



All the Lonely Children

Questions for Policy Makers Regarding
Guardianship for Unaccompanied Minors

DRAFT: OCTOBER 2013

1. Introduction	3
2. Guardianship: duties and obligations	3
3. Ethical and theological perspectives	4
4. Children's rights and the rights framework	4
5. An especially vulnerable cohort	5
6. Onshore detention and resettlement	6
6.1 Conflict of interest - the Minister as guardian, detaining authority and decision maker	6
6.2 Children left alone to navigate the law	8
6.3 Jurisdictional anomalies	9
6.4 Duty of Care and the policy-practice disjuncture	10
6.5 Proposed re-introduction of Temporary Protection Visas (TPV's)	11
7. Offshore detention & resettlement	12
7.1 The PNG resettlement agreement	13
7.2 The Agreement with Nauru	13
7.3 Potential breaches of international law and domestic duties	14

All the Lonely Children

Questions for Policy Makers Regarding
Guardianship for Unaccompanied Minors



Cover Image:
©UNHCR / H. Caux/ July 2010

1. Introduction

The Australian Churches Refugee Taskforce is an initiative of the National Council of Churches in Australia. The Taskforce formally commenced work in April 2013 and currently has over 321 members. The core steering committee is comprised of 18 senior members of churches and church agencies, representing eight Christian churches and three ecumenical bodies from across Australia.

A key concern and focus of the Taskforce is the welfare of refugee and asylum seeking children¹. This paper canvasses the significant existing and emerging concerns regarding the guardianship of these children².

2. Guardianship: duties and obligations

When a child arrives in Australia unaccompanied and without a parent or carer, and without a valid visa, they become a ward of the Commonwealth under the *Immigration Guardianship of Children Act 1946* ('IGOC Act')³.

Specifically, the Minister for Immigration and Citizenship ('the Minister') becomes legal guardian of that child, standing in loco parentis, assuming the place of parent and with it 'the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have'⁴.

The Minister can delegate his or her powers and duties of guardianship to any officer or authority of the Commonwealth or of any State or Territory under section 5 of the IGOC Act. The Minister may also exclude a certain child or group of children from the operation of the IGOC Act.

The Minister can also place a non-citizen child in the custody of an adult who is willing to be the child's custodian and who is, in the opinion of the Minister, a suitable person to be the custodian of that child⁵.

In this respect guardianship of these vulnerable children and young people is not a mere legislative function to be discharged. It is a multifaceted responsibility that encompasses statutory duties, duties under common law, the fulfilment of Australia's international obligations, and a serious moral and ethical concern for the wellbeing of a child that flows from such responsibility.

1 In assuming the role of guardianship, parents, leaders, governments take upon themselves a great responsibility. Such a role can be a means of blessing for the child and society, or an indication of indifference and lack of care at the heart of civil relationships.

2 Children who have been accepted as refugees and are without family are generally supported as part of the Unaccompanied Humanitarian Minors program, referred to as UHMs, whereas children seeking asylum whose status has yet to be determined are supported through the separate Unaccompanied Minors program, often referred to as UAMs.

3 The IGOC Act applies to 'non-citizen' children. A person will be a non-citizen child under the IGOC if he or she falls within the categories outlined in section 4AAA. This requires the person to be: under the age of 18; entering Australia as a non-citizen and with the intention of becoming a permanent resident; and without a parent, adult relative or adoptive parent. Section 6 of the IGOC Act provides that the Minister shall be the guardian of every non-citizen child - until the child reaches the age of 18 years or leaves Australia permanently, or until the provisions of this Act cease to apply to and in relation to the child, whichever first happens. Amendments made in 2012 clarify that a non-citizen child will 'leave Australia permanently' if he or she is removed from Australia under section 198 or 199 of the Migration Act 1958; or is taken from Australia to a regional processing country under section 198AD of the Migration Act.

4 Section 6(1) Immigration Guardianship of Children Act 1946 ('IGOC Act').

5 The IGOC Regulations provide further guidance as to the process for appointing a custodian, and in relation to the duties of custodians, which include duties commensurate to those of a foster parent, under the laws of the State in which the custodian lives.

3. Ethical and theological perspectives

Those who are given the role of guardians have as their first responsibility the need to make available the supportive caring relationships that are necessary for children to flourish.

If that supportive network is denied, all evidence points to children suffering the spiritual, psychological and sociological consequences of this privation for the rest of their life.

Care for children stands at the heart of Jesus' message, teaching and example. He both blesses children and warns those who have control over them. It is when the disciples are arguing about matters of authority and control, that Jesus sets children before them and blesses them and declares that in the sight of God not only are the children precious in themselves, but they are indicators of the nature of the reign of God.

In the strongest terms possible Jesus also warns those responsible for children not to despise them, or become a stumbling block, or cause children to stumble (Matt 18). Parents too are warned about provoking their children so that they do not lose heart (Col 3:21). Children are fully human, a blessing from God.

The early church also saw in Jesus' attitude to children the reality of the fact that we are all made in the image of God and from God's point of view 'children of God'. Jesus and the Church after him have underlined the prophet's focus on the care for the orphan and children in need as an ethical marker that God gives to individuals and nations alike.

In assuming the role of guardianship, parents, leaders, governments take upon themselves a great responsibility. Such a role can be a means of blessing for the child and society, or an indication of indifference and lack of care at the heart of civil relationships.

