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# Submission to National Inquiry into Children in Immigration Detention 2014

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## **Australian Human Rights Commission**

30 May 2014

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## Executive Summary

The Law Council of Australia congratulates the Australian Human Rights Commission (AHRC) for undertaking this important National Inquiry into Children in Immigration Detention.

The Law Council is concerned that despite genuine efforts made by successive Commonwealth Governments since the AHRC's 2004 national inquiry into children in immigration detention, *A last resort?* (the 2004 Report), recent figures released by the Department of Immigration and Border Protection (DIBP) indicate that there are over 600 children in closed immigration detention facilities.<sup>1</sup> While the average number of children in closed immigration detention facilities appears to have declined since December 2013, the number of children in immigration detention in Nauru is increasing. The Law Council is also disappointed that the five overarching recommendations of the 2004 Report are yet to be fully implemented.

The Law Council also notes that there are a significant number of children in the community under residence determination or on Bridging Visa Es. The Law Council welcomes the use of alternatives to closed detention and recognises that these children do not face the same issues as those children in closed immigration detention facilities. However, it is also aware of the growing body of evidence pointing to the negative consequences for children and families who have been released into the community without work rights and with limited forms of income support, and who face prolonged legal uncertainty as to their visa status and future protection options.<sup>2</sup> For example, if families had the opportunity to earn an income, their prospects would be greatly enhanced.

The Law Council has long held the position that asylum-seekers should be subject only to a limited form of reviewable detention for health, identity and security checks unless extended by a judicial officer for a defined period and purpose; and that asylum-seekers should be released into the community following this limited period of detention.<sup>3</sup>

In general, the Law Council opposes the use of mandatory detention policies. The use of such policies raises particular concerns when applied to children. If children are to be detained for immigration purposes, this should only occur as a measure of last resort and for the shortest appropriate period of time. If detention is found to be necessary as a last resort, less restrictive forms of detention should be used for children and families that include appropriate access to services and facilities.

The use of mandatory detention for immigration purposes also raises general common law duty of care concerns. These include particular concerns relating to the detention of children in immigration detention facilities and the transfer of children to regional processing facilities. Relevant legal obligations also arise under the *Immigration (Guardianship of Children) Act 1946* (Cth) (IGOC Act).

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<sup>1</sup> Department of Immigration and Border Protection, 'Immigration Detention and Community Statistics Summary', (30 April 2014) 3 ('DIBP Detention Statistics'), available at: <http://www.immi.gov.au/managing-australias-borders/detention/pdf/immigration-detention-statistics-apr2014.pdf>.

<sup>2</sup> See for example: Asylum Seeker Resource Centre, 'Destitute and Uncertain: the reality of seeing asylum in Australia', (October 2010), available at: <http://www.asrc.org.au/wp-content/uploads/2013/07/asrc-welfare-paper.pdf> and Asylum Seeker Resource Centre, 'Locked Out: Position Paper on Homelessness of Asylum Seekers Living in the Community', available at: <http://www.asrc.org.au/pdf/locked-out.pdf>.

<sup>3</sup> Law Council of Australia, Directors' Resolution (16 March 2002).

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The Law Council therefore recommends that:

- all children be removed from closed immigration detention facilities and that genuine efforts are made to temporarily house asylum-seekers in alternative detention facilities;
- children not be transferred to third countries under regional processing arrangements;
- the IGOC Act be amended to provide that the National Children's Commissioner assumes the role of guardian of unaccompanied minors;
- minimum standards for detention and alternatives to detention be codified in legislation, including maximum time limits on detention where immigration detention is deemed a necessary last resort;
- the following review mechanisms and alternatives to detention are given consideration:
  - Australia ratify and implement the *Optional Protocol to the Convention Against Torture (OPCAT)*<sup>4</sup> and the *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (CROC-OP3)*;<sup>5</sup>
  - extend the role of the National Children's Commissioner to allow for regular reviews into immigration detention; and
  - the International Detention Coalition (IDC)'s five-step model to prevent and reduce the likelihood of unnecessary detention.

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<sup>4</sup> *Optional Protocol to the Convention against Torture*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).

<sup>5</sup> *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, opened for signature 28 February 2012, GA Res 66/138 (entered into force 14 April 2014).

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## Introduction

1. The Law Council welcomes the opportunity to engage with the AHRC in its National Inquiry into Children in Immigration Detention 2014 (the Inquiry).
2. In 2004, the AHRC conducted a national inquiry into children in immigration detention who had arrived in Australia without a visa over the period 1999-2002. It found that Australia's immigration detention laws are fundamentally inconsistent with the *Convention on the Rights of the Child* (CROC);<sup>6</sup> that children that are in immigration detention for long periods of time are at high risk of serious mental harm; and that at various times during the period 1999-2002, children in immigration detention were not able to fully enjoy a plethora of their human rights.
3. The five overarching recommendations of the 2004 Report were: to remove children from immigration detention; that Australia's immigration laws had not been amended to comply with the CROC; to appoint an independent guardian for unaccompanied children; to create statutory minimum standards of treatment for children in immigration detention; and, to review the impact on children of legislation that creates 'excised offshore places' and the 'Pacific Solution'.<sup>7</sup>
4. The Law Council has welcomed the commitments made and efforts undertaken by successive Commonwealth Governments to reduce the number of children in immigration detention facilities and to improve the conditions of detention facilities housing children since the 2004 Report. However, despite the gradual removal of all children from immigration detention following the 2004 Report,<sup>8</sup> children are once again in restrictive immigration detention environments; Australia's immigration laws have not been amended to comply with the CROC;<sup>9</sup> there is no independent guardian for unaccompanied children; there are no statutory minimum standards of treatment for children in immigration detention; and, there has been no Governmental review of the impact on children of legislation that creates 'excised offshore places' and the 'Pacific Solution', aside from those carried out by the AHRC.<sup>10</sup>
5. It is alarming, for example, that despite the genuine efforts of recent Governments, as at 30 April 2014, there were 677 children in closed immigration detention facilities and 156 in immigration residential housing and immigration transit accommodation, amounting to 833 in detention facilities.<sup>11</sup> These statistics also indicate that there are 190 children in offshore processing centres.<sup>12</sup> The Law Council notes with regret that this number has increased since October 2013, when it stood at 108 (the statistical

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<sup>6</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 3 (entered into force 2 September 1990) ('the CROC'). <sup>7</sup> Australian Human Rights Commission (AHRC), *A last resort?* (April 2004) 6-7, ('*A last resort?*'), available at:

[https://www.humanrights.gov.au/sites/default/files/document/publication/alr\\_complete.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/alr_complete.pdf).

<sup>7</sup> Australian Human Rights Commission (AHRC), *A last resort?* (April 2004) 6-7, ('*A last resort?*'), available at: [https://www.humanrights.gov.au/sites/default/files/document/publication/alr\\_complete.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/alr_complete.pdf).

<sup>8</sup> AHRC, 'National Inquiry into Children in Immigration Detention 2014: Discussion Paper' (2014) 1, available at:

[https://www.humanrights.gov.au/sites/default/files/document/publication/Children\\_Detention2014\\_Discussion\\_paperFINAL.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/Children_Detention2014_Discussion_paperFINAL.pdf).

<sup>9</sup> The Law Council notes that the *Migration Act 1958* (Cth) was subsequently amended to codify the principle that detention of children is a matter of last resort; however, there is no presumption against detention. For further analysis of the extent to which recommendations have been implemented, see ChilOut:

<http://www.chilout.org/blog/14023050/>. <sup>10</sup> *A last resort?* 6-7.

<sup>10</sup> *A last resort?* 6-7.

<sup>11</sup> DIBP Detention Statistics, 3.

<sup>12</sup> *Ibid* 2.

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summary from October 2013 is the first summary that referred to offshore detention in 2013).<sup>13</sup>

6. The Law Council also notes that there are 1,490 children in the community under residence determination, and 1,827 in the community on Bridging Visa Es, including those children in a re-grant process.<sup>14</sup>
7. The Law Council notes the particular focus of the Inquiry on the practices undertaken in regard to children in immigration detention, and how these practices affect those children. Whilst organisations with other expertise are best placed to contribute to a discussion about the experiences of children in detention, the Law Council seeks to assist the Inquiry by focusing the legislative framework governing the Terms of Reference, and the international law and/or rule of law principles relevant to Australia's laws and policies concerning the detention of children. In particular, the submission Law Council addresses:
  - 1) the appropriateness of facilities, as it relates to standards of detention;
  - 2) the impact on the length of detention, as it relates to the best interests of the child;
  - 3) measures to ensure the safety of children, as it relates to standards of detention;
  - 4) provision of education, recreation, maternal and infant health services, as it relates to various human rights;
  - 5) the separation of families, as it relates to various human rights;
  - 6) the guardianship of unaccompanied minors, as it relates to the appropriateness of the Minister holding both the role of guardian and of ultimate decision-maker concerning an applicant's refugee status; and
  - 7) assessments for transfer, as it relates to international obligations.
8. Before examining these Terms of Reference, the Law Council will set out the relevant policy positions arising from its past advocacy in this area.

