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Castan Centre for Human Rights Law



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Submission to the

Australian Human Rights Commission

National Inquiry into Children in Immigration Detention

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The Castan Centre for Human Rights Law welcomes the opportunity to make a submission to the National Inquiry into Children in Immigration Detention. The Centre is concerned with the promotion and protection of human rights. The human rights of children seeking asylum have been the subject of our longstanding concern.

The Australian Human Rights Commission noted in its 2004 report on children in immigration detention, *A Last Resort*, that Australia's policy of mandatory immigration detention was fundamentally inconsistent with the Convention on the Rights of the Child (CRC), failing to comply with a range of its obligations. Ten years on, Australia continues to subject children to essentially the same policy of mandatory immigration detention in violation of its international human rights obligations.

Our submission will focus on two areas: it will consider the detention of children in the immigration detention facility of Nauru and provide a comparative analysis of Australia's detention of children in contrast to that of States in the European Union.

Part A: Detention of children in Nauru

Australia signed a Memorandum of Understanding (MOU) with the government of Nauru on 29 August 2012¹ and Nauru was designated as a 'regional processing country' in September 2012.² The 2012 MOU between Australia and Nauru was superseded by a further MOU between the two countries signed on 3 August 2013.³ Under the MOU with Australia, the Republic of Nauru has agreed to host asylum seekers transferred to Nauru in 'one or more Regional Processing Centres' (RPC).⁴ It is now government policy that all asylum seekers who arrive in Australia irregularly by boat will be transferred to either Nauru or Papua New Guinea.⁵

¹ *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*, signed 29 August 2012.

² This was pursuant to section 198AB(1) of the Migration Act 1958 (Cth).

³ *Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru and Related Issues* signed 3 August 2013.

⁴ *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* signed 3 August 2013, clause 10.

⁵ Australian Broadcasting Corporation, 'Scott Morrison describes 'secrecy with a purpose' in asylum policy', *7:30 Report*, 14 January 2014 (Scott Morrison).

The term Regional Processing Centre is a misnomer for at the time of writing, no asylum seeker had undergone a full assessment process and no refugees had been resettled as a result of processing on Nauru. The centre in which asylum seekers are processed at Nauru should therefore be understood as a detention facility rather than a processing facility.

There are currently 177 asylum seeker children detained in Nauru which include 20-50 unaccompanied minors. While government statistics indicate that no minors are currently detained at Manus Island, concerns have been raised about the age assessment procedures, which have in some cases seen children classified as adults and treated accordingly.⁶

Extraterritorial Application of the Convention on the Rights of the Child

Australia's role in detaining asylum seeker children in Nauru places it in violation of numerous obligations under the CRC. Australia is bound by its obligations under the CRC to children transferred by Australia to Nauru because article 2(1) of the CRC provides:

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

That is, in accordance with article 2(1) of the CRC, a State is obliged to provide rights under the CRC to all children in its 'jurisdiction' rather than simply in its territory. Australia clearly exercises jurisdiction over asylum seeker children detained in Nauru. Under the MOU between Australia and Nauru, Australia has the responsibility to select and transfer children for detention in Nauru.⁷ The detention of asylum seekers in Nauru is paid for entirely by Australia and Australia maintains a presence in the detention centre and has the power to make decisions about asylum seeker children at the RPC, including their return to Australia. In the words of UNHCR:

⁶ Amnesty International, 'This is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea' December 2013; Oliver Loughland, Manus Island document mentions 14 alleged unaccompanied minors, *The Guardian*, 4 March 2014 at <http://www.theguardian.com/world/2014/mar/04/manus-island-document-mentions-14-alleged-unaccompanied-minors>; Oliver Loughland, 'Every day I am crying': boys held on Manus island tell of their despair', *The Guardian*, 7 November 2013 at <http://www.theguardian.com/world/2013/nov/07/every-day-i-am-crying-manus>

⁷ Clause 7 of the MOU signed in August 2013 provides '[t]he Commonwealth of Australia may Transfer and the Republic of Nauru will accept Transferees from Australia under this MOU.

it is clear that Australia has retained a high degree of control and direction in almost all aspects of the bilateral transfer arrangements. The Government of Australia funds the refugee status determination process which takes place in Nauru, seconds Australian immigration officials to undertake the processing and effectively controls most operational management issues.

Furthermore, Australia is responsible for the asylum seeker children despite the fact that they are not Australian citizens because article 2(1) of the CRC applies to all children, regardless of their status, including their status as a non-citizen, asylum seeker, stateless or an 'unauthorised maritime arrival'.

