AUSTRALIA: REFUGEE CHILDREN IN DETENTION
AN HRAS CASE STUDY
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“If children were treated in this way in Australia the child protection authorities would want to prosecute those who are looking after them”1 – Alistair Nicholson, Former Chief Justice of the Family Court

Children, whether alone or with their families, come to Australia from some of the most conflict-ravaged countries to seek refuge. An already vulnerable group, they arrive with histories of trauma and complex mental and physical health needs. Yet there is a serious disjuncture between Australia's international obligations to protect the interests of refugees and children's rights, and Australia's cutthroat detention regime, which has led to international outcry as to the detrimental consequences to refugee children, including particular mention in the new United Nations High Commissioner’s maiden speech. In particular, under the Abbott government’s Operation Sovereign Borders, boat interceptions and the policy to deter people from seeking refuge in Australia has placed Australia under intense scrutiny in its mandatory detention of all unlawful non-citizens in offshore regional processing centres.

Scott Morrison, Minister for Immigration and Border Protection

In August 2014, Scott Morrison the Australian Government’s Immigration Minister announced\(^2\) the release of 150 children under 10 years old in mainland detention centres who arrived before 19 July 2013 into the community with their families on bridging visas. However, this does not include the children who arrived after 19 July 2013 and remain in offshore detention in Nauru and Christmas Island, numbers of which are reported at over 300. Shocking reports of these locations have shown abhorrent conditions wholly unsuitable for children, with widespread physical and mental health issues.

\(^2\) [https://www.youtube.com/watch?v=IaCvoO2HheU](https://www.youtube.com/watch?v=IaCvoO2HheU)
Such treatment in relation to children is in breach of Australia's international obligations to, amongst other duties, ensure the best interests of the child are the primary consideration under the Convention on the Rights of the Child ("CRC"), which incorporates the provisions of the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR") relevant to the needs of children. Such violations are amplified by issues such as the conflicting roles of the Minister as both the legal guardian and the ‘jailer’ in such cases, as well as the limited scrutiny mechanisms available in the legislation.

In a recent report published in the Medical Journal of Australia, it was found that out of 139 Australian paediatricians, over 80% believed that the mandatory detention of children constituted child abuse. Indeed, the UNHCR in October 2013 concluded that the conditions in the Nauru detention centre, coupled with the long periods spent there, raised “serious issues about their compatibility with international human rights law, including the prohibition against torture and cruel, inhuman or degrading treatment (article 7, ICCPR)”

Policy and Legislation

Particular regard should be had to Article 3(1) of the CRC, which states that the best interests of the child must be the primary consideration in all actions concerning children. Yet under Operation Sovereign Borders, the Migration Act 1958 ("the Migration Act") stipulates the mandatory detention of all unlawful non-citizen children and families until they are granted a valid visa or removed. This blanket approach is clearly at odds with any considerations as to the best interests of the child, however, and further appears contrary to Article 37(b) of the CRC, which states:

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

Such considerations from the above provision appear absent from Australia’s immigration policy, and in particular under Operation Sovereign Borders. Under the current scheme, which mandatorily detains all unlawful non-citizens in offshore regional processing centres, there appears little room for discretion in the handling of children in violation of the CRC’s requirement that children should not be detained arbitrarily. Indeed, the government's “rapid transfer”

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policy, which mandates a 48-hour turnaround target from arrival to detention, clearly fails to account for the intrinsic assessments required in determining whether it is necessary for a child to be detained, contrary to Article 37(b)’s provision that any detention should be only in the last resort. To date, there have been no known precedents where the Minister has halted removal of a child to an offshore location.

Further, the long and indefinite detention periods fall foul of the need to detain children only for the shortest appropriate period of time. Guidelines as to the appropriate period can be found in the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), which state that detention should be brief and should only occur where the child has committed ‘a serious act involving violence’. This was highlighted by Professor Gillian Triggs, who made it clear that as a matter of international law, children should not be detained for anything more than what is absolutely necessary for health checks and security checks. Nevertheless, it is clear that under Australia’s current scheme, detention is far from brief. Whilst the government recently released a number of children from the Christmas Island detention centre, it was made clear that children who had arrived after 19 July 2013 were not to be released, with deterrence being the main justification:

“I don’t think encouraging children to get on boats where they can die at sea is an acceptable humanitarian outcome. And so this government won’t be watering down its policies on border protection.”  
– Scott Morrison, Minister for Immigration and Border Protection.