4. Children's rights and the rights framework

Australia is a signatory to the Convention on the Rights of the Child ('CROC'), one of the six 'core human rights treaties' that underpins our international human rights framework⁶. The CROC provides a critical cornerstone for protecting children's rights and monitoring the obligations of States towards them.

The four fundamental principles that underpin the CRC framework are: non-discrimination; survival; development and protection; participation; and the best interests of the child. The latter is perhaps the most important in any discussion of unaccompanied children. Enshrined in Article 3(1), it is further reinforced by Article 18(1) which states '... the best interests of the child will be [the legal guardian's] basic concern.'⁷

Some of the key rights related to unaccompanied children under the CROC include:

- ▶ children should not be detained unlawfully or arbitrarily (Art 37(b));
- ▶ children must only be detained as a measure of last resort and for the shortest appropriate period of time (Art 37(b));
- ▶ children in detention:
 - ▶ should be treated with respect and humanity, in a manner that takes into account their age and developmental needs (Art 37(c));
 - ▶ have the right to challenge the legality of their detention before a court or other independent and impartial authority (Art 37(d));
- ▶ children seeking asylum have a right to protection and assistance - because they are an especially vulnerable group of children (Art 22);
- ▶ children have a right to family reunification (Art 10); and
- ▶ children who have suffered trauma have a right to rehabilitative care - recovery and social reintegration (Art 39).

6 See: www.unicef.org/crc/index_framework.html and www.unicef.org.au/Discover/What-We-Do/Convention-on-the-Rights-of-the-Child.aspx. Australia's current treatment of unaccompanied children also raises issues under the *Refugee Convention*, *International Covenant on Civil and Political Rights (ICCPR)*, and *Convention Against Torture (CAT)*.

7 The Australian Human Rights Commission (AHRC) argues that article 18(1) suggests that the best interests of an unaccompanied child must not only be a primary consideration (as suggested by art 3(1)) but the primary consideration for their legal guardian. See: *Immigration Detention on Christmas Island: Observations from visit to immigration detention facilities on Christmas Island*, 2012, p.13.

Like any other children, unaccompanied children also have a range of rights that are protected under the CROC, which include rights to physical and mental health, education; culture, language and religion; rest and play; protection from violence; to remain with their parents or to be reunited.

As a signatory to the Convention on the Rights of the Child, Australia is required to report regularly to the UN Committee on the Rights of the Child on progress made in ensuring children enjoy in practice the rights given to them under the Convention: Article 44.

5. An especially vulnerable cohort

Regardless of their legal status or method of entry to Australia, unaccompanied children are a particularly vulnerable group. Separated from their families, many have experienced lengthy periods without safety or stability in transit and detention, be that overseas or in Australia, have histories of trauma and as a result many have serious and complex mental and physical health needs.

An extensive body of research and literature has clearly established the unique developmental challenges that frequently manifest within this cohort⁸.

These unique challenges to their mental and physical wellbeing must be taken into account when considering what is in their best interests and in the drafting of any policy or programming likely to affect them.

It is noted with great concern that Australia's current approach to the treatment of unaccompanied asylum seeker children is centred on "deterrence"⁹ families seeking asylum from encouraging unaccompanied minors to travel to Australia by boat,¹⁰ yet little has been done in the last 12 months to alleviate the situation of the thousands waiting in unsafe situations in transit countries, such as Indonesia.¹¹

8 See for instance the discussion in the Senate Joint Select Committee on Australia's Immigration Detention Network, *Final Report*, March 2012, from page 123; and Mary Crock & Mary Anne Kenny (2012), *Rethinking the Guardianship of Refugee Children after the Malaysian Solution*, Sydney Law Review, [vol 34:437], p.439, footnote 6.

9 Deterrence measures aim to prevent asylum seekers coming to Australia. They privilege particular constructions of state sovereignty over any international or multilateral commitments to non-citizens (in this case those seeking our protection). In this respect a deterrence framework is antithetical to a humanitarian based protection framework. As the UNHCR warned in late 2012 of Australia's then protection framework: 'the humanitarian, ethical and legal basis of international refugee protection was in danger of being lost if public debate continued to be based primarily on the idea of deterrence.' See: http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=278:unhcr-calls-for-compassion-and-legal-principles-to-be-at-centre-of-policy-responses&catid=35:news-a-media&Itemid=63.

We have since moved towards a framework that is explicitly and primarily deterrence based.'

10 This includes an undertaking by the previous Rudd Government to transfer asylum seekers, including unaccompanied minors to Manus Island in PNG and Nauru under regional resettlement arrangements. The current Coalition Government election policies also flagged a significant ramping up of offshore processing, and boat turn backs, amongst others.

11 During the year 2012 Human Rights Watch estimated (conservatively) that at least 1,178 unaccompanied children entered Indonesia. Human Rights watch further documented the detention, abuse and neglect of these children in their report *Barely Surviving*, released 24 June 2013, see: <http://www.hrw.org/reports/2013/06/23/barely-surviving>. Yet despite the recommendations of the Expert Panel in August 2012, and acceptance of their recommendations in full by the former Labor government, it has been reported that less than 20 unaccompanied children were accepted in Australia's humanitarian program during this past year from Indonesia.

A deterrence based approach is also a contributing factor to Australia now having record numbers of children being held in immigration detention. As at 31 August 2013 there were:

—1743 children in immigration detention facilities and alternative places of detention (APODs);

—1393 children in community under a residence determination (i.e. community detention); and

—1543 children in the community on a Bridging Visa E (including people in a re-grant process).