## Relevant Law Council Policy Positions

9. The Law Council has proactively developed a Policy Statement on Principles Applying to the Detention of Asylum Seekers (Detention Statement).<sup>15</sup> This Detention Statement was developed following consultation with the Law Council's expert Committees and Constituent Bodies and draws upon relevant principles of international human rights law in order to outline Australia's obligations in relation to immigration detention.

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<sup>13</sup> Ibid 4. For all of DIBPs the statistics from 2013 onwards, see: <http://www.immi.gov.au/About/Pages/detention/about-immigration-detention.aspx?tab=3&heading=immigration-detention-and-community-statistics>.

<sup>14</sup> Ibid 3.

<sup>15</sup> Law Council of Australia, *Policy Statement: Principles Applying to the Detention of Asylum Seekers*, 22 June 2013 ('LCA Detention Statement'), available at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Final\\_PDF\\_18\\_Oct\\_Asylum\\_Seekers\\_Principles.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Final_PDF_18_Oct_Asylum_Seekers_Principles.pdf).

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10. The Law Council also notes that the AHRC has developed its own Human Rights Standards for Immigration Detention (AHRC Standards)<sup>16</sup> that draw on international treaties, interpretive instruments, including the United Nations High Commissioner for Refugees (UNHCR Guidelines),<sup>17</sup> and national laws in order to outline Australia's obligations.
  11. When applied to the detention of children, the Law Council's Detention Statement reflects the well-established position that mandatorily detaining children in immigration detention facilities conflicts with a range of Australia's international human rights obligations,<sup>18</sup> including those under the CROC that oblige State Parties to protect children from arbitrary detention and to provide appropriate protection and assistance to children seeking refugee status.<sup>19</sup>
  12. The Law Council notes that even detention in community detention arrangements or alternative detention arrangements such as immigration residential housing, immigration transit accommodations and alternative temporary detention may raise concerns about compliance with Australia's international human rights obligations depending on the nature of these facilities, and the ability of children to access appropriate services and exercise their rights, including the right to family reunification, the rights to education and the right to leisure, culture and play.<sup>20</sup>
  13. The Detention Statement makes it clear that children should be detained only as a measure of last resort and for the shortest appropriate period of time. If detention is found to be necessary as a last resort, community-based detention should be used for children and families, provided that it includes appropriate access to services and facilities.<sup>21</sup>
  14. The Law Council is also of the view that there are many features of Australia's immigration policy as provided for in the *Migration Act 1958* (Cth) (Migration Act) that are punitive in character and give rise to the risk of arbitrary immigration detention, including arbitrary detention of children. For example, the Law Council has raised concerns that the Migration Act:
    - permits indefinite detention of unlawful non-citizens in circumstances where there is no real prospect of removing them from Australia;
    - does not provide for adequate judicial oversight of decisions to detain or continuation of detention, nor does it provide regular review of all forms of detention, particularly for those asylum seekers arriving by boat;
    - fails to prescribe maximum periods of immigration detention for all categories of detainees; and

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<sup>16</sup> AHRC, 'Human rights standards for immigration detention' (2013) ('AHRC Standards'), available at: <https://www.humanrights.gov.au/publications/human-rights-standards-immigration-detention>.

<sup>17</sup> Office of the United Nations High Commissioner for Refugees, 'Detention Guidelines: guidelines on the Applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention' (2012) ('UNHCR Guidelines'), available at: <http://www.unhcr.org/505b10ee9.html>.

<sup>18</sup> Law Council of Australia, submission to Joint Select Committee on Australia's Immigration Detention Network, *Inquiry into Australia's Immigration Detention Network*, 17 August 2011, [20] ('LCA Immigration Detention Network submission'), available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2400-2499/2458%20Inquiry%20into%20Australias%20Immigration%20Detention%20Network.pdf>

<sup>19</sup> See Articles 22 and 37 of the CROC.

<sup>20</sup> See details of alternative detention arrangements at: <http://www.immi.gov.au/managing-australias-borders/detention/services/alternative-arrangements.htm>.

<sup>21</sup> LCA Detention Statement, 7, Key Principle 10.

- fails to prescribe clear, objective criteria to determine the length of detention and time of release for those detained following health, identity and security checks.<sup>22</sup>

15. The Law Council has also consistently raised concerns relating to the need to ensure that all detainees are fully informed of their legal rights and have access to appropriate publicly funded legal assistance at all stages of the resolution of their immigration status. This includes recent advocacy raising concerns at the withdrawal of funding for the Immigration Advice and Application Assistance Scheme (IAAAS) to assist asylum seekers with their complex legal needs.<sup>23</sup>

16. Many of these concerns have been exacerbated by regional processing and resettlement arrangements made by the former Commonwealth Government and the Governments of Nauru and Papua New Guinea (PNG). These arrangements<sup>24</sup> - which leave many thousands of asylum seekers at risk of transfer to Nauru or PNG regardless of the veracity of their protection claims - fail to contain adequate safeguards to ensure that the assessment of protection claims and the treatment of asylum seekers will adhere to rule or law or international human rights standards.

## International Obligations

17. The Law Council acknowledges that international human rights Conventions to which Australia is a party, such as the CROC, the *Convention relating to the Status of Refugees* (the Refugee Convention) and the *Protocol relating to the Status of Refugees* (the Refugee Protocol),<sup>25</sup> do not automatically give rise to enforceable legal rights or obligations under Australian domestic law.<sup>26</sup> However, the obligations

<sup>22</sup> See for example: Law Council of Australia, submission to Joint Standing Committee on Migration, *Inquiry into Immigration Detention in Australia*, 25 August 2008 and LCA Immigration Detention Network submission, [20].

<sup>23</sup> Law Council, 'Law Council concerned by removal of IAAAS Funding' (Media Release, 2 April 2014), available at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1409\\_-\\_Law\\_Council\\_concerned\\_by\\_removal\\_of\\_IAAAS\\_Funding.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1409_-_Law_Council_concerned_by_removal_of_IAAAS_Funding.pdf). These concerns are echoed by some of the Law Council's Constituent Bodies, as are concerns related to the complex legal needs of people in detention. Indeed, as the Law Society of South Australia (LSSA) notes, due to the withdrawal of IAAAS funding, matters referred back to DIBP from the Review Tribunal are now not subject to funding. This is particularly detrimental to unaccompanied minors in community detention as they are not able to work and have very little income to fund private legal representation. Many of people in this situation suffer from depression and are subsequently left to make independent choices in relation to matters critical to their future, in an unfamiliar environment and with very little assistance.

<sup>24</sup> On 19 August 2011, the (then) Labor Government signed a Memorandum of Understanding (MOU) with the PNG Government on the possible transfer and assessment of certain asylum seekers to an offshore processing centre in Manus Province: The Hon Chris Bowen MP, Minister for Immigration and Citizenship, 'Australia and Papua New Guinea sign MOU' (Media Release, 19 August 2011). This was subsequently updated on 8 September 2012: The Hon Chris Bowen MP, Minister for Immigration and Citizenship, 'Australia and Papua New Guinea sign updated memorandum of understanding' (Media Release, 8 September 2012). The Government also signed an MOU for assessment and transfer of asylum seekers on 29 August 2012: The Hon Chris Bowen MP, Minister for Immigration and Citizenship, 'Australia signs Memorandum of Understanding with Nauru' (Media Release, 29 August 2012). The MOUs with Nauru and PNG were both superseded by MOUs relating to transfer, assessment and resettlement: Department of Foreign Affairs and Trade, 'Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues' (6 August 2013) and Department of Foreign Affairs and Trade, 'Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues' (3 August 2013).

<sup>25</sup> *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('Refugee Convention') and the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('Refugee Protocol').

<sup>26</sup> *Minister for Immigration v Teoh* (1995) 183 CLR 273 and *Dietrich v The Queen* (1992) 177 CLR 292.

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contained in these Conventions can be incorporated into domestic law in many ways, including the following:

- direct incorporation of Convention articles into specific legislation;<sup>27</sup>
- reference to Conventions in statutory object clauses, leading to incorporation through statutory interpretation,<sup>28</sup> and
- incorporation through common law principles including the principle of statutory interpretation that presumes that the legislature intended to comply with Australia's international obligations.<sup>29</sup>

18. Some of Australia's international human rights obligations are also reflected in common law principles, such as the principle of legality<sup>30</sup> and the common law of duty of care.<sup>31</sup>

19. Australia is also liable at the international level for breaches of Conventions to which it is party. Although there may be practical limitations on the level to which some of these obligations can be enforced, there are a variety of mechanisms for promoting compliance with these international obligations and consequences for breach.<sup>32</sup>

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<sup>27</sup> See for example s 36 of the *Migration Act 1958* (Cth) that provides that a non-citizen is eligible for protection pursuant to the Refugee Convention, as amended by the Refugee Protocol.

<sup>28</sup> For example, see the *Racial Discrimination Act 1975* (Cth) that sets out the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('the ICERD') at the Schedule of the Act, and provides at s 20 that AHRC must 'develop, conduct and foster research and educational programs and other programs' for the purpose of the Convention.

