Australia, the Commonwealth Government has developed an extensive knowledge and awareness of the risks and dangers posed with immigration detention.

26. Given these factors, including the foreseeable risks of prolonged and remote detention (on the basis of evidence from various independent inquiries), Australia's clear control and the vulnerability of many detainees, the Law Council and its Constituent Body, the LIV, considers that it is highly likely that the Australia owes an ongoing duty to take reasonable care to avoid these foreseeable risks of harm.

27. The Law Council also notes that this issue is currently before the Supreme Court of Victoria. Majid Karami Kamasae, a detainee at the Manus Island RPC has brought a class action in the Supreme Court on behalf of persons detained on Manus Island from 21 November 2012 to 19 December 2014. The plaintiff's claim is in negligence and is against the Commonwealth of Australia, G4S Australia Pty Ltd and Transfield Services (Australia) Pty Ltd. The matter is listed for directions on 15 May 2015 before McDonald J, and once resolved may provide clarity about the Commonwealth Government's duty of care towards asylum seekers transferred offshore.³² The Law Council suggests that the Select Committee closely monitor these proceedings.

³² See:

<http://www.supremecourt.vic.gov.au/home/law+and+practice/class+actions/manus+island+detention+class+action#sthash.GPAem4Of.dpuf>.

International law

The joint and several responsibility for internationally wrongful acts under international law

28. The Law Council notes that there are three basic principles of State responsibility:³³

- (a) the basic principle of international law is that each State is responsible for its own actions in respect of its international obligations.³⁴
- (b) the 'constituent elements' of a wrongful act at international law can consist of acts or omissions.³⁵ To be a wrongful act of the State, a 'given event' must be 'sufficiently connected' to acts or omissions that can be attributable to a State.³⁶ An internationally wrongful act will exist when an act or omission:
 - (i) is attributable to the State under international law; and
 - (ii) constitutes a breach of an international obligation of the State.
- (c) the characterisation of an act of a State as internationally wrongful is governed by international law and is not affected by the characterisation of the act by domestic law.

29. The general rule for attribution of State conduct is that the conduct of a State's organs of government or of others who have exercised governmental authority in an official capacity, regardless of the scope of the authority, will be attributed to the State.³⁷ The Victorian Bar considers that there are four types of attribution of conduct that are directly relevant to the Nauru RPC:

- (a) the conduct of private bodies (such as an outsourced manager of a detention centre) is conduct for which a State (such as Australia) is responsible where the private body is empowered by the State to exercise elements of governmental authority;³⁸
- (b) when one State places its organs or assets at the disposal of another State, the conduct of the organ of the former State (such as Papua New Guinea (PNG) or Nauruan police or security forces) shall be considered to be the conduct of the latter State (such as Australia) if acting in the exercise of elements of governmental authority of the latter State;³⁹

³³ James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), 77. The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts were prepared by Professor James Crawford AO SC, the eminent Australian international lawyer recently elected as a member of the International Court of Justice. They represent the consensus of international law, having been widely approved and applied in practice, including by the International Court of Justice. See: *Responsibility of States for internationally wrongful acts*, GA Res. 56/83, UN GAOR 56th sess, 85th plen mtg, Agenda Item 162, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) ('ARSIWA'), art 16.

³⁴ Ibid 80.

³⁵ Ibid 81-2.

³⁶ Ibid 83.

³⁷ Ibid 91. An organ includes any person or entity which has that status in accordance with the internal law of the State.

³⁸ ARSIWA, art 5

³⁹ ARSIWA art 6

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- (c) if an organ empowered to exercise governmental authority exceeds its authority or contravenes instructions, the government remains liable for those acts;⁴⁰ and
 - (d) the conduct of persons is conduct for which a State is liable if the person is in fact acting on the instructions of, or under the direction or control of the State in that conduct.⁴¹