There is no time limit for detention under the Migration Act. Moreover, there is no clear justification for such detention in this regard; under the legislation, acts of serious violence by a child or anything of such nature are not a precondition to detention. As discussed below, such long curtailment of liberty in abhorrent conditions have detrimental and far-reaching consequences in a child’s development and mental state.

Little, if any, safeguards are present in Australia’s domestic legislation. There is a striking absence of Commonwealth legislation setting out the minimum rights of children in immigration detention. However, whilst the CRC has not been incorporated into Australian legislation, this does not mean that Australia, as a signatory to the convention, has free rein to disregard its provisions. As stated in the High Court of Australia’s decision in Teoh:

“The fact that the Convention [on the Rights of the Child] has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or
subordinate legislation is ambiguous, the courts should favour that construction which accords which Australia’s obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia’s obligations under international law."

In reality, however, the courts have limited scope to review the conditions of detention, being rarely able to provide remedies for the government’s failure to abide by the CRC with regard to children in immigration detention. Further, whilst the Human Rights and Equal Opportunity Commission have the role of monitoring compliance with the CRC and ICCPR, they do not have the power to enforce any recommendations made. In the case of Odhiambo, which involved two African children who had stowed away on a cargo ship fleeing persecution from Islamic militants in Sudan and the Tutsis in Rwanda, the Court rejected the contention that the Migration Act should be interpreted so as to comply with the CRC and other international instruments. Further, it was held that there was no procedural unfairness in the failure to provide the children with legal or other assistance.

Guardianship of the child

Underpinning the guardianship of child migrants is the Immigration (Guardianship of Children) Act 1946 (“ICOG Act”), which was created as a legal framework to coordinate the influx of child migration from the United Kingdom at the end of World War II, and extends to all unaccompanied children entering Australia whether authorised or not. By virtue of Section 6(1) of the ICOG Act, the Minister stands in loco parentis as the guardian of every non-citizen child who arrives in Australia and has the “same rights, powers, duties, obligations and liabilities as a natural guardian of the child”.

The Immigration Minister’s (“the Minister”) dual role as both a guardian of the child and a decision-maker under the Migration Act (which has generally held precedence over the ICOG Act), has been criticised as being a significant conflict of interest. In the 1999 case of X v Minister for Immigration and Multicultural Affairs, it was held that although the Minister was in breach of his duty as a guardian under the IGOC Act, such duty was nominal given the Minister’s powers

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7 Minister for Immigration and Ethnic Affairs v Ah Hin Teoh [1995] 183 CLR 273 at 287
9 Odhiambo and Martizi v Minister for Immigration & Multicultural Affairs [2002] 122 FCR 29
10 ibid. at [47]
11 [1999] 92 FCR 524, 537-8 at [41] and [43]
under the Migration Act, and accordingly there was no specific obligation for the Minister to act with benevolence in such matters, much less feed, house or maintain the children. This, and subsequent cases demonstrate the glaring conflict in the Minister’s duties. Indeed, the UN Committee on the Rights of the Child has explicitly stated the need for an independent guardian in the case of unaccompanied refugee children, to the exclusion of agencies or individuals whose interests could possibly be in conflict with those of the child’s. In a recent report by the Australian Churches Refugee Taskforce, recommendations were made that an independent guardian instead be appointed, beholden to neither the Minister nor their department, to ensure minors are protected and cared for under Australia’s laws and treaty obligations.

However, under sections 6(1) and (2)(b) of the IGOC Act, the Minister’s guardianship duties cease when an unaccompanied asylum-seeking child is removed to a processing country in accordance with the Migration Act. This is highly unsatisfactory and fails to recognise the particular importance of the duty of guardianship. This is further accentuated by the fact that under the Migration Act, the designated processing country does not need to be scrutinised for their human rights record or capacity; they only need to give (non-binding) assurances as to refoulement and demonstrate a willingness to assess protection applications. Yet this qualification adds little reassurance. Not only are the assurances non-binding on the processing country, but the processing countries chosen by the Australian government are those that in fact have significantly poor human rights records generally.

A report into Nauru’s detention centre by independent clinical experts stated that guardianship of unaccompanied minors is delegated to the manager of Save the Children. However, it was unclear as to how decision-making or best interests considerations would occur, what legal training or framework was in place, whether protocols for sentinel events existed, and whether there was a plan for long-term review and support of children’s rights.

**Best interests principle**

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” – Article 3(1), CRC.

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The words of Article 3(1) unequivocally state that the primary consideration is the best interests of the child. This duty is expressly conferred upon the Australian Parliament, courts, and other public and private institutions. The question remains, however: what are the best interests of the child, and can they be met by the Abbott government’s current refugee policies?

