



# Unlocking Childhood:

**Current immigration detention practices  
and alternatives for child asylum seekers  
and refugees in Asia and the Pacific**

**May 2017**



**Save the Children**

**Asia Pacific  
Refugee Rights  
Network**

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Cover image: Hands of a refugee child, behind hand-drawn bars (Photo: Annie Bodmer-Roy/Save the Children)

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# 1. EXECUTIVE SUMMARY AND KEY FINDINGS

In September 2016, global leaders condemned the detention of children for immigration purposes and pledged, through the UN General Assembly's adoption of the New York Declaration, to work towards ending this harmful practice.<sup>1</sup>

The detention of children for immigration purposes violates the rights of children under international law and is never in the best interests of the child.<sup>2</sup> It is a practice that offends the sacred and shared duty of all people and institutions to nurture and protect children. It is also extremely expensive to government, when compared with the alternatives.

However, despite the significant human and economic cost of this practice, the immigration detention of undocumented migrant children (including asylum seekers and refugees) is still common in many countries around the world. The Asia Pacific region is no exception with key transit, host and destination countries such as Indonesia, Thailand, Malaysia, Australia and Nauru having each engaged in the practice of detaining children for immigration-related purposes in recent years.

## The scale of the problem in the region

There are hundreds of thousands of asylum seeking and refugee children and their family members living as undocumented migrants in South East Asia, with many compelled to live 'below the radar', afraid to venture outside their homes for fear of being arrested and detained. **During 2016 more than 2,290 asylum seeker and refugee children were detained in officially-designated 'immigration detention' facilities in Indonesia, Thailand and Malaysia.** Australia has detained thousands of children for immigration purposes in recent years, including via its regional processing arrangements with the Republic of Nauru, with immigration detention of children still being legally permissible in both countries. After several years, hundreds of these children remain in Nauru, living in very challenging circumstances and facing a very uncertain future.

In addition to those in official immigration detention facilities, tens of thousands of other children have been held in other forms of detention or detention-like conditions or have faced serious restrictions on their freedom of movement due to their migration status, including those confined to closed refugee camps, closed shelters, police holding cells and to isolated or remote locations.

## NUMBER OF CHILD ASYLUM SEEKERS AND REFUGEE CHILDREN IN IMMIGRATION DETENTION FACILITIES<sup>3</sup>

	31 DEC 2014	FULL YEAR 2014	31 DEC 2015	FULL YEAR 2015	31 DEC 2016	FULL YEAR 2016
Australia	420	DNA but 1,000 in Jan <sup>4</sup>	91	DNA but 127 in June <sup>5</sup>	<5	DNA but 88 in Jan <sup>6</sup>
Indonesia	1,349	1,795	1,056	1,904	975	1,602
Malaysia	425	1,334	418	1,433	87	647
Nauru <sup>7</sup>	135	DNA but 135 in Dec	Nil (68 in 'open centre')	DNA but 119 in Jan <sup>8</sup>	Nil (45 in 'open centre')	Nil (54 in 'open centre' in Jan) <sup>9</sup>
Thailand	DNA	DNA	49 <sup>10</sup>	DNA but 49 in Dec	43 <sup>11</sup>	DNA but 43 in Dec
<b>Total</b>	<b>More than 2,329</b>	<b>More than 4,264</b>	<b>1,614</b>	<b>At least 3,632</b>	<b>1,109<sup>12</sup></b>	<b>At least 2,380</b>

DNA = Data not available for relevant period

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## The human impact and economic cost of immigration detention

In Malaysia, Indonesia and Thailand, asylum seeker and refugee children are detained for indefinite and sometimes lengthy periods without judicial oversight. **They are held 24 hours a day, seven days a week with overcrowding, inadequate hygiene and lack of access to adequate and timely medical treatment leading to a number of reports of children in detention dying from treatable illnesses in recent years.**<sup>13</sup> Children are detained in cells housing dozens of unrelated adults, frequently separated from their family members along age and gender lines, with cramped and substandard sleeping facilities, no privacy from unrelated adults, little or no educational opportunities, little or no recreational space or activities, extremely limited access to healthcare and are at risk of sexual and other forms of violence and exploitation.

Those detained in Australia and Nauru in recent times have also faced challenging and unsafe detention conditions and in recent years children have been held for indefinite periods, in some cases several years, without judicial review or other mechanisms to secure their release.

**The adverse impact of immigration detention on the physical and mental wellbeing of children is well documented – mental illness, poor physical health and susceptibility to illness, developmental impairment, self-harm, exposure to violence and even death are all sadly predictable outcomes.**

In addition, immigration detention can prolong the separation of children from their family members and often prevents them from accessing basic services including education, adequate healthcare and recreation.

The practice of detention affects not just those who are detained, but also the larger community of undocumented asylum seekers and refugees who fear arrest and detention, many of whom live in a form of self-regulated house arrest, afraid to leave their homes or travel beyond their immediate neighbourhoods lest they encounter authorities and find themselves arrested and detained. This culture of fear can seriously limit the access of children to vital services and opportunities such as education, healthcare and recreation.

In addition to the human cost of this practice, immigration detention is also very costly to governments when compared with more humane and child-appropriate alternatives. The International Detention Coalition estimates that such alternatives may cost up to 80 percent less to run than detention facilities<sup>14</sup> and have numerous other benefits which are salient to national policy agendas.

## The research

This report examines current policy frameworks and practices in five countries, namely Malaysia, Thailand, Indonesia, Australia (which are key host, transit and/or destination countries for asylum seekers and refugees) along with the Republic of Nauru which has in recent years accepted the transfer of undocumented asylum seeker children and adults from Australia. Reflecting extensive desk-based research and stakeholder consultations in South East Asia, it seeks to document current practices in the detention of child asylum seekers and refugees, the conditions of detention, the impact of detention on children, available alternatives to detention in these countries and emerging initiatives that may offer new, improved or expanded alternatives to detention in the future.

The report focusses on detention in officially designated immigration detention centres or facilities (IDCs), reflecting our understanding that those in IDCs typically face the most comprehensive restraints on liberty for the most prolonged periods, when compared with those in other forms of detention or detention-like conditions.<sup>15</sup>

Child asylum seekers and refugees (and their family members) were selected as the focus of this research because members of this group are regularly exposed to prolonged detention as they cannot be lawfully returned to their countries of origin owing to their fear of persecution and the related international legal norm of *non-refoulement*.<sup>16</sup> Undocumented migrant children who do not have refugee protection claims are typically released from detention within much shorter timeframes than asylum seeker or refugee children (ie when they are deported to their countries of origin).<sup>17</sup> However, Save the Children and the Asia Pacific Refugee Rights Network are opposed to the detention of any child or adult based solely on their migration status or that of their family members and we hope that this report and its recommendations may have a positive impact on the situation of the wider group of undocumented migrant children and their families, as well as adult forced migrants.

Finally, while this report provides a broad overview of conditions in detention, the principal purpose of this report is not to advocate for improved conditions for children in detention, but rather to promote the end of the practice of child immigration detention.

### Positive developments and ongoing challenges

Encouragingly, our findings suggest that authorities in each of the five countries are responding to calls to end the practice of child immigration detention to greater and lesser degrees. Our research indicates:

- A **reduction in the number of children being detained** in immigration detention facilities in each country from 2015 to 2016, with reductions in Malaysia being the most numerically significant overall. Access to resettlement opportunities for those in South East Asia (mostly to the United States) and changes in underlying population demographics may account for some of this reduction, but the availability of alternatives to detention (where relevant) is also playing a significant role
- The ongoing **emergence of alternative policies and practices** which aim to release or divert children away from immigration detention including community-based residence (with accompanying case management) and foster care for unaccompanied or separated children
- **Developing initiatives and announcements** in each jurisdiction which indicate a general desire of relevant governments to work towards ending this practice

**Of particular interest, we note the development of small scale initiatives in Malaysia and Indonesia by which local NGOs are supporting unaccompanied and separated child asylum seekers and refugees to live in community settings, rather than in detention or institutional care, with comprehensive case management and other support services.** With sufficient support from government and international organisations these initiatives could be expanded and adopted elsewhere (including in Thailand) to support a greater number of child asylum seekers and refugees, including those accompanied by family members.

Notwithstanding these positive developments, without national level legislative or policy reform in each country, efforts to eliminate the practice of child immigration detention may not succeed. In particular:

- The dynamics of the global refugee crisis show **refugee numbers climbing while resettlement opportunities are stagnating** or, in the case of the United States, dramatically shrinking.<sup>18</sup> Bearing in mind that over half the world's 21 million refugees are children,<sup>19</sup> this dynamic may result in the number of children detained beginning to climb again in South East Asia, a region that has had significant access to resettlement opportunities in the United States in recent years<sup>20</sup>

- A sudden influx of asylum seekers in any of the countries included in this research could see the numbers increase as they did in 2012-2013 in Australia and in 2015 in Malaysia
- Current initiatives aimed at diverting or removing children from immigration detention are limited in scale, often ad hoc and discretionary and will not necessarily continue to reduce the instances of child immigration detention
- Many current government-initiated alternative programs are not underpinned by a conceptual framework that supports the rights and wellbeing of children more generally and, while often well-meaning, can offer a 'hit and miss' response to the needs of children

## Recommendations

In light of the positive developments and ongoing challenges summarised above, we have provided a set of recommendations which aim to:

- **Provide general principles in relation to the development of alternatives** that are available to all, reliable, safe and appropriate for children and likely to promote good relationships between host communities and the asylum seekers and refugees who seek to live among them
- **Propose opportunities for building upon current initiatives** in the region which would increase access of child asylum seekers and refugees to alternatives to detention
- **Encourage further collaboration** between government, NGOs and international organisations in efforts to end child immigration detention and increase efficiencies of their work.

## Overview of Country Findings



### AUSTRALIA

POSITIVE DEVELOPMENTS	ONGOING CONCERNS
<p>Reduction of number of children in immigration detention to almost zero, with children and families awaiting decisions in relation to their refugee status being allowed to reside in the community, subject to certain reporting obligations and restrictions</p> <p>Bipartisan political denouncement of immigration detention of children echoing public sentiment and media attention</p> <p>Recent Supreme Court decision which recognised the jurisdiction of Victorian child protection authorities in relation to children in onshore Federal immigration detention facilities in Victoria</p>	<p>A small number of children are still detained in immigration detention facilities (reported as less than 5 children as at December 2016)</p> <p>Lack of legislative reform to limit or prevent child detention</p> <p>Inappropriate guardianship arrangements for UASC</p> <p>Children in immigration detention are generally excluded from State child protection laws and services (with the recently-established exception of Victoria)</p>



POSITIVE DEVELOPMENTS	ONGOING CONCERNS
<p>Transition of the regional processing centre (RPC) to an ‘open centre’ model, with many child refugees also living outside the RPC in community housing</p> <p>Creation of a national Child Protection Directorate in 2015 (which includes child asylum seekers and refugees within its mandate) and enactment of the Child Protection and Welfare Act 2016 (which appears to countenance potential application to child asylum seekers and refugees in Nauru).</p> <p>Bilateral arrangements between Australia and the United States which may see Nauru-based refugee children and their families resettled in the US</p>	<p>Lack of legislative reform in relation to the detention of children</p> <p>Lack of freedom of movement – with many still constrained by the isolation of the RPC and all confined to the 21 square kilometres of the island of Nauru</p> <p>Inappropriate guardianship arrangements for UASC</p>



POSITIVE DEVELOPMENTS	ONGOING CONCERNS
<p>Thailand’s Cabinet of Ministers approved a State Council proposal to implement a new screening process to identify undocumented migrants with protection needs</p> <p>The Thai government implicitly reinforced that it does not intend to detain ‘children, women and sick people’ in its response to the Human Rights Council in 2016, though the mechanism it cited (bail) is currently largely suspended. In early 2017 the government also reassured the Human Rights Committee that Thailand has a ‘no child detention policy’</p> <p>A recent Thai court decision has seen a refugee child being brought within Thailand’s child protection system and avoiding immigration detention</p> <p>Rollout of enhanced UNHCR refugee card (with photograph) and digital verification application, but without all of the features of the UNHCR Malaysia card which enable authorities to self-verify the validity of the card and the details of the person it pertains to</p> <p>Reduced waiting times for RSD decision after commencement of a UNHCR initiative to clear a large backlog of claims</p> <p>Some good practices developing in relation to victims of trafficking, which may be expanded upon (including temporary residence cards carrying work rights and the operation of at least one family shelter)</p>	<p>Child asylum seekers and refugees continue to be detained in sub-standard and dangerous conditions</p> <p>Currently lacking a national legal or policy framework for asylum seekers and refugees</p> <p>Lack of legal status renders individuals vulnerable to arrest and detention and inclined to live in a way that decreases their visibility in their host community</p> <p>Waiting times for RSD decisions are still likely to be significant. Even if refugee status is conferred, this provides limited additional protection</p> <p>Currently lacking of formal mechanisms to secure the release of children from immigration detention (even where they are registered with the UNHCR), with informal methods requiring the separation of children from their parents (who must remain in detention)</p> <p>Bail program currently suspended with only very few individuals being able to access bail since its suspension following concerted and individualised advocacy by UNHCR and NGOs</p> <p>Lack of legal framework for legal guardianship and foster care of UASC</p> <p>Lack of consistent use of reliable age-assessment practices by immigration authorities which may result in children being inadvertently detained as adults</p> <p>Child asylum seekers and refugees (including those in immigration detention) are generally excluded from national child protection laws and services</p>





POSITIVE DEVELOPMENTS	ONGOING CONCERNS
<p>New UNHCR refugee ID card and related digital platforms are commanding greater respect and offering greater protection from arrest and detention</p> <p>Current UNHCR processes prioritise the registration of the most vulnerable, including children</p> <p>As a matter of current practice (rather than policy) the Malaysian government prioritises the referral to UNHCR of detained asylum seeking children, which facilitates their registration with UNHCR and subsequent release from detention</p> <p>Alternatives to detention for UASC are being developed by NGOs (albeit on a relatively small scale at present), with a strong emphasis on case management principles and a move away from institutional care</p> <p>Government and UNHCR cooperating in pilot project which will give 300 Rohingya access to work rights</p> <p>Establishment of new government/UNHCR taskforce with working groups tasked to focus on addressing the issue of detention and alternatives to detention for children</p> <p>Relatively high levels of public sympathy towards Rohingya refugees reflected by favourable government statements such as the Prime Minister’s announcement that all Rohingya refugees will be able to access training and work rights</p> <p>Civil society is undertaking legal analysis in relation to the application of Malaysia’s Child Act to undocumented child migrants</p> <p>Related to the above, the instigation of recent strategic litigation pursued by the legal community to challenge the detention of a 16-year-old Rohingya refugee which seeks to apply provisions of the Malaysian Child Act as well as the CRC. The case has yet to be finally decided but has received sympathetic media coverage and the boy was released on bail pending a final decision</p>	<p>Child asylum seekers and refugees continue to be detained in sub-standard and dangerous conditions</p> <p>Currently lacking a national legal or policy framework for asylum seekers and refugees</p> <p>Lack of legal status renders individuals vulnerable to arrest and detention and inclined to live in a way that decreases their visibility in their host community, particularly for those who do not hold a UNHCR card</p> <p>Not all refugees and asylum seekers are registered with UNHCR</p> <p>Lengthy waiting time for initial UNHCR registration for some groups, and lengthy waiting time for RSD decision and the additional protection that registration and refugee status can provide</p> <p>Lack of alternatives to detention for family groups</p> <p>Lack of legal framework for guardianship and foster care of UASC</p> <p>Risk that non-Rohingya refugees may be excluded from emerging initiatives in relation to training and work rights</p> <p>Lack of consistent use of reliable age-assessment practices by immigration authorities which may result in children being inadvertently detained as adults</p> <p>Child asylum seekers and refugees (including those in immigration detention) are generally excluded from national child protection laws and services</p>



POSITIVE DEVELOPMENTS

As a matter of current practice the Indonesian government cooperates with UNHCR, IOM and other NGOs to facilitate the release from immigration detention of asylum seekers and refugees (including children), though this process usually takes several months

Expansion of alternatives to detention for children and families through increased NGO capacity and co-operation between immigration, social services, UNHCR, IOM and NGOs

Recent Presidential Regulation provides a new framework for a nationally coordinated response to asylum seekers and refugees and contemplates the availability of alternatives to detention for children and other vulnerable groups and could potentially be implemented to end the practice of detaining children

Planned rollout of new UNHCR ID card in 2017 with same security features and digital verification application as that employed by UNHCR in Malaysia, which may see fewer child asylum seekers and refugees arrested and/or a reduction in duration of their detention

New child protection law and regulation waiting presidential signature, which would establish a system of court-appointed guardianship and could potentially apply to undocumented migrant children

ONGOING CONCERNS

Child asylum seekers and refugees continue to be detained in sub-standard and dangerous conditions

Currently lacking detailed regulations to implement the new national legal framework for asylum seekers and refugees established by the recent Presidential Regulation. The Indonesian government has indicated that it may take up to two years for these to be developed

Lack of legal status renders individuals vulnerable to arrest and detention and inclined to live in a way that decreases their visibility in their host community, particularly for those who do not hold a UNHCR card.

Lengthy waiting time for initial UNHCR registration and RSD decisions, with delays in accessing the additional protection that registration and refugee status may carry

Access to alternatives for asylum seekers and refugees generally requires first passing through immigration detention for a significant period, though there are some ATD mechanisms that are enabling UASC to bypass immigration detention

For this reason, as well as the general lack of livelihood support, many asylum seekers and refugees self-report to detention to access food, shelter and alternative programs

Presidential Regulation appears to permit detention of minors, at least as a short-term measure

Currently lacking a legal framework for guardianship and foster care of UASC

Lack of consistent use of reliable age-assessment practices by immigration authorities which may result in children being inadvertently detained as adults

Child asylum seekers and refugees (including those in immigration detention) are generally excluded from national child protection laws and services

Risk that in the current political climate segments of Indonesian society may become intolerant of asylum seekers and refugees who are not Sunni Muslims

## 2. INTRODUCTION AND METHODOLOGY

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### 2.1 Save the Children and APRRN

Save the Children is a leading independent international organisation for children and child rights. Our vision is of a world in which every child attains the right to survival, protection, development and participation. Our purpose is to inspire breakthroughs in the way the world treats children and to achieve immediate and lasting change in their lives. We work towards this vision in more than 120 countries across the globe.

Save the Children is heavily engaged in supporting child migrants and advocating for the rights of children in situations of forced migration, with 'Children on the Move' being a current global priority for our organisation. In this region Save the Children:

- Provided educational and welfare services to child and adult asylum seekers and refugees in immigration detention in Nauru
- Supported UASC asylum seekers in Australia
- Supports refugee families in Australia under the 'It Takes a Village' program
- Supports early childhood and youth education of children from Australian refugee communities
- Supported asylum seeker children who disembarked from boats in Aceh Indonesia and in Southern Thailand following the 2015 Andaman Sea Crisis
- Supports forced migrant children in refugee camps and shelters in Thailand, providing educational and child protection support

The Asia Pacific Refugee Rights Network (APRRN) is a regional network of organisations and individuals committed to advance the rights of refugees in the Asia Pacific region through joint advocacy, capacity strengthening, knowledge/resource sharing and outreach. APRRN works through different thematic and geographic working groups. Through the Immigration Detention Working Group (IDWG), APRRN has been working consistently to improve protection of detainees, increase access to justice for detainees, limit and end the use of immigration detention, and advocate for alternatives to detention. The work of the IDWG includes the development of national and regional action plans to achieve these goals, as well as the organisation of advocacy and capacity strengthening workshops around themes related to immigration detention and alternatives to detention.

### 2.2 Purpose and scope

This research aims to build upon existing studies on immigration detention of children in the Asia Pacific region and provide new information on the practice of immigration detention of child asylum seekers and refugees in five target countries in the Asia Pacific region, namely Australia, Nauru, Thailand, Indonesia and Malaysia. The research also aims to highlight feasible alternatives and good practices that are emerging in these countries. In doing so, it is intended to encourage and assist governments in those countries to develop appropriate alternatives to detention and, with that end in mind, to enable civil society to conduct successful evidence-based advocacy to secure children's release from immigration detention and prevent future detention of children on the basis of their immigration status.

These countries were selected as they are the key host, transit and/or destination countries for asylum seekers and refugees in this region and have, in recent years, routinely detained asylum seeker and refugee children in immigration detention. The emphasis of this research is on the context in Thailand, Indonesia and Malaysia, where detention of significant numbers of child asylum seekers and refugees continues. The detention of children in Australia and Nauru

in recent years is also addressed but dealt with in less detail given that current government policies and practices have moved away from immigration detention of children as a routine practice, notwithstanding that legislation in these two countries still permits child immigration detention.

The reasons for selecting child asylum seekers and refugees as the focus of this report (as opposed to undocumented child migrants more generally) and for focussing on detention of children in formally designated immigration detention facilities (as opposed to other forms of detention or detention-like facilities) are outlined in the executive summary.

Finally, while this report provides a broad overview of conditions in detention, the principal purpose of this report is not to advocate for improved conditions for children in detention, but rather to promote the end of the practice of child immigration detention. We consider that there is a broad consensus amongst relevant stakeholders that asylum seeker and refugee children should not be subject to immigration detention. Taking into account initiatives that are currently being pursued, the goal of having no child asylum seekers or refugees in detention in the five countries studied is achievable within the short to medium term. That said, we support, recognise and applaud the work of NGOs and international organisations who support and respond to the day-to-day needs of children who are currently detained or who may be detained in the future.

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## 2.3 Methodology

Our research was comprised of three main parts including:

- A literature review of more than 40 substantial reports or submissions that deal with the treatment of asylum seeker and refugee children in the region, the practice of immigration detention in the five target countries and/or regional and global practices and initiatives.
- A series of consultations with more than 40 organisations or stakeholders in South East Asia between November 2016 and March 2017, namely with government stakeholders, national human rights commissions, NGOs, international organisations and other organisations engaged in policy or programs affecting child asylum seekers and refugees. Consultations were undertaken on the understanding that the observations made by organisations would not be quoted in this report without their express permission or unless such observations are otherwise in the public domain. These consultations were supplemented with informal conversations with a number of other individuals and organisations engaged in this issue including asylum seekers and refugees who reside or have resided in a relevant country.
- Interviews with a small number of children who had previously experienced detention in South East Asia, in order to capture qualitative information about the experience of children. These interviews were highly constrained in their design to avoid re-traumatising children and excluded any children under the age of ten. Comprehensive risk assessments were undertaken to minimise the risk of exposing children to harm and to ensure full, prior, informed consent of children and their parents or, in the case of UASC, caregivers.
- Field visits to an immigration detention centre, an NGO shelter for UASC asylum seekers and refugees, and a number of refugee communities in South East Asia.

Where this report contains statements without accompanying references to literature, such statements should be taken to be based upon information gathered during the consultations referred to above.

A Glossary of key terminology is included in the Appendices.

## 3. REGIONAL OVERVIEW

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### 3.1 Policy history

In Australia, indefinite mandatory immigration detention has been used since the early 1990s as a key tool of immigration policy,<sup>21</sup> principally to deter asylum seekers from seeking to enter Australia by boat. Nauru first began detaining asylum seekers and refugees in 2001 in connection with its regional processing arrangements with Australia.<sup>22</sup> Since 2013, thousands of children have been detained in Australian and Nauruan immigration detention facilities.<sup>23</sup> In the last 12 to 18 months, changes in immigration department practices and a decrease in arrival numbers have seen the release of almost all children from closed immigration detention centres in both Australia and Nauru.<sup>24</sup> However, no changes have been made to the laws of either country to prevent immigration authorities from reinstating child immigration detention as a routine practice in the future.

In South East Asia, the origins of the practice of immigration detention are more difficult to pinpoint, as are the reasons behind the practice. In Malaysia, Thailand and Indonesia, asylum seekers and refugees are typically treated by national legal frameworks as 'illegal immigrants' and thus subject to arrest and detention notwithstanding these countries have relatively porous borders which in practice permit significant levels of irregular immigration. In these countries, the practice is commonly attributed to a variety of government agendas and circumstances including the deterrence of irregular migration, national security, labour market protection and lack of available alternatives as well as, in some cases, the desire to protect vulnerable migrants from trafficking and other forms of exploitation. That said, there are a number of initiatives and emerging developments which have seen some children released from immigration detention and indicate that these governments also share a desire to see children no longer detained.

