AustralianChurches
RefugeeTaskforce

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National Council of
Churches in Australia

Protecting the Lonely Children

Recommendations to the Australian Government and the UN Committee on the Rights of the Child with respect to unaccompanied children who seek asylum and refuge in Australia

JULY 2014

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The Taskforce and Unaccompanied Children

The Australian Churches Refugee Taskforce is an initiative of the National Council of Churches in Australia. The Taskforce formally commenced work in April 2013 and currently has 498 member entities. The Board is comprised of 21 senior members of churches and church agencies, representing nine Christian churches and three ecumenical bodies from across Australia.

A key concern and focus of the Taskforce is the welfare of refugee and asylum-seeking children. This paper canvasses the significant existing and emerging concerns regarding the guardianship of these children[1].

In October 2013 the Taskforce released the discussion paper, *All the Lonely Children: Questions for the Incoming Government Regarding Guardianship of Unaccompanied Minors* and circulated this to all Members and Senators of the Federal Parliament of Australia.

The Taskforce also sought comment and welcomed written responses from both the **Minister for Immigration and Border Protection, the Hon Scott Morrison MP,** and the **Shadow Minister, the Hon. Richard Marles MP.** Their full responses can be found at Appendixes A & B.

This is the final report, but not the final chapter in this unconscionable story.

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1 Children who have been accepted as refugees and are without family are generally supported as part of the Unaccompanied Humanitarian Minors program, referred to as UHMs, whereas children seeking asylum whose status has yet to be determined are supported through the separate Unaccompanied Minors program, often referred to as UAMs. In this paper we generally use the term "unaccompanied children" in reference to both, unless otherwise specified.

LIST OF ACRONYMS USED IN THIS REPORT:

AHRC:	Australian Human Rights Commission
ALHR:	Australian Lawyers for Human Rights
AMA:	Australian Medical Association
APOD:	Alternative Place of Detention
CRC:	Convention on the Rights of the Child
DIBP:	Department of Immigration and Border Protection
EU:	European Union
HRW:	Human Rights Watch
IAAAS:	Immigration Advice and Application Assistance Scheme
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
IGOC Act:	Immigration (Guardianship of Children) Act 1946
IHAG:	Immigration Health Advisory Group
IHMS:	International Health and Medical Services
NGOs:	Non Government Organisations
MOU:	Memorandum of Understanding
OECD:	Organisation for Economic Co-operation and Development
OPC:	Offshore Processing Centre
PTSD:	Post Traumatic Stress Disorder
PNG:	Papua New Guinea
RACP:	Royal Australian College of Physicians
RANZCP:	Royal Australian and New Zealand College of Psychiatrists
RPC:	Regional Processing Centre
TPV:	Temporary Protection Visa
UAMs:	Unaccompanied Minors
UASC:	Unaccompanied and Separated Children
UHM:	Unaccompanied Humanitarian Minors
UN:	United Nations
UNHCR:	United Nations High Commissioner for Refugees
UNICEF:	United Nations Children's Fund (formerly the United Nations International Children's Emergency Fund)
UNSW:	University of New South Wales

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Foreword

CHAIR OF THE TASKFORCE The Very Rev'd **Dr Peter Catt**

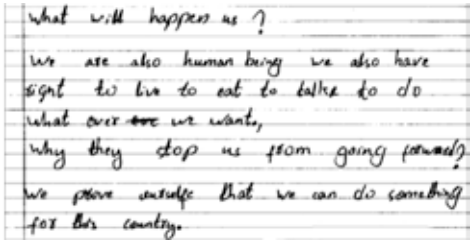
Unaccompanied children are some of the most vulnerable in our society and throughout the world; they have been forced, separated or orphaned from their families through reasons of violence, fear and persecution.

Yet many Australians would not be aware of their predicament; with no-one to advocate for their needs, their stories are rarely heard. The Taskforce has found that the current system of guardianship and care of unaccompanied children is failing on many fronts. It is convoluted, inequitable, grievously lacking in transparency and accountability and it is a system which can be cruel.

Unaccompanied children are receiving vastly different treatment and care, depending on a multitude of factors; how they arrived; the 'stream' through which they are 'processed'; the timing of their arrival; the competency of the various bureaucrats assessing their age or conducting interviews (often while no independent advocate is present such as during enhanced screening, at Christmas Island and certainly during these latest 'on-water transfers' for example); the quality of the detention they're locked up in; and the outcome of the 'care lotto' should they be fortunate enough to get that far.

Shamefully too for Australia, some have been sent to detention camps offshore, and uncounted others have been forced back to the homelands from where they have fled persecution, before even being given a fair chance to tell their story and have their claim for asylum justly processed.

A recent letter written by an unaccompanied child *AR,* was forwarded to the Taskforce (below). This and other letters, and stories heard first hand, contain the cries of these largely voiceless and hidden unaccompanied children: **"What will happen to us?"**



"What will happen to us? We are also human beings, we also have to fight to live to eat to do whatever we want. Why do they stop us from going forwards? We prove ourself that we can do something for this country."

For now, many that arrived as asylum seekers live in an excruciating limbo – that is at once both deeply real and existential – and that threatens great and lifelong harm to their physical, mental, and spiritual wellbeing. Many more of these children are given only temporary respite and safety. They are not accepted here, nor can they be reunited with family. To be returned home may mean torture or even death.

The Australian Catholic Bishops recently stated that asylum seeker policy "has about it a cruelty that does no honour to our nation." The Australian Anglican Primate, Dr Phillip Aspinall said "Putting children behind razor wire is never a loving response to people in need. That breaks people's hearts... There has got to be a better way for us to deal with these issues."

The position of the Minister for Immigration and Border Protection as guardian is untenable. At present the Minister is the legal guardian for unaccompanied children but is also tasked with being their judge and jailor. And now with the (disturbingly secretive) case of boat interceptions the Minister is perhaps even handing such children over to the very military from which their families originally fled.

The Taskforce has synthesized the issues into **six key problem areas,** and proposes solutions for each of these. The Taskforce is by no means alone, nor the first in expressing these concerns or in making such recommendations. A long line of academic institutions, Australian medical colleges, law societies, child welfare groups, and those working in the field and international agencies have called for similar changes.

We can only continue to work towards such changes, call on others to join us in these efforts, and pray that our renewed calls may finally be heard by those in positions of power able to bring effect to justice.

Chair of the Taskforce
The Very Rev'd **Dr Peter Catt**

1. Summary of Recommendations

Problem 1: The Minister for Immigration is the guardian, judge and jailer of unaccompanied children

Unaccompanied children who arrive in Australia seeking our protection have the Minister for Immigration appointed as their guardian. The Minister is meant to stand in place of the natural parents, *in loco parentis*. But the arrangements under law make the Minister and his delegates the guardian, judge and jailer. They are charged with care, the determination of refugee claims and deportation. **These are glaring conflicts of interest.**

- e.g. The Minister locks up unaccompanied children, like animals, indefinitely behind wire in Australian immigration detention centres. These shocking environments are considered by the Minister to be acceptable places of care.
- e.g. The Minister sends children in his care to a detention camp on Nauru: an environment of neglect and abuse that the UNHCR concluded was particularly inappropriate for the care and support of child asylum seekers to which no child should be transferred. See section 7.6.4.3 for more details.

Solution 1: Replace the Minister for Immigration as guardian of these children

1. The Minister for Immigration should cease to be the legal guardian of unaccompanied asylum-seeker and refugee children.
2. An independent guardian, beholden to neither the Minister nor their department, should be appointed to ensure unaccompanied minors are protected and cared for in accordance with all Australian child-welfare laws and relevant international treaty obligations:
   a. Ideally this role would be transferred to a properly resourced Independent Statutory Office of Guardianship for Unaccompanied Minors.
   b. Alternatively, guardianship responsibilities could be transferred to the new National Children's Commissioner with the commensurate level of resourcing required; and when the Commissioner requires, they may delegate to State & Territory welfare agencies.
3. The independent guardianship role must have a clear and secure tenure. Their office must be sufficiently resourced, and have appropriate, technical expertise.
4. To define the role, related law reform, and the processes for appointing and overseeing the work of the guardian, an independent, Expert Committee should immediately be established. These reforms should include that:
   a. Independent guardians must be appointed immediately after children identify themselves as a minor.
   b. Any other delegations should only be to appropriately qualified individuals who reside in close proximity to children in care, e.g. to places of accommodation.

Problem 2: The Australian Government is failing to provide institutional child protection and welfare, thus causing individual and generational damage

The Australian Government consistently fails to apply fair and lawful processes for determining the 'best interests of the child'. This is the most important principle underpinning children's rights throughout the world. See section 4 for more details. Australians know from current experience there can be no half-commitments on children.

- e.g. **Australian Governments have consistently degraded the best interests principle,** in their arguments before the courts and in introducing laws that subordinate the Minister's guardianship role to his immigration roles. For instance the guardianship law dictates that a Minister must consent to these children being forcibly removed offshore, unless it would be 'prejudicial to the interests' of the child. There are no known precedents where the Minister has pro-actively done this and voluntarily halted a transfer. **This is too low a standard, and a clear derogation of the Minister's responsibilities to act in the best interests of a child.** See section 7.1.2 for more details.
- e.g. **In comparable jurisdictions the 'best interests of the child' are treated with the gravity it requires** - unaccompanied minors are exempt from any 'transfer rules' in the EU and between the US and Canada. The highest courts in the UK and NZ have also held that 'concerns about immigration control and border security are insufficient to override a best interests determination, and are contrary to the international legal obligation' under the Convention on the Rights of the Child (CRC). See section 7.1.4 for more details.

Solution 2: Stop treating unaccompanied children like unwanted cargo – demonstrate strength by upholding children's best interests

5. Fully incorporate the Convention on the Rights of the Child into an updated Guardianship Act.
6. Embed a positive obligation to give effect to the best interest principle in all related laws, such as the Migration Act and Regulations. Only exceptional circumstances, which are also rights based (such as a serious threat to national security), should outweigh these considerations.
7. The best interest's principle must be made central to all policies affecting unaccompanied children as the "consideration of first importance".

Problem 3: Children who are on their own can't be expected to navigate our 'system'

Unaccompanied children are effectively left to fend for themselves in the complex and constantly changing protection environment. The cumulative changes to this system are increasingly stacking the odds against them. **These children are being thrown into hostile processes, which ultimately lead to a (what can be) life or death decision, with no support.**

- e.g. Children are being interviewed, and effectively interrogated, without a lawyer present, without an independent guardian acting in their interests, and without being told of their rights. See section 7.2 for more details.
- e.g. After fleeing persecution, unaccompanied children seeking our protection have been forced back to Sri Lanka, on the basis of a single interview with an Immigration bureaucrat, and without having their claims fairly heard.

Solution 3: Protect children by conducting an independent review of the claims process for unaccompanied children, and thereafter support them to navigate the refugee claims system

8. Immediate action should be taken to:
- **a.** Cease 'enhanced screening,' and ensure unaccompanied minors are given adequate opportunity to have their claims considered. See section 7.2.1 for more details.
- **b.** Reinstate publicly-funded legal assistance and advocacy for all children, for the entire refugee claim process.
- **c.** Ensure all unaccompanied children have an independent guardian appointed before any further interviews or claims processing takes place.

9. Independently review the claims process to ensure children's claims are processed in a fair, transparent and timely manner, which protects the child, and is in accordance with child's rights frameworks and international treaty obligations.

Problem 4: The standards and qualifications of the carers and care frameworks provided by the various agencies differ wildly

The Department of Immigration is not a specialist in child welfare. The states are responsible for many aspects of care, health and education. There are many jurisdictional anomalies, and there has long been a shabby patchwork of care for unaccompanied minors. Unaccompanied children are some of the most vulnerable, traumatised children in our community, yet they are treated differently depending on their mode and timing of arrival. **Their security, healing and future is held hostage to a 'care lotto.'**

- e.g. When transitioning between programs, unaccompanied children have been forcibly transferred interstate, away from any support networks they've been able to establish due to the lack of an agreement between the Commonwealth and State agencies. See section 7.3.1 for more details.
- e.g. A vulnerable child in Brisbane might experience good support, with a 24-7, complex care model and be readily connected to their community, whereas a child in regional Victoria might experience isolation, a lack of autonomy and access to services, and may have many barriers to participating in community activities and developing any independence - because there are no standards of care in place. See section 7.3.2 for more details.

Solution 4: We need a national policy framework and consistent standards of care

10. The Australian Government should develop a nationally uniform policy framework and standards for the care of unaccompanied children, which should apply across all jurisdictions.
- **a.** This should take into account The National Framework for Protecting Australia's Children.
- **b.** Standards of care should be based on best-practice models in the child-protection and health care sectors.

11. The care of unaccompanied children across the whole service spectrum should be evidence-based and centred on the individual needs and circumstances of each child.
- **a.** This should apply equally, regardless of whether they arrive seeking asylum or as a refugee, and continue consistently through until they are independent adults.
- **b.** Immediate consideration should be given to implementing holistic, transitional arrangements for guardianship and care to extend beyond 18 years, in line with a young person's developmental need.

12. The Australian Human Rights Commission should establish an inquiry into the standard and quality of care of unaccompanied minors who are cared for in community residential detention arrangements.

Problem 5: Failure in the implementation of Department of Immigration stated policy and procedures with regard to unaccompanied children in closed detention

There is a serious disjuncture between the duties owed by the Minister and Department, including those stated in policy and procedures, and how unaccompanied children are being treated in practice, in particular while in the detention network. There is too much secrecy and a lack of transparency. Any existing oversight is fragmented, lacking in powers and doesn't have system-wide perspective. The duty of care towards these young people is being consistently breached.

- e.g. Doctors on Christmas Island have noted that **these children are frequently arriving with a history of rape, torture, trauma and suffer high rates of sexually-transmitted infections.** They also face high rates of mental illness such as depression, anxiety and PTSD. Yet there are grossly inadequate services, with 'minimal preventative care and no regular monitoring of child health.' There is a complete lack of functioning adolescent health programs. See section 6.2 for more details.
- e.g. Desperate and neglected children in the care of the Minister and Department have tried to commit suicide in Australian immigration detention. See section 6.2 for more details.

Solution 5: End closed detention of children and make accountabilities clear, public and more transparent

13. Unaccompanied children should immediately be removed from closed detention on Christmas Island and on-shore detention centres.

14. Clear lines of responsibility and accountability must be made publicly available and transparent regarding the care of vulnerable unaccompanied children.

15. Until a new guardian is appointed and the following responsibilities have been clearly assigned to an appropriate Expert Committee should also take on interim responsibilities to:

a. Monitor, publicly report and advise on all aspects of care and protection of asylum-seeker and refugee children across the spectrum of service delivery.

b. Recommend reforms to improve the system, restore accountability and transparency.

Problem 6: Australia cruelly dumps unaccompanied children off-shore, inflicting life-long harm

The Minister forsakes his guardianship duties when he sends unaccompanied children to the detention camp in Nauru (and previously to Manus Island). The evidence is clear that children are experiencing terrible physical and mental suffering. **This is state sanctioned child abuse which the Taskforce believes will warrant a Royal Commission.** There is no sustainable resettlement possible in Nauru. It is a painful façade offering no real solution.

- e.g. The Nauruan Government is completely ill-equipped to process asylum seeker claims, let alone ensuring the protection of children. The Minister for Justice is embroiled in what the International Commission of Jurists calls a 'crisis for the rule of law' yet has also become the guardian of these unaccompanied children. See section 7.6.4.3 for more details.
- e.g. Children on Nauru are locked up behind wire, living in cramped, rat infested vinyl tents where the temperatures are extreme. They have poor access to the most basic of subsistence needs, such as water and are considered 'at significant risk of sexual abuse.' Children are witnessing adults self-harming, including by hanging, wounding, and starvation. See section 7.6.4.3 for more details.

Solution 6: The Government must immediately end the forcible removal of unaccompanied children to off-shore detention

16. The Australian Government should immediately cease forcibly removing children offshore and return the children to Australia.

a. These children should have appropriate care in our community while their claims for protection are assessed.

b. Both current and previous Governments should apologise and ask for forgiveness for sanctioning the abuse of children they were legally, morally and ethically bound to protect.

2. Guardianship: duties and obligations

When a child arrives in Australia without a parent or carer, and without a valid visa, they become a ward of the Commonwealth under the *Immigration (Guardianship of Children) Act 1946* (IGOC Act)[2].

Specifically, the Minister for Immigration and Border Protection (the Minister) becomes legal guardian of that child, standing *in loco parentis,* assuming the place of a parent and with it 'the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have.[3]

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

The Minister can place a non-citizen child in the custody of an adult who is willing to be the child's custodian and who is, in the opinion of the Minister, a suitable person to be the custodian of that child.[4]

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

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

3 Section 6(1) *Immigration Guardianship of Children Act* 1946 *(IGOC Act).*

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

3. Ethical and theological perspectives

Those who are given the role of guardians have as their first responsibility the need to make available the supportive caring relationships that are necessary for children to flourish. If that supportive network is denied, all evidence points to children suffering spiritual, psychological and sociological consequences of this privation for the rest of their life.

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

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

Michael Hardin and Jeff Krantz (Preaching Peace, Lectionary for Pentecost 8A) write,

> *"Sadly, the 'little ones' are frequently our cultural and ecclesial scapegoats. The little ones; the powerless, the weak, the hurting, the abused and the abandoned make the easiest targets for our wrath...*
>
> *We may say what we like about the greatness of the Bible or God, but our care for the 'little ones' in our neighborhoods and in the world speaks a better word about the place of Jesus in our lives. The way we choose to include the marginalized in our societies, with those unjustly accused, these actions constitute our 'positive mimesis,' our imitation of the Prince of Peace."*

In other words that is part of the duty of care?

The early church also saw in Jesus' attitude to children that we are all made in the image of God and from God's point of view 'children of God'. Caring for the orphan and children in need is an ethical marker that God gives to individuals and nations alike.

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

4. Children's rights and the rights framework

4.1 Child Rights Convention

Australia is a signatory to the Convention on the Rights of the Child (CRC), one of the six 'core human rights treaties' that collectively sit alongside the Universal Declaration of Human Rights, and underpin the international human rights framework.[5] The CRC provides a critical cornerstone for protecting children's rights and monitoring the obligations of States towards them.