Violations of the CRC in Nauru

Detention

The harmful impact of detention has been well established and documented.⁸ Detention leads to a deterioration in the mental and physical health of children and is clearly antithetical to their best interests. Therefore, the continuing detention of children in Nauru places Australia in violation of Article 3(1) of the CRC which provides:

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.

Furthermore, all children who arrive or are intercepted whilst attempting to arrive in Australia are now liable to be transferred to and detained in Nauru. Detention in Nauru is mandatory and there are no alternatives to detention for asylum seeker children in Nauru.

The United Nations Human Rights Committee has expressed the view that 'detention should not continue beyond the period for which the State can provide appropriate justification'.⁹ In *A v Australia* the Human Rights Committee also stated that the factors necessitating detention must be 'particular to the individual'.¹⁰ Detention that is not justified and is not particular to the individual circumstances of a detainee will constitute arbitrary detention under Article 9

⁸ See for example Louise Newman and Zachary Steel 'The child asylum seeker: psychological and developmental impact of immigration detention.' (2008) 17 (3) *Child and adolescent psychiatric clinics of North America* 665; Sarah Mares, Louise Newman, Michael Dudley, and Fran Gale. 'Seeking refuge, losing hope: parents and children in immigration detention.' (2002) 10 (2) *Australasian Psychiatry* 91; Sarah Mares and Jon Jureidini 'Psychiatric assessment of children and families in immigration detention—clinical, administrative and ethical issues' (2004) 28 (6) *Australian and New Zealand Journal of Public Health* 520;

⁹ *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (30 April 1997), [9.2].

¹⁰ *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (30 April 1997), [9.4].

of the *International Covenant on Civil and Political Rights*¹¹ (ICCPR). Such detention is therefore also arbitrary under article 37 (b) of the CRC which provides:

No child shall be deprived of his or her liberty unlawfully or **arbitrarily**.

Article 37(b) of the CRC also provides:

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;

As there are no alternatives to the detention of asylum seeker children in Nauru, detention is not a last resort but a first resort, further violating obligation under Article 37(b) of the CRC.

Conditions of Detention

The conditions of detention in Nauru place Australia in further violation of its obligations under the CRC. According to article 24(1):

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

Detention in Nauru is not compatible with the highest attainable standard of health. As stated above, it is well established that immigration detention leads to a deterioration in the physical and mental health of children. A monitoring visit of the detention centre in Nauru in October 2013 led UNHCR to conclude:

Overall, the conditions of mandatory and arbitrary detention within a ‘return-orientated environment’, delays in RSD processing and the absence of clear durable solutions, if left unaddressed, will inevitably have a detrimental impact on the physical and psycho-social health of asylum-seekers, particularly vulnerable individuals.¹²

Beyond the harmful effects of detention on children in general, Nauru is particularly unsuitable for the detention of children. UNHCR has observed that asylum seeker families in Nauru are kept in ‘cramped conditions, with very little privacy, in very hot conditions, with

¹¹ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹² UNHCR, UNHCR Monitoring Visit to the Republic of Nauru 7-9 October 2013 (26 November 2013) <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf>, 2.

some asylum seekers sleeping on mattresses on the ground.’¹³ These poor conditions, which compromise the health of asylum seekers, are further exacerbated by:

- a) lack of adequate medical facilities, including for heart conditions, dental issues and, in one case, to address a metal plate embedded in one person’s leg;
- b) hygiene issues – many complained of skin conditions and other infections, including parasites and lice;
- c) lack of a gynaecologist for the women;
- d) lack of access to x-rays and other medical equipment; and
- e) limited access to medication¹⁴

A Dengue fever outbreak in Nauru in 2014 has highlighted the fact that asylum seeker children should be released into the community in Australia rather than have their health compromised in a detention facility in Nauru.

The poor conditions of the detention facility in Nauru are severe enough for UNHCR to conclude that:

the conditions at the RPC, coupled with the protracted period spent there by some asylum-seekers, raise serious issues about their compatibility with international human rights law, including the prohibition against torture and cruel, inhuman or degrading treatment (article 7, ICCPR).¹⁵

The CRC also contains a prohibition in article 37 (a) which stated in part:

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

If conditions in Nauru constitute cruel, inhuman or degrading treatment under the ICCPR they also constitute the same for children under the CRC.

¹³ UNHCR, UNHCR Monitoring Visit to the Republic of Nauru 7-9 October 2013 (26 November 2013) <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf>, 16 [87].

¹⁴ UNHCR, UNHCR Monitoring Visit to the Republic of Nauru 7-9 October 2013 (26 November 2013) <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf>, 21 [115].