This is despite the fact that it is in breach of the CROC, and that there is little to no evidence that “deterrence” based policies actually work.

Also of significant concern in this regard is the stated intention of the current Government to withdraw legal advice and representation to those people who arrive by boat seeking asylum, and the implementation of the 48 hour turnaround target for screening asylum seekers in order to send them offshore, which have seemingly been coupled with a “no exemptions” approach (see further below).

6. Onshore detention and resettlement

6.1 Conflict of interest - the Minister as guardian, detaining authority and decision maker

Within Australia, the overarching issue regarding the guardianship of unaccompanied asylum seeker children (UAMs) is the significant conflict of interest that arises for the Minister in his/her role as decision maker in various respects under the *Migration Act 1958* (*Migration Act*), and as legal guardian under the *IGOC Act*.

It is a serious conflict that has been repeatedly raised and condemned both domestically and internationally over the last decade.¹²

After years of litigation and frequent legislative amendment, the broad outcome of this (ongoing) debate is that the Minister is not penalised for failing to consider or act in the best interests of the vulnerable asylum seeker children in their care even though under law he/she has that obligation. This is because the specific powers of the *Migration Act* have generally been held to take precedence over the broad operation of the *ICOG Act*.

Even in circumstances where the Minister delegates this guardianship duties to a Commonwealth officer or State authorities, this conflict persists as the ‘delegate is also perceived at law to have a conflict of interest in any conflict between the child and the state.’¹³ Moreover, following the High Court challenge to the “Malaysia refugee-swap deal” negotiated by the previous Labor Government, amendments were made with the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*, to ensure that the *IGOC Act* remained legislatively subordinated to the *Migration Act*.¹⁴

12 For instance see: Senate Joint Select Committee on Australia’s Immigration Detention Network, Final Report, March 2012: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=immigration_detention_ctte/immigration_detention/index.htm and Australian Human Rights Commission’s, National Inquiry into Children in Immigration Detention A last resort? the report of the National Inquiry into Children in Immigration Detention tabled in Parliament on 13 May 2004.

13 Crock & Kenny (2012), p.448, quoting Crock (2004).

14 See further at: <http://www.immi.gov.au/legislation/amendments/2012/120818/lc18082012-01.htm>

There has also been a strong preference by respective Ministers to delegate guardianship powers and duties under the *IGOC Act* to Commonwealth and State and Territory officials, often resulting in individual officials having guardianship responsibilities for a large number of vulnerable children, in addition to other responsibilities. While custodial arrangements can then be made for these children by the guardian, it is unclear whether this is resulting in the appointment of custodians who have the capacity to take a personal and active interest in the rights and interests of these children.¹⁵

Limited information is publicly available that outlines the day to day care arrangements for unaccompanied minors in immigration detention facilities and in community detention facilities, and existing guidelines and regulations in this area, such as the *Immigration (Guardianship of Children) Regulations 2001*, fail to include the full range of human rights obligations that Australia has assumed as a party to the CROC.

In April 2012 a Joint Select Committee into Australia's Immigration Detention Network recommended that the Minister be replaced as the legal guardian of unaccompanied minors in the immigration detention system.¹⁶ And in 2012, the UN Committee on the Rights of the Child noted its "deep concern" that the best interests of the child were not 'the primary consideration in...determinations and when considered, not consistently undertaken by professionals with adequate training.' The Committee also noted the continuing 'high risk of conflict of interest' and lack of redress for children adversely affected.¹⁷

¹⁵ In terms of the legal process for delegating guardianship, this is outlined in sections 5 and 7 of the *IGOC Act* and Regulations 8-11 of the *Immigration (Guardianship of Children) Regulations 2001* - which provide for a system of appointment of 'custodians' - for eg. an adult relative, family friend or NGO officer (such as Life Without Barriers), or State or Territory authority if the person is in community detention, or if in immigration detention a sub-contracted organisational employee (such as a Maximus Solutions employee).

¹⁶ Recommendation 19 - Joint Select Committee on Australia's Immigration Detention Network, Final Report, March 2012.

¹⁷ UN Committee on the Rights of the Child (28 August 2012), Consideration of reports submitted by States parties under article 44 of the Convention, CRC/C/AUS/CO/4, p.19 at: www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf

ACRT COMMENT

The Taskforce is deeply concerned by the ongoing conflict inherent in the Minister's dual position as the legal guardian of unaccompanied children under the *IGOC Act* and the decision maker in terms of their visa status under the *Migration Act*.

At present it is difficult to be confident that the processes for delegating guardianship and appointing custodians adhere to the full range of Australia's human rights obligations in this area, including those under the CROC. It is imperative that clear lines of responsibility and accountability be made publicly available and transparent regarding these vulnerable unaccompanied children and young people.

QUESTIONS FOR GOVERNMENT

1. Who specifically is the delegated guardian in each of the mainland detention facilities/alternative places of detention (APODs)?
2. What arrangements are being made to provide for the day to day care for unaccompanied children in detention? For example, are custodians being appointed under the *IGOC Act*?
3. If so, how many children does each custodian have responsibility for, how are decisions made about the child in the case of an emergency (eg medical) and what processes are in place to ensure that these custodians are acting in the best interests of the child?

6.2 Children left alone to navigate the law

Intensifying the seriousness of this conflict is the burden of navigating Australia's complex refugee determination processing system.¹⁸ This is largely left to the child seeking asylum, as the Minister is not compelled, as their guardian, to facilitate their applications for asylum, nor to 'ensure that the children are made aware of their legal entitlements.'¹⁹

Extremely limited practical support is available to children seeking to navigate this system or to understand and give effect to their full range of legal rights. This is especially demonstrated in relation to the application of enhanced screening processes that have been applied to Sri Lankans and the transfer of UAM's to off-shore processing centres.