30. The Victorian Bar identifies the recent judgment by the European Court of Human Rights in *Hassan v United Kingdom*⁴² as a practical example of the continuing responsibility of the originally detaining State. The case concerned the treatment of a person who had been originally detained by British forces in Iraq. The person had been handed over and physically housed in a detention centre conducted by the United States. In defending claims said to have arisen from the detention, the United Kingdom argued that it ceased to be responsible when it handed the detained man over to the US authorities because the camp in which he was then held was not under the effective control of British authorities. The Grand Chamber held that the detainee was under the authority and control, and thus the jurisdiction, of the UK from the moment of his arrest until his release.⁴³
31. To like effect, the United Nations Human Rights Committee (HRC) in an interpretative *General Comment No. 35* on Article 9 of the ICCPR (concerning liberty and security of the person) stated that when a person is detained by a State exercising effective control over the person, the State remains responsible at international law for their treatment in detention.⁴⁴
32. To establish whether Australia has engaged in an internationally wrongful act (including determining that Australia has breached its international obligations), the Select Committee must therefore examine the nature of the relationship between the State and its organs or agents, and assess these acts or omissions by reference to Australia's obligations at international law, including human rights treaties to which Australia is party.
33. For example, an assessment could be undertaken of whether the alleged rape of a female detainee by a contract service provider staff member, detailed in the Moss Review,⁴⁵ amounts to torture, or cruel, inhuman or degrading treatment or punishment, thereby breaching Australia's obligations under the ICCPR⁴⁶ and the CAT
34. The NSW Bar also considers that the conditions of detention at the RPC are contrary to Article 10 of the ICCPR which requires that all persons deprived of their liberty be treated with humanity and with respect for the inherent dignity of the human person. This could therefore amount to a breach of international law, satisfying the second element of an internationally wrongful act for the purposes of determining State responsibility. In this respect, the NSW Bar refers to the lack of personal security as detailed in the Moss Review; the lack of oversight of the RPC and the lack of an effective complaints mechanism; inadequate infrastructure at the RPC; the length of

⁴⁰ ARSIWA, art 7.

⁴¹ ARSIWA, art 8.

⁴² See: *Case of Hassan v The United Kingdom*, (Application no. 29750/09), 16 September 2014, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?1=001-146501>.

⁴³ At [80].

⁴⁴ Human Rights Committee, *General Comment No. 35, Article 9 Liberty and Security of Persons*, U.N. Doc. CCPR/C/GC/35, 63 (Oct. 28, 2014).

⁴⁵ Moss Review, 26-7.

⁴⁶ At art 7.

detention and indefinite detention; and the recommendation in the Moss Review to strengthen intelligence capability and better integrate welfare services.

35. The Law Council notes that Australia may also be jointly or severally responsible for an internationally wrongful act committed by Nauru if it can be demonstrated that it:

- (a) aided or assisted Nauru in committing an internationally wrongful act;⁴⁷
- (b) directed and exercised control over Nauru's commission of an internationally wrongful act;⁴⁸ or
- (c) coerced Nauru to commit an internationally wrongful act.⁴⁹

36. Further, as noted by the NSW Bar, in addition to the State responsibility borne by Australia, is the promise made by both Australia and Nauru in Article 17 of the MOU to 'treat Transferees with dignity and respect and in accordance with relevant human rights standards'.

37. In contrast, the terms of reference for the Moss Review include the statement that 'Consistent with [the MOU] the security, good order and management of Centre, including the care and welfare of persons residing at the Centre remain the responsibility of the sovereign Government of Nauru'.

Australia's effective control of its regional processing centres in relation to the extraterritorial application of human rights treaties to which it is party

38. The Law Council notes that various human rights treaties to which Australia is party have extraterritorial application. Perhaps most significantly for the purposes of this inquiry is the extraterritorial application of the ICCPR.

39. The relevant clause of the ICCPR is found at Article 2(1) and 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 Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status [emphasis added].*

40. The LIV notes that the ICCPR imposes a number of obligations on contracting states such as Australia, including obligations to provide free access to the courts of law within Australia, to provide treatment in relation to housing and public assistance that is equivalent to that afforded to the Australian community, and to not contravene the prohibition on *refoulement*. It notes that one of the Australia's key human rights obligations extends to taking reasonable steps to prevent asylum seekers from being subject to human rights violations in detention centres.