### 3.2 Population and detention statistics

The following data is based on information provided by UNHCR's Regional office in Thailand, unless indicated to the contrary. The data in relation to detention in South East Asia is likely to underrepresent the number of asylum seekers and refugees who are in fact detained as:

- not all people who require international protection from persecution are registered with UNHCR
- UNHCR largely relies on government authorities to alert them to the presence of a UNHCR 'person of concern' being in detention, which may lead to underreporting of asylum seekers and refugees in detention

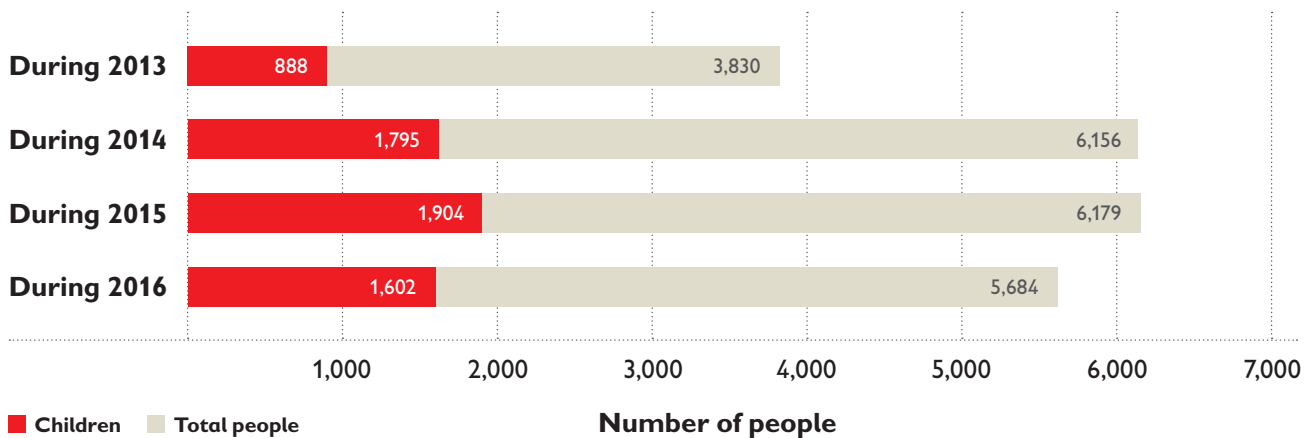


## Indonesia

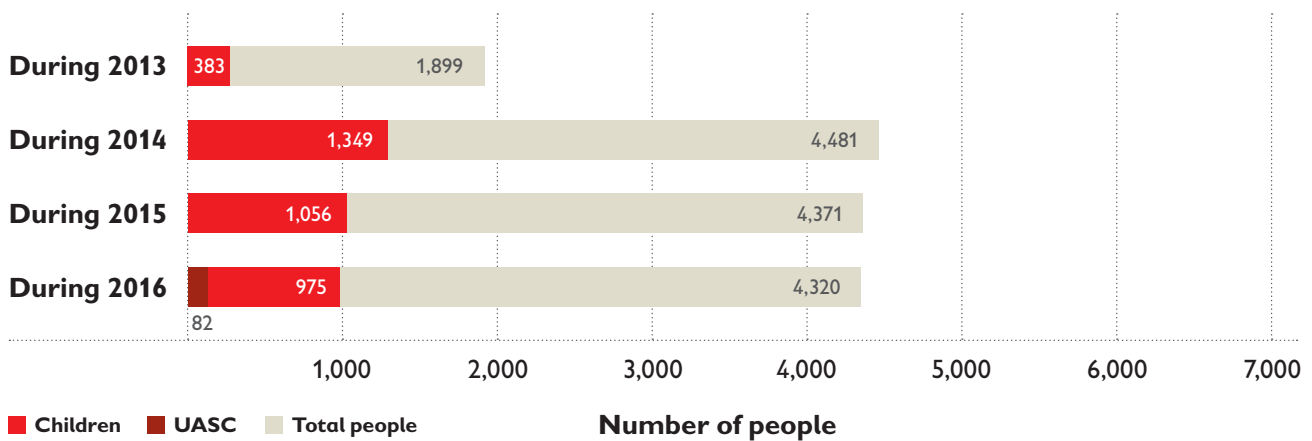
### ASYLUM SEEKER AND REFUGEE POPULATION

Total UNHCR 'Persons of Concern' including asylum seekers and refugees (31 Jan 2017)	14,524
Of which are children	3,669
Of which are UASC	471

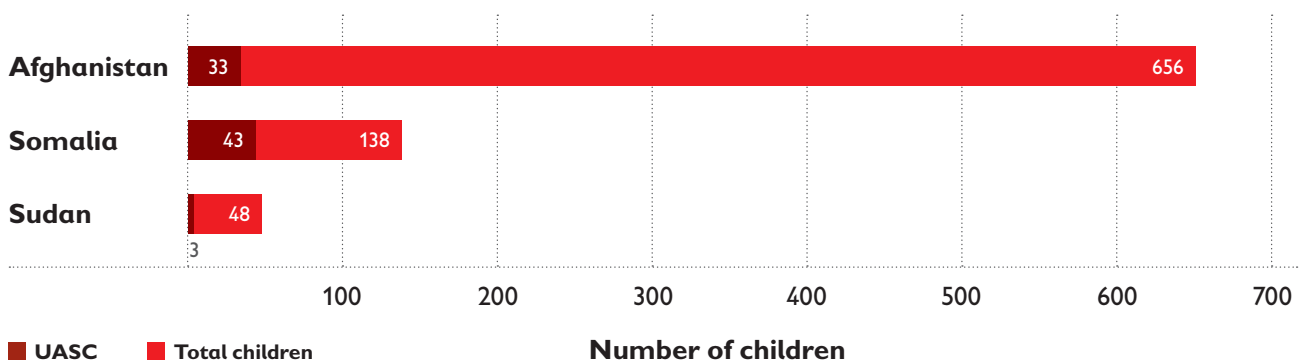
### ASYLUM SEEKERS AND REFUGEES WHO EXPERIENCED IMMIGRATION DETENTION OVER THE COURSE OF THE YEAR



### ASYLUM SEEKERS AND REFUGEES IN IMMIGRATION DETENTION CENTRES AS OF 31 DECEMBER



### TOP 3 SOURCE COUNTRIES FOR DETAINED ASYLUM SEEKER AND REFUGEE CHILDREN AS AT 30 DECEMBER 2016



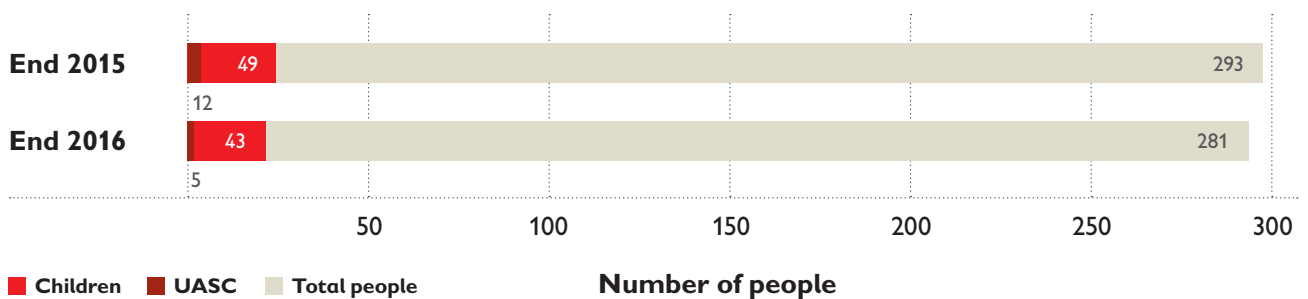


## Thailand

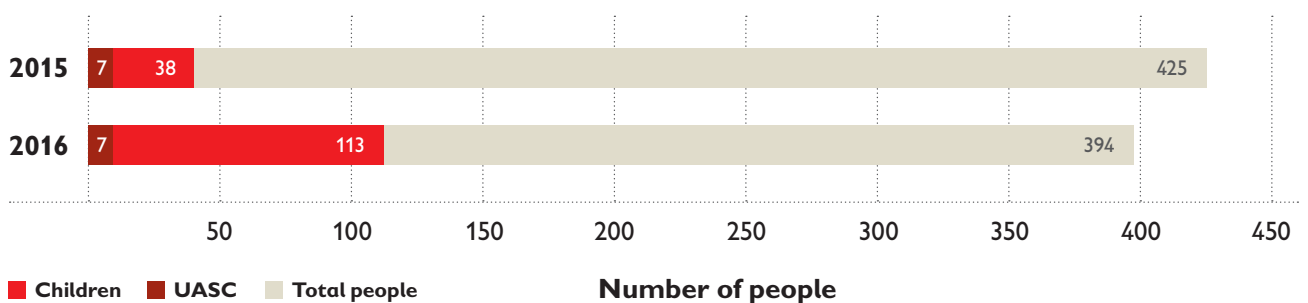
### ASYLUM SEEKER AND REFUGEE POPULATION<sup>26</sup>

Total UNHCR 'Persons of Concern' including asylum seeker and refugees	111,241
Of which are children	51,540
Of which are UASC	4,713
Total population in refugee camps on Thai/Myanmar border	103,179
Of which are children	48,389
Total population of asylum seeker and refugees in government shelters	Unknown but includes 261 Rohingya persons of concern
Of which are children	Total unknown but includes 210 minors
Urban refugees (including those in IDCs)	8,278 <sup>27</sup>
Of which are children	2,809 <sup>28</sup>

### ASYLUM SEEKERS AND REFUGEES IN IMMIGRATION DETENTION CENTRES AS OF 31 DECEMBER (EXCLUDES GOVERNMENT SHELTERS AND REFUGEE CAMPS)



### ASYLUM SEEKERS AND REFUGEES ON BAIL FROM IMMIGRATION DETENTION CENTRES AS OF 31 DECEMBER (EXCLUDES SHELTERS AND CAMPS)

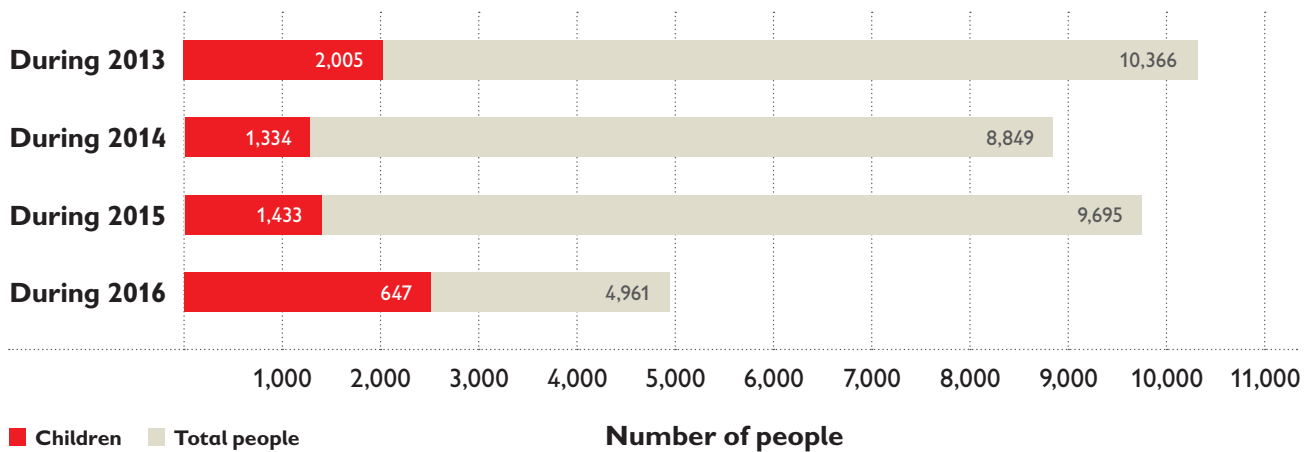




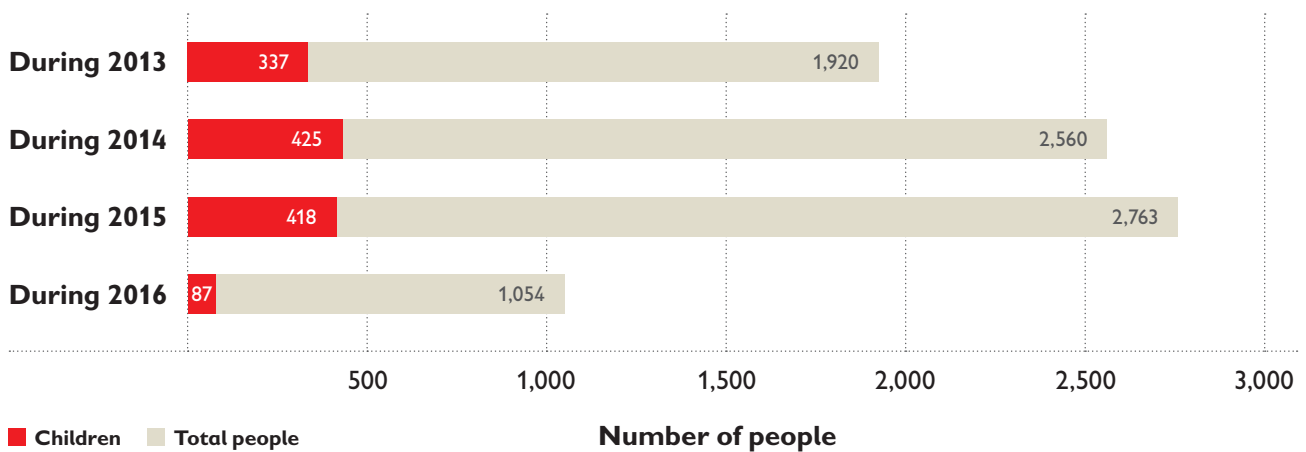
ASYLUM SEEKER AND REFUGEE POPULATION

Total UNHCR 'Persons of Concern' including asylum seekers and refugees (31 Jan 2017)	150,809
Of which are children	34,913
Of which are UASC	940

ASYLUM SEEKERS AND REFUGEES WHO EXPERIENCED DETENTION OVER THE COURSE OF THE YEAR<sup>30</sup>

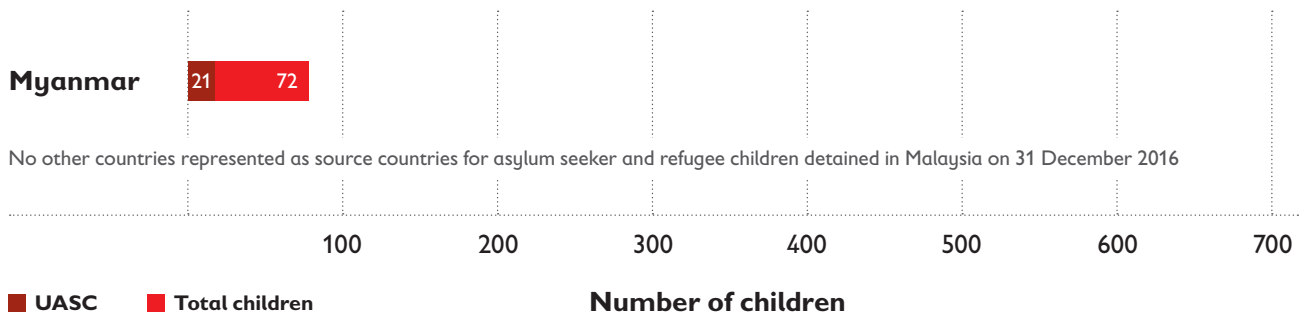


ASYLUM SEEKERS AND REFUGEES IN IMMIGRATION DETENTION CENTRES AS OF 31 DECEMBER



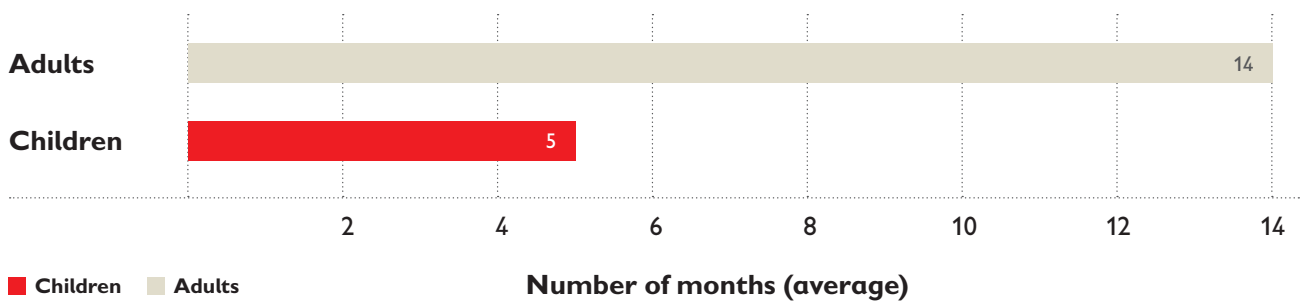


TOP 3 SOURCE COUNTRIES FOR DETAINED ASYLUM SEEKER AND REFUGEE CHILDREN AS AT 31 DECEMBER 2016



No other countries represented as source countries for asylum seeker and refugee children detained in Malaysia on 31 December 2016

DURATION OF DETENTION (2016)<sup>31</sup>

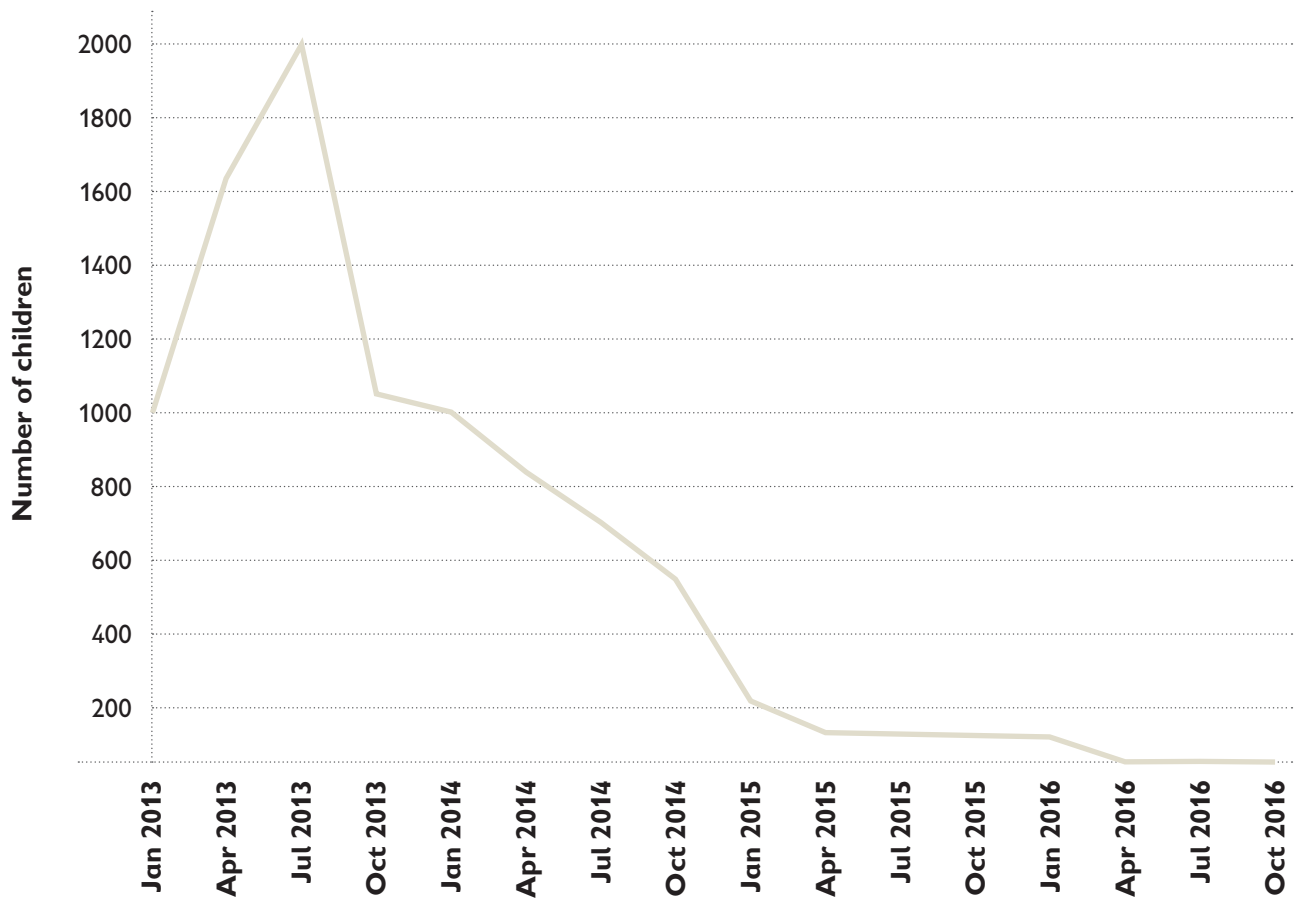




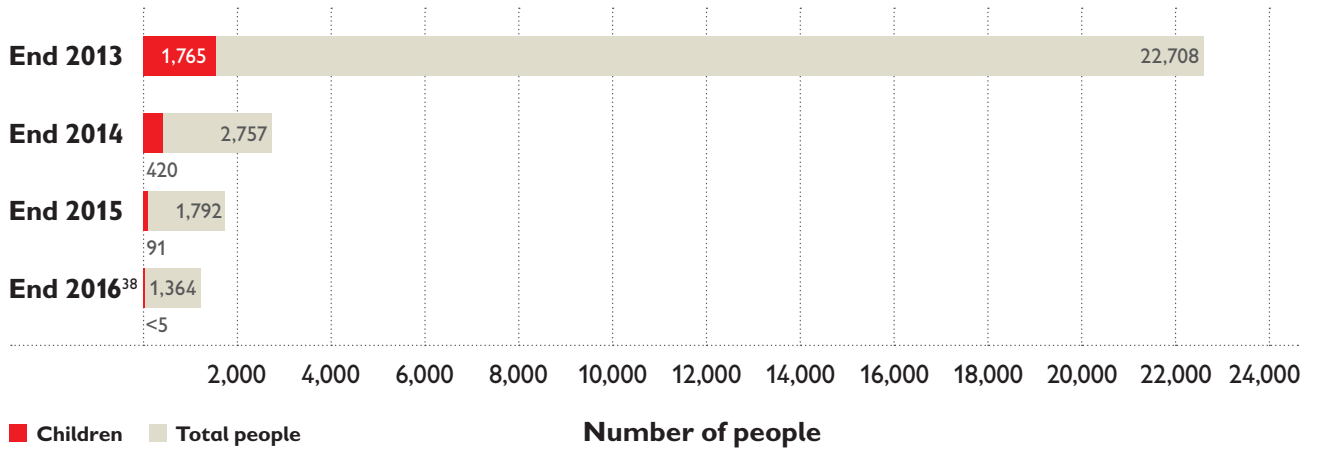
'AT RISK' ASYLUM SEEKER POPULATION AS AT 31 DECEMBER 2016<sup>33</sup>

Total	Approximately 24,204 <sup>34</sup>
Of which are children	Approximately 4,395 <sup>35</sup>

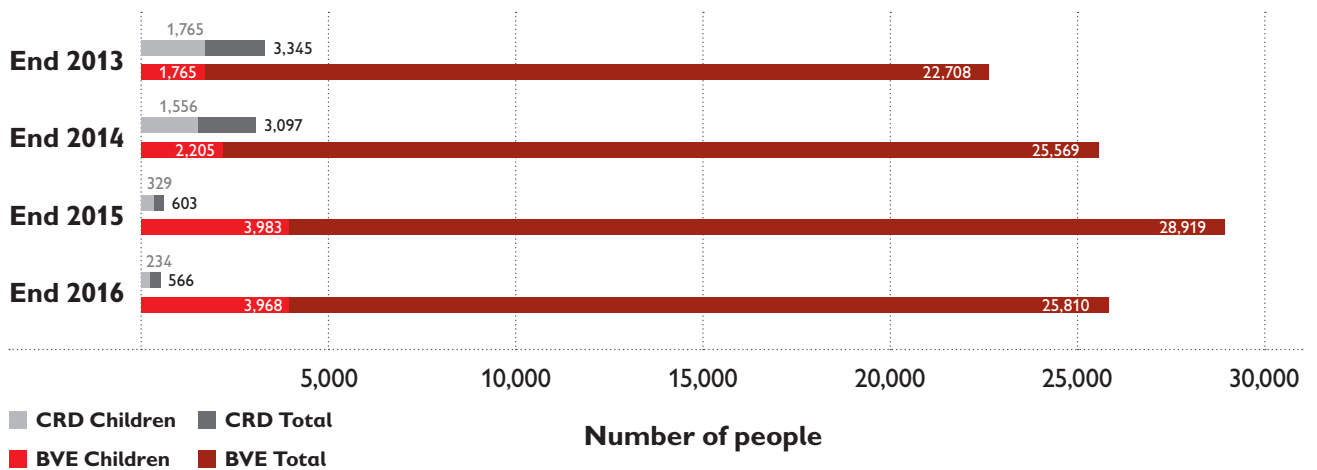
NUMBER OF CHILDREN IN CLOSED DETENTION IN AUSTRALIA, JANUARY 2013 TO DECEMBER 2016<sup>36</sup>



PERSONS IN IMMIGRATION DETENTION<sup>37</sup> AS AT 31 DECEMBER (EXCLUDES THOSE TRANSFERRED TO NAURU AND PAPUA NEW GUINEA)



PEOPLE UNDER 'COMMUNITY RESIDENCE DETERMINATIONS' (CRD) AND ON 'BRIDGING VISA E' (BVE)

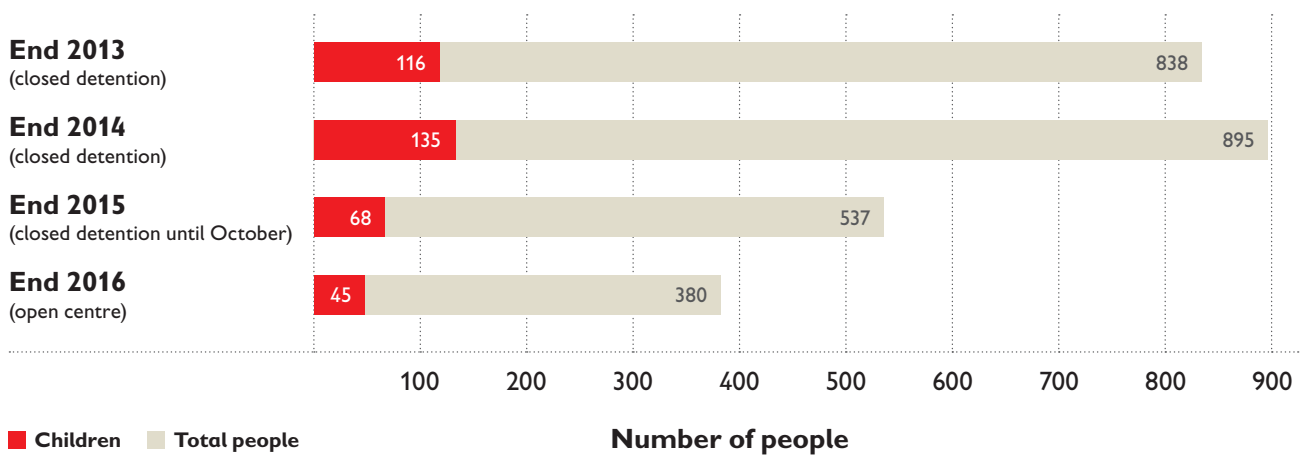




ASYLUM SEEKER AND REFUGEE POPULATION

Total estimated asylum seeker and refugee population (including those currently in Australia after temporary medical transfers) as of 31 January 2017 <sup>39</sup>	1705
Of which are children	273 (est)
Of which were UASC upon transfer to Nauru	28 (est)

ASYLUM SEEKERS DETAINED/RESIDING IN THE REGIONAL PROCESSING CENTRE AS OF 31 DECEMBER



### 3.3 International legal obligations

The practice of detaining children in connection with their migration status engages the provisions of a number of international treaties. The below table contains a list of the most relevant treaties and indicates whether or not each of the five countries considered by this research is bound by such treaty. In addition Appendix B contains an overview of the key provisions of each treaty that are potentially engaged by this practice. The list of treaties is by no means exhaustive – other relevant international treaties include the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families.

It is important to note that none of the five countries have an exclusively or predominantly ‘monist’ (rather than ‘dualist’) legal system.<sup>40</sup> This means that international treaty law does not automatically bind the governments of those states as a matter of domestic law unless domestic laws have been enacted to incorporate the contents of the relevant treaty into domestic law. Accordingly, the ratification of treaties by these countries does not automatically give citizens and others within the relevant jurisdictions rights which can be legally enforced in domestic courts.

#### Ratification of Key International Conventions

	INDONESIA	MALAYSIA	THAILAND	AUSTRALIA	NAURU
Refugee Convention	No	No	No	Yes	Yes
Convention on Rights of the Child	Yes (no current reservations)	Yes (reservations) <sup>41</sup>	Yes (reservations) <sup>42</sup>	Yes (reservations) <sup>43</sup>	Yes (no current reservations)
International Covenant on Civil and Political Rights	Yes	No	Yes	Yes	No – signed but not yet ratified
Convention Against Torture	Yes	No	Yes	Yes	Yes
Optional Protocol to the Convention Against Torture	No	No	No	Scheduled for 2017	Yes

## Stories of detained children

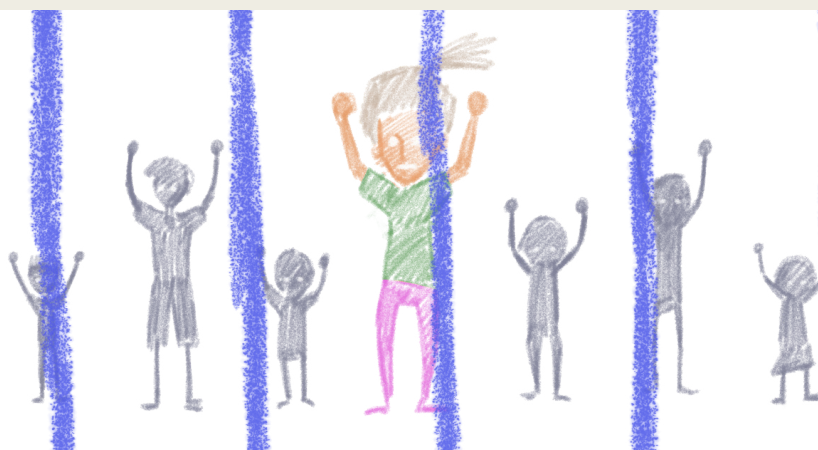
The following brief case studies are taken from our interviews with children in South East Asia. Their names have been changed, and their locations omitted, in order to protect them from identification.

