

Submission to the Australian Human Rights Commission on behalf of the Refugee Advice & Casework Service (RACS)

National Inquiry into Children in Immigration Detention 2014

1 Introduction

- 1.1 The Refugee Advice & Casework Service (Australia) (**RACS**) was established in 1987 at the request of Amnesty International with funding from The Office of the United Nations High Commissioner for Refugees.
- 1.2 RACS was established in order to meet the increasing demand for legal assistance of people seeking asylum in Australia. From 1 July 1997, RACS confined its operations to NSW and detention centres in Australia.
- 1.3 RACS provides a comprehensive specialist refugee advice service and works closely with a broad network of legal and inter-agency support services, such as Red Cross, Amnesty International, Asylum Seekers Centre, House of Welcome, Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, Immigration Advice and Rights Centre, Legal Aid Commission of NSW, National Council of Churches and the Refugee Council of Australia.
- 1.4 RACS is a specialist legal service in working with children. In September 2010, RACS joined the cross-institutional research project called “Small Mercies, Big Futures: enhancing law, policy and practice in the selection, protection and settlement of refugee children and youth” as an industry partner. Since 2012, RACS has been leading the development of one project within this research, developing guidelines for legal representatives working with children and young people seeking asylum. This work has been undertaken in partnership with the University of Sydney and other research partners. RACS has also established a dedicated legal role for working with children, predominantly unaccompanied children, with all lawyers at RACS having completed working with children checks. This has seen the creation of an outreach clinic to assist unrepresented unaccompanied children within New South Wales, as well as advocacy for unaccompanied children who remain on Christmas Island. Our work with children applying for protection puts us in position where we are able to make informed comments based on our extensive experience.
- 1.5 RACS is grateful for the opportunity to provide these submissions to the Australian Human Rights Commission (**Commission**) on the current situation of children in Australian immigration detention as well as in detention in Nauru and Manus Island.
- 1.6 RACS is willing to be consulted with respect to the following recommendations which are listed below and further explored within the body of the submissions.

2 Summary of Recommendations

2.1 RACS notes that many of the following recommendations were also recommended by the 2004 report of the National Inquiry into Children in Immigration Detention, *A Last Resort?*. RACS believes that the 2004 recommendations remain relevant and their implementation is urgently needed.

Recommendation 1: Children in immigration detention centres, including alternative places of detention and residential housing, should be released as soon as possible.

Recommendation 2: Australia's immigration laws should be amended, as a matter of urgency, to comply with the *Convention on the Rights of the Child*. In particular, the *Migration Act 1958* (Cth) should be amended to prohibit detention of children beyond 3 months.

Recommendation 3: Minimum standards of treatment for children in immigration detention should be codified in legislation.

Recommendation 4: Comprehensive training on child protection and working with children from refugee backgrounds should be provided to all people working with children in immigration detention centres.

Recommendation 5: Independent observers for unaccompanied children are inadequate given that they are unable to advocate, care for unaccompanied children in detention or provide advice or information to children about the interviews in which they are participating.

Recommendation 6: An independent guardian should be appointed for unaccompanied children and they should receive appropriate support. The Minister for Immigration and Border Protection should no longer be the legal guardian of unaccompanied children.

Recommendation 7: Children should not be subject to transfer 'regional processing countries'. The protection claims of all children should be assessed in Australia.

Recommendation 8: An independent impact and best interests assessment should be conducted by independent and qualified experts on all children detained in regional processing facilities.

Recommendation 9: Every child in immigration detention or community detention should be assigned a migration agent to assist them with all processes relating to their immigration matter until that matter is finalised.

Recommendation 10: Children who have *prima facie* claims for protection should not be returned to the country where they fear harm until their claims for protection are assessed under the law according to a process that complies with procedural fairness standards and with access to independent legal advice and representation.

3 Format of these submissions

- 3.1 RACS makes submissions in response to each of the terms of reference as listed in the Commission's *National Inquiry into Children in Immigration Detention 2014: Discussion Paper*. RACS also takes the opportunity to make further submissions on the issue of access to justice, including access to legal assistance and access to refugee status determination procedures.
- 3.2 With respect to each term of reference and the additional issue of access to justice, RACS:
- (a) observes Australia's obligations under the *Convention on the Rights of the Child*¹ (**CRC**), the *Convention Relating to the Status of Refugees*² (**Refugees Convention**), the *Migration Act 1958* (Cth) (**Migration Act**) and the *Immigration (Guardianship of Children) Act 1946* (Cth) (**Guardianship Act**) and jurisprudence on those provisions;
 - (b) provides empirical evidence from a review of client case studies that have been de-identified for privacy reasons;
 - (c) considers whether the empirical evidence indicates that Australia is, or is not, meeting its obligations under the CRC and Refugees Convention; and
 - (d) makes recommendations for change so that Australia can fulfil its obligations under these conventions.

¹ Short for *Convention on the Rights of the Child* opened for signature 20 November 1989 1755 UNTS 3 (entered into force 2 September 1990).

² Short for *Convention Relating to the Status of Refugees* opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) read in conjunction with the *Protocol relating to the Status of Refugees* opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (collectively, the 'Refugee Convention').

4 The appropriateness of facilities in which children are detained

- 4.1 RACS current work with children within the detention centre network is primarily Christmas Island. As RACS has been unable to visit this centre for a number of years, we make the following observations as per the continued anecdotal complaints received by our clients.
- 4.2 One of the most complained about issues is that of boredom. Many of the clients cite not being able to study and feeling crippled by the desire to attend school. Further, our clients also discuss their frustration in the number of services and advocates that visit them in the centre, explaining they are trying to introduce programs such as schooling for the children. However, our clients never see the results of these suggested or indicated changes. Our clients have indicated to us this only tends to crush their spirits more, as their hopes are lifted and broken again.
- 4.3 Many of the clients also present with incredible loneliness, many often requesting to be moved from the “UAM Camp” into the “Family Camp” so that they feel more a part of a community. The remoteness of the centres in which children are held, impacts upon any friends or family that may be in Australia from visiting them and certainly restricts the access of any legal or advocacy support also. Facilities within the detention centres seem to also exacerbate this sense of loneliness as our clients face a significant limitation in accessing external support, such as restricted internet access and the use of public phones where calls continually drop out.
- 4.4 RACS has also endured difficulties in trying to access our clients. It is very rare for RACS to be able to call into a centre and be able to speak to our clients immediately. Our experience is often that we wait a number of days before a call can be facilitated, as we must comply with the need to have a room booked, Serco booked, Case Management booked and an Independent Observer booked in order to place one client call. RACS has on occasion had to wait in excess of ten days in order to speak to clients on Christmas Island, despite having a 956 Form signed and our representation clearly known to Case Management. Further, the issues of confidentiality for these clients will be discussed later in our submissions.
- 4.5 Many of the clients that we work with have significant mental health concerns, with almost all reporting feelings of powerlessness, helplessness and uncertainty about the future. The process of moving clients within the detention network is one process in particular which causes great anxiety. The collection and removal of people from camps in the middle of the night causes complete distress of all parties. Many of the boys complain of not being able to sleep in fear they will be woken in the early hours of the morning and told they have to move, many are given no warning at all that they will be moved and so all live in fear that they could be next.
- 4.6 Even the internal transfer within the mainland can cause great distress and a feeling of insecurity and instability. Earlier this year, it is our understanding that the unaccompanied boys were moved from Charlie Compound to Bravo

Compound on Christmas Island. At this time, RACS received many distressed calls from the boys as they primarily feared they were being moved offshore or being moved as a transitory step to be sent offshore and not just within the Christmas Island network. The complaints RACS received were that they felt settled in Charlie Compound and also that the facilities were starkly different between the two compounds and so they felt punished.

- 4.7 The boys complain that they previously had access to refrigerators and more private bathroom facilities within Charlie Compound, which they do not receive in Bravo. Further, they feel more distant from the rest of the camp. RACS acknowledges that we understand severe storms warnings and damage were potentially the initial cause of the move, but RACS received report of some boys having to sleep on floors in order for them to not be separated from the rest of the unaccompanied children at this time.
- 4.8 RACS primary concern is that children are held in detention. The nature of facilities and complaints raised in terms of the detention experience of children will be further explored throughout our submission.

Empirical evidence

Case study

Hamid is 17 years old and has been transferred between Christmas Island and Manus Island, he is currently detained on Christmas Island. He fled Afghanistan because his life was in danger at the hands of the Taliban.

He tells his lawyers at RACS that he is unable to sleep and feels mentally distressed. He says "we feel torture in present and they treat us is like criminal." He worries that there is no end in sight to his detention. He worries that he again will be transferred offshore with no opportunity to say goodbye to his friends if he does move. Hamid is haunted by his time on Manus Island.

Recommendations

Recommendation 1: Children in immigration detention centres, including alternative places of detention and residential housing, should be released as soon as possible.

Recommendation 7: Children should not be subject to transfer to 'regional processing countries'. The protection claims of all children should be assessed in Australia.

5 The impact of the length of detention on children

The CRC

5.1 The CRC provides that:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.³

The Migration Act

5.2 The detention of children in immigration detention is mandated by the Migration Act as set out below at paragraphs 5.3 to 5.5.