The four fundamental principles that underpin the CRC framework are: non-discrimination; survival, development and protection; participation, and a right to have a say in decisions that affect them; and the best interests of the child.[6]

The latter is the most important in any discussion of unaccompanied children. Enshrined in Article 3(1), it is further reinforced by Article 18(1) which states 'the best interests of the child **will be** [the legal guardian's] basic concern.'[7] (emphasis added).

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

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

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

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

5 The other instruments of the international human rights framework are: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); and the Convention on the Elimination of All Forms of Discrimination against Women CEDAW). Every country in the world has ratified at least one of these, and many have ratified most. These treaties are important tools for holding governments accountable for the respect for, protection of and realization of the rights of individuals in their country. See: www.unicef.org/crc/index_framework.html

6 See: www.unicef.org.au/Discover/What-We-Do/Convention-on-the-Rights-of-the-Child.aspx

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

4.2 International refugee protection

Within the broader human rights framework, the other key element related to the rights of unaccompanied children is the system of international refugee protection, set out in the Refugee Convention and Protocol.[8]

This modern system was born out of the horrific genocide and mass displacement of World War II. In essence it was based upon the recognition that in certain circumstances States are unable or unwilling to protect the fundamental human rights of their own citizens, and may torture and persecute them so that people are forced to flee, 'leave their homes, their families and their communities to find sanctuary in another country.' In these circumstances 'the international community steps in to ensure they are safe and protected.'[9]

In late 2012 the United Nations High Commissioner for Refugees (UNHCR) called for a 'more compassionate and principled approach to the asylum debate in Australia,' suggesting that:

> *...the humanitarian, ethical and legal basis of international refugee protection was in danger of being lost if public debate continued to be based primarily on the idea of deterrence.* [10]

4.3 From humanitarian protection to deterrence

It is therefore with great concern that Australia's current approach to the treatment of asylum seekers has since become fixated on this simplified notion of 'deterrence', as this is largely antithetical to a humanitarian based protection framework.[11] It is also despite the fact that there is little to no evidence that 'deterrence' based policies actually work in resolving the movement of displaced people over the medium to long term.[12]

This turn towards deterrence has been justified in part to 'break the people smugglers model'; and in part to repel anyone from seeking asylum in Australia, particularly to 'stop the boats', and ostensibly for refugees own protection.

Yet while claims may be made that as a result there are now no 'children floating in the ocean,'[13] the more complex global reality of people displaced by war and persecution belies this. As Professor William Maley has pointed out, any success in stopping the people smugglers here, will 'not put an end to the phenomenon of people smuggling, for this is simply a market response' to the desperate need of people to find safety. Rather in his opinion, it simply pushes people towards other regions and other risks, such that the 'real message of the new Australian approach is a simple one: **"Go and die somewhere else."**[14]

8 UNHCR (2011), The 1951 Convention relating to the Status of Refugees and its 1967 Protocol', p.2.These 'are the only global legal instruments explicitly covering the most important aspects of a refugee's life. According to their provisions, refugees deserve, as a minimum, the same standards of treatment enjoyed by other foreign nationals in a given country and, in many cases, the same treatment as nationals' See: http://www.unhcr.org/4ec262df9.pdf

9 As above.

10 UNHCR, Media Statement, 'UNHCR calls for compassion and legal principles to be at centre of policy responses,' 23 November 2012, at: http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=278:unhcr-calls-for-compassion-and-legal-principles-to-be-at-centre-of-policy-responses&catid=35:news-a-media&Itemid=63

11 This includes an undertaking by the previous Rudd Government to transfer asylum seekers, including unaccompanied minors to Manus Island in PNG and Nauru under regional resettlement arrangements and never allow them to resettle in Australia. See: http://www.smh.com.au/federal-politics/federal-election-2013/kevin-rudd-to-send-asylum-seekers-who-arrive-by-boat-to-papua-new-guinea-20130719-2q9fa.html#ixzz34P1sbUwO This has been adopted and expanded upon by the Coalition, see: 'The Coalition's Policy for a Regional Deterrence Framework to Combat People Smuggling', August 2013.

12 The current physical interceptions at sea and 'turn backs' of asylum seeker vessels need to be distinguished to the Australian use of offshore detention camps, and other deterrence based policies such as 'no advantage' or 'no exemptions'. These deterrence measures aim to prevent asylum seekers coming to Australia. They privilege particular constructions of state sovereignty over any international or multilateral commitments to non-citizens (in this case those seeking our protection). A more comprehensive discussion of these policies (both turn backs and deterrence), their breaches of international law, lack of sustainability and relationship to Australian security are beyond the scope of this report. However for a brief summary on the evidence base of 'deterrence' see: http://theconversation.com/theres-no-evidence-that-asylum-seeker-deterrence-policy-works-8367

13 ABC News, 'Joe Hockey refers to asylum seeker 'children floating in ocean' to attack Labor's border protection record', 4 June 2014 at: www.abc.net.au/news/2014-06-04/labor-slams-asylum-seeker-comment/5500468

14 Professor William Maley, 'Die Somehere Else,' Canberra Times, 27 July 2013 at: http://www.canberratimes.com.au/comment/die-somewhere-else-20130726-2qq3s.html#ixzz34P1EgezEH

So for instance, despite Australia's professed concerns for the plight of unaccompanied children, as highlighted during the emotional debate over the Malaysia 'refugee-swap' case, little was done during 2013 to alleviate the situation of the hundreds of separated and orphaned asylum seeker children caught in limbo in unsafe situations in transit countries, such as Indonesia.[15]

4.4 Theological reflection: Human rights, Christianity and the State

Human rights are also a properly Christian discourse and religious manner of speaking. For they are basic minimum standards for human flourishing and attach to persons in virtue of their equal status as beings 'of equal moral value.' In Christian terms this is understood as grounded in the sacredness of every human life, of every being created 'in the image of God' or the *imago Dei* (Gen 1:26).[16] Our Christian support of human rights not only reflects the view that every human life is sacred but thus also 'rests on the understanding that the community flourishes when all people are included and accorded the dignity and respect they deserve as beloved children of God.' [17]

We might also reflect on humanity 'after Auschwitz.' That is, we have seen how low humanity can descend and we reject that view of ourselves. Ernest Tugendhat says: 'The question whether we ourselves act as human beings or as monsters becomes evident not only in our individual dealings but, above all, in whether we require the state to act morally. Or whether we require it or simply allow it to act like a monster.'[18]

Thus we must continually reflect upon the behaviour not only of ourselves but also of the State of which we are part, and continue to demand the highest moral and ethical dealings. In this, human rights, about which there is considerable international consensus, provide an additional and shared standard by which to measure its actions.

15 During the year 2012 Human Rights Watch estimated (conservatively) that at least 1,178 unaccompanied children entered Indonesia. Human Rights Watch further documented the detention, abuse and neglect of these children in their report *Barely Surviving,* released 24 June 2013, see: www.hrw.org/reports/2013/06/23/barely-surviving. Despite the recommendations of the Expert Panel in August 2012, and acceptance of their recommendations in full by the former Labor government, a mere 15 unaccompanied children were accepted in Australia's humanitarian program during the subsequent 12 months from Indonesia, and it remains unclear whether even this initiative will continue. See: The University of Sydney, In Association with Amnesty International Australia, *Removing the Stumbling Blocks: Ways to Use Resettlement More Effectively to Protect Vulnerable Refugee Minors,* March 2014, p.37.

16 See Michael Perry (1998), 'The Idea of Human Rights: Four Enquiries' Cary, NC: Oxford University Press. Cf Nietzsche who believed every human life was not equally important and that such an idea was inherently dangerous.

17 Uniting Justice, 'Dignity for All: Protecting Human Rights in Australia,' Issues Paper, July 2013 at: http://unitingjustice.org.au/election2013/item/902-dignity-for-all-protecting-human-rights-in-australia

18 Quoted in Dietmar Mieth, (1993) 'People in flight: social and theological reflections on the distribution of rights and duties,' in Dietmar Mieth & Lisa Sowle Cahill, Migrants and Refugees, London: SCM Press, 1993, p.72.

5. Unaccompanied children - An especially vulnerable cohort

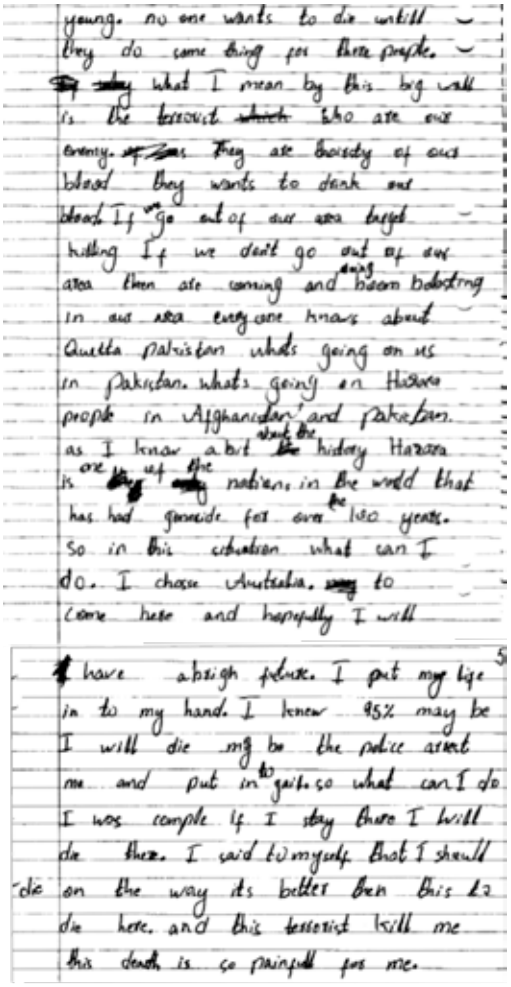
Regardless of their legal status or method of entry to Australia, refugee and asylum seeker children are among 'society's most vulnerable.'[19]

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

Unaccompanied children are a particularly vulnerable sub-group. Separated from their families, many have experienced lengthy periods without safety or stability in transit and detention, be that overseas or in Australia, have histories of serious trauma[20] and as a result many have serious and complex mental and physical health needs.[21]

There are a variety of factors that displace children from home and propel them on a dangerous journey towards Australia alone. These include: 'the violent murder of parents, child torture and detention, forced military recruitment, ethnic persecution, parental political activity, physical and sexual abuse, poverty and paucity of opportunity.'[22] In some instances they may also be sent by their families, because of fears for their safety and/or perhaps to secure protection for themselves and consequently the family.[23]

A part of AR's Story:



young. no one wants to die until they do some thing for their people. what I mean by this big wall is the terrorist who are our enemy. They are thirsty of our blood they wants to drink our blood If we go out of our area target killing If we don't go out of our area then are coming and doing boom blasting in our area every one knows about Quetta Pakistan whats going on us in Pakistan. whats going on Hazara people in Afghanistan and Pakistan. as I know a bit about the hiday Hazara is one of the nations in the world that has had genocide for over the 100 years. So in this situation what can I do. I chose Australia. to come here and hopefully I will

have a high future. I put my life in to my hand. I know 95% may be I will die. may be the police arrest me and put in to gail. so what can I do I was comple if I stay there I will die there. I said to myself that I should die on the way its better than this to die here. and this terrorist kill me this death is so painfull for me.

"No one wants to die until they do some thing for their people. What I mean by this big wall is the terrorist who are our enemy. They are thirsty for our blood. They wants to drink our blood. If we go out of our area target killing. If we don't go out of our area then are coming and doing boom blasting in our area. Every one knows about Quetta Pakistan what's going on us in Pakistan. What's going on Hazara people in Afghanistan and Pakistan as I know a bit about the history Hazara is one of the nations in the world that has had genocide for over the 100 years. So in this situation what can I do. I chose Australia. To come here and hopefully I will have a high future. I put my life into my hand. I know 95% may be I will die. May be the police arrest me and put in to gail. So what can I do. If I was to comply, if I stay there, I will die there. I said to myself that I should die on the way its better than this to die here. And this terrorist kill me this death is so painful for me."

19 The Royal Australasian College of Physicians (RACP), the Royal Australian and New Zealand College of Psychiatrists (RANZCP) and the Australian Medical Association (AMA), amongst other professional bodies, have reiterated this point for many years. See: Joint RACP & RANZCP Media Statement, 'Call to end the detention of society's most vulnerable,' 27 August 2012.

20 There is now growing scientific evidence of altered brain functioning as a result of early abuse and neglect (serious trauma). This emerging knowledge has many implications for the prevention and treatment of trauma in children. See for eg. U.S. Department of Health and Human Services (2009). 'Understanding the Effects of Maltreatment on Brain Development,' November, Issue Brief; & U.S. Department of Health and Human Services (2011). 'Supporting Brain Development in Traumatized Children and Youth,' August, Bulletin For Professionals, at: www.childwelfare.gov

21 See for instance: the discussion in the Senate Joint Select Committee on Australia's Immigration Detention Network, Final Report, March 2012, from page 123; publications by the Royal Australasian College of Physicians (RACP) at: www.racp.edu.au; & Mary Crock & Mary Anne Kenny (2012), 'Rethinking the Guardianship of Refugee Children after the Malaysian Solution', Sydney Law Review, [vol 34:437], p.439, footnote 6.

22 Mark Evenhuis (2013), 'Child-Proofing Asylum: Separated Children and Refugee Decision Making in Australia', International Journal of Refugee Law, Vol.25 No. 3 p.538.

23 As above.

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

Yet in late 2013 the Australian Government disbanded the independent Immigration Health Advisory Group (IHAG), which had been formed eight years previously to 'provide the department with independent advice on the design, development, implementation and evaluation of health and mental health policies and services for people' who were newly arrived on bridging visas right through to those granted permanent visas, whether living in community or being held in detention.[24] The IHAG work had led to better identification and treatment of mental health conditions, approaches that reduced mental deterioration, and 'importantly, advice about the mental health and well-being of children.'[25]

The Australian Medical Association (AMA) called it a 'shock move... at a time when concerns about the adequacy of medical services at offshore detention centres at Christmas Island and Manus Island were multiplying' and called on the Government to re-establish a 'truly independent' medical panel.[26]

24 Department of Immigration, 'New immigration health advisory group', Annual Report 2012-13, at: http://www.immi.gov.au/about/reports/annual/2012-13/html/close-ups/cs08_new_immigration_health_advisory_group.htm. IHAG was the successor to DHAG, formed in 2006 after the Palmer and Colmie Inquires were spurred by the scandals surrounding the Immigration Department's handling of the Vivian Alvarez and Cornelia Rau cases. See also: http://www.immi.gov.au/about/stakeholder-engagement/national/advisory/dehag/

25 Louise Newman is Professor of Developmental Psychiatry and Director of the Monash University Centre for Developmental Psychiatry & Psychology, and was a member of IHAG. See 'Back to the future: revisiting the treatment of child asylum seekers' The Conversation, 5 February 2014 at: http://theconversation.com/back-to-the-future-revisiting-the-treatment-of-child-asylum-seekers-22699

26 Australian Medical Association, 'Depression, anxiety soars among asylum seekers', Australian Medicine, 18 February 2014, at: https://ama.com.au/ausmed/depression-anxiety-soars-among-asylum-seekers

6. Onshore detention and resettlement

6.1 Detention of children in Australia

A punitive, deterrence based approach is contributing to Australia continuing to have record numbers of children held in immigration detention. As at 30 April 2014 there were:

- 833 children in immigration detention facilities and alternative places of detention (APODs);
- 1490 children in community under a residence determination (i.e. community detention); and
- 1827 children in the community on a Bridging Visa E (including people in a re-grant process).

There were also 190 children who had been removed from Australia to detention on Nauru.

Many countries throughout the world have some form of initial immigration detention or 'reception centre' for arrivals without documents. However Australia's system is quite extreme by comparison to other countries in the OECD, or other Refugee Convention signatory countries.[27]

Not only is Australia's system of mandatory, enclosed detention 'one of the strictest,' but 'it is not time limited, and people are not able to challenge the need for their detention in a court.'[28] This gives rise to a 'serious violation of international human rights and refugee law.'[29]

There are various forms of closed detention facilities used in Australia, with differing levels of services, monitoring, and security in place.[30]

6.2 Christmas Island

Some of the harshest conditions for children have been reported on Christmas Island. In November 2013 a leaked 'Letter of Concern' written by medical officers working for International Health and Medical Services Management (IHMS) on Christmas Island detailed 'numerous unsafe practices and gross departures from generally accepted, medical standards which have posed significant risk to patients and caused considerable harm.'[31]

The doctor's claims included patients undergoing their initial health assessments while dehydrated, exhausted, filthy, and in clothing 'soiled with urine and faeces'; that patients were left queuing for hours for basic medicine, and begging for treatments; there were poor medical stocks and systems; and life-threateningly long delays in medical evacuations.

The medical care provided for children and adolescents was 'inadequate,' with 'minimal preventative care and no regular monitoring of child health.' Of adolescents, particularly unaccompanied minors, the doctors noted that:

- **they frequently had backgrounds of rape, torture and trauma, and were are a high-risk group for mental illness such as depression, anxiety and PTSD;**
- limited treatments were available, and their conditions were exacerbated by indefinite, mandatory detention;
- they lacked functioning adolescent health programs; and access to education.

Moreover that the 'majority of concerns detailed have been expressed repeatedly, in some cases over a period of years.'[32]

27 See for instance comment: APH Library, Immigration Detention in Australia, 20 March 2013, at: www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/Detention#_ftnref5; Australian Human Rights Commission, Immigration detention and human rights, at: https://www.humanrights.gov.au/immigration-detention-and-human-rights

28 Australian Human Rights Commission, *Immigration detention and human rights,* at: https://www.humanrights.gov.au/immigration-detention-and-human-rights

29 Ben Saul, 'Constitutional crisis: Australia's dirty fingerprints are all over Nauru's system', *The Conversation,* 21 January 2014, at: http://www.theguardian.com/commentisfree/2014/jan/21/constitutional-crisis-australias-dirty-fingerprints-are-all-over-naurus-system

30 For a description of the various forms of immigration detention see: http://www.immi.gov.au/About/Pages/detention/immigration-detention-facilities.aspx

31 Christmas Island Medical Officer's, 'Letter of Concern, For review of by International Health and Medical Services Management (IHMS) and Executive,' November 2013.