**Ahmad** arrived in South East Asia as an unaccompanied fourteen-year-old. His two hopes were to find a safe place to live and to become a football player. He was taken by a local man to immigration authorities soon after arriving in South East Asia. He was subsequently held in an immigration detention centre for around a month. He and one other boy were the only children in a cell of more than 30 men. He recalled only being allowed to wash once a week and having to use soft drink bottles to store water – running water was only available once a week. He expressed regret that the authorities didn't separate teenagers from adults in the detention centres. He now lives in a NGO run shelter along with other teenage boys and is hoping to be resettled in the United States. His dream of finding a safe place to live and becoming a footballer have not changed.

**Sara** was fourteen years old and seeking asylum in South East Asia when her family's single-room home was raided by the authorities early one morning. She was arrested and detained along with her mother, father, two-year-old brother and grandfather. Sara was held in a cell with approximately 150 other people along with her mother and brother, while her father and grandfather were held in a separate part of the detention complex. Her grandfather's ill health led to the release of the family from detention on bail after around six months, but he passed away shortly after their release. Since being released on bail she and her family have lived on the outskirts of the country's capital. She doesn't attend school and reports having largely given up on her dream of becoming a doctor.

**Elijah** was ten-years-old and living with his mother and father and sisters (aged seven and two) in a single small room in a low-rent apartment when immigration authorities raided their room, arrested them and detained the family in an IDC. The authorities thought he was older than he was and separated him from both his parents on his first night in detention, placing him in a room with dozens of unrelated adult men. He was very scared. The next day, after the intervention of an advocate, he was transferred to a cell with his mother and sisters. His family was released on bail after around one month in detention and have been recognised as refugees by the UNCHR. They continue to reside in the same city awaiting resettlement, having arrived in the country more than four years ago. He attends a small community run learning centre on the ground floor of his building, run by parents of asylum seeking children, and rarely ventures outside to play for fear of drawing the attention of authorities to his community of undocumented asylum seekers.

**Shan's** parents and siblings were killed during an attack on his community during a civil war in his home country when he was nine. After living below the radar in a neighbouring country for several years, he arrived in South East Asia at aged fourteen, seeking asylum. He was initially accompanied by a lady he knew as 'aunty' who disappeared on a boat without him shortly after arrival. Immigration authorities detained him in an 'office' and an immigration detention 'camp' for around six months where he found the dirty, unsanitary conditions very challenging and would shake from illness at night. He was later released into the care of an NGO shelter, not knowing a single person who speaks his first language, but now enjoys his language classes and entertains himself and his friends by singing American pop songs. He still hopes for a chance to one day become an engineer.



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### 3.4 Conditions in detention

Conditions in immigration detention in the five countries vary significantly from place to place, depending on their geographical location, individual management arrangements and the nature of the facilities. With dozens of official places of detention in each of the five countries (plus other places of detention such as airports, police holding cells, interception depots, closed government shelters, hotels or similar facilities)<sup>44</sup> a detailed account of the conditions in each place of detention is beyond the scope of this research.

Our research indicates that conditions in immigration detention centres in Indonesia, Malaysia and Thailand are typically at odds with community expectations and international standards in relation to the treatment of children.<sup>45</sup> Asylum seeker and refugee children are routinely detained 24 hours a day, 7 days a week in cells housing dozens of unrelated adults, frequently separated from their family members along age and gender lines, with cramped and substandard sleeping facilities, no privacy from unrelated adults, little or no educational opportunities, little or no recreational space or activities, extremely limited access to healthcare and are at risk of sexual and other forms of violence and exploitation.

In Australia and Nauru, some of the conditions in immigration detention centres reflect greater financial investment in infrastructure and services. Nevertheless, many serious concerns have been raised in relation to the physical conditions in which children have been detained, lack of access to appropriate services and, perhaps most significantly, the indefinite and often extremely prolonged nature of their detention.

The following is a more detailed overview of concerns raised in relation to conditions in the relevant countries.

#### Malaysia, Indonesia and Thailand

Based on our literature review and consultations with relevant stakeholders, it appears that most detention centres in Indonesia, Thailand and Malaysia share a number of features that are of serious concern, particularly in relation to the detention of children. Most facilities were not designed to hold people for months and years at a time (but were rather designed to facilitate deportation within a period of days or weeks) and were not designed to hold children and family groups and are thus considered to be gravely substandard in their physical design, amenities and services,<sup>46</sup> in some cases even life threatening.<sup>47</sup> In particular, concerns are consistently raised in relation to the following issues:

- **Significant overcrowding**, with many detention centres housing more than 100 people in a single room, at times without even sufficient space to enable everyone to lie down at once with their legs fully extended
- **Lack of privacy and separation from unrelated adults** caused by insufficient space and/or partitioning, leading to children typically living, sleeping and washing in the presence of unrelated adults
- **Unhygienic environment**, with insufficient bathroom amenities to cope with the number of detainees, general overcrowding and/or poorly maintained toilet and washing facilities
- **Inadequate bedding and inappropriate sleeping spaces**, with reports of some detainees sleeping directly on the floor or on thin pieces of cardboard without mattresses, pillows, sheets or blankets
- **Separation of family members along age and gender lines**, with men and boys above a certain age usually being detained in a separate area, or even a separate facility, to women and young children
- **Boys aged 12 or above are generally treated as ‘men’** and detained with unrelated men (even if unaccompanied), though this practice can reportedly apply to boys as young as 7 years’ old
- **Exposure to violence and abuse**, with children witnessing or being the victims of violence including sexual abuse
- **Lack of access to adequate nutrition**, with the food provided by detention centres often described as inadequate, lacking in nutritional variety, unpalatable and at times of insufficient quantity. Detainees must rely on friends, family and ad hoc NGO programs to supplement the detention diet with nutritional variety and food appropriate to their religious requirements
- **Lack of adequate exercise, recreational and outdoor spaces and opportunities** with reports that outdoor and recreational areas are, where available, inadequate in size and lacking in equipment, with access often at the discretion of guards or centre management

### Alone, separated and unprotected

“The first night was very difficult because my Mum and Dad weren't there. I'd never stayed alone before.”

(Elijah, detained at age 10)

### Detained with unrelated adults

“When they took us to the prison [detention] mostly it was adults there, only me and one other person were underage.”

(Ahmad, detained at age 14, unaccompanied)

### Poor and inadequate food

“Food also not good...not enough... I am very hungry every day.”

(Shan, detained at age 14, unaccompanied)

### Dirty and hot

“Downside is there's lot of germs... And the weather was so hot so we cannot stay, we cannot breathe ourselves easily because it's really hot inside.”

(Sarah, detained at age 14)

### No privacy

“The toilets did not have any doors they had put a cloth to cover, and in the shower, they only had the tub and where the tub was there was no walls where you have a private section where you can bathe.”

(Elijah, detained at age 10)

- **Lack of access to formal education** with reports that, to the extent that any educational opportunities are available, these are typically informal, ad hoc programs that only provide a few hours a week of education (focussing mostly on language) and rely on NGOs gaining access and having sufficient resources to deliver such programs
- **Very limited access to timely and appropriate healthcare** based on reports that, to the extent that healthcare is provided in detention, it is typically based on a schedule of visits from an external doctor. Detainees are typically unable to access medical assistance or pharmaceuticals as and when they feel they need them, and there are reports of deaths from untreated illness and injuries
- **Lack of independent monitoring** and related mandates to empower and facilitate regular engagement with government on concerns relating to detention<sup>48</sup>
- **Limited or no access to visits from family and NGOs and limited means to communicate with family members outside of detention**
- **Child protection concerns** related to lack of routine vetting of detention staff and lack of training of detention staff in relation to working with children in a custodial facility, in addition to child protection risks referred to above
- **Absence or lack of enforcement of standard operating** with significant decisions (such as staff recruitment, opportunities for family visits, policies in relation to leaving the facility for medical or recreational purposes, and access of NGOs) at the discretion of the officer in charge of the facility
- **Lack of access to interpreters, legal representation and judicial oversight/recourse in relation to detention**

All of these conditions are conducive to children experiencing serious harm and deterioration to their wellbeing as explored further in part 3.4.

### Australia and Nauru

Conditions in detention in Australia and Nauru in recent years deserve separate examination as they differ in some important respects from those in Thailand, Indonesia and Malaysia (as discussed



above). This is partly due to the specific policy settings in Australia and Nauru as well as the Australian government's significant expenditure on immigration detention facilities and related operations.

The Australian government has detained children and families in recent years, in a deliberate and strategic attempt to deter irregular maritime migration of asylum seekers. However, it has done this within the context of its status as a wealthy developed state and a signatory to the Refugee Convention – factors which establish a clear moral and legal duty to provide, or be seen to provide, access to certain basic services such as formal education, healthcare and recreational opportunities. Nauru is also a recent signatory to the Refugee Convention and, perhaps more relevantly, essentially follows Australia's lead on these matters as Australia is financially underwriting the costs incurred by the Government of Nauru in allowing asylum seekers and refugees to reside there.<sup>49</sup>

There has been no shortage of money spent in constructing and running immigration detention facilities in Australia and in 'regional processing countries' such as Nauru and Papua New Guinea. Save the Children undertook research in 2016 which revealed that over the period 2013 to 2016 Australia spent AUD 5.7 billion on onshore detention and AUD 3.6 billion on offshore processing.<sup>50</sup>

However, despite this extraordinary investment, most of the concerns in relation to conditions of detention set out above have also been present to a greater or lesser extent in relation to Australian funded immigration detention in Australia and Nauru.<sup>51</sup>

We welcome developments in government practices over the last 12 to 18 months, which have moved away from children being 'detained' (in the narrowest sense of the term) in Nauru and Australia as discussed further in part 4.4 and 4.5 below. However, immigration detention remains an option for immigration authorities in both countries, hence the ongoing relevance of recent detention practices and conditions.

The following is a summary of the concerns raised in relation to Australian-funded immigration detention facilities in Australia and Nauru since 2013, which are discussed in greater detail in the Save the Children/ UNICEF *At What Cost?* report and were also the subject of extensive investigation by the Australian Human Rights Commission (AHRC) in their 2014 *Forgotten Children Inquiry*.<sup>52</sup>

### Chronic illness

*“We have some like food problems and different kinds of disease like some people are very sick here. And I have my little brother who every day was sick and they have cough problem and flu sometimes.”*

(Sara, detained at age 14)

*“But every time I sleep my body is shaking. I don't know why this.”*

(Shan, detained at age 14, unaccompanied)

### Sleeping on cardboard

*“There was no place to stay, there was some cardboard and we were sleeping on the cardboard.”*

(Ahmad, detained at age 14, unaccompanied)

### Praying for bail

*“We just pray to God that God would help us to go out of this and be bailed out”*

(Sara, detained at age 14)

### No chance to play

*“They did not give us anything to play, they just told us we could take a little walk and after that they would take us up to the locked room.”*

(Elijah, detained at age 10)

## Concerns in relation to recent immigration detention conditions in Australia and Nauru

Indefinite and prolonged detention	Poor standards of accommodation including families residing in non-air-conditioned, mouldy tents separated from other families only by canvas or plastic partitions
Isolated locations, often with extremely hot and humid climates	Unsanitary conditions including problems with sewerage and flooding
Lack of privacy between family groups	Exposure to violence, sexual abuse and exploitation
Lack of appropriate separation between children and unrelated adults	Restrictions on access to water
Inadequate clothing and footwear	Lack of provision for children with special needs
Inadequate access to medication, specialist healthcare and emergency medical evacuation	Oppressive security measures including daily bag searches
Inadequate training of staff	Shortage of suitable recreational space
Prolonged and unexpected family separations in connection with the medical transfer of detainees	Lack of independent monitoring
Long term exposure to others suffering acute mental illness	Lack of appropriate child protection systems and lack of adequate investigation of allegations of abuse of children

We note that a current Australian Royal Commission into Institutional Responses to Child Sexual Abuse recently received a report, commissioned by the Department of Immigration and written by an independent children protection panel, which found that institutional responses to almost half the reported incidents of child abuse in Australian-run immigration detention (including in Australia and Nauru) were inadequate.<sup>53</sup>

Notwithstanding these and other significant shortcomings, Australian-funded detention centres arguably provide a somewhat higher standard of physical accommodation and range of services than those in South East Asia. In particular, Australian-funded detention conditions are generally considered to:

- Have somewhat higher standards of sanitation and shelter than those in Indonesia, Thailand and Malaysia (with the possible exceptions of facilities in Nauru and Christmas Island)
- Provide formal primary and secondary education to all school-aged children, although educational opportunities do differ for children depending on where and when they were detained, with access to formal education particularly problematic for those detained on Christmas Island<sup>54</sup>
- Provide higher quality health services than their South East Asian counterparts, though the isolated locations of many detention centres and dysfunctional escalation/evacuation processes have seen several potentially preventable deaths occur among those transferred to Nauru and Manus. There have also been many long-standing concerns in relation to access to medication, access to diagnostic tests and specialist treatment, access to pharmaceuticals, and a general culture of dismissiveness of medical complaints by healthcare personnel.<sup>55</sup>
- Show greater respect for maintaining family unity provided that family members were intercepted by authorities at the same time. Close family members were usually permitted to reside together in family accommodation, whether that be in a separate room or in an onshore facility, or a partitioned section of a large tent, or a converted shipping container in Nauru

On the question of family unity, it is important to note that some individuals who have travelled separately from other family members have faced prolonged separation by operation of the regional processing system<sup>56</sup> and the medical transfer of family members from Nauru to Australia has reportedly separated family members for extended periods of time.<sup>57</sup>

In understanding the conditions of detention in Australia and on Nauru, it is critical to factor in the duration of detention as one of the key conditions which has impacted so adversely on the mental health of children and adults

in detention. In 2014 it was reported that on average children spent one year and two months in detention in Australia and Nauru.<sup>58</sup> It is self-evident that when children continue to be detained indefinitely, no amount of investment in healthcare facilities or psychological services can fully counteract the harmful effect of such prolonged detention.<sup>59</sup>

### 3.5 Impact of detention on children

Immigration detention of children has significant adverse impacts on children who are detained. In addition, serious adverse impacts are experienced by children who are at risk of re-detention or who are not themselves detained but who are at risk of arrest, or whose family members are at risk of arrest on account of their lack of protected legal status.

It is also important to consider the potential impact of detention conditions and practices on the migration decisions of asylum seekers and refugees. The possibility of indefinite and prolonged detention, especially in obviously dangerous or unhealthy conditions, could well result in people with a well-founded fear of persecution agreeing to return to their countries of origin. In this context, the expressed commitment of all five countries to the principle of *non-refoulement* becomes somewhat spurious.<sup>60</sup>

#### Impact on detained children

The devastating impact of immigration detention upon children is well documented in numerous studies and collections of anecdotal reports relating to the practice of immigration detention in the region and across the globe.<sup>61</sup>

In addition to the inherent harm experienced when a child's freedom of movement is unjustifiably removed,<sup>62</sup> negative impacts of detention on children may include:

- Death from illness or injury
- Poor health and susceptibility to illness
- Compounding existing mental health conditions
- Increased risk of suffering mental health disorders including depression, anxiety, insomnia, nightmares and bedwetting
- Impaired cognitive development
- Developmental and language delays
- Harm to the health of parents, leading to children being deprived of support and appropriate care from their parents
- Malnutrition, particularly among pregnant women and young children
- Fear, distress and harm caused by exposure to violence or deteriorating mental health of others
- Violent and prematurely sexualised behaviour
- Physical injury caused by violence of others
- Experiences of sexual abuse and exploitation
- Self-harm<sup>63</sup>

Alarming rates of self harm have been recorded among children detained by the Australian government, with the AHRC reporting government statistics indicating that '[b]etween 1 January 2013 and 25 August 2016, there were 203 recorded incidents of self-harm in immigration detention involving children.'<sup>64</sup>

Parents often report their distress at being unable to protect their children from violence and abuse within detention. For example, the recently published *Nauru Files (2016)* cite two examples of parents in such despair they wished to relinquish their babies into the care of others, with one couple telling caseworkers '[w]e want to give our baby to Save the Children and we want to die. We don't want anything for us we just want our baby to be safe. Our baby is not safe here.'<sup>65</sup>

The impact of institutionalisation also has an insidious effect on children and families. Living in a detention environment for prolonged periods interferes with the ability of parents to care for their children. For example, the lack of access to family cooking facilities, the limited access to personal possessions, the inability of parents to work and provide for the needs of their children, the lack of private family recreational spaces and the lack of privacy involved in living in cramped accommodation, all prevent parents from caring for their children independently in the manner that most families are accustomed to.<sup>66</sup>

In addition, detention can adversely impact a child's ability to access and enjoy a whole range of basic rights and services, with long term social, economic and developmental impacts, including:

- Family unity
- Education
- Healthcare
- Play and recreation
- Enjoyment of cultural and other aspects of the child's identity<sup>67</sup>

The impact of family separation that often comes with the experience of immigration detention is also well documented – family separation can be extremely harmful to a child's sense of security and his/her psychological development and resilience.<sup>68</sup>

### **Impact on wider asylum seeker/refugee community**

While the detention of roughly 2,400 children in 2016 is cause enough for alarm, the threat of detention has significant adverse effects on the wider population of undocumented forced migrants in host countries such as Indonesia, Malaysia and Thailand as well as asylum seekers living in the community in Australia and Nauru.

Our research suggests that asylum seekers and refugees will often make choices, some of which adversely impact on the access of children to education, healthcare and recreation, in order to minimise the risk of being detected and arrested by authorities.

Available literature and our consultations suggest that the fear of arrest and detention that is synonymous with lack of legal status in Indonesia, Malaysia and Thailand:

- Is conducive to labour exploitation and trafficking
- Prevents children from accessing educational opportunities, particularly where significant travel to and from school is required
- May prevent children and families from seeking medical attention, including fear of attending hospital to give birth
- May deter families from going outside their homes, even to buy basic necessities<sup>69</sup>

During our interviews in South East Asia we met one asylum seeker community leader who informed us that the children in his community did not play outside their homes or visit public parks for fear of becoming 'visible' and exposing themselves or other members of their communities to arrest and detention. One boy we interviewed had not played his favourite game of cricket for more than two years due to this concern.

The same community was attempting to run their own small learning centre for the asylum seeker and refugee children residing in a cramped and crumbling apartment on the outskirts of a capital city, so that families wouldn't have to risk travelling to established schools or learning centres in the city.

Children we interviewed spoke of many fears associated with their lack of legal status – fear of being re-arrested by local authorities, fear of being separated from their families and loved ones, fear of being sent back to their home countries, even fear of leaving their house.

In the Australian context, asylum seekers living under residence determinations or on short-term bridging visas also feel vulnerable to the prospect of being detained again:

*Under the Code of Behaviour that people seeking asylum have had to sign, even the most minor breach of a law could lead to a person being detained again. This makes life precarious, makes people reluctant to get help, leading to isolation. It also places those who support people seeking asylum in difficult situations, particularly where domestic violence is involved, because any report may lead to prolonged detention.<sup>70</sup>*

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### 3.6 Alternatives to detention and their benefits

Alternatives to detention can come in many different forms and can include laws, policies or practices which support community-based case management systems for undocumented migrants, access to community housing and/or open shelters or reception centres and other programs or mechanisms which effectively divert individuals away from detention or secure their release from detention.

The International Detention Coalition defines ‘alternatives to detention’ as ‘[a] law, policy or practice by which persons are not detained for reasons relating to their migration status.’<sup>71</sup>

We have used this as a working definition for the purposes of this research, while noting that not all ‘alternatives to detention’ (as defined above) are necessarily safe or appropriate for children. As our recommendations recognise, further principles and features are required in order for alternatives to detention to be designed and implemented in a manner that is consistent with child rights and the best interests of children.

The development of alternatives to detention is not only necessary in order to protect vulnerable child migrants – alternatives also offer a range of other advantages to governments as highlighted in the extensive research conducted by the International Detention Coalition on the available alternatives to detention and their respective benefits to government as outlined in their Handbook on ATDs.<sup>72</sup>

This detailed publication highlights that alternatives typically cost less to implement than detention. This aligns squarely with detailed work undertaken by Save the Children and UNICEF in 2016 which found that the Australian government spent more than AUD400,000 per person per year on the detention of asylum seekers and refugees in Nauru in recent years, and around AUD240,000 per person per year on onshore detention.<sup>73</sup> This compares with the cost of supporting asylum seekers in the community pursuant to ‘residence determinations’ (also referred to as ‘community detention’) and the issuance of bridging visas, which have costed roughly AUD90,000 and AUD33,000 per person per year respectively.<sup>74</sup>

An independent study in the United States found that the government could save over USD1.44 billion of its USD2 billion budget by detaining only non-citizens with serious criminal histories and otherwise using alternatives to detention.<sup>75</sup> In Indonesia the cost of running a shelter for unaccompanied refugee and asylum seeking children was estimated at USD 8.00 per person per day,<sup>76</sup> a figure which is likely considerably lower than the cost to government of keeping these individuals in immigration detention. On average, it is estimated that alternatives may cost up to 80 percent less to run than detention facilities.<sup>77</sup>

The International Detention Coalition highlights that in addition to costing less to governments, alternatives to detention:

- Support the health and wellbeing of migrants
- Are more conducive to governments respecting and fulfilling human rights in line with their international and domestic obligations
- Strengthen participation in immigration case resolution processes
- Improve voluntary and independent departure rates
- Can help stabilise vulnerable individuals in transit
- Avoid wrongful detention and reduce overcrowding and long-term detention<sup>78</sup>

## 4. COUNTRY BY COUNTRY ANALYSIS



### 4.1 Thailand

#### Overview and legal framework

Thailand is currently host to approximately 111,000 asylum seekers and refugees, the vast majority of whom (approximately 103,000 people) are forced migrants from Myanmar, who live in nine camps or 'temporary shelters' along the Thai/Myanmar border.<sup>79</sup> Almost half of this group are children.<sup>80</sup> These camps were first established in the mid-1980s to accommodate large numbers of displaced persons from Myanmar, including Karen and Karenni people and other Burmese minority groups.<sup>81</sup> The balance of the asylum seeker and refugee population includes approximately 8,200 'urban refugees',<sup>82</sup> typically refugees from non-neighbouring countries such as Pakistan and Somalia who reside in and around Bangkok, as well as several hundred other individuals (including approximately 261 Rohingya refugees) in government shelters in Southern Thailand.<sup>83</sup> Among those counted as 'urban refugees' are those held in immigration detention facilities around the country.

The immigration detention statistics provided by the UNHCR indicate that as of 31 December 2016 there were 281 asylum seekers and refugees (including 43 children) in officially designated 'immigration detention centres' in Thailand, with 394 asylum seekers and refugees (including 113 children) on bail.<sup>84</sup> These numbers do not include the number of asylum seekers and refugees who live in refugee camps (described above) and those identified by authorities as 'victims of human trafficking' or as 'particularly vulnerable women and children' who at times are diverted to closed government shelters.<sup>85</sup> These individuals are also subject to significant, if not total, restrictions on their freedom of movement.<sup>86</sup>

Thailand is not signatory to the Refugee Convention and does not have a formal national asylum framework in domestic law or policy. This means that at present asylum seekers and refugees who are present in the country without valid visas are technically 'illegal immigrants' and, by operation of Thailand's Immigration Act, subject to arrest, prosecution, criminal detention, immigration detention and (occasionally) deportation.<sup>87</sup>

UNHCR has operated in Thailand under the invitation of the Thai Government since 1975.<sup>88</sup> UNHCR's work involves assisting and providing 'temporary protection' to refugees living in camps on the Thai/Myanmar border,<sup>89</sup> as well as registering asylum seekers from the urban refugee community and undertaking refugee status determinations (and issuing related certification) which can lead to Thai-based refugees accessing resettlement opportunities in other countries. However, it enjoys no formal mandate or legislative framework for its work in Thailand. Also, due to the number of asylum seekers and the very stretched budget of the UNHCR, the process of being recognised as a refugee has, in recent times, taken several years.<sup>90</sup> Encouragingly, the recent channelling of additional resources to UNHCR Thailand has allowed it to commence an initiative to clear a large backlog of refugee claims, with more than 1508 cases (involving 3338 persons of concern) determined in the second half of 2016, since commencement of the project.<sup>91</sup>

The Thai government expresses respect for the customary international law norm which prohibits

*refoulement* and, with some notable exceptions,<sup>92</sup> does not generally deport undocumented migrants with clear protection needs as recognised by the UNHCR.<sup>93</sup> The absence of a national framework, combined with a degree of respect for the norm of non-*refoulement*, has led to the situation outlined above where different groups of forced migrants are subject to a patchwork of government responses depending on their country of origin, ethnic backgrounds and the era and circumstances in which they arrived in Thailand.<sup>94</sup> It is hoped that new screening and protection mechanisms may soon be introduced to address this situation, as discussed further below.

Forced migrants from Myanmar in refugee camps are the subject of a long-standing policy framework pursuant to which those fleeing persecution in Myanmar have been offered 'temporary shelter' on humanitarian grounds.<sup>95</sup> Similarly Rohingya who have arrived in recent years (including in the aftermath of the Andaman Sea crisis) are typically brought under the government's laws and policies in relation to 'victims of trafficking' and are currently held in a network of government shelters.<sup>96</sup> However, no legal or policy framework exists for urban refugees, making their situation highly precarious and exposing them to the possibility of arrest, prosecution and detention on account of their undocumented status.<sup>97</sup>

### **Situation of urban refugees and asylum seekers**

Refugees living in urban settings in Thailand, most notably in Bangkok, have typically travelled by air on their own, or in small family units, fleeing persecution or conflict from various countries around the world. Usually, these individuals enter Thailand by air on a 60-day tourist visa (usually available on arrival) and seek to register with UNHCR soon after arrival.<sup>98</sup>

UNHCR usually registers such migrants within approximately one week from first contact, collects their personal data (including biometric information) and issues them with a UNHCR card that identifies them as an asylum seeker.<sup>99</sup> They then go onto a waiting list for an RSD decision, a process that can take several years to complete.<sup>100</sup>

Asylum seekers quickly become 'illegal entrants' when their initial entry visa expires and are thereafter vulnerable to arrest, prosecution and detention while awaiting durable solutions to their situations. To date, such solutions have consisted primarily of resettlement (through access to a very limited number of resettlement opportunities) or voluntary repatriation.

Given their lack of legal status in the country, urban asylum seekers and refugees are unable to work legally and must rely upon savings, limited support from UNHCR and other NGOs, or illegal work in order to survive in the community. Individuals and families tend to seek out others from their own national, linguistic or cultural groups and often live in small urban enclaves (eg often centred around a particular building or complex) on the outskirts of Bangkok where the cost of living is lower than in more central parts of the city.