5.3 First, a non-citizen is defined as 'a person who is not an Australian citizen'.⁴ A 'person' is taken to include a child.⁵ A child non-citizen who does not hold a valid visa will be deemed an 'unlawful non-citizen'.⁶

5.4 An officer of the Department must detain any child that he or she knows or suspects is an unlawful non-citizen.⁷ There is no initial discretion to refuse to detain a child.⁸

5.5 The Minister can make a 'residence determination', which places a child in a more appropriate residential placement rather than an immigration detention centre.⁹ There is, however, no duty on behalf of the Minister to consider making a residence determination.¹⁰ That is so, notwithstanding that in relation to detention of a 'minor', defined as a person under 18 years, the Act states:

The Parliament affirms as a principle that a minor shall only be detained as a measure of last resort.¹¹

5.6 The Explanatory Memorandum that accompanied the Migration Amendment (Detention Arrangements) Bill 2005 (Cth), which was the Bill that saw the insertion of the above provision, states that:

The new section is proposed to indicate that the principle relates to the holding of children in traditional detention arrangements. The principle would indicate that, where detention of a child is required under the Act, it

³ CRC, Article 37(b).

⁴ *Migration Act 1958* (Cth) s 5 definition of **non-citizen**.

⁵ *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at [157].

⁶ *Migration Act 1958* (Cth) ss 13(1), 14(1).

⁷ *Migration Act 1958* (Cth) ss 189(1), (3). An 'officer' is defined to include a Customs officer, as well as members of the Australian Federal Police, and State and Territory police forces: *Migration Act 1958* (Cth) s 5 definition of **officer**. An officer also has the power to detain people who are not yet in the migration zone or in an excised offshore place, but are seeking to enter those places: *Migration Act 1958* (Cth) ss 189(2), (4).

⁸ *Migration Act 1958* (Cth) s 5 definition of **immigration detention**.

⁹ *Migration Act 1958* (Cth) s 197AB. See also s 5 definition of *immigration detention*, Note 2.

¹⁰ *Migration Act 1958* (Cth) s 197AE.

¹¹ *Migration Act 1958* (Cth) s 4AA.

should, when and wherever possible, take place in the community, under a residence determination.¹²

- 5.7 The principle that a minor shall only be detained as a measure of last resort has not been the subject of substantive jurisprudence. It appears to be nothing more than a 'legislative policy... to be applied within the framework of the Act'.¹³

Empirical evidence

- 5.8 RACS has witnessed first-hand the impact of lengthy detention on minors. This includes significant decrease of mental health, suicide attempts and increased levels of anxiety and self-harm. Many of our clients speak of self-harm and an inability to sleep, with a number of our clients receiving medication in order to sleep. Many of our clients also cite an inability to concentrate or focus whilst experiencing signs of depression and hopelessness. The two main concerns for the children with whom we work with are; Firstly, that they don't know when or if they will be transferred offshore, and the fears surrounding that. Secondly, that they don't know when or how their claims will be processed and what the future outcomes may be.
- 5.9 RACS believes that the impact of the length of detention is exacerbated by current government policies. Initially, the 'no advantage policy' and introduction of regional processing on 13 August 2012 has meant that asylum seekers arriving after this date have been given no proposed time-frame for consideration of their claims and what future in Australia there may be for them, if any. For asylum seekers who arrived after 19 July 2013, they will not have their claims assessed in Australia; there is no proposed time-frame for consideration of their claims; and there is no possibility of administrative or judicial review or remedy in relation to their continued detention. This applies universally to adults, families and children alike.

RACS case study:

Reza is 17 years from Burma and has been held at Christmas Island for over 9 months. Reza has told RACS that he fled his country because "the situation was deadly - everyday there was suicide attacks, target killings. My life was never certain. I didn't know if I stepped outside whether I would return alive..."

Reza remembers that on his way to Australia, six people drowned and people would often scream in their sleep. When he talks about his time in immigration detention, he says that "drowning and dying in the ocean would be better than this. Every day we are gradually dying".

"I'm so uninterested and bored... I don't know what my future holds. I have lost all my hope."

¹² Explanatory Memorandum to the Migration Amendment (Detention Arrangements) Bill 2005 (Cth) at [3].

¹³ *Plaintiff M168/10 v Commonwealth* (2011) 279 ALR 1 at [22].

Fulfilment of obligations under the CRC

- 5.10 RACS submits that Australia is not meeting its obligations under the CRC in respect of this Terms of Reference.
- 5.11 The CRC unequivocally states that detention of a child should occur 'as a measure of last resort'.¹⁴ However, this is at odds with the Migration Act, which provides that the detention of a child non-citizen 'must' occur.¹⁵
- 5.12 RACS considers that the non-compellability of the Minister to make a residence determination with respect to any child¹⁶ is contrary to the obligations under the CRC that detention occur as a 'last resort'.¹⁷
- 5.13 RACS notes that a child that has been validly detained under the Migration Act will be lawfully deprived of his or her liberty.¹⁸ Therefore, the principle that a child 'shall only be detained as a measure of last resort' is, in its present incarnation in the Migration Act, nothing more than policy. In other words, whilst it appears as a right in the CRC to which Australia is a signatory, the principle has no real effect unless it is given legislative force by the Migration Act.
- 5.14 RACS believes that the current presumption of detention, followed by the possibility of a residence determination, should be reversed. That is, a child should initially have the presumption of a residence determination with the option of ongoing mandatory detention only considered as a measure of 'last resort'.
- 5.15 RACS agrees with the comments made by the Commission in their *Submission to the Committee on the Rights of the Child - August 2011* that:

Australia's system of mandatory immigration detention ... is inconsistent with Australia's obligations under ... the Convention ...¹⁹

Recommendations

Recommendation 1: Children in immigration detention centres, including alternative places of detention and residential housing, should be released as soon as possible.

Recommendation 2: Australia's immigration detention laws should be amended, as a matter of urgency, to comply with the *Convention on the Rights of the Child*. In particular, the Migration Act should be amended to prohibit detention beyond 3 months.

¹⁴ CRC, Article 37(b).

¹⁵ *Migration Act 1958* (Cth) ss 189(1), (3).

¹⁶ *Migration Act 1958* (Cth) s 197AE.

¹⁷ CRC, Article 37(b).

¹⁸ *SBEG v Commonwealth* (2012) 208 FCR 235 at [19].

¹⁹ Australian Human Rights Commission, *Submission to the Committee on the Rights of the Child - August 2011*, (2011) at [150].

5.16 RACS endorses the recommendations made by the Commission in 2011²⁰ that:

The Australian Government should amend Australia's immigration detention laws, as a matter of urgency, to comply with the Convention on the Rights of the Child. The new laws should incorporate the following minimum features:

- There should be a presumption against the detention of children for immigration purposes.
- A court or independent tribunal should assess whether there is a need to detain children for immigration purposes within 72 hours of any initial detention.
- There should be prompt and periodic review by a court of the legality of continuing detention of children for immigration purposes.
- All courts and independent tribunals should be guided by the following principles:
 - detention of children must be a measure of last resort and for the shortest appropriate period of time
 - the best interests of children must be a primary consideration ...

5.17 RACS accepts that it is necessary that all children undergo health and security checks before any residence detention is made. RACS appreciates that these checks take time. RACS also acknowledges that the process of making residence determinations can also take time.

5.18 In order to balance the competing interests of health and security and the interests of children, RACS recommends that children only be detained as a measure of last resort and for a maximum of 3 months.

5.19 While RACS acknowledges that up to three months may be required for a residence determination to be made, we are of the view that shorter aspirational targets should be implemented.

²⁰ Australian Human Rights Commission, *Submission to the Committee on the Rights of the Child - August 2011*, (2011) Recommendation 37.

6 Measures to ensure the safety of children

The CRC

- 6.1 The primary object of the CRC is to promote the best interests of the child.²¹ The CRC provides that signatories will take steps in order to:
- (a) ensure the child is protected from all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents;²²
 - (b) ensure the child is afforded such protection and care as is necessary for his or her well-being;²³ and
 - (c) ensure the child is protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation while in the care of parent(s), legal guardian(s) or any other person who has the care of the child;²⁴

Migration Act and Guardianship Act

- 6.2 The interaction of the Migration Act and Guardianship Act is relevant to the issue of safety of children in immigration detention.
- 6.3 The Guardianship Act provides that the Minister "shall be the guardian...of every non-citizen child" to the exclusion of every other guardian.²⁵ However, the Minister is not the guardian if the child did not "arrive in Australia" or has been taken to a regional processing centre.²⁶ Therefore, asylum-seeking children who have been taken to a regional processing centre will not fall within the guardianship of the Minister.
- 6.4 The Department is in control of the children's welfare and movements and will make all arrangements for the children, their location and the processing of their claims. This control and oversight exists despite the fact that the Department does not have any of the legal obligations and responsibilities of a guardian.
- 6.5 Further, there is often little legal recourse for a child who is suffering harm in immigration detention. If a child is detained in accordance with the Migration Act, or is detained in the valid exercise of an administrative power, the child will be prevented from succeeding in an action in tort in relation to any damage sustained during that statutorily mandated detention.²⁷

²¹ CRC, Article 3(1).

²² CRC, Article 2(2).

²³ CRC, Article 3(2).

²⁴ CRC, Article 19.

²⁵ *Immigration (Guardianship of Children) Act 1946 (Cth)* s 6.

²⁶ *Immigration (Guardianship of Children) Act 1946 (Cth)* s 6(2)(b).

²⁷ *SBEG v Commonwealth* (2012) 208 FCR 235 at [18], [48].