32 As above.

Subsequent to this, in March 2014 an Australian Human Rights Commission (AHRC) expert delegation inquiring into children in detention also reported:

- of the 315 children on Christmas Island, most of these had been in detention for **six to eight months;**
- many exhibited physical health problems such as rotting teeth and fungal infections;
- there were instances of children biting themselves and others, and banging their heads;
- most of the children were visibly distressed, saying things like "this place is hell", "help me get out of here" and "there's no school, nowhere to play and nothing to do";
- the children told of their distress at living in an environment with adults who were sad, angry and self-harming[33].

In testimony to the inquiry on the 2 July 2014 the International Health Medical Service also revealed that two children in detention were known to be 'suffering from "active TB", with 14 carrying a latent strain of the disease.'[34]

Tuberculosis is a communicable disease 'one of the most significant public health threats to the global population'[35] in which young children are 'at much greater risk of developing tuberculosis meningitis, a very dangerous form of the disease that affects the central nervous system. For these reasons, prompt diagnosis and immediate treatment of tuberculosis are critical in paediatric cases.'[36] The rates could be much higher, given the inadequacy of medical service and lack of routine screening.

Professor Gillian Triggs, President of the Australian Human Rights Commission observed after a site visit:

> *The overwhelming sense is of the enormous anxiety, depression, mental illness but particularly developmental retardation... The children are stopping talking. You can see a little girl comes up to you and she is just staring at you but won't communicate.*[37]

However it should not be assumed this is only contained to Christmas Island. The AHRC inquiry has revealed system-wide issues. For instance between January and mid-August 2013 there were reportedly 50 incidents of self-harm and 49 incidents of threatened self-harm by unaccompanied children at Pontville detention in Tasmania.[38]

CHRISTIAN VIEWPOINT

Somehow it has come to suit us to treat this particular group of vulnerable 'others' as we would never want to be treated ourselves. That's what the opinion polls seem to say. And that is deeply disturbing. Measured against the Golden Rule, it points to a neglected, enfeebled, imperilled Australian soul.[39]

– Rev'd Prof Andrew Dutney

33 The inquiry team included a paediatrician, Dr Karen Zwi and Dr Sarah Mares, a child psychiatrist. See: https://www.humanrights.gov.au/news/stories/inquiry-team-visits-distressed-children-christmas-island-0

34 The Guardian, 'Asylum-seeker children: self-harm 'shockingly high', national inquiry hears,' 2 July 2014. At: http://www.theguardian.com/world/2014/jul/02/asylum-seeker-children-prime-victims-of-self-harm-national-inquiry-hears

35 Reports of this serious communicable disease raise all manner of questions about the screening and treatment of these cases. The Commonwealth Department of Health states that TB 'represents one of the most significant public health threats to the global population.' See http://www.health.gov.au/internet/main/publishing.nsf/Content/cda-pubs-annlrpt-tbannrep.htm.

36 American Lung Association, 'Tuberculosis in Children Fact Sheet,' March 2013. At: http://www.lung.org/lung-disease/tuberculosis/tuberculosis-in-children-fact.html

37 ABC News, 'Asylum seeker children describe Christmas Island detention centre as 'hell', Human Rights Commission says,' 24 March 2014, http://www.abc.net.au/news/2014-03-24/human-rights-commissioner-says-christmas-island-centre-shocking/5341524

38 National Inquiry into Children in Immigration Detention 2014 was held in Sydney on Friday 4 April Transcripts of evidence from public hearing on 4 April 2014, p. 14 statement by President Triggs, at: http://www.humanrights.gov.au/transcripts-inquirys-public-hearings

39 Reverend Professor Andrew Dutney, 'The Fear of others has corrupted the Australian Soul,' ABC online, 27 November 2012: http://www.abc.net.au/religion/articles/2012/11/27/3642256.htm

6.3 Impacts of the detention system generally

Alongside these psychological and physical impacts on children, concerns have also long been raised that **immigration detention restricts or cuts children off from their faith traditions, cultural communities and religious practices.** This deprives them of spiritual development and sustenance, and further denying them their most basic human rights.[40]

The 'entirely predictable' result of Australia's immigration detention over the last two years has been ongoing reports of self harm and suicide attempts by children in detention, including a child as young as nine attempting to overdose on painkillers; others slashing their wrists, arms and bodies; and a boy who had to be taken to hospital after repeatedly bashing his head against a pole.[41] More recently an unaccompanied child tried to hang himself on Christmas Island and had to be evacuated to the mainland.[42]

The current AHRC National Inquiry into Children in Immigration Detention[43] marks ten years since their first report in 2004 - *A last resort? The report of the National Inquiry into Children in Immigration Detention* - comprehensively detailed the impacts of Australia's system on children.[44]

Over ten years ago, two Australian professors argued that the system of detention effectively subjected children to **'organised' and 'ritualised' abuse by the government.** They recently stated:

> *We used the term 'ritualised abuse' to explain that the children were subject to formal and repeated acts of abuse, carried out under a belief system that the government adopted to justify such cruelty.*
>
> *We used the term 'organised abuse' to illustrate that children were being abused by many perpetrators who acted together in ways they knew could be extremely harmful.*
>
> *Ten years later, there are 10 times as many children subject to this organised, ritualised practice.*[45]

Many of the conditions outlined above have only come to light through the activities of whistleblowers or concerted, yet ad hoc attention of the AHRC. In June 2014 the inadequate conditions and pervasive lack of transparency in the Australian immigration detention system prompted both UNICEF and Plan International Australia to speak out, with the UNICEF Australia Chief Executive Officer Norman Gillespie stating: "We frequently hear of allegations of mistreatment, abuse and a failure to provide adequate services where there are very vulnerable children."[46]

Both called on the Australian Government to establish an 'independent body to monitor and publicly report on the treatment of children held in Australian immigration detention.'[47]

40 Convention on the Rights of the Child, article 30; ICCPR Arts 18 & 27; Human Rights declaration Art 2, 18. See for instance the AMCRO submission to the AHRC 2014 Inquiry, also the original 2004 Inquiry into children in detention, where this was discussed at: https://www.humanrights.gov.au/publications/last-resort-national-inquiry-children-immigration-detention/15-religion-culture-and

41 SMH, 'Traumatised children self-harming in detention,' 20 February 2013. At: www.smh.com.au/federal-politics/political-news/traumatised-children-selfharming-in-detention-20130219-2epl7.html#ixzz348cFg05d; and ABC News online, 'Asylum seeker children attempting suicide at Pontville 'prison', 17 July 2013. At: www.abc.net.au/news/2013-07-16/suicide-and-self-harm-attempts-confirmed-amongst-pontville-chil/4822262

42 The Australian, 'Asylum-seeker child tries to take his life in detention,' 28 August 2013. At: http://www.theaustralian.com.au/news/nation/asylum-seeker-child-tries-to-take-his-life-in-detention/story-e6frg6nf-1226705301560

43 See: www.humanrights.gov.au/children-immigration-detention

44 See: https://www.humanrights.gov.au/publications/last-resort-national-inquiry-children-immigration-detention

45 Linda Briskman and Chris Goddard, 'Australia trafficks and abuses asylum seeker children,' The Age, 25 February 2014. At www.theage.com.au/comment/australia-trafficks-and-abuses-asylum-seeker-children-20140224-33cxs.html#ixzz347JZW5L2. This is a view that has been shared by leading health professionals and peak bodies. At the AMA Federal Conference in 2005 a motion passed which recognized the indefinite detention of children was child abuse; and urged the release immediate release of all children detained in immigration detention facilities. See Dr Michael Gliksman, 'Indefinite asylum seeker detention shames us all,' Australian Medicine. At: https://ama.com.au/ausmed/indefinite-asylum-seeker-detention-shames-us-all

46 UNICEF, Media Release, 17 June 2014, http://www.unicef.org.au/Media/Media-Releases/2014-6--June/UNICEF-calls-for-independent-monitor-of-immigratio.aspx

47 As above. See also : Plan International Australia, Media Release, 17 June 2014, https://www.plan.org.au/Media/Media-Releases/20140617-Plan-urges-independent-monitor-for-immigration-detention.aspx

6.4 Theological reflection: scapegoating and the disappearance of children

Christian theology and tradition place great store on the protection of children as among the widows, orphans and other vulnerable and marginalised persons in society. Against a background of cultures where child sacrifice was practised[48] the people of God were enjoined to protect and value their children.

Alberto Alexandre Duarte's account of the slaughter of the innocents in Matthew Ch 2 illustrates the failure of power when it is attempted to be exercised against the most powerless members of society. In Duarte's words, 'when deceit and lies fail, the eruption of force and violence makes explicit the actual intention of the powerful... rage ineluctably leads to desolation, to 'they are no more.'

The French anthropologist Rene Girard has written at great length about the mechanism of sacred violence, including the concept or scapegoating. Girard observed that human society has long used scapegoats to maintain social unity. Where tension and conflict exist, a 'cause' for the conflict is identified and isolated. Through a campaign or marginalisation and demonisation the scapegoat is understood to be the reason for the social disruption who needs to be expelled from the community.

Amazingly, when the scapegoat is expelled, unity is restored to the community, which has bonded together over a common threat. It is important to note that part of the successful scapegoating mechanism is the invocation of some divine mandate for doing so - whether that source of divinity be God or reason or border security or some other source of authority.

The trouble with scapegoating is that it doesn't work for very long. The underlying problems always resurface once the memory of the last scapegoat has gone.

The murder of Jesus upon the cross can be seen as 'the unmasking of our society's ugly, evil and illogical desire for scapegoats.'[49]

As Pastor Jarrod McKenna has written:

> *'Easter reveals the violent shape of our society's scapegoat mechanisms that crucify the vulnerable. That is why we willingly accepted that we would be arrested, not willing to leave without an answer to why 1,138 children were being indefinitely detained. In so doing, our prayer was that we might witness to the unmasking of the principalities and powers that animate what we all know, but our society lives like it isn't happening: the irrational and barbaric indefinite imprisonment of some of the world's most vulnerable people and their children whose only 'crime' is fleeing death.'*[50]

The image Duarte speaks of, the great and powerful venting their fear or rage or insecurity upon those who are least of all able to respond would be ridiculous were it not so tragic. **That children who come to us seeking asylum are to be regarded as a significant threat requiring detention and deportation represents the utter moral failure of leadership in our country.**

48 For example 2 Kings 16 - 2 Ahaz was twenty years old when he began to reign; he reigned for sixteen years in Jerusalem. He did not do what was right in the sight of the Lord his God, as his ancestor David had done, but he walked in the way of the kings of Israel. He even made his son pass through fire, according to the abominable practices of the nations whom the Lord drove out before the people of Israel.

49 Jarrod Mc Kenna, 'Easter Made Me Do It! On Scapegoats, Asylum Seekers and Being Arrested, ' ABC Religion & Ethics, 8 April 2014. At: http://www.abc.net.au/religion/articles/2014/04/08/3981214.htm

50 As above.

7. Problems and Solutions

7.1 Conflict of interest - The Minister for Immigration is the guardian, judge and jailer of unaccompanied children

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

It is a serious conflict of interest that has been repeatedly raised and condemned both domestically and internationally over the last decade,[51] including in April 2012, when a Joint Select Committee into Australia's Immigration Detention Network recommended that the Minister be replaced as the legal guardian of unaccompanied minors in the immigration detention system.[52]

Associate Professor Zwi, who accompanied the AHRC delegation to Christmas Island, noted the presence of more than 40 unaccompanied children, and reflecting on their conditions stated:

> *'While Immigration Minister Scott Morrison is their legal guardian, I believe this duty of care is being abdicated.'*[53]

7.1.2 THE BEST INTERESTS OF THE CHILD

After years of litigation and frequent legislative amendment, the Minister is generally not penalised for failing to consider or act in the **best interests** of the vulnerable asylum seeker children in their care, even though under law they have this most serious of duties.

This is because the specific powers of the Migration Act have generally been held to take precedence over the broad operation of the *IGOC Act.*

This principle is perhaps the most important underpinning children's rights throughout the world yet the Australian Government consistently fails to apply fair and lawful processes for determining the **best interests of the child and has actively sought to downgrade it.**

For instance the *IGOC Act* subordinates the Minister's guardianship role to his immigration roles - this dictates that a Minister must consent to these children being forcibly removed offshore, unless 'satisfied' it would be 'prejudicial to the interests' of the child. There are no known precedents where the Minister has pro-actively done this and voluntarily halted a transfer. **This is too low a standard,** and a clear derogation of the Minister's responsibilities to act in the best interests of a child.

In 2012, the UN Committee on the Rights of the Child noted its 'deep concern' that the best interests of the child were not 'the primary consideration in... determinations and when considered, not consistently undertaken by professionals with adequate training.' The Committee also noted the continuing 'high risk of conflict of interest' and lack of redress for children adversely affected.[54]

51 For instance see; the Australian Human Rights Commission's *National Inquiry into Children in Immigration Detention, A last resort?* the report of the National Inquiry into Children in Immigration Detention, tabled in Parliament on 13 May 2004; and submissions and final report from the Senate Standing Committees on Legal and Constitutional Affairs, Inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010, At: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2010-13/commissionerforchildrenandyoungpeople/index

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

53 ABC News, 'Christmas Island detainees, including children, suffering life-threatening conditions and mental health problems, doctors say,' 28 May 2014. At: http://www.abc.net.au/news/2014-05-27/doctors-treating-christmas-island-detainees-raise-health-issues/5481850

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

CHRISTIAN VIEWPOINT

"Every person seeking asylum is created in God's image and is loved unconditionally by God, and Christians have an obligation to demonstrate this same love toward asylum seekers through compassion, advocacy and hospitality. Instead of slamming the door and turning our backs on those in need, we should welcome and assist them to make a new life in the country of their choice...

"We expect our Government to honour its obligations under international law to guarantee asylum seekers access to protections, and to ensure that all decisions about children who seek to come to Australia by boat are made with the best interests of the children as the primary consideration."[55]

– Rev'd. Andrew Palmer

7.1.3 DELEGATIONS AND ROLE CLARITY

Even in circumstances where the Minister delegates this guardianship duties to a Commonwealth officer or State authorities, this conflict persists as the 'delegate is also perceived at law to have a conflict of interest in any conflict between the child and the state.'[56] Moreover, following the High Court challenge to the Malaysia 'refugee-swap' deal negotiated by the previous Labor Government, amendments were made with the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012,* to ensure that the *IGOC Act* remained legislatively subordinated to the *Migration Act.*[57]

There has also been a strong preference by respective Ministers to delegate guardianship powers and duties under the *IGOC Act* to Commonwealth and State and Territory officials, often resulting in individual officials having guardianship responsibilities for a large number of vulnerable children, in addition to other responsibilities.[58]

While the guardian can then make custodial arrangements for these children, it is unclear whether this is resulting in the appointment of custodians who have the capacity to take a personal and active interest in the rights and interests of these children.[59]

55 Reverend Andrew Palmer, State Director of Global Interaction and spokesperson for the Association of Baptist Churches of NSW & ACT - Statement, 24 July 2013 At: http://christiantoday.com.au/article/rudds-asylum-policy-morally-bankrupt-baptist-church-weighs-in-on-labor-solution/15776.htm

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

57 See brief summary at: http://www.immi.gov.au/legislation/amendments/2012/120818/lc18082012-01.htm

58 'Guardianship is delegated according to the instrument and local operational needs, often, for example to the Executive Level 2 Centre Manager. The delegated guardian is responsible for making decisions affecting a minor's long term welfare and decisions of a non-routine nature as the need arises, whatever the time of day or night. Within the context of immigration detention, the Minister's guardianship obligations are discharged through arrangements with service providers who deliver appropriate care, welfare, education and recreational activities.' – Correspondence from the Minister For Immigration and Border Protection, 'Australian Churches Refugee Taskforce draft report "All the Lonely Children",' 12 February 2014.

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

The Minister has recently stated that:

> *Over the last three years and since the establishment of a dedicated Children's Unit in the Department of Immigration and Border Protection (the Department), the Department has put in place a number of arrangements and procedures to ensure guardianship responsibilities are clearly delegated and understood.*[60]

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

7.1.4 AUSTRALIAN GUARDIANSHIP COMPARED INTERNATIONALLY

Australia's guardianship arrangements have been criticised internationally because they are largely out of step both with international standards and practices of similarly placed countries (who are often dealing with much larger numbers of unaccompanied children than here).

Firstly, comparable countries with transfer arrangements in place have exceptions for unaccompanied children.[61] This includes the agreement between Canada and the United States, and that in Europe, where not only are these children exempt from transfer, but there is also a clear reference to the 'best interests principle' unless it may be possible to reunite them with family in the EU.[62]

Secondly, it is very unusual for an Immigration Minister or someone with such immigration responsibilities to have guardianship responsibilities. For instance, in the EU, a guardian may be someone from an NGO or possibly within government with responsibilities for child protection, 'but not the department legally responsible for the child's detention and deportation.'[63] The UNSW submission to the AHRC Inquiry into Children in Detention noted that one of the key strengths observed in European jurisdictions was the ability of the unaccompanied children to access their guardian and establish a genuine relationship with them. In Australia there is a disjoint between unaccompanied children and their legal guardian.[64]

60 Correspondence from the Minister For Immigration and Border Protection, 'Australian Churches Refugee Taskforce draft report "All the Lonely Children",' 12 February 2014.

61 It should also be noted these 'transfer arrangements' are far less punitive and problematic than the current Australian ones.

62 Maria O'Sullivan (2013), 'The 'Best Interests" of Asylum-seeker Children: Who's guarding the guardian?', Alternative Law Journal, vol. 38, no. 4, pp 224-228, p.3.

63 As Above.

64 UNSW Submission to the Australian Human Rights Commission National Inquiry into Children in Immigration Detention, June, 2014, p.7.

Alternatives to the Australia Model

European countries appoint different types of guardians, but in general there is a clear distinction between the immigration authorities and the role of the guardian. The principal types of guardians appointed in Europe include:

- Child protection or youth services government agencies: Austria, Germany, Lithuania, Spain
- Non-government bodies: France, Netherlands, Poland
- Hybrid models: Belgium (professional non-government employees, and volunteers); Czech Republic (child protection departments and NGOs)
- Citizens of good standing: Sweden

In Europe the method of appointment recognises the need for independence. For example, the following principal methods are used:

- Appointment by a court: the Netherlands, Austria, Germany, Italy
- Appointment by an independent body: Belgium (the Guardianship Service), Sweden (the Chief Guardian).