To the extent that members of this community may seek and find work, their undocumented status and fear of arrest means that they are targets for underpayment and other forms of labour exploitation. We heard anecdotal reports of employers withholding pay from migrants on the basis that the employer has had to pay a bribe to immigration authorities, whether or not such a bribe has actually been paid. Engaging in work also increases a migrant's chances of being arrested and detained, with raids on workplaces one of the principal ways in which immigration authorities seek to apprehend undocumented migrants.

Urban refugees and asylum seekers will generally try to live 'under the radar' for fear of arrest and detention. Anecdotal reports suggest that the lack of legal status (and related fear of arrest) can lead to a reluctance for parents to send children to school, allow children to play outside the home or seek medical treatment, with the result that some children live in conditions that could be described as similar to house arrest.

Thailand's policy of 'Education for All', in theory, allows asylum seeker and refugee children to access public primary and secondary education.<sup>101</sup> It is also observed that the wearing of a school uniform may provide a reasonable degree of immunity from arrest for the



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children themselves.<sup>102</sup> However, there are a number of practical barriers that have deterred asylum seeker and refugee children from attending Thai schools. Government schools use the Thai language as the primary language of instruction. However, few asylum seeker and refugee children are fluent in Thai given that Thailand has generally been regarded by urban refugees as a 'transit' country, rather than a place where they might be able to build a stable future. This approach reflects Thailand's historical unwillingness to ratify the Refugee Convention or establish a formal refugee program. Furthermore, while children may not be highly vulnerable to arrest while in school uniform, parents are at risk while accompanying their children to and from school. Accordingly, it is estimated that only 34% of urban refugee children attend government schools, with the vast majority of these children enrolled in kindergarten or primary levels.<sup>103</sup>

While undertaking consultations for this research project we met a number of people involved in small scale education initiatives in apartment buildings where asylum seekers and refugees live, or endeavouring to access education through on-line learning, in an effort to essentially 'home-school' children in order to minimise the possibility of arrest. Many urban refugees try to access education through community-run learning centres but those who fear arrest may still not be willing to travel to attend these schools. Furthermore, lack of recognised formal certification from these learning centres places significant limits on the value of such education.<sup>104</sup>

### Arrest and detention of children

The immigration detention statistics provided by the UNHCR indicate that as of 31 December 2016 there were 43 children in officially designated 'immigration detention centres' in Thailand and 113 children on bail. Children in immigration detention in Thailand come from many different countries, reflecting the broad demographic of Thailand's urban refugee population.

Bangkok IDC is the location for most long-term detainees including most asylum seekers and refugees who remain for longer than other undocumented

migrants because they will not usually be deported if recognised as a 'person of concern' to the UNHCR.<sup>105</sup> Bangkok IDC has in the past held some refugees for up to four or five years.<sup>106</sup>

Arrests may occur as a result of concerted efforts by immigration authorities (eg raids on workplaces or homes) and also as a result of less orchestrated encounters with police and other authorities (eg random ID checks by police, ID checks during traffic incidents or other encounters). Those who look like foreigners, who don't speak Thai and/or who find themselves in conflict with Thai neighbours (for example, by noise created by children or cultural celebrations) are at increased risk of arrest.

UNHCR documentation offers only very limited protection against arrest and detention, and is reportedly more likely to have an impact when dealing with police rather than immigration authorities. Those who carry UNHCR cards may be able to negotiate with police and/or pay bribes to avoid arrest. UNHCR officers and/or NGOs may also be able to intervene and advocate on behalf of individuals to prevent their arrest. Those who speak Thai and can explain their situation to police may also fare better than those who cannot. However, where arrests are the result of concerted raids by immigration officers, detention in an IDC is almost inevitable. We were informed that these raids may be used by immigration officers to fill quotas for the arrest of irregular migrants, particularly towards the end of a calendar year, with asylum seekers and refugees being 'easy targets' because they tend to live in community groups in locations which are generally known to authorities.

Unlike in Malaysia and Indonesia, registration with UNHCR in Thailand does not generally enable asylum seekers and refugees to gain release from detention. The following gives an overview of the mechanisms by which children are detained, and their limited options for release. Aside from bail (which is no longer routinely available), none of these options respect the rights of children in relation to family unity or recognise the serious negative impact of separating children from their parents (discussed in part 3.5 above). We note that Thailand's Child Protection Act enshrines a 'best



interest' principle in relation to decisions pertaining to children, but this does not appear to be systematically or effectively implemented in relation to the treatment of child asylum seekers and refugees.<sup>107</sup>

Typically, where children are detained in immigration detention facilities, this follows either the arrest of the parents or of the entire family group. Upon arrest, undocumented migrants (including, it would seem, children who are 15 years or older)<sup>108</sup> may be brought before a court and prosecuted for immigration offenses related to their overstay. Once convicted they can either pay a fine in lieu of imprisonment<sup>109</sup> or imprisoned for a period of time, which generally ranges from 6 to 24 days,<sup>110</sup> before being transferred to the IDC. During our consultations, we met individuals from the asylum seeker community in Bangkok who confirmed that prosecution and criminal sentencing of asylum seekers and refugees is not uncommon.

Where parents are sentenced to jail, mechanisms exist to divert young children to government shelters run by the Ministry of Social Development and Human Service (MSDHS). In some cases, they may be allowed to remain with other members of the asylum seeker community until such time as the parents are released from jail and transferred to the IDC.

Once parents are transferred to the IDC (whether having served a jail sentence or paid a fine), their children will reportedly often then end up detained with them. The Thai Government characterises this as detention at the request of parents and considers this a response to enable families to remain together.<sup>111</sup> However, this must be understood in the context where: (i) parents may have no other choice if they wish to retain custody of their children; and (ii) the likely duration of their detention is usually unknown.

The Thai Government states that children of detained parents can be cared for in government shelters (which exist predominately to service the needs of Thai citizens) if parents are prepared to surrender children to the government.<sup>112</sup> In practice, it is reported that this option is not routinely offered to detained parents and may only be available after concerted and individualised

advocacy, as was the case in December 2016 when this option was offered by the government after the arrest of a large number of Pakistani Christian families, including many young children. Even when these options are made available by the government, parents are understandably reluctant to relinquish custody of their children to government shelters, and NGOs express concerns about the conditions in these government shelters. Furthermore, undocumented migrant children do not usually speak Thai and thus parents fear that, in addition to all the common concerns relating to the wellbeing of children in institutionalised care, their children would be extremely frightened and isolated if placed in a government shelter.

Relinquishing custody in favour of having other members of the community care for their children is also reportedly a possibility in some cases (again, relying on concerted individual advocacy) but that option may present detained families with little comfort as other members of the community may themselves be arrested or subject to unforeseen changes in circumstances due to their own precarious status.

It is understandable that for parents who have a well-founded fear of persecution and thus may be detained for the time it takes to obtain an RSD decision and an opportunity for resettlement, relinquishing custody of their children at the point of arrest may mean losing custody of children for years.

During our consultations, we were also informed that, in some cases, parents who are detained have been told to sign a form consenting to the detention of their children, without the benefit of a translation of the document, or an explanation of its contents and without any discussion as to alternative care arrangements that might be available for their children. We were also told of children being detained in circumstances where they had a parent or other closer relative who was not detained and could have cared for them outside of detention.

As described in part 3.4 above, once in the detention system, children are held in large communal cells with dozens of strangers in conditions typically



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described as overcrowded, unhygienic and squalid with no access to formal education, food that lacks nutritional variety and sub-standard medical care.<sup>113</sup> Thai IDCs are typically designed to house people only for short periods, pending their deportation, and have not been designed to accommodate children or families, particularly for prolonged periods of time. UASC are also detained with no formal guardianship arrangements in place. The government claims to have made efforts to implement more consistent operating standards in relation to the separation of individuals within IDCs<sup>114</sup> and efforts to collaborate with NGOs to bring doctors into detention centres to conduct medical check-ups and transfer seriously ill people to hospital with financial support.<sup>115</sup>

In recognition of the fact that children are now residing in the IDC for prolonged periods the Thai government has recently made some efforts to cater for the needs of children, most notably by facilitating the establishment of an IOM-run 'day-care centre' within the Bangkok IDC compound for children under the age of 12.<sup>116</sup> During our research we viewed this day-care centre from the outside – it appeared to consist of one small room with no outdoor facilities. Thai authorities informed us that detained children are also allowed out of the IDC compound once a month for a supervised field trip.

It is standard practice for families to be separated within IDCs, with women and young children being held in one part of the facility and men and boys older than 12 being held in a different area. We were informed that practice often sees much younger boys (some as young as 8) placed in men's cells, even if they have no male relative accompanying them. One child we interviewed was detained at the age of 10 and was separated from both of his parents and spent his first night in detention in a cell with dozens of unrelated men before an advocate intervened the next day to have him moved to the same cell as his father. Thai authorities have informed us that families members who are separated from one-another within the Bangkok IDC are allowed to see each other once a week within the IDC facility.

While there is a paucity of data in relation to the average time spent by children in detention, it is reported that children are not uncommonly detained for months or even years at a time.

Occasionally women and children detained in provincial areas (where IDC facilities are even less child-friendly than Bangkok) are identified by immigration authorities as 'especially vulnerable' and transferred to MSDHS shelters. These shelters are considered to offer better conditions than IDCs but are still generally 'locked down' facilities and offer no formal educational or recreational opportunities for children and very limited means to communicate with family members who are outside these shelters.<sup>117</sup> In provincial areas, fathers and other male members of a family group over the age of 12 will remain in IDCs, jails or police holding cells with no opportunities for family visits.<sup>118</sup>

Aside from the limited and flawed opportunities for children to be removed from detention discussed above, there are currently only three possible pathways out of detention for urban asylum seekers in Bangkok: (i) 'voluntary' repatriation, a choice some opt to take once they realise the reality of indefinite detention in challenging conditions; (ii) access to the limited number of resettlement opportunities (which will take years of waiting, with opportunities likely to shrink dramatically due to the reduced size of the United States resettlement program); and (iii) in some very limited cases, release on bail, a mechanism provided for in the Immigration Law which is largely suspended at present.<sup>119</sup>

The government has recently stated that 'Thailand allows NGOs to seek bail for those believed to have fled home for fear of persecution, especially women, children, and persons with serious medical conditions, to live outside [IDCs]. Today, the majority have been granted bail with the remaining few being expedited for consideration'.<sup>120</sup> However, our consultations suggest that this does not align with current practices.

We understand that in recent years, up until mid-2016, the release of asylum seekers and refugees on bail had developed into a relatively routine practice for immigration detention officers operating in Bangkok.

Particularly vulnerable detainees, such as families with children, could request bail. After paying a refundable bond of 50,000 Baht (roughly USD 1,400) per person (excluding children under the age of 15) such individuals could be released into the community and remain there until their case was finalised by UNHCR, subject to the requirement of reporting to immigration authorities twice a month. This system was by no means a perfect solution to the problem of child detention – children were still detained prior to be granting bail and the bail program was reportedly not operated in a consistent or transparent manner.<sup>121</sup> However, in mid-2016 the practice of granting bail (such as it stood) was reportedly suspended by authorities for reasons that are not entirely clear.<sup>122</sup> Since that time only a very few individuals have reportedly been able to access bail following concerted and individualised advocacy by UNHCR and NGOs.

### Emerging alternatives, opportunities and challenges

Despite the fact that asylum seeker and refugee children continue to be detained in Thailand, with no clear pathways towards adequate alternatives, there are a number of recent developments which could have a significant positive impact on this practice. These include the following:

- In September 2016 the Prime Minister of Thailand attended the Leaders' Summit on Refugees in New York. Thailand was the only ASEAN country to attend and the Prime Minister used the opportunity to pledge, among other initiatives, that Thailand would develop a screening system to reduce the risks of people falling victim to trafficking.<sup>123</sup> This announcement was generally thought to be positive in relation to the protection of asylum seekers and refugees, as Rohingya refugees are often also classified as victims of trafficking in the Thai context
- In November 2016, in its reply to the list of issues raised during the Human Rights Council's Universal Period Review, the Thai government:
  - (i) reiterated its commitment to humanitarianism and its respect for the principle of *non-refoulement*;
  - (ii) implicitly reinforced that it does not intend to

detain 'children, women and sick people' though the mechanism it cited (bail) is currently largely suspended; and (iii) provided further clarity in relation to its September 2016 pledge noting that 'Thailand is committed to developing a screening mechanism to distinguish those who truly need protection from those migrating to Thailand for other reasons, so protection can be accorded, and to minimise immigration detention'<sup>124</sup>

- The Thai Cabinet passed a resolution in January 2017 to reflect its September 2016 commitments at the New York Leader's Summit (see above) approving in principle a proposal to finalise and implement a screening mechanism for undocumented immigrants and refugees.<sup>125</sup> The development of such a mechanism would provide the framework to enhance the identification and, hopefully, enhanced protection of refugees and asylum seekers. The Cabinet Resolution appears to anticipate new regulations and/or revisions to Thailand's Immigration Law and was welcomed by the UNHCR<sup>126</sup>
- In early 2017 the Thai government reiterated aspects of the above commitments before the UN Human Rights Committee and told the committee that it had a 'no child detention policy'<sup>127</sup>
- A recent Thai court decision has seen a refugee child avoiding immigration detention and instead being brought within Thailand's child protection system<sup>128</sup>
- UNHCR began issuing a new card to asylum seekers and refugees in 2016, with additional verification features. The validity of the card can be ascertained on the spot by government officers via a digital platform that can be accessed via smartphone. However, unlike the new UNHCR Malaysia ID card, government officers cannot access photographs or other biometric information via the digital platform. Nevertheless, it is hoped that roll-out of this new card may result in fewer refugees and asylum seekers being detained in immigration facilities



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- UNHCR is in the process of clearing a large backlog of refugee claims, with more than 1508 cases (involving 3338 persons of concern) determined in the second half of 2016 after receiving additional funding for this purpose.<sup>129</sup> This ongoing initiative will mean that the limited protection afforded by holding a UNHCR refugee card (discussed above) is now enjoyed by a larger portion of the asylum seeker/refugee population

Those who have conducted legal research in relation to the immigration detention of refugees in Thailand widely consider that there are a variety of existing mechanisms in Thai law that would allow Thailand to implement regulations and practices which ensure that those with protection needs, including children, are not detained.<sup>130</sup> Among these is section 17 of the Immigration Law which allows the provision of temporary legal status to 'special categories of people', a provision that has reportedly been used before to cater for those with protection needs (for example those refugees in the Thai/Myanmar border camps).<sup>131</sup>

In addition, Thailand already has experience in using alternatives to detention in limited cases which could be improved and expanded upon to provide alternative policies for asylum seekers and refugees outside of immigration detention including:

- The use of bail processes – a modified bail program could potentially be more widely used to avoid detaining asylum seekers and refugees. While the current bail program is flawed and no longer routinely used, it is our understanding that there is nothing in Thai law that requires a financial surety to be paid in connection with release on bail, nor that those arrested must be physically detained prior to the granting of bail
- The issuance of temporary work permits for victims of trafficking – we were informed that under Thailand's *Anti-Trafficking in Persons Act*, victims of trafficking have access to a temporary residence card which allows them to legally work in Thailand and to move freely in the community

without fear of arrest, to the extent that they are allowed to leave government shelters in order to attend work. This system has potential for expansion and adaptation to the needs of asylum seekers and refugees (including families with children or children of a working age) and could enable them to live in the community or in open shelters (for the most vulnerable) with greater financial independence and no fear of arrest and detention

- The use of family shelters – we understand that the Department of Anti-Trafficking has at least one shelter that is designed to accommodate families who are victims of trafficking.<sup>132</sup> These sorts of facilities could be used more widely to respond to the needs of asylum seeker and refugee families, though we would encourage the government to pursue open-shelter models or community-based models, rather than closed shelters. Such an approach could be used in place of current practices which have on occasion seen the release of children into government-run shelters but which involve the separation of such children from their parents (who have remained in indefinite detention in these scenarios)<sup>133</sup>

In addition, there is potential for more child-sensitive approaches to emerge if asylum seekers and refugee children can be treated first and principally as 'children' under national legal and policy frameworks, rather than principally as 'undocumented migrants'. Thailand has child-specific legislation, such as the Child Protection Act, which could have significant positive impacts on child asylum seekers and refugees if relevant government Ministries were fully empowered to treat those under 18-years-old primarily as 'children' and thereby include them within the purview of such legislation. The recent court decision referenced above is a positive development in this regard.



## 4.2 Malaysia

### Overview and legal framework

Malaysia is home to an estimated 2 to 4 million undocumented migrants, many of whom travel to Malaysia from countries in the region in order to find work in the informal labour market.<sup>134</sup>

As at the end of February 2017 there were approximately 149,500 refugees and asylum seekers registered with UNHCR in Malaysia, with tens of thousands, perhaps as many as 45,000, still awaiting registration.<sup>135</sup> Of those registered with UNHCR, approximately 91% (133,263) come from Myanmar and are comprised of 56,458 Rohingyas, 39,684 Chins, 10,454 Myanmar Muslims, 4,611 Rakhines and Arakanese, and other ethnic minorities from Myanmar. The balance of roughly 16,233 refugees and asylum seekers come from other countries including Pakistan, Sri Lanka, Yemen, Syria, Somalia, Iraq, Afghanistan, Palestine and elsewhere. Of all registered asylum seekers and refugees approximately 35,144 are children.<sup>136</sup>

The number of asylum seeker and refugee children in immigration detention in Malaysia appears to have been falling in recent years, dropping from 2,005 detained during the course of 2013 to 647 during the course of 2016.<sup>137</sup> That said, there was a slight increase in the number of children detained during the course of 2015, compared with 2014, which we understand was due to children being detained following the large numbers of new boat arrivals (ie those who travelled through the Bay of Bengal and Andaman Sea that year). As of 31 December 2016, there were reportedly 87 child asylum seekers and refugees in Malaysian immigration detention centres, down from 418 as of 31 December 2015.<sup>138</sup> The reasons for this overall downward trend are discussed further below.

Many asylum seekers and refugees enter Malaysia from Myanmar, often with the combined purposes of seeking protection from persecution, finding work and re-uniting with family or friends within the Malaysian-based diaspora.<sup>139</sup> Unlike Thailand, there are no refugee 'camps' or government shelters for refugees in Malaysia. Once in Malaysia, asylum seekers and refugees typically live in urban communities, in shared living spaces in family and community groups. In Malaysia, there are long established communities of migrants from Myanmar throughout the country, but centred mostly around Kuala Lumpur and the surrounding Klang Valley area.<sup>140</sup> We were informed that refugees from other countries also tend to be concentrated in and around Kuala Lumpur, where they can readily access UNHCR and other services.

Malaysia is not a signatory to the Refugee Convention and has no domestic legal framework governing the status of asylum seekers or refugees in the country. UNHCR has operated in Malaysia since 1975 when Vietnamese refugees began to seek refuge around the region.<sup>141</sup> In the absence of a government framework for responding to refugees, UNHCR conducts refugee registration and RSD in the country and issues documentation to asylum seekers and refugees whom it registers.

Malaysia's Immigration Act does not distinguish between refugee and asylum seekers (on the one hand) and other undocumented migrants, with the result that asylum seekers and refugees are technically "illegal" or undocumented migrants and liable to arrest, prosecution, whipping, incarceration, immigration detention and deportation.<sup>142</sup> Malaysia shows a degree of respect for the customary international principle of *non-refoulement* and will typically not deport individuals who are persons



## 4.2 Malaysia (c'td)

of concern to the UNHCR.<sup>143</sup> This is partly reflected in a Circular issued by the Attorney General's Chambers in 2005, which reportedly provides some degree of immunity to asylum seekers and refugees registered with UNHCR from prosecution for immigration charges.<sup>144</sup> This Circular is not publicly available.

In Malaysia, policies and practices in relation to asylum seekers and refugees are formed in the context of concerns in relation to border security, terrorism and labour market protection as well as concerns in relation to the allocation of public resources (including access to healthcare). In recent times, government announcements in relation to increased support for refugees reflect and reinforce public sympathy for Muslim refugees from Syria and Rohingya from Myanmar.<sup>145</sup>

### Situation of asylum seekers and refugees

The following is an overview of the situation of asylum seekers and refugees in Peninsular Malaysia. In conducting this research we have found a paucity of information in relation to the situation of forced migrants in Sabah and Sarawak, with few international organisations engaged in the issue of immigration detention of refugees possessing any expertise in relation to these locations. This is partly because of differing bureaucratic arrangements for undocumented migrants in different areas – immigration detention centres in Peninsular Malaysia are the primary concern of the Immigration Department whereas those in Sabah and Sarawak are overseen by the National Security Council.<sup>146</sup>

Asylum seekers and refugees in Peninsular Malaysia do not currently enjoy any legal status or rights on account of the fact that they are in need of international protection from prosecution. They have very limited access to basic government-funded services such as accommodation, medical care, education or legal assistance.<sup>147</sup> Furthermore there is currently no legal framework which allows asylum seekers or refugees to live in the community, free from the possibility of arrest. The 2005 Attorney General Chamber's Circular referenced above (which

addresses immunity from prosecution for immigration offenses) does not have the status of law, though it has underpinned the development of some positive practices which have seen some asylum seeker and refugee children released from immigration detention, or not being subjected to arrest, prosecution or immigration detention in the first place.

Government schools do not generally accept non-Malaysian or undocumented children, leaving many refugees or asylum seekers without access to formal education.<sup>148</sup> UNHCR cardholders can access medical services at public hospitals and other health facilities but these are not free – card-holders are charged 50 percent of the 'foreigner rate' for medical services, which has recently doubled,<sup>149</sup> making access prohibitively expensive for many.<sup>150</sup>

The UNHCR, NGOs and other civil society groups endeavor to support refugees and asylum seekers while living in the communities through the establishment of informal learning centres, networks of health clinics, micro-enterprise grants, vocational skills training, child protection programs and community based livelihoods programs.<sup>151</sup> However, given the size of the refugee and asylum seeker population these resources are not sufficient to adequately meet the needs of the community.

Most UNHCR registered children were not enrolled in any community learning centre in 2016, with security and safety issues faced by the students and teachers in and out of school highlighted as a key challenge to accessing education.<sup>152</sup> UNHCR's livelihood support programs were able to provide financial assistance to only 841 people in 2016, with 100 people participating in UNHCR vocational training programs.<sup>153</sup>

During our consultations, we were informed that many refugees and asylum seekers continue to live fearfully in the community, particularly those who have not been able to access registration by UNHCR. Travelling beyond immediate neighbourhoods and interactions with government authorities are particularly fraught. Attendance at a public health facility may expose asylum seekers and refugees to the possibility of arrest –

as health workers may report undocumented migrants to the authorities and are particularly inclined to do so in circumstances where the patient is unable to pay for their treatment.<sup>154</sup> For example, there are reports of women being arrested with their babies after giving birth at government hospitals.<sup>155</sup> UNHCR has also reported that refusal of health care centres to provide services due to payment issues was a significant barrier to accessing primary health care.<sup>156</sup>

Given limitations on the availability of UNHCR and NGO-funded support services, we understand that most families will have at least one member working, or seeking work, in the informal labour market, further exposing them to the risk of arrest and detention.

Registration with UNHCR and the possession of a UNHCR identity card gives a degree of protection from arrest and detention, and the prospect of release if detained. UNHCR practice is to issue recognised refugees and asylum seekers from groups that are ‘manifestly in need of international protection’ with the new ID card, with asylum seekers falling outside of this category issued with an ‘under consideration’ letter. Neither the UNHCR ID card nor the letter guarantee immunity from arrest, with individual police or immigration officers exercising discretion in the decision of whether or not to stop an individual, check their identity and undertake further immigration enforcement measures (including arrest),<sup>157</sup> and many reports of bribes being paid to authorities by undocumented migrants to avoid arrest.<sup>158</sup>

Furthermore, not all asylum seekers are registered with UNHCR. Unregistered asylum seekers are commonly arrested and detained and must await UNHCR registration in detention and related intervention before they can be released. This process can take several months, as discussed further below. The Malaysian government currently has no screening or referral mechanism in place in detention through which to systematically identify and refer asylum seekers to UNHCR. As a result, access to the UNHCR-facilitated registration and release process varies for those in detention and there are reports that non-Rohingya

asylum seekers (including those from the Middle East and Africa) may have limited access to UNHCR-facilitated release.

It is estimated that there may be as many as 45,000 unregistered refugees in Malaysia. UNHCR prioritises access to registration services based on its assessment of vulnerability of the individual as well as the seriousness and immediacy of the threats faced by the individual in their country of origin, and uses a network of several dozen NGO partners to refer individuals to the UNHCR for registration.<sup>159</sup> It was also reported that some do not approach the UNHCR for fear of becoming ‘visible’ to government authorities as an irregular migrant, while others (particularly those outside of Kuala Lumpur) may find it difficult to access UNHCR processes.

UNHCR Malaysia has recently developed a new ID card (underpinned by a biometric data collection system) for asylum seekers and refugees, in part to support the implementation of alternatives to detention.<sup>160</sup> The card is accompanied by a smartphone application which allows authorities to immediately verify whether an individual is registered with UNHCR.<sup>161</sup> Since commencing the roll-out of this new card in mid-2016, approximately 60,000 of these cards have been issued with the result that around one-third of all UNHCR registered asylum seekers and refugees now hold the new cards. Reports so far indicate that the new cards enhance the ‘immunity’ from prosecution that asylum seekers and refugees are entitled to under the terms of Attorney Generals Circular and support the development of new approaches to the management of irregular migrants with protection needs.<sup>162</sup>

Another development which is reducing the instances and duration of detention is the UNHCR’s ‘enhanced registration’ of Rohingya asylum seekers from the Rakhine province of Myanmar. Recognising the heightened international protection needs of this group, UNHCR has developed a simplified and expedited refugee status determination process which merges registration with refugee status determination.



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### Arrest and detention of child asylum seekers and refugees

As noted above, there has been a significant downward trend in the number of asylum seeker and refugee children detained in immigration detention since 2013.<sup>163</sup> We understand that the rates of arrest of children are proportionately higher in provincial areas, compared with those in Kuala Lumpur, due to decreased access to UNHCR registration and advocacy services in those areas.

The Malaysian government will typically not deport undocumented asylum seekers or refugees who are registered with UNHCR. However, if arrested and detained, such individuals can remain in immigration detention for prolonged and indefinite periods of time during which time UNHCR will advocate for their release. There is currently no maximum period of detention or administrative or judicial channels which asylum seekers and refugees can use to challenge their detention, though it is hoped that a case currently before the Malaysian courts, discussed further below, might establish a new precedent for judicial oversight of detention of persons of interest to UNHCR.<sup>164</sup> UNHCR estimates that in 2016 detained adults spent on average 14 months in detention whereas children, typically prioritised by both the UNHCR and government for release, will spend on average 5 months.<sup>165</sup>

Reasons for the decline in the number of children being detained may include:

- The roll-out of the new UNHCR ID cards and the smart-phone application which are decreasing the number of people taken into custody on immigration grounds
- Strengthened cooperation between the Malaysian government and UNHCR to verify the status of persons registered with UNHCR. For example, officials will often notify UNHCR of a planned raid in order to allow UNHCR an opportunity to be on site to identify those who have registered with UNHCR. UNHCR has also developed and trained authorities on

a computer verification system through which law enforcement authorities can self-verify the status of persons claiming to be registered with UNHCR

- A reduction in the number of children being arrested, owing to advocacy by UNHCR and civil society on the issue, including the End the Immigration Detention of Children Campaign which commenced in Malaysia in 2013
- More effective interventions for those arrested and detained, through their registration with UNHCR while in detention, which then facilitates their release
- The release/resettlement of many refugees who arrived from Myanmar in 2015 in the aftermath of the Andaman Sea crisis

There are twelve IDCs across Peninsular Malaysia where asylum seekers and refugees are detained. It is reported that up to 15,000 undocumented migrants are held in these facilities at any given time,<sup>166</sup> with more than 85,000 undocumented migrants held in immigration detention facilities over the course of 2016.<sup>167</sup> Overcrowding is a very significant problem, particularly in detention centres in Northern Malaysia, the area in which most undocumented migrants are initially intercepted and detained by Malaysian authorities. Overcrowding and poor hygiene standards have reportedly resulted in 118 deaths in Malaysian immigration detention centres from disease and other causes over the last two years.<sup>168</sup> It is not clear how many, if any, of those who have died in detention were children.