<sup>29</sup> For example, as Mason CJ and Deane J stated in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287: 'Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.' See also *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38. However, there is some debate about whether this rule is to be applied only when legislation is ambiguous or where legislation is designed to implement Australia's obligations under international law. See: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ) and *Coleman v Power* (2004) 220 CLR 1, 27-8 (Gleeson CJ).

<sup>30</sup> The principle of legality is based on the assumption that the legislature did not intend to abrogate fundamental rights and freedoms 'unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment'. See for example: *Al-Kateb v Godwin* (2004) 208 ALR 124, [19] (Gleeson CJ).

<sup>31</sup> See: *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2005] 143 FCR 549. This has been subsequently upheld – see for example *MZYR v Secretary, Department of Immigration and Citizenship* (2012) 292 ALR 659.

<sup>32</sup> For example, the United Nations Human Rights Committee may consider individual communications alleging violations of the rights set forth in *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 277 (entered into force 23 March 1976) ('the ICCPR') by States parties to the *First Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976), pursuant on the conditions set out at art 5(2) that provides that complaints cannot be made if the same matter is being examined under another procedure of international investigation or settlement; or the complainant has not exhausted all available domestic remedies. Equivalent complaints procedures are available under other instruments including the *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, opened for signature 10 December 1999, GA Res 54/4 (entered into force 22 December 2000); the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); the ICERD; the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, GA Res 61/106 (entered into force 3 May 2008); and the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, opened for signature 24 September 2009, GA Res 63/117 (entered into force 5 May 2013).

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Compliance with these obligations also influences Australia's international and regional reputation, which carries significance in the context of developing sustainable regional responses to irregular migration. For example, Australia's failure to comply with the Articles of the Refugee Convention can undermine efforts to ensure that neighbouring countries have legal frameworks in place for assessing the protection claims of asylum seekers.

20. For these reasons, the Law Council considers that the obligations that Australia has voluntarily assumed under the Conventions to which it is a party form an appropriate framework for assessing Australia's existing legislative and policy settings concerning the detention of children in immigration facilities.
21. Australia is obliged to respect and observe the rights of refugees and asylum seekers in the International Bill of Human Rights.<sup>33</sup> These rights include the fundamental legal right to seek asylum<sup>34</sup> and are further articulated in the following instruments:
- the Refugee Convention the Refugee Protocol;
  - the CROC and its optional protocols;
  - the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the CAT) and its optional protocol;
  - the *Convention on the Elimination of all Forms of Racial Discrimination* (the ICERD);
  - the *Convention on the Elimination of Discrimination Against Women* (the CEDAW) and its optional protocol;<sup>35</sup> and
  - the *Convention on the Rights of Persons with Disabilities* (the CRPD) and its optional protocol.<sup>36</sup>
22. Of these instruments, the CROC provides the most useful framework for ensuring that such an evaluation focuses on the particular rights of children.
23. Australia signed the CROC on 22 August 1990 and ratified it on 17 December 1990. The CROC does not create new rights for children, but rather, it incorporates the civil, political, economic, social and cultural rights that are recognised in the *Universal Declaration on Human Rights* (UDHR), the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic and Social and Cultural Rights* (ICESCR) and sets out the specific ways in which States must ensure these rights for children and young people, demonstrating that children and young

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<sup>33</sup> The *Universal Declaration on Human Rights*, G.A. res. 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810, (10 December 1948) ('the UDHR') clearly articulates those rights that are to apply to all people, including asylum seekers and refugees. These rights were expanded upon by the United Nations in the ICCPR and the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force in 3 January 1976). These three instruments, with their optional protocols, are commonly referred to as the 'International Bill of Human Rights'. The rights that are found within these instruments are further articulated in international conventions. These conventions do not create new rights, but simply apply the rights that are within the International Bill of Human Rights to particular groups.

<sup>34</sup> See for example, art 14 of the UDHR.

<sup>35</sup> The *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>36</sup> The *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, GA Res 61/106 (entered into force 13 December 2006).

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people need special protection because of the particular vulnerabilities associated with their age.

24. The CROC has three Optional Protocols.<sup>37</sup> The Third Optional Protocol, the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* was opened for signature on 19 December 2011 and entered into force on 14 April 2014. It has not been signed or ratified by Australia, and this will be discussed further below.
25. The detention of children for immigration purposes has been one of the most prolific of international communications made raising concerns against Australia. For example, on 15 June 2012, at its 1725th meeting, the CROC Committee adopted its concluding observations on Australia's fourth report under the CROC.<sup>38</sup> The Committee's particular recommendations regarding asylum-seeking children concerned Articles 22, 30, 38, 39, 40, 37 (b)-(d), and 32-36 of the CROC, and were as follows:

*The Committee urges the State party to bring its immigration and asylum laws into full conformity with the Convention and other relevant international standards. In doing so, the State party is urged to take into account the Committee's general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin. Furthermore, the Committee reiterates its previous recommendations (CRC/C/15/Add.268, para 64). In addition to that, the Committee urges the State party to:*

- (i) *Reconsider its policy of detaining children who are asylum-seeking, refugees and/or irregular migrants; and, ensure that if immigration detention is imposed, it is subject to time limits and judicial review;*
- (ii) *Ensure that its migration and asylum legislation and procedures have the best interests of the child as the primary consideration in all immigration and asylum processes; and ensure that determinations of the best interests are consistently conducted by professionals who have been adequately trained on best-interests determination procedures;*
- (iii) *Expediently establish an independent guardianship/support institution for unaccompanied immigrant children;*
- (iv) *Adhere to its High Court ruling in Plaintiff M70/2011 v. Minister for Immigration and Citizenship, and, inter alia, ensure adequate legal protections for asylum seekers and conclusively abandon its attempted policy of so-called "offshore processing" of asylum claims and "refugee swaps"; and evaluate reports of hardship suffered by children returned to Afghanistan without a best interests determination.*

*Furthermore, the Committee recommends that the State party consider implementing the United Nations High Commission for Refugees Guidelines on International Protection No.8: Child Asylum Claims under articles 1(A)2 and 1(F) of*

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<sup>37</sup> The *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in Armed Conflict*, opened for signature 25 May 2000, GA Res 54/263, (entered into force on 12 February 2002) was signed by Australia on 21 October 2002 and ratified on 26 September 2006. The Second Optional Protocol, the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, GA Res 54/263, (entered into force on 18 January 2002). It was signed by Australia on 18 December 2001 and ratified on 8 January 2007.

<sup>38</sup> Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention*, 66<sup>th</sup> sess, CRC/C/AUS/CO/4 (28 August 2012) ('CROC Committee Report'), available at: [http://www2.ohchr.org/english/bodies/crc/docs/co/CRC\\_C\\_AUS\\_CO\\_4.pdf](http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf).

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*the 1951 Convention and ratifying the 1967 Protocol relating to the Status of Refugees.*<sup>39</sup>

26. In relation to 'the best interests of the child' (appearing throughout the CROC, but most notably at Article 3), the CROC Committee recommended that Australia:

*...strengthen its efforts to ensure that the principle of the best interests of the child is widely known and appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings and all policies, programmes and projects relevant to, and with an impact on children. ... In implementing this recommendation, the Committee stresses the need for the State party to pay particular attention to ensuring that its policies and procedures for children in asylum seeking, refugee and/or immigration detention give due primacy to the principle of the best interests of the child.*<sup>40</sup>

27. In addition to Communications and Concluding Observations, the CROC Committee and the United Nations High Commissioner for Refugees (UNHCR) have also developed the following interpretive instruments, that are of particular relevance to unaccompanied minors:

- the Committee on the Rights of the Child (the Committee)'s General Comment No. 6 'Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (CROC General Comment);<sup>41</sup>
- UNHCR Guidelines and Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum (UNHCRG);<sup>42</sup> and
- UNHCR's Refugee Children: Guidelines on Protection and Care.<sup>43</sup>

28. These instruments are referred to below in response to particular Terms of Reference.

## Responses to certain Terms of Reference

### **The appropriateness of facilities, as it relates to standards of detention**

#### Current Immigration Detention Facilities

29. The Department describes the four types of immigration detention facilities that house asylum-seekers on its website.<sup>44</sup> These facilities are: immigration detention centres (IDC), immigration residential housing (IRH), immigration transit accommodation (ITA)

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<sup>39</sup> Ibid [81].

<sup>40</sup> Ibid [32].

<sup>41</sup> Committee on the Rights of the Child, *General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin*, 39<sup>th</sup> sess, CRC/GC/2005/6 (1 September 2005) ('CROC General Comment').

<sup>42</sup> Office of the United Nations High Commissioner for Refugees, 'Guidelines and Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum' (February 1997) ('UNHRG'), available at: <http://www.refworld.org/docid/3ae6b3360.html>.

<sup>43</sup> Office of the United Nations High Commissioner for Refugees, 'Refugee Children: Guidelines on Protection and Care' (1994), available at: [http://www.unicef.org/violencestudy/pdf/refugee\\_children\\_guidelines\\_on\\_protection\\_and\\_care.pdf](http://www.unicef.org/violencestudy/pdf/refugee_children_guidelines_on_protection_and_care.pdf).