7.1.5 THEOLOGICAL REFLECTION: GUARDIANSHIP AND REDUCING CHILDREN TO AN UNDESIRABLE CONCERN

Much has been written about the unacceptability of the situation whereby the Minister for Immigration and Border Protection is also legal guardian of asylum seeker children in detention. The tension that appears to exist between the Minister's responsibilities as immigration minister and guardian for asylum seeker children assumes certain realities. Primarily it assumes that the minister's responsibility to the well-being of the state (and by extension the Australian people) directly conflicts with the guardian's responsibility to the children under his or her care.

We must question whether we as Australians wish our nation to be a place where human rights, and specifically our care of the most vulnerable of children, is regarded as a secondary, or worse, undesirable concern? This alludes to Turgendhat's question - do we want our State to be a monster?

Judeo-Christian tradition has long interpreted the justice of its rulers through the lens of their care for the poor and vulnerable. For example:

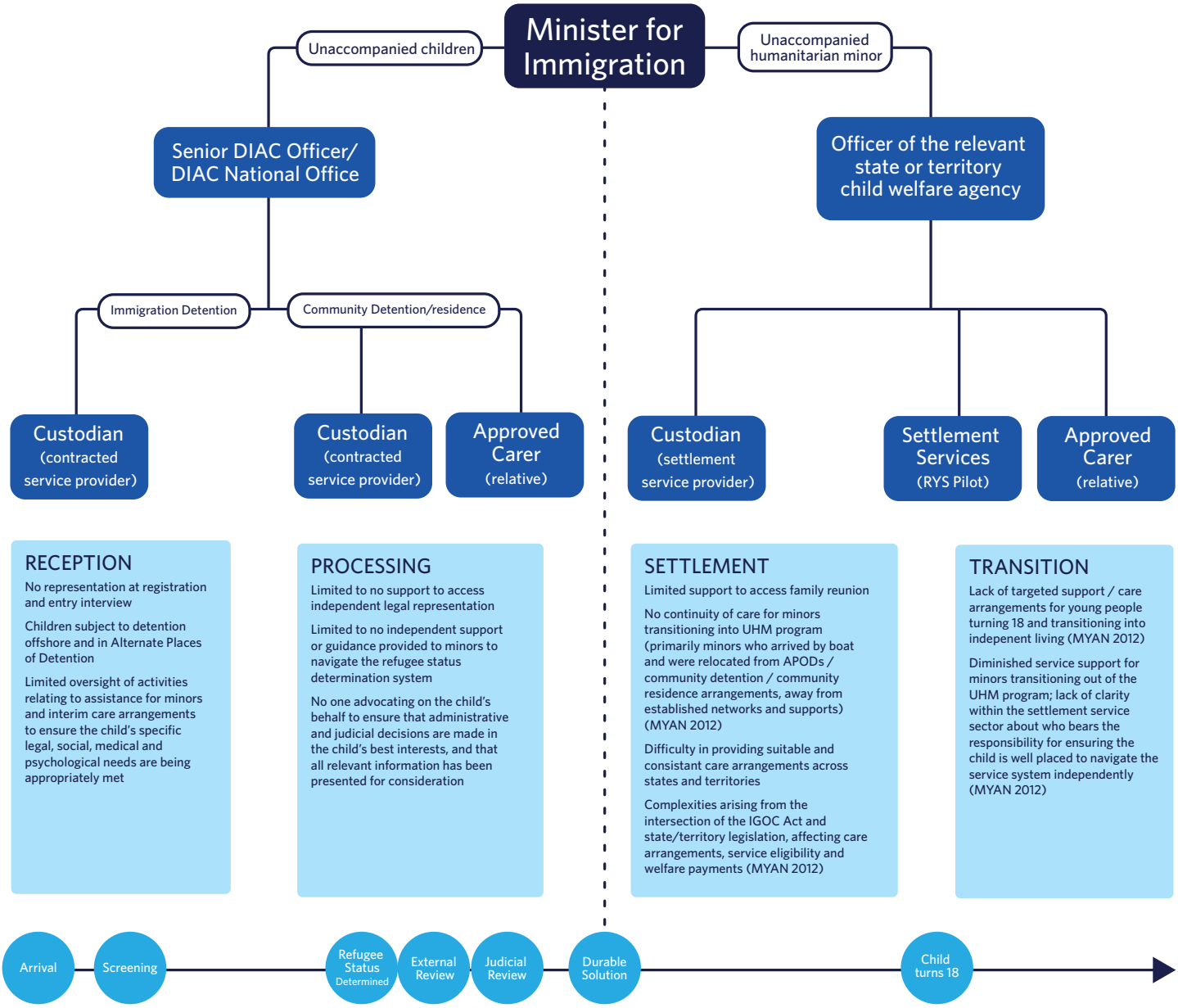
> *Thus says the LORD, "Do justice and righteousness, and deliver the one who has been robbed from the power of his oppressor. Also do not mistreat or do violence to the stranger, the orphan, or the widow; and do not shed innocent blood in this place.' - Jeremiah 22:3.*

The standard of care for the guardian is to be whatever is in the best interests of the child. Is it not in the interests of our nation that we are people who regard the best interests of children to be one of our highest ideals? **When did we become a people for whom caring for children is a duty that sits in competition with, and not as an integral part of, our national identity?**

However if the Minister is simply unable to reconcile these 'competing' interests then there must be alternative arrangements for the care of these children. It is not an acceptable solution to say that we have no place for the rights of children who come within our sphere of concern, overwhelmingly through the decisions of others and not their own.

Current Australian Model

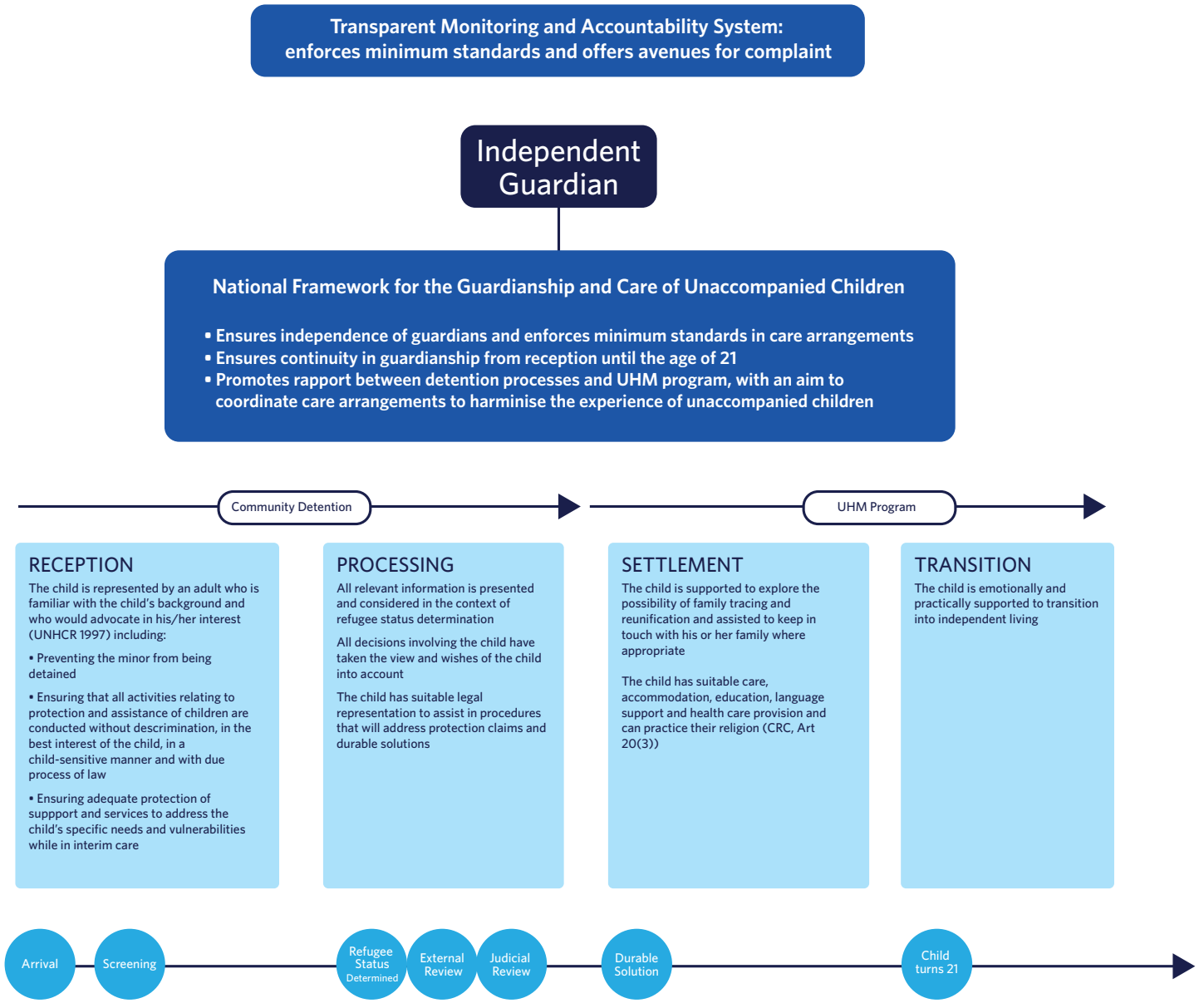
The diagram below[65] depicts the fragmented nature of the current approach. Although the Minister remains the legal guardian throughout the process, in practice the delegate guardian is responsible for the unaccompanied child, but only for part of the child's journey through the process. The separation and lack of collaboration between the detention process and the unaccompanied humanitarian minor (UHM) program compounds the fragmented services provided to unaccompanied minors. Refer to footnote 1, page 2.



65 UNSW, Submission to the Australian Human Rights Commission National Enquiry Into Children in Immigration Detention, June 2014, p.11.

Proposed Australian Model

The diagram below[66] illustrates a possible approach to guardianship and care arrangements, but any final proposal will need to be informed by the detailed knowledge of current service providers, in close consultation with key stakeholders.



66 UNSW, Submission to the Australian Human Rights Commission National Enquiry Into Children in Immigration Detention, June 2014, p.13 UNSW, Submission to the Australian Human Rights Commission National Enquiry Into Children in Immigration Detention, June 2014, p.13

7.2 Children left alone to navigate the law

Intensifying the seriousness of this conflict is the burden of navigating Australia's complex and constantly changing refugee determination processing system.[67] This is largely left to the child seeking asylum, as the Minister is not compelled, as their guardian, to facilitate their applications for asylum, nor to 'ensure that the children are made aware of their legal entitlements.'[68]

Such is the complexity, that for unaccompanied asylum seeking children who arrived by boat, there are now three groups facing different refugee claim processes:

- Those arriving before 13 August 2012 can have their asylum claim processed in Australia and be resettled in Australia if found to be a refugee;
- Those arriving after 13 August 2012, but before 19 July 2013, might have their asylum claim processed in a third country but may be resettled in Australia;
- Those arriving after 19 July 2013 will have their asylum claim processed in a third country (Nauru or Papua New Guinea) and cannot be resettled in Australia.[69]

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

CHRISTIAN VIEWPOINT

Laws, which subject asylum seekers to arbitrary and prolonged immigration detention or banish them from seeking protection, fail to uphold justice and mercy and are immoral. It is not illegal to seek asylum. [70]
– Catholic Church

7.2.1. ENHANCED SCREENING

Under 'enhanced screening', shortly after arriving in Australia, the unaccompanied child who has sought our protection may be interviewed, the result of which might be they are returned to the country they have fled, without having their full claim for asylum fairly and rigorously assessed.

These children may have little or no English or education, will possibly be suffering a range of mental and physical health issues, and are of diverse cultural and ethnic backgrounds. Yet these children are presumed to know that they should formally ask an Australian bureaucrat to provide them with an independent lawyer; they are not offered this support. They are presumed to understand that their bid for safety may rest upon these single interviews. It is presumed that they are able to overcome their fears, ill-health, confusion, immaturity... and on their first meeting will tell a stranger and authority figure their most intimate and horrifying stories. That in effect they will ask for 'asylum,' by articulating the correct 'trigger words' to invoke Australia's protection obligations.

'Enhanced screening' has been described as 'unfair and unreliable' by Richard Towle, the former UNHCR regional representative[71], and both the Australian Lawyers for Human Rights (ALHR) and the Australian Human Rights Commission (AHRC) have expressed concern that it does not afford procedural justice, risks *refoulement,*[72] and is not in accordance with Australia's international obligations.[73] A former Immigration official previously intimately involved in the process also expressed similar fears of these dangers.[74] Both the ALHR and AHRC have also raised particular concerns for unaccompanied children, their lack of support or legal assistance during this process, and that they are especially at risk and 'require special protections and safeguards.'[75]

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

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

69 University of New South Wales, Submission to the Australian Human Rights Commission, National Inquiry into Children in Immigration Detention, June 2014, p.3.

70 Australian Catholic Migrant & Refugee Office, What the Church Teaches on Asylum and Migration, pamphlet 2014: www.acmro.catholic.org.au/policy

71 The Australian, 'UNHCR chief slams 'unfair' screening,' 19 June 2013, at: www.theaustralian.com.au/news/foi/unhcr-chief-slams-unfair-screening/story-fn8r0e18-1226665929809

72 The principle of non- forcible return of people to territories where they could face persecution (non-refoulement) is a fundamental principle of international law.

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

74 ABC News, 'Asylum seeker 'enhanced screenings' dangerous: former official,' 26 June 2013. At: www.abc.net.au/news/2013-06-10/asylum-seeker-enhanced-screenings-dangerous-former-official-says/4744628

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

7.2.2 AGE DETERMINATIONS

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

While interpreters are used and an independent observer is supposed to be present,[76] again there is no provision of legal assistance or advice. Independent observers, if present, have limited capacity and so the child is without the benefit of a support person who is able to actively monitor and advocate for their interests.[77]

In this process a child is unable to access legal assistance,[78] yet evidence adduced during such interviews, and findings made, remain on the DIBP file, (ie. in relation to credibility) and can severely impact upon the child's subsequent application for protection.[79] **It is this process that has repeatedly been shown to fail and has resulted in children being accidentally transferred as adults and detained in inappropriate facilities on Manus Island.**[80]

7.2.3 PROCESSING GENERALLY

The Australian Government has stated:

> *The Department acknowledges the sensitive nature of interviewing minors, and has in place policies for children to be interviewed by experienced, trained decision makers and, if possible, by decision makers who have knowledge of the psychological and emotional development of children, and their behaviour.*

Yet despite such acknowledgment, Australia's dealings with these unaccompanied children routinely fail to meet basic international standards such as the *UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum.* These specifically recommend:

> ***A guardian or adviser should be appointed as soon as the unaccompanied child is identified.*** *The guardian or adviser should have the necessary expertise in the field of childcaring, so as to ensure that the interests of the child are safeguarded and that his/her needs are appropriately met.*
>
> ***...an asylum-seeking child should be represented by an adult who is familiar with the child's background and who would protect his/her interests****...Interviews should be conducted by specially qualified and trained officials.*[81]
>
> *Access should also be given to a qualified legal representative.*[82]

Australia's current refugee determination system fails to sufficiently acknowledge or respond to unaccompanied children's needs. It creates multiple barriers and pitfalls that act to 'formally and systemically discriminate' against them. Although a more comprehensive analysis of these issues is beyond the scope of this paper they are outlined clearly elsewhere.[83]

76 As the Department noted – 'Where a minor is being interviewed there are arrangements in place to ensure there is an independent observer present at the interview.' Correspondence from the Minister For Immigration and Border Protection, 'Australian Churches Refugee Taskforce draft report "All the Lonely Children",' 12 February 2014. See Appendix A.

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

78 Such as through the Immigration Advice and Application Assistance Scheme (IAAAS), see: www.immi.gov.au/media/fact-sheets/63advice.htm

79 In this respect the Migration Act 1958 (Cth) arguably fails to provide legislative protection of a child's rights under Article 12(2) of the CRC. 27 See www.refworld.org/docid/3ae6b3360.html

80 As acknowledged in Correspondence from the Minister For Immigration and Border Protection, 19 May 2014.

81 Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum 1997, p.2 at: www.unhcr.org/3d4f91cf4.pdf

82 As above, p.12.

83 See: Mark Evenhuis (2013), 'Child-Proofing Asylum: Separated Children and Refugee Decision Making in Australia', International Journal of Refugee Law, Vol.25 No. 3.

7.2.5 HOW MUCH WORSE CAN IT GET?

Finally, serious issues of transparency and procedural fairness persist. Further changes are taking place that appear likely to create an even more unjust system, in particular for their potential impact on unaccompanied children.

A 'Code of Behaviour' is now being implemented for asylum seekers living in the community. Serious concerns being raised that this loose document ushers in an arbitrary regime which allows for people to be locked up indefinitely 'on the basis of untested allegations of traffic infringements or bullying.'[84]

There have already been reports of an unaccompanied child being pulled out of their home in the community and moved into detention after getting into a scuffle or school fight for instance. It also places the carers of unaccompanied children in an unenviable position, as they are under a duty to report any transgression of 'The Code'. Thus the guardianship/conflict issues permeate the system, potentially fracturing the relationships of trust and care at a day-to-day level, as carers are increasingly forced to take on 'policing roles' for the Department.[85]

The Australian Government has now withdrawn publicly funded legal representation for asylum seekers (through the IAAAS program).[86] Although the Government has stated that it will 'provide a small amount of additional support to those who are considered vulnerable, including unaccompanied minors,' the Department has yet to release details.[87]

The changes proposed to the refugee status determination process include removing appeals to the Refugee Review Tribunal and putting in place an administrative (non-statutory) assessment and review process in which Immigration officials would be both decision maker and reviewer. It will also be coupled with a new 'Fast Track Assessment and Removal process...modelled on the Detained Fast Track system in the United Kingdom.'[88] In the UK these 'processes do not under any circumstances apply to children.'[89] Again, the Government has flagged that legislation will be introduced on 1 July 2014, but the Department has noted these 'issues remain under consideration by the Government and no decisions have been announced.'[90]

84 Human Rights Law Centre quoted in The Guardian, 16 December 2013: www.theguardian.com/world/2013/dec/16/asylum-seekers-living-in-australia-forced-to-sign-code-of-conduct -

85 These issues have been raised with the ACRT through members who have had first-hand experience of the disruption.

86 Immigration Advice and Application Assistance Scheme (IAAAS), see: www.immi.gov.au/media/fact-sheets/63advice.htm

87 Hon Scott Morrison, MP, *End of taxpayer funded immigration advice to illegal boat arrivals saves $100 million,* Monday, 31 March 2014. At: www.minister.immi.gov.au/media/sm/2014/sm213047.htm

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

89 UK Government, Detained fast track processes: instruction. At: www.gov.uk/government/publications/detained-fast-track-processes-instruction

90 Correspondence from the Minister For Immigration and Border Protection, 'Australian Churches Refugee Taskforce draft report "All the Lonely Children",' 12 February 2014.