Enhanced screening has been described as "unfair and unreliable" by Richard Towle, the UNHCR regional representative,²⁰ and both the Australian Lawyers for Human Rights (ALHR) and the Australian Human Rights Commission (AHRC) have expressed concern that it does not afford procedural justice, risks refoulement, and is not in accordance with Australia's international obligations.²¹ A former Immigration official previously intimately involved in the process also expressed similar fears of these dangers.²² Both the ALHR and AHRC have also raised particular concerns for unaccompanied children, their lack of support or legal assistance during this process, and that they are especially at risk and 'require special protections and safeguards.'²³

Another example arises in relation to age determination processes applied to UAM's. A child may face serious difficulties establishing his or her status as a minor, particularly in the context of a screening interview with Immigration officers where access to legal and other support services may not be provided.

18 We note that s46A(2) of the *Migration Act* allows the Minister to 'lift the bar' and permit an 'unauthorised maritime arrival' to make an application for a protection visa. Also that s256 provides that people in immigration detention should have access to application forms for a visa and facilities for making a statutory declaration or for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention.

19 Crock & Kenny (2012), p.452. See discussion 450-453 of *Jaffari* case in 2001, and subsequent decisions.

20 The Australian, *UNHCR chief slams 'unfair' screening*, 19 June 2013, at: <http://www.theaustralian.com.au/news/foi/unhcr-chief-slams-unfair-screening/story-fn8rOe18-1226665929809>

21 Australian Lawyers for Human Rights (ALHR), letter to Prime Minister Kevin Rudd, 8 July 2013. The AHRC is concerned that the enhanced screening process may not protect people from *refoulement* in accordance with Australia's obligations under the *CRC*, *ICCPR*, the *Convention Against Torture* and the *Refugee Convention*. See: <http://www.humanrights.gov.au/publications/tell-me-about-enhanced-screening-process>

22 ABC News online: <http://www.abc.net.au/news/2013-06-10/asylum-seeker-enhanced-screenings-dangerous-former-official-says/4744628>

23 Australian Lawyers for Human Rights (ALHR), letter to Prime Minister Kevin Rudd, 8 July 2013

While interpreters are used and an independent observer is supposed to be present, there is no provision as of right to legal assistance or advice. Independent observers, if present, have limited capacity and so the child is without the benefit of a support person who is able to actively monitor and advocate for their interests.²⁴

The child is unable to access legal assistance through the IAAAS,²⁵ yet evidence adduced during such interviews and findings made, remain on the DIAC file, ie. in relation to credibility, and can severely impact upon the child's subsequent application for protection.²⁶

The Coalition Government's proposed changes to the refugee status determination process and withdrawal of legal representation, also raise significant questions and are of great concern, in particular for their potential impact on unaccompanied children. It is noted that the UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum²⁷ specifically recommend: *'..an asylum-seeking child should be represented by an adult who is familiar with the child's background and who would protect his/her interests. Interviews should be conducted by specially qualified and trained officials. Appeals should be processed as expeditiously as possible. In the examination of the factual elements of the claim of an unaccompanied child, particular regard should be given to circumstances such as the child's stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her special vulnerability.'*

The changes proposed to the refugee status determination process include removing appeals to the Refugee Review Tribunal and putting in place an administrative (non-statutory) assessment and review process in which Immigration officials would be both decision maker and reviewer.

It would also be coupled with a new 'Fast Track Assessment and Removal process...modelled on the Detained Fast Track system in the United Kingdom.'²⁸

24 See for eg: Australian Human Rights Commission, *Immigration Detention on Christmas Island: Observations from visit to immigration detention facilities on Christmas Island, 2012*, p.13. Even when 'Independent observers' are present, their ability to 'act in the best interests of the child' is severely curtailed by their inability to take any casework, advocacy or investigative role, as set out in the *DIAC Procedures Advice Manual*, section 22

25 Immigration Advice and Application Assistance Scheme, see: <http://www.immi.gov.au/media/fact-sheets/63advice.htm>

26 In this respect the *Migration Act 1958* (Cth) arguably fails to provide legislative protection of a child's rights under Article 12(2) of the *CROC*.

27 See <http://www.refworld.org/docid/3ae6b3360.html>

28 *The Coalition's Policy to Clear Labor's 30,000 Border Failure Backlog*, p.7.

ACRT COMMENT

Many churches are witnessing first-hand the struggles being experienced by asylum seekers who are turning to church welfare agencies for support and basic assistance. Pro-bono legal services are also limited and will not be able to meet demand.

Withdrawing access to the IAAAS will force a desperate search for legal assistance or the financial means to access such assistance, and will make asylum seekers ever more vulnerable to exploitation. The Taskforce believes that withdrawing publicly funded legal assistance will have an enormous and detrimental impact on asylum seekers, in particular unaccompanied children. It is difficult to see how this policy, in combination with the flagged changes to processing, will afford a just process and allow refugees a fair go at having their claims for protection heard. It increases the risks that unaccompanied minors may be refouled. The Taskforce strongly urges the Government to reconsider these measures, to ensure that children have access to government funded independent legal advice and assistance, and that any changes to the processing system are accompanied by sufficient safeguards to protect the best interests of the child.