Conditions in detention centres are described by Malaysia's National Human Rights Commission SUHAKAM as 'appalling' with those who have been detained reporting that 'they did not get adequate food, water or healthcare, that many inmates developed skin and lung infections, and the sick are usually not isolated, leading to the spread of contagious diseases,<sup>169</sup> sharing concerns voiced by UNHCR and other NGOs.<sup>170</sup> Corporal punishment is reportedly used by authorities against detainees in the form of court-ordered



whipping, non-judicial caning by detention officers and other forms of physical punishment.<sup>171</sup> Other reported concerns include lack of access to formal educational programs, lack of access to adequate healthcare, lack of appropriate training for guards, lack of access to recreational space, lack of access for international organisations to conduct best interest determinations and the potential for children to be exposed to sexual and other forms of violence. Child protection concerns are exacerbated by detention practices which result in children, including UASC being held with large numbers of unrelated adults.

The precise conditions in each IDC vary significantly. The Commandant of each IDC reportedly has a great deal of discretion in relation to the treatment of detainees, and the range of goods and services that are allowed in to the centre. Regulations are in place which are intended to provide minimum standards<sup>172</sup> but these are reported to be inconsistently followed and there are no formal oversight mechanisms to ensure compliance with these standards (discussed further below).

We understand that in 2016 some basic healthcare resources have been put in place in each Malaysian detention centre involving a Ministry of Health appointed 'medical assistant' and the provision of equipment by two NGOs. The quality and capacity of these services is not well documented but is likely to be quite limited given that these health facilities are reportedly not staffed by doctors.

Members of a family unit are usually detained and, where relevant, released at the same time. However, while in detention, family groups are usually separated with women and children under 12 kept separately from men.<sup>173</sup> It is reported that in practice much younger boys, some as young as seven years old, are at times held in the cells set aside for adult males. It was also reported that in 2013-2014 children (including babies) were separated from both their mothers and fathers in detention, with poor records kept by authorities resulting in serious problems in relation to family reunification and relationship verification upon their

release. Lack of reliable age related screening means that children may be being detained without necessarily being recognised as children.

Some families may have occasional opportunities (eg once a month) but many families are not permitted to see each other for the duration of their detention. Certain detention centres reportedly permit non-detained family members to visit if they are documented (with UNHCR cards being accepted in some centres), while other centres do not permit any family members to visit.

There is no independent organisation with a formal mandate to inspect and report on the conditions in immigration detention. SUHAKAM has a mandate to monitor detention centres but lacks the funding to undertake regular and comprehensive monitoring and reportedly is unable to undertake unannounced inspections. UNHCR has informal arrangements in place enabling it to undertake regular visits to register asylum seekers and refugees in detention, during which it liaises with authorities in relation to such conditions.<sup>174</sup> Other international organisations and NGOs have similar arrangements in place, the scope of which vary from place to place.

### **Emerging alternatives, opportunities and challenges**

While child asylum seekers and refugees still lack protected legal status and are vulnerable to arrest and detention, there are a number of positive developments taking place which are reducing the instances of detention and offering hope that this practice could be eliminated entirely. These include:

- Increased respect for the new UNHCR refugee card which is seeing fewer recognised refugees arrested and detained
- Gradual increase in the number of spaces available in NGO-run shelters for UASC asylum seekers and refugees and increased government willingness to allow UASC from the Rohingya community to be transferred out of detention and into such shelters. The UNHCR reported in mid-2016 that there had been modest improvement



## 4.2 Malaysia (c'td)

in the number of places available in alternative care arrangements for UASC (increasing from 20 places in 2014 and 30 places in 2015), with UASC typically being released into the care of NGO-run shelters, after UNHCR registration and UASC aged 16-17 being released into informal care within their ethnic communities.<sup>175</sup> The UNHCR's child protection unit provides case management support to most of these children. We understand that there continues to be a constructive informal collaboration between UNHCR, the government and civil society organisations aimed at improving and expanding this system and that SUHAKAM and NGOs have proposed a formal pilot program to the government involving a transitional shelter model supported by intensive case management up until case resolution or aging out, for UASC<sup>176</sup>

- One of the positive initiatives being trialled by civil society involves a small but intensive case management program for UASC, centered around independent living arrangements or placement in foster families (being members of the refugee community), which is reportedly being implemented by SUKA Society. Currently, approximately 30 UASC are being supported to live independently in group homes, or with foster families of the same ethnic and linguistic background. Foster families are identified via referrals from community networks, pre-vetted by SUKA Society and given a small amount of financial support as well as comprehensive case management support. Case managers work to ensure that each UASC is able to access fundamental services and supports him or her towards achieving case resolution. This initiative recognises that it is preferable to support children in home-like environments, rather than institutional care, where safe and appropriate community-based care arrangements are available
- The recent commencement of a three-year pilot project that involves 300 Rohingya refugees being

granted work rights to work in Malaysia,<sup>177</sup> which indicates a growing interest in supporting forced migrants and could have positive impacts upon the conditions of child asylum seekers and refugees (to the extent that family members of a working age may access legal work under this schedule)

- The recent formation of a new Government/ UNHCR joint taskforce which is an encouraging development and provides recognition by the Malaysian government of the need for more protection-sensitive policy in relation to asylum seekers and refugees. This taskforce will oversee a number of technical working groups covering a range of issues relating to asylum seekers and refugees in Malaysia including detention and alternatives to detention
- The announcement made by the Malaysian Prime Minister during the Conference for the Organisation of Islamic Cooperation in January that all 56,000 UNHCR-registered refugees would be granted work rights. It is hoped that this announcement will be implemented before the end of the three-year pilot and that this approach could extend to all UNHCR registered refugees and asylum seekers, and not just be limited to Rohingya refugees. As with the pilot work rights program referenced above, work rights for refugees could benefit children of a working age or who have family members who may become eligible for work rights
- The further investigation of legal arguments which could be used to provide immunity from arrest and prosecution. During consultations it was noted that illegal work is a crime under the Immigration Act. However, under the Attorney General's Circular, asylum seekers and refugees are identified as being immune from prosecution under the Immigration Act. Accordingly, some organisations are investigating the legal argument that immigration officials and government prosecutors should adopt policies that recognise asylum seekers and refugees as immune from prosecution for offenses relating to illegal work<sup>178</sup>

- NGOs are also investigating arguments which would advocate for the Child Act to be applied to all children in Malaysia (the natural meaning of which would appear to include undocumented migrant children) rather than only Malaysian children (the current practice). Under the Child Act, children without guardians are channelled into government homes run by the Welfare Department (JKM). However, care needs to be taken in pursuing this approach as institutional care should only be used as a last resort

Related to the above, litigation has been instigated recently to challenge the government's decision to detain a 16-year-old Rohingya refugee. The case, which is yet to be decided by the Shah Alam High Court, seeks to apply provisions of the Malaysian Child Act as well as article 22 of the CRC in order to bring his situation within the jurisdiction of Malaysia's child protection laws and prevent his detention.<sup>179</sup> In this context it is important to note that under article 55 of the Immigration Act the Minister of Home Affairs can exempt particular individuals or groups of people from prosecution for immigration offenses. During our consultations it was widely considered that an exercise of this power could, if appropriately constructed, effectively be used to end the practice of detaining asylum seekers and refugees.<sup>180</sup>

Factors which may impede the development of a full suite of alternatives to detention for child asylum seekers and refugees include:

- A perceived political bias in favour of Muslim asylum seekers and refugees, with non-Muslim forced migrants potentially being overlooked in the development of alternative frameworks
- The absence of current initiatives to secure alternatives for children who are in Malaysia with their families, with current ATD schemes focussing exclusively on UASC
- A perceived reluctance to bring undocumented migrant children within the purview of child protection legislation



## 4.3 Indonesia

### Overview and legal framework

At present, Indonesia is home to roughly 14,410 asylum seekers and refugees including around 3,669 children, 471 of whom are UASC.<sup>181</sup> Approximately half of all asylum seekers and refugees in Indonesia are from Afghanistan, followed by Somalia (10 percent), Iraq (6.4 percent), Myanmar (6.4 percent) and Nigeria (5.5 percent) and other parts of Asia, the Middle East and Africa.<sup>182</sup> As indicated in part 3.2 above, the number of children detained in Indonesian immigration detention facilities has reduced somewhat in the last two years, after reaching a recent high point in 2014 and 2015. However, the number of children detained remains very significant, with 1,602 asylum seeker and refugee children experiencing immigration detention during the course of 2016, representing 43 percent of all child asylum seekers and refugees in Indonesia.

Indonesia, like Thailand and Malaysia, is not a signatory to the Refugee Convention. However, it has accommodated hundreds of thousands of asylum seekers and refugees since receiving around 200,000 Indochinese refugees in the 1970s.<sup>183</sup> Indonesia's constitution and human rights law specifically recognises a right to seek asylum<sup>184</sup> and UNHCR has operated in Indonesia since 1979, with a mandate to conduct registration of asylum seekers, refugee status determinations and find durable solutions for refugees living in Indonesia.<sup>185</sup>

Indonesia's Immigration Law provides that those without a valid visa have the status of an "illegal migrant" and may be detained and deported,<sup>186</sup> and gives immigration officials a discretionary power to place certain vulnerable individuals (including children) in an alternative location.<sup>187</sup> Detention can be for up to 10 years without clear avenues for judicial review.<sup>188</sup>

Since 2002 a number of Directives and Regulations have been issued by the Director General of Immigration, establishing something of a policy framework which: (i) recognises the role of UNHCR in the country in relation to registering asylum seekers and conducting RSDs; and (ii) provides some guidance in relation to the treatment of undocumented asylum seekers and refugees.<sup>189</sup> It would appear that Indonesia typically respects the customary international law obligation of *non-refoulement*.<sup>190</sup> However the legal and policy framework that is currently in place does not prevent asylum seekers and refugees (including children) from being detained owing to their lack of immigration status, sometimes for prolonged periods of time. Self-reporting to detention is also a common practice in recent years, the reasons for which are discussed further below.

The Government of Indonesia does not clearly articulate why it detains asylum seekers and refugees. During our consultations stakeholders speculated about a variety of rationales including national security, anti-Shia religious sentiments, the employment opportunities and economies that surrounded current bureaucratic processes and concerns that local communities may not tolerate asylum seekers and refugees living in their midst.

Despite this situation, there are some emerging practices in Indonesia that signal an increasing willingness of the government to offer greater protection to refugees. In addition, a Presidential Regulation issued at the end of 2016,<sup>191</sup> offers hope that immigration detention practices may

be significantly reformed in the future. These developments are discussed further below.

Unlike Thailand and Malaysia, Indonesia receives few asylum seekers from Myanmar. This is partly explained by the fact that Indonesia is generally an exporter, rather than importer, of low-paid migrant labour and thus does not offer a significant employment market for undocumented migrant workers. There are currently around 1,000 registered refugees and asylum seekers from Myanmar in Indonesia, some of whom were among the approximately 1,800 migrants from Myanmar and Bangladesh (mostly Rohingya) who arrived in Aceh in the aftermath of the Andaman Sea crisis and who were, for the most part, endeavouring to reach Malaysia rather than Indonesia.<sup>192</sup>

In the last decade, Indonesia has been a critical point of transit for those seeking to travel to Australia by boat. These asylum seekers have typically entered Indonesia by boat from Malaysia, relying on people smugglers.<sup>193</sup> The impact of current Australian immigration policies and practice, which have effectively blocked this route to Australia, has meant that a large number of asylum seekers and refugees have become effectively 'stuck' in Indonesia, unable to move forwards or backwards, with the prospect of resettlement becoming more and more remote as time goes on. Australia's 'ban' on the resettlement of refugees who arrived in Indonesia after 1 July 2014 together with the recent slashing of the annual US resettlement quota by 60,000 places are both areas of great concern.<sup>194</sup> The numbers of asylum seekers and refugees arriving in Indonesia does not appear to have diminished in recent years, although there is some suggestion that the number of arrivals with bona fide claims to protection may be diminishing somewhat.<sup>195</sup>

### **Situation of asylum seekers and refugees**

Asylum seekers and refugees living in Indonesia can be divided into several key groups:

- Approximately 5,000 to 6,000 living independently in different parts of Indonesia, with a significant cluster in the Bogor region near Jakarta
- Approximately 4,300 in immigration detention
- Approximately 3,800 in IOM programs (including community housing)<sup>196</sup>
- Up to 200 UASC and particularly vulnerable women in five recently established shelters and semi-independent living programs run by

Church World Service (CWS) in partnership with UNHCR

- Approximately 250 from Rakhine state in Myanmar, who were among the 1,800 migrants who arrived in Aceh in mid-2015 (the majority of whom are no longer in Aceh)<sup>197</sup>

In recent years Indonesia has seen a steady influx of UASC, with UNHCR statistics suggesting that as of September 2016 there were 502 asylum seeker or refugee UASC of whom 139 were in 'IOM accommodation', 136 were 'living independently', 89 were in a 'partner shelter', 86 were in some form of immigration detention facility, with the balance in government shelters (including those in Aceh) which we understand are either closed or 'semi-open' facilities.<sup>198</sup>

Some asylum seekers, particularly UASC, self-report to shelters and/or immigration detention immediately upon arrival in Indonesia in order to access food, shelter and alternatives to detention, while others (particularly family groups) will typically seek to live independently in the community in Indonesia for as long as they can while awaiting an RSD decision and resettlement opportunity.

The RSD process, like elsewhere in the region, can take a very long time, with individuals often waiting months in order to be registered and from five months to two years for their first RSD interview.<sup>199</sup> Upon first registration, asylum seekers receive a paper 'UNHCR Certificate' and then, upon recognition as a refugee, a UNHCR Photo ID card. These documents provide a degree of protection from arrest and detention if the arresting officer is aware of the role of UNHCR and can be persuaded to check the veracity of the document with UNHCR. It is reported that more than one-third of those detained in Indonesian immigration detention centres are persons of concern to UNHCR, which may be explained by a combination of factors including: (i) high rates of self-reporting to detention; and (ii) limited respect for the 'immunity' that may be associated with UNHCR registration. We understand that UNHCR Indonesia plans to roll out new cards, with the same features and digital platforms as those recently rolled out in Malaysia, during 2017 (discussed further below).

In addition to the UNHCR, the IOM plays a significant role in relation to Indonesia's response to asylum seekers and refugees. In addition to IOM's core work of providing resettlement assistance and assisted voluntary return, the Australian Government currently funds IOM approximately AUD55 million per annum to: (i) provide counselling, medical care, food, shelter, education and



### 4.3 Indonesia (c'td)

vocational support to people both within and outside of immigration detention centres, including unaccompanied minors; (ii) provide 'technical assistance' in relation to Indonesian detention centres, and (iii) train officials in combating people smuggling.<sup>200</sup> In addition to working in immigration detention centres, IOM has established a community housing and financial support project for several thousand asylum seekers and refugees who have been released from detention.

Those living in the community face varying degrees of hardship depending on their location and personal circumstances. In order to live in these situations asylum seekers and refugees must secure the explicit or implicit agreement of local communities, may be restricted in their ability to move beyond their immediate geographical area, and often try to live 'under the radar' so as to not draw attention to themselves, which could lead to their arrest and detention. Those who identify as Shia Muslim are particularly careful about how they worship in a country comprising mostly Sunni Muslims.

Asylum seekers and refugees are legally prohibited from working and the limited financial support provided by UNHCR, IOM and local NGOs does not stretch very far. Asylum seekers and refugees also face difficulties in accessing basic social services. While in theory they may access public primary and secondary education,<sup>201</sup> in 2015 less than 10% were reportedly enrolled in public education.<sup>202</sup> We understand that this is due to a variety of issues including: (i) lack of knowledge about enrolment options; (ii) the language of instruction (principally Bahasa Indonesia, a language in which few asylum seekers or refugees are fluent); (iii) registration and enrolment requirements which prevent asylum seekers and refugees from obtaining a national registration number and thus prevent them from sitting national exams or receiving their secondary school diploma; and (iv) security concerns among the asylum seeker population.

We understand that access to healthcare is also challenging, with asylum seekers claiming it too expensive to access. Asylum seekers and refugees can attend local state-run medical clinics ('Puskesmas') but their lack of eligibility for National Health Insurance (BPJS) makes these services prohibitively expensive.<sup>203</sup>

In some cases, refugee communities have sought to establish their own social services, including education and healthcare services, by drawing on the skills, time and resources of those within their community and with varying degrees of success. Living in this way involves relying on personal savings and/or the support of remittances from friends and family overseas. With opportunities for resettlement taking longer and longer to secure, many people living in this community find that at some point they need to self-report to immigration authorities simply to secure shelter and food. In recent years, it has been common to see large numbers of asylum seekers and refugees camping out near IDCs for prolonged periods, waiting for an opportunity to enter, with reports of bribes being paid to guards to facilitate entry.<sup>204</sup>

UASC travelling to Indonesia will typically be detained within a short period of their arrival in the country and then spend a number of months awaiting transfer to a shelter or program such as one of the five shelters run by CWS, or their semi-independent living arrangements. Currently there is no legal or policy framework in relation to guardianship of UASC, or the provision of foster care although we understand that there are draft regulations and a bill currently awaiting presidential signature which, if adopted, would enshrine a system of court-appointed guardianship to replace customary laws and processes in Indonesia.<sup>205</sup> It remains to be seen whether this framework would be applied to UASC who are undocumented migrants, or only Indonesian children.

Family groups with children and other vulnerable individuals who are detained will also need to wait a number of months for an opportunity to be released from detention into an IOM shelter or community housing program. On rare occasions, they may also be able to access shelters run by the Ministry of Social Affairs (which typically cater to the needs of vulnerable Indonesian individuals).

In 2015, in the aftermath of the Andaman Sea crisis, around 1,800 migrants from Bangladesh and Myanmar were allowed to disembark in Aceh, Indonesia after the intervention of local communities who insisted that they be given aid. Thereafter they lived in camp environments

with limited freedom of movement. Since that time, more than 800 people have been repatriated to Bangladesh through the involvement of IOM. Of the approximately 1,000 people who arrived from Rakhine state, only 253 remained in June 2016, with the balance having been ‘let go’ and possibly having made their way by irregular migration pathways to Malaysia.<sup>206</sup>

### **Arrest and detention of children**

As indicated above, during the course of 2016 UNHCR figures indicated that 1,602 asylum seeker and refugee children experienced immigration detention in Indonesia – that is more than 40 percent of the total population of asylum seeker and refugee children in Indonesia. Of these, 975 remained in detention at the end of 2016.

The Indonesian Immigration Directorate General oversees a network of 13 designated immigration detention centres<sup>207</sup> as well as a number of other places of detention including ‘interception cites’ and immigration offices.<sup>208</sup> Asylum seekers and refugees (including children) may be arrested and detained when they come into contact with immigration officials or police, with approaches to raids and arrests varying across the country.<sup>209</sup> In recent years however, a significant portion of asylum seekers and refugees have become part of the detained population after self-reporting to immigration detention. As discussed above, they do so in an attempt to secure food and shelter when they can no longer fund their own survival in Indonesia and/or in order to join the queue for access to alternative forms of shelter and support.<sup>210</sup> In the course of this research we interviewed a number of UASC who had self-reported to immigration detention authorities upon arrival in Indonesia.

Those who are in immigration detention centres will remain there until such time as they are: (i) deported (if they receive a negative RSD decision which is upheld on appeal) or agree to voluntary return to their country of origin; (ii) transferred to a IOM, government or CWS shelter or other program (which will usually take a number of months, even for the youngest or most vulnerable of children); or (iii) resettled to a third country (which will take years, with no guarantee that an opportunity will ever present).

Detainees are permitted access to the UNHCR and, while UNHCR does not have an official mandate to monitor all Indonesian detention facilities, the organisation reports having reasonable access to all of Indonesia’s IDCs. When UNHCR becomes aware of a detainee with possible protection claims, UNHCR will typically attempt to register the individual and liaise with the Immigration Department to secure the person’s release from detention.

Unlike in Thailand and Malaysia, family members who are arrested together are sometimes allowed to reside together inside detention facilities depending on the practices of the IDC involved. Practices seem to vary depending on the facility in question with children sometimes residing with both parents, sometimes with their mother (but not their father) and with UASC typically detained with unrelated adults.<sup>211</sup>

Overcrowding in Indonesian detention centres appears to be universal, particularly given the demand created by those who self-report to detention. Most detention centres are reportedly filled to two or sometimes three times their official capacity. Other conditions and services in immigration detention vary enormously.

Human Rights Watch published a detailed report on conditions inside Indonesian detention facilities in 2013.<sup>212</sup> While there may have been some incremental improvements to facilities and services in some locations since that report was published, our consultations suggest that the concerns raised in that report remain current. These include concerns in relation to all the issues mentioned in part 3.4 above. The lack of appropriate care and protection for UASC in Indonesia is of particular concern, given the relatively large number of UASC who have sought asylum in Indonesia in recent years.

### **Emerging alternatives, opportunities and challenges**

Among the countries examined in this report, Indonesia has the largest number of asylum seeker and refugee children currently in immigration detention facilities, with 987 children detained as of 31 December 2016. However, there are a number of initiatives in progress that could have a positive impact on the practice of child immigration detention, as examined briefly below.



### 4.3 Indonesia (c'td)

One of the most potentially positive developments is the Presidential Regulation that was issued on 31 December 2016 which provides the framework for a more comprehensive and coordinated approach in Indonesia's response to asylum seekers and refugees. Whether or not this new instrument results in the practice of detaining child asylum seekers coming to an end or significantly curtailed remains to be seen and will largely depend upon implementing regulations and related bureaucratic practices. However, the Regulation signals a willingness to examine current processes and a desire to provide a range of policy responses that recognise the unique position of asylum seekers and refugees (as opposed to other undocumented migrants) in Indonesia.

The Presidential Regulation outlines how relevant government departments and international organisations should respond to refugees within Indonesia and addresses functions such as search and rescue, detention and living arrangements while in Indonesia, voluntary return and the handling of deceased refugees.

In relation to immigration detention practices, the Regulation clearly contemplates Immigration Detention Centres playing a central role at the point at which an asylum seeker or refugee is intercepted by authorities. However, it is not clear whether all refugees intercepted by authorities must be initially detained in an IDC, or merely have their case referred to an IDC.<sup>213</sup>

The Regulation also: (i) contemplates the transfer of refugees to a shelter or temporary shelter (which might be run by an international organisation); (ii) contains language which could allow such shelters to be 'open' residential facilities; and (iii) suggests that refugees may be issued with some form of government identification, which could foreseeably allow them to move more freely in Indonesia without fear of arrest or detention.<sup>214</sup> Other provisions in the Regulation set out minimum standards for shelters (eg proximity to healthcare and religious facilities and the provision of water, food, drinks and clothing).<sup>215</sup> Reference to shelters having 'adequate security conditions'<sup>216</sup> might be read to suggest that the shelters will be 'closed' shelters. Similarly, the article dealing with 'safeguarding of refugees at the shelter' by Indonesian authorities raises similar concerns.<sup>217</sup>

More encouragingly for the purposes of this research, the Presidential Regulation specifically authorises the placement of refugees with special needs outside of the 'shelter' system mentioned above and includes children within the list of those with special needs. The Regulation provides that placement outside a shelter shall aim to ensure that 'refugee children are provided with care with the best interest of the child in mind'<sup>218</sup> and that 'refugees may be transferred from one shelter to another to facilitate family reunification', among other stated objectives.<sup>219</sup> It is not clear from the text of the Regulation whether children who benefit from these arrangements may be allowed to reside outside of detention or closed shelters along with their family members. However past practice in Indonesia (which has seen immigration practices often protecting family unity) give cause for optimism on this front.

Finally, the Regulation does not clarify whether or not asylum seekers should be treated as prima facie refugees for the purposes of application of the regulatory framework that it establishes, though it is hoped that this would be the case given past practice in Indonesia.

During our consultations we sought to ascertain how the Regulation is likely to be implemented in relation to all of the issues outlined above. However, there appears to be a clear lack of any knowledge of the likely details of the implementing regulations, though there were suggestions that the Ministry of Law and Human Rights (which oversees Indonesia's immigration detention centres and implementation of the Regulation) may be open to receiving recommendations from civil society groups on this and other issues.

Aside from the potential impact of the recently issued Presidential Regulation, there are a number of other emerging initiatives in Indonesia which are contributing to the gradual reduction in instances of child detention and the duration of detention. These include:

- The steady expansion of capacity within the network of shelters for UASC operated by CWS in partnership with UNHCR, with five shelters now operational, providing capacity for up to 200 UASC and (in the case of one of



these shelters) particularly vulnerable women. This capacity is supplemented by a 'semi-independent living' program also administered by CWS, which supports older UASC to live more independently in the community, with financial assistance and case management support

- A small program for foster care of UASC by members of the refugee community, which is being trialled by CWS. Currently a small number of teenaged UASC are placed with an adult of the same gender and of the same ethnic and linguistic background. The foster carers are identified via referrals from community networks, pre-vetted by CWS and given a small amount of financial support, with regular ongoing contact between CWS, the UASC and foster carer and comprehensive case management support provided by CWS
- NGO programs to support people living independently in Indonesia, such as that run by JRS in West Java which provides financial assistance to help forced migrants rent accommodation, buy food and meet other basic needs
- IOM-funded community housing projects which allows some of those who are intercepted by immigration authorities (including families with children) access to community-based housing (paid for by IOM) as well as a small cash stipend of IDR 1,250,000 per month (approximately USD 100).

These initiatives have seen a gradual expansion in the capacity of ATD programs in Indonesia. UNHCR has observed that ATD opportunities grew from 2,546 places in 2014 to 3,772 in 2015 for families and from 120 to 250 for UASC over the same period.<sup>220</sup> It is likely that capacity has expanded further since that time.

We also understand that work has been done by government departments on new draft laws and regulations which might create opportunities for more formalised foster care and guardianship arrangements in Indonesia.<sup>221</sup> We understand that there are draft regulations and a bill currently awaiting presidential signature which, if adopted, would enshrine a system of court-appointed guardianship to replace customary laws and processes in Indonesia.<sup>222</sup> It remains to be seen

whether this framework would be applied to UASC who are undocumented migrants, or only Indonesian children.

Furthermore, we understand that UNHCR plans to roll out a new refugee ID card in 2017 using the same technology and system as that recently implemented in Malaysia (discussed in 4.2 above), which it is hoped will enjoy greater recognition from government officials and provide enhanced protection to those registered with the UNHCR.