41. The seminal case on the extraterritorial application of the ICCPR before the International Court of Justice (ICJ) is its Advisory Opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*.⁵⁰ Concluding that Israel's construction of the wall was contrary to international law, the

⁴⁷ ARSIWA, art 16.

⁴⁸ Ibid, art 17.

⁴⁹ Ibid, art 18.

⁵⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 ('Wall').

ICJ referred to the HRC's extraterritorial application of the ICCPR in a number of its Communications,⁵¹ as well as the *travaux préparatoires* for the ICCPR that demonstrated that the drafters 'did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory.'⁵²

42. The HRC has also set out its approach to the extraterritorial application of the ICCPR in its *General Comment 31*. Although the HRC failed to clarify the meaning of jurisdiction, it noted that the jurisdiction of States in respect of the ICCPR applies to 'anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.'⁵³ It also declared that the rights under the ICCPR must be available to all individuals in the territory or subject to the jurisdiction of the State party, including asylum seekers and refugees.⁵⁴
43. The jurisdiction clause of the CAT appears at Article 2(1) and provides that 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'.
44. Therefore, under human rights treaties to which Australia is party, such as the ICCPR, the Senate Committee can confirm Australia's responsibility over asylum seekers detained at the Nauru RPC by determining whether Australia has effective control over them.
45. The NSW Bar notes that in *CPCF v Minister for Immigration and Border Protection*,⁵⁵ the High Court of Australia was asked to consider whether obligations Australia had assumed under international human rights instruments and the Refugee Convention applied to individuals located outside Australian territory but subject to Australia's effective control. Reference was made to the practice of other States, national judicial decisions and materials from international human rights committees. As the Court resolved that case by reference to the construction of Australian legislation, it was unnecessary for it to finally determine that issue.
46. The NSW Bar has noted that the Moss Review exposes serious matters of concern, even at the 'very high level' of effective control which Australia has previously argued is the level of control at which extraterritorial application of relevant international instruments inures. Australia's argument for a higher level of effective control was recently questioned by the Committee Against Torture in oral exchange with Australian representatives in relation to the consideration of Australia's 5th periodic report to that Committee.⁵⁶ Following the release of the concluding observations by the Committee, the Chair, Professor Claudio Grossman, expressed the view that Australia holds effective control over offshore detention centres. He pointed to the role Australia has

⁵¹ Namely: Human Rights Committee, *Decision: Communication No. R. 12/52*, UN Doc CCPR/C/13/D/52/1979 (29 July 1981) 176; Human Rights Committee, *Decision: Communication No. 56/1979*, UN Doc CCPR/C/OP/1 (29 July 1981) 92; and Human Rights Committee, *Decision: Communication No. 106/1981*, UN Doc Supp No 40 (A/38/40) (31 March 1983) 186.

⁵² *Wall* [2004] ICJ Rep 136, [109].

⁵³ Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 18th sess, UN Doc CCPR/C/21/Rev.1/Add. 13 (26 May 2004) [10].

⁵⁴ *Ibid.*

⁵⁵ [2015] HCA 1.

⁵⁶ See footnote 50, Andrew and Renata Kaldor Centre for International Refugee Law, *Offshore Processing and Australia's responsibility for asylum seekers and refugees in Nauru and Papua New Guinea* (Fact Sheet, 5 April 2015)

had in interdicting asylum seekers and funding the operations of offshore detention centres.⁵⁷