The concept of the best interests of the child is echoed throughout the CRC, obliging signatory countries to make this principle the primary consideration in a wide range of decisions affecting individual children. Yet for all its references to it, there is no explicit definition of the concept of ‘best interests’. Some guidance is provided in Article 12, which directly involves the child’s participation in the decision-making process, with due weight being given in accordance with the child’s age and maturity.

It is clear that the best interests of a child will inevitably involve the consideration of the long-term consequences of a decision, the child being a human being in the crucial stages of development. This is recognised in Article 18(1), which states that the best interests of the child should be followed when raising a child to ensure his/her development. The UNHCR guidelines on refugee children state that children and adolescents require special care and assistance due to their vulnerability to disease and injury, dependence for their physical and psychological wellbeing, and their vital development. Accordingly, the unique challenges in the mental and physical wellbeing of refugee children mean that special care must be taken in dealing with them. Specifically, it is clear that the individual situation of every child must be taken into account, something the government’s 48-hour turnaround target from arrival would not possibly achieve. Of note is the negative wording of section 6A(2) of the IGOC Act, which states that: “The Minister shall not refuse to grant any such consent [for a non-citizen child leaving Australia] unless he or she is satisfied that the granting of the consent would be prejudicial to the interests of the non-citizen child”. Nowhere in this provision is a positive obligation conferred upon the Minister to consider the ‘best interests’ of the child prior to removal.

In assessing the nature of Australia’s immigration policies relating to children, comparison can be made to the approach taken by EU member states, where the CRC is ratified and the best interests principle is embedded into Article 8 of the ECHR and case law. In all but the UK, a guardian from a non-governmental organization or government agency (from a department not responsible for detention and deportation) is appointed if an unaccompanied child does not have one currently residing in the arrival country. A number of decisions in the European Court of Human Rights have made it clear that certain acts of detention of children will amount to a violation of Article 3 of the European Convention on Human Rights (ECHR), which prohibits torture and other inhuman or degrading

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15 UNHCR, 'Refugee Children: Guidelines on Protection and Care': [http://www.unhcr.org/3b84c6c67.html](http://www.unhcr.org/3b84c6c67.html)
treatment. In *Mubilankzila and Mitunga v Belgium*¹⁶, it was held that the detention of an unaccompanied child for almost two months had left the child in an extremely vulnerable situation amounting to inhuman or degrading treatment under Article 3, which took precedence over the child’s status as an illegal immigrant. Further, its decision of the 2012 case *Popov v France*¹⁷, the Court held that France was in breach of Articles 3 and 5 of the ECHR in not measuring the potential harmful impact of detention upon two young children. In that case, the centre in question contained only iron-frame beds for adults and no play areas for children. It was found that whilst the detainment of two weeks would not be considered excessive *per se*, where children were concerned it raised a serious risk of serious psychological trauma. Moreover, in comparison to Australia’s policy of mandatory detention, a number of European countries grant a limited residence visa to unaccompanied minors in order to ensure children are not detained for long periods of time and provide them with some level of security in relation to settlement.

Of course, the best interests principle does not mean that a child’s best interests will always override other conflicting interests; rather, it should be actively recognised to be the primary consideration. In light of EU case law, it would be interesting to note how Australia’s policy would fare if they were themselves an EU country. What EU case law makes clear, however, is that such detention in unsuitable conditions, which make no reference to the individual needs of the child, is not in the best interests of the child and should not be overridden by other countervailing policy justifications.

**Conditions**

In a report by independent clinical experts on the Nauru detention centre, it was found that the environment was wholly unsuitable for children. Physical conditions were reported as harsh, and the availability of drinking water was intermittent despite the hot and humid climate. Sanitation was of prime concern, and it was reported that there was a significant risk of groundwater contamination as a result of poor waste management at the detention centre. In September 2014, it was revealed that detention centres on Nauru were experiencing serious water shortages¹⁸.

Acute deficiencies were found relating to educational and development facilities, including inadequate school facilities and play spaces. In a visit to Christmas Island, the Human Rights Commission’s president, Professor Gillian Triggs revealed that children who had been detained for up to nine months had only

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¹⁶ (13178/03), 12 October 2006  
¹⁷ (39472/07 and 39474/07), 19 January 2012  
had two weeks of schooling during that time\textsuperscript{19}. The majority of children had no access to education or structured physical activity, and there was almost no space of recreation or physical exercise. Reports further stated high concern over the fact that there were no places for babies to learnt to crawl or walk in the 3x3 containers they were confined to which consisted of a bunk bed and a cot, leaving only one square metre of space\textsuperscript{20}. It is a widely known fact that both adequate play and education are vital to the proper mental and physical development in the crucial stages of a child’s development. This is recognized in Articles 28(a) and 31 of the CRC. Arguably, the long-term deficiencies present in Australia’s offshore processing centres in this regard are therefore akin to child abuse, with detrimental far-reaching consequences.