There are, however, some challenges that will need to be overcome before the practice of detaining child asylum seekers and refugees can be brought to a complete halt. In particular:

- There is a need for a screening mechanism to identify children and other vulnerable individuals in order to ensure that they are diverted away from detention and into appropriate alternative programs
- Current ATDs for children and families still rely, for the most part, upon individuals being intercepted by the government and detained in immigration detention facilities **before** they can access places in alternative shelters or programs run by IOM or the government. We note that UASC and other highly vulnerable individuals can access CWS shelters without first being detained, but capacity is currently limited to 200 places
- Insufficient avenues for financial and other support for asylum seekers and refugees living in the community still cause many to self-report to detention in order to access shelter, food and the possibility of accessing alternative shelters and programs

Finally, it will be important to monitor whether the current political climate in Indonesia, which suggests growing social division along religious lines, might have an adverse impact upon government policies in relation to asylum seekers and refugees in the future given that a significant portion of the current asylum seeking population are Shia Muslims, with most of Indonesia's population identifying as Sunni.<sup>223</sup> For now, animosity towards religious minorities seems mostly directed at religious minorities within the Indonesian citizen population.<sup>224</sup>



## 4.4 Australia

### Overview and legal framework

Unlike the countries examined above, Australia is a signatory to the Refugee Convention and has a long history of accepting refugees for resettlement. It also has a complex and elaborate legal and policy framework for responding to asylum seekers and, in particular, undocumented asylum seekers who seek to arrive in Australia by boat.

The Migration Act requires that any non-citizen who is in Australia without a valid visa must be detained.<sup>225</sup> Those asylum seekers who arrive by air have not been routinely subject to immigration detention, and recognised refugees have either temporary or permanent protection visas allowing them to legally reside and work in the community and access to basic public services.<sup>226</sup>

Controversial changes in Australia's laws and practices in 2012 and 2013, including the practice of interdictions or 'turn-backs' at sea, have resulted in the number of unauthorised maritime arrivals residing in Australia gradually decreasing.

These policy changes have resulted in numerous international bodies and human rights experts raising serious concerns in relation to Australia's compliance with its human rights obligations.<sup>227</sup>

### Situation of asylum seekers arriving by boat

Successive governments have sought to deter unauthorised maritime migration and among the deterrence measures is the policy of mandatory and indefinite detention of such asylum seekers (including children), first enshrined in Australian law in 1992.<sup>228</sup> People who arrive by boat without a visa are referred to as 'unauthorised maritime arrivals' (or in some cases 'illegal maritime arrivals' or 'IMAs'). Prior to mid-2013, such individuals were subject to mandatory immigration detention in Australia until granted a visa or removed from Australia.<sup>229</sup> Since changes to the Migration Act in 2013, unauthorised maritime arrivals must now be taken 'as soon as reasonably practicable' to a regional processing country (i.e. Nauru or Papua New Guinea).<sup>230</sup>

While immigration detention is still commonly experienced by asylum seekers in Australia, since 2013 there has been a very significant reduction in the number of people detained and the closure of a number of immigration detention facilities.<sup>231</sup> The current government has linked these measures to the reduction of individuals seeking to arrive in Australia by boat.<sup>232</sup>

Those who arrived on or after August 2012 and who were not transferred offshore are often referred to as the 'legacy caseload' and originally comprised around 30,000 individuals (including more than 4,300 children)<sup>233</sup> and are subject to a separate refugee status determination known as the 'fast track' process, with limited rights to review and limited access to legal assistance.<sup>234</sup> As of December 2016 approximately 6,600 of these cases had been finalised,<sup>235</sup> leaving the vast majority still awaiting resolution of their refugee claims.

### Detention of children

Australia's attempts to implement laws and policies to deter unauthorised maritime arrivals has led to thousands of children being detained in immigration detention facilities in recent years - whether in mainland Australia, on the remote Australian territory

of Christmas Island or, more recently, in detention centres managed and funded by the Australian government in Nauru and, for a brief period, Papua New Guinea.<sup>236</sup> This has taken place notwithstanding that Australia's Migration Act provides that 'a minor shall only be detained as a measure of last resort'.<sup>237</sup>

From 2009 to early 2016 thousands of children were detained in Australian immigration detention facilities, with roughly 2,000 children detained in July 2013.<sup>238</sup> Many of these children were detained in remote detention facilities such as those on Christmas Island (which is a small, isolated island 1,550 kilometres from mainland Australia). In September 2014, the average length of detention for children and adults was one year and two months.<sup>239</sup> The transfer and detention of children in Nauru is dealt with separately in part 4.5 below.

The Immigration Minister is typically the legal guardian of any unauthorised maritime arrivals who are UASC and, where a child is detained, the guardianship role is delegated to a senior manager of the detention facility,<sup>240</sup> a situation that has been the subject of criticism given the inherent conflict of interest involved.<sup>241</sup>

Serious concerns about the conditions in which children have been held in Australian-run immigration detention facilities and related impacts on children are addressed briefly in parts 3.4 and 3.5 above. The AHRC has recently summarised the recent empirical evidence of harm to children detained by Australian authorities as follows:

*Between 1 January 2013 and 25 August 2016, there were 203 recorded incidents of self-harm in immigration detention involving children.*

*The Commission's 2014 National Inquiry found that prolonged detention was having a profoundly negative impact on the mental and emotional health and development of children. The deprivation of liberty and the exposure to high numbers of mentally unwell adults were found to cause emotional and developmental disorders amongst children.*

*Health assessments conducted during the first half of 2014 revealed that 34% of children in detention in Australia and on Christmas Island had mental health disorders that would be comparable in seriousness to children referred to hospital-based child mental health out-patient services for psychiatric treatment. Less than two per cent of children in the Australian population have mental health disorders at this level.*

*Assessments conducted by consultant paediatricians during a visit by the Commission to the Wickham Point*

*detention facility in October 2015 revealed further evidence of the negative impacts of detention on the mental health of children. All of the children under eight years who were assessed for developmental risk were found to be in the two highest risk categories — higher than any published results anywhere in the world for the screening tool used. Eight were assessed as reaching more than twice the threshold for the highest level of developmental risk. Almost all of the children aged eight years and over who were assessed for risk of post-traumatic stress disorder were found to be in the 'clinical' range. In an assessment of personal hopefulness, almost all children and adolescents assessed received the highest possible scores for hopelessness and despair.*

*The negative impacts of detention tend to worsen as detention becomes more prolonged. This is of particular concern given that the average length of detention has increased significantly in recent years.*<sup>242</sup>

The immigration detention of child asylum seekers and refugees in Australia has prompted public outcry and international condemnation, with a wide variety of experts considering Australia to have violated a number of different human rights obligations.<sup>243</sup>

### **Recent developments and ongoing concerns**

The number of children in detention in Australia declined steadily from mid-2014 onwards,<sup>244</sup> correlating roughly with a decline in the number of unauthorised maritime arrivals successfully entering Australia over the same period.<sup>245</sup> In April 2016, Immigration Minister Dutton announced that there were no more children held in immigration detention in Australia, with the opposition Labor Party also publicly supporting children being removed from detention.<sup>246</sup> This result reflects government initiatives to have asylum seeking children and their families released from detention facilities pursuant to the mechanisms outlined below. Since that time, the number of children in Australian immigration detention facilities has sat at zero or less than 10.<sup>247</sup> We understand that those few who are detained are individuals who have failed to establish a legal ground for remaining in Australia and are typically detained for short periods in connection with their impending deportation.

There are two principal mechanisms which the government has used to facilitate the residence of unauthorised maritime arrivals in the community rather than in detention:



## 4.4 Australia (c'td)

- Pursuant to a Ministerial 'residence determination' (approximately 566 people, including 234 children),<sup>248</sup> which is a bureaucratic decision enabling individuals to live in the community in government allocated housing, which is conditional upon them observing a number of conditions, including not undertaking paid work and residing at the nominated residence<sup>249</sup>
- On a 'bridging visa' (approximately 25,810 people, including roughly 3,968 children) – these may be valid for as little as 3 months and do not always include the right to work<sup>250</sup>

It is up to the Immigration Minister and/or Department of Immigration to decide which of these two frameworks to apply<sup>251</sup> and asylum seekers in these categories face a variety of hardships and challenges.<sup>252</sup> However residence in the community is generally considered a much better option than immigration detention.<sup>253</sup>

Notwithstanding the shift in policy and practice that has led to almost all children being released from detention in Australia, there have been no changes to Australia's laws to prevent children from being detained in immigration detention centres in the future and no public commitment by either of the two major political parties to pursue any such legislative amendment.

One positive development, however, has been the recent Victorian Supreme Court decision which recognised the jurisdiction of Victoria's child protection authority over children living in Victoria in Federal immigration detention facilities.<sup>254</sup> We understand that Victoria is the only Australian state where it is clearly established that child protection authorities have such jurisdiction and, in the absence of children in immigration detention centres located in Victoria, the practical ramifications of this decision are not yet clear. We also note DIBP's appointment of an independent Child Protection Panel, and the adoption of a new Child Safeguarding Framework in 2015, which aims to ensure the safety of children in 'immigration programs'<sup>255</sup>

For the time being, however, the question of whether or not to detain a child asylum seeker currently remains almost entirely at the discretion of the Immigration Minister and/or departmental bureaucrats. In the absence of legislative reform, there is a risk that large-scale child immigration detention could re-emerge in Australian immigration practices in the future and, in the meantime, individual asylum seekers (including children) continue to face the threat of being detained, or re-detained, especially those who have not been issued with visas, or for those on short-term or highly-conditional visas.

The framework of policies which seek to deter all irregular maritime migration to Australia remains the most significant obstacle to achieving legislative reform on this issue of child immigration detention in Australia.



## 4.5 Nauru

### Overview and legal framework

The Australian Government first began transferring asylum seekers to the Republic of Nauru in 2001 pursuant to what became known as Australia's 'Pacific Solution'. Bilateral asylum seeker transfer arrangements were abandoned in 2007, but later reinstated in August 2012 when Nauru re-opened its immigration detention centre in connection with the MOU between the Government of Nauru and Australia.<sup>256</sup> Australia is responsible for meeting all of Nauru's costs in connection with these arrangements.<sup>257</sup>

Under the MOU, Australia transfers to Nauru individuals who have travelled to Australia by sea, or who are intercepted at sea whilst travelling to Australia, without a valid Australian visa. This policy was adopted to deter individuals from travelling to Australia by boat in these circumstances. These individuals are transferred by Australia without their consent and Nauru has accepted the transfer of all such individuals to date. The MOU anticipates that those transferred to Nauru would stay in Nauru for 'as short a time as is reasonably necessary'.<sup>258</sup>

Nauru recently became party to the Refugee Convention in connection with its decision to recommence 'regional processing' operations with Australia.<sup>259</sup> Asylum seekers are granted temporary visas upon transfer from Australia and those who are recognised as refugees by the Government of Nauru have issued with temporary settlement visas that initially could be renewed for up to five years, though it appears that arrangements are now in place which may result in refugees remaining on Nauru for up to 20 years.<sup>260</sup> The Government of Nauru has never offered permanent resettlement in Nauru as an option to those transferred there.<sup>261</sup>

### Detention of children

Up until changes in October 2015, which saw the RPC become an 'open centre', transferred individuals were placed in mandatory immigration detention in Nauru's RPC while Nauruan authorities assessed whether or not they had valid claims to protection as refugees; a process that has taken years in many cases.<sup>262</sup> The Minister of Immigration was appointed as the legal guardian of any UASC amongst this group.<sup>263</sup>

Children transferred to Nauru were typically held in immigration detention in the RPC until their refugee claims were determined. This process saw some children held in closed detention in the RPC for one to two years, before the RPC became an 'open' facility (discussed further below). Those recognised as refugees have typically been released from detention into community housing in Nauru or in converted shipping containers adjacent to the RPC.

While the precise and up to date numbers are difficult to determine, based on publicly available information and informal consultations with refugee advocates, we estimate that since September 2012 approximately 315 children (including at least 27 unaccompanied children) have been transferred to Nauru since 2013 along with approximately 1,950 adults.<sup>264</sup> In September 2016 the Government of Nauru reported that there were 173



## 4.5 Nauru (c'td)

child refugees and asylum seekers residing in Nauru.<sup>265</sup> Currently 45 children reside in the RPC,<sup>266</sup> with the balance living in community housing. In addition there are 90 to 100 children who form part of the cohort originally transferred to Nauru but currently in Australia in connection with medical transfers and technically at risk of being transferred back to Nauru at any time.<sup>267</sup>

Save the Children Australia was contracted by the Australian Department of Immigration and Border Protection from August 2013 to October 2015 to provide education, recreation, child protection and welfare services to those in the RPC including children and their families. Conditions in detention in Nauru are described briefly in part 3.4 above and in more detail in the *At What Cost* report recently published by Save the Children and UNICEF.<sup>268</sup> Allegations of sexual abuse and other forms of violence against children in the RPC have received considerable media attention and have been the subject of numerous official inquiries in Australia, as have been the reported instances of mental illness and self-harm among these children.<sup>269</sup>

### Recent developments and ongoing concerns in relation to detention

The most significant positive development in relation to the detention of children was the decision taken by the Government of Nauru to make the RPC an 'open centre' with effect from 6 October 2015.<sup>270</sup> Since that time those who continue to reside at the RPC, including 45 children and 380 adults, are officially free to come and go from the centre during the day, though largely reliant upon Australian-appointed contractors to provide transport from the remote centre to the rest of the island. There were no amendments made to Nauruan law or regulations in connection with this development, with future reinstatement of immigration detention remaining a legal possibility.

Notwithstanding the October 2015 transition of the RPC to an 'open centre', there remains a real concern that asylum seeker children and their families, while theoretically free to move around the island, remain effectively 'detained' in the Republic of Nauru, or at the very least unduly restricted in relation to

their freedom of movement. This is due to practical considerations involved in moving around the island, safety considerations involved in interacting with the local community, as well as travel documents that do not allow for travel outside of Nauru,<sup>271</sup> a remote island state of 21 square kilometres.

We also note that the Nauruan government has recently taken steps to include child asylum seekers and refugees within the ambit of its child protection framework. The recently-created Child Protection Directorate includes child asylum seekers and refugees within its mandate and the newly enacted Child Protection and Welfare Act 2016 appears to countenance potential application to child asylum seekers and refugees in Nauru.<sup>272</sup>

In early 2016 it was announced that Australia and the United States had reached an arrangement whereby refugees in Nauru will be eligible for resettlement in the United States, and US officials have reportedly begun assessing candidates for resettlement in Nauru.<sup>273</sup> However at the time of writing an executive order issued by US President Trump in early 2017 has temporarily suspended the resettlement of refugees to the US and reduce the US's refugee resettlement intake from 110,000 to 50,000 places per annum, both of which make the timing and implementation of the proposed resettlement uncertain.<sup>274</sup> President Trump's order has also sought to temporarily suspend migration from certain countries – a suspension which would affect a large portion of Nauru's refugee population.<sup>275</sup> At the time of writing, this aspect of Trump's executive order is not in force after court-ordered injunctions were obtained.<sup>276</sup>

Putting aside the fate of the current group of asylum seekers and refugees, the governments of Australia and Nauru appear committed to keeping the framework of their existing regional processing arrangements in place for the foreseeable future in order to act as a deterrent to would-be future boat arrivals.<sup>277</sup> Whether this may see children detained in Nauruan immigration facilities in the future is unclear, though it is fair to assume that Nauru is likely to be heavily influenced by Australian policies and practices.

## 5. RECOMMENDATIONS AND DEVELOPMENT OF ALTERNATIVES

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The following recommendations are made in connection with the goal of ending the practice of detaining child asylum seekers and refugees owing to their migration status or that of their family members, in relevant states. They aim to see detention replaced with other policy responses that are appropriate for children and which respect the fundamental rights of children (including in relation to family unity, education, healthcare, recreation) and which enhance the safety and security of children.

These recommendations are focussed specifically on the issue of detention and do not address the broader-range of concerns that arise in relation to the treatment and status of refugees and asylum seekers in the relevant countries.

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### 5.1 General principles for developing alternatives

The following recommendations are, for the most part, relevant to all stakeholders involved in developing laws, policies, programs and advocacy initiatives that engage with the needs of asylum seekers and refugees.

**Establish targets:** Governments should establish and publicise targets (with dates) for working towards the goal of ending the immigration detention of child asylum seekers and refugees. Specific targets might include:

- Launching pilot programs which trial community-based alternatives to detention for children and their families, in partnership with civil society and UNHCR (to the extent that such trials are considered necessary)
- Amending laws to require authorities to use alternatives to detention for children and their families
- Adopting legal and policy changes to completely cease the immigration detention of children and their families

**Presumption of innocence and liberty:** All reforms should start from the basis that asylum seekers and refugees are not criminals and should not be presumed to be a risk to public safety. To the extent that they have committed non-violent administrative offenses by crossing borders or remaining in countries without a valid visa, they have done so out of necessity rather than criminal intent. Accordingly, policy choices should treat asylum seekers and refugees as innocent people, with a corresponding presumption that they should enjoy freedom of movement unless there is a specific need for their detention, which should be assessed on a case by case basis and should not result in the detention of children.

**'Children' first and foremost:** Policy frameworks should treat asylum seeker and refugee children as 'children' first and foremost (rather than as 'illegal immigrants'), and ensure access to the same range of basic rights and services as other children in the country.

**Avoid detention of children entirely:** Focus on developing solutions that allow children and their families to bypass detention entirely, rather than having to pass through detention in order to access alternatives or support.

**Conditions and restrictions not necessary:** Alternatives may involve restrictions or conditions such as regular reporting to immigration officials. However, examples of alternatives used globally demonstrate that such restrictions are not an essential or necessary feature of alternative policy responses<sup>278</sup> and care should be taken to ensure that the government response to non-compliance is not to simply detain non-compliant adults or children, and that conditions are not unreasonable or likely to unduly impair the enjoyment of basic rights.

**Emphasise best interests of children and rights-based criteria:** Recognise that detention is not the only practice that can harm migrant children – it is critical that alternatives to detention protect children from other forms of harm and are consistent with children enjoying other fundamental rights and accessing basic services and that their best interests are a primary consideration. Family unity, protection from violence and exploitation and access to education and healthcare are among the important issues that must be considered in designing and implementing alternatives. Within this context ‘the principal of minimal intervention and the best interests of the child should govern any measures taken by States.’<sup>279</sup>

**Respect family unity:** Ensure that when developing alternatives to detention, alternatives are consistent with other rights of the child including, importantly, rights in relation to family unity.<sup>280</sup> In this context it is important to recall that children have a right to know and be cared for by both parents,<sup>281</sup> not just their mothers (with mothers at times being given greater access to children than fathers in this region).

**Transparency and predictability:** In situations where asylum seekers and refugees lack temporary or permanent residency rights, access to alternatives to detention policies should be mandated by law and practiced transparently and consistently so as to eliminate fear of detention. This will give refugee and asylum seeker communities confidence to access services and live openly within their host community, rather than living in fear ‘below the radar’, which can seriously impact on children’s access to education, healthcare and their enjoyment of a full and dignified life.

**Community-based and family-based arrangements:** Pursue alternatives to detention which prioritise community-based and family-based living arrangements including safe foster-care arrangements for UASC, with institutional care (in shelters, homes and other institutions) being the last resort.<sup>282</sup> In this regard, we recommend consideration of the ‘Community Assessment and Placement’ and ‘Child Sensitive Community and Assessment Placement Model’ developed by the International Detention Coalition.<sup>283</sup>



**Non-discrimination:** Alternatives to detention should be accessible by all children on a non-discriminatory basis. While certain nationality, religious or ethnic groups may enjoy greater or lesser support within a given host community, such populist sentiments should not lead to policies or practices which prioritise some children over others in relation to access to alternatives.

**Engage appropriate screening, identification and age assessment procedures:** These are required in order to ensure that authorities correctly identify children who may be within their care/jurisdiction as ‘children’ and respond appropriately.<sup>284</sup> Screening can be used to identify other vulnerable individuals as well as children.<sup>285</sup>

Authorities (including police and immigration officers) should be trained in and required to employ reliable age assessment techniques to reduce the possibility of children mistakenly being detained as adults. The UN Committee on the Rights of the Child has recommended that age assessment involve both physical examination and an assessment of psychological maturity and that, if in doubt, the person should be considered a minor.<sup>286</sup> Consideration should also be given to training child welfare authorities and NGOs in these techniques in order to build knowledge and capacity within relevant jurisdictions.

**Consider impact on host community:** Alternatives should be designed and implemented in a way that is likely to foster, rather than erode, goodwill between forced migrants and the host community in which they live and the long-term sustainability of arrangements. To the extent that material support is provided to beneficiaries, this should be designed so as to maximise potential economic benefits to a wide cross section of stakeholders in host communities through thoughtful property rental and other procurement arrangements. Where significant investment is made in services for asylum seekers that would put asylum seekers in a better position than the local community consider, where possible, models which would involve disadvantaged members of the local community also accessing such services.

Cultural education programs can be engaged to sensitise migrants to the cultural and religious practices of the host community.

**Involve local government and communities:** The success of alternative approaches will depend in large part on the willingness of local communities to accept asylum seekers and refugees living amongst them. They need to be consulted and included in planning and implementation of alternatives, rather than new policies or programs affecting them being presented to them as a ‘fait accompli’.

**Consistency with access to education, health and other basic needs:** Alternatives should be designed so as to be consistent with children having their full range of basic needs met, including in relation to health, education, recreation, family reunification or other opportunities to maintain contact with family members and the preservation of important aspects of their heritage and identity

**Child protection:** Policy frameworks should ensure that all of those working directly with children in alternative policy settings should be screened and trained in child safeguarding practices to ensure that children in their care are not exposed to harm.




**Independent guardianship for UASC:** Measures should be taken to ensure that appropriately screened and independent legal guardians are appointed for all UASC.

**Ensure genuine freedom of movement:** Alternatives to detention should not be so localised, or in such remote and isolated locations, as to unreasonably restrict freedom of movement and prevent people from connecting with larger populations in the host country.

**Address xenophobia:** The development of alternatives should be accompanied by concerted efforts to combat any risk of xenophobic attitudes developing in the host community (whether at a local or national scale).


**Address short, medium and long-term needs:** In recognition of the fact that resettlement and/or voluntary return may not be available to all asylum seekers or refugees within a short period of time, alternatives should be consistent with ensuring that asylum seekers and refugees have ways of fulfilling their basic needs and reunifying with close family members. This will reduce the vulnerability of individuals to trafficking and other forms of exploitation and would ideally involve individuals having access to income generating opportunities in order to increase immediate and long-term self reliance.

## 5.2 Building alternatives based on existing initiatives





COUNTRY	STAKEHOLDER	RECOMMENDATION
 Indonesia, Thailand, Malaysia	Government, UNHCR, civil society	<b>New time-bound ATD pilot programs:</b> Governments should work with the UNHCR, and civil society to develop new pilot programs for undocumented children and their families. Design of these pilots should be accompanied by a commitment to bring these up to scale should they achieve their objectives within a defined period of time.
	Government, UNHCR, civil society	<b>Case management for all children:</b> Governments and civil society should expand and strengthen the case management approaches currently used by NGOs in Malaysia and Indonesia to support UASC in community-based alternatives, and to develop such approaches in Thailand. <sup>287</sup>
	Government, UNHCR, civil society	<b>Build on existing work in relation to use of foster care arrangements for UASC:</b> Governments, UNHCR and civil society should work together to build on existing programs which utilise informal foster care arrangements for UASC and put in place mechanisms to ensure appropriate screening, training, monitoring and support. <sup>288</sup>
 Indonesia, Thailand, Malaysia, Australia, Nauru	Government, civil society	<p><b>Explore work rights and other forms of legal residence as alternatives to detention for children and families:</b> Granting asylum seekers and refugees work rights (and related temporary residence permits) is a positive practice that could potentially prevent children of a working age, or children with a working parent, from being detained. This could be achieved by constructing work rights so that: (i) where one member of a family is granted the right to work, all other close family members are given residency rights (for example, a 'dependent's pass') and related identification; and (ii) the work permit and related family rights remains valid, or is renewable, until such time as the individual's protection needs are resolved (eg through voluntary repatriation, resettlement or the implementation of some other durable solution).</p> <p>As with work rights, consideration should be given to the use of other appropriate visa categories such as student visas, family reunification visas and other forms of residency, with appropriate safeguards for maintaining and promoting family unity and ensuring that refoulement does not occur upon expiry of the visa.</p>
 Indonesia	Government, UNHCR, IOM and civil society	<b>Implementation of Indonesian Presidential Regulation (2016):</b> The Indonesian government should work expeditiously towards the finalisation of implementing regulations in relation to this Regulation which would mandate the use of alternatives to detention for children, in line with the principles outlined above. The views of civil society and international organisations should be sought throughout this process. NGOs and international organisations should undertake research and make submissions to the Ministry of Law and Human Rights and other government authorities as appropriate to ensure that these implementing regulations are appropriate for children.