¹⁵ UNHCR, UNHCR Monitoring Visit to the Republic of Nauru 7-9 October 2013 (26 November 2013) <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf>, 16, [90].

Unaccompanied Children

The CRC mandates special protection for unaccompanied children. There is no evidence that children seeking asylum alone in Nauru are provided with any special protection in violation of article 20(1) of the CRC which provides:

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

The Castan Centre has concerns regarding the guardianship of unaccompanied children detained in Nauru. Children seeking asylum alone are currently under the guardianship of the Nauruan justice minister, David Adeang who in turn delegates this guardianship responsibility to NGO, Save the Children. There is an inherent conflict of interest in the role of the Minister for Justice as both the guardian of children seeking asylum alone and the person that bears some responsibility for their detention.¹⁶ It is therefore inappropriate for the Justice Minister to be the person responsible for the care of the children and the individual tasked with protecting their best interests. It is more appropriate for the children to be under the care of an individual or body that is independent of either the Australian or Nauruan governments and can advocate for the needs and rights of the unaccompanied children.

Concluding Remarks on Detention of Children in Nauru

UNHCR has stated that ‘overall, the harsh and unsuitable environment at the closed RPC is particularly inappropriate for the care and support of child asylum seekers. UNHCR is also concerned that children do not have access to adequate educational and recreational facilities’.¹⁷ The Castan Centre shares the concerns of UNHCR. Australia should refrain from detaining children in Nauru and should instead release children into the community in Australia in order to be compliant with the rights of children under the CRC. To do otherwise would be to continue to act in violation of Australia’s international obligations.

¹⁶ For a discussion of this inherent conflict in the role of the Minister for Immigration in Australia See Maria O’Sullivan, ‘The ‘best interests’ of asylum-seeker children: Who’s guarding the guardian?’ (2013) 38 *Alternative Law Journal* 224; Mary Crock and Mary Anne Kenny, “Rethinking the Guardianship of Refugee Children after the Malaysian Solution,”(2012) 34 *Sydney Law Review* 437.

¹⁷ UNHCR, UNHCR Monitoring Visit to the Republic of Nauru 7-9 October 2013 (26 November 2013) <<http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf> > [128].

Part B: Detention of Children – A Comparative Analysis

This section focuses on the following three terms of reference for the Inquiry:

- (1) the appropriateness of facilities in which children are detained;
- (2) the guardianship of unaccompanied children in detention in Australia; and
- (3) assessments conducted prior to transferring children to be detained in ‘regional processing countries’.

The analysis will refer to ‘best practice’ in a number of EU countries as a means of illustrating the way in which other comparable State Parties to the 1951 Refugee Convention and relevant international human rights instruments approach these three issues.

(1) Appropriateness of facilities of detention

There is growing recognition in EU countries that closed detention is not suitable for children:

- In Belgium, unaccompanied children and families with minor children are no longer kept in closed centres.¹⁸
- In the Netherlands, unaccompanied migrant children are no longer placed in immigration detention. Children stay at reception locations with their family or on their own (if they are unaccompanied minor asylum seekers).¹⁹

A number of decisions of the European Court of Human Rights (ECHR) have also held that certain acts of detention of children amount to a violation of Article 3 of the European Convention on Human Rights, which prohibits torture and other inhuman or degrading treatment or punishment.²⁰

¹⁸ UNHCR, ‘Alternatives to the Detention of Asylum-Seekers in Belgium’, UNHCR Brussels, 2011, at p.5, <http://www.refworld.org/pdfid/524fc3ef4.pdf>. This report notes that a law to prohibit children from being detained in closed centres was adopted by the Chamber of Representatives on 20 July 2011.

¹⁹ In 2011, The Dutch Minister for Immigration and Asylum, announced on 10 March that unaccompanied migrant children will no longer be placed in immigration detention: see International Detention Coalition, <http://idcoalition.org/blog/news/children-pave-the-way-for-alternatives-to-detention-in-holland/>. See also <http://www.coa.nl/en/asylum-seekers/living-at-an-asylum-seekers-centre>.

²⁰ European Convention on Human Rights, http://www.echr.coe.int/Documents/Convention_ENG.pdf.

In a 2006 decision of the ECHR, the Court found that Belgium was in breach of Article 3 relating to inhuman or degrading treatment due to its detention of a five year old child in a closed detention centre.²¹ In this case the applicants were a mother and daughter from the Republic of Congo who had become separated, after which the daughter (unaccompanied) was detained for nearly two months in a closed centre for adults (a transit centre near Brussels Airport). The Court noted that the child had been left in an ‘extremely vulnerable situation’²² and that the protection from inhuman or degrading treatment set out in Article 3 took precedence over the child’s status as an illegal immigrant.²³ It found a breach of Article 3 arose from the detention of the child and also the deportation of the child from Belgium on a flight without sufficient adult supervision.