<sup>44</sup> Department of Immigration and Border Protection, Commonwealth Government, *Immigration Detention Facilities*, ('DIBP Detention Facilities'), available at: <http://www.immi.gov.au/About/Pages/detention/immigration-detention-facilities.aspx>

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and alternative places of detention (APOD). The Department states in addition to these facilities, detainees can be accommodated in the community in the Community Detention Program or through holding a Bridging Visa E. Current immigration detention facilities can be described as follows:

- IDCs house people who have overstayed their visa, are in breach of their visa conditions, who have come to Australia without a valid visa or who are refused entry into Australia at international airports and seaports. This facility houses medium and high-risk detainees. Research commissioned by DIBP in late 2013 describes the particular features of each IDC. For example, in regards to the Northern IDC close to Darwin, it was found that ‘compounds were separated from each other by high fences and gates’ and that the facilities available to detainees varied.<sup>45</sup> Wickham Point IDC, also in the Northern Territory, was described as being ‘surrounded by a high fence with numerous fences within the facility. Accommodation was basic but adequate. It consisted of three separate compounds each accommodating 500 people.’<sup>46</sup> Wickham Point IDC has the second largest capacity of all IDCs, at 1,180 with Curtin IDC having the largest capacity at 1,500;<sup>47</sup>
- an IRH is flexible housing that allows detainees in immigration detention to cook their own food, go shopping and take part in community events. There are two IRH facilities: one in Sydney, and one in Perth. The Department describes that the Perth IRH ‘blends in with the surrounding environment’ with a ‘typical suburban fence and border plantings’ and ‘subtle and unobtrusive’ security.<sup>48</sup> It ‘comprises two single storey dwellings’ with capacity for 16 detainees.<sup>49</sup> One dwelling is ‘configured to accommodate people with disabilities’;<sup>50</sup>
- an ITA provides hostel-style accommodation for detainees whose immigration pathway is likely to be resolved quickly. There are three ITA facilities: one in Adelaide, one in Brisbane and one in Melbourne. The Melbourne ITA is comprised of three designated areas and has both individual and shared bedrooms with shared amenities and ‘ensuited accommodation buildings.’<sup>51</sup> There are various facilities at the ITA such as internet rooms, prayer rooms and a gym.<sup>52</sup> The Melbourne ITA has a capacity of 448 people, compared to Brisbane that has a capacity of 74.<sup>53</sup>
- APODs are for detainees that DIBP considers a ‘minimal risk’ to the community, and often accommodate families, children and detainees in need

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<sup>45</sup> Social Policy Research Centre, ‘The experiences of Irregular Maritime Arrivals detained in immigration detention facilities’ (July 2013) 13, available at: <http://www.immi.gov.au/media/publications/research/pdf/IMA-experiences-IDF.pdf>.

<sup>46</sup> Ibid 14.

<sup>47</sup> Department of Immigration and Border Protection, Commonwealth Government, *Accommodation capacity* (‘DIBP accommodation capacity’), available at: <https://www.immi.gov.au/About/Pages/detention/accommodation-capacity.aspx>.

<sup>48</sup> Department of Immigration and Border Protection, Commonwealth Government, *Perth Immigration Residential Housing (IRH)* (‘DIBP Perth IRH’), available at: <https://www.immi.gov.au/About/Pages/detention/perth-immigration-residential-housing-irh.aspx>.

<sup>49</sup> DIBP accommodation capacity.

<sup>50</sup> DIBP Perth IRH.

<sup>51</sup> Department of Immigration and Border Protection, Commonwealth Government, *Melbourne Immigration Transit Accommodation (ITA)*, available at: <http://www.immi.gov.au/About/Pages/detention/melbourne-immigration-transit-accommodation-ita.aspx>

<sup>52</sup> Ibid.

<sup>53</sup> DIBP accommodation capacity.

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of medical treatment.<sup>54</sup> Detainees may be accommodated in community housing through arrangements with other governments.<sup>55</sup> As the AHRC describes, an APOD can include correctional centres, hospitals, hotels, psychiatric facilities, foster care arrangements, or in private residence with a designated person.<sup>56</sup> Conditions and restrictions will vary according to the place of detention.<sup>57</sup> In addition to these APODs, DIBP also classifies a number of low security immigration detention facilities as APODs, including the Inverbrackie APOD in South Australia.<sup>58</sup> People detained in low security immigration detention facilities are supervised and cannot come and go freely.<sup>59</sup> Inverbrackie APOD has capacity to house 400 people.<sup>60</sup>

30. As discussed below, conditions and services in each of these facilities vary with some facilities located in metropolitan areas (such as the Perth IRH) and some in much more remote areas (such as the Curtin IDC). As indicated, some facilities have capacity for one-thousand or more detainees (such as Bladin APOD and Curtin and Wickham Points IDCs), whilst others can only house a few of families (such as the IRH in Sydney and Perth). Indeed, even those facilities that are apparently less restrictive have been shown to severely curtail detainees' enjoyment of their rights. As Professor Mary Crock and Associate Professor Mary Anne Kenny observe:

*Although presented as alternatives to detention, the APODs have almost all involved severe constraints on mobility and freedoms. Unaccompanied children were held in Darwin in hotel accommodation that quickly became overcrowded, and more restrictive for the children than a regular detention centre would have been. Health and mental health services in some facilities were inadequate, with little provision made for education, activities and excursions.*<sup>61</sup>

31. The Law Council notes that on 13 May 2014, in handing down the budget, the Coalition Government announced the closure of nine immigration detention facilities: Aqua and Lilac on Christmas Island; Curtin; Darwin Airport Lodge; Inverbrackie; Leonora; Northern; Pontville; Port Augusta; and Scherger.<sup>62</sup> The Law Council welcomes the closure of some of these facilities which have been found to give rise to serious human rights concerns. However, it is concerned that the closure of these facilities, particularly those designed to house families and children, will result in the transfer of more asylum-seekers to offshore processing centres where there is uncertainty over processing procedures and resettlement outcomes and under arrangements that contain inadequate human rights safeguards.

### Relevant Legal Principles

32. The Law Council considers that immigration detention facilities in Australia and offshore should comply with international and Australian standards for detention.

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<sup>54</sup> DIBP Detention Facilities.

<sup>55</sup> Ibid.

<sup>56</sup> AHRC, *Immigration detention and human rights*, available at: <https://www.humanrights.gov.au/immigration-detention-and-human-rights>.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> DIBP accommodation capacity.

<sup>61</sup> Mary Crock and Mary Anne Kenny, 'Rethinking the Guardianship of Refugee Children after the Malaysian Solution' (2012) 34 Sydney Law Review 437, 443 ('Rethinking Guardianship'). The Authors make reference to the AHRC's research and reporting on immigration detention.

<sup>62</sup> Refugee Council of Australia, '2014-15 Federal budget in brief: What it means for refugees and people seeking humanitarian protection' (2014) 1 ('RCOA Budget analysis'), available at: <http://www.refugeecouncil.org.au/r/bud/2014-15-Budget.pdf>.

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33. These standards take the form of broad principles, for example Articles 3(1) and 18(1) of the CROC require that the best interests of the child should be a primary consideration in all actions concerning children (and the 'basic concern' of their legal guardians), and also provide more specific guidance for State Parties.
34. Building upon these international law principles, the Law Council's Detention Statement requires (at Principle 9) that conditions of detention must be humane and dignified. In order to achieve this end, the Government must ensure that:
- a. *No asylum seeker should be held in conditions of detention which amount to torture or cruel, inhuman or degrading treatment. This includes being held in incommunicado or lengthy solitary detention.*
  - b. *Asylum seekers should not be held with prisoners or in prison-like facilities.*
  - c. *Asylum seekers should be detained in a manner appropriate to their status – for example, unless they are family members, men and women should be segregated, and children should be separated from adults.*
  - d. *Detained asylum seekers should have appropriate access to key services such as education and health services, including appropriate mental health services.*
  - e. *The State should identify and minimise the risk of suicide and self-harm by detained asylum seekers.*
35. The NSW Bar Association has also emphasised that the underlying approach to children in detention should be care, and not detention. This applies especially to unaccompanied children and children who have been temporarily or permanently separated from their parents. It submits that facilities should not be located in isolated areas where culturally appropriate community resources and legal access may be unavailable, or where it is not practicable for the child to attend school outside the place of detention.<sup>63</sup>
36. As noted above, the UNHCR Guidelines also set out minimum conditions of detention at Guideline 8.
37. Some of the UNHCR Guidelines have been well-implemented in Australia. For example, of the 18 minimum conditions at Guideline 8, detainees in Australian immigration detention can freely practice their religion;<sup>64</sup> and children born in detention are registered immediately after birth in line with international standards and issued with birth certificates.<sup>65</sup>
38. The Law Society of South Australia (LSSA) has provided feedback directed specifically at the Inverbrackie APOD in the Adelaide Hills, and has noted that a number of the concerns previously outlined about conditions of detention have been positively addressed at Inverbrackie. For example LSSA notes that:
- it is a metropolitan detention centre that is close to hospitals and emergency care;

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<sup>63</sup> UNHCRG, [7.6]-[7.8].