By section 4860 of the Migration Act, the Commonwealth Ombudsman is required to conduct a review as to the appropriateness of the immigration arrangements if a person has been in immigration detention for two years or more, and every six months thereafter if the person remains in detention\textsuperscript{21}. In reality, however, asylum seekers have their first review after approximately 32 months in detention and are reviewed irregularly thereafter\textsuperscript{22}. Such disparities in practice demonstrate a clear breach of the need to protect a child’s best interests, with no real prospect of properly assessing individual cases in a timely manner to ensure the best possible treatment and care.

### Physical health

Inadequate, if any, are the health checks on asylum seekers on arrival before being sent to the offshore processing centres within the 48-hour turnaround period. In a confidential report by independent clinical experts on health conditions inside the Nauru detention centre\textsuperscript{23}, it was found likely that many children were carrying undiagnosed blood-borne diseases including hepatitis B, with up to 50% of children in the facility carrying latent tuberculosis. Children are more prone to transmission of such diseases, with the potential to suffer detrimental long-term consequences, particularly in the close living conditions of the detention centres, which amplify the risk of infection. In a public hearing under the inquiry, Mark Cormack, an official within the Department of

\begin{itemize}
\item[\textsuperscript{19}] ABC News, 4 April 2014: \url{http://www.abc.net.au/news/2014-04-04/inquiry-hears-child-detainees-missing-out-on-months-of-school/5367208}
\item[\textsuperscript{21}] Migration Act 1958, s.486M(b)
\item[\textsuperscript{23}] Physical and Mental Health Subcommittee of the Joint Advisory Committee for Nauru Regional Processing Arrangements, ‘Nauru Site Visit Report 16-19 February 2014’: \url{http://www.theguardian.com/world/interactive/2014/may/29/nauru-family-health-risks-report-in-full}
\end{itemize}
Immigration and Border Protection, accepted that “the longer a person spends in detention, the higher the incidence of a range of health conditions.”

In Christmas Island, Professor Elizabeth Elliott reported that most children were ill with chest or gut infections due to the unacceptably cramped and high-density accommodation. As a result of the dirty environment, extreme heat, and proximity to a phosphate mine, many children suffered from recurrent asthma and irritation of the eyes and skin.

Contrary to Article 24(1) CRC, minimal medical care is provided for children and adolescents. In a leaked letter by a Christmas Island medical officer, it was revealed that “there is no discernable, overarching child health policy available or in use on the Island.” In the course of an inquiry by the Australian Human Rights Commission, shocking accounts were discovered as to the shortcomings in healthcare for asylum seekers. It was revealed that children are forced to wait for months on end for advanced medical care, and often go without any meaningful mental health management altogether. In one reported case, a seven-year-old girl with a lazy eye who had broken her glasses on the journey to Christmas Island had gone nearly a year without receiving a replacement pair. She was virtually blind for that time, and now risked losing her eye and was receiving psychological support.

Mental health

“State Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.” – Art.39, CRC.

Children flee to Australia to escape rampant persecution and abuse in their home countries, frequently arriving with backgrounds of rape, torture and trauma. Yet contrary to Article 39 of the CRC and Article 6(2), which provide for the survival and development of the child, it is clear that the conditions of regional processing centres are wholly unsuitable for the development and recovery of children.

Mental illnesses and suicide attempts amongst children are rife in offshore processing centres. In recent leaked documents obtained by the Guardian Australia, it was revealed that staff at Nauru detention centres have reported persistent acts of child abuse and self-harm over several months, with accounts including suicide attempts, sexual abuse, bed-wetting, depression\(^{28}\). Between January 2013 and March 2014 alone, the Australian Human Rights Commission revealed 128 reported self-harm incidents amongst the 2000 children in detention, which its president Professor Gillian Triggs described as \textit{“shockingly high”}. Such incidents were stated to be dramatically higher for children than for the parents, demonstrating the \textit{“particularly egregious”} impacts of detention on children.\(^{29}\)

As part of a national inquiry into the well-being of children in detention led by the Australian Human Rights Commission, Triggs noted the overwhelming sense of anxiety, depression, mental illness and developmental retardation, with concerns over children who have, amongst other problems, stopped talking or identifying themselves by number rather than name. In drawings given to Triggs by the children, the common theme was a cry for freedom.