7.2.6 THEOLOGICAL COMMENT: THE LAW, JUSTICE AND RIGHTEOUSNESS

In a Christian understanding, it is not enough for the Australian Government to claim that what it does is 'lawful'. It must also be just. It is arguable that the State only derives its authority from acting morally. In our scriptural tradition the prophets frequently warn of the imminent fall of unjust and unrighteous rulers and judges. For the prophets justice and righteousness are most often marked by care for the widow and the orphan.

> *Ah, you who make iniquitous decrees,*
> *who write oppressive statutes,*
> *to turn aside the needy from justice*
> *and to rob the poor of my people of their right,*
> *that widows may be your spoil,*
> *and that you may make the orphans your prey!*
>
> *What will you do on the day of punishment,*
> *in the calamity that will come from far away?*
> *To whom will you flee for help,*
> *and where will you leave your wealth,*
> *so as not to crouch among the prisoners*
> *or fall among the slain?* — *Isaiah 10.1-4*

Matthew's account of Herod's decree against the children of Bethlehem (Matt 2), as indicated above, highlights the moral failure of the ruler who turns his or her fear, frustration and rage upon those who are least able to bear it. As Thomas Aquinas stated in his works on government, even the State and its laws are subject to moral standards, especially but not only the principles and norms of justice. In particular, there is no exemption of public authorities from the exceptionless moral norms such as intentionally killing the innocent, lying, rape and other extra-marital sex, and so forth.

More recently, other political theologians have surmised that the nation-state, despite Aquinas' hope, is not capable of acting morally or of being any kind of repository of the public good. Cavanaugh[91] and McIntyre[92] both argue that along with acknowledging this insufficiency of secular governments, churches have a role to play in complexifying the dialogue around this and other issues and reminding the state that its responsibility to the people is to act in the common good. This includes a duty to behave in a way that ensures the people themselves will not become subject to the vagaries of government policy.

91 William T Cavanaugh, "Killing for the telephone company: why the nation-state is not the keeper of the common good", Modern Theology 20 (2), April 2004.

92 MacIntyre, A. (1994) "A partial response to my critics", in John Horton and Susan Mendus (eds), After MacIntyre: Critical Perspectives on the Work of Alasdair MacIntyre (Notre Dame: University of Notre Dame Press, p. 303

7.3 Jurisdictional anomalies

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

This has led to:

- different agreements, with differing levels of support and care and across jurisdictions;
- instances of children having to relocate across jurisdictions in order to receive appropriate care;[93]
- children compelled to seek their own placements with carers (who may not be well placed or able to care for them, which can result in a breakdown in guardianship arrangements);[94]
- instances where UHM's have been unable to access complementary services provided by the State, which may be accessible to non-refugee wards or children;[95] and
- shortcomings in transitional arrangements when a child becomes an Australian citizen or turns 18, and can then 'disappear' from the system.[96]

93 Multicultural Youth Advocacy Network (MYAN), Unaccompanied Humanitarian Minors in Australia, Policy Paper, September 2012, pp.13-14.

94 MYAN Policy Paper p.16

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

96 These issues have been raised with the ACRT through members who have had first-hand experience of these transitions.

7.3.1 INTERSTATE TRANSFERS

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

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

7.3.2 STANDARDS OF CARE

The Government has stated:

> *The Department has been working with state and territory governments to ensure nationally consistent service and cost models for the UHMs in their care. Where guardianship responsibilities for the day-to-day care of UHMs has been delegated to state and territory governments, these arrangements are consistent across jurisdictions.*
>
> *Current procurement for the UHM Programme includes provision for services in NSW through a Commonwealth service provider. The procurement is yet to be completed.*[97]

These are welcomed improvements. However despite this, unaccompanied children continue to receive vastly different, inconsistent and often times inadequate care, depending on their mode and timing of arrival, where in the country they are placed, and who is responsible for their day to day care. There is still no national policy framework or consistent standards of care applying across jurisdictions.

Professionals working with these unaccompanied children have suggested that the 'unique challenges' of the asylum seeker children continue to be ignored by some care providers. That these young people were deemed 'difficult' if they respectfully questioned something or highlighted their rights, that there was an expectation they ought to be 'grateful' for everything they got and to the extent it made it very difficult for the young people to express any concerns.[98]

In particular it was suggested that in 'regional areas service providers acting as guardians [sic] have not had the necessary training or experience to manage appropriately this cohort of young people' with unaccompanied children placed in quite isolated houses or small towns, with no access to public transport, limited opportunities for social integration and severe restrictions on participation in community life.[99]

This is not to suggest that all care providers would deal with unaccompanied children in this same manner, but rather, it has resulted from this clear lack of standards of care, with such issues magnified by the lack of transparency and accountability, as well as clarity of responsibilities, as highlighted above.

7.3.4 EXITING DETENTION OR PROGRAMS FOR UNACCOMPANIED CHILDREN

Many young people are also turning 18 either in the immigration detention system or unaccompanied minors program, or shortly after exiting mandatory detention. It raises serious challenges: having just experienced months or possibly years in dangerous transit then detention (with little stability or safety, still suffering the effects of multiple traumas and with complex needs) these young people might be released into the community on permanent visas or, even more precariously, on bridging visas (without work rights) and without sufficient support.

7.3.5 AGE REDETERMINATION

A 'process' currently exists within the DIBP wherein a child's age can be changed. The 'rules' with regards to this process are opaque but the upshot is that children *on one day* walk into the interview as a child (under 18) and walk out of the interview, no longer a child (over 18).

97 Correspondence from the Minister For Immigration and Border Protection, 'Australian Churches Refugee Taskforce draft report "All the Lonely Children",' 12 February 2014.

98 Extract taken from confidential submission from concerned community members to the Taskforce.

99 As above.

Part of JH's story:

> Now I am living in Australia. Now I am very happy living in Australia and I have a good life and safe life also I am very happy. I am with Australian people they are very good and kind people. I look to them like my family sometimes my feelings are that I didn't lose my parents and my brother because these Australians are doing and showing me things like parents. I am proud of myself I am in Australia and living with Australian people. Now I am just waiting and waiting wondering what will ever happen to me because I came after August 2012. When I turned 18 I couldn't keep going to school and I can't work. This makes me very sad and depressed. I have had to go to the doctor about this many times. I tried to keep doing school work with my teacher on gmail but it was too hard for us to keep doing it. Now most days I just sleep and am just waiting.

7.4 Duty of Care and the policy-practice disjuncture

The various duties and obligations under both domestic and international law, which the Minister and the Department of Immigration are required to exercise and safeguard are in many respects, non-delegable.[100] For example, common law duties of care mean that even where the Department contracts out services, the third party must take 'reasonable care to avoid the persons in immigration detention suffering reasonably foreseeable harm' and if they breach these duties, the Department is also taken to have breached their duties.[101] Certainly the high level duty of care that is owed, and what this entails is well noted within the various policies and operational manuals of the Department.

For instance, the Department's Procedures Advice Manual notes that:

- minors in immigration detention require special care above and beyond the standard of care required for an adult person, because they are particularly vulnerable;
- decisions must consider the best interests of the minor
  - this is not restricted to the child's legally enforceable rights but also long-term and short-term welfare concerns, physical and emotional well-being, financial, moral, religious and health interests;
- children should only be detained as a measure of last resort and for the shortest practicable time; and
- making decisions in best interest requires detention staff to be trained appropriately to deal with minors and in age appropriate behaviours and development.[102]

It is impossible to reconcile the stated procedures of the Department and duty of care of the Minister, with the distressing experiences of children currently in detention, as detailed above.

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

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

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

There is a serious disjuncture between the duties owed by the Minister and Department, including those clearly acknowledged and stated in policy, and how unaccompanied children are being treated in practice.

In essence, the Government and Department are failing in their duties towards these children, a situation that is compounded by the lack of transparency and accountability across the system.

The requisite standards of care required in detention centres and while children are within the immigration detention network, are consistently breached on a number of fronts. Anomalies persist too across the spectrum of our dealings with unaccompanied children, even as children are accepted as refugees and are permanently settled into our community.

7.4.1 THEOLOGICAL REFLECTION: GOVERNMENTS AND HYPOCRISY

Once again, Christian tradition speaks about the duty of leaders to follow their own teaching. Jesus was scathing in his critique of those who did not practice what they preached, going so far as to call them 'unmarked graves'! (Luke 11.44)

In the tradition of the Old Testament prophets, Jeremiah sounded a warning to the king whose rule was characterised by displays of wealth and power rather than by good government:

> *Woe to him who builds his house by unrighteousness,*
> *and his upper rooms by injustice;*
> *who makes his neighbours work for nothing,*
> *and does not give them their wages;*
> *who says, 'I will build myself a spacious house*
> *with large upper rooms',*
> *and who cuts out windows for it,*
> *panelling it with cedar,*
> *and painting it with vermilion.*
>
> *— Jeremiah 22.13-14*

Jesus repeated these critiques to the leaders of his own day:

> *But woe to you Pharisees! For you tithe mint and rue and herbs of all kinds, and neglect justice and the love of God; it is these you ought to have practiced, without neglecting the others... And he said, 'Woe also to you lawyers! For you load people with burdens hard to bear, and you yourselves do not lift a finger to ease them.'*
>
> — Luke 11.42-43, 46-47; see also Mark 7.9-13

In other words those who lead have a higher, not a lesser, duty to uphold the law than those they rule over.

7.5 Proposed Re-introduction of Temporary Protection Visas (TPV's)

The Coalition Government has proposed re-introducing Temporary Protection visas for asylum seekers arriving by boat who are found to be refugees. As outlined in their election policies this would include that:

- 'no permanent visa will be issued' to the estimated 30,000 asylum seekers already in Australia (including the record number of children in detention);
- TPVs would not exceed 3 years (effectively meaning a refugee must reprove their claim for protection in order to receive another TPV);[103]
- settlement services would be limited, if available at all; and
- refugees who arrived by boat would be denied access to family reunion.

The devastating mental health and wellbeing, and associated impacts of TPV's were well documented during the period they were previously in use (from 1999 to 2007). The 2004 Inquiry into Children in Immigration Detention found that the TPV regime breached seven articles of the CRC,[104] and summarised that the evidence showed two very significant barriers faced by children:

1. Their temporary status created 'a deep uncertainty and anxiety about their future. This can exacerbate existing mental health problems from their time in detention and their past history of persecution.' It also affected their 'capacity to fully participate in the educational opportunities'; and
2. The effect of the family reunion and travel ban meant that 'some children may be separated from their parents or family for a long, potentially indefinite, period of time. Again, this can undermine a child's mental health and well-being.'[105]

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

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

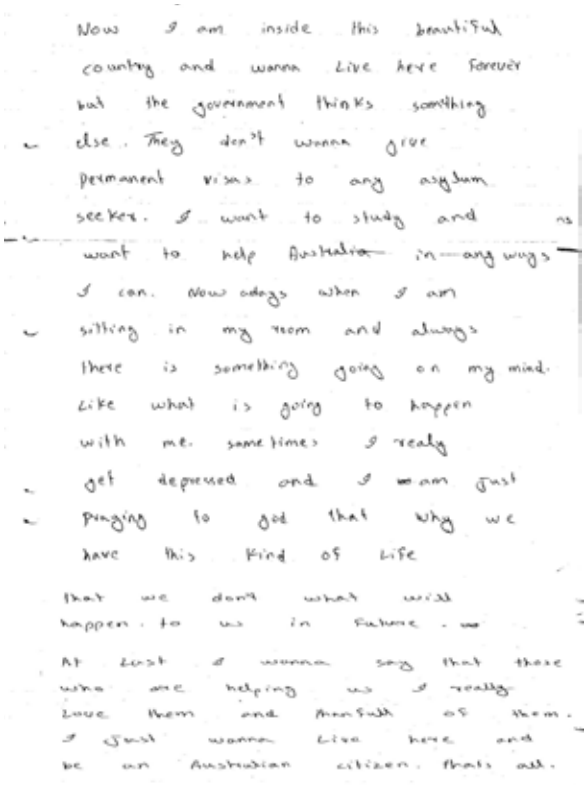
105 See: https://www.humanrights.gov.au/publications/last-resort-summary-guide-temporary-protection-visas

The AHRC further noted that these TPV conditions had a

'proportionally greater impact on unaccompanied refugee children than upon other children due to their isolation from their family.' [106]

A part of AG's Story:

> *"Now I am inside this beautiful country and wanna live here forever but the government thinks something else. They don't wanna give permanent visas to any asylum seekers. I want to study and want to help Australia in any ways I can. Nowadays when I am sitting in my room and always there is something going on my mind. Like what is going to happen with me. Sometimes I realy get depressed and I am just praying to God that why we have this kind of life that we don't want will happen to us in future.*
>
> *"At last I wanna say that who are helping us I really love them and thanfull of. I just wanna live here a be an Australian citizen."*


Now I am inside this beautiful country and wanna live here forever but the government thinks something else. They don't wanna give permanent visas to any asylum seekers. I want to study and want to help Australia in any ways I can. Nowadays when I am sitting in my room and always there is something going on my mind. Like what is going to happen with me. Sometimes I realy get depressed and I am just praying to God that why we have this kind of life that we don't want will happen to us in future. At last I wanna say that who are helping us I really love them and thanfull of. I just wanna live here a be an Australian citizen. thats all.

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

7.5.1 THEOLOGICAL REFLECTION: BEING IN LIMBO – THE VIOLENCE OF EXCLUSION

From a theological perspective, belonging is a high ideal for all people. We are created to live in community with others, to have a place where we belong. The gospels are full of healing stories, accounts of Jesus bringing people back to full health. In the context of ancient near-eastern society, illness excluded the ill-person from full participation in the life of the community. Jesus' action in healing the sick was primarily an act of restoration to the body of the community.

For example in the account of the woman who suffered for 12 years with haemorrhaging (Mark 5.25-34): in receiving healing the woman not only had her bleeding stopped but importantly Jesus called her 'daughter'. In doing so Jesus recognised her belonging to a family and restored that relationship. It was a healing of both the woman and the community, which was diminished by her absence from the common life.

This can also be understood as a challenge to the scapegoating mechanism referred to above. The healing miracles are also about overturning the violence of exclusion. Part of the impact of understanding humanity as being created in the image of God is the effect this understanding has on the way we shape our common life. God's mission of radical inclusion in the wider world is a challenge to any policy, including policies around temporary visas which seeks to exclude people from belonging to the community.

> *Not by chance is the right to belong considered to be a basic human right by secular authorities as well as the church.*[107]

107 See for example *The Universal Declaration of Human Rights*: Art 27 (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits; and (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. Art 28 Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Also the *Convention on the Rights of the Child* which provides that children have a right to know their parents and family, to be cared for by them wherever possible, and to be allowed travel to stay with their own community (arts 7, 8, 9, 10).

7.6 Offshore detention and resettlement

In August 2012 the former Labor Government accepted all of the recommendations made by its Expert Panel on Asylum seekers and reintroduced a form of 'offshore processing', opening up camps on Manus Island in Papua New Guinea, and Nauru.[108] This regime was hardened in mid-2013 with the announcement of new agreements by then Prime Minister Kevin Rudd to resettle refugees in these countries, so that 'asylum seekers who come here by boat without a visa will never be settled in Australia.'[109]

Over this time changes were made to the Migration Act to allow the Minister power to designate a country as a 'regional processing country' if in the 'national interest.' At the same time amendments were made to the *IGOC Act*[110] to ensure that the Minister's guardianship duties ceased when an unaccompanied asylum-seeking child is removed to such a processing country in accordance with the *Migration Act.*

The changes to the *Migration Act* have meant the designated processing country does not need to be scrutinised for their human rights record or capacity, they only need to give (non-binding) assurances as to refoulement and demonstrate a willingness to assess protection applications.[111]

7.6.1 THE PAPUA NEW GUINEA RESETTLEMENT AGREEMENT

The two page *Regional Resettlement Agreement* struck with PNG on 19 July 2013 ('the PNG Agreement')[112], was followed by the *MOU Relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues* on 6th September 2013.[113] The MOU provided that 'special arrangements will be developed and agreed to by the Participants for vulnerable cases, including unaccompanied minors.'[114]

In addition, PNG agreed to other undertakings not to expel or send asylum seekers to another country where their lives would be threatened or they may be subject to persecution, and to either make or permit assessments of refugee applications.[115] From the outset these arrangements lacked a range of details as to how specifically vulnerable, unaccompanied children might be dealt with once sent to Manus Island. It had been suggested that the PNG courts may be responsible for assigning guardianship, but it was never publicly clarified what regime unaccompanied children sent to PNG would be administered under.

UNICEF have noted that 'children in Papua New Guinea remain some of the most vulnerable children in the world.'[116] In addition that:

> *As many as half the primary school-age children are out of school. Half of those who enrol drop out before grade six. Many of the schools lack basic facilities such as safe water and toilet facilities as well as furniture and teaching aids. Young people are often denied their right to continuous learning and access to income. Youth unemployment rate is on the increase. Opportunities for young people to express their views are extremely limited. Most services are not young people friendly. Despite great traditions, violence against women and children and physical and sexual abuse of children are widely prevalent and a major threat to Papua New Guinea's development.*[117]

PNG is a country with its own very significant development and governance challenges, ranking 144 of 177 on the Transparency International corruption perceptions index.[118] Since its re-opening, the Manus Island detention camp has been plagued by issues of maltreatment, violence, suffering and maladministration.[119] In December 2013 Amnesty International further detailed horrendous conditions in the camp, and a 'host of human rights violations' in their report *This Is Breaking People.*[120]

These issues escalated into the violent clashes of February 2014, resulting in dozens of asylum seekers being horrifically injured and Reza Berati being murdered, attracting international condemnation.