Empirical evidence

- 6.6 RACS notes there is a concerning paucity of published information available about the measures, if any, taken to protect the safety of children in immigration detention, both in Australia and in regional processing centres. The lack of information suggests that there is a lack of measures for protecting children from psychological harm and trauma caused by experiences in detention.

Immigration detention in Australia

- 6.7 Those who have visited Christmas Island detention centre (the Human Rights Commission's visit to Christmas Island of October 2012 for example) have voiced concerns over the fact that unaccompanied minors detained there do not have dedicated carers but are supervised by Serco officers. While an Independent Observer is generally present as a support person at all interviews of unaccompanied minors, as contracted by Maximus Solutions, the role of an Independent Observer is very limited.
- 6.8 Independent Observers do not formally advocate or care for unaccompanied minors in detention more generally and do not provide advice or information to minors about the interviews in which they are participating. Rather they observe an interview to ensure that the child or young person is treated appropriately and can ask for an interview to be paused if they feel that the child or young person is stressed, for example. Effective guardianship is an important element of care that unaccompanied minors need.

RACS case study:

Rahul is 17 years old and is being held at Christmas Island. He fled Pakistan because his house was burnt down and his father was killed.

He has spoken to RACS about feeling depressed and not being able to sleep. He says he needs medical attention and wants to take antidepressants. He feels under a lot of pressure and says that thinking about the safety of his family makes him want to kill himself. He tells RACS that he doesn't feel like anyone is on his side.

Immigration detention in regional processing centres

The report of the United Nations High Commissioner for Refugees, *UNHCR monitoring visit to the Republic of Nauru, 7 to 9 October 2013 (UNHCR Nauru Report)* indicates that the overall ethic of the centre is one of enforcement and not

care.²⁸ The UNHCR Report also notes that the Nauru Regional Processing Centre does "not provide safe and humane conditions of treatment in detention."²⁹

- 6.9 As previously mentioned, the power and direction to send unauthorised maritime arrivals to a regional processing centre applies universally with no exception for children, including unaccompanied children. RACS would submit that the justification of applying this policy universally as a deterrent is not justifiable, more so when it appears that people are no longer able to access Australia by boat given the introduction of Operation Sovereign Borders.
- 6.10 The facilities at both Nauru and Manus Island have been continually condemned. The UNHCR Report notes its particular concern for that of children, RACS echoing this concern, particularly for unaccompanied children in such an environment. RACS recommends that all children on Nauru are returned to mainland Australia to avoid any further harm and that no children be sent to a regional processing centre.
- 6.11 RACS raises serious concerns in relation to the appropriateness of transferring children to either Nauru or Manus Island. As RACS has not had access to these centres, nor access to asylum seekers within these centres, RACS relies upon expert organisations such as UNHCR in their opinion and evidence of the current safety measures for children within these centres.

Fulfilment of obligations under the CRC

- 6.12 RACS submits that Australia is not meeting its obligations under the CRC in respect of this Terms of Reference.
- 6.13 RACS submits that Australia does not have effective measures in place to ensure the safety of children in immigration detention because there is no effective proponent of their rights and interests, particularly for those children sent offshore.
- 6.14 RACS is particularly concerned that:
- (a) The legal guardian of unaccompanied children in detention in Australia is the Minister, a responsibility which clearly conflicts with his responsibility for administering the Migration Act, including detaining, transferring, assessing visa applications and removing children;
 - (b) There is a lack of legislative and administrative measures in place to ensure, measure and report on the safety and welfare of children in immigration detention.
 - (c) Children transferred offshore have their guardianship delegated from the Minister to the Justice Minister in Nauru who then delegates guardianship to

²⁸ United Nations High Commissioner for Refugees, *UNCHR monitoring visit to the Republic of Nauru, 7 to 9 October 2013*, [101].

²⁹ United Nations High Commissioner for Refugees, *UNCHR monitoring visit to the Republic of Nauru, 7 to 9 October 2013*, 1.

Save the Children, with again a conflict for that organisation in reporting properly about the children to the detention centre management.

Recommendations

Recommendation 3: Minimum standards of treatment for children in immigration detention should be codified in legislation.

Recommendation 4: Comprehensive training should be provided to people working with children in immigration detention centres.

Recommendation 5: Independent observers for unaccompanied children are inadequate given that they are unable to advocate, care for unaccompanied minors in detention or provide advice or information to minors about the interviews in which they are participating.

Recommendation 7: Children should not be subject to transfer to 'regional processing countries'. The protection claims of children should be assessed in Australia.

Recommendation 9: Every child in immigration detention or community detention should be assigned a migration agent to assist them with all processes relating to their immigration matter until that matter is finalised.

7 Provision of education, recreation, maternal and infant health services

The CRC

- 7.1 In addition to the obligation on Australia to place the best interests of the child as the primary consideration,³⁰ the CRC provides three key rights of children particularly relevant to education, recreation and health:
- (a) the right to enjoy the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health,³¹
 - (b) the right to education. Australia has an obligation to "make primary education compulsory and available free to all",³² and
 - (c) the right to rest and leisure, to engage in play and recreational activities.³³
- 7.2 Australia as a signatory to the CRC is obligated to ensure the survival and development of the child to the maximum extent possible,³⁴ and to ensure the child has access to information and material aimed at the promotion of, among other things, his or her physical and mental health.³⁵

Empirical evidence

- 7.3 RACS is concerned by independent reports that indicate basic health and education services are not being provided to children in immigration detention in Australia and in regional processing centres.

Immigration detention in Australia

- 7.4 As previously discussed, the clients of RACS often complain about boredom being one of the key crippling factors of being in detention. Many of the boys show a strong and willing desire to study and attend school. They often mention the opportunity for excursions around Christmas Island and activities such as playing cricket or soccer as a fun way to pass the time and alleviate the pressures of detention. However still experience the desperation of wanting to attend school so that their minds develop and grow, and so they can see a future world outside of detention.
- 7.5 Many of the RACS clients have indicated their sense of being on Christmas Island has having a 'life without purpose'. Further, they have experienced a real sense of injustice having shared the camp with other boys, who arrived prior to 19 July 2013 and are now living in the Australian community and attending school.

³⁰ CRC, Article 3

³¹ CRC, Article 24(1).

³² CRC, Article 28.

³³ CRC, Article 31.

³⁴ CRC, Article 6(2).

³⁵ CRC, Article 17.

- 7.6 RACS notes the description of medical care contained in a "letter of concern" provided by a group of 15 doctors working on Christmas Island (**Doctors' Report**).³⁶ The Doctors' Report states that:
- (a) antenatal care provided by International Health and Medical Services (IHMS) is unsafe and inadequate and does not comply with Australian standards; and
 - (b) the risk of depression among children is high and an effective system for identifying children at risk is lacking.
- 7.7 Two specific case studies reported by the Doctor's include:
- (a) a case of tuberculosis that went undiagnosed for 44 days, potentially exposing the entire camp; and
 - (b) a case where a woman with a "very high-risk pregnancy" was transferred to Nauru despite medical authorities believing she was carrying twins.
- 7.8 Overall, the Doctors' Report states that detention is "unsuitable for children and a contravention of human rights" and that the doctors' duty of care obliges them to advocate "for their immediate removal from the detention environment."
- 7.9 The case studies identified by RACS raise similar concerns about mental and physical health as those raised in the Doctors Report. RACS has received a number of similar complaints particularly surrounding a lack of mental health support. RACS raises particular concern about the lack of mental health support after reports of self-harm, particularly for those who become aware of such instance within their own camp.
- 7.10 RACS has received a number of complaints from children within detention surrounding insufficient support from Case Management, Serco and in particular IHMS. Many clients complain that their medical needs are not treated with legitimacy and are often just given a 'Panadol and told to go back to their rooms'. RACS has received complaints surrounding eye and vision issues, chest and breathing problems as well as a lack of attention to existing physical injuries sustained on the child's journey to Australia, or within their home countries, such a broken bones not properly healed.

RACS case study:

Morteza is 15 years old from Iran and has been held at Christmas Island for 7 months. He has told RACS that he has problems with his vision: "there is a spot in my eye that is getting bigger and bigger, like a black spot. I reported it to the medical, but no one has done anything. I reported it to Serco and requested attention one and a half weeks ago but no one has done anything."

³⁶ David Marr, *Doctors reveal 'harmful' standards of medical care for asylum seekers* (20 December 2013) The Guardian Australia <<http://www.theguardian.com/world/2013/dec/19/revealed-doctors-outrage-over-unsafe-refugee-patients>>.

“[other] Children are interacting with the Australian society very respectfully and they are learning Australian culture and traditions and the country’s laws. They are able to integrate in the Australian society and start building their promised future.”

RACS case study:

Jawad is 16 years old from Pakistan and has been at held at Christmas Island for 9 months. He has problems with breathing and sinuses, and has difficulty sleeping. He was told that he has been referred to a specialist but, several months later, he has not received notice about when he will be seen.

“All I can do is eat and sleep and sit in the one place, not doing anything my mind has become so bored, staying within the same camp, not doing anything, not going anywhere.”