47. The NSW Bar considers that the Moss Review's recommendation⁵⁸ for a more integrated and 'joined up' approach between the Nauruan operation managers and the service providers contracted by the Commonwealth Government was made to remedy what the review saw, and what the Nauruan authorities complained, was a lack of Nauruan participation in the running of the Centre. The Moss Review findings and recommendations are therefore indicative of Australia's direction and effective control of the RPC.
48. Part 5 of the Moss Review gives some detail of the lack of Nauruan direction and effective control of the Centre, in terms of what the Review perceived to be a lack of partnership and integration between the Nauruan operations managers and DIBP and its contract service providers. The Reviewer found:
- (a) the Nauruan authorities at the RPC complained of a lack of information and engagement in the running of the Centre, (e.g. by excluding Nauruan authorities from meetings with DIBP and its contract service providers, as well as a lack of regular meetings);⁵⁹
 - (b) the Nauruan managers complained they were not kept 'fully informed' by some of the contract service providers⁶⁰ and did not receive enough information directly from the DIBP;⁶¹ and
 - (c) the Nauruan operation managers also did not consider they were effectively engaged in the running of the RPC.⁶²
49. The NSW Bar also notes that an important aspect of Australia's direction and effective control of the RPC is its funding of and contractual arrangements with contract service providers, including Transfield Services and its subcontractors Wilson Security, and International Health and Medical Services and Save the Children Australia. The LIV also notes that at present, the Commonwealth Government pays for the detention of asylum seekers in Nauru⁶³ and maintains a permanent presence at the detention facility. It also makes decisions about the day to day operation of the centre. The Review said it did not 'contemplate any change to the present arrangement' whereby service providers contract with DIBP. For its part, Transfield Services stated that 'We need the certainty of a commercial arrangement with the Commonwealth'.⁶⁴

Preventing or Lessening future risk of abuse

50. On the basis of Australia's potential responsibility, the Law Council notes the recommendations of the recent Moss Review, Cornall Report and the Manus Island Inquiry, all of which have considered the issues of responsibility and how to prevent or

⁵⁷ *ABC News*, 'UN torture committee criticises Australia's mandatory detention policy for asylum seekers', 29 November 2014, available at: www.abc.net.au/news/2014-11-29/un-torture-committee-criticises-australias-asylum-seeker-policy/5927542

⁵⁸ Recommendation 10.

⁵⁹ At [5.2]-[5.6].

⁶⁰ At [5.9].

⁶¹ At [5.10].

⁶² At [5.12].

⁶³ See MOU, item 6 under 'Guiding Principles'.

⁶⁴ Moss Review at [5.7].

lessen future risk of abuse. These inquiries all examined the issue of harm to asylum seekers in immigration detention.

51. The Law Council considers that the frequency of incidents and inquiries into those incidents demonstrate that there are consistent themes and that the findings of the inquiries present an opportunity to prevent or lessen the instances of future abuse by addressing the underlying issues that lead to these incidents. Indeed, the recommendations clearly indicate that responsibility to address the issues that led to the incidents precipitating the inquiries lies with the Commonwealth Government and in some instances jointly with the Governments hosting its RPCs.
52. As a result of Australia's duty of care obligations and responsibilities, there are two steps that the Government can take to prevent or lessen the risk of future abuse:
- (a) independent monitoring and review of detention centres could prevent the recurrence of incidents of physical and sexual abuse owing to the stronger safeguards that will be established as a result of these oversight mechanisms; and
 - (b) in addition to the legal representation and advice that the Law Council advocates for during the refugee status determination process, victims of physical and/ or sexual abuse must have access to legal and representation and advice in accordance with Australia's obligations under international law, rule of law principles and procedural fairness guarantees.
53. The Law Council also notes the LSNSW recommendation in its submission to the Senate Legal and Constitutional Affairs References Committee on the Incident at the Manus Island Detention Centre from 16 February to 18 February 2014. The LSNSW recommended the Act be amended such that the Minister could only lawfully declare a country a RPC if: it has effective procedures in place for assessing protection claims; can provide protection to asylum seekers during and after the assessment of their claims (and through to resettlement); meets relevant human rights standards and the transfer would be consistent with Australia's obligations under the ICCPR, CAT and CRC. It also notes that it is appropriate for these safeguards to be subject to judicial review.