108 http://expertpanelonasylumseekers.dpmc.gov.au

109 Kevin Rudd, quoted in SMH, 19 July 2013. At www.smh.com.au/federal-politics/federal-election-2013/kevin-rudd-to-send-asylum-seekers-who-arrive-by-boat-to-papua-new-guinea-20130719-2q9fa.html#ixzz34efvq1ta

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

111 Crock and Kenny (2012). p.462

112 The PNG Agreement is available at: www.immi.gov.au/

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

114 MOU with PNG, provision 18.

115 MOU with PNG, provision 20.

116 See: www.unicef.org/png/activities_4362.html

117 See: www.unicef.org/png/activities_3825.html

118 See: www.transparency.org/country#PNG

119 See the major investigation by The Guardian newspaper: www.theguardian.com/world/interactive/2014/jan/06/manus-detention-reports-four-months#undefined; and UNHCR 'Monitoring Visit to Manus Island, Papua New Guinea' Report, 23-25 October 2013: At: http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=351:men-women-and-children-suffering-from-harsh-physical-conditions-and-legal-shortcomings-at-pacific-island-asylum-centres-unhcr-reports&catid=35:news-a-media&Itemid=63

120 Amnesty International, *This is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea,* November 2013: www.amnesty.org.au/refugees/comments/33587/?utm_source=feedburner&utm_medium=feed& utmampaign=Feed:+AIACampaigns+Amnesty +International+Australia+Campaigns

CHRISTIAN VIEWPOINT

Following the tragedy on Manus Island, the implementation of government policies regarding asylum-seekers must be reviewed... the implementation of these policies is causing great harm and is a matter of moral distress to many Australians.

A civilized government must be able to control its refugee intake without resort to measures of intentional cruelty.[121]
— Rt. Rev. Philip Huggins

7.6.2 CHILDREN REMOVED FROM MANUS ISLAND

The Australian Government has now publicly confirmed its position that no minors will be transferred to Papua New Guinea.'[122]

However, reports have persisted of unaccompanied children being inadvertently transported to and detained on Manus Island. These mistakes have again highlighted the failure of the guardianship arrangements and the deep flaws in the screening processes, age determination and '48 hour turnaround' policies being enforced in Australia, in particular on Christmas Island.[123] When recently queried about the presence of unaccompanied children on Manus Island, the Minister responded:

> *As at 4 April 2014, there were 15 transferees accommodated at the Manus OPC who had personally raised claims they were under the age of 18. In each case, transferees were given the opportunity to provide further information or documentation to support their age related claims.*
>
> *Following consideration of these cases by the Age Determination Section in Canberra, the Department of Immigration and Border Protection is satisfied that these transferees are more likely than not to be adults...'*
>
> *Since November 2012, the department has returned four transferees from Manus to Australia following a view they were more likely than not minors... As at 4 April, no transferee has been returned to Australia from Manus for the Purpose of undergoing a formal age determination assessment.*[124]

It is quite alarming that young people claiming to be children remain on Manus Island, under these circumstances. The process of age determination appears to be decided remotely from Canberra. There is no indication that young people claiming to be children on Manus Island have guardians appointed, nor are they given access to independent legal advice or advocacy.

The threshold purportedly being used of 'more likely than not' is also an exceedingly low and insufficient threshold considering the serious implications of the age determination process. In such circumstance the UNHCR guidelines state that the 'child should be given the benefit of the doubt if the exact age is uncertain.'[125]

Yet as Amnesty reported, there were extremely serious and deeply flawed issues with the processes on Manus Island. For instance, no Australian Immigration officials could name a person on the Island 'who had been trained in the age assessment methods its guidelines call for.' Further to this they were told that 'inconsistencies in children's reports of their age weigh heavily against them, a practice that does not recognise variations in calendars, differing cultural conceptions of adulthood, or possible motivations for claiming to be older.'[126]

The Minister also highlighted again that he ceases to be a guardian upon transfer of these minors to offshore detention, and that 'Guardianship arrangements are a matter for the governments of Nauru and PNG.' Yet by the Government's own account, 'any claims raised that bring age into question are investigated by the department without delay.'[127]

Clearly then, despite the rhetoric of PNG sovereignty in these issues and their attempt to abdicate responsibility for the care of these children, the Australian Government remains in control of key decisions in these Australian run offshore detention camps.

121 Rt. Rev. Philip Huggins, Chair of the Anglican Church of Australia's Migrant and Refugee Working Group, Media Release, 12 Feb 2014, http://episcopaldigitalnetwork.com/ens/2014/02/21/australia-bishop-speaks-out-after-asylum-tragedy/

122 Correspondence from the Minister For Immigration and Border Protection, 'Australian Churches Refugee Taskforce draft report "All the Lonely Children",' 12 February 2014. See Attachment A.

123 Correspondence from the Minister For Immigration and Border Protection, 19 May 2014.

124 As above.

125 Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum 1997, p.8. At: www.unhcr.org/3d4f91cf4.pdf

126 Amnesty International, This is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea, November 2013: p. 77. However, see extensive discussion of these issues at 76-82. www.amnesty.org.au/images/uploads/about/Amnesty_International_Manus_Island_report.pdf

127 Correspondence from the Minister For Immigration and Border Protection, 19 May 2014.

CHRISTIAN VIEWPOINT

We are a compassionate people motivated by Christian faith, who are deeply concerned about those who need protection and security. But to allow asylum seekers against their will into our country, and imprisoning people who have not broken our laws appears to us a new form of human trafficking.

As Papua New Guineans we are rightly proud of the protection guaranteed by our Constitution to all people, citizen and non-citizen alike. So is it right to allow people across our borders and place them in detention against their wishes? Is it right to do so without proper consultation with our people, particularly the people of Manus? We resist the temptation to disregard the values enshrined in our Constitution in exchange for monetary or material gain.

We regret the way that Papua New Guinea has become an accomplice in a very questionable handling of human tragedy. The detention centre in Manus seems a cruel campaign that involves Papua New Guinea and its people in problems that are not of our making.

— PNG Council of Churches[128]

7.6.3 THE AGREEMENT WITH NAURU

Like the PNG Agreement and MOU, the MOU signed with Nauru on the 3rd August 2013, *Relating to the transfer and Assessment of Persons in Nauru, and Related Issues*[129] also provides for 'special arrangements... including unaccompanied minors'[130] and undertakings about the expulsion of transferees to another country, and permitting assessments of refugee applications.[131]

Nauru does have legislative provision under their existing *Guardianship of Children Act 1975* (Nauru) for the courts to make determinations about guardianship. It also has in place the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nauru), which sets out that in the treatment of children, regard must be had to the CRC.[132] It also establishes that the Minister for Justice will be the guardian of unaccompanied minors, with the same powers as would apply if appointed under the Guardianship Act, and that they may delegate in writing any of those powers or functions to a 'fit and proper person' within a corporation working for the 'welfare and protection of children.'[133]

7.6.4 DEVELOPMENTS AND CONDITIONS IN NAURU

Nauru is currently the only offshore processing centre to which unaccompanied children are intentionally being removed. There are significant issues which have also emerged regarding this site.

128 Fr. Denny Guka, President of the PNG Council of Churches, 'Statement by the PNG Council of Churches to the PNG Government On the Manus Asylum Seekers' Issue', 28 March 2014.

129 MOU with Nauru. Found at: http://www.dfat.gov.au/issues/people-smuggling-mou.html

130 MOU with Nauru, provision 18.

131 MOU with Nauru, provision 19.

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

133 s15, Asylum Seekers (Regional Processing Centre) Act 2012 (Nauru).

7.6.4.1. 48 HOUR TURNAROUND

In the first two weeks in office, the current Australian Government introduced rapid transfer procedures, with 48 hour 'turnaround' targets for those asylum seekers reaching Australia. Previously they would have been subject to appropriate health and security checks in Australia, taking weeks.

Doctors on Christmas Island have detailed ongoing 'concerns regarding the rushed medical clearance of individuals by IHMS as fit to be transferred to Offshore Processing Centres.'[134] With pressure to meet targets 'several aspects of the health induction assessments' were compromised and 'standards were abandoned.'

These views were supported in strong criticisms from the Australian Medical Association[135] and Royal Australasian College of Physicians, which detailed serious concerns about the process, in their opinion 'a full post-arrival medical assessment is not possible within a 48-hour timeframe', furthermore that they were 'significantly concerned' with the suggestion that medical checks would be carried out on Manus Island and Nauru, given their limited facilities.[136]

The UNHCR also criticised this regime in their monitoring visit to Nauru, stating that 'targeted '48 hour' timeframe did not appear to adequately or thoroughly assess the individual needs of asylum-seekers, including children.'[137] They noted 'the presence of unaccompanied children who had been transferred inadvertently' and suggested it 'highlights the need for, and importance of, accurate and effective pre-transfer assessments.'[138]

7.6.4.2. CRISIS IN THE 'RULE OF LAW'

In January 2014 the Nauruan Government sacked and deported its Resident Magistrate and prevented its Chief Justice from re-entering the country. Legal bodies both in Australia and abroad expressed alarm at the crisis in the rule of law. The International Commission of Jurists stated that 'removing judges from office, without any process whatsoever, breaches clear international standards on the independence of the judiciary.'[139] After a two-month standoff, the Chief Justice also resigned citing the 'political motivations' behind the Nauruan Government's actions.[140]

Moreover, following this three members of the Nauruan Parliament were banned in May for criticising Government actions and another two were suspended from Parliament in the first week of June, amid allegations the Government was trying to avoid scrutiny of its budget.[141] Also raising problems of transparency and accountability is the lack of independent media with only a single Government controlled news outlet, and recent increase in visa costs from $200 to $8000 for journalists - as scrutiny was mounting on the detention regime.[142]

It is arguable that Australia's current involvement and influence in Nauru's affairs is so great that it is not only in *defacto* control of the processing arrangements, but is implicated to the extent that 'Australia has contaminated conceptions of the rule of law amongst the Nauruan government, by encouraging it to regularise grossly abusive executive power under a thin veneer of apparent legislative or constitutional authority.'[143]

134 Christmas Island Medical Officer's, 'Letter of Concern, For review of by International Health and Medical Services Management (IHMS) and Executive,' November 2013. p 23.

135 SBS News, 'Concerns over rapid asylum-seeker transfers,' 25 September 2013. At: www.sbs.com.au/news/article/2013/09/25/concerns-over-rapid-asylum-seeker-transfers

136 Royal Australian College of Physicians, 'Submission to the Australian Human Rights Commission's 2014 Inquiry into Children in Immigration Detention.' At: www.racp.edu.au

137 UNHCR, 'Monitoring Visit to the Republic of Nauru' Report, 7-9 October 2013, p.3. At: http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=351:men-women-and-children-suffering-from-harsh-physical-conditions-and-legal-shortcomings-at-pacific-island-asylum-centres-unhcr-reports&catid=35:news-a-media&Itemid=63

138 As above.

139 International Commission of Jurists, Press Release, *Nauru: removal of judges violates independence of judiciary,* 21 January 2014. At: www.icj.org/nauru-removal-of-judges-violates-independence-of-judiciary - Many other legal bodies, such as the Australian Bar Association, expressed similar alarm. See for instance: www.radioaustralia.net.au/international/radio/program/pacific-beat/australian-bar-association-concerned-about-rule-of-law-on-nauru/1279330

140 Quoted in the SMH, 12 March 2014. At: www.smh.com.au/federal-politics/political-news/nauru-chief-justice-quits-citing-rule-of-law-breach-20140312-34n3c.html. This also sparked further alarm from the International Commission of Jurists, who stated the crisis in the rule of law had "deepened". See: http://www.icj.org/nauru-crisis-for-rule-of-law-deepens

141 SBS, 'Two more Nauru opposition MPs banned,' 5 June 2014. At: www.sbs.com.au/news/article/2014/06/05/two-more-nauru-opposition-mps-banned

142 The Guardian, 'Nauru to increase visa cost for journalists from $200 to $8,000,' 9 January 2014. At http://www.theguardian.com/world/2014/jan/09/nauru-visa-to-cost-8000

143 Professor Ben Saul, 'Constitutional crisis: Australia's dirty fingerprints are all over Nauru's system,' The Guardian, 21 January 2014 http://www.theguardian.com/commentisfree/2014/jan/21/constitutional-crisis-australias-dirty-fingerprints-are-all-over-naurus-system

7.6.4.3. INHUMANE CONDITIONS IN OFFSHORE DETENTION

Following a monitoring visit in October 2013 the UNHCR suggested the conditions were inhumane and unsafe, and breached international standards in that it constituted mandatory detention, did not have fair or efficient processes in place for assessing refugee claims nor provide timely or adequate resolutions, and breached the prohibition against 'torture, cruel, inhuman or degrading treatment.'[144]

A leaked 'Nauru Site Visit Report' compiled by a committee of medical professionals 16-19 February 2014, also detailed serious medical, resource, and child protection issues.[145] Taken together, these two reports describe the following conditions:

- Children are living in cramped, vinyl tents without sufficient privacy and with rat infestations. They are without air conditioning in an environment where the temperatures can be extreme. They have poor access to the most basic needs, such as water, which is restricted and limited across the island. There is poor waste management and the potential for ground water contamination.
- The room set up for educational purposes is often too hot to use. There is little education or recreation - they 'play' in the dirt with rocks, and have little to no natural shade. These conditions are exacerbated by ongoing construction in the camp and nearby phosphate mining on the island, which cause high levels of noise and dust.
- Children suffer skin infections and constant lice infestations. There are likely to be cases of latent tuberculosis, and undiagnosed blood-borne diseases, including hepatitis B. There were 'critical issues' with the general lack of health screening for children. There was an outbreak of dengue fever in the detention camp in recent months.

In addition there have been serious reports of security guards verbally and physically assaulting children,[146] one leaked report regarding a local Nauruan cleaner sexually assaulting a teenage boy,[147] and children generally are considered 'at significant risk of sexual abuse.'[148] Children are witnessing adults self-harming, (including by hanging, wounding, and starvation). In 14 months there were 102 incidents of reported self-harm, resulting in 24 transfers and nine medical evacuations. An unexploded WW2 bomb was found inside the 'family camp.'[149]

The UNHCR concluded that:

> *Overall the harsh and unsuitable environment at the closed RPC is particularly inappropriate for the care and support of child asylum-seekers... UNHCR is of the view that no child, whether an unaccompanied child or within a family group, should be transferred from Australia to Nauru.*[150]

It paints a harrowing picture of neglect and abuse, one that we could not imagine allowing our own children to be placed in. Indeed fearing that many more unaccompanied children were about to be removed to Nauru from Christmas Island, in March 2014 the Uniting Church in Australia wrote to the Australian Government offering sanctuary for all children without parents then being held on Christmas Island.

The President of the Uniting Church of Australia, the Rev. Prof. Andrew Dutney said "We are well placed to offer these vulnerable young asylum seekers a place of sanctuary where we can ensure their wellbeing... our extensive networks stand ready to take these young people into our custody where they will be given the support and care that they need and deserve."[151]

The Australian Government did not take up this offer, and more unaccompanied children were subsequently removed from Australia to Nauru, where they became the wards of the Nauruan Minister for Justice.

144 UNHCR, 'Monitoring Visit to the Republic of Nauru' Report, 7-9 October 2013, p.3. At: http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=351:men-women-and-children-suffering-from-harsh-physical-conditions-and-legal-shortcomings-at-pacific-island-asylum-centres-unhcr-reports&catid=35:news-a-media&Itemid=63

145 Physical and Mental Health Sub Committee of the Joint Advisory Committee for Nauru Processing Arrangements, Nauru Site Visit Report, 16-19 February 2014. Found at: http://www.theguardian.com/world/interactive/2014/may/29/nauru-family-health-risks-report-in-full

146 The Guardian, 'Nauru Guards accused of assaulting children in detention camp' 24 April 2014. At: http://www.theguardian.com/world/2014/apr/24/nauru-guards-accused-of-assaulting-children

147 News report here: http://www.theguardian.com/world/2014/jun/06/evidence-nauru-cleaner-sexually-assaulted-asylum-seeker-boy and the official leaked report of the incident here: http://www.theguardian.com/world/interactive/2014/jun/06/nauru-sexual-assault-investigation-final-report-in-full

148 Physical and Mental Health Sub Committee of the Joint Advisory Committee for Nauru Processing Arrangements, Nauru Site Visit Report, 16-19 February 2014. Found at: http://www.theguardian.com/world/interactive/2014/may/29/nauru-family-health-risks-report-in-full

149 The Guardian, 'Unexploded wartime bomb found in Nauru detention centre,' 22 April 2014. At: www.theguardian.com/world/2014/apr/22/unexploded-wartime-bomb-found-in-nauru-detention-centre

150 UNHCR, 'Monitoring Visit to the Republic of Nauru' Report, 7-9 October 2013, p.2.

151 Uniting Church in Australia, Media Release, 4 March 2014. At: www.unitingjustice.org.au/refugees-and-asylum-seekers/news/item/945-uniting-church-offers-sanctuary-for-all-child-asylum-seekers-on-christmas-island

CHRISTIAN VIEWPOINT

Today no one in the world feels responsible for this; we have lost the sense of fraternal responsibility for our brothers and sisters...

In this world of globalization we have fallen into a globalization of indifference. We are accustomed to the suffering of others, it doesn't concern us, it's none of our business...

The globalization of indifference makes us all "unnamed", responsible, yet nameless and faceless.[152] *– Pope Francis*

7.7 Offshore resettlement & the Cambodia proposal

Three families and four single males were recently found to be owed protection by Nauru, were granted refugee status and provided with accommodation outside of the detention camp boundaries. Their visas are valid for 5 years and permit them to work. Of the 20 initial decisions, 13 were positive and 7 negative.[153]

The likelihood of any sustainable resettlement in either Nauru or PNG is almost farcical. The UNHCR noted particular concern there would be no durable solution for unaccompanied children, and that 'the current socio-economic and demographic identity in Nauru makes it very unlikely that recognized refugees will be able to find a sustainable, long term solution in Nauru itself.'[154]

7.7.1 CAMBODIA

In late May 2014 Prime Minister Hun Sen confirmed that 'Cambodia will sign a memorandum of understanding with Australia in order to help the refugees, who are already interviewed, in the near future.'[155]

No details are as yet available, so it remains unclear whether any such arrangements might involve families or unaccompanied children. However this is an alarming development on many fronts. Cambodia is placed even further down in Transparency International rankings than PNG (being 160 of 177 on its Corruption Perceptions Index).[156] Phil Robertson, deputy director of Human Rights Watch's (HRW) Asia division, stated that Cambodia was ill-equipped to take Australia's asylum seekers, and any deal to do so would be a major step backwards and 'a disaster for refugee rights protection in Southeast Asia.'[157]

Some of the strongest objections came from the Cambodian Human Rights Action Committee; a Coalition of 21 NGO's who released a statement calling Australia 'irresponsible' for seeking to shift its 'responsibilities and obligations under the Refugee Convention onto a country with a history of serious human rights abuse and little or no resources to support incoming refugees.'