### 5.3 Increased collaboration and efficiency – civil society and international organisations

COUNTRY	STAKEHOLDER(S)	RECOMMENDATION
 <p>Indonesia, Thailand, Malaysia, Australia, Nauru</p>	Government, human rights commissions, civil society, UNHCR	<p><b>Share data and knowledge:</b> Meet regularly with each other and with stakeholders in other countries to find out more about best practice and how to further develop and improve policy and operational responses.</p> <p>Government authorities should share information with UNHCR and other members of civil society in relation to the instances and duration of child detention to enable accurate, reliable and standardised data collection and analysis.</p>
	Government, civil society, UNHCR	<p><b>Share and Co-ordinate:</b> Increase efforts to share data and speak with one voice on this important issue. In this region, a shared digital platform for sharing information, mapping current and emerging programs and coordinating advocacy is greatly needed. Access to this platform should be open to those who share the objective of ending child immigration detention in a manner consistent with other human rights.</p>
	Government, civil society, UNHCR, donors	<p><b>Increase capacity to offer alternatives:</b> Work towards increasing the capacity of civil society to support asylum seekers and refugees while living in the community.</p>
	Civil society	<p><b>Strategic Litigation and Legal Education:</b> Coordinate efforts to identify and pursue opportunities for strategic litigation in relation to immigration detention practices where current practices may be contrary to domestic laws or where domestic laws provide avenues for new interpretations and practices. This should include investigating the feasibility of legal challenges to the legitimacy of domestic laws themselves, where they conflict with national constitutions or binding international commitments.</p> <p>In addition, seek out opportunities to train prosecutors and the judiciary in relation to applicable legal frameworks and emerging interpretations impacting on decisions relating to detention.</p>
	National human rights commissions, government, civil society, UNHCR	<p><b>Role of human rights commissions:</b> National human rights commissions should be actively engaged in research on the practice of child immigration detention and pursuing initiatives to end child immigration detention, in collaboration with other stakeholders, and be mandated and adequately funded to play such a role.</p>

 <p>Malaysia, Indonesia, Thailand</p>	<p>UNHCR</p>	<p><b>Continue to increase efficiency and reliability in relation to registration, RSD and documentation:</b> Following on from the apparent success of the new UNHCR ID card issued in Malaysia, continue to explore use of technology and other systemic improvements to aid in speedy and reliable identification, registration and RSD resolution for asylum seekers and refugees</p> <p>In this regard, we encourage UNHCR to continue to strive towards achieving the prompt registration and assessment of all asylum seekers.</p>
	<p>UNHCR</p>	<p><b>Standardise data collection:</b> In order to better track the progress of UNHCR’s stated agenda of ending child immigration detention, and to support other advocates working on this issue, UNHCR offices should seek to standardise their data collection methods in relation to instances of detention across country offices. This should include, ideally, capturing data in relation to:</p> <ul style="list-style-type: none"> <li>• Number of children who enter and exit detention in a given year and the time spent by each child in detention</li> <li>• Whether detained children are separated, unaccompanied or accompanied</li> <li>• Number of children in detention at any given time</li> <li>• Country of origin, ethnicity, religion and language of each child in detention</li> </ul>
	<p>Donors</p>	<p><b>Support UNHCR and NGOs:</b> Fund the work of: UNHCR to ensure that all asylum seekers receive prompt registration and efficient examination of their refugee claims</p> <p>NGOs involved in implementing ATD projects, to ensure that these can operate at an appropriate scale and provide all necessary support services</p>
	<p>Civil society, UNHCR</p>	<p><b>Public and media education:</b> Educate the public (via local and regional media and other forums) in relation to the practice of immigration detention of children and the available alternatives</p>

## 5.4 Other recommendations

COUNTRY	STAKEHOLDER	RECOMMENDATION
 <p>Indonesia, Thailand, Malaysia, Australia, Nauru</p>	Government, civil society	<b>Access to legal advice:</b> Children should have access to legal advice and representation both in relation to their potential detention (to the extent that detention remains a possibility) as well as their refugee claims.
	Government	<b>Child sensitive interview techniques:</b> Governments should implement child-sensitive interviewing techniques, including ensuring the presence of an independent guardian/observer to support the child in any interviews.
	Government, UNHCR, civil society	<b>Other forms of detention:</b> Investigate situations in which children are held in forms of detention or detention-like conditions other than in IDCs for immigration related purposes and develop ATDs to address such situations.
 <p>Indonesia, Malaysia, Thailand</p>	Government, civil society	<b>Monitor places of detention to identify detained children:</b> To the extent that reliable screening, identification and age assessment procedures are not provided by authorities, governments should ensure independent monitoring of places of detention to identify any detained children and secure their immediate release. <sup>289</sup>
	Government, civil society	<b>Address vulnerability through support, rather than restriction:</b> Where children and other migrants are being denied freedom of movement in order to protect them from potential trafficking or exploitation, efforts should be made to address the underlying reasons for their vulnerability to exploitation and trafficking (eg through education, strengthening of community structures and access to livelihoods) rather than by restricting their freedom of movement.
 <p>Australia, Nauru</p>	Government, parliament, civil society	Initiate and enact legislative amendments to end the practice of detaining children for immigration related purposes.
 <p>Malaysia</p>	Government, UNHCR, civil society	<b>Assess and address practices in non-Peninsular Malaysia:</b> Develop a strategy to better understand and address the needs of undocumented migrant children in Sabah and Sarawak to ensure that all children in Malaysia enjoy freedom from immigration detention, and not just those in Peninsular Malaysia. This should include engagement with social anthropologists who have a well-developed understanding of the migration history of these children.

# APPENDICES

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## Appendix A: Glossary

<b>Asylum Seeker</b>	A person who has sought international protection and whose claims for refugee status have not yet been determined.
<b>Alternative to Detention or ATD</b>	Any legislation, policy or practice that allows children, whether accompanied or not, to reside in the community or, when unaccompanied or separated, in appropriate reception or care arrangements where protection and assistance are provided to meet their specific needs. <sup>290</sup>
<b>Child</b>	Any person under the age of 18, as defined in the CRC.
<b>CAT</b>	Convention Against Torture.
<b>CRC</b>	Convention on the Rights of the Child
<b>DIBP</b>	Australian Department of Immigration and Border Protection
<b>Detention</b>	The deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities. <sup>291</sup>
<b>ICCPR</b>	International Covenant on Civil and Political Rights.
<b>IDC</b>	A government designated immigration detention centre or facility.
<b>Immigration Detention</b>	Detention for reasons of a person's immigration status or that of their family members.
<b>IOM</b>	International Organization for Migration
<b>MSDHS</b>	Ministry of Social Development and Human Security, Thailand.
<b>Persons of Concern or POC</b>	Asylum seekers, refugees and individuals who do not necessarily fall directly into any of the groups above (refugee, asylum seeker, IDP's etc.) but to whom UNHCR has extended its protection and/or assistance services, based on humanitarian or other special grounds. <sup>292</sup>
<b>Refoulment</b>	The act of expelling or returning a refugee to a country where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion. <sup>293</sup>
<b>Refugee</b>	A person who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion. <sup>294</sup>

<b>Refugee Convention</b>	1951 Convention Relating to the Status of Refugees and 1967 Protocol Relating to the Status of Refugees.
<b>RSD</b>	Refugee Status Determination, the legal or administrative process by which governments or UNHCR determine whether a person seeking international protection is considered a refugee under international, regional or national law.
<b>Separated Children</b>	Children separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. <sup>295</sup>
<b>Unaccompanied Children</b>	Children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. <sup>296</sup>
<b>UASC</b>	Unaccompanied or separated child/children.
<b>UNHCR</b>	United Nations High Commissioner for Refugees.



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## Appendix B: Overview of relevant provisions of key international treaties

### Refugee Convention

- States not to impose penalties on account of the illegal entry or presence of refugees, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence (Article 31(1)(2))
- Obligation not to return refugees to countries where they face persecution (Article 33(1))

### Convention on the Rights of the Child

- States shall respect and ensure the rights of all children in their jurisdiction. Children must not be discriminated against based on their or their parent's or legal guardian's religion, political affiliation, race, birth or other status (Article 2(1))
- The best interests of the child shall be a primary consideration in all actions concerning children (Article 3(1))
- States shall ensure to the maximum extent possible the survival and development of the child (Article 6(1)).
- All children have the right to a name and nationality as well as the right to be known and cared for by their parents (Article 7(1))
- States shall respect the right of the child to preserve his or her identity including nationality, name and family relations (Article 8(1))
- States shall ensure that a child shall not be separated from his or her parents against their will except where judicially determined to be in the best interest of the child (Article 9(1))
- Children have the right to freedom of association and peaceful assembly (Article 15(1))
- Both parents (or legal guardians) have the responsibility of their child's upbringing and should have access to services and institutions to aid in this responsibility (Article 18(1) and (3))
- States shall take measures to protect children from all forms of violence, abuse, neglect etc (Article 19(1)).
- Unaccompanied children are entitled to special protection (Article 20(1))
- Refugee children shall be given appropriate protection and humanitarian assistance (Article 22(1))

- Children who have any kind of disability should receive special care and support so that they can live a full and independent life (Article 23(1), (2) and (3))
- Children have the right to enjoy the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health (Article 24(1))
- States must take appropriate measures to implement this right including:
  - ensuring the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care
  - combating disease and malnutrition, and through the provision of adequate nutritious foods and clean drinking-water (Article 24(2) (b) and (c))
- Every child has the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development (Article 27(1))
- Children have the right to education and states shall achieve this progressively by:
  - making primary education compulsory and free for all
  - making higher education accessible to all
  - taking measures to encourage regular attendance at school (Article 28(1))
- Children have the right to practice their own religion, culture and language (Article 30)
- Children have the right to play, recreation and enjoyment of cultural and recreational activities (Article 31)
- States should protect children from potential sexual abuse and exploitation (Article 34 (a))
- No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment (Article 37(a)).
- Children should only be detained as a measure of last resort and for the shortest appropriate period of time (Article 37(b))
- Children should not be arbitrarily detained (Article 37(b))
- Every child deprived of liberty shall be treated with humanity and in a manner which takes into account their needs, and separated from adults

unless it is in their best interest not to do so and have the right to maintain contact with their family (Article 37(c))

- Children deprived of liberty shall have the right to access legal and other assistance and the right to challenge the legality of their detention (Article 37(d))
- States shall take measures to promote the recovery and social reintegration of child victims of violence, abuse, armed conflict etc (Article 39)

### **International Covenant on Civil and Political Rights**

- States shall respect the rights of all individuals within its territory and subject to its jurisdiction without discrimination (Article 2(1))
- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Article 7)
- Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention (Article 9(1))
- Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court in relation to the lawfulness of his detention (Article 9(4))
- All persons deprived of their liberty shall be treated with humanity and respect for their inherent dignity (Article 10(1))
- No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation (Article 17(1))
- Everyone has the right to freedom of thought, conscience and religion and to manifest those beliefs (Article 18(1))
- The family is the natural and fundamental group unit of society and is entitled to protection by society and the State (Article 23(1))
- Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor; on the part of his family, society and the State (Article 24(1))

### **Convention Against Torture**

- States shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under their jurisdiction (Article 2(1))
- States shall not expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture (Article 3(1))
- States shall undertake to prevent other acts of cruel, inhuman or degrading treatment or punishment where committed by a public official (Article 16(1)).

### **Optional Protocol to the Convention Against Torture (OPCAT)**

- OPCAT requires States to establish a system of ongoing independent monitoring of places of detention in order to prevent torture or other cruel, inhuman or degrading treatment or punishment.

# REFERENCES

1. See Article 33, New York Declaration UN General Assembly, *New York Declaration for Refugees and Migrants : resolution / adopted by the General Assembly*, 3 October 2016, A/RES/71/1, (<http://www.unrefworldun.org/docid/57ceb74a4.html> ga/search/view\_doc.asp?symbol=A/71/L.1)
2. UNHCR, *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, January 2017, p 2; see also the observations of a number of UN Special Rapporteurs in Defense for Children International, *Children Deprived of Liberty: A Global Perspective* (Brief Report: Side Event to the 28th Session of the Human Rights Council), 10 March 2015, p 6; Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion – The rights of all children in the context of international migration*, p32; Inter-Agency Working Group to End Child Immigration Detention (IAWG), *Summary of standards relating to child immigration detention*, June 2016; IAWG, *Ending Child Immigration Detention*, p 9
3. The data in this table is compiled from that set out in part 3.2 and comes from a number of different sources. In some cases, the collection methods may vary between years and between jurisdictions. These numbers are provided to give a general indication of the scale of child detention rather than to provide a precise quantification of every instance of detention.
4. The Australian government does not produce data showing the number of children who have experienced immigration detention in Australia or Nauru in a given year but provides end of month population statistics for each detention centre overseen by Australian authorities. DIBP statistics for children in detention in 2014 show the number reaching a high point of 1000 in January 2014. See *DIBP Detention Statistics for January 2014* (<https://www.border.gov.au/about/reports-publications/research-statistics/statistics/live-in-australia/immigration-detention>) (accessed 7 April 2017)
5. See *Ibid* and *DIBP Detention Statistics for June 2015*
6. See above n 4 and *DIBP Detention Statistics for January 2016*
7. We note that the RPC became an 'open centre' from 6 October 2015 onwards
8. See above n 4 and *DIBP Detention Statistics for January 2015*
9. See above n 4 and *DIBP Detention Statistics for January 2016*
10. With 38 children on bail
11. With 113 children on bail
12. Total includes 4 for Australia (based on reported number of <5)
13. See Mamatjan Juma, 'Death of Boy in Thailand Highlights Plight of Hundreds of Uyghur Detainees', *Radio Free Asia*, 29 April 2015 (<http://www.rfa.org/english/news/uyghur/death-04292015161150.html>) (accessed 7 April 2017); Equal Rights Trust and Institute of Human Rights and Peace Studies, Mahidol University, *Equal Only in Name: The Human Rights of Stateless Rohingya in Thailand* (October 2014), p45. During our consultations we heard of children who had died in Malaysian detention centres, in circumstances consistent with that described in relation in this recent news article: A Ananthalakshmi, 'Exclusive: More than 100 die in Malaysian immigration detention camps in two years', Reuters, 30 March 2017 (<http://www.reuters.com/article/us-malaysia-detention-deaths-idUSKBN1710GR>) (accessed 7 April 2017) Families are generally reluctant to report the deaths of children to the media for fear of reprisals against their communities.
14. IDC, *There are Alternatives (Revised Edition)*, 2015, p 1, 11-12
15. In the five countries this report examines there are other administrative practices linked with immigration control which also impose serious limits upon the freedom of movement of asylum seekers, refugees and other migrants including: interception sites, police holding cells, guarded hotels; refugee camps which do not permit residents to leave, or place serious restrictions on exit and re-entry; government shelters which do not permit residents to leave, or place serious restrictions on exit and re-entry; and camps or residential facilities in highly isolated or remote locations including islands.
16. This is the principle that a country may not return a person to another country where they may face persecution, torture or other forms of serious harm. This principle is enshrined in customary international law as well as in treaty law including under article 33 of the Refugee Convention and article 3 of the Convention Against Torture.
17. 'Those from countries bordering Thailand tend to spend a few days or weeks in detention before they are taken to the border to be deported or otherwise released. Nationals from countries that do not border Thailand, however, can spend years in indefinite detention, being essentially held until they can pay for their own removal.' Human Rights Watch, *Two Years with No Moon*, September 2014, p 8
18. Stephanie Anderson & Henry Belot, 'Donald Trump slams 'dumb' refugee deal with Australia after 'worst' phone call', *ABC News*, 2 February 2017 (<http://www.abc.net.au/news/2017-02-02/trump-slams-dumb-refugee-deal/8235820>) (accessed 7 April 2017); Ray Sanchez & Madison Park 'What to know about Trump's visa and refugee restrictions', *CNN Politics*, 30 January 2017 (<http://edition.cnn.com/2017/01/28/politics/trump-immigration-refugees-visa-policy/>) (accessed 7 April 2017)
19. See UNHCR, *Children* (<http://www.unhcr.org/en-au/children-49c3646c1e8.html>) (accessed 7 April 2017)
20. See UNHCR, *UNHCR Projected Global Resettlement Needs 2017* (13-15 June 2016), p 14
21. Janet Phillips and Harriet Spinks, 'Immigration Detention in Australia', *Australian Parliamentary Library*, 20 March 2013, p 5-6
22. *Ibid*, p 9
23. Australian Human Rights Commission (AHRC), *Asylum seekers, refugees and human rights: Snapshot Report*, 2nd Edition 2017, p 16
24. See parts 4.4 and 4.5 below
25. These statistics reflect the number of individuals who 'experienced detention' in the given calendar year. This includes those who were already in detention when the year began and those who were newly detained of the course of the year. If a single person experienced multiple instances of detention, this would only be reflected once.

26. Unless otherwise indicated, figures in this section are as at end of December 2016 (Source: UNHCR Regional Office in Thailand)
27. 8,029 in Bangkok plus 249 in Mae Sot (Source: UNHCR Regional Office in Thailand)
28. Does not include a small number of children in Mae Sot and Southern Thailand (Source: UNHCR Regional Office in Thailand)
29. January 2017 figures supplied by UNHCR Regional Office in Thailand
30. See above n 25
31. Figures supplied by UNHCR Malaysia for 1 January 2016 to 9 November 2016
32. Unless stated otherwise, this data is based on figures in DIBP *Detention Statistics* for the relevant month (see above n 4)
33. This group reflects the number of asylum seekers who arrived by boat who yet had their refugee claims determined, or been issued with a Temporary Protection Visa or Save Haven Enterprise Visa, and are thus at risk of detention. These figures do not include asylum seekers who arrive in Australia by air, who have not to date been subjected to mandatory or routine immigration detention.
34. See DIBP, IMA Legacy Caseload Report on *Status and Processing Outcomes* (January 2017), p 3.
35. See Asylum Seeker Resource Centre, *Fast facts about the Fast Track refugee determination system* (<https://www.asrc.org.au/fastfacts/>) (accessed 7 April 2017).
36. Based on data published in AHRC *Snapshot Report 2017* (see above n 23 p,16) which is based on figures published by the Department of Immigration and Border Protection as of 7 December 2016.
37. This includes, but is not limited to, asylum seekers and refugees. This includes persons in Immigration Detention Centres/ Facilities, Alternative Places of Detention, Immigration Transit Accommodation and Immigration Residential Housing as outlined in DIBP, *Detention Statistics* for December 2016, p 3 (see above n 4)
38. 'Illegal maritime arrivals' make up 415 total, <5 of whom are children (Ibid, p 8)
39. This includes those currently in Australia pursuant to medical transfers who, according to Australian law, must be transferred back to Nauru 'as soon as reasonably practicable' (see s198 Migration Act 1958 (Cth)). Data is based on our consultations along with data cited in the following sources along with information gathered during consultations: Kaldor Centre, 'Transfer Tracker', *UNSW Law*, (available at <http://www.kaldorcentre.unsw.edu.au/publication/transfer-tracker>) (accessed 7 April 2017); Government of Nauru, "Opening Statement: Committee on the Rights of the Child," 13-14 September 2016, para 18 ([http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/NRU/INT\\_CRC\\_STA\\_NRU\\_25175\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/NRU/INT_CRC_STA_NRU_25175_E.pdf)) (accessed 7 April 2017)
40. See Simon Butt, 'The Position of International Law Within the Indonesian Legal System', *Emory International Law Review*, Vol 28 (2014); Abdul Ghafur Hamid, Khin Maung Sein, 'Judicial Application of International Law in Malaysia: An Analysis' (2006), *The Malaysian Bar* ([http://www.malaysianbar.org.my/international\\_law/judicial\\_application\\_of\\_international\\_law\\_in\\_malaysia\\_an\\_analysis.html](http://www.malaysianbar.org.my/international_law/judicial_application_of_international_law_in_malaysia_an_analysis.html)); David Sloss, 'Domestic Application of Treaties, Santa Clara Law Digital Commons, (4-29-2011); Hon Justice Michael Kirby, *The Growing Rapprochement Between International Law and National Law* ([http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirby/kirby\\_weeram.htm](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirby/kirby_weeram.htm)) (accessed 7 April 2017); Pacific Islands Treaty Series, *How Treaties become Law: Legal Systems of the Pacific Island States* (<http://www.paclii.org/pits/en/domestication.shtml>) (accessed 7 April 2017)
41. 'The Government of Malaysia accepts the provisions of the Convention on the Rights of the Child but expresses reservations with respect to articles 2, 7, 14, 28 paragraph 1 (a) and 37, of the Convention and declares that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.' (see [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg\\_no=IV-11&chapter=4&clang=\\_en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-11&chapter=4&clang=_en#EndDec)) (accessed 7 April 2017)
42. 'The application of articles 22 of the Convention on the Rights of the Child shall be subject to the national laws, regulations and prevailing practices in Thailand' (see [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg\\_no=IV-11&chapter=4&clang=\\_en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-11&chapter=4&clang=_en#EndDec)) (accessed 7 April 2017)
43. 'Australia accepts the general principles of article 37. In relation to the second sentence of paragraph (c), the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. Australia, therefore, ratifies the Convention to the extent that it is unable to comply with the obligation imposed by article 37 (c).' (see [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg\\_no=IV-11&chapter=4&clang=\\_en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-11&chapter=4&clang=_en#EndDec)) (accessed 7 April 2017)
44. See for example Human Rights Watch, *Barely Surviving – Detention, Abuse and Neglect of Migrant Children in Indonesia*, June 2013, p 27; DIBP, *Detention Statistics* for December 2016, p 3
45. These standards are outlined by AHRC (and discussed in the Australian context) in AHRC's *Human Rights standards for immigration detention*, 2013
46. See APPRN, AICHR Thailand and International Detention Coalition, *Report on Regional Expert Roundtable on Alternatives to Immigration Detention for Children*, 19th to 20th November 2015; UNHCR, *2014-2019 Beyond Detention – A global strategy to support governments to end the detention of asylum-seeker and refugees*, Aug 2016, p 5; UNHCR, *Beyond Detention Progress Report mid-2016*, August 2016, HRW, above n 44; HRW above n 17; International Detention Coalition, *Captured Childhood*, 2012; International Detention Coalition above n 14, p 5
47. See above n 13
48. Various international organisations have access to detention facilities from time to time including IOM, the International Committee of the Red Cross and UNHCR. However, to our knowledge, none enjoy a formal mandate and related powers of unannounced inspection in relation to facilities in these countries. National human rights commissions, such as SUHAKAM in Malaysia, may have some form of mandate to inspect these facilities but unannounced visits to detention, and related engagements with governments on the findings of such visits, do not appear to be a regular feature of their work.
49. Save the Children Australia and UNICEF, *At What Cost? The Human, Economic and Strategic Cost of Australia's Asylum Seeker Policies and the Alternatives*, September 2016, p 46
50. Ibid, see also Calla Wahlquist, 'Immigration detention cost blowout blamed on procurement failures', *The Guardian Australia*, 13 September 2016 (<https://www.theguardian.com/australia-news/2016/sep/13/immigration-detention-cost-blowout-blamed-on-procurement-failures>) (accessed 20 April 2017)

51. 'For example, during visits to the Christmas Island detention facilities conducted as part of the 2014 National Inquiry, the Commission documented concerns about harsh and cramped living conditions (which had created a particular risk of physical illnesses among children), the lack of safe spaces for babies to learn to crawl or walk and lack of access to education (including preschool education)' (see AHRC above n 23, p 17)
52. AHRC, *The Forgotten Children: National Inquiry into Children in Immigration Detention*, November 2014. We note that in Australia, the AHRC has a mandate to inspect places of detention in Australian territories, but this does not extend to places of detention run by the Australian government in other jurisdictions such as Nauru and PNG.
53. Child Protection Panel (CPP), *Making children safer: The wellbeing and protection of children in immigration detention and regional processing centres*, May 2016, p 16
54. AHRC above n 52 p 132, 147. The Report found that for large portions of 2013 there was little schooling available for any children being detained on Christmas Island.
55. See Save the Children Australia and UNICEF above n 49 and AHRC above n 52.
56. See Save the Children Australia and UNICEF above n 49 p 26
57. Ibid
58. AHRC above n 52 p 56. See also Elizabeth Elliott, Hasantha Gunasekera, *The health and well-being of children in immigration detention: Report to the Australian Human Rights Commission Monitoring Visit to Wickham Point Detention Centre, Darwin, NT: October 16th-18th 2015*, p 9, 112. The average duration of detention on Nauru for children interviewed in this study was 10 months, and time spent in detention at Wickham Point was 9 months. Majority of the children interviewed had spent several months on Nauru before being transferred to detention centres on the Australian mainland.
59. See AHRC above n 52, p 36-37
60. See AHRC above n 52, p 33 for discussion of 'constructive refolement' in the Australian/Nauru context.
61. '[R]ecent studies have indicated that detention of children can undermine their psychological and physical well-being and compromise their cognitive development. Furthermore, children held in detention are at risk of suffering depression and anxiety, and frequently exhibit symptoms consistent with post-traumatic stress disorder such as insomnia, nightmares and bedwetting. There is indeed strong evidence that detention has a profound and negative impact on children's health and development, regardless of the conditions in which children are held, and even when detained for short periods of time or with their families. The risk of exposure to others [sic] forms of harm, including sexual and gender-based violence, are also significant in many detention contexts' (See UNHCR above n 2, p 2 )
62. 'Despite the best efforts of the Department of Immigration and Border Protection and its contractors to provide services and support to children in detention, it is the fact of detention itself that is causing harm', AHRC above n 52, p 29-30
63. See for example AHRC above n 23; HRW above n 44 p 32-42; HRW above n 17, p 28-40; International Detention Coalition above n 48; United Nations General Assembly, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, A/HRC/23/41, 15 May 2013*, para 36
64. See above n 23, p 21
65. Paul Farrell, "'I want death': Nauru files chronicle despair of asylum seeker children", 10 August 2016, *The Guardian*, (available at <https://www.theguardian.com/news/2016/aug/10/i-want-death-nauru-files-chronicle-despair-of-asylum-seeker-children>) (accessed 7 April 2017)
66. Save the Children Australia and UNICEF above n 49, p 27
67. *Ibid* p 22-28; AHRC above n 52; Elliot and Gunasekera above n 58 p 9-12
68. AHRC above n 52 p 195; American Immigration Council, *Divided by Detention: Asylum-Seeking Families' Experiences of Separation*, August 2016; Bail for Immigration Detainees, *Fractured Childhoods: The separation of families by immigration detention* (April 2013)
69. HRW, above n 17, p 17; HRW above n 44 p 67; Refugee International, *Malaysia: Rohingya refugees hope for little and get less*, 2015, p 10-12
70. Refugee Council of Australia, *State of the Nation*, February 2017, p 7
71. International Detention Coalition above n 14, p II
72. Ibid
73. See Save the Children and UNICEF above n 49, p 43. These findings were supported by data subsequently released by Australia's National Audit Committee which showed that at some points in time, offshore detention had cost more than AUD464,000 per person per year (after excluding capital expenditure (see above n 50)
74. Save the Children and UNICEF, *ibid*.
75. International Detention Coalition, above n 14, p 11
76. Ibid
77. *Ibid*, p 1 and 11-12
78. *Ibid*, p III.
79. Based on data provided by UNHCR Regional Office in Thailand and UNHCR, *Thailand Factsheet*, August 2016
80. Based on data provided by UNHCR Regional Office in Thailand
81. UNHCR Thailand <http://unhcr.madappe.com/en/who/thailand> (accessed 7 April 2017)
82. As at 31 December 2016 (Source: UNHCR Regional Office in Thailand)
83. UNHCR, *Thailand Factsheet*, August 2016.
84. Based on data provided by UNHCR Regional Office in Thailand
85. We understand that this assessment is typically made by the Thai Immigration Bureau, sometimes in consultation with the Ministry of Social Development and Human Services. Those in government shelters include several hundred refugees and asylum seekers (typically Rohingya women and children) identified by government officials as 'victims of human trafficking' (a term very broadly defined by Thai law. Under section 29 of the 2008 Anti-Trafficking in Persons Act, if the arresting official identifies an adult or a child as a victim of trafficking, they may refer that person to a government shelter instead of sending them to detention. There are no such exemptions for migrant children who are not victims of trafficking. Adult males do not appear to be recognised within the group of particularly vulnerable individuals and, if arrested, are detained in IDCs unless specifically identified as a 'victim of trafficking', in which case they will be transferred to a Department of Anti-Trafficking (DAT) shelter for men. Occasionally families who are victims of trafficking are

able to access a place in Thailand's only government shelter for undocumented migrant families in Phatum Thani. This shelter specifically caters for family groups and allows them to reside together in apartment-type accommodation.