<sup>64</sup> UNHCR Guidelines, [48]( ix).

<sup>65</sup> Ibid [48](xviii).

- pre-school children have a children’s playgroup which now provides a stimulating environment for the children;
- school age children are able to attend school in the local community;
- a homework club has been developed within the centre;
- the fact that the centre is in a metropolitan area limits the degree of isolation of detainees. A lot of work has been done to encourage visits from members of the local community who later form important links when detainees enter the community;<sup>66</sup> and
- families are allowed some autonomy such as cooking their own meals.

39. However, the LSSA notes that despite these features, the experiences of children detained in APODs can still have long term detrimental impacts on their legal rights and health and wellbeing. In particular, observations of children and families in Inverbrackie APOD suggest that there is a general sense of powerlessness and uncertainty amongst detainees due to the indefinite nature of the detention and the uncertainty of asylum seekers’ migration status. There is also a lack of accurate information about processing of visa applications.

40. Unfortunately, the positive features of the recently closed Inverbrackie APOD are not replicated across Australia’s immigration detention network, which instead continues to be subject to strong domestic and international criticism for failing to meet domestic and international human rights standards. For example, following a recent visit to detention facilities in Christmas Island, the AHRC reported that:

*Most of the children were visibly distressed. They told the team “this place is hell”, “help me get out of here” and “there’s no school, nowhere to play and nothing to do.” The children also spoke about their distress at living in closed environment with adults who were sad, angry and self-harming.*

*[Medical experts] noted that the conditions of detention are taking their toll on the development of children. They recorded instances of children biting themselves, and others, and banging their heads.<sup>67</sup>*

41. Following visits to Nauru and PNG in November 2013 the UNHCR reported that ‘it was deeply troubled to observe that the current policies, operational approaches and harsh physical conditions at the centres, not only do not meet international standards, but impact very profoundly on the men, women and children housed there.’<sup>68</sup>

42. The AHRC has also described the remote location of certain Australian detention facilities as raising significant concern. For example, in its 2011 Report on Curtin IDC the AHRC found that its overarching concern with conditions of detention at Curtin IDC related to its remote location. This has a wide range of impacts on people’s access to

<sup>66</sup> For example, the Inverbrackie Good Neighbour Council is an independent, non-political, community-based group that draws on the wider community to provide volunteers, donations of goods, friendly visitors, events and activities that directly benefit asylum seekers at the Inverbrackie Alternative Place of Detention (APOD).

<sup>67</sup> AHRC, *Inquiry team visits distressed children on Christmas Island* (24 March 2014), available at: <https://www.humanrights.gov.au/news/stories/inquiry-team-visits-distressed-children-christmas-island-0>.

<sup>68</sup> United Nations High Commissioner for Refugees: Regional Office – Australia, New Zealand, Papua New Guinea and the Pacific, *Men, women and children suffering from harsh physical conditions and legal shortcomings at Pacific Island asylum centres: UNHCR reports* (26 November 2013), available at: [http://www.unhcr.org.au/unhcr/index.php?option=com\\_content&view=article&id=351](http://www.unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=351).

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services and support, and also affects the physical conditions of detention. It also raised concerns about:

*[T]he harsh physical environment in which Curtin IDC is situated. The outdoor heat is often extreme and there are limited shady areas and virtually no grassy areas inside the IDC – most areas consist of red dirt or concrete. These concerns remain despite the recent construction of additional shade shelters and positive efforts to allow people to grow plants near their bedrooms. The harsh nature of the outdoor environment is exacerbated by the limited amount of indoor recreation space.<sup>69</sup>*

43. The concerns raised in these reports are replicated in reports relating to onshore and offshore immigration detention facilities. For example, in its October 2013 *Asylum seekers, refugees and human rights: Snapshot report 2013*, the AHRC identified that there was ‘a significant gap between Australia’s human rights obligations under international law and the current treatment of asylum seekers and refugees.’<sup>70</sup> In respect of onshore protection and processing, the Law Council notes the AHRC’s finding that:

*The Commission has conducted several visits to immigration detention centres to monitor conditions of detention. The Commission has raised concerns about the conditions in many of Australia’s immigration detention facilities and has found that many are not appropriate places in which to hold people, especially for prolonged periods of time.<sup>71</sup>*

44. The AHRC also noted the United Nation’s Human Rights Committee’s concerns regarding arbitrary detention,<sup>72</sup> including those related to indefinite detention on the basis of adverse security assessments conducted by ASIO.<sup>73</sup>
45. The Law Council also notes the recommendations made in the March 2012 Report of the Joint Select Committee on Australia’s Immigration Detention Network that people are detained only ‘as a last resort and for the shortest practicable time, and subject to an assessment of non-compliance and risk factors’;<sup>74</sup> and that DIBP ‘develop and implement a uniform code for child protection for all children seeking asylum across the immigration system.’<sup>75</sup> This is largely consistent with the recommendations made on these issues in AHRC’s 2004 Report, which included the recommendation that minimum standards of treatment for children in immigration detention should be codified in legislation.<sup>76</sup>

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<sup>69</sup> AHRC, ‘Immigration Detention at Curtin: observations from visit to Curtin immigration detention centre and key concerns across the detention network’ (2001) 39, available at: [https://www.humanrights.gov.au/publications/2011-immigration-detention-curtin#\\_Toc302979169](https://www.humanrights.gov.au/publications/2011-immigration-detention-curtin#_Toc302979169).

<sup>70</sup> AHRC, ‘Asylum seekers, refugees and human rights: snapshot report’ (2014) 4 (‘AHRC snapshot report’), available at: [https://www.humanrights.gov.au/sites/default/files/document/publication/snapshot\\_report\\_2013.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/snapshot_report_2013.pdf)

<sup>71</sup> Ibid 10.

<sup>72</sup> Ibid 9, citing: *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997) [9.4]; *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002) [8.2]; and *Shams et al v Australia*, Communication Nos. 1255,1256,1259,1260,1266,1268,1270,1288/2004, UN Doc CCPR/C/90/D/1255,1256,1259,1260,1266,1268,1270&1288/2004 (2007) [7.2].

<sup>73</sup> Ibid 13, citing: Human Rights Committee, *F K A G et al v Australia*, note 65, [9.4] and [9.8]; Human Rights Committee, *M M M et al v Australia*, Communication No. 2136/2012, UN Doc CCPR/C/108/D/2136/2012 (2013), [10.4] and [10.7].

<sup>74</sup> Joint Select Committee Report, xxi: Recommendation 22.

<sup>75</sup> Ibid: Recommendation 20.

<sup>76</sup> AHRC snapshot report, 7. Namely, Recommendations 2 and 4:

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46. The Law Council supports these recommendations and submits that robust, independent, and regular monitoring of all places of immigration detention is urgently needed to ensure that these Australian and international standards are met.
47. This is particularly critical given that immigration detention facilities in Australia and offshore are generally operated by private contractors, under arrangements that may not contain sufficient safeguards or compliance regimes to ensure that facilities adhere to human rights standards and which can limit access by the media and other forms of public scrutiny. In this context the minimum conditions set out at UNHCR Guideline 8 provide a useful starting point for evaluating these arrangements. For example, one of the minimum conditions at Guideline 8 provides that:

*With regard to private contractors, subjecting them to a statutory duty to take account of the welfare of detainees has been identified as good practice. However, it is also clear that responsible national authorities cannot contract out of their obligations under international refugee or human rights law and remain accountable as a matter of international law. Accordingly, States need to ensure that they can effectively oversee the activities of private contractors, including through the provision of adequate independent monitoring and accountability mechanisms, including termination of contracts or other work agreements where duty of care is not fulfilled.<sup>77</sup>*

48. The Law Council also suggests that the AHRC consider the findings of the Senate Legal and Constitutional Affairs References Committee Inquiry into the Incident at the Manus Island Detention Centre from 16 February to 18 February 2014, due to report 16 July 2014.

## **The impact on the length of detention, as it relates to the best interests of the child**

### Length of Detention

49. The Law Council is concerned by the length of time people spend in immigration detention. It notes that at 30 April 2014, DIBP statistics revealed that 506 people had been held in closed immigration detention for over a year and 132 had been held in

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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 new laws should incorporate the following minimum features:

- (a) There should be a presumption against the detention of children or immigration purposes.
- (b) 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 (for example for the purposes of health, identity or security checks).
- (c) There should be prompt and periodic review by a court of the legality of continuing detention of children for immigration purposes.
- (d) All courts and independent tribunals should be guided by the following principles:
  - (i) detention of children must be a measure of last resort and for the shortest appropriate period of time
  - (ii) the best interests of the child must be a primary consideration
  - (iii) the preservation of family unity
  - (iv) special protection and assistance for unaccompanied children.
- (e) Bridging visa regulations for unauthorised arrivals should be amended so as to provide a readily available mechanism for the release of children and their parents.

...

4. Minimum standards of treatment for children in immigration detention should be codified in legislation

<sup>77</sup> UNHCR Guidelines, [48](xvii).