QUESTIONS FOR GOVERNMENT

4. Where are 'enhanced screening' assessments & interviews taking place? If specific support is not being provided to children, are the Immigration officials conducting the interviews trained appropriately to deal with and assess traumatised children and young people?

5. Who is the delegated guardian when children are on Christmas Island (or other detention facility) and undergoing these screenings? Why aren't they or other persons actively involved in protecting the child's interests?

6. Will children be exempt from the proposed "fast track" system as they are in the UK? How will unaccompanied children be dealt with under the proposed changes to the refugee status determination process? What safeguards will be put in place to ensure their best interests of the child are taken into account and children's rights are protected?

7. Will the IAAAS continue to be available to unaccompanied children? If not, will other alternative support for legal advocacy and assistance be made available?

6.3 Jurisdictional anomalies

An additional layer of complexity exists in relation to unaccompanied children, between the operation of the Commonwealth laws, such as the IGO Act and the relevant State or Territory laws. In particular this applies to the humanitarian minors program (UHM), as the Commonwealth must separately negotiate arrangements for the care of unaccompanied children with each of the States and Territories, with their welfare agencies being delegated guardianship duties under these arrangements. This has led to:

- ▶ Different agreements, with differing levels of support and care and across jurisdictions, with no national framework to ensure a consistent standard of care;
- ▶ As a result of these anomalies, there are instances of children having to relocate across jurisdictions in order to receive appropriate care;²⁹
- ▶ Children being compelled in some cases to seek their own placements with carers who may not be well placed or able to care for them, which can result in cases of a breakdown in guardianship arrangements;³⁰
- ▶ In some instances UHM's unable to access complementary services / supports provided by the State, which may be accessible to non-refugee wards or other children;³¹
- ▶ Ongoing shortcomings in transitional arrangements, such as when a young refugee person either becomes an Australian citizen, or turns 18 and must exit the UHM program.³²

The granting of refugee status and a permanent protection visa should mark the beginning of a new period of stability and settlement for an unaccompanied refugee child or young person. Yet there have been cases in which young people have had to move interstate in order to access the support and services they need (for example, where their claims for protection have been accepted and they have transitioned from the UAM (asylum seeker) to UHM (humanitarian) programs, but no support was available in that State). Not only is such movement exceedingly destabilising, but often the young people will return to the State in which they have community connections or other opportunities, such as work.

²⁹ Multicultural Youth Advocacy Network (MYAN), *Unaccompanied Humanitarian Minors in Australia*, Policy Paper, September 2012, p.13.

³⁰ MYAN Policy Paper p.14.

³¹ MYAN Policy Paper p.16.

³² It is a particularly vulnerable period, in which transitional care plans can often lack arrangements for the ongoing mental and physical health care requirements of these young people. See: RCOA *Australia's Refugee and Humanitarian Program 2013-14*: RCOA submission, p.72

There can be resultant confusion or delay in transfer of delegated guardianship arrangements (across jurisdictions) and subsequently also referrals to agencies, resulting in ongoing difficulties for these young people in accessing support and/or effectively being left without an active guardian.³³

QUESTIONS FOR GOVERNMENT

8. What is the current state of agreements between the Department of Immigration and each State and Territory? For instance NSW has been a state of concern, from which many young people have reportedly had to move, and it remains unclear as to whether a new agreement has been negotiated or will be put in place?

9. What is being done to address these anomalies and ensure guardianship responsibilities are clearly delegated and understood at all stages of transition?

Many young people are also turning 18 either in the system, or shortly after exiting mandatory detention.

It is a serious concern that, having just experienced months or possibly years in dangerous transit then detention, with little stability or safety, that these traumatised young people might be released into the community on permanent visas or bridging visas (without work rights) or sufficient support.

6.4 Duty of Care and the policy-practice disjuncture

The various duties and obligations under both domestic and international law, which the Minister and the Department of Immigration, are required to exercise and safeguard are in many respects, non-delegable.³⁴ For example, common law duties of care mean that even where the Department contracts out services, the third party must take 'reasonable care to avoid the persons in immigration detention suffering reasonably foreseeable harm' and if they breach these duties, the Department is also taken to have breached their duties.³⁵ Certainly the high level duty of care that is owed, and what this entails is well noted within their various policies and operational manuals of the Department.

For instance, the DIAC Procedures Advice Manual notes of minors in immigration detention that they:

- ▶ require special care above and beyond the standard of care required for adult person, because they are particularly vulnerable;
- ▶ decisions must consider the best interests of the minor – this is not restricted to the child's legally enforceable rights but also long-term and short-term welfare concerns, physical and emotional well-being, financial, moral, religious and health interests;
- ▶ minors should only be detained as a measure of last resort and for the shortest practicable time; and
- ▶ making decisions in best interest requires detention staff to be trained appropriately to deal with minors and in age appropriate behaviours and development.³⁶

34 See for instance the Parliamentary Joint Committee on Human Rights report on the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* and related legislation which outlines in detail Australia's human rights obligations relating to offshore processing and why these obligations cannot be transferred: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=humanrights_ctte/reports/2013/9_2013/index.htm

35 In *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* (2005) 216 ALR 252, the court held that the Commonwealth's duty of care was not delegable on the basis of the complex outsourcing arrangements. The Commonwealth had the responsibility to ensure the provision of medical and psychiatric services was adequate and effective.

36 *DIAC Procedures Advice Manual*, August 2013. See section 9, dealing with minors.

33 These issues have been raised with the ACRT through members who have had first-hand experience of the disruption. See also MYAN Policy Paper p.13.