In a later 2011 decision of the ECHR, Belgium was also found to be in violation of Article 3 for detaining the children in a facility that was not age-appropriate.²⁴ The family in question comprised a mother and three children – Sri Lankan nationals of Tamil origin. In this case, the Belgian authorities placed the family in a closed transit centre for illegal aliens near the airport, pending processing of their asylum application. The entire family was detained for a total of four months. In September 2009 the Belgian authorities granted the mother and her children refugee status. Although the children had been detained with their mother, the Court considered that by placing them in detention, the Belgian authorities had exposed them to feelings of anxiety and inferiority, and in full knowledge of the facts, compromised their development. The Court had regard to the fact that the applicants had experienced a traumatic situation in their country of origin and were vulnerable due to their personal history. The situation experienced by the children had therefore amounted to inhuman and degrading treatment.

As noted above, Belgium decided to change its policy following these cases and now no longer detains families in closed transit centres.

In a 2012 decision, *Popov v France*, the ECHR found France to be in violation of the prohibition against inhuman or degrading treatment (Article 3) and the right to liberty and

²¹ *Mubilankzila and Mitunga v. Belgium*, (Appn no. 13178/03), 12 October 2006.

²² *Ibid.*, para 55.

²³ *Ibid.*

²⁴ *Kanagaratnam and Others v. Belgium* (15297/09 Judgment 13.12.2011). Please note that a summary of the case is available on the ECHR website. However, the judgement itself is only available in French.

security (Articles 5(1) and 5(4)) in respect of the detention of two children, who were at that time aged three years old and five months (respectively).²⁵ Here the applicants applied for asylum in France but were rejected. On 27 August 2007 they were arrested and taken into police custody. Following a failed attempt to return the family to Kazakhstan, they were taken to Rouen-Oissel detention centre, which was authorised to accommodate families. On 29 August a judge ordered a two-week extension to their detention. On 11 September, the French authorities made a second attempt to remove the family which failed, upon which a judge ordered their release from detention. The family therefore spent approximately 2 weeks in detention in that centre. In finding that France had breached Article 3 and Article 5, the ECHR found that the Rouen-Oissel detention centre was not suitable for children. The only beds available were iron-frame beds for adults and play areas were not available. Moreover the stressful detention environment was found to be unsuitable for children. While detainment of two weeks would not be considered excessive *per se*, in relation to the children it was held to have raised the risk of serious psychological trauma. Here France was in breach of the ECHR because the French authorities had not measured the potential harmful impact of detention upon the children.

Limits on length of detention

Many EU Member States also set a maximum period of detention for families and unaccompanied minors.²⁶ This is underpinned by Article 11(2) and (3) of the EU Receptions Directive which states that:

Minors shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. **Such detention shall be for the shortest period of time** and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors. The minor's best interests, as prescribed in Article 23(2), shall be a primary consideration for Member States. Where minors are detained, they shall have the possibility to **engage in leisure activities, including play and recreational activities appropriate to their age.**

²⁵ *Popov v. France* (Applications nos. 39472/07 and 39474/07), ECHR Press Release, 024 (2012) 19.01.2012 <http://www.refworld.org/cgi-bin/telexis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=4f19923c2>. Unfortunately the case is only available in French, it is not translated into English. Note: in addition to those Articles listed above, the Court also found France in violation of Article 8 (right to family life) for detaining the whole family.

²⁶ For instance, Norway sets a maximum period of 12 weeks; in Sweden, the maximum for unaccompanied children is 3 days (in practice they are rarely detained), in France, 45 days: see European Commission Directorate-General, 'Comparative Study on Practices in the Field of Return of Minors, Final report, December 2011, p. 74.

Unaccompanied minors shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible. . .²⁷

(2) Guardianship of unaccompanied children in detention

As noted earlier in this submission, there are concerns arising from the guardianship arrangements for unaccompanied children in Nauru.

This section will address guardianship issues in Australian territory – of those children in detention in Australia and also those assessed as transferees to regional processing countries.

It is well-recognised that the current laws on guardianship of unaccompanied children in Australia are problematic. The legislative function of the Minister for Immigration as guardian of unaccompanied minors presents a conflict of interest given his/her other roles as detainer and deporter of such children under the Migration Act.²⁸ Article 18(1) which specifically states that a child's legal guardian, should have the best interests of the child as his/her '*basic concern*'.²⁹ In addition to this, the UN Committee on the Rights of the Child has stated that unaccompanied asylum-seeker children require an independent guardian to protect their rights and interests and has explicitly stated that '[a]gencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship'.³⁰

²⁷ Directive 2013/33/EU Of The European Parliament And Of The Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (EU Receptions Directive) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0096:0116:EN:PDF>. Article 14 also sets down standards for education of children.