They noted Cambodia's 'serious culture of impunity where Cambodian security forces and government agencies have been known to commit abuses such as killings, torture, and arbitrary detention without being held accountable.' And expressed grave concerns that money promised in aid would simply end up in 'the pockets of individual Government Officials.'[158]

There are reportedly 69 refugees and 16 asylum seekers in Cambodia, mainly from Myanmar and Vietnam. Many of these people are trying to leave and are seeking resettlement in a third country.[159]

CHRISTIAN VIEWPOINT

No Australian politician acting in good conscience could send asylum seekers to Cambodia satisfied that they would receive appropriate processing of their claims and protection'[160]

— Fr Frank Brennan

152 Transcript of speech available at: www.news.va/en/news/pope-at-lampedusa-forgive-us-lord-for-indifferen-2

153 As reported during a Ministerial Press Conference, 22 May 2014. At http://www.minister.immi.gov.au/media/sm/2014/sm214759.htm; and media report at: http://www.smh.com.au/federal-politics/political-news/refugees-released-into-nauru-community-on-temporary-visas-but-will-be-refused-settlement-in-australia-20140522-38pmk.html#ixzz34RijF1BP

154 UNHCR, 'Monitoring Visit to the Republic of Nauru' Report, 7-9 October 2013, p.2.

155 SMH, 'Cambodia's PM Hun Sen confirms controversial agreement to resettle refugees from Australia,' May 20, 2014. At: http://www.smh.com.au/federal-politics/political-news/cambodias-pm-hun-sen-confirms-controversial-agreement-to-resettle-refugees-from-australia-20140520-zrhz3.html#ixzz33UDEdc8x; and see also: Klaus Neumann, 'Price of resettling refugees should not be our silence on Cambodia,' The Conversation, 26 May 2014. At: http://theconversation.com/price-of-resettling-refugees-should-not-be-our-silence-on-cambodia-26984

156 See: http://www.transparency.org/country#KHM

157 Integrated Regional Information Networks (IRIN), Australia-Cambodia refugee deal sparks criticism, 21 May 2014, available at: http://www.refworld.org/docid/537f39924.html

158 The Cambodian Human Rights Action Committee (CHRAC), Press Statement On Cambodia's Refugee Resettlement Agreement With Australia, Phnom Penh, 4 June 2014, At: http://www.chrac.org/eng/CHRAC%20Statement%20in%202014/06_04_2014_CHRAC%20Statement%20on%20the%20case%20of%20refugees.pdf

159 Integrated Regional Information Networks (IRIN), Australia-Cambodia refugee deal sparks criticism, 21 May 2014, available at: http://www.refworld.org/docid/537f39924.html

160 Fr Frank Brennan, 'Is our morality at sea with the refugees?' Eureka Street, 10 April 2014. At: http://www.eurekastreet.com.au/article.aspx?aeid=39272#.U7WUmMZCNFx

7.7.2 REGIONAL COOPERATION

Most serious and considered policy pieces written about asylum seekers in the last several years have reiterated the need for durable solutions to be found through a regional framework and cooperation. The issue with Australia's current involvement in the region is that, as canvassed above, being fixated as it is on a 'deterrent' at all costs, has resulted in distorted relationships. Not only has it undermined Australian credibility internationally, through diminishing our claim to shared humanitarian foundations and moral leadership, but we have weakened or undermined the democratic processes in other states.

Regardless, positive contributions continue to be made as to how Australia might play a more constructive, effective and positive influence regionally, including in relation to unaccompanied children.[161]

In June 2012, the Department of Immigration provided funding to the UNHCR to conduct a research project 'to map, review and assess the protection situation and treatment of unaccompanied and separated children (UASC) who have moved irregularly to and within South East Asia, with a particular focus on Indonesia, Malaysia and Thailand.' This project produced the *Regional Guidelines for Responding to the Rights and Needs of UASC.*[162] Though notably, while funded by Australia, the subsequent Government has distanced itself from its contents.[163]

CHRISTIAN VIEWPOINT

And so we repeat again our respectful encouragement to Australia 'to find a more humane solution to people seeking asylum in their country. Asylum seekers are human beings who deserve respect and recognition of their dignity

Detaining people against their will in PNG, even if it 'works' as a deterrent is not a just solution worthy of a great nation otherwise proud of its human rights record. It clearly places an intolerable strain on the capacity of PNG to manage, and might lead to even more deaths, injury and trauma. Close the centre and manage the problem in Australia."[164]

—Catholic Bishops Conference of Papua New Guinea and the Solomon Islands

161 A broader literature review is beyond this work, but on unaccompanied children see: The University of Sydney, In Association with Amnesty International Australia, *Removing the Stumbling Blocks: Ways to Use Resettlement More Effectively to Protect Vulnerable Refugee Minors,* March 2014; University of New South Wales Human Rights Clinic, Improving Guardianship Arrangements for Unaccompanied Minor Asylum Seekers (UMAS) in South East Asia and Australia: Towards a Holistic Approach, June 2013.

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

163 '...the Government and Department do not necessarily endorse its content.' - Correspondence from the Minister For Immigration and Border Protection, 'Australian Churches Refugee Taskforce draft report "All the Lonely Children",' 12 February 2014 .

164 Fr Victor Roche SVD, General Secretary, Ststement by the Catholic Bishops Conference of Papua New Guinea an the Solomon Islands, 28 February 2014.

7.8 Potential breaches of international law and domestic duties

There are serious issues with offshore processing in third countries regarding its compatibility with international human rights law. Aspects of their operation are being tested in both Australian and PNG courts.

7.8.1 BREACHES OF OBLIGATION

It appears that Australia is in breach of its obligations and duties, including:[165]

- **Convention of the Rights of the Child** (CRC) - Under the CRC to ensure the best interests of the child are a primary consideration (Article 3) and potentially under Article 20(1)) to provide child asylum seekers with human rights protections and humanitarian assistance;
- **Refugee Convention** - Being likely to violate its obligation under Article 31 of the Refugee Convention not to penalise an asylum seeker on account of their 'illegal' mode of entry to Australia. (For instance asylum seekers arriving by boat being treated differentially to those arriving by plane, in part because of the 'deterrence' policy), potentially too Article 33 prohibiting *refoulment;*
- **International Covenant on Civil and Political Rights** (ICCPR) - Breaching Article 9 of the ICCPR prohibiting arbitrary and indefinite detention as people will be detained for extended periods in conditions that are unfit for purpose and do not meet international standards and Article 26 providing for equal protection before the law. Potentially too, the prohibition against torture and cruel, inhuman or degrading treatment (Article 7, ICCPR), the right to humane conditions in detention (Article 10, ICCPR) and the right to family life and privacy (Article 17, ICCPR).[166]
- **International Covenant on Economic, Social and Cultural Rights** (ICESCR) - Interfering with families in a manner contrary to the right to family life, in that family is 'the natural and fundamental group unit of society' and should be accorded 'the widest possible protection and assistance' (Article 10).[167]
- **Minister's duties** - The Minister also risks breaching both statutory and common law duties to these children. In particular, as the socio-economic conditions in both Nauru and PNG raise concerns that any children sent there will face the prospect of further psychological and physical harm. This is further accentuated by the likelihood that PNG and Nauru will not have the capacity to undertake refugee status determination processes in a suitably rigorous way that takes into account the noted developmental vulnerabilities of children, let alone have the capacity to offer safe, appropriate or sufficient resettlement.

CHRISTIAN VIEWPOINT

The warehousing of asylum seekers in inadequate facilities in these offshore centres is entirely unacceptable. It is a breach of our obligations under international law and diminishes us as a nation.'[168]

- Rev'd Elenie Poulos

165 See for instance the Parliamentary Joint Committee on Human Rights report on the Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation, June 2013; a discussion by Ben Saul, *'The new asylum seeker arrangement between Australia and Papua New Guinea is almost certain not to comply with Australia's international law obligations,'* The Conversation, 20 July 2013. At: http://theconversation.com/rudds-png-plan-unlikely-to-comply-with-international-law-16250

166 These latter three were highlighted by UNHCR after their visit to Nauru. See: UNHCR, 'Monitoring Visit to the Republic of Nauru' Report, 7-9 October 2013, p.16.

167 International Covenant on Economic, Social and Cultural Rights (ICESCR).

168 Uniting Church in Australia, Media Release, 'The Uniting Church has expressed sorrow over the tragic loss of life on Manus,' 18 February 2014 http://www.unitingjustice.org.au/refugees-and-asylum-seekers/news/item/943-violence-on-manus-island

7.8.2 AUSTRALIAN RESPONSIBILITY

There is a strong case that under international law, Australia continues to have obligations towards the asylum seekers transferred to detention offshore. The UNHCR has expressed a position that Australia's excision of the mainland did not absolve it of its responsibilities towards asylum seekers, that their expectation was that any asylum-seeker arriving in Australia would be given access to 'a full and efficient refugee status determination process in Australia', and that if transferred to another country, 'the legal responsibility for those asylum-seekers may in some circumstances be shared with that other country.'[169]

Others, including Human Rights Law Centre, have expanded on this and suggested that 'Australia's human rights obligations do not end at our borders. Australia is responsible for those who are within its effective jurisdiction or control even if those people have been transferred abroad.'[170]

It is a view that reflects previous comment by the UN Human Rights Committee, which noted that parties to the International Covenant on Civil and Political Rights (ICCPR) 'must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party,' and that these rights 'must be available to all individuals, regardless of nationality or statelessness, such as asylum seekers.'[171]

So surely, real responsibility for the care of these vulnerable unaccompanied young people must remain with the Australian government. Even if able to construe a technical legal argument, the moral and ethical obligations cannot be so easily discarded.

Such responsibilities should also be viewed in light of the failings that were exposed of the original offshore processing – the 'Pacific solution' of the early 2000's. Subsequent research indicated that 32 out of 55 unaccompanied children may have been returned to Afghanistan from Nauru, even though the evidence suggested they should have been granted asylum in Australia.[172] Many people returned during this time are also well documented to have been 'deported to danger' counter to a key tenet of international law, not to *refoule* those seeking our protection.[173]

169 UNHCR, 'New 'excision" law does not relieve Australia of its responsibilities towards asylum-seekers,' UNHCR Press Releases, 22 May 2013, at: http://www.unhcr.org/519ccec96.html

170 Human Rights Law Centre, Letter to Parliamentary Joint Committee on Human Rights, 23 Jan 201, Examination of Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related bills and instruments - answer to question taken on notice at public hearing, at: http://www.hrlc.org.au/wp-content/uploads/2012/12/HRLC-response-to-question-on-notice.pdf; this disjuncture was also well documented by the Joint Parliamentary Committee on Australia's Immigration Network June 2012 Inquiry. See also Kevin Boreham, 'Australia has an obligation to support the rule of law in Nauru,' The Conversation, 22 January 2014, http://theconversation.com/australia-has-an-obligation-to-support-the-rule-of-law-in-nauru-22179

171 UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: http://www.refworld.org/docid/478b26ae2.html

172 Crock & Kenny, p.442

173 Most prominently this has been exposed through the Edmund Rice Centre, in their Deported to Danger project: http://www.erc.org.au

CHRISTIAN VIEWPOINT

Today too, the question has to be asked: Who is responsible for the blood of these brothers and sisters of ours? Nobody! That is our answer: It isn't me; I don't have anything to do with it; it must be someone else, but certainly not me. Yet God is asking each of us: 'Where is the blood of your brother which cries out to me?' Today no one in our world feels responsible; we have lost a sense of responsibility for our brothers and sisters. We have fallen into the hypocrisy of the priest and the Levite whom Jesus described in the parable of the Good Samaritan: we see our brother half dead on the side of the road, and perhaps we say to ourselves: 'poor soul...!', and then go on our way. It's not our responsibility, and with that we feel reassured, assuaged. The culture of comfort, which makes us think only of ourselves, makes us insensitive to the cries of other people, makes us live in soap bubbles which, however lovely, are insubstantial; they offer a fleeting and empty illusion which results in indifference to others; indeed, it even leads to the globalization of indifference. In this globalized world, we have fallen into globalized indifference. We have become used to the suffering of others: it doesn't affect me; it doesn't concern me; it's none of my business![174]

—Pope Francis

If nations can't hate and scapegoat their enemies, how can they cohere? If societies can't project blame onto a hated 'other', how can they keep from turning on themselves? Jesus' answer is as simple as it is revolutionary: Instead of an arrangement around hate and violence, the world is now to be arranged around love and forgiveness. The fear of our enemy and the pain of being wronged is not to be transferred through blame, but dispelled through forgiveness. Unity is not to be built around the practice of scapegoating a hated victim, but around the practice of loving your neighbour as yourself - even if your neighbour is your enemy. Jesus is trying to lead humanity into the deep truth that there is no 'them', there is only us.[175]

—Brian Zahnd:

174 Homily of Holy Father Francis, 'Arena' sports camp, Salina Quarter, Monday, 8 July 2013, available at: http://w2.vatican.va/content/francesco/en/homilies/2013/documents/papa-francesco_20130708_omelia-lampedusa.html

175 Brian Zahnd, quoted in: Jarrod Mc Kenna, 'Easter Made Me Do It! On Scapegoats, Asylum Seekers and Being Arrested, ' ABC Religion & Ethics, 8 April 2014. At: http://www.abc.net.au/religion/articles/2014/04/08/3981214.htm

Final Taskforce theological comment

Dignity: the state or quality of being worthy of honour or respect.

> *And the king will answer them, 'Truly I tell you, just as you did it to one of the least of these who are members of my family, you did it to me.' Matthew 25: 40*

As noted at the outset, an overarching concern of the Taskforce is that of our inalienable human dignity based in our being created in the image of God. It is a concern that encompasses those who come to our shores seeking our protection, and extends to what our response to the challenges of displaced peoples in our modern era means for us as individual Australians and as a nation of peoples. As Pope John Paul II, amongst many others, observed — **a society will be judged on the basis of how it treats its weakest.**

Our treatment of the children

Never has this been more evident than the plight of unaccompanied children, particularly those arriving by boat seeking our protection. There can be little doubt that in our guardianship and care of unaccompanied children, Australia has breached and continues to transgress many of its legal, moral and ethical obligations and duties towards these children.

Our collective claim upon the state or quality of being worthy of honour or respect slips further as each new story of neglect, abuse and abandonment of these unaccompanied children emerges.

The urge to scapegoat remains a strong one for a state which stands to benefit. The State uses its power to atomise its citizens (and in this case those stateless or displaced persons who are under its effective control), 'to isolate them from each other and to create a state of chaos from which the violence and power of the state [is] required to rescue the country.' **The creation of a common threat from whom only the State can rescue its people is a powerful force for legitimising what would otherwise be the untenable and illegitimate actions by a civilised government.**

Yet this position is neither moral nor maintainable. For:

> *' ... while these reasonable voices seem to be out-shouted by those who have descended into the game of demonisation and the stirring of populist unrest, that cruel noise will not deafen the ears of the future.*

These days will return to haunt us and our actions will bewilder those who follow us in the same way that the actions of those in charge of churches, government departments and other institutions during the '60s, '70s and '80s, which allowed abuse, bewilder us today.

Some time in the future the 'transferees' will join the list of those of those to whom we have apologised: the victims of forced adoptions and the stolen generations.

In the present we 'other' these human beings and hide our lack of care behind labels such as 'illegals' and 'transferees'. But these labels will not protect us from the future's scrutiny.'

No more is this and will this be evident than in our treatment of unaccompanied children.

Despite the difficulties we are still called in the present to act, to bear witness, to speak out, to work towards and pray for change – to reverse or ameliorate the cruellest of these policies and to seek a better system of care for those unaccompanied children under our protection.

This is the cross that has been taken up by churches, by ecumenical groups such as The Australian Churches Refugee Taskforce, the Australian Coalition to End the Immigration Detention of Children, the emerging movement of #Love Makes A Way, and other faith communities right across Australia.

> *Because as we do to these children, the 'least' of us, we potentially do to all.*

Now that we can imprison the innocent with impunity, we too can be imprisoned. We too are at risk.

In fact the parable in Matthew is saying that nobody is safe once violence is the paradigm, not even the King (or God or Jesus – and how true that has turned out to be).

Thus the churches are in it for the long haul. Politicians and governments come and go, policies wax and wane. The people of God have been on the side of the powerless and the vulnerable since before the time of Christ, because 'we are powered by the Holy Spirit... we are not giving up.'[176]

176 Reverend Chris Bedding, Cranky Chritians Against asyklum seeker cruelty,' The Drum ABC online, 20 May 2014. At: http://www.abc.net.au/news/2014-05-20/bedding-love-makes-a-way/5465300

Our Dignity as Australians and Australia as a nation

As Australians we now see ourselves portrayed on the international stage by groups such as Human Rights Watch, as 'hell-bent on using cruel policies to deter asylum seekers, even at the expense of the country's international reputation.'

Reverend Professor Andrew Dutney has observed:

> *'somehow it has come to suit us to treat this particular group of vulnerable 'others' as we would never want to be treated ourselves.'*

Pope Francis recently spoke to a similar point, in his visit to Lampedusa:

> *"Today no one in the world feels responsible for this; we have lost the sense of fraternal responsibility for our brothers and sisters...*
>
> *"In this world of globalization we have fallen into a globalization of indifference. We are accustomed to the suffering of others, it doesn't concern us, it's none of our business."*

This is not trite sentiment, unconcerned with the realities of the challenges we face; just as civil society and our faith communities do not seek transparency of Government action towards asylum seekers out of 'sport' or some 'idle curiosity'.