ACRT COMMENT

There is a serious disjuncture between the duties owed by the Minister and Department, including those clearly acknowledged and stated in policy, and how unaccompanied minors are being treated in practice. The requisite standards required in detention centres and while children are contained within the immigration detention network, are simply not being met and the duty of care towards these young people is consistently breached on a number of fronts.³⁷ Anomalies persist too across the spectrum in our dealings with unaccompanied minors, even as children are accepted as refugees and are permanently settled into our community.

In essence, we are failing in our duties towards these children, a situation that is compounded by the lack of transparency and accountability across the system. As a first step to remedying this situation, we suggest an independent advisory body could be immediately established to specifically monitor, report on, and provide advice regarding asylum seeker and refugee children across the spectrum of service delivery and support.

6.5 Proposed re-introduction of Temporary Protection Visa's (TPV's)

The Coalition Government has proposed reintroducing Temporary Protection visa's for asylum seekers arriving by boat who are found to be refugees. As outlined in their election policies this would include that:

- ▶ 'no permanent visa will be issued' to the estimated 30,000 asylum seekers already in Australia (including the record number of children in detention);
- ▶ TPV's would not exceed 3 years (effectively meaning a refugee must reprove their claim for protection in order to receive another TPV);³⁸
- ▶ settlement services would be limited, if available at all; and
- ▶ refugees who arrived by boat would be denied access to family reunion.

The devastating mental health and wellbeing, and associated impacts of TPV's were well documented during the period they were previously in use from 1999-2007. The National Inquiry into Children in Immigration Detention by AHRC (tabled in Parliament in 2004) found that the TPV regime breached seven articles of the CROC,³⁹ and summarised that the evidence showed two very significant barriers faced by children:

1. Their temporary status created 'a deep uncertainty and anxiety about their future. This can exacerbate existing mental health problems from their time in detention and their past history of persecution.' And also affected their 'capacity to fully participate in the educational opportunities'; and
2. The effect of the family reunion and travel ban meant that 'some children may be separated from their parents or family for a long, potentially indefinite, period of time. Again, this can undermine a child's mental health and well-being.'⁴⁰

³⁸ In this respect the claim that TPV's are consistent with the Refugee Convention is highly contested and the stronger argument is that they are a breach of international law. Temporary protection is valid in international law as an 'exceptional mechanism', where mass movements are taking place. It is not intended to replace protection under the Geneva Convention, nor to be used as a "punitive" or "deterrence" measure.

³⁹ These breaches were of articles 3(1) best interest of the child, 6(2) ensuring the survival and development of a child, 10(1) right to family reunification, 20(1) right to special protection and assistance when deprived of family, 22(1) appropriate protection and humanitarian assistance for asylum seeking child, 24(1) right to health services and rehabilitation and 39 right to rehabilitative care - recovery and social reintegration - after suffering trauma. See 16.4.5, Australian Human Rights Commission *A last resort? National Inquiry into Children in Immigration Detention, 2004* at: <http://www.humanrights.gov.au/publications/untitled-document-1>. The issues canvassed in the report also point to breaches of other international law instruments, such as the Refugee Convention.

⁴⁰ See: <https://www.humanrights.gov.au/publications/last-resort-summary-guide-temporary-protection-visas>

The AHRC further noted that these TPV conditions had a 'proportionally greater impact on unaccompanied refugee children than upon other children due to their isolation from their family.'⁴¹

ACRT COMMENT

Considering the significant and documented adverse impacts on children, in particular unaccompanied children, and possible breaches of their rights under the CROC, the Taskforce are extremely concerned by the proposed reintroduction of TPV's.

7. Offshore detention & resettlement

Recent changes to the Migration Act have allowed the Minister power to designate a country as a 'regional processing country' if in the 'national interest.'

At the same time amendments were made to the *IGOC Act*⁴² to ensure that the Minister's guardianship duties cease when an unaccompanied asylum seeking child is removed to such a processing country in accordance with the *Migration Act*.

The changes to the *Migration Act* have meant the designated processing country need not be scrutinised for their human rights record or capacity, they need only give (non-binding) assurances as to *refoulement* and demonstrate a willingness to assess protection applications.⁴³

41 See 16.7, Australian Human Rights Commission *A last resort? National Inquiry into Children in Immigration Detention, 2004* at: <http://www.humanrights.gov.au/publications/untitled-document-1>

42 This is given effect under ss 6(1) and (2)(b) of the *IGOC Act*.

43 Crock and Kenny (2012). p.462

7.1 The PNG resettlement agreement

The former Immigration Minister confirmed that under the Regional Resettlement Agreement struck with PNG on 19 July 2013 ('the PNG Agreement')⁴⁴, the Minister would no longer be the legal guardian once unaccompanied minors are transferred to Manus Island.⁴⁵

The two page PNG Agreement was followed by the signing of an *MOU Relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons*, and related issues on 6th September 2013.⁴⁶ The MOU provides that 'special arrangements will be developed and agreed to by the Participants for vulnerable cases, including unaccompanied minors.'⁴⁷

In addition, PNG agreed to other undertakings not to expel or send transferees to another country where their lives would be threatened or they may be subject to persecution, and to either make or permit assessments of refugee applications.⁴⁸ Yet these arrangement still lack a range of details as to how specifically vulnerable, unaccompanied children might be dealt with once sent to Manus Island.