²⁸ See Maria O'Sullivan, 'The 'best interests' of asylum-seeker children: Who's guarding the guardian?' (2013) 38 *Alternative Law Journal* 224; Mary Crock and Mary Anne Kenny, "Rethinking the Guardianship of Refugee Children after the Malaysian Solution,"(2012) 34 *Sydney Law Review* 437.

²⁹ See also Article 22(1) of CROC which addresses the particular circumstances of child asylum seekers, noting that they should be given appropriate protection and assistance: 'States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties'.

³⁰ Committee on the Rights of the Child, General Comment 6, Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6, 1 September 2005, [33].

The primary role of the best interests principle and the need to maintain independence of the guardian of unaccompanied minors has been specifically addressed in key EU instruments on asylum:

- Article 24 of the Charter of Fundamental Rights of the European Union ('the Charter'), provides that 'In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'³¹;
- Article 24 of the EU Receptions Directive, dealing with detention and treatment of asylum-seekers, states that '[o]rganisations or individuals whose interests conflict or could **potentially conflict** with those of the unaccompanied minor shall not be eligible to become representatives'.³² A similar provision is set out in Article 25 of the EU Procedures Directive.³³

This is reflected in European practice where it is generally accepted that a guardian may be appointed from a government agency dealing with child protection and/or from a non-government organisation (NGO), but *not* the department legally responsible for the child's detention and deportation.³⁴ For instance, guardians in Belgium are entirely unrelated to immigration authorities.³⁵

In relation to alternatives to the present guardianship structure in Australia, we note that there are two possible avenues for reform. Firstly, the guardianship role could be transferred to the new Commonwealth Children's Commissioner.³⁶ Secondly, as submissions to a recent Senate Committee pointed out, it may be more appropriate for the Commonwealth Commissioner to provide oversight of the entity acting as the legal guardian of such minors, rather than hold the guardianship duty itself.³⁷ These problems could be addressed by either

³¹ Charter of Fundamental Rights of the European Union (2000/C 364/01)
http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

³² EU Receptions Directive, above.

³³ Directive 2013/32/EU of the European Parliament and of The Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast) (EU Procedures Directive), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=EN>.

³⁴ see European Migration Network, Policies on Reception, Return and Integration arrangements for, and numbers of, Unaccompanied Minors – an EU comparative study - Synthesis Report, May 2010, 53-54.

³⁵ <http://endchilddetention.org/belgium/>

³⁶ Commonwealth Attorney-General, Media Release, 29 April 2012.

³⁷ Senate Legal and Constitutional Affairs Committee, Inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010, 16 December 2010, 66 [5.16].

delegating the guardianship duty from the Commission of Children to relevant state and territory child welfare agencies (so that the Commissioner would have an oversight function) or by transferring the guardianship role to the Minister for Families, Community Services and Indigenous Affairs and retain the Commissioner for Children as an oversight mechanism. We note, in this context, that the UK Commissioner for Children has such a reporting role in relation to unaccompanied asylum seeker children³⁸

(2) Assessments conducted prior to transferring children to be detained in ‘regional processing countries’

There is some evidence that assessments of children prior to transfer to ‘regional processing countries’ are not being carried out in line with the best interests principle. For instance, UNHCR has reported, as part of its monitoring visit to Nauru, that children detained in Nauru ‘have been transferred without an assessment of their best interests and without adequate services in place to ensure their mental and physical well-being.’³⁹

One of the main problems with transfers of children is the consent provisions for the Minister of Immigration as guardian. Section 6A of the Guardianship Act provides, amongst other things, that the Minister must give consent in writing prior to a non-citizen child leaving Australia.⁴⁰ However, the consent provision under Section 6A(2) is phrased in a negative way, obligating the Minister not to *refuse* such consent unless the grant would be ‘prejudicial’ to the child:

The Minister *shall not refuse* to grant any such consent unless he or she is satisfied that the granting of the consent would be *prejudicial* to the interests of the non-citizen child.⁴¹

Section 6A(2) therefore does not explicitly place a positive obligation on the Minister to ensure that the transfer or departure would be in the ‘best interests’ of the child, which is the

³⁸ See eg Children’s Commissioner for England, [Landing in Kent: The experience of unaccompanied children arriving in the UK](http://www.childrenscommissioner.gov.uk/content/publications/content_465), February 2011, http://www.childrenscommissioner.gov.uk/content/publications/content_465 .