\textit{“They’re asking for help and they perceive themselves as being behind bars and in prison. And this theme is repeated over and over again”}\(^{30}\)

Following a visit to Christmas Island, RACP paediatrician Karen Zwi found that many unaccompanied children there displayed symptoms of major depression, post-traumatic stress disorder and/or general anxiety disorders. Many had been detained there for over 12 months and were living in uncertainty, fearing transfer to Nauru.\(^{31}\)

Further, a leaked independent assessment of healthcare in the Nauru detention centre in February 2014 highlighted concerns of children being vulnerable to sexual abuse, with no child protection checks being undertaken on Nauruan staff who comprise over 50\% of the detention centre workforce\(^ {32}\). Greens immigration spokeswoman, Sarah Hanson-Young has further stated accusations that children had been forced to have sex in front of guards at the centre\(^ {33}\). Frequent allegations of abuse and sexual misconduct by staff against children have now prompted a government inquiry into children in detention on Nauru. Yet despite such recognition by the government being a positive step, it seems

that for all the complaints and concerns raised over a long period, this inquiry is just too little, too late. As stated by Hanson-Young: “Why didn’t he act and initiate an investigation before this week when he was dragged to one, kicking and screaming, by extremely serious allegations?”34

Resettlement agreements

Australia made the Regional Resettlement Agreement with Papua New Guinea on 19 July 2013 (“the PNG Agreement”). A Memorandum of Understanding followed in 6 September 2013, which provided for special arrangements to be developed for vulnerable cases including unaccompanied minors. Little detail is present on how specifically vulnerable unaccompanied children might be dealt with, however. This agreement has been heavily criticised by human rights groups. Indeed, reports have shown that “children in Papua New Guinea remain some of the most vulnerable children in the world”, with rampant abuses including sexual assault and commercial exploitation35.

In September 2014, Scott Morrison signed a memorandum of understanding with Cambodia, cementing a plan for refugees who sought Australia’s protection to be settled in Cambodia. The agreement states that Australia will bear the direct costs, including initial support to refugees and relevant capacity building to ensure Cambodia has the appropriate resources to receive and integrate the refugees successfully. However, the agreement has received intense condemnation by the UNHCR and human rights groups, with refugees on Nauru reportedly staging protests on the matter. The previous United Nations High Commissioner Antonio Guterres expressed deep concern over the precedent it sets, emphasising the treatment refugees should be afforded and importance that countries do not shift their refugee responsibilities elsewhere. Of particular concern has been the poor human rights record of Cambodia, its substandard public health service and widespread corruption. 36 In Transparency International’s most recent corruption perception index, Cambodia is placed at 160 out of the 177 countries surveyed37.

Conclusion

It is clear that Australia’s blanket approach in the mandatory detention of all unauthorised non-citizens is wholly unsatisfactory, particularly in the context of the vulnerable cohort of children who arrive following immense persecution,

35 UNICEF: http://www.unicef.org/png/activities_4362.html
37 http://www.transparency.org/country#KHM
torture, or other traumatic experiences. Of particular concern is Australia’s blatant disregard of the paramount consideration of the best interests of the child under the CRC. The arbitrary transfer to the abhorrent conditions in offshore processing centres, coupled with the indefinite time periods of detention are clearly at odds with any child’s best interests, resulting in detrimental consequences to their development, physical health, and mental well-being. Such consequences are demonstrated by the alarming rates of mental illness and suicide attempts rife amongst this young demographic. Moreover, the failure of the Australian government to ensure the proper screening of workers within the detention centres, ensure that children detained there are at the mercy of potential abuse and neglect.

In comparison to the approach taken by the EU, for example, it is obvious that Australia's rampant failures to accommodate for such needs within the legislation or otherwise, are highly unsatisfactory and have no substantive justification. Whilst the IGOC Act confers legal guardianship to the Minister, such duties conflict substantially with his interests in detaining and deporting refugee and asylum seekers, and is therefore irresponsible by nature. Rather, it is important that an independent guardian be appointed, with particular regard to the proper training and knowledge required to attend to the best interests of the children.

The desire of the Australian government to surrender its guardianship duties under the Migration Act to the processing country, as well as its resettlement agreements with both Papua New Guinea and Nauru further demonstrate a rampant disregard for the best interests of the child, handing over responsibility to countries with poor human rights records and unsatisfactory infrastructure. It is shocking that in this day and age, where human rights are at the forefront of discussion, that a country with abundant resources should so determinedly seek to abandon any compassion for children seeking refuge and a better life.

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