



Australian
Human Rights
Commission

Joint General Comment on the Human Rights of Children in the Context of International Migration

**AUSTRALIAN HUMAN RIGHTS COMMISSION
SUBMISSION TO THE CMW AND CRC**

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and the Committee on the Rights of the Child (CRC), for their Joint General Comment (JGC) on the human rights of children in the context of international migration.
2. The Australian Human Rights Commission is established and operates under the *Australian Human Rights Commission Act 1986* (Cth). The Commission has been accredited as an ‘A status’ national human rights institution by the International Coordinating Committee of National Human Rights Institutions, and operates in conformity with the ‘Paris Principles’.

2 Summary

3. This submission focuses on the situation of *children that migrate unaccompanied and separated from their parents*. It is based on the findings of the National Inquiry into Children in Immigration Detention conducted by the Commission in 2014.¹
4. The Commission has particular concerns about Australia’s policies on immigration detention and guardianship arrangements as they relate to unaccompanied children seeking asylum. The Commission would welcome consideration of these issues in the JGC.

3 Recommendations

5. The Australian Human Rights Commission recommends that the following issues be included in the JGC:
 - detention on the basis of a child’s immigration status, including as it affects unaccompanied children
 - guardianship arrangements for unaccompanied children seeking asylum.

4 Unaccompanied children in detention

Recommendation 1

The Commission recommends that the issue of detention on the basis of a child’s immigration status, including as it affects unaccompanied children, be included in the Joint General Comment.

6. Under Australia’s policy of mandatory immigration detention, all non-citizens who enter or are present in Australia without visas (including children) must be detained. They may only be released from immigration detention if they are granted a visa, moved into alternative community arrangements, or if they are being removed from Australia.²

7. Beginning in 2009, Australia experienced a surge in the number of children arriving to seek asylum without parents or a legal guardian. Between the financial years 2009-10 and 2012-13, 3,584 unaccompanied children arrived in Australia by boat as asylum seekers.³ In accordance with the policy of mandatory immigration detention, all of these children were initially detained in closed detention facilities. While many were subsequently released into alternative community arrangements, some remained in closed facilities for prolonged periods.
8. The Commission's 2014 National Inquiry into Children in Immigration Detention found that prolonged detention had profoundly negative impacts on the mental and emotional health and development of children. Some of most concerning evidence gathered related to the situation of unaccompanied children.
9. The inquiry found that there are causal links between detention, mental health deterioration and self-harm in unaccompanied children. The Inquiry received considerable evidence indicating that detention had adversely affected the mental health of unaccompanied children. For example, when the Commission asked 42 unaccompanied children whether their emotional and mental health had been affected since being in detention, every one of the respondents answered yes.⁴
10. The Inquiry also received information about cases of self-harm (including attempted suicide) and threatened self-harm by unaccompanied children in detention. For example, in 2013, the majority of unaccompanied children detained in Australia were held at Pontville detention facility in Tasmania. In July 2013, there were 254 unaccompanied children detained at Pontville. Between 1 January 2013 and 14 August 2013, there were reports of 50 incidents of actual self-harm and 49 incidents of threatened self-harm at Pontville.⁵ While the centre closed in February 2014, the rate of actual and threatened self-harm at the facility clearly highlights the vulnerability of unaccompanied children in the detention environment.
11. The Commission acknowledges that the Australian Government has made substantial efforts to release children (including unaccompanied children) from closed detention into alternative community arrangements. However, it is clear that being held in detention places an additional burden on unaccompanied children, who are already affected by their past experiences characterised by high levels of trauma, loss and material deprivation, and who suffer high rates of mental health disorders. Detention is not a place where these children can recover from past trauma or develop the resiliencies that they will need for adult life. Their sense of isolation and distress is compounded by the daily challenges of the detention environment.
12. The Commission understands that detention of children on the basis of their immigration status will be among the key issues considered in the JGC. We would warmly welcome a specific focus on the additional vulnerabilities of unaccompanied children in the detention environment and the need for dedicated care and support arrangements for this highly vulnerable group of children.

5 Guardianship of unaccompanied children

Recommendation 2

The Commission recommends that the issue of guardianship arrangements for unaccompanied children seeking asylum be included in the Joint General Comment.

13. The Commission has long expressed concern about inadequate guardianship arrangements for unaccompanied children seeking asylum in Australia.⁶ Under the *Immigration (Guardianship of Children) Act 1946* (Cth), the Minister for Immigration and Border Protection is appointed the legal guardian of certain 'non-citizen' unaccompanied children. In this role the Minister has the same 'rights, powers, duties, obligations and liabilities as a natural guardian of the child'.⁷ The responsibilities of a guardian under section 6 of the Guardianship of Children Act:

include the responsibilities which are the subject of the Convention [on the Rights of the Child]. They are responsibilities concerned with according fundamental human rights to children.⁸