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immigration detention for over two years.<sup>78</sup> The Law Council notes that this does not include those people detained in offshore detention facilities – such figures are not readily available. However, since the commencement of transfer arrangements to Nauru on 14 September 2012 and to PNG on 21 November 2012,<sup>79</sup> very few refugee assessments have been completed, or refugees resettled under these arrangements.<sup>80</sup>

50. The Law Council acknowledges the efforts of successive Governments to attempt to ensure that children are not held in restrictive immigration detention facilities for long periods of time and notes that since December 2013, significant numbers of children have been released from closed immigration detention facilities and released on Bridging Visa Es or other community detention arrangements.
51. However, as outlined above, recent statistics show that, as at 30 April 2014, over 600 children continue to remain in closed facilities in Australia and 190 in Nauru. Moreover, children who seek protection in Australia who have arrived by boat (including unaccompanied minors) continue to be liable to transfer to Nauru or PNG for claims processing and resettlement.

### Relevant Legal Principles

52. The Law Council notes that the requirement that States take measures to ensure the best interests of the child appears in the CROC at Articles 3(1), 9(1) and (3), 18(1), 20(1), 21, 37(c) and 40(2)(iii). There are other articles that are applicable to the best interests of the child in the context of a child's mental health, such as Article 37(b) of the CROC that provides that children should only be detained as a measure of last resort, and for the shortest appropriate period of time.

53. In giving effect to these obligations, Principle 10 of the Law Council's Detention Statement provides:

*In all actions concerning children, the best interests of the child shall be a primary consideration.*

- a. Children should be detained only as a measure of last resort and for the shortest appropriate period of time. If necessary as a last resort, community-based detention should be used for children and families, provided that it includes appropriate access to services and facilities.*

54. As discussed, although international human rights law and its interpretive instruments provide for minimum standards of detention, the Law Council opposes any form of immigration detention of children except as a matter of last resort and queries whether such detention could ever satisfy the 'best interests of the child' principle, due to the long-term effects of detention on children's mental and physical health and wellbeing.

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<sup>78</sup> DIBP Detention Statistics, 10.

<sup>79</sup> Janet Phillips, 'A comparison of Coalition and Labor government asylum policies in Australia since 2001' (Research paper, Parliamentary Library, Parliament of Australia, 28 February 2014) 5.

<sup>80</sup> See, for example, the Minister's clarification that recommendations, not determinations, have been made for detainees in PNG: Paul Farrell, 'Scott Morrison says decisions on Manus refugee applications "recommendations"', *Guardian Australia* (online), 9 May 2014, available at:

<http://www.theguardian.com/world/2014/may/09/scott-morrison-says-decisions-on-manus-refugee-applications-recommendations>.

Michael Gordon, 'Nauru proposes buddy system for refugees as Cambodia confirms new deal', *The Sydney Morning Herald*, (online), 21 May 2014, available at:

<http://www.smh.com.au/federal-politics/political-news/nauru-proposes-buddy-system-for-refugees-as-cambodia-confirms-resettlement-deal-20140520-38mmr.html>:

in Nauru, the handing down of refugee status determinations commenced on 20 May 2014, with refugees to be housed at two separate locations in Nauru.

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55. This is also reflected in the recommendations of the 2004 Report which included that Australia's immigration laws and policies be urgently amended to incorporate the following minimum features:

- 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 (for example for the purposes of health, identity or security checks).
- prompt and periodic review by a court of the legality of continuing detention of children for immigration purposes.

#### The impacts of immigration detention on the mental health of detainees

56. In past submissions the Law Council has sought to highlight the damaging effects of prolonged periods of detention on children (and adults), as well as the damaging effects of exposure to offshore immigration detention.<sup>81</sup>

57. The adverse impacts of immigration detention have been well documented by relevant medical experts including through parliamentary inquiry processes. For example:

- The Royal Australian & New Zealand College of Psychiatrists' 2011 position statement 'Children in immigration detention' notes that 'detention is detrimental to children's development and mental health and has potential to cause long-term damage to social and emotional functioning.'<sup>82</sup>
- On 30 March 2013 the Parliamentary Joint Select Committee on Australia's Immigration Detention Network acknowledged the dramatic negative impact mandatory, long term immigration detention can have on an individual's fundamental human rights, and physical and mental health. For example, the foreword to the Report, states that:

*The Committee's most fundamental conclusion is that asylum seekers should reside in held detention for as short a time as practicable. Evidence overwhelmingly indicates that prolonged detention exacts a heavy toll on people, most particularly on their mental health and wellbeing.*<sup>83</sup>

One of the Joint Select Committee's key recommendations, accepted by the Government, was that:

*...the Australian Government take further steps to adhere to its commitment of only detaining asylum seekers as a last resort and for the shortest practicable*

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<sup>81</sup> See, for example: Law Council of Australia, submission to Senate Committee on Legal and Constitutional Affairs *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012*, 17 December 2012, 28 ('LCA UMA submission'), available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2679%20-%20Migration%20Amendment%20%28Unauthorised%20Maritime%20Arrivals%20and%20Other%20Measure%29%20Bill%202012.pdf>. In this submission, the Law Council cited the Australian Parliamentary Library's publication *Immigration Detention in Australia* (23 January 2012) that provided a summary of these impacts.

<sup>82</sup> Royal Australian & New Zealand College of Psychiatrists, 'Position Statement 52: Children in immigration detention' (September 2011) 1, available at: [https://www.ranzcp.org/Files/Resources/College\\_Statements/College\\_Statements/ps52-pdf.aspx](https://www.ranzcp.org/Files/Resources/College_Statements/College_Statements/ps52-pdf.aspx).

<sup>83</sup> Joint Select Committee Report, x.

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*time, and subject to an assessment of non-compliance and risk factors, as enunciated by the New Directions policy.*<sup>84</sup>

The Australian Psychological Society, the professional association of psychologists in Australia that represents approximately 20,000 psychologists, made a submission to the Inquiry. It made 10 recommendations based on psychological research and practice, including that detention be used only a last resort for *all* asylum seekers, and if that detention is to be mandatory, it is subject to strict time limits.<sup>85</sup>

- The July-September 2013 Quarterly Health Data Set provided to DIBP from its service provider International Health and Medical Services (IHMS), released under the *Freedom of Information Act 1982* (Cth) provided a summary of the health of detainees in Australian Immigration Detention Facilities. It stated that:

*The results for this quarter are again consistent with internationally published research and show the familiar pattern established from previous data recorded from the immigration detention mental health screening program. The pattern shows the negative mental health effects of immigration detention with a clear deterioration of mental health indices over time in detention.*<sup>86</sup>

- In November 2013, IHMS doctors provided their employer with a 92-page letter outlining their concerns in respect of the standards of medical care and practices at the detention centres on Christmas Island.<sup>87</sup> Some of the relevant concerns outlined in this letter were:
  - Poor standards of paediatric and antenatal care;
  - Insufficient measures for preventative common infectious diseases; and
  - Facilities are not fit for purpose.<sup>88</sup>
- In 2013 the AHRC released its *Asylum seekers, refugees and human rights - Snapshot Report* that cited various statistics on self-harm and fatalities in immigration detention, including 10 deaths between 1 July 2010 and 20 June 2013, reflecting 'the longstanding concern that Australia's system of mandatory and indefinite detention has a detrimental impact on the mental health of those detained'.<sup>89</sup>
- In May 2013 the Commonwealth Ombudsman published a report, *Department of Immigration and Citizenship (DIAC): Suicide and self-harm in the*

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<sup>84</sup> Commonwealth Government, 'Government Response to Recommendations by the Joint Select Committee on Australia's Immigration Detention Network.' (November 2012), [4https://www.immi.gov.au/media/publications/pdf/2012/response-recommendations-joint-select-committee-aust-immi-detention.pdf](https://www.immi.gov.au/media/publications/pdf/2012/response-recommendations-joint-select-committee-aust-immi-detention.pdf)recc: Recommendation 22.

<sup>85</sup> Australian Psychological Society, submission to the Joint Committee on Australia's Immigration Detention Network, August 2011, 3, available at: <http://www.psychology.org.au/Assets/Files/APS-Submission-to-Australias-Immigration-Detention-Network.pdf>.

<sup>86</sup> International Health and Medical Services, 'Health Data Set: July-Sept 2013' (30 September 2013) 19, available at: <http://www.immi.gov.au/About/foi/Documents/FA131200935.PDF>.

<sup>87</sup> Letter from International Health and Medical Services Doctors to International Health and Medical Services Management and Executive, November 2013, available at *The Guardian Australia* (online), 13 January 2014 ('IHMS letter'), available at: <http://www.theguardian.com/world/interactive/2014/jan/13/christmas-island-doctors-letter-of-concern-in-full>

<sup>88</sup> Ibid 4.

<sup>89</sup> AHRC snapshot report, 10.