³⁹ UNHCR monitoring visit to the Republic of Nauru, 7 to 9 October 2013.

⁴⁰ Immigration (Guardianship of Children) Act 1946 (Cth), Section 6A(1) provides that ‘A non-citizen child shall not leave Australia except with the consent in writing of the Minister.’

⁴¹ Immigration (Guardianship of Children) Act 1946 (Cth), Section 6A(2) [emphasis added].

central protective term used in the international human rights instruments to which Australia is a party.

The judgment of the High Court in *Plaintiff M70/Plaintiff M106 of 2011* ('*Plaintiff M70/106*') held that the written consent of the Minister was required prior to any transfer of unaccompanied asylum-seeker children.⁴² This was, however, overturned by amendments made to the Migration Act and Guardianship Act in August 2012. These amendments repealed Section 198A of the Migration Act which had been relied upon by the High Court in its judgement. Under the new provisions, all eligible persons are subject to transfer to a third country and there are no exemptions for unaccompanied children. Further, and controversially, the guardianship duty of the Minister of Immigration ceases in relation to those children who are transferred to a 'regional processing' country.⁴³

This should be contrasted with the laws and practice of comparable countries. Those countries which have a formal agreement in place to transfer asylum-seekers to other States have an *exception* for unaccompanied minors. For instance, the 'Safe Country' transfer arrangement between the United States and Canada exempts unaccompanied minors.⁴⁴ Significantly, the EU regional transfer agreement, called the 'Dublin Convention', sets out special rules for unaccompanied children and explicitly refers to the 'best interests' principle.⁴⁵ Article 8 of the Dublin Convention gives primary to considerations of family reunion. It provides:

⁴² *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 ('*Plaintiff M70/106*').

⁴³ Immigration (Guardianship of Children) Act 1946 (Cth), Section 6(2)(b). Section 8(2) of the amended Guardianship Act also clarifies that the Migration Act overrides the provisions of the Guardianship Act. In particular, Section 8(3) of the Guardianship Act provides that nothing in the Guardianship Act affects the performance or exercise of any function, duty or power relating to the taking of a 'non-citizen child' from Australia to a regional processing country.

⁴⁴ The Canada - United States Safe Third Country Agreement, 5 December 2002, Article 4(2)(c), <<http://www.cic.gc.ca/english/departement/laws-policy/menu-safethird.asp#exceptions>>.

⁴⁵ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person ('Dublin Convention'), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF>. Recital (13) to the Convention provides that '. . . the best interests of the child should be a primary consideration of Member States when applying this Regulation. In assessing the best interests of the child, Member States should, in particular, take due account of the minor's well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity, including his or her background. In addition, specific procedural guarantees for unaccompanied minors should be laid down on account of their particular vulnerability'; see also Article 6 on application of the best interests principle.

Where the applicant is an unaccompanied minor, the Member State responsible shall be that where a family member or a sibling of the unaccompanied minor is legally present, provided that it is in the best interests of the minor. . .⁴⁶

This prioritisation of the best interests principle and family reunion in the Dublin Convention is very important in the context of intra-EU transfers of unaccompanied children as it ensures that children have family support and are not separated from family members.

The Dublin Convention also sets out important protective provisions which have importance for children. For instance, Article 32 requires exchange of health data before a transfer is carried out:

For the sole purpose of the provision of medical care or treatment, in particular concerning disabled persons, elderly people, pregnant women, **minors** and persons who have been subject to torture, rape or other serious forms of psychological, physical and sexual violence, the transferring Member State shall, in so far as it is available to the competent authority in accordance with national law, transmit to the Member State **responsible information on any special needs of the person to be transferred**, which in specific cases may include information on that person's physical or mental health. That information shall be transferred in a common health certificate with the necessary documents attached. The Member State responsible **shall ensure that those special needs are adequately addressed**, including in particular any essential medical care that may be required.⁴⁷

Other key EU instruments prioritise the best interests principle in detention and processing matters. For instance, the EU Procedures Directive (the regulation which sets out common standards for the processing of refugee claims within the EU) states that 'specific procedural guarantees for unaccompanied minors should be laid down on account of their vulnerability' and that in that context 'the best interests of the child should be a primary consideration of Member States'.⁴⁸ Importantly, the EU Receptions Directive, dealing with detention of asylum-seekers, requires EU States to implement the 'best interests' principle and to ensure 'a standard of living adequate for the minor's physical, mental, spiritual, moral and social development.' Specifically, Article 23 states:

⁴⁶ Ibid, Article 8(1). Article 8(4) also provides that 'In the absence of a family member, a sibling or a relative as referred to in paragraphs 1 and 2, the Member State responsible shall be that where the unaccompanied minor has lodged his or her application for international protection, provided that it is in the best interests of the minor.