Immigration detention in regional processing centres

7.11 The UNHCR Nauru Report stated:

... children were in closed detention, in difficult conditions, without access to adequate educational and recreational facilities, and with a lack of durable solution within a reasonable time frame.³⁷

... overall, the harsh and unsuitable environment at the closed RPC is particularly inappropriate for the care and support of child asylum-seekers. UNHCR is also concerned that children do not have access to adequate educational and recreational activities.³⁸

7.12 The UNHCR also confirmed the following:

- (a) children had not been going to school;
- (b) the room set up for educational purposes was too hot for the children to remain in it for any length of time.³⁹
- (c) the mental health of the children in the centre was deteriorating;
- (d) skin and other infections as well as lice and hygiene issues were associated with the centre;⁴⁰

³⁷ United Nations High Commissioner for Refugees, *UNCHR monitoring visit to the Republic of Nauru, 7 to 9 October 2013*, [106].

³⁸ United Nations High Commissioner for Refugees, *UNCHR monitoring visit to the Republic of Nauru, 7 to 9 October 2013*, 2.

³⁹ United Nations High Commissioner for Refugees, *UNCHR monitoring visit to the Republic of Nauru, 7 to 9 October 2013*, [100].

- (e) there was no suitable playing areas existed in the centre; and
- (f) the centre did not provide for freedom of movement.⁴¹

Fulfilment of obligations under the Convention

- 7.13 RACS submits that Australia is not meeting its obligations to provide adequate education and health services under the CRC.
- 7.14 The concerns referred to in the UNHCR Nauru Report and the Doctors' Report suggest that the rights of children in the Nauru detention centre are not being upheld in relation to education, health, recreation.
- 7.15 Both reports, as well as the experience of RACS' clients, highlight the following major concerns:
 - (a) Children's physical illnesses are not being responded to adequately;
 - (b) Children's mental health is deteriorating;
 - (c) Poor hygiene across the centre;
 - (d) No opportunity to complete primary education; and
 - (e) Little to no opportunity to exercise their right to leisure as they are detained without play equipment.
- 7.16 RACS agrees with the UNHCR Nauru Report that indicates Australia is failing to honour the rights of children as contained in articles 6(2), 24, 28 and 31 of the CRC.

Recommendations

Recommendation 1: Children in immigration detention centres, including alternative places of detention and residential housing, should be released as soon as possible.

Recommendation 2: Australia's immigration laws should be amended, as a matter of urgency, to comply with the *Convention on the Rights of the Child*. In particular, the *Migration Act 1958* (Cth) should be amended to prohibit detention of children beyond 3 months.

Recommendation 3: Minimum standards of treatment for children in immigration detention should be codified in legislation.

⁴⁰ United Nations High Commissioner for Refugees, *UNCHR monitoring visit to the Republic of Nauru, 7 to 9 October 2013*, [99].

⁴¹ United Nations High Commissioner for Refugees, *UNCHR monitoring visit to the Republic of Nauru, 7 to 9 October 2013*, [101].

Recommendation 4: Comprehensive training should be provided to people working with children in immigration detention centres.

Recommendation 7: Children should not be subject to transfer to 'regional processing countries'. The protection claims of children should be assessed in Australia.

Recommendation 8: An independent impact and best interests assessment should be conducted by independent and qualified experts on all children detained in regional processing facilities.

8 The separation of families across detention facilities in Australia

The CRC

8.1 The CRC at Article 9 provides that:

All signatories are to "ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine ... that such separation is necessary for the best interests of the child".

The ICCPR

8.2 RACS also notes Articles 17 and 23 of the International Covenant on Civil and Political Rights (**ICCPR**) which provides that:

- (a) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence (article 17); and
- (b) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State (article 23).

8.3 RACS submits that there is arbitrary interference with family when detainees are separated from family who are living in community detention.

Empirical evidence

RACS Case Study:

Rasool is 13 years old and being held in immigration detention at Christmas Island as he arrived as an unaccompanied child after 19 July 2013. Rasool has an older brother Murteza who also arrived as an unaccompanied child in September 2012. Murteza is 16 years old and living in community detention in Melbourne. Both boys were born in Iraq, their father was killed 2 years ago.

Rasool desperately wants to be with Murteza. Murteza has continued to struggle in Melbourne as he misses his brother dearly and is saddened by the fact his little brother remains on Christmas Island to be sent to Nauru.

Both brothers have alerted Immigration about their desire to live together and have Rasool join Murteza in community detention in Melbourne.

Recommendations

Recommendation 1: Children in immigration detention centres, including alternative places of detention and residential housing, should be released as soon as possible.

Recommendation 2: Australia's immigration laws should be amended, as a matter of urgency, to comply with the *Convention on the Rights of the Child*. In particular, the

Migration Act 1958 (Cth) should be amended to prohibit detention of children beyond 3 months.

9 The guardianship of unaccompanied children in detention in Australia

The CRC

9.1 The CRC recognises the vulnerability of unaccompanied children seeking asylum and requires that signatories provide the children with special protection and assistance in addition to the range of general rights and protections afforded to all children. In particular, the CRC:

- (a) imposes a specific obligation on Australia to ensure that children seeking refugee status receive appropriate protection and humanitarian assistance and are able to enjoy the rights and protections afforded to all children under the CRC;⁴²
- (b) recognises the particular needs of children who have lost the support of their family environment and states:⁴³

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

States Parties shall in accordance with their national laws ensure alternative care for such a child.

Such care could include, *inter alia*, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due care shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

- (c) states that, for the legal guardian of a child, "the best interests of the child will be their basic concern."⁴⁴ As the Commission has previously observed, this reinforces that the best interests of an unaccompanied child must be *the* primary consideration for a legal guardian and not just one of any number of primary considerations.⁴⁵

The Guardianship Act and Migration Act

9.2 As noted earlier, the Minister acts as the legal guardian of every "non-citizen child" under 18 years of age,⁴⁶ who:

- (a) enters Australia as a non-citizen;

⁴² CRC, Article 22(1).

⁴³ CRC, Article 20.

⁴⁴ CRC, Article 3(1), 18(1).

⁴⁵ Australian Human Rights and Equal Opportunity Commission, *A last resort? National Inquiry into Children in Immigration Detention* (April 2004), section 14.1 p.699.

⁴⁶ *Immigration (Guardianship of Children) Act 1946* (Cth) s 6.

- (b) either intends, or is intended, to become a permanent resident of Australia, and
 - (c) is not in the charge or under the care of a parent or relative over 21 years of age or a intending adoptive parent.⁴⁷
- 9.3 The Minister can delegate any of his or her powers or functions as legal guardian to any officer or authority of the Commonwealth or of any State or Territory and can also place a non-citizen child in the custody of any person who is willing to act as custodian of that child and who, in the Minister's opinion, is a suitable person to be the custodian of that child.⁴⁸
- 9.4 As noted above RACS is concerned that the Minister's guardianship responsibilities cease to apply when a non-citizen child is taken from Australia to a regional processing country under section 198AD of the Migration Act.⁴⁹
- 9.5 In terms of the Minister's obligations as guardian, section 6(1) of the Guardianship Act states:
- The Minister shall be the guardian...of every non-citizen child who arrives in Australia...and shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have until the child reaches the age of 18 years or leaves Australia permanently, or until the provisions of this Act cease to apply to and in relation to the child, whichever first happens.
- 9.6 The Guardianship Act does not provide any further specific guidance regarding the content of the Minister's guardianship rights, powers and duties under the Guardianship Act.
- 9.7 More substantive guidance is contained in Departmental policy which states that, as the guardian of unaccompanied minors, the Minister:
- ...has the same rights, powers, duties, obligations and liabilities as the parents of an unaccompanied minor would have if they were in Australia. The guardian is responsible for an unaccompanied minor's basic needs including food, housing, health, education, and protection from harm.⁵⁰
- 9.8 This position appears to be consistent with the common law concept of guardianship that extends to a broad range of rights, powers and duties in respect of which the overarching principle is that a guardian must always act in the best interests of the child.⁵¹

⁴⁷ *Immigration (Guardianship of Children) Act 1946* (Cth) s 4AAA which outlines the meaning of "non-citizen child".

⁴⁸ *Immigration (Guardianship of Children) Act 1946* (Cth) s 7(1).

⁴⁹ *Immigration (Guardianship of Children) Act 1946* (Cth) s 6(2)(b).