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*immigration detention network*, following an investigation which was prompted by several deaths and incidents of self-harm in detention facilities, along with observed deterioration in the psychological health of detainees, particularly at Christmas Island. The Ombudsman reports that he was limited in his ability to draw conclusions about the reasons for self-harm because of limitations in the data that DIAC and its service providers maintained in relation to self-harm. However, the report identified a strong correlation between the average time in detention and the increase in self-harming behaviour during 2011.<sup>90</sup>

58. The Law Council's Constituent Bodies have also consistently raised the issue of the negative impact that detention has on the mental health of detainees. For example the Law Institute of Victoria (LIV) has noted that family is a critical factor in determining the mental health impact of detention on children and that detention weakens the family structure, therefore affecting mental health.<sup>91</sup> Further, there are risks associated with re-traumatisation of people in immigration detention, as well as risks of new trauma.<sup>92</sup>
59. Also relevant are the AHRC's former findings on the issue of mental health in the 2004 Report where it was found that 'Australia's immigration detention centres can have a serious and detrimental impact on the mental health of children.'<sup>93</sup> It was noted that '[a] variety of factors contribute to mental health problems for children in detention' which are a direct result of, or exacerbated by, long-term detention. It was noted that increased duration in detention correlates with a higher likelihood of suffering mental harm.
60. Past and current information thus suggests that the current legislative and policy settings – which do not include a prescribed maximum period for detention of children and which do not guarantee that children will be detained only as a matter of last resort and for the shortest period of time – fail to adhere to international human rights standards. In particular, it is difficult to be confident that a decision to detain a child could ever be made with regard to the best interest of that child, given the strong evidence that even a short period in closed immigration detention can have lasting detrimental effects on the child's health.
61. The Law Council has long advocated that legislated limits be placed on detention, and that immigration detention be subject to judicial oversight and regular review.<sup>94</sup> The Law Council acknowledges the important role played by the AHRC and the

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<sup>90</sup> Commonwealth Ombudsman, *Ombudsman 2012-2013 Annual Report: Section 6 – Reports* (4 October 2013), available at: <http://www.ombudsman.gov.au/pages/publications-and-media/reports/annual/ar2012-13/6b-reports.html>.

<sup>91</sup> See for example: Rachel Kronick, Cécile Rousseau, and Janet Cleveland, 'Mandatory detention of refugee children: A public health issue?' 16(8) *Pediatrics and Child Health journal* (2011) ('Mandatory detention: a public health issue?'), available at: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3202397/>

<sup>92</sup> Katy Robjant, Rita Hassan, Cornelius Katona 'Mental health implications of detaining asylum seekers: systematic review' 194 *British Journal of Psychiatry* (2009) 306, available at: <http://bjp.rcpsych.org/content/194/4/306.long>.

<sup>93</sup> *A last resort?* 429.

<sup>94</sup> LCA Detention Standards, 8. Principle 12 states that:

*Policy and Practice in the detention of asylum-seekers should be accountable, transparent, and subject to independent monitoring:*

- a. *The State should legislate for appropriate standards regarding the detention of asylum seekers, including the length and conditions of detention, to be met by public and private authorities, and for penalties for non-compliance.*
- b. *The State should make public all policies and practices concerning the detention of asylum seekers. Such policies and practices should be subject to systematic independent review and monitoring. Where reports highlight deficiencies in detention policy and practice, the State should promptly redress them.*

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Commonwealth Ombudsman in their oversight roles,<sup>95</sup> but notes the importance of having a regular review mechanism that can apply to all immigration detention centres over which Australia has ‘effective control’,<sup>96</sup> including those offshore.

62. If legislative limits on detention of children are not prescribed, the Law Council submits that robust, comprehensive and regular monitoring must occur in all immigration detention facilities in which children are detained. This monitoring should regularly and publicly report on the number and characteristics of children detained, such as their age, the length of time of detention and access to and quality of health, education and other services. Expert advice should also be sought by the Government as to what changes should be made to detention facilities to mitigate against the risk of harm associated with periods spent in detention facilities.
63. The Law Council notes that past AHRC reports<sup>97</sup> contain a range of recommendations relevant to this issue, providing a useful basis for determining both the appropriate time limits to be placed on detention of children in immigration facilities and the minimum features of any such facility.<sup>98</sup>
64. The Law Council also notes the LIV’s suggestion that longitudinal studies are also necessary to assess the long-term effects of immigration detention.<sup>99</sup>

## **Measures to ensure the safety of children, as it relates to standards of detention**

### Relevant Legal Principles

65. Australia has a number of legal obligations to ensure the safety of children. Some of these obligations arise at common law or under statute. For example, the Commonwealth Government has a common law non-delegable duty of care to people in immigration detention.<sup>100</sup> It also has obligations under the *Work Health and Safety Act 2011* (Cth) to ensure that immigration detention facilities are safe.
66. At the international level, Australia also has obligations to ensure the safety of children in detention. For example, under the CROC Australia is required to ensure that:
- children are protected from all forms of physical or mental violence, injury or abuse while in the care of parents or legal guardians (Article 19); and

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<sup>95</sup> The Law Council notes that the Commonwealth Ombudsman inspects immigration detention centres and reports on the condition of people held in immigration detention as well as investigating complaints about the administrative actions of DIBP – see: Joint Select Committee Report, 35.

<sup>96</sup> AHRC ‘Human rights issues raised by the third country processing regime’ (Report, Australian Human Rights Commission, March 2013) 6, citing the decisions of the European Court of Human Rights in *Bankovi v Belgium and others* (dec.) [GC] [2001] ECHR 890 and *Al-Skeini v United Kingdom* [GC] [2011] ECHR 1093.

<sup>97</sup> See for example: AHRC, *A last resort?* Recommendation 4: ‘Minimum standards of treatment for children in immigration detention should be codified in legislation’; and AHRC, *Immigration detention on Christmas Island* (2012) 24ff, available at:

[https://www.humanrights.gov.au/sites/default/files/document/publication/idc2012\\_christmas\\_island.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/idc2012_christmas_island.pdf). The latter publication calls on the Government to implement the recommendations in *A Last resort?* and makes further, specific recommendations over standards such as healthcare and education.

<sup>98</sup> *A last resort?*

<sup>99</sup> See for example: Kronick, Rousseau, and Cleveland, ‘Mandatory detention: a public health issue?’.

<sup>100</sup> See: *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2005] 143 FCR 549. This has been subsequently upheld – see for example *MZYR v Secretary, Department of Immigration and Citizenship* (2012) 292 ALR 659.

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- children are protected from torture or cruel, inhuman or degrading treatment or punishment (Article 37(a)).

67. Complying with these obligations in the immigration detention context requires that certain mechanisms are employed to ensure that facilities are safe and that appropriate policies and procedures are employed within these facilities to ensure that safety standards are observed and that incidents threatening children's safety are responded to effectively.

68. Some of these policies and procedures are outlined in the AHRC Standards relating to several conditions for security and facility management,<sup>101</sup> as well as the duty of care over self-harm or suicide, violence, bullying and harassment and critical-incident review.<sup>102</sup> It is noted that these standards derive from the ICCPR (Articles 2, 6, 7, and 9), the CAT (Articles 2 and 16), and the ICESCR (Article 12), as well as the common law duty of care and the *Work Health and Safety Act 2011* (Cth). For example, one such standard relating to self-harm or suicide is that:

*All staff members who directly supervise detainees are trained to assist in the prevention of suicide and self-harm and to react appropriately to any incidents of suicide and self-harm by detainees. Training emphasises 'being with' detainees, rather than watching them.*<sup>103</sup>

69. The Law Council notes that Comcare, the Commonwealth agency responsible for implementation of federal laws associated with work health and safety, investigated work health and safety in seven immigration detention facilities in 2011.<sup>104</sup> It found that the work health and safety standards varied across the immigration detention network, and that the Department had failed to meet its statutory obligations over risk management; staffing ratios; training for departmental staff and contractors; critical incident management; and, managing the diversity of detainees.<sup>105</sup>

70. The Law Council notes the significance of these findings, but regrets that Comcare's inquiry powers are restricted to work health and safety in the detention 'workplace', rather than broader safety concerns. This suggests the need for a more comprehensive review mechanism that can assess compliance with safety standards across the entire immigration detention network, including from the perspective of detainees.

### Implementation of and Compliance with Safety Standards

71. The Law Council understands that efforts have been made to implement safety standards, policies and procedures in Australian immigration detention facilities, for example by the inclusion of safety standards in contracts for service delivery. However, continuing media reports of incidents giving rise to safety concerns (including self-harm, riots, arson and violence),<sup>106</sup> and accounts provided by medical

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<sup>101</sup> AHRC Standards, 12-7.

<sup>102</sup> Ibid 18-9.

<sup>103</sup> Ibid 18.

<sup>104</sup> Joint Select Committee Report, 37-8.

<sup>105</sup> Ibid.

<sup>106</sup> See for example reports out of Darwin immigration detention centres of a 17-year-old boy trying to hang himself, a 17-year-old boy who repeatedly bashed his head against a metal pole after hearing his case had failed and reports of a nine-year-old boy deliberately overdosing on his mother's Panadeine tablets: Bianca Hall, 'Traumatised children self-harming in detention' 23 February 2013 *The Sydney Morning Herald* (online), available at: <http://www.smh.com.au/federal-politics/political-news/traumatised-children-selfharming-in-detention-20130219-2epj7.html#ixzz31r8EHqFb>.