⁴⁷ Dublin Convention, above, Article 32.

⁴⁸ Directive 2013/32/EU of the European Parliament and of The Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast) (EU Procedures Directive), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=EN>. See also Articles 2(i) and 17(6).

1. The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors. Member States shall ensure a **standard of living adequate for the minor's physical, mental, spiritual, moral and social development**.
2. In assessing the best interests of the child, Member States shall in particular take due account of the following factors:
 - (a) family reunification possibilities;
 - (b) **the minor's well-being and social development, taking into particular consideration the minor's background**;
 - (c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;
 - (d) the views of the minor in accordance with his or her age and maturity.
3. Member States shall ensure that minors have access to leisure activities, including **play and recreational activities appropriate to their age** within the premises and accommodation centres referred to in Article 18(1)(a) and (b) and to open-air activities.
4. Member States shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counselling is provided when needed. . . .⁴⁹

The consideration given by European countries to developmental issues of asylum-seeker children is reflected in a recent, influential judgement of the German Constitutional court which held the following:

Children are *not small adults*. Their need which must be covered in order to ensure a subsistence minimum that is in line with human dignity must be orientated in line with *child development phases* and towards what is necessary for the *development of a child's personality*.⁵⁰

Although this German case dealt with a different issue than that of detention,⁵¹ it is indicative of increasing recognition of children's special needs.

⁴⁹ Directive 2013/33/EU Of The European Parliament And Of The Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (EU Receptions Directive) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0096:0116:EN:PDF>

⁵⁰ Zitierung: BVerfG, 1 BvL 1/o09 vom 9.2.2010, Absatz-Nr. (1 - 220), http://www.bverfg.de/entscheidungen/1s20100209_1bvl000109en.html (emphasis added)

⁵¹ It dealt with the question of the appropriate level of social security benefits to be paid to adult and child asylum-seekers.

Alternatives to transfer – temporary residence

It should also be noted that a number of European countries grant a residence visa to unaccompanied minors where there are no adequate reception arrangements in the country to which they would be returned. For instance, authorities in Norway grant a limited residence visa to unaccompanied minors. This permit expires when the minor reaches the age of 18, after which time they are expected to return to their country of origin.⁵² A similar practice of granting temporary residence permits to unaccompanied children is found in the UK⁵³ and the Netherlands.⁵⁴ This is a way of ensuring that unaccompanied minors are not sent back to countries where they may not have sufficient family support. It also ensures such children are not detained for long periods and are given some level of security in relation to settlement in the asylum host state.

Improving application of ‘best interests’ to Australian children in detention

The best interests principle is not adequately reflected in current Australian law and policy on detention of children, including their guardianship and transfer. The wording of Section 6A(2) of the Guardianship Act, which merely refers to satisfaction that removal would ‘not prejudice the interests’ of an unaccompanied child is problematic and requires attention. This is arguably a weaker provision than the ‘best interests’ principle as it simply requires that the transfer not prejudice the child’s interests, rather than a positive obligation on the Minister to

⁵² Norwegian Aliens Act, §38, ch.8 §8.8, discussed in

<https://www.duo.uio.no/bitstream/handle/10852/37272/MAxThesisxSolveixIgesund.pdf?sequence=1> at 1.

⁵³ UK Immigration Rules, Rule 352ZC set out requirements for limited leave to remain as an unaccompanied asylum seeking child. The requirements to be met in order for a grant of limited leave to remain to be made in relation to an unaccompanied asylum seeking child under paragraph 352ZE are: a) the applicant is an unaccompanied asylum seeking child under the age of 17 ½ years throughout the duration of leave to be granted in this capacity; b) the applicant must have applied for asylum and been refused Refugee Leave and Humanitarian Protection; c) there are no adequate reception arrangements in the country to which they would be returned if leave to remain was not granted; d) the applicant must not be excluded from a grant of asylum under Regulation 7 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 or excluded from a grant of Humanitarian Protection under paragraph 339D or both; e) there are no reasonable grounds for regarding the applicant as a danger to the security of the United Kingdom; f) the applicant has not been convicted by a final judgment of a particularly serious crime, and the applicant does not constitute a danger to the community of the United Kingdom; and g) the applicant is not, at the date of their application, the subject of a deportation order or a decision to make a deportation order.