UNICEF have noted that 'children in Papua New Guinea remain some of the most vulnerable children in the world.'⁴⁹

In addition that:

*'As many as half the primary school-age children are out of school. Half of those who enrol drop out before grade six. Many of the schools lack basic facilities such as safe water and toilet facilities as well as furniture and teaching aids. Young people are often denied their right to continuous learning and access to income. Youth unemployment rate is on the increase. Opportunities for young people to express their views are extremely limited. Most services are not young people friendly. Despite great traditions, violence against women and children and physical and sexual abuse of children are widely prevalent and a major threat to Papua New Guinea's development.'*⁵⁰

It has been suggested that the courts may be responsible for assigning guardianship, but it is currently unclear what regime unaccompanied children sent to PNG would be administered under.

44 The PNG Agreement is available at: <http://www.immi.gov.au/>

45 See ABC news online, *Burke confirms his guardian role limited under PNG plan*, 24th July 2013 at: www.abc.net.au/pm/content/2013/s3810192.htm

46 The MOU with PNG is available at: <http://www.dfat.gov.au/geo/png/joint-mou-20130806.html>

47 MOU with PNG, provision 18.

48 MOU with PNG, provision 20.

49 See: http://www.unicef.org/png/activities_4362.html

50 See: http://www.unicef.org/png/activities_3825.html

QUESTIONS FOR GOVERNMENT

10. Please clarify who, if anyone, assumes guardianship for children without guardians who are sent to PNG, and what might happen in the case of those young people who may not be recognised as children under PNG law?

7.2 The Agreement with Nauru

Like the PNG Agreement and MOU, the MOU signed with Nauru on the 3rd August 2013, *Relating to the transfer and Assessment of Persons in Nauru, and Related Issues*⁵¹ also provides for 'special arrangements...including unaccompanied minors'⁵² and undertakings about the expulsion of transferees to another country, and permitting assessments of refugee applications.⁵³

Nauru does have legislative provision under their existing Guardianship of Children Act 1975 (Nauru) for the courts to make determinations about guardianship. It also has in place the Asylum Seekers (Regional Processing Centre) Act 2012 (Nauru), which sets out that in the treatment of children, regard must be had to the CROC.⁵⁴ It also establishes that the Minister will be the guardian of unaccompanied minors, with the same powers as would apply if appointed under the Guardianship Act, and that they may delegate in writing any of those powers or functions to a 'fit and proper person' within a corporation working for the 'welfare and protection of children.'⁵⁵

However there is much that is uncertain about both the PNG and Nauruan arrangements. For example, although the MOUs include assurances that transferred asylum seekers will not be returned to a place where they fear persecution, there is no clear sense of what legal and administrative processes will apply in these countries or how this could be guaranteed. It is also unclear if asylum seekers transferred to PNG will have access to adequate legal assistance or will be able to seek independent merits review of negative decisions.

51 MOU found at: <http://www.dfat.gov.au/issues/people-smuggling-mou.html>

52 MOU with Nauru, provision 18.

53 MOU with Nauru, provision 19.

54 s14, *Asylum Seekers (Regional Processing Centre) Act 2012 (Nauru)*, available at: http://ronlaw.gov.nr/nauru_ljms/index.php/act/view/1081

55 s15, *Asylum Seekers (Regional Processing Centre) Act 2012 (Nauru)*

7.3 Potential breaches of international law and domestic duties

Under this regime, which is yet to be tested in the courts, it is arguable that Australia is in breach of obligations, including:⁵⁶

- ▶ Under the CROC to ensure the best interests of the child are a primary consideration (Art 3) and potentially under Art 20(1)) to provide child asylum seekers with human rights protections and humanitarian assistance;
- ▶ Being likely to violate its obligation under Art 31 of the Refugee Convention not to penalise an asylum seeker on account of their “illegal” mode of entry to Australia. (For instance asylum seekers arriving by boat being treated differentially to those arriving by plane, in part because of “deterrence”), potentially too Art 33 prohibiting refoulement;
- ▶ Breaching Art 9 of the ICCPR prohibiting arbitrary and indefinite detention as people will be detained in PNG for extended periods in conditions that are unfit for purpose and do not meet international standards. Potentially too, Art 26 providing for equal protection before the law.
- ▶ Interfering with families in a manner contrary to the right to family life, in that family is ‘the natural and fundamental group unit of society’ and should be accorded ‘the widest possible protection and assistance’ under the ICESCR (Art 10).⁵⁷
- ▶ The Minister also risks breaching both statutory and common law duties to these children. In particular, as the socio-economic conditions in both Nauru and PNG raise concerns that any children sent there will face the prospect of further psychological and physical harm. This is further accentuated by the likelihood that PNG and Nauru will not have the capacity to undertake refugee status determination processes in a suitably rigorous way.