⁵⁰ Department of Immigration and Border Protection website FAQ's "*How does the minister's guardianship work?*", <<http://www.immi.gov.au/FAQs/Pages/how-does-the-ministers-guardianship-work.aspx>> (viewed on 26 May 2014)

⁵¹ Mary Crock and Mary Anne Kenny, *Rethinking the Guardianship of Refugee Children after the Malaysian Solution* (2012), 34 Sydney Law Review 449

- 9.9 However, RACS notes that jurisprudence on the scope of the Minister's guardianship obligations under Guardianship Act would appear to indicate that there is a divergence between the scope of the Minister's statutory obligations and the common law concept of guardianship. Successive attempts to give content to the Minister's guardianship obligations under the Guardianship Act have proved unsuccessful in that the Courts have repeatedly given a narrow interpretation to the scope of the Minister's statutory guardianship obligations that falls short of an obligation to act in the best interests of the child. In addition, the Courts have consistently confirmed a characterisation of those general guardianship obligations as subservient to the Minister's specific powers under the Migration Act.⁵²
- 9.10 To date, the usual response of the executive to any suggestion of a broader interpretation of the Minister's statutory guardianship obligations has been to introduce clarifying amendments to the Guardianship Act and the Migration Act, explicitly narrowing the scope and operation of those statutory obligations.⁵³
- 9.11 As a matter of practice, the Minister delegates guardianship to "delegated guardians", being officers either within the Department or State and Territory child welfare agencies. In turn, those delegated guardians may place the child with a custodian, being a person or organisation responsible for the child's basic welfare and day-to-day-care.⁵⁴

Empirical evidence

- 9.12 RACS notes that there is limited public information made available by the Department about the guardianship of children in detention. This raises significant issues with transparency in terms of the identity, resourcing capacity, qualifications, capabilities and specific duties and lines of accountability of delegated guardians and custodians who have direct responsibility for the protection and day-to-day care of unaccompanied children in detention.⁵⁵

Fulfilment of obligations under the Convention

- 9.13 RACS submits that Australia is not meeting its obligations under the CRC in respect of this Terms of Reference.
- 9.14 There is an inherent conflict of interest between the Minister's role as the legal guardian of unaccompanied children in detention and the Minister's

⁵² Ibid, see pages 450-456 for Crock and Kenny's general discussion of a group of cases considering the Minister's role as guardian under the Guardianship Act

⁵³ An example is the enactment of the *Migration Amendment Act 2012(Cth)* in response to the High Court's judgement in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 where, *inter alia*, the majority held that the Minister's failure to provide express written consent to the relevant plaintiff (who was an unaccompanied minor and non-citizen child under the Guardianship Act) leaving Australia was a further restriction on the government's ability to remove that plaintiff from Australia under the proposed regional processing arrangements contemplated by the government's "Malaysia solution".

⁵⁴ DIBP website FAQ's, Op cit note 41.

⁵⁵ Australian Churches Refugee Taskforce, *All the Lonely Children: Questions for Policymakers regarding Guardianship for Unaccompanied Minors*, (draft October 2013), 7.

responsibilities under the Migration Act, including the responsibility for detaining a child, making decisions about whether to release a child from detention, making decisions about whether to transfer a child to a regional processing country, deciding whether to allow a child to apply for a visa, deciding whether to grant or refuse a visa, and deciding whether to removal a child from Australia.

- 9.15 On the issue of this conflict of interest, the Full Court in *Odhiambo v Minister for Immigration and Multicultural Affairs* noted:

In the case of children who come to Australia with government approval, under voluntary migration schemes, there would appear to be no conflict between the role of the minister as guardian and the minister's role in administering the Migration Act. However, where children come to Australia as asylum-seekers there may be such a conflict. For example, the minister may have a policy of detaining all asylum-seekers (or all persons falling within a particular class of asylum seekers) pending final determination of their claims to be recognised as refugees. Yet a person acting independently of the minister might see grounds, in the particular case, for the grant of a bridging visa permitting release of the child from detention during that period.

Similarly, as the person administering the Migration Act, the minister has an interest in resisting challenges to decisions of delegates and decisions of the tribunal that uphold delegates' decisions. That interest is directly opposed to the interest of an asylum-seeker in setting aside a decision unfavourable to him or her and obtaining reconsideration of the application for a protection visa.⁵⁶

- 9.16 The conflict of interest in the Minister's role as guardian also arises in the context of decisions regarding whether a child should be exempt from regional transfer. Departmental policy regarding pre-transfer assessments, including the Best Interests Assessment (**BIA**), explicitly states that the best interests of an unaccompanied child may be outweighed by other factors.⁵⁷

- 9.17 RACS is also seriously concerned about the fact that the Minister's guardianship responsibilities cease to apply once an unaccompanied child has been transferred to a regional processing country. RACS agrees with the UNHCR that the physical transfer of asylum seekers from Australia to offshore regional processing countries does not extinguish the responsibility of the transferring state.⁵⁸

- 9.18 This unacceptable position was recognised in the 2011 Senate committee report into the Malaysia solution, which stated:

...explicit provision needs to be made for the transfer of guardianship of children in Malaysia. The Australian Government simply cannot rely on an expectation that an official of the Malaysian Government will become the

⁵⁶ *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 29 at [90]-[91].

⁵⁷ See the Department's form "Best Interests Assessment for transferring minors to an RPC (forming part of the Pre-Transfer Assessment)" (13 February 2014 – Version 1.4), page 1

⁵⁸ UNHCR report, *UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013*, Part III, paragraph 22

guardian to unaccompanied children. To send unaccompanied minors to Malaysia without making detailed provision for their guardianship on arrival is a dereliction in the Minister's duty as legal guardian of these children.⁵⁹

- 9.19 While the arrangements in Papua New Guinea are at present unclear, it appears that under the current arrangements with Nauru, the guardianship of unaccompanied children transferred to Nauru is in effect delegated to the Nauru operations manager of Save the Children Australia.⁶⁰
- 9.20 Leaving aside questions of whether the organisation is adequately resourced to cater for the day-to-day care of unaccompanied children in detention on Nauru, it is clear that Save the Children by itself will not be in a position to provide full range of protections and assistance required by an unaccompanied child in those circumstances.
- 9.21 We raise concerns regarding reports such as that of the Guardian of April 24 2014⁶¹ which detail allegations of Nauru guards assaulting children in the detention camp.
- 9.22 The UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum suggests that:
- ...an independent and formally accredited organisation be identified/established in each country, which will appoint a guardian or adviser 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 the child's legal, social, medical and psychological needs are appropriately covered during the refugee status determination procedures and until a durable solution for the child has been identified and implemented. To this end, the guardian or adviser would act as a link between the child and existing specialist agencies/individuals who would provide the continuum of care required by the child.⁶²
- 9.23 RACS submits that the Australian government has not put in place appropriate measures to ensure that special care and protection is provided to unaccompanied children seeking refugee status as contemplated by article 20 of the CRC. This is taking into account:
- (a) the conditions of the facilities in which children are detained both within Australian and offshore,
 - (b) the inherent conflict of interest between the Minister's role as the legal guardian of unaccompanied asylum seeker children;

⁵⁹ Senate Legal and Constitutional Affairs References Committee, report on Australia's arrangement with Malaysia in relation to asylum seekers (October 2011) paragraph 4.26

⁶⁰ See the Department's document "Guidance for Completing the Best Interests Assessment for Transferring Minors to an RPC (13 February 2014 – Version 1.0)"

⁶¹ Accessible at: <http://www.theguardian.com/world/2014/apr/24/nauru-guards-accused-of-assaulting-children>

⁶² UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (February 1997), paragraph 5.7

- (c) gaps in responsibility and accountability in terms of the day-to-day care and protection of children in immigration detention; and
- (d) the failure to ensure the protection of children's legal rights in asserting their claim for refugee status.

Recommendations

Recommendation 2: Australia's immigration laws should be amended, as a matter of urgency, to comply with the *Convention on the Rights of the Child*. In particular, the *Migration Act 1958* (Cth) should be amended to prohibit detention of children beyond 3 months.

Recommendation 6: An independent guardian should be appointed for unaccompanied children and they should receive appropriate support.

Recommendation 7: Children should not be subject to transfer to 'regional processing countries'. The protection claims of children should be assessed in Australia.

Recommendation 8: An independent impact and best interests assessment should be conducted by independent and qualified experts on all children detained in regional processing facilities.

- 9.1 RACS submits that a legislative framework should be introduced that appoints an independent legal guardian to protect the interests of the children until their immigration matters are resolved or the child turns 18 years old.
- 9.2 An independent legal guardian would have the primary functions of monitoring, investigating and reporting on the protection of children's rights⁶³ and would act in the best interests of the child.
- 9.3 An independent legal guardian with an appropriate range of expertise and separately funded from the Department, should be appointed with sole and overarching responsibility for ensuring the protection and care of unaccompanied children in detention until completion of their refugee status determination process. While actual care and protection services may be provided by appropriately qualified agencies or individuals, the appointed guardian(s) should bear ultimate responsibility for the protection and welfare of each unaccompanied child in detention.
- 9.4 RACS submits that all unaccompanied children should have an Independent Children Legal Advocate at each stage of the pre-removal assessment process or residence determination (where necessary) and at each stage in the refugee status determination process thereafter, extending to any appeals of adverse decisions including proceedings in the Refugee Review Tribunal. The role of an Independent Legal Advocate will be discussed further below.

⁶³ Australian Human Rights Commission, *Australian Human Rights Commission Submission to the Committee on the Rights of the Child*, August 2011, recommendation 5.

10 Assessments conducted prior to transferring children to be detained in 'regional processing countries'

The CRC

10.1 The CRC provides that:

... in all actions concerning children ... the best interests of the child shall be a primary consideration.⁶⁴

Australia 'shall ensure to the maximum extent possible the survival ... of the child.'⁶⁵

The Refugees Convention

10.2 The Refugee Convention defines the term 'refugee' as follows:

... the term "refugee" shall apply to any person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ...⁶⁶

10.3 Article 33 of the Refugee Convention requires that:

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.⁶⁷

The ICCPR

10.4 Article 24(1) of the ICCPR states that:

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."

10.5 The measures of protection required by our clients as minors by the Australian State include that:

- children should not be detained unlawfully or arbitrarily;
- children must only be detained as a measure of last resort and for the shortest appropriate period of time;
- children in detention:

⁶⁴ CRC, Article 3(1).

⁶⁵ CRC, Article 6.

⁶⁶ Refugees Convention, Article 1.