Learning from former inquiries and reviews

The Cornall Report

54. On 21 February 2014, the Hon Scott Morrison MP, the then Minister for Immigration and Border protection, announced that the Secretary of the DIBP, Martin Bowles PSM, had initiated a review to investigate and report on key issues surrounding two significant incidents at the Manus Island RPC in PNG from 16-8 February, 2014. The Cornall Report was released by the Minister on 26 May 2014.
55. The purpose of the review was to strengthen relevant arrangements at the RPC and prevent recurrence of any similar incident in the future.⁶⁵ Its Terms of Reference⁶⁶ provided that inquiry and report, to be undertaken in cooperation with the PNG Government, would address the following key areas:

⁶⁵ As set out in the Terms of Reference at: <http://www.immi.gov.au/pub-res/Pages/reviews-and-inquiries/manus-tor-feb2014.aspx>.

⁶⁶ Ibid.

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- to determine exactly what the facts were;
 - to ensure that those facts are available to any authorities for any action that would take place as a result; and
 - to ensure that the department is provided with clear recommendations on any improvements that can be made to assist in the management of future incidents.

56. The Cornall Report made 13 recommendations some of which, similarly to the Moss Review, indicate that greater clarity around roles is needed and that DIBP bears the ultimate responsibility for what takes place at the RPC. The most significant recommendations were that:

- the contracted service providers Transfield and Wilson Security, the Royal Papua New Guinea Constabulary provincial police and the mobile squad clearly establish and understand their respective roles over the law and order of the RPC, including concerning handover and hand-back processes of incidents beyond the control of the garrison security provider, and the levels of force to be used; and
- DIBP review risk involved in the conduct of the RPC and continue to strengthen its risk management procedures and the RPC's physical security infrastructure.

57. The Cornall Report also identified that 15 previous reviews and reports into Australia's detention centres (including the United Nations High Commissioner for Refugees' findings from its monitoring visits to Nauru and Manus Island, reviews by Amnesty International, the Ombudsman and the Red Cross) had a different focus, but a consistent finding: that clarity over the asylum determination process is important, as is the timely resolution of claims, sound communication, meaningful engagement with detainees and improvements to living conditions.

58. The central recommendation of the Report was that the PNG and Commonwealth Governments expedite the refugee determination and resettlement process.

The Manus Island Inquiry

59. On 5 March 2014, the Senate referred the matter of the incident at the Manus Island Detention Centre from 16 February to 18 February 2014 to the Senate Legal and Constitutional Affairs References Committee for inquiry and report. The Terms of Reference for the Inquiry included that the Senate Committee examine the Commonwealth Government's duty of care obligations and responsibilities. The Committee reported on 11 December 2014.

60. The Committee made five recommendations, the following related to duty of care:

the duty of care responsibilities that the Australian Government owes under domestic Australian law are another compelling reason for Australia to take full responsibility for the treatment of asylum seekers held in the Manus Island RPC.

61. The Committee agreed that asylum seekers had suffered numerous violations of their basic human rights, and that they should be provided with remedies for these

violations. The Committee made recommendations to this end,⁶⁷ but Government members of the Committee did not agree with those recommendations. Government members of the Committee also disagreed with the recommendation that the Governments of Australia and PNG facilitate access to the RPC for United Nations representatives, lawyers, the Australian Human Rights Commission and journalists.⁶⁸

The Moss Review

62. In October 2014, the then Acting Secretary of DIBP, Mr Mark Cormack, initiated a review into recent allegations relating to conditions and circumstances at Nauru RPC, conducted by Mr Philip Moss. The Report was released on 20 March⁶⁹ and highlighted allegations of sexual and physical assault on asylum seekers, including children, at the Nauru centre.

63. It was found that there is a level of under-reporting by detainees of sexual and physical assault and that 'the arrangements for identifying, reporting, responding to, mitigating and preventing incidents of sexual and other physical assault at the Centre could be improved'.⁷⁰

64. It was also suggested that the Centre 'would operate more effectively if there was greater partnership and integration between the Nauruan operations managers and the Department and its contract service providers'.⁷¹

65. The Report made 19 recommendations, all of which DIBP accepted.⁷² The recommendations included that contract service providers review their guidelines over sexual harassment and sexual relationships;⁷³ and that there is a more 'joined-up' approach between Nauruan operations managers and contracted service providers⁷⁴ and between the Wilson security intelligence unit and the Nauruan Police Force.⁷⁵

Independent monitoring and review

66. As the findings of the Cornall Report, Manus Inquiry and Moss Review demonstrate, closely related to the issue of responsibility is the issue of preventing or lessening the future risk of physical and/ or sexual abuse, to achieve this the Law Council has consistently called for independent monitoring and review of detention centres, including those offshore. It considers that, at present, there is a lack of sufficient safeguards and independent monitoring of detention centres.