This 'globalization of indifference' goes to the heart of the story we tell each other about the kind of nation we are, and it shapes our relationships with each other and towards the world. It can both expand and limit what our nation could be.

Continuing to treat those who seek asylum as deserving of less than full human dignity not only 'crush[es] the souls of detainees,' but it reflects upon and shapes our own human dignity; it points to 'a neglected, enfeebled, imperilled Australian soul;' and marks the diminishment of us all as a nation of peoples.

Our society is called to a better version of itself

However it is the role of the church and Christians to continue to call our society into a better version of itself – more loving, more charitable, less afraid, less violent – Australia does have a different story that at its best creates a community of hospitality, inclusion and compassion. We have a history of welcoming people from all over the globe, at some times more fully than at others, and we can easily point to the benefits that hospitality has brought to us.

'If nations can't hate and scapegoat their enemies, how can they cohere? If societies can't project blame onto a hated 'other', how can they keep from turning on themselves? Jesus' answer is as simple as it is revolutionary: Instead of an arrangement around hate and violence, the world is now to be arranged around love and forgiveness. The fear of our enemy and the pain of being wronged is not to be transferred through blame, but dispelled through forgiveness. Unity is not to be built around the practice of scapegoating a hated victim, but around the practice of loving your neighbour as yourself - even if your neighbour is your enemy. Jesus is trying to lead humanity into the deep truth that there is no 'them', there is only us.'

It may be argued that Christian theology has no greater truth claims than any other philosophy or worldview. In particular it may be argued that Christianity can make no truth claims on those who do not profess its beliefs. All this is true. However Christians can argue that Christianity offers the world this better vision of itself, this higher standard of humanity, by recognizing and protecting the value of every human life. If the alternatives have led us to a place where imprisoning children is an acceptable part of our common life, then what have we to lose?

Christian theology offers a vision of humanity that can live in community without violence, where we are interdependent, nonviolent, compassionate and empowering. To grasp such a vision is to live in a way 'that will make those who come after proud; proud rather than bewildered. A present that can be found, ever so simply, by allowing our compassion - which is real - to overrule our fears.'

We cannot ensure that all other nations will follow the vision, but we can make a choice for our country and ourselves. We can become the Australia we always thought we were. Not because we are a Christian nation but because it is a narrative that brings us life rather than death.

Appendices

Appendix A: Minister Scott Morrison's response to ACRT's Draft Report *All the Lonely Children*

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

Ms Misha Coleman
Executive Officer
Australian Churches Refugee Taskforce
Level 4, Causeway House
306 Little Collins Street
MELBOURNE VIC 3000

Dear Ms Coleman,

Australian Churches Refugee Taskforce draft report "All the Lonely Children"

I refer to your letter of 8 October 2013 concerning your draft report "All the Lonely Children" and our subsequent meeting in December 2013. I regret the delay in responding.

Thank you for the opportunity of considering the fifteen questions posed before finalising your report. Please find attached responses to these questions.

During our meeting, you asked a further question regarding birth certificates for children born in immigration detention. I can advise that for children born to parents in immigration detention, detention operations officers will arrange for the submission of a completed Registration of Birth form to the Births, Deaths and Marriage Registration Office in the relevant state/territory. For community detainees, contracted service providers are required to assist the parents to register the baby's birth and to obtain a birth certificate. In both circumstances, the cost is covered by the department.

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
Minister for Immigration and Border Protection
12/2/2014

Response to the Australian Churches Refugee Taskforce

Australian detention:

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

Under the *Immigration (Guardianship of Children) Act 1946* (IGOC Act), the Minister for Immigration and Border Protection (the Minister) is the guardian of certain unaccompanied minors in Australia.

To help meet his guardianship responsibilities, the IGOC Act allows the Minister to delegate a majority of his guardianship powers and functions to officers in the Commonwealth or State or Territory governments. Such officers are referred to as 'delegated guardians'. Delegation is enlivened by the Instrument of Delegation, which may be amended from time to time. The current instrument was made on 31 May 2013 and provides for the delegations of the Minister's powers in different circumstances.

All minors who fall within the scope of the IGOC Act (commonly referred to as 'IGOC minors') are under the care of a delegated guardian. Guardianship is delegated according to the instrument and local operational needs, often, for example, to the Executive Level 2 Centre Manager. The delegated guardian is responsible for making decisions affecting a minor's long term welfare and decisions of a non-routine nature as the need arises, whatever the time of day or night.

Within the context of immigration detention, the Minister's guardianship obligations are discharged through arrangements with service providers who deliver appropriate care, welfare, education and recreational activities. Under section 7 of the IGOC Act, a custodian may be appointed to provide day to day care for IGOC minors. This may be a service provider or a relative of the minor who has agreed to act in this role. Where a service provider is a custodian, the number of minors placed in their care will vary depending on a range of factors including their capacity, location and contractual arrangements.

The custodian can make routine day to day decisions about an IGOC minor. The *Immigration (Guardianship of Children) Regulations 2001* require the custodian to notify the delegated guardian of certain serious incidents involving an IGOC minor in their care, ensuring any relevant decisions are able to be made by the delegated guardian. A delegated guardian will make decisions in consultation with the custodian and any relevant experts (such as medical practitioners) and taking into account the minor's views, giving appropriate weight to their age and maturity.

Older minors may have the maturity and understanding to make certain decisions on their own behalf. Usually, these will be decisions relating to medical treatment.

Over the last three years and since the establishment of a dedicated Children's Unit in the Department of Immigration and Border Protection (the Department), the Department has put in place a number of arrangements and procedures to ensure guardianship responsibilities are clearly delegated and understood.

This includes:

- the development of a range of guidance material;
- the operation of helpdesks to support staff and service providers;
- regular formal and informal consultation with key stakeholders, including delegated guardians and custodians;
- the establishment of a practice management group for delegated guardians;
- improvements to departmental information; and
- regular training sessions.

Legal:

- *Where are 'enhanced screening' assessments & interviews taking place? If specific support is not being provided to children, are the Immigration officials conducting the interviews trained appropriately to deal with and assess traumatized children and young people?*
- *Who is the delegated guardian when children are on Christmas Island (or other detention facility) and undergoing these screenings? Why aren't they or other persons actively involved in protecting the child's interests?*
- *Will children be exempt from the proposed "fast track" system as they are in the UK? How will unaccompanied children be dealt with under the proposed changes to the refugee status determination process? What safeguards will be put in place to ensure their best interests of the child are taken into account and children's rights are protected?*
- *Will the IAAAS continue to be available to unaccompanied children? If not, will other alternative support for legal advocacy and assistance be made available?*

Enhanced screening interviews usually take place on Christmas Island, and are conducted by an experienced officer with relevant background and training in protection decision making.

Interviewers carefully consider the personal circumstances of the individual being interviewed to ensure that the interview is conducted in a manner sensitive to their circumstances. Where a minor is being interviewed there are arrangements in place to ensure there is an independent observer present at the interview. Additionally, when a child is accompanied by a relative over 21 years of age they are not interviewed separately unless the child specifically makes such a request.

The Department acknowledges the sensitive nature of interviewing minors, and has in place policies for children to be interviewed by experienced, trained decision makers and, if possible, by decision makers who have knowledge of the psychological and emotional development of children, and their behaviour.

Officers are trained in child sensitive questioning techniques and have guidance to assist them. Interviewing officers exercise special care when interviewing children and ensure the interview is conducted in a child-sensitive manner. Departmental policies guide the interviewing officer to take

the initiative in actively considering whether the child understands the process and to tailor particular questions, taking into account the child's experience, age and developmental stage.
Responsibility for the care and welfare of unaccompanied minors at immigration detention facilities - including Christmas Island - (irrespective of whether they fall under the IGOC Act) lies with Centre Managers and officers working at the facilities, all of whom have a duty of care in respect of children in the facilities. In relation to enhanced screening, the policy guidelines require that the best interests of the child are a primary consideration when making any decision about the child.

There are a number of arrangements in place when children are subject to the screening process.
A suitability assessment is undertaken for all children to assist in determining suitability for enhanced screening, and this is done in consultation with departmental case managers and the Department's health service provider, IHMS. The personal characteristics of a child are considered when determining whether they are suitable for enhanced screening.

Where a minor is being interviewed, there are contractual arrangements in place to ensure an independent observer is present at the interview including:

- the independent observer ensures that the treatment of unaccompanied minors during the interview is fair, appropriate and reasonable.
- where appropriate, the interviewing officer may allow the independent observer to help the minor explain their claims but at the same time ensure that the minor is able to speak for themselves and is given the opportunity to present their claims in their own words.

As part of the Government's pre-election policy, *'Coalition's policy to clear Labor's 30 000 border failure backlog'*, the Government announced their intention to establish a new Fast Track Assessment and Removal Process, modelled on the United Kingdom's (UK) Detained Fast Track and to conduct a rapid audit of the protection assessment process.

These issues remain under consideration by the Government and no decisions have been announced. To date, there have been no changes to processing, as a result of the rapid audit.

In pre-election commitments, the Government stated they would "*withdraw taxpayer funded immigration assistance under IAAAS for those who arrive illegally by boat, or illegally by any other method, to prepare asylum claims and make appeals*". Implementation of this commitment, including the way in which it may impact on unaccompanied minors, is one of a range of matters currently being considered by Government.

Domestic jurisdictional:

- *What is the current state of agreements between the Department of Immigration and each State and Territory? For instance NSW has been a state of concern, from which many young people have reportedly had to move, and it remains unclear as to whether a new agreement has been negotiated or will be put in place?*
- *What is being done to address the jurisdictional anomalies and ensure guardianship responsibilities are clearly delegated and understood at all stages of transition?*

The Department works with state and territory child welfare agencies (SCWAs) in jurisdictions where unaccompanied *humanitarian* minors (UHMs, i.e. unaccompanied minors who hold a protection or humanitarian visa) reside, to provide welfare services, such as case management, to UHMs with approved pre-existing carers under Memoranda of Understanding and equivalent agreements.
The Department has been working with state and territory governments to ensure nationally consistent service and cost models for the UHMs in their care. Where guardianship responsibilities for the day-to-day care of UHMs has been delegated to state and territory governments, these arrangements are consistent across jurisdictions.

Current procurement for the UHM Programme includes provision for services in NSW through a Commonwealth service provider. The procurement is yet to be completed.

Offshore:

- *Please clarify who, if anyone, assumes guardianship for children without guardians who are sent to PNG, and what might happen in the case of those young people who may not be recognised as children under PNG law?*
- *In the context of PNG, what is the definition of a "minor," and what is the legal framework governing the guardianship of unaccompanied minors in PNG?*
- *In Nauru, how will the Minister's guardianship powers be delegated and what arrangements will be made for the day to day care of these children to ensure that their rights and wellbeing are protected and promoted?*
  - *For example, will custodians be appointed and if so what criteria will govern the appointment of custodians for these children?*
  - *How will the Australian Government ensure that the best interests of these children, and their rights under the CRC, are promoted and promoted under these arrangements?*
- *What systems is Australia putting in place to ensure that the best interests of these children, and their rights under the CROC, are promoted and protected under these arrangements?*
- *How can Australia provide effective oversight of regional processing arrangements without committing to similar standards of care for unaccompanied minors in Australian facilities?*
- *Are the regional arrangements for children and young people consistent with recommendations made in the Regional Guidelines for Responding to the Rights and Needs of Unaccompanied and Separated Children (UASC), which were funded by DIAC?*

Papua New Guinea

The Government's position is that no minors will be transferred to Papua New Guinea.

Arrangements to support the transfer of children to Nauru

The Governments of Australia and Nauru have worked together to develop appropriate arrangements for the transfer of children to the offshore processing centre (OPC) that comply with Nauruan domestic laws and have regard to relevant international obligations.

Save the Children Australia has been contracted to provide specialised services for all children at the Nauru OPC.

In relation to unaccompanied minors, under the *Asylum Seekers (Regional Processing Centre) Act 2012*, the Nauruan Minister for Justice and Border Control is the legal guardian of unaccompanied transferee children. Whilst guardianship arrangements for unaccompanied minors are ultimately a matter for the Government of Nauru, the Nauruan Department of Justice and Border Control, the Department, OPC service providers and expert advisors have worked together to implement appropriate accommodation and broader service arrangements for unaccompanied minors.

Best interests

In relation to 'best interests of the child' considerations under the *Convention on the Right of the Child* (CRC), the Government considers that offshore processing arrangements are designed to discourage asylum seekers risking their lives on dangerous boat journeys to Australia, which is in the best interests of all children. Article 3 of the CRC states that the best interests of the child shall be **a** primary consideration, not **the** primary consideration. In these circumstances, the CRC does not have absolute priority over other considerations and countervailing considerations, such as the integrity of Australia's migration system and the national interest.

There are specific arrangements in place for minors prior to their transfer to the Nauru OPC taking place. For example, the Department conducts a Pre-Transfer Assessment, which includes an additional assessment for minors.

Regional Guidelines for Responding to the Rights and Needs of Unaccompanied and Separated Children (UASC)

In June 2012, under the previous Government, the Department provided funding to the Office of the United Nations High Commissioner for Refugees (UNHCR) to conduct a research project to map, review and assess the protection situation and treatment of unaccompanied and separated children (UASC) who have moved irregularly to and within South East Asia, with a particular focus on Indonesia, Malaysia and Thailand. The 'Regional Guidelines for Responding to the Rights and Needs of UASC' was an outcome of the project. While the Department provided funding for the project, the Government and Department do not necessarily endorse its content.

Appendix B: Shadow Minister Richard Marles' response to ACRT's Draft Report *All the Lonely Children*

Richard Marles MP

Federal Member for Corio

11th February 2014

Ms. Misha Coleman
Australian Churches Refugee Taskforce
209 Gertrude Street
FITZROY VIC 3065

Dear Ms. Coleman,

Thank you for the opportunity to comment on and respond to the questions posed in the Australian Churches Refugee Taskforce's draft document *"All the Lonely Children: Questions for the incoming Government Regarding Guardianship for Unaccompanied Minors"*.

As Labor is now in Opposition, we no longer have access to the appropriate information you are seeking. However, we encourage you to pose these questions to the Federal Government, in particular the Minister for Immigration and Border Protection if you have not done so already.

When in Government, Labor's policy was to ensure that everyone in detention had sufficient access to basic health services, legal assistance, and social support.

Labor firmly rejects the Coalition Government's policy to abolish access to the Immigration Advice and Application Assistance Scheme (IAAAS) for all irregular maritime arrivals. The provision of legal aid to persons seeking Australia's humanitarian protection is a cornerstone of the Refugee Convention of which Labor is committed to honouring.

Yours sincerely,

Richard Marles

Hon Richard Marles MP
Shadow Minister for Immigration and Boarder Protection

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Appendix C: Minister Scott Morrison's response to ACRT's *Concerns about children held at offshore processing centres*

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

Reference: 1404/00048

The Very Reverend Dr Peter Catt
Australian Churches Refugee Taskforce
209 Gertrude Street
FITZROY VIC 3065

Dear Rev Dr Catt

Concerns about children held at offshore processing centres

Thank you for your letter of 26 March 2014 regarding children held at Offshore Processing Centres (OPCs). I appreciate the time you have taken to bring this matter to my attention.

In response to the various questions raised, I have been advised that as at 4 April 2014, there were 15 transferees accommodated at the Manus OPC who had personally raised claims they were under the age of 18. In each case, transferees were given the opportunity to provide further information or documentation to support their age related claims.

Following consideration of these cases by the Age Determination Section in Canberra, the Department of Immigration and Border Protection is satisfied that these transferees are more likely than not to be adults.

Due to privacy considerations, the department is unable to provide specific details regarding these individual cases. However, please be assured that any claims raised that bring age into question are investigated by the department without delay.

As at 4 April 2014, there were no outstanding offshore age consideration cases on hand, so no transferees were accommodated separately from the main population due to age related claims. However, in the past, transferees have been accommodated separately following an offshore age consideration process or policy change that resulted in them being viewed as more likely than not to be minors. These transferees were returned to Australia at the earliest possible opportunity following the offshore age consideration process.

Since November 2012, the department has returned four transferees from Manus to Australia following a view they were more likely than not minors. As a formal assessment was made on the basis of identity documents provided whilst they remained on Manus, there was no need for further consideration or process upon their return to Australia. As at 4 April 2014, no transferee has been returned to Australia from Manus for the purpose of undergoing a formal age determination assessment.

Parliament House Canberra ACT 2600 Telephone (02) 6277 7860 Fax (02) 6273 4144

In addition to the four cases mentioned above, the department has returned another three transferees from Manus to Australia following a policy change in January 2014 relating to the allocation of default dates of birth applicable to individuals who do not know exactly when they were born. This policy change resulted in the three transferees, who were previously considered to be adults, having their dates of birth reviewed which resulted in them being considered under the age of 18. These three transferees were quickly separated from the main population at the Manus OPC and returned to Australia shortly following the review.

Under the *Immigration Guardianship of Children Act (IGOC) 1946*, I cease to be the guardian of an IGOC minor upon their transfer to an OPC. This arrangement ensures that my guardianship obligations do not interfere with the guardianship laws of another country. Guardianship arrangements are a matter for the governments of Nauru and PNG. The department has been working closely with the Government of Nauru and associated service providers to consider the arrangements that need to be in place to support the transfer of unaccompanied minors, including in relation to access to health and educational services. Save the Children Australia has been contracted to provide specialised services for children at the Nauru OPC.

The arrangements made for the transfer of children to OPCs are intended to ensure compliance with the domestic laws of the relevant country and with the international obligations of those countries. Relevantly, Nauru and Papua New Guinea (PNG) are signatories to the *1989 Convention on the Rights of the Child*, with no reservations. The Memorandum of Understanding signed with Nauru and PNG reaffirm the commitment of both countries to the Refugee Convention. Both countries commit to treat people transferred with dignity and respect in accordance with human rights standards.

Statistical updates on illegal maritime arrivals who have been transferred to OPCs and voluntary returns from OPCs are available at:
http://www.immi.gov.au/media/publications/statistics/asylum/_files/asylum-statistics-aus-jun-qtr-2013.pdf.
and are published weekly at: http://newsroom.customs.gov.au/channels/operational-updates/releases.

Thank you for raising your concerns with me.

Yours sincerely

The Hon Scott Morrison MP
Minister for Immigration and Border Protection
19 / 5 /2014

NOTES

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An initiative supported by
National Council of
Churches in Australia