⁶⁷ Refugees Convention, Article 33, which has been described as the 'cornerstone' of the protection of refugees: *NBMZ v Minister for Immigration and Border Protection* [2014] FACFC 38 at [12].

- should be treated with respect and humanity, in a manner that takes into account their age and developmental needs;
- have the right to challenge the legality of their detention.
- children seeking asylum have a right to protection and assistance – because they are an especially vulnerable group of children;
- children have a right to family reunification; and
- children who have suffered trauma have a right to rehabilitative care – recovery and social reintegration.

10.6 We note that a number of our clients have family members within Australia, with whom remain separated. As such, articles 17 and 23 of the ICCPR are also relevant. RACS submits that the transfer of such individuals to a RPC, would be in further contravention of these articles.

The Migration Act

- 10.7 A person who arrives in Australia and has entered by sea,⁶⁸ without a visa, is deemed an 'unauthorised maritime arrival'.⁶⁹ A person who is an 'unauthorised maritime arrival' is not permitted to make a valid application for a visa,⁷⁰ unless the Minister decides that it is in the public interest to let that person make a valid application.⁷¹
- 10.8 A person who arrives in Australia and is deemed an unauthorised maritime arrival must be detained.⁷² The person 'must, as soon as reasonably practicable',⁷³ be taken to a regional processing country.
- 10.9 The Minister has the power to designate a country as a 'regional processing country'.⁷⁴ The Minister has designated Papua New Guinea⁷⁵ and Nauru⁷⁶ as regional processing countries.⁷⁷
- 10.10 Prior to a child being taken to a regional processing country, a 'Pre Transfer Assessment' (**PTA**) of the child will be undertaken pursuant to the procedure in the Procedure Advice Manual (**PAMS**).
- 10.11 If, during that assessment or at any other time, the Minister thinks it is in the public interest to do so, the Minister may decide that the provisions requiring transfer to a regional processing country do not apply to a certain child.⁷⁸ This decision must be made by the Minister personally.⁷⁹ The rules of natural justice

⁶⁸ A person is taken to have 'entered Australia by sea' if they 'entered the migration zone except on an aircraft': *Migration Act 1958* (Cth) s 5AA(2)(a).

⁶⁹ *Migration Act 1958* (Cth) s 5AA(1).

⁷⁰ *Migration Act 1958* (Cth) s 46A(1).

⁷¹ *Migration Act 1958* (Cth) s 46A(2)-(3).

⁷² *Migration Act 1958* (Cth) s 189.

⁷³ *Migration Act 1958* (Cth) s 198AD(2).

⁷⁴ *Migration Act 1958* (Cth) s 198AB(1).

⁷⁵ Federal Register of Legislative Instruments F2012L02003.

⁷⁶ Federal Register of Legislative Instruments F2012L01851.

⁷⁷ The 'rules of natural justice do not apply' to a determination of the Minister to designate a country as a regional processing country, or to revoke such a designation: *Migration Act 1958* (Cth) s 198AB(7).

⁷⁸ *Migration Act 1958* (Cth) s 198AE(1).

⁷⁹ *Migration Act 1958* (Cth) s 198AE(2).

do not apply to such a decision.⁸⁰ The Minister does not have a duty to consider whether or not to determine that a child should not be subject to transfer.⁸¹

10.12 In determining whether or not a child should be exempt from transfer, the guidelines state that the officers of the Department must 'turn their mind to whether it is reasonably practicable in the circumstances of an individual child to take them to a regional processing country'.⁸² The PTA will assess the health, special needs, and vulnerabilities of the child. If a child is very ill and unable to be expelled to a regional processing country, the Minister can permit the child to remain in Australia until they are well enough to be expelled.⁸³ The PTA also considers whether or not the child has made a claim for protection against either of the regional processing countries. This is despite the fact that the child is not provided information about circumstances in that country or legal advice about how a claim for protection would be considered.⁸⁴

10.13 Further, according to Departmental policy, all minors require a 'Best Interests Assessment' (**BIA**) prior to transfer:

Australia has an obligation to treat the best interests of the child as a primary consideration in all actions concerning children. The best interests of the child must however be considered with other considerations, including those that arise under the Migration Act and the Migration Regulations. As such, consideration of the best interests of a child does not necessarily require a decision to allow the child or the child's family to remain in Australia and may be outweighed by other primary considerations.⁸⁵

Empirical evidence

10.14 RACS has numerous clients who are children, including unaccompanied children and children in family groups, who are currently detained at Christmas Island and other transitory locations. As these clients arrived after 19 July 2013 they face imminent transfer to Nauru.

RACS Case Study:

Abdul is 17 years old and has been held at Christmas Island for over 8 months. He fled Somalia as he feared being kidnapped or forced to join the militia. He has significant problems with his vision and is suffering daily from the stress of not knowing if he will be transferred to Nauru or what his future holds.

⁸⁰ *Migration Act 1958* (Cth) s 198AE(3).

⁸¹ *Migration Act 1958* (Cth) s 198AE(7).

⁸² *Departmental Guidelines for Assessment of Persons Prior to Transfer pursuant to section 198AD(2) of the Migration Act 1958* at s 3

⁸³ *Departmental Guidelines for Assessment of Persons Prior to Transfer pursuant to section 198AD(2) of the Migration Act 1958* at s 7.

⁸⁴ *Departmental Guidelines for Assessment of Persons Prior to Transfer pursuant to section 198AD(2) of the Migration Act 1958* at s 11.

⁸⁵ *Departmental Guidelines for Assessment of Persons Prior to Transfer pursuant to section 198AD(2) of the Migration Act 1958* at s 9.

When he speaks to his lawyer at RACS, he regularly speaks of the fear and insecurity he feels each week when decisions are made about who will be transferred. He often articulates his overwhelming sadness and has threatened suicide.

Fulfilment of obligations under the CRC

- 10.15 RACS submits that Australia is not currently meeting its obligations under the CRC, ICCPR or under the Refugees Convention in respect to this Term of Reference.
- 10.16 RACS believes the process of regional transfer is inconsistent with Australia's obligations under the CRC, ICCPR and the Refugees Convention.
- 10.17 RACS believes that children are transferred without a proper assessment of their best interests and without adequate services in place to ensure their mental and physical well-being.
- 10.18 Under Australian law, international law only has domestic force through a specific act of incorporation into domestic law.
- 10.19 The Migration Act in s 36 has adopted the definition of a refugee from the Refugee Convention, and the High Court in M61/2010 has held that:
- The Migration Act contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugee Convention and the Refugees Protocol.
- 10.20 This amounts to an incorporation of the definition and certain rights under the Refugee Convention, but not the Convention in its entirety. However at a minimum by becoming a signatory to the Refugee Convention, Australia has undertaken to consider the claims of a person seeking refugee status so as to honour the obligations imposed on Australia by Article 1 and Article 33 of the Refugee Convention.
- 10.21 However, the Guidelines governing the process of regional transfer state that 'Officers must not consider any protection claims put forward by the [child] against their home country'.⁸⁶ The Minister admits that once a child is removed to Papua New Guinea and Nauru, the Minister has no control over whether or not that child's claim for protection will be assessed in accordance with law, or at all.⁸⁷

⁸⁶ *Departmental Guidelines for Assessment of Persons Prior to Transfer pursuant to section 198AD(2) of the Migration Act 1958* at s 11.

⁸⁷ On 9 and 13 May 2014, the High Court of Australia heard a constitutional challenge to the provisions of the Migration Act that impose the process of Automatic Removal. In the Minister's written submissions for that hearing, the Minister discussed the key provision of the Automatic Removal provisions and stated it 'neither authorises nor requires [children] to be kept in any form of detention in a regional processing country. Nor does it prescribe any process for the assessment of any protection claim by [a child] in a regional processing country. That ... is unsurprising, given that [a child] who is within the territory of a regional processing country is subject to the sovereign control of that country: see Written Submissions of the Minister located at http://www.hcourt.gov.au/assets/cases/s156-2013/P1f-S156-2013_Def.pdf at [8].

10.22 The current process of regional transfer does not take the 'best interests of the child' into account as a 'primary consideration' and is therefore inconsistent with Article 3 of the CRC. The test of what is 'reasonably practicable' is not in line with considering as a 'primary consideration' the 'best interests of the child'.⁸⁸ The guidelines provide that:

... consideration of the best interests of a child does not necessarily require a decision to allow the child or the child's family to remain in Australia and may be outweighed by other primary considerations.⁸⁹

10.23 In addition, there are inadequate protections for the legal rights of unaccompanied children in the pre-removal assessment and refugee status determination process. Specifically, an independent legal representative is not as a matter of course allocated to represent an unaccompanied child at each stage of these processes. This point was reflected in the comments of a 2011 Senate committee report into the proposed offshore processing arrangements with Malaysia. The Senate Committee Report stated:

Specific provision needs to be made for unaccompanied minors to have representation with respect to their legal rights during any pre-removal interview. The committee does not take any comfort in the fact that unaccompanied children will be accompanied at interview by an 'independent observer'. Nowhere in the list of roles fulfilled by the independent observer will that person be required to advocate for the legal rights of the child. That is the role of the child's legal guardian and, in the committee's view, it is necessary that a person representing the child's legal interests be present at the interview.⁹⁰

10.24 Based on information in the UNHCR report on Nauru, RACS further submits that Nauru does not have the resources and facilities available to properly discharge the obligations to comply with the CRC and the ICCPR which include:

- Providing protection and assistance towards children seeking asylum;
- Providing recovery and social reintegration for children who have suffered trauma;
- Detaining children only as a measure of last resort for the shortest appropriate period of time;
- Treating children with respect and humanity, in a manner that takes into account their age and developmental needs; and
- Enable family reunification.