The UNHCR had previously stated its belief that Australia’s excision of the mainland and changes to the Migration Act did not absolve it of its responsibilities towards asylum seekers, that their expectation was that any asylum-seeker arriving in Australia would be given access to ‘a

56 See for instance the Parliamentary Joint Committee on Human Rights report on the Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation, June 2013; a discussion by Ben Saul, The new asylum seeker arrangement between Australia and Papua New Guinea is almost certain not to comply with Australia’s international law obligations; The Conversation, 20 July 2013, at: <http://theconversation.com/rudds-png-plan-unlikely-to-comply-with-international-law-16250>; also Greg Barns in interview above at: www.abc.net.au/pm/content/2013/s3810192.htm; and Politifact, Labor’s Regional Resettlement Arrangement is entirely in accordance with Australia’s international obligations, 19 July 2013, at: <http://www.politifact.com.au/truth-o-meter/statements/2013/aug/01/mark-dreyfus/png-breach-international-law/>

57 *International Covenant on Economic, Social and Cultural Rights* (ICESCR)

full and efficient refugee status determination process in Australia’, and that if transferred to another country, ‘the legal responsibility for those asylum-seekers may in some circumstances be shared with that other country.’⁵⁸

The Human Rights Law Centre has expanded on this and suggested that ‘Australia’s human rights obligations do not end at our borders. Australia is responsible for those who are within its effective jurisdiction or control even if those people have been transferred abroad.’⁵⁹ At present, it also remains unclear what criteria will be applied by Australian officials as part of any initial checks to determine whether it is safe to send a person to PNG or Nauru.

In relation to the PNG deal, the UNHCR has expressed concern about the arrangements, noting it was ‘troubled by the current absence of adequate protection standards and safeguards.’ It further suggested that ‘[t]hese include a lack of national capacity and expertise in processing, and poor physical conditions within open-ended, mandatory and arbitrary detention settings. This can be harmful to the physical and psycho-social well-being of transferees, particularly families and children.’⁶⁰ This view has been echoed by the AHRC, who has also expressed concern that it may ‘violate fundamental human rights.’⁶¹ Similarly concerns are being raised about the capacity of Nauru, and conditions on the island, in particular for children.

Finally, the Coalition Government policy aims to quickly expand capacity at Manus and Nauru, including an additional 2000 places on Nauru. In the first two weeks in office, this was coupled with the introduction of rapid transfer procedures, with 48 hour “turnaround” targets for those asylum seekers reaching Australia.

58 UNHCR, *New “excision” law does not relieve Australia of its responsibilities towards asylum-seekers*, UNHCR Press Releases, 22 May 2013, at: <http://www.unhcr.org/519ccec96.html>

59 Human Rights Law Centre, Letter to Parliamentary Joint Committee on Human Rights, 23 Jan 2011, Examination of *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* and related bills and instruments - answer to question taken on notice at public hearing, at: <http://www.hrlc.org.au/wp-content/uploads/2012/12/HRLC-response-to-question-on-notice.pdf>; this disjuncture was also well documented by the Joint Parliamentary Committee on Australia’s Immigration Network June 2012 Inquiry.

60 UNHCR, *Australia-Papua New Guinea asylum agreement presents protection challenges*, 26 July 2013 at: http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=344:unhcr-australia-papua-new-guinea-asylum-agreement-presents-protection-challenges-&catid=35:news-media&Itemid=63

61 See: <http://www.humanrights.gov.au/news/media-releases/human-rights-concerns-regional-resettlement-arrangement>

Previously they would have been subject to proper health and security checks in Australia, taking weeks.

The Australian Medical Association, amongst others, has expressed serious concerns about this practice.⁶² During this same period, reports emerged about unaccompanied children potentially being secretly transferred offshore, possibly to Nauru or Manus.⁶³

ACRT COMMENT

The latest offshore processing and settlement arrangements are extremely concerning to the Taskforce. There is little to no reason to have confidence that these arrangements will honour all of Australia's international legal obligations or reflect the fundamental rule of law and natural justice on which we rely and deeply value in Australia.

These policies represent an unconscionable abrogation of our rights and duties towards the unaccompanied children who arrive in Australia seeking our protection and care.

We note and applaud the former Department of Immigration and Citizenship for funding the excellent work done by eminent persons from our region to describe what is required to care for unaccompanied and separated children, and commend these guidelines to the new Federal Government and its departments.⁶⁴

QUESTIONS FOR GOVERNMENT

11. In the context of PNG, what is the definition of a "minor," and what is the legal framework governing the guardianship of unaccompanied minors in PNG?

12. In Nauru, how will the Minister's guardianship powers be delegated and what arrangements will be made for the day to day care of these children to ensure that their rights and wellbeing are protected and promoted?

- ▶ For example, will custodians be appointed and if so what criteria will govern the appointment of custodians for these children?
- ▶ How will the Australian Government ensure that the best interests of these children, and their rights under the CRC, are promoted and protected under these arrangements?

13. What systems is Australia putting in place to ensure that the best interests of these children, and their rights under the CROC, are promoted and protected under these arrangements?

14. How can Australia provide effective oversight of regional processing arrangements without committing to similar standards of care for unaccompanied minors in Australian facilities?

15. Are the regional arrangements for children and young people consistent with recommendations made in the Regional Guidelines for Responding to the Rights and Needs of Unaccompanied and Separated Children (UASC), which were funded by DIAC?

⁶² See SBS online: <http://www.sbs.com.au/news/article/2013/09/25/concerns-over-rapid-asylum-seeker-transfers>

⁶³ The Australian, 'Fears minors sent offshore alone', at: <http://www.theaustralian.com.au/national-affairs/policy/fears-minors-sent-offshore-alone/story-fn9hm1gu-1226727236942>

⁶⁴ Sriprapha Petcharamesree & Mark Capaldi, *Regional Guidelines for Responding to the Rights and Needs of Unaccompanied and Separated Children* (UASC), Commissioned by UNHCR, September, 2012.

Australian Churches Refugee Taskforce

209 Gertrude Street, Fitzroy, VIC 3065

 #ChRefugee  AustralianChurchesRefugeeTaskforce
 info@acrt.com.au  www.acrt.com.au



An initiative supported by
National Council of
Churches in Australia