67. The Law Council has previously proposed that more regular monitoring and review should be undertaken domestically by the Commonwealth Ombudsman; and, both domestically and internationally through the mechanisms established by the Optional Protocol to the *Convention against Torture and Other Cruel, Inhuman or Degrading*

⁶⁷ Manus Island Inquiry, Recommendation 3.

⁶⁸ Ibid, Recommendation 5.

⁶⁹ The Hon Phillip Dutton MP, Minister for Immigration and Border protection, 'Moss report' (Media Release, 20 March 2015), available at: <http://www.minister.immi.gov.au/peterdutton/2015/Pages/moss-report.aspx> ('Media Release').

⁷⁰ Moss Review, 4-5

⁷¹ Ibid, 6.

⁷² Media Release.

⁷³ Moss Review, Recommendation 2.

⁷⁴ Ibid, Recommendation 10

⁷⁵ Ibid, Recommendation 15

*Treatment or Punishment (OPCAT)*⁷⁶ and the Third Optional Protocol to the *Convention on the Rights of the Child (CROC-OP3)*.⁷⁷

The Commonwealth Ombudsman

68. Pursuant to section 3C of the *Ombudsman Act 1976* (Cth), the Commonwealth Ombudsman's oversight role applies both within and outside Australia and extends to every external Territory. Indeed, the Immigration Ombudsman's role extends to oversight of offshore processing of immigration cases and inspecting immigration detention facilities, including those offshore.⁷⁸

69. As set out in its 2013-14 Annual Report, the Immigration Ombudsman has had oversight of immigration detention since 2005.⁷⁹ The Immigration Ombudsman focuses on the legislative, policy and procedural compliance and administrative actions undertaken in regard to immigration detainees.

70. The Report details that the Immigration Ombudsman visited the Nauru RPC in June 2014.⁸⁰ Although noting the significant changes in policy regarding offshore processing during this period, the Report set out the following key issues in immigration detention facilities arising in 2013-14:

- separation of family groups;
- access to legal support for screened-out detainees;
- management of detainees' personal property;
- provision of welfare support to detainees; and
- inconsistency in access to mobile telephones.

71. In addition to this oversight role, the Secretary of DIBP must give the Ombudsman a review relating to the circumstances of a person's detention where that person has been detained for a period of two years, and every six months thereafter pursuant to section 486N of the *Migration Act 1958* (Cth). Pursuant to section 486O of the *Migration Act*, the Ombudsman must provide the Minister with an assessment of the appropriateness of the arrangements for that person's detention. A de-identified version of the report is tabled by the Minister in the Parliament.

72. Whilst the Law Council acknowledges the important role played by the Immigration Ombudsman, it considers that the Ombudsman's resources should be expended to allow for more regular reviews of offshore detention facilities. As the regularity of incidents and reviews into incidents in RPCs indicates, there is need for improvement in relation to the legislative, policy and procedural compliance and administrative actions undertaken in regard to detainees in offshore detention. The Law Council considers that this can only be achieved through regular, independent monitoring and reviews of detention facilities.

⁷⁶ *Optional Protocol to the Convention against Torture*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) ('OPCAT').

⁷⁷ *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, opened for signature 28 February 2012, GA Res 66/138 (entered into force 14 April 2014) ('CROC-OP3').

⁷⁸ See: <http://www.ombudsman.gov.au/pages/our-legislation/immigration-ombudsman/index.php>.

⁷⁹ Commonwealth Ombudsman, *2013-2014 Annual Report* (2014), 55, available at: http://www.ombudsman.gov.au/pages/publications-and-media/reports/annual/ar2013-14/pdf/commonwealth_ombudsman_annual_report_1314.pdf.

⁸⁰ It did not visit the Manus Island RPC in 2013-14.