Recommendations

10.25 RACS submits that no child should be sent offshore.

⁸⁸ *Departmental Guidelines for Assessment of Persons Prior to Transfer pursuant to section 198AD(2) of the Migration Act 1958* at s 3.

⁸⁹ *Departmental Guidelines for Assessment of Persons Prior to Transfer pursuant to section 198AD(2) of the Migration Act 1958* at s 9.

⁹⁰ Senate Legal and Constitutional Affairs References Committee, report on Australia's arrangement with Malaysia in relation to asylum seekers (October 2011) paragraph 4.25

- 10.26 In the event that children are sent offshore, however, a proper assessment should be undertaken in which the best interests of the child are of primary consideration.
- 10.27 In the event that children are sent offshore, however, they should have access to independent legal advice prior to any assessment of their claims or suitability assessment to be sent offshore.
- 10.28 RACS advocates for a process whereby a child's claim for protection is assessed onshore, within the territorial limits of Australia.
- 10.29 RACS further advocates for a process whereby each child, who seeks protection from Australia pursuant to its obligations under the CRC and Refugees Convention, is able to make a valid application for a protection visa.

Recommendation 7: Children should not be subject to transfer to 'regional processing countries'. The protection claims of children should be assessed in Australia.

Recommendation 8: An impact and best interests assessment should be conducted by independent and qualified experts on all children detained in regional processing facilities.

Recommendation 9: Every child in immigration detention or community detention should be assigned a migration agent to assist them with all processes relating to their immigration matter until that matter is finalised.

11 Access to Justice

The CRC

11.1 Article 37(d) of the CRC states that:

Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

11.2 Article 12 of the CRC states:

... [A] child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

11.3 Article 22.1 states:

[Australia] shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance ...

11.4 Article 42 states:

[Australia] undertake[s] to make the principles and provisions of the [CRC] widely known, by appropriate and active means, to adults and children alike.

The Migration Act

11.5 RACS submits that Australia is not currently meeting its obligations under the CRC with respect to this Term of Reference. The Migration Act does not provide for a child to have a right to access free legal representation or assistance in relation to matters arising under the Act. The current status quo does not reflect our responsibilities under the CRC which include: '[e]very child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance'.

Empirical evidence

Cessation of the scheme for providing free immigration assistance

11.6 The Immigration Advice and Application Assistance Scheme (**IAAAS Program**) was established in 1997 Under IAAAS, free professional migration advice and visa application assistance was offered to all asylum seekers who came to Australia by boat, including children.

- 11.7 On 31 March 2014, the Minister announced that persons who arrive in Australia “illegally”, i.e. by boat without a visa or by plane and were not immigration cleared, would no longer receive any advice or assistance under the IAAAS Program.⁹¹ As a result, there is currently no system for providing free legal assistance to children in immigration detention who came to Australia by boat to seek asylum.
- 11.8 Since the cuts to IAAAS, children in detention have had no consistent avenue for accessing free legal assistance.
- 11.9 RACS provides limited pro bono legal assistance to people in detention who have an imminent legal problem. However, because this assistance is pro bono, it is extremely limited in scope and does not constitute comprehensive legal assistance. In addition, because of the lack of funding, this form of assistance is not sustainable.
- 11.10 Between January and June of 2014, approximately 2180 people sought legal advice and assistance from RACS including a substantial number from immigration detention. RACS is currently assisting more than 30 unaccompanied children deemed to be unauthorised maritime arrivals who are at imminent risk of removal pursuant to the Automatic Removal provisions. Given the lack of funding and capacity of staff RACS cannot presently provide comprehensive legal assistance for all children in immigration detention.

Practical problems accessing legal assistance

- 11.11 With the cessation of IAAAS referrals for those in detention, the facilitation of independent legal advice has been significantly hindered. As discussed previously the remoteness and isolation of the locations in which people are held in detention acts as a huge limitation as to the provision of legal advice.
- 11.12 As clients are no longer referred to lawyers, the realisation and discovery of services such as RACS may only be found through a variety of ad-hoc means. For example, children with internet may become aware of the existence of RACS through internet searching, facebook groups or word of mouth online or within the detention network. Clients may also be referred to RACS by other services, such as the Commission or by NGOs such as from Chilout. Visitors and staff of detention centres may also alert those detained of the services of RACS. For children who are in community detention, caseworkers may refer children to the services of RACS.
- 11.13 It is RACS’ experience that children are not told as a matter of practice that they have a right to speak to a lawyer, and they are not provided with clear information about how to contact a lawyer or why they may seek legal advice.
- 11.14 Once a client is connected to a service such as RACS, there are still significant hurdles in accessing instructions and information. Practical realities are the limited number of phones and computers within detention centres. When a client calls into RACS often the phones disconnect and the client is not

⁹¹ Media Release, 31 March 2014, <http://www.minister.immi.gov.au/media/sm/2014/sm213047.htm> .

afforded any privacy in order to make a confidential call. If RACS makes a request to call into a detention centre then this request is facilitated by Case Management. If the client is an unaccompanied child, then Serco and an Independent Observer must also be notified of the call in scheduling, which is incredibly problematic in terms of conflict and confidentiality.

- 11.15 The obtainment of documents is also a huge issue. For RACS and a client within a detention centre to share any urgent paperwork it goes through that of Case Management or Serco in order for any documentation to be printed, signed, scanned or faxed. This poses incredible confidentiality and conflict issues for the Department, client and RACS. If a document needs to be signed by an unaccompanied minor this must also be witnessed by an independent observer raising additional confidentiality and conflict concerns.
- 11.16 As mentioned previously, there are also significant delays in scheduling legal appointments for clients, which creates additional hurdles for legal advocates requiring client instruction before responding, particularly when facing a tight limitation date or a matter that requires urgency.
- 11.17 RACS has been told by children in immigration detention that they are often initially afraid to speak to a lawyer, they are worried that it will cause them to be seen as trouble makers, that it will have a negative impact on their case. Further, often RACS receives instructions over an email or receives an unscheduled phone call, particularly from unaccompanied children who were not comfortable providing particular instructions in front of independent observers, or when they can see certain Department and Serco officers around.

Fulfilment of international obligations

- 11.18 Children who are detained by the Australian government are in a uniquely vulnerable position compared to other groups of people in relation to their need for legal assistance: they may lack family or other social support structures, most come from non-English speaking backgrounds and therefore face cultural and linguistic challenges in presenting their cases.
- 11.19 Many have suffered trauma and are fearful of authorities due to experiences in their countries of origin. Asylum seeker children may find it difficult to share information with a decision-maker in the context of a short interview, since it takes time to build up trust and share personal details. Children detained may also be unable to lucidly recount their experiences due to trauma. They often lack the financial resources to pay for legal advice and representation.
- 11.20 Without legal assistance, detained asylum seeker children are left to present their protection visa applications on their own, which is highly problematic given that asylum seekers are often unable to articulate the elements relevant to an asylum claim without the assistance of a qualified counsellor because they are not familiar with the precise grounds for the recognition of refugee status and the legal system of a foreign country.

- 11.21 Given the multi-factored nature of the disadvantage and vulnerability faced by detained asylum seeker children, without access to free legal assistance, there is a high risk of erroneous decisions entailing not only serious consequences for asylum seekers, but also place Australia at risk of breaching its *non-refoulement* obligations under the Refugee Convention and international human rights law – that is the obligation not to return people to countries where they face persecution or other forms of serious harm.
- 11.22 In addition, we have responsibilities under the CRC which include that: '[e]very child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance'.
- 11.23 Children who are detained by the Australian government should be provided access to free legal assistance by the Australian government. RACS believes that the Australian government has a duty to provide free immigration legal assistance to all children who are detained as a result of its laws and policies.
- 11.24 RACS believes that all asylum seekers should be informed that they have a right to speak to a lawyer and if they request to speak to a lawyer, this should be facilitated by the Department or the detention services provider, we believe this is particularly essential for children and even more so for unaccompanied children.
- 11.25 Children need an independent confidant to whom they can articulate their protection claims, complaints and concerns in consideration of their instructions and best interests. Children need an independent source of legal support that they can speak to without fear of retribution from authorities with compliance obligations of having to report them. A lawyer's duty, bound by professional obligations is the one person in the whole refugee status determination process who has to take instructions from the client and is an advocate only for them, without any other competing interests.
- 11.26 A child's relationship with an independent lawyer is also an empowering one. The facilitation of this service, allows for a child to possibly for the first time in their lives, make a decision, and most importantly an informed decision.

Recommendations

Recommendation 9: Every child in immigration detention or community detention should be assigned a migration agent to assist them with all processes relating to their immigration matter until that matter is finalised.

12 Access to refugee status determination procedures

- 12.1 RACS holds serious concerns about the ability of children in immigration detention to access refugee status determination procedures in the context of the current policies and practices of 'enhanced screening'.

The Refugee Convention

- 12.2 According to Article 31 of the Refugee Convention:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

- 12.3 According to Article 33 of the Refugee Convention:

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

- 12.4 According to Article 3 of the Refugee Convention:

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

The Migration Act

- 12.5 The process of enhanced screening process is not defined in or otherwise address by the Migration Act 1958. The process is determined by policy and practices of the Department of Immigration, details of which are not made publically available.