86. Restrictions on movement in government shelters are typically explained by Thai government as necessary in order to protect vulnerable individuals from the risk of being re-trafficked, though there have been some recent relaxing of these rules to enable children to attend school in one DAT shelter in Surat Thani. This shelter also allows women to access occupational training inside shelter and sell products at a small stall in order to make a modest income.
87. See Immigration Act, B.E. 2522; APRRN, Asylum Access, HRDF, Peoples Empowerment, JRS, Fortify Rights, Migrant Working Group, *Kingdom of Thailand Universal Periodic Review – 2nd Cycle*, Sept 2015, p 1
88. UNHCR Thailand (<http://unhcr.madappe.com/en/who/thailand>) (accessed 7 April 2017)
89. UNHCR, *Beyond Detention Progress Report Mid-2016*, August 2017, p 71
90. See APRRN et al, above n 87
91. Thailand consultations
92. See Asylum Access, APRRN, CRSP and Centre for Asylum Protection, *Report on the Implementation of the International Covenant on Civil and Political Rights with Regard to the Rights of Refugees and Asylum Seekers in Thailand*, 5 February 2017, para 12-16; UN Human Rights Committee UN ICCPR, *List of issues in relation to the second periodic report of Thailand Addendum Replies of Thailand to the list of issues*, Nov 2016, (CCPR/C/THA/Q/2/Add.1), p 17; APRRN et al above n 87 p 6
93. Thailand consultations
94. APRRN above n 87, p 1
95. Thailand consultations
96. See above n 85 and 86
97. APRRN et al, above n 87, p 1, 4
98. Thailand consultations
99. Thailand consultations
100. APRRN et al, above n 87, p 3-4
101. Section 10, National Education Act and July 2005 Cabinet Resolution on Education for Unregisterd Persons; Asylum Access et al., *Kingdom of Thailand Universal Periodic Review – 2nd Cycle*, Sept 2015, p 8
102. HRW above n 17, p 13
103. Save the Children, *The Journey of Refugee and Asylum-Seeking Children Across the Andaman Sea*, 2016 p 20
104. above n 87, p 8
105. HRW above n 17
106. Ibid, p 19 and 21
107. See article 22 Child Protection Act 2003 (Thailand)
108. Under s 73 and 74 of the Thai Penal Code, the age of criminal responsibility is 15,. For those aged 15 to 18, the Court may exercise discretion in relation to sentencing.
109. The amount of the fine is reportedly at a rate of 500 Bhat (roughly USD 15) per person for each day of imprisonment that would otherwise be served
110. We received reports of imprisonment for up to 120 days but it is not clear whether such instances involved other offences (for example, offenses relating to illegal work).
111. See Human Rights Committee, *List of issues in relation to the second periodic report of Thailand: Addendum: Replies of Thailand to the list of issues* (CCPR/C/THA/Q/2/Add.1) 15 November 2016, para 134.
112. Ibid
113. UN Human Rights Committee, *List of issues in relation to the second periodic report of Thailand* (CCPR/C/THA/Q/2), August 2016, para 25; HRW above n 17; CRSP, *Thailand ATD Report* (2017) Undated English translation)
114. n 111, p 18
115. Ibid
116. Ibid
117. The family shelter at Surat Thani appears to be an exception to this practice (see above n 86)
118. See above n 111, p 4
119. See section 19, Immigration Law
120. See above n 111, para 130
121. See HRW above n 17
122. See Asylum Access, Asia Pacific Refugee Rights Network, CRSP and CAP, *Report on the Implementation of the International Covenant on Civil and Political Rights with Regard to the Rights of Refugees and Asylum Seekers in Thailand* (5 February 2017), para 39
123. Ministry of Foreign Affairs of the Kingdom of Thailand, *Press Releases: Thailand pledged additional assistance to alleviate the plights of displaced persons*, 20 September 2016 (<http://www.mfa.go.th/main/en/media-center/14/70440-Thailand-pledged-additional-assistance-to-alleviat.html>) (accessed 7 April 2017)
124. See above n 111, paras 121, 128, 130, 132.
125. Unofficial English translation of ' Cabinet Resolution on 10 January 2017 regarding an important law that should be prioritised for revision or re-drafting (The Draft Immigration Act)
126. UNHCR, *UNHCR welcomes Thai Cabinet approval of framework for refugee screening mechanism*, 16 January 2017 (<http://reliefweb.int/report/thailand/unhcr-welcomes-thai-cabinet-approval-framework-refugee-screening-mechanism>) (accessed 7 April 2017)
127. See Human Rights Committee, *Human Rights Committee considers the report of Thailand*, 14 March 2017 (<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21377&LangID=E>) (accessed 7 April 2017)
128. On 30 November 2016 the Chiang Rai Juvenile and Family Court ruled in favour of the right of child protection for Somali refugee child by using special measure under the Juvenile and Family Court and Juvenile and Family Case Procedure Act B.E. 2553 and providing restorative justice plan to the child. The decision marked the first time that a child recognised as refugee by UNHCR has been reconised as entitled to protections under the section 132 of the Juvenile and Family Court and Juvenile and Family Case Procedure Act B (see above n 122, para 44)

129. Information provided by UNHCR Thailand
130. 'In Thailand, UNHCR presented a series of research papers to the Royal Thai Government on the existing provisions in Thai law which permit non-detention, including non-detention of children' (UNHCR, above n 46, p 21). We understand that UNHCR outlined many of these options in two private reports to the Government of Thailand in 2014 and 2015. See also CRSP above n 113.
131. Thailand consultations
132. We understand from our consultations that under Thailand's Anti-Trafficking Law, victims have the right to work while in Thailand and that accordingly the Interior Minister provides them with a temporary residence card which allows them to work. This does not apply to some asylum seekers and refugee women and children referred to Department of Anti-Trafficking shelters whom who are not strictly classified as 'victims of trafficking'.
133. See above n 111, para 134.
134. Migrant Working Group, *Recommendations for the National Human Rights Action Plan: Thrust 3: Vulnerable Populations (with focus on Refugees)*, 5 October 2016, p 2.
135. Based on *ibid* and Malaysia consultations.
136. UNHCR Malaysia, *Figures At A Glance* [https://www.unhcr.org/my/About\\_Us-@-Figures\\_At\\_A\\_Glance.aspx](https://www.unhcr.org/my/About_Us-@-Figures_At_A_Glance.aspx) (accessed 7 April 2017)
137. See UNHCR, *Malaysia: Progress Under the Global Detention Strategy Beyond Detention 2014-2019*, (mid 2016), p 2 as supplemented by figures for 2016 up to 9 November 2016 provided by UNHCR Malaysia.
138. Data supplied by UNHCR Regional Office in Thailand
139. See Humanitarian Policy Group, *Livelihood strategies of Rohingya refugees in Malaysia* "We want to live in dignity" (June 2016)
140. UNHCR, *Refugees in Malaysia Factsheet*, November 2016.
141. UNHCR Malaysia, *UNHCR in Malaysia* ([https://www.unhcr.org/my/About\\_Us-@-UNHCR\\_in\\_Malaysia.aspx](https://www.unhcr.org/my/About_Us-@-UNHCR_in_Malaysia.aspx)) (accessed 7 April 2017)
142. UNHCR above n 46, p 59
143. See above n 139, p 7
144. UNHCR, above n 46 p 59
145. See for example Hariati Azizan, 'Responding to Refugees', *The Star Online*, 25 December 2016 (<http://www.thestar.com.my/news/nation/2016/12/25/responding-to-refugees-malaysia-is-not-only-well-placed-to-take-a-leadership-role-in-resolving-the-ro/>); 'Malaysia to accept 3000 Syrian refugees: PM Najib', *Channel News Asia*, 2 October 2015 (<http://www.channelnewsasia.com/news/world/malaysia-to-accept-3-000/2165028.html>); Sumisha Naidu, 'Malaysia welcomes first group of Syrian asylum seekers', *Channel News Asia*, 8 December 2015, (<http://www.channelnewsasia.com/news/asiapacific/malaysia-welcomes-first/2330092.html>)
146. Malaysia consultations
147. UNHCR, above n 46, p 61
148. Child Rights Coalition Malaysia, *Report for the Universal Periodic Review*, (2013) p 6
149. UNHCR Malaysia, *Information on UNHCR Protection in Malaysia (undated)*; UNHCR, *Malaysia Health Factsheet* (December 2016)
150. UNHCR Malaysia, *Information on UNHCR Protection in Malaysia (no date)*; UNHCR, *Malaysia Health Factsheet* (December 2016)); see also above n 148, p 8
151. See UNHCR Malaysia, *Livelihoods Factsheet* (November 2016); UNHCR Malaysia, *Information on UNHCR Protection in Malaysia* (no date)
152. See UNHCR Malaysia, *Education Factsheet* (December 2016)
153. See UNHCR Malaysia, *Livelihoods Factsheet* (November 2016)
154. Malaysia consultations. See also UNHCR, *Malaysia Health Factsheet* (December 2016).
155. Kate Mayberry, 'Born and jailed in Malaysia: A refugee's fear', *Aljazeera*, 20 November 2014 (<http://www.aljazeera.com/indepth/features/2014/11/born-jailed-malaysia-refugee-fear-201411199338940852.html>)
156. UNHCR, *Malaysia Health Factsheet* (December 2016)
157. The 'under consideration' letter offers a reduced level of protection when compared with the UNHCR identity card. If arrested, asylum seekers and refugees will generally be detained on remand for a maximum of 14 days, unless extended by a court. During this time, if informed of the arrest, UNHCR will typically intervene, to verify the status of the detainee and request that they be released without prosecution
158. See JRS Asia Pacific, *The Search: Protection Space In Malaysia, Thailand, Indonesia, Cambodia and The Philippines*, 2012; International Rescue Committee, *In Search of Survival and Sanctuary in the City: Kuala Lumpur Malaysia*, p 58-60; HPG above n 139, p 15
159. UNHCR Malaysia, *External Partner Referral Network: Referral Prioritization and Vulnerability Guide*, February 2017
160. See above n 111, p 60
161. UNHCR, *Introduction to the New UNHCR Refugee Card and 'UNHCR Verify-MY' Mobile Application*.
162. UNHCR, above n 111, p 60
163. An exception to the overall trend was seen in 2015 when the numbers of children detained was somewhat higher than in 2014, which was reportedly a consequence of the number of children who entered Malaysian detention centres in the aftermath of the 2015 Andaman Sea crisis.
164. UNHCR, above n 111, p 62
165. Information from UNHCR Malaysia
166. Malaysia consultations
167. See above n 13; Dr Ong Kian Ming, *1918 children currently being detained at detention centers for immigrants must be treated properly*, 21 of October 2015 <http://ongkianming.com/2015/10/21/press-statement-1918-children-currently-being-detained-at-detention-centers-for-immigrants-must-be-treated-properly/> (accessed 7 April 2017)
168. See above n 13
169. See above n 13
170. UNHCR, above n 111, p 62
171. Whipping, which is permissible under the Immigration Act, is court-ordered and may take place where older boys are mistaken for adult men. This practice has been documented by Amnesty (see Amnesty International, *A Blow to Humanity: Torture by Judicial Caning in Malaysia*, 2010 ([http://www.univie.ac.at/bimtor/dateien/malaysia\\_ai\\_2010\\_blow\\_to\\_humanity.pdf](http://www.univie.ac.at/bimtor/dateien/malaysia_ai_2010_blow_to_humanity.pdf)))
172. Including, for example, Malaysia's Prisons Act 1995, Prisons Regulations 2000 and Immigration Regulations 2003

173. Malaysia consultations
174. UNHCR, above n 111, p 62.
175. UNHCR, above n 111, p 61
176. See UNHCR, above n 111, p22;APRRN et al above n 46, p 4
177. Caitlin Wake, 'Turning a blind eye':The policy response to Rohingya refugees in Malaysia, Humanitarian Policy Group Working Paper, November 2016, p 15; Prem Kumar, 'Malaysia begins pilot job project for Rohingya refugees', AA,14 November 2016 (<http://aa.com.tr/en/asia-pacific/malaysia-begins-pilot-job-project-for-rohingya-refugees/685382>) (accessed 7 April 2017)
178. Malaysian consultations
179. Malaysia consultation and news articles (see Alyaa Alhadjri, 'Detained Rohingya teen's bail bid delayed as DPP not ready', *Malaysiakini*, 16 March 2017 (<http://www.malaysiakini.com/news/375903>) (accessed 7 April 2017)
180. UNHCR, above n 111, p 60
181. Data as of 31 January 2017, provided by UNHCR Regional Office in Thailand
182. Ibid and UNHCR, *Indonesia Factsheet*, February 2016, p 1
183. Many of these refugees were held in a refugee camp on Galang Island, Indonesia
184. See article 28G 1945 Constitution of the Republic of Indonesia; Article 28(1) of Indonesia's Law No 39 of 1999 on Human Rights also provides that: '[e]veryone has the right to seek and receive political asylum from another country' (Law of the Republic of Indonesia No 39 of 1999 on Human Rights)
185. UNHCR Indonesia, *What We Do* (<http://www.unhcr.or.id/en/what-we-do/refugee-status-determination>)
186. See Article 83, *Law of the Republic of Indonesia No 6 of 2011 on Immigration*
187. Ibid
188. Ibid, article 85 (2) We understand that an administrative appeal mechanism exists under article 77 but there are no reports of this provision being used by asylum seekers or refugees to challenge their detention. This may be due to (a) lack of knowledge, (b) lack of precedent and (c) the precariousness of asylum seekers/refugees stay in Indonesia (and an unwillingness to jeopardise that stay).
189. See Directive from the Director General of Immigration No. F-IL.01.10-1297 on Procedures Regarding Aliens Expressing their Desire to Seek Asylum or Refugee Status (unofficial English translation available at: <http://www.unhcr.org/50a5117b9.pdf>); National Legislative Bodies/National Authorities, Indonesia: Regulation of the Director General of Immigration No IMI.1489.UM.08.05 Year 2010 Regarding Handling of Irregular Migrants, 17 September 2010 (available at <http://www.refworld.org/docid/3ed8eb5d4.html>); Immigration Letter on the Placement and Immigration Supervision on Illegal Immigrants (10 March 2015) (unofficial English translation); Director General of Immigration Regulation No. IMI-0352.GR.02.07 of 2016 on the Handling of Illegal Migrant who Declares to be Asylum Seekers or Refugee replacing No. 1489.UM.08.05 of 2010 on Handling of Irregular Migrants
190. Ibid and Indonesia consultations
191. *Indonesia: Regulation of the President of the Republic of Indonesia No. 125 Year 2016 Concerning the Handling of Foreign Refugees*, 31 December 2016 (unofficial English translation reviewed)
192. See above n 103, footnote 65
193. 'Eighty Thousand entry Points: An Interview with Antje Missbach', *Journal of International Affairs*, Spring/Summer 2015, Vol. 68, No. 2, p 1
194. See above n 18
195. Consultations with UNHCR Indonesia
196. The IOM provides community housing, and refugees and those asylum seekers in IOM community housing receive an allowance of 1,250,000 rupiah per month (roughly USD 100)
197. Above n 103, p 17
198. See UNHCR statistics cited in Komisi Nasional Hak Asasi Manusia, *Draf Ringkasan Laporan Kajian Dan Penelitian*, (2016) p106
199. Indonesia consultations. See also UNHCR, *Indonesia Fact Sheet* (February 2016)
200. Commonwealth of Australia, *Budget 2016-17: Immigration and Border Protection Portfolio* (<https://www.border.gov.au/ReportsandPublications/Documents/budget/2016-17-pbs-full.pdf>) p 17; Refugee Council of Australia, *International Organization for Migration (IOM)* <http://www.refugeecouncil.org.au/getfacts/international/internationalsystem/iom/> (accessed 7 April 2017)
201. UNHCR, *Indonesia Fact Sheet*, (February 2016)
202. Ibid
203. We were informed that foreigners must work in Indonesia for 6 months before they can assess this public health insurance scheme.
204. Indonesia consultations
205. Indonesia consultations
206. Above n 103, p 17
207. See Global Detention Project, *Indonesia Immigration Detention Profile* (January 2016) (<https://www.globaldetentionproject.org/wp-content/uploads/2016/06/indonesia.pdf>) (accessed 7 April 2017)
208. See HRW, above n 44, p 27
209. Ibid p 39, 59-61
210. See UNHCR, *Indonesia Fact Sheet* (February 2016). We understand from our consultations that as many as one-half of those currently detained may have self-reported to detention.
211. Indonesia consultations; HRW, above n 44, p 28
212. See HRW, above n 44
213. There are a number of possible interpretations of the role of IDCs in the Regulation. The Regulation indicates that refugees rescued from the sea or found on the land must be referred to IDC (article 9(1)(d) and article 19), but it is not clear whether this means that refugees must thereafter be held in the custody of the IDC. Based on the article 24(1), the referral suggested in article 9(d) and 19 could be interpreted as 'case referral' instead of 'physical hand-over' or detention. Article 24(1) provides that IDC will coordinate with local government to escort and to place refugee from where they are found to the shelters or temporary accommodation (article 24(1) and (2))
214. See above n 191. Article 25(d) refers to a process for the 'recording of refugees temporarily leaving the shelter' and article 25(g) which refers to the '[i]ssuance of special identity cards for refugees by the Immigration Detention Centres'.
215. Ibid. See article 26
216. Ibid
217. Article 32 sets out three principle objectives for safeguarding



- activities, namely: (i) 'to ensure that refugees shall remain at the shelter'; (ii) 'to create a sense of security for the community surrounding the holding facility'; and 'to establish and disseminate rules of conduct' for refugees to comply with.
218. *Ibid*, article 27(4)
219. *Ibid*, article 28(1)
220. UNHCR, above n 46, p 48
221. Indonesia consultations
222. Indonesia consultations
223. This is an assumption based upon data in relation to the main countries of origin and ethnicity of asylum seekers in Indonesia.
224. See for example Tammara Soma, 'Indonesians must speak up against persecution of Ahmadi to protect unity', *The Jakarta Post*, February 14th 2016.
225. See Division 6, *Migration Act 1958* (Cth)
226. We note that there are many concerns amongst refugee communities and advocates in relation to these visas and the processes for obtaining them. See above n 23 and above n 70.
227. See for example Natalie Klein, 'Assessing Australia's push back the boats policy under international law: Legality and accountability for maritime interceptions of irregular migrants', [2014] *Melbourne Journal of International Law* 14; See AHRC, *Children in immigration detention: statements by the United Nations*, (available at <https://www.humanrights.gov.au/sites/default/files/document/publication/Children%20in%20immigration%20detention%20statements%20by%20UN.pdf>); Madeline Gleeson, 'Offshore processing: Australia's responsibility for asylum seekers and refugees in Nauru and Papua New Guinea', 8 April 2015, *Kaldor Centre, UNSW*, (available at <http://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-australia-s-responsibility-asylum-seekers-and-refugees-nauru-and#obligations>)
228. Janet Phillips and Harriet Spinks, 'Immigration Detention in Australia', 20 March 2013, *Australian Parliamentary Library* (available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=id%3A%22library%2Fprspub%2F1311498%22>)
229. *Ibid*
230. See section 198AD(2), *Migration Act 1958* (Cth)
231. See AHRC above n 23, p 14.
232. See for example "Darwin immigration detention centre closes due to 'success in stopping boats'", *ABC News*, 21 February 2015 (<http://www.abc.net.au/news/2015-02-21/blaydin-point-immigration-centre-closes/6174730>) (accessed 7 April 2017)
233. See above n 35
234. See *Ibid*; above n 23; Refugee Council of Australia, *Legacy Caseload*, (<http://www.refugeecouncil.org.au/wp-content/uploads/2015/02/1502-Legacy-Caseload.pdf>) (accessed 7 April 2017)
235. DIBP, IMA Legacy Caseload: Report on Status and Processing Outcomes (December 2016), p 3
236. See Dan Harrison, 'Children moved from Manus Island detention', 20 June 2013, *The Sydney Morning Herald* (<http://www.smh.com.au/national/children-moved-from-manus-island-detention-20130620-2olz5.html>) (accessed 7 April 2017)
237. Section 4AA(1) *Migration Act 1958* (Cth). See also above n 23, p 15
238. Above n 23, p 17.
239. *Ibid*, p 56.
240. See *Immigration (Guardianship of Children) Act 1946* (Cth)
241. See above n 23, p 16.
242. *Ibid*, p 21 (citations omitted)
243. See above n 49, p 55 and above n 23 p 11-12
244. See above n 70, p 6
245. See Malcolm Turnbull MP and Peter Dutton MP, *Media Release: Operation Sovereign Borders: no successful people smuggling boats in two years*, 27 July 2016 (available at [http://www.minister.border.gov.au/peterdutton/2016/Pages/Operation\\_Sovereign\\_Borders\\_no\\_successful\\_people\\_smuggling\\_boats\\_in\\_two\\_years.aspx](http://www.minister.border.gov.au/peterdutton/2016/Pages/Operation_Sovereign_Borders_no_successful_people_smuggling_boats_in_two_years.aspx)) (accessed 7 April 2017)
246. See Australian Labor Party, *A humane and Compassionate Approach to Asylum Seekers* (<http://www.alp.org.au/asylumseekers>) (accessed 7 April 2017)
247. See DIBP, *Detention Statistics for December 2016*, p 8; DIBP, *Annual Report 2015-2016*, 2016 p 8, 44
248. See DIBP, *Detention Statistics for December 2016*
249. See above n 53, p 7
250. See above n 70, p 10
251. See section 197AB *Migration Act 1958* (Cth)
252. See above n 70 and above n 23
253. AHRC, *Community arrangements for asylum seekers, refugees and stateless persons, 2012*
254. Alice Workman, 'Victoria Now Has The Power To Remove Children From Immigration Detention', *BuzzFeedNews*, 20 February 2017 ([https://www.buzzfeed.com/aliceworkman/kids-in-detention?utm\\_term=.gd753RO0EY#.epG5dzGBvV](https://www.buzzfeed.com/aliceworkman/kids-in-detention?utm_term=.gd753RO0EY#.epG5dzGBvV)) (accessed 7 April 2017)
255. See above n 23 p 15-16; DIBP *Child Safeguarding*, (<https://www.border.gov.au/about/reports-publications/reports/corporate/child-safeguarding>) (accessed 7 April 2017)
256. See *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 (2012 MOU) (available at [https://www.humanrights.gov.au/sites/default/files/Docs%20tabled%20with%20Instrument%20of%20Designation.Nauru\\_.pdf](https://www.humanrights.gov.au/sites/default/files/Docs%20tabled%20with%20Instrument%20of%20Designation.Nauru_.pdf)). This was subsequently replaced by another MOU signed on 3 August 2013 (2013 MOU) (available at <http://dfat.gov.au/geo/nauru/Documents/nauru-mou-20130803.pdf>)
257. See clause 6, 2012 MOU and clause 6, 2013 MOU
258. See clause 11, 2012 MOU and clause 15, 2013 MOU
259. Kirsty Needham, 'Nauru signs UN refugee convention', *The Sydney Morning Herald*, 17 June 17 2011 (<http://www.smh.com.au/national/nauru-signs-un-refugee-convention-20110617-1g830.html>) (accessed 7 April 2017)
260. Government of the Republic of Nauru, *Nauru welcomes US refugee resettlement*, (<http://www.naurugov.nr/government-information-office/media-release/nauru-welcomes-us-refugee-resettlement.aspx>) (accessed 7 April 2017)
261. *Ibid*
262. Stephanie Anderson, 'Immigration detention times on Nauru and Manus Island blow out to 450-day average under Liberals',

- 13 January 2016, *ABC News*, (available at <http://www.abc.net.au/news/2016-01-13/immigration-detention-times-blow-out-to-almost-450-days/7085264>) (accessed 7 April 2017)
263. See *Asylum Seekers (Regional Processing Centre) Act 2012* (Nauru), s 15.
264. See Kaldor Centre, 'Transfer Tracker', *UNSW Law*, (available at <http://www.kaldorcentre.unsw.edu.au/publication/transfer-tracker>) (accessed 7 April 2017); above n 52, p 185
265. See Government of Nauru, "Opening Statement: Committee on the Rights of the Child," 13-14 September 2016, para 16.
266. DIBP, *Detention Statistics for January 2017*, p 4
267. Estimate based on consultations and publicly available reports including sources referenced at above n 264; n 56; Kara Vickery, 'Peter Dutton pledges to be tough on people smugglers regardless of what High Court decides on Nauru,' 3 February 2016, *News.com.au* (<http://www.news.com.au/national/politics/peter-dutton-pledges-to-be-tough-on-people-smugglers-regardless-of-what-high-court-decides-on-nauru/news-story/dccbfd4d2ed3bdc11908cb6684bbb42>); Michael Gordon, 'Peter Dutton vows children released from detention are still bound for Nauru', 4 April 2016, *The Sydney Morning Herald* (<http://www.smh.com.au/federal-politics/political-news/peter-dutton-vows-children-released-from-detention-are-still-bound-for-nauru-20160404-gnxkklk.html>)
268. See above n 49
269. See for example Philip Moss, *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, Final Report*, 6 February 2015; Final Report of the Senate Select Committee on the Recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru *Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru*, 31 August 2015
270. The Government of the Republic of Nauru, *No more detention for Nauru asylum seekers* (<http://www.naurugov.nr/government-information-office/media-release/no-more-detention-for-nauru-asylum-seekers.aspx>) (accessed 7 April 2017)
271. See Amnesty International, *Island of Despair: Australia's "Processing" of Refugees on Nauru* (2016), p 23: 'Unlike Nauruan citizens, asylum-seekers and refugees cannot leave the island. Recognized refugees have tried – and failed – to do so. Amnesty International has seen the identification documents issued by the Government of Nauru to refugees: the person's nationality is indicated as "refugee." Several refugees told researchers that they had tried to leave the island with their Nauruan documents – to Canada, Fiji, and New Zealand, but none of these countries would issue visas to them. It is not always clear why these people were denied visas, but one Iranian couple reported that one reason was the fact that their nationality was listed as "refugee." A wife and husband said that they applied to more than 30 countries for visas; eventually a Canadian religious organization agreed to sponsor them, but when they sent copies of their Nauruan-issued documents, the organization responded that they "belonged to Australian authority.' (citations omitted)
272. See section 70
273. 'Asylum seeker deal: US officials arrive in Australia to assess refugees for resettlement', *ABC News*, 19 November 2016 (<http://www.abc.net.au/news/2016-11-19/us-officials-arrive-in-australia-to-assess-asylum-seekers/8040100>) (accessed 7 April 2017)
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275. Executive order targets those from Iran, Libya, Somalia, Sudan, Syria and Yemen (see *ibid*)
276. See above n 274
277. Stephanie Anderson, Francis Keany, Eric Tlozek, Mandie Sami, 'Malcolm Turnbull, Peter Dutton announce refugee resettlement deal with US', *ABC News*, 13 November 2016 (<http://www.abc.net.au/news/2016-11-13/australia-announces-refugee-resettlement-deal-with-us/8021120>) (accessed 7 April 2017)
278. See above n 14, p VI
279. See above n 2, p 1. See also: UNHCR, *Options paper 1: Options for governments on care arrangements and alternatives to detention for children and families*. Geneva: (2015); UNHCR and UNICEF, *Safe & sound: What states can do to ensure respect for the best interests of unaccompanied and separated children in Europe* (2014); International Detention Coalition, above n 46
280. See above n 2, p 3: The UNHCR expressed its agreement with the position that 'when the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents, and requires the authorities to choose alternative measures to detention for the entire family.'
281. See article 7 and 9, Convention on the Rights of the Child
282. See above n 2, p 1
283. See above n 14, p V and 23
284. See *ibid*, p 22
285. See UNHCR and International Detention Coalition, *Vulnerability Screening Tool: Identifying and addressing vulnerability - a tool for asylum and migration systems* (2016)
286. See above n 14, p 23
287. See *ibid* p 47-51
288. See UNHCR, *Child protection issue brief: Alternative care* (2014)
289. See Defence for Children International *Practical guide: Monitoring places where children are deprived of liberty* (2016); see also above n 285
290. See above n 14, p II.
291. 291 UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, p 9
292. UNHCR, *Global Trends Forced Displacement in 2015*, 2015, p 54
293. See article 33, Refugee Convention
294. See article 1, Refugee Convention
295. UNHCR *Options for governments on care arrangements and alternatives to detention for children and families*, 2015, p 1
296. UNHCR *Options for governments on care arrangements and alternatives to detention for children and families*, 2015, p 1



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