International monitoring mechanisms

73. In addition to the independent review and monitoring mechanism that falls with the Immigration Ombudsman, the Law Council considers that conditions in detention would also be improved by allowing for international monitoring of immigration detention.

OPCAT

74. The Law Council has previously made several submissions in support of the ratification and implementation of the OPCAT,⁸¹ most recently in its submission to the National Inquiry into Children in Immigration Detention 2014.⁸² It considers that the ratification of OPCAT would allow independent domestic and international monitoring of immigration detention facilities.

75. As a result of this monitoring process, conditions in detention may improve to address any cruel, inhuman or degrading treatment that currently occurs in Australia's detention facilities, for example in relation to the mental health of children as identified by the Australian Human Rights Commission *The Forgotten Children* report..

76. The OPCAT establishes a two-tiered prevention mechanism: the independent United Nations Subcommittee on the Prevention of Torture (the Subcommittee), made up of international experts, and a national preventative mechanism (NPM).

77. The Subcommittee regularly⁸³ carries out monitoring visits to all places of detention within a country.⁸⁴ It also advises and assists State's with the establishment of NPMs; maintains direct and confidential contact with NPMs, where necessary, assisting them with strengthening their capacities; advises NPMs on how to strengthen the protection of victims; and makes recommendations to States about strengthening the capacity and mandate of NPMs.⁸⁵

78. Under OPCAT, the State bears several obligations to the Subcommittee, such as reception of the Subcommittee in their territory and to grant it access to the places of detention as defined in Article 4 of the Protocol; and to examine the recommendations of the Subcommittee on Prevention and enter into dialogue with it on possible implementation measures.⁸⁶ States' obligations also extend to providing unrestricted access to the Subcommittee, including conducting private interviews, and choosing the people that will be interviewed.⁸⁷

⁸¹ See for example the following: Law Council of Australia, submission to Joint Standing Committee on Treaties, *Inquiry into the Optional Protocol to the Convention Against Torture*, 30 March 2012, available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2628%20-%20Optional%20Protocol%20to%20the%20Convention%20against%20Torture.pdf>; Law Council of Australia, submission to Attorney General's Department, *Optional Protocol to the UN Convention Against Torture*, 1 July 2008; Law Council of Australia, 'Shadow Report to Australia's Common Core Document', Report to the United Nations Human Rights Committee, 29 August 2008, available at: http://www2.ohchr.org/english/bodies/hrc/docs/ngos/LCA_Australia95.pdf.

⁸² Law Council of Australia, Submission to the Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention 2014*, 30 May 2014, available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2834_-_Submission_to_National_Inquiry_into_Children_in_Immigration_Detention_2014.pdf.

⁸³ OPCAT, art 13.

⁸⁴ OPCAT, art 11(1)(a).

⁸⁵ OPCAT, art 11(1)(b).

⁸⁶ OPCAT, art 12.

⁸⁷ OPCAT, art 14.

79. Within one year of ratification of the OPCAT, State parties are obliged to establish an NPM, or series of NPMs.⁸⁸ The NPM is independent of government, and should be granted the following powers, at minimum:

- (a) to regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in the OPCAT⁸⁹ with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
- (b) to make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations; and
- (c) to submit proposals and observations concerning existing or draft legislation.⁹⁰

80. In its 2012 submission to the Joint Standing Committee on Treaties regarding the ratification of the OPCAT, the Law Council considered, in line with the Australian Human Rights Commission's recommendations,⁹¹ that the monitoring mechanisms in OPCAT should build upon and coordinate the existing monitoring mechanisms that operate in respect of certain detention facilities around the country in order to apply to all places of detention, including immigration detention, police cells and mental health facilities.⁹² The Law Council considers that this should also apply to RPCs.

CROC-OP3

81. As with the OPCAT, the Law Council has a history of advocating its support the signature and ratification of the CROC-OP3,⁹³ again, most recently in its submission to the National Inquiry into Children in Immigration Detention 2014.