Empirical evidence

- 12.6 There is very limited publically available information about the process of 'enhanced screening'. The information gathered by RACS has been acquired mainly through client testimony, Departmental documents obtained through freedom of information, and Departmental evidence at Senate Estimates.
- 12.7 The 'enhanced screening' process, which has been in place since late 2012, involves an officer of the Department of Immigration conducting an interview, approximately 30-60 minutes in duration, with an asylum seeker about the nature of their fears. The asylum seeker has no access to legal representation at this interview. Following the interview, the officer makes a determination about whether the asylum seeker has claims that could reasonably engage

Australia's protection obligations.⁹² The officer completes a template interview record and chooses one of three options: (1) the person has not made claims that raise any fear of harm whether for a Refugee Convention reason or otherwise (2) the person has made claims that raise a fear of harm and those claims appear to be plausible and to have substance, or (3) the person has made claims that raise a fear of harm and those claims appear not to be plausible and / or not to have substance. The decision is then checked off by a senior officer.

- 12.8 In cases where the Department determines that the asylum seeker does not have protection claims, the asylum seeker is "screened out". This means that the Department may remove them to their home country without any further assessment of their claims. There is no real opportunity given to appeal this decision.
- 12.9 RACS is aware that the enhanced screening process has been applied to children, including both unaccompanied children and children in family groups, and has resulted in the forcible removal of children from Australia.⁹³ The exact number of children returned under this process has not been disclosed by the Department.
- 12.10 As far as RACS is aware, the enhanced screening process has been applied to asylum seekers from Sri Lanka and Vietnam and has resulted in over 1000 asylum seekers being returned to their home country.
- 12.11 RACS holds serious concerns that the enhanced screening process fails to meet basic procedural safeguards and, for this reason, it could have resulted in, and could continue to result in persons to whom Australia owes protection obligations being returned to a place where they have a well-founded fear of persecution.
- 12.12 Some of the problems that RACS has identified include:
- Lack of independent legal assistance: Asylum seekers, including children, are not provided with independent advice or representation about the enhanced screening process before or during the interview and, in practice, they are not informed of their right to request legal assistance.⁹⁴ This means that asylum seekers may not understand the law and process and can lead to them providing inaccurate or incomplete information.
 - Interviews do not allow for genuine assessment of claims: RACS has received numerous reports that enhanced screening interviews are often very short, sometimes as short as 20 minutes; interviewers have told them to keep their responses short; interviewers have told them that what happened in the past is not relevant and they should only talk about what

⁹² Department of Immigration and Citizenship, *Enhanced Screening – Policy Guidelines*, April 2013.

⁹³ Evidence of the Department of Immigration provided to Senate Estimates cited in Curtin University, Centre for Human Rights Education, *Submission to the National Inquiry into Children in Immigration Detention*, 2 June 2014, p4.

⁹⁴ Evidence of the Department of Immigration to Senate Estimates cited in Curtin University, Centre for Human Rights Education, *Submission to the National Inquiry into Children in Immigration Detention*, 2 June 2014, p10.

will happen in the future; interviewers have told them that they will have another chance to talk about their claims in more detail, when in fact they this did not happen.

- The decision-making process does not meet basic procedural fairness standards:
 - Decision records are not provided to asylum seekers who receive a negative decision.
 - Decision records do not contain reasons for the decision.⁹⁵
 - The Department does not disclose to asylum seekers, and has withheld disclosure under freedom of information, its policies and standards for determining that a person's claims are "not plausible and/or lack substance".⁹⁶
 - There is inconsistency between the outcomes of decisions in similar cases.⁹⁷
 - Decision records indicate that some officers have made negative decisions based on wrong interpretations of the law.⁹⁸
 - Asylum seekers cannot seek formal review of a negative decision.

12.13 There are no specific procedural or evidentiary safeguards for assessing the claims of children, in breach of UNHCR guidelines on assessing child asylum claims.⁹⁹

RACS Case Study:

Nathan arrived in Australia from Sri Lanka after being on a boat for approximately 46 days. A few days after his arrival, he was interviewed by the Department about his case. The interview went for about 45 minutes. During the interview, he was not feeling well. As a result of having almost starved to death, he was constantly worried about food. He had heard from other asylum seekers that Australia refuses to give visas to people who were in the LTTE, so he didn't disclose information about his involvement in the LTTE during the interview. About 3 months later, he was told his case had been rejected and he would be

⁹⁵ RACS has obtained access to Enhanced Screening Policy Guidelines under freedom of information, however, key sections of the guidelines were redacted, including the 'The purpose of the interview', 'Consideration of the interview' and 'Determining if claims are implausible or lacking in substance'.

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⁹⁸ Records of interviews and decisions obtained under FOI.

⁹⁹ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, para 65, available at: <http://www.refworld.org/docid/4b2f4f6d2.html>.

returned to Sri Lanka. He subsequently sought legal advice from RACS where he was advised to disclose all relevant information about his fears. He was subsequently “screened in”.

Fulfilment of international obligations

- 12.14 RACS submits that Australia is not currently meeting its obligations under the Refugee Convention and the CRC in relation to children in immigration detention who are subject of the enhanced screening process.
- 12.15 Under article 33 of the Refugee Convention, Australia is obliged not to return any person who meets the definition of a refugee, including children. The Convention does not specify a process for determining whether a person meets this definition. However, UNHCR guidelines require that the process must meet basic procedural standards.¹⁰⁰
- 12.16 The lack of a formal review mechanism is in direct contradiction of the recommendation of the Executive Committee of the High Commissioner’s Program (ExCOM) that: “(vi) if the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.”¹⁰¹
- 12.17 RACS is also concerned about the fact that the enhanced screening process is applied in a discriminatory manner to asylum seekers of particular countries of origin. RACS considers that this is a breach of article 3 of the Refugee Convention.
- 12.18 As a consequence of the lack of basic procedural safeguards, there is a serious risk that asylum seekers who satisfy the definition of a refugee have been, and will continue to be, returned to the country where they face a well-founded fear of persecution.
- 12.19 RACS considers that the forceful removal of asylum seekers following a negative ‘enhanced screening’ decision is a flagrant breach of Australia’s obligations under the Refugee Convention.
- 12.20 In addition, to return a child to a country where they claim to fear serious harm, without a proper assessment of whether those fears are well-founded, is also a gross breach of Australia’s obligations under the CRC including, but not limited to, the requirement that the best interests of the child should be a primary consideration in all actions concerning children;¹⁰² the right to life, survival and

¹⁰⁰ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: <http://www.refworld.org/docid/4f33c8d92.html>.

¹⁰¹ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, para 193, available at: <http://www.refworld.org/docid/4f33c8d92.html>.

¹⁰² CRC, article 3.

development;¹⁰³ and the prohibition on torture or cruel, inhuman or degrading treatment or punishment.¹⁰⁴

Recommendations

12.21 RACS believes that the enhanced screening process should be abolished because it breaches Australia's obligations towards all asylum seekers, including child asylum seekers under the Refugee Convention.

Recommendation 10: Children who have *prima facie* claims for protection should not be returned to the country where they fear harm until their claims for protection are assessed under the law according to a process that complies with procedural fairness standards and with access to independent legal advice and representation.

12.22 At a minimum, this process should include:

- access to independent legal advice prior to any interviews conducted
- age-appropriate interview procedures and determination by officers who are specially trained in assessing child asylum claims;
- the right to be provided with reasons for decisions in an age-appropriate manner;
- right of review of negative decisions.

Thank you for considering this submission.

Yours sincerely,

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC

Per:



Tanya Jackson-Vaughan
Executive Director



Katie Wrigley
Principal Solicitor

30 June 2014

¹⁰³ CRC, article 6.

¹⁰⁴ CRC, article 37(a).

SUMMARY OF RECOMMENDATIONS

Recommendation 1: Children in immigration detention centres, including alternative places of detention and residential housing, should be released as soon as possible.

Recommendation 2: Australia's immigration laws should be amended, as a matter of urgency, to comply with the *Convention on the Rights of the Child*. In particular, the *Migration Act 1958* (Cth) should be amended to prohibit detention of children beyond 3 months.

Recommendation 3: Minimum standards of treatment for children in immigration detention should be codified in legislation.

Recommendation 4: Comprehensive training on child protection and working with children from refugee backgrounds should be provided to people working with children in immigration detention centres.

Recommendation 5: Independent observers for unaccompanied children are inadequate given that they are unable to advocate, care for unaccompanied children in detention or provide advice or information to children about the interviews in which they are participating.

Recommendation 6: An independent guardian should be appointed for unaccompanied children and they should receive appropriate support. The Minister for Immigration and Border Protection should no longer be the legal guardian of unaccompanied children.

Recommendation 7: Children should not be subject to transfer 'regional processing countries'. The protection claims of children should be assessed in Australia.

Recommendation 8: An independent impact and best interests assessment should be conducted by independent and qualified experts on all children detained in regional processing facilities.

Recommendation 9: Every child in immigration detention or community detention should be assigned a migration agent to assist them with all processes relating to their immigration matter until that matter is finalised.

Recommendation 10: Children who have *prima facie* claims for protection should not be returned to the country where they fear harm until their claims for protection are assessed under the law according to a process that complies with procedural fairness standards and with access to independent legal advice and representation.

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