14. Under the current arrangements, the Minister has delegated these guardianship responsibilities to nominated executive-level officers within the Department of Immigration and Border Protection. However, the nominated officers are not required to have specific qualifications or experience relating to children. While the Department has engaged a specialist pastoral care service for unaccompanied children in detention, the Commission remains concerned that, as the nominated guardians, Departmental officers are not sufficiently qualified to make important decisions relating to the care and welfare of vulnerable children.
15. The Commission also believes that the effectiveness of the Minister's role as guardian of unaccompanied children conflicts with their additional responsibilities for administering the immigration detention regime and for making decisions about granting visas, removals, and transfers to Regional Processing Centres (RPCs) in Nauru and Manus Island. Given these multiples roles, it is difficult for the Minister, or their delegate, to make the best interests of the child the primary consideration.
16. In the event of any conflict between guardianship obligations and migration policies, the Minister and the delegated guardians are required to give priority to their roles under migration law. In August 2012, the Guardianship of Children Act was amended to make clear that the Minister or their delegated guardians can only exercise their guardianship obligations to the extent that those duties do not affect the performance or exercise of any function, duty or power under the migration law.⁹
17. In some instances, the responsibilities and powers of the Minister and delegated guardians under the Migration Act are in direct conflict with the best interests of the child. During the 2014 Inquiry into Children in Immigration Detention, the Commission became aware of at least 27 unaccompanied children who had been transferred to the RPC Nauru. Prior to being

transferred, these children were assessed under the Department of Immigration and Border Protection's Best Interest Assessment process. However, documents provided by the Department of Immigration to the Commission's inquiry indicated that these assessments are irrelevant in the decision to transfer a child to Nauru:

The Australian Government's view is that in making the transfer decision, the best interests of such children are outweighed by other primary considerations, including the need to preserve the integrity of Australia's migration system and the need to discourage children taking, or being taken on, dangerous illegal boat journeys to Australia.

Accordingly, while this assessment considers a range of factors to ensure that care, services and support arrangements are available to meet the needs of the individual child, it does not consider whether the best interests of the child would be served by the individual child being transferred to an RPC.¹⁰

18. None of the assessments for unaccompanied children documented any individualised assessment of the unaccompanied child's educational, care, welfare and service related needs. There was also no information provided about the quality of the facilities and services on Nauru to support the findings that these facilities and services are appropriate to support that child's needs. All were recommended for transfer to Nauru on the basis of almost identical generalised statements of reasons.
19. These recommendations were made in spite of concerns raised by the United Nations High Commissioner for Refugees (UNHCR), which conducted a monitoring visit to the Nauru RPC in October 2013. The report of this visit affirmed that the 'harsh and unsuitable environment at the Regional Processing Centre is inappropriate for the care and support of children seeking asylum' and raised concerns that children did not have access to adequate education and recreational facilities. UNHCR recommended that children (particularly unaccompanied children) not be transferred from Australia to Nauru.¹¹
20. This example highlights the conflict of interest between the Minister's role as guardian and responsibilities under the Migration Act. If best interests of children are, as a matter of policy, always outweighed by 'other primary considerations', it is impossible for the Minister or their delegates effectively to advocate for and safeguard the rights of the children under their care. Indeed, the conflicting roles of the Minister results in decision-making which is contrary to the best interests of unaccompanied children.
21. In light of Australia's experiences, the Commission would welcome an acknowledgement in the JGC of the importance of robust guardianship arrangements for children who migrate unaccompanied, and the need to ensure that appointed guardians are able to effectively safeguard and advocate for the best interests of the children under their care.

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- ¹ Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014*, 2015. At <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/projects/national-inquiry-children-immigration-detention-index> (viewed 16 February 2016).
- ² *Migration Act 1958* (Cth), ss 198(1), 196(1)
- ³ Department of Immigration and Citizenship and Department of Immigration and Border Protection, *Annual Report 2009-10* (2010), *Annual Report 2010-11* (2011), *Annual Report 2011-12* (2012) and *Annual Report 2012-13* (2013). At <http://www.border.gov.au/about/reports-publications/reports/annual> (viewed 16 February 2016).
- ⁴ Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014*, 2015. At <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/projects/national-inquiry-children-immigration-detention-index> (viewed 16 February 2016), p 153
- ⁵ Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014*, 2015. At <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/projects/national-inquiry-children-immigration-detention-index> (viewed 16 February 2016), p 159
- ⁶ See Human Rights and Equal Opportunity Commission, *A last resort? report of the National Inquiry into Children in Immigration Detention*, 2004. At https://www.humanrights.gov.au/sites/default/files/content/human_rights/children_detention_report/report/PDF/alr_complete.pdf (viewed 19 February 2016), pp. 719-730; Australian Human Rights Commission, *Submission to the Joint Select Committee on Australia's Immigration Detention Network*, 2011. At http://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2011/201108_immigration.pdf (viewed 19 February 2016), pp 70-71; Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014*, 2015. At <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/projects/national-inquiry-children-immigration-detention-index> (viewed 16 February 2016), pp 166-168.
- ⁷ *Immigration (Guardianship of Children) Act 1946* (Cth), s 6(1)
- ⁸ *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524, 537-538 [43] (North J).
- ⁹ *Immigration (Guardianship of Children) Act 1946* (Cth), s 8(2)
- ¹⁰ Department of Immigration and Border Protection, Notice to produce, *Best interests Assessment for transferring minors to an RPC (forming part of Pre-Transfer Assessment)*, Schedule 3, First Notice to produce 31 May 2014, Document 1.2.
- ¹¹ Office of the United Nations High Commissioner for Refugees, *UNHCR Monitoring visit to the Republic of Nauru 7-9 October 2013 Report*, p 13. At <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf> (viewed 16 February 2016).