82. The Optional Protocol does not create new rights, but provides a redress mechanism for violations of rights that are articulated in the CROC and its First and Second Optional Protocols. It establishes three separate procedures:

⁸⁸ OPCAT, art 17.

⁸⁹ At Article 4.

⁹⁰ OPCAT, art 19.

⁹¹ Professors Richard Harding and Neil Morgan, Centre for Law and Public Policy, The University of Western Australia, 'Implementing the Optional Protocol to the Convention against Torture: Options for Australia' (2008), available at: http://www.hreoc.gov.au/human_rights/publications/opcat/index.html#1. Recommendations included that 'Australia should adopt a "mixed" model for its NPM in which responsibility is shared between the States, the Territories and the Commonwealth, but there must be (i) a national coordinating NPM and (ii) a single coordinating agency within each State and Territory' (Recommendation 2); and, that 'the Australian Human Rights Commission should be designated as the national coordinating NPM' (Recommendation 3).

⁹² See for example: Law Council of Australia, submission to Joint Standing Committee on Treaties, *Inquiry into the Optional to the Convention Against Torture*, 30 March 2012, 28, available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2628%20-%20Optional%20Protocol%20to%20the%20Convention%20against%20Torture.pdf>.

⁹³ See for example: Law Council of Australia, submission to Attorney General's Department, *Third Optional Protocol to Convention on the Rights of the Child*, 10 April 2012, available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2613%20-%20Third%20Optional%20Protocol%20to%20Convention%20on%20the%20Rights%20of%20the%20Child.pdf>. The Law Council has also engaged in extensive correspondence with the Attorney-General's Department on this issue.

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- (a) an 'individual communication procedure', where individuals and groups of individuals may submit a complaint of an alleged violation of any of the rights contained in the CROC or the First or Second Optional Protocol;⁹⁴
 - (b) an 'Inter-State complaints procedure', which allows the CROC Committee to consider communications from one State party alleging that another State party is not fulfilling its obligations under the CROC or its Optional Protocols;⁹⁵ and
 - (c) an inquiry procedure, which allows the CROC Committee, upon receipt of reliable information, to initiate inquiries into grave or systemic violations by a State party of any of the rights contained in the CROC or its Optional Protocols.⁹⁶

83. The Law Council considers that ratification of this instrument will allow for children whose rights have been violated in immigration detention to have recourse and remedy for this violation. It considers this is particularly important due to the limited recourse that is currently available to children in immigration detention regarding, for example, transfer to offshore processing.

84. It also considers that this mechanism would be especially beneficial for unaccompanied minors. In Nauru, guardianship of children is governed by the *Guardianship of Children Act 1975* and there is no provision for automatic guardianship of unaccompanied minors seeking protection status.⁹⁷

Access to independent legal advice and representation

85. To augment Australia's responsibility for asylum seekers in the Nauru RPC, the Law Council recommends that the Commonwealth Government should ensure that asylum seekers are provided with access to legal advice and representation throughout the process of application for protection and in relation to any incidents that may arise during this process, such as physical or sexual abuse.

86. The Law Council has consistently advocated for the need for legal advice and representation for detainees and asylum seekers applying for protection. Based on rule of law principles, the Law Council's *Asylum Seeker Policy* states that when arrangements have been entered into between Australia and other States for the purpose of processing protection claims and providing resettlement, Australia also remains responsible for ensuring that rule of law principles and human rights obligations are adhered to under any such arrangements.⁹⁸

87. Furthermore, and in accordance with its *Principles Applying to the Detention of Asylum Seekers*, the Law Council considers that whilst in detention, asylum seekers should have full, confidential access to a competent and independent legal adviser of their choice to establish and defend their rights.⁹⁹

⁹⁴ CROC-OP3, art 5.

⁹⁵ Ibid art 12.

⁹⁶ Ibid art 13.

⁹⁷ Ibid.

⁹⁸ LCA Policy, [15].

⁹⁹ Ibid [10(g)].

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive are:

- Mr Duncan McConnel, President
- Mr Stuart Clark, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Dr Christopher Kendall, Executive Member
- Mr Morry Bailes, Executive Member
- Mr Ian Brown, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.