⁵⁴ Netherlands’, Aliens Decree, 2000. Article 3.56(1)(c): The residence permit for unaccompanied minors may only be granted to aliens who are unaccompanied and who are underage. The unaccompanied minor must furthermore meet the conditions that (a) he or she cannot support himself or herself independently in the country of origin or (b) in another country where he or she could reasonably go to and that (c) adequate reception, by local standards, is absent in the country of origin or another country where he or she could reasonably go to’. This is discussed in http://amis.ku.dk/news/2013/refugee_studies_centre/wr-deportation-unaccompanied-minors-erpum-210613.pdf at 9-10.

ensure the transfer is in the child's best interests. In practice, this allows the Minister to justify sending unaccompanied minors to regional processing centres on the basis of his view that it would not be 'prejudicial' to the child's interest. In contrast, such conditions may not satisfy a more stringent requirement to demonstrate that the transfer is actually in the 'best interests of the child'. Thus, consideration should be given to reflecting a positive obligation to give effect to the best interests of the child principle in both the Guardianship Act and Migration Act. Further, the cessation of the guardianship role upon transfer of asylum seeker children to a 'regional processing country' is contrary to international standards and should be remedied. As noted above, the Guardianship role of the Minister for Immigration should also be reformed to remove the conflict of interest. As Australia is a party to the major international human rights and refugee treaties, regard should be had to comparable laws in leading EU countries discussed above, which demonstrate aspects of best practice on detention, guardianship and transfer of asylum-seeker children.

Conclusion

10 years ago, the Commission's report of the National Enquiry into Children in Immigration Detention provided the most comprehensive report yet to be compiled on the harm caused to children by the policy and practice of immigration detention. By its rigorous and comprehensive detailing of the policy and practice of immigration detention and its impact upon children, *A Last Resort* built upon the work it had done with respect to examining immigration detention more generally in *Those who've come across the Seas*. Like its *Bringing them Home* report published seven years previously on the removal of Aboriginal and Torres Strait Islander children from their families and communities, *A Last Resort* was a significant social document which outlined the brutal impact of operation of government policy which is fundamentally inconsistent with human rights.

Through the needless suffering of children in detention occasioned by the operation of policy administered on their behalf, Australians faced the reality that their assumptions with respect to their own morality and decency were open to question. *A Last Resort* played a significant role in the Howard government's decision to remove all children and their families from closed detention. Since the release of children and their families from immigration detention in July 2005, the affirmation as a principle inserted into the Migration Act that a minor shall only be detained as a measure of last resort has been of little effect. The practice of detaining

children has been a source of embarrassment but the putative commitment of successive governments to keeping children out of the detention environment has been short-lived and difficult to implement in the context of a mandatory detention regime. In the past year, there has been a significant increase in the number of children held in immigration detention.

For children held in immigration detention, little has changed. While improvements may be noted from time to time with respect to the delivery of services, the reality remains that immigration detention has a deleterious impact on physical and mental health and that children are especially vulnerable to its harsh impacts. Reflecting on what has actually changed in the past decade, it is disturbingly clear that the human rights of minors seeking asylum have not been advanced. Immigration detention continues to undermine the health, well-being and development of vulnerable minors seeking asylum. The practice is still fundamentally inconsistent with human rights, including key guarantees enshrined in the CRC.

We believe that the only significant advance in the past decade is an understanding of the harsh effects of detention on children and the availability of alternatives to detention. In the years since the publication of *A Last Resort*, further medical studies have confirmed the conclusion that immigration detention has a deleterious effect on mental health.⁵⁵ The passage of time has also given rise to a range of reports by human rights bodies concerning the inconsistency of immigration detention with Australia's human rights obligations and has provided an abundance of international models for processing children seeking asylum. While these alternatives would promote the human dignity, well-being and development of children seeking asylum, Australian government policy continues to exact preventable harm upon these vulnerable children.

We applaud the commission for initiating this enquiry but regret that it is necessary.

⁵⁵ Z Steel and others, 'Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees' (2006) 188 *British Journal of Psychiatry* 58; L Newman, M Dudley and Z Steel, 'Asylum, Detention and Mental Health in Australia' (2008) 27 *Refugee Survey Quarterly* 110. More recent examples include Green JP, Eagar K. The health of people in Australian immigration detention centres. (2010) 192(2) *Medical Journal of Australia* 65-70; Newman et al, 'Mental illness in Australian immigration detention centres', *The Lancet*, Volume 375, Issue 9723, 1344-1345; Editorial: 'Mental illness in Australian immigration detention centres', *The Lancet*, Volume 375, Issue 9713, Page 434, 6 February 2010.