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experts (including reports of domestic violence),<sup>107</sup> suggest that adherence to these standards does not always occur. It is also not clear whether these standards adequately address the full range of safety concerns that apply in the context of detention of children. For example, it is not clear that the type of safety standards and compliance regimes that apply to Australian child care facilities are reflected in safety standards applying to immigration detention facilities that accommodate large number of pre-school aged children.

72. These concerns are exacerbated in the context of regional processing facilities, which from recent media reports, would appear to fall drastically short of Australian safety standards for accommodation suitable for children.<sup>108</sup> For this reason, the Law Council has called upon successive Commonwealth Governments to incorporate Australia's key human rights obligations into relevant provisions of the Migration Act and within the legal arrangements the Commonwealth Government enters into with relevant service providers, including health service providers.
73. For example, the Law Council assumes that clear standards of service delivery are included in contractual arrangements made between the Australian Government and its security and health service providers such as the IHMS, the Salvation Army, Serco and Transfield. However, unless further details about these arrangements are made publicly available it is difficult to be confident that these standards adequately reflect Australia's obligations under international law, or that they are currently being implemented. As noted above, UNHCR Guideline 8 and the AHRC Standards provide useful guidance as to the type of safety standards that should form an enforceable part of these contractual arrangements. For example, AHRC Standard 19.5 relating to Child Protection requires that:

*Measures are taken to protect children in immigration detention facilities from all forms of violence, injury or abuse, maltreatment or exploitation, including sexual abuse. Where child abuse is suspected, procedures for reporting and responding are followed in accordance with relevant legislation.*

*Children are supported following any disclosure of past or current abuse or mistreatment.*

*All necessary measures are taken without delay to promote the physical and psychological recovery and social integration of child victims of abuse, torture or cruel inhuman or degrading treatment or punishment.*<sup>109</sup>

74. Certain categories of children also give rise to specific legal obligations to ensure their safety. For example, pursuant to section 6 of the IGOC Act, the Minister is the legal guardian of unaccompanied minors seeking protection in Australia. There is also concern that the transfer of unaccompanied minors to offshore detention leads to safety risks due to the cessation of the Minister's guardianship once transfer has occurred (discussed further below).
75. The NSW Bar Association notes that unaccompanied minors are particularly vulnerable to exploitation, including from persons posing as relatives or carers who

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<sup>107</sup> The Hon Scott Morrison MP, Minister for Immigration and Border Protection, Interview with Ray Hadley, 2GB Ray Hadley Program, 29 April 2014, available at: <http://www.minister.immi.gov.au/media/sm/2014/sm213847.htm>. Discussion over people on bridging visas charged with offences, including offences related to domestic violence.

<sup>108</sup> ABC, 'No Advantage', 4 Corners, 29 April 2013, available at: <http://www.abc.net.au/4corners/stories/2013/04/29/3745276.htm>.

<sup>109</sup> AHRC Standards, 56.



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*promptly as possible after arrival, and conducted by competent medical professionals. While in detention, detainees should receive periodic assessments of their physical and mental well-being. Many detainees suffer psychological and physical effects as a result of their detention, and thus periodic assessments should also be undertaken even where they presented no such symptoms upon arrival. Where medical or mental health concerns are presented or develop in detention, those affected need to be provided with appropriate care and treatment, including consideration for release.*<sup>112</sup>

- *Asylum-seekers should have access to reading materials and timely information where possible (for example through newspapers, the internet, and television).*<sup>113</sup>
- *Asylum-seekers should have access to education and/or vocational training, as appropriate to the length of their stay. Children, regardless of their status or length of stay, have a right to access at least primary education. Preferably children should be educated offsite in local schools.*<sup>114</sup>

80. There are also other United Nations interpretive instruments that are relevant to this issue. The NSW Bar Association noted the example of the UN *Rules for the Protection of Juveniles Deprived of their Liberty* requiring States to provide special education programmes to children of foreign origin with particular cultural or ethnic needs.<sup>115</sup>

81. With reference to Article 28 of the CROC, and in relation to unaccompanied minors, the UNHCRG also provides that children should have full access to education and the right to maintain their cultural identity and values, including the maintenance and development of their mother tongue and the ability to enrol in vocational training which would improve their prospects, including on return to their country of origin.<sup>116</sup>

82. Further to this, Principles 9 and 10 of the Law Council's Detention Statement, require that children have appropriate access to education, recreation and play, and health services. The Law Council also recognises that the AHRC Standards take a broad view of the standards relating to 'activity' and 'excursions'.<sup>117</sup>

#### Concerns about provision of education, recreation and maternal and infant health services in immigration detention

83. The Law Council acknowledges that, while there are efforts being made to ensure adequate provision of education, recreation and maternal and infant health services in immigration detention, these efforts must be measured against the framework of international human rights law provisions.

84. It is concerned, for example, by the lack of regular, independent scrutiny of the quality of such services in immigration detention facilities, including the extent to which these services adhere to Australian and international standards. As noted above, the Law Council has also recommended that these standards, and compliance regimes, be

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<sup>112</sup> UNHCR Guidelines, [48](vi)

<sup>113</sup> Ibid [48](xii)

<sup>114</sup> Ibid [48](xiii)

<sup>115</sup> *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113 (14 December 1990), rule 38, available at: <http://www.un.org/documents/ga/res/45/a45r113.htm>.

<sup>116</sup> UNHCRG, [7.12]-[7.14]. See also: CROC art 28.

<sup>117</sup> AHRC Standards, 51. The treaties that apply to 'activities' are: ICCPR 2(1), 3, 7, 10, 18, 19, 22, 26, 27; CAT 16; ICESCR 2(2), 3, 12, 15; CRC 6, 13-15, 22-24, 27, 30, 31, 32, 37(c), 39; CRPD 21, 25, 26, 30; CEDAW 11; CRPD 27. The treaties that apply to 'excursions' are: ICESCR 4, 15.

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clearly incorporated into the legal arrangements Australia makes with service providers in Australian immigration detention facilities, and within the arrangements it makes with regional processing countries.

85. The Law Council also notes that transfer between immigration detention facilities or from closed facilities to community detention arrangements or release on Bridging Visas can also have a significant effect on a child's access to quality education, recreation and health services. For example, difficulties obtaining housing are often experienced by those families released on restrictive Bridging Visa Es, which can often result in children not attending school. The application of Behavioural Codes of Conduct can also result in families with children being re-detained, dislocating children from communities and health and education services.
86. The Law Council observes that it is difficult to obtain clear statistics on the number of pregnant women in immigration detention but remains strongly concerned that there is inadequate provision of education, recreation and maternal and infant health services in immigration detention, including in offshore detention. For example, the IHMS doctors who provide medical services on Christmas Island have expressed particular concern about access to health care in the detention centres on Christmas Island, stating that '[a]ntenatal care is performed far below any accepted Australian standard and places pregnant women and their children at unnecessary risk of harm'.<sup>118</sup> The challenges that pregnant women face is also demonstrated by the LSSA's example that pregnant women from offshore detention facilities have been transferred to onshore detention facilities for the purposes of having their babies.<sup>119</sup> Once the babies are born, mothers and babies are then transferred back to offshore processing centres.<sup>120</sup>
87. The Law Council notes that international human rights law recognises that pregnant women in detention have particular health needs, and may require certain temporary measures and/or permanent measures, such as adequate antenatal services, in order to fully enjoy their right to health.<sup>121</sup>
88. The Law Council trusts that the AHRC will receive further information on the quality of these services, and barriers to accessing services from those individuals and organisations with direct experience or relationships with people in immigration detention.

## **The separation of families, as it relates to various human rights**

### Relevant Legal Principles

89. The following provisions set out the human rights regarding the family unit:
- Article 7 of the ICESCR: the right to just and favourable conditions of work which ensure, including a decent living for themselves and their families in accordance with the provisions of the present Covenant;

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<sup>118</sup> IHMS letter, 4.

<sup>119</sup> Jane Lee, 'Greens seek conscience vote on asylum seeker babies born in detention' *The Sydney Morning Herald* (online) 16 April 2014, available at: <http://www.smh.com.au/federal-politics/political-news/greens-seek-conscience-vote-on-asylum-seeker-babies-born-in-detention-20140416-zqvc3.html>.

<sup>120</sup> Ibid.

<sup>121</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 16: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 34<sup>th</sup> sess, UN Doc E/C.12/2005/4 (11 August 2005) [35].

- Article 10 of the ICESCR: the family is the natural and fundamental group unit of society and should be accorded the widest possible protection and assistance;
- Article 11 of the ICESCR: everyone has the right to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions;
- Articles 9(1) and 16(1) of the CROC: children have a right to remain with their parents (unless contrary to their best interests), and to have their family protected from arbitrary or unlawful interference;
- Article 20(1) of the CROC: children who are without their family have a right to special protection and assistance; and
- Article 22 of the CROC: a child that is considered a refugee, whether accompanied or unaccompanied, shall receive appropriate protection and assistance, including in regard to family tracing and reunification.

90. In the addition to those specific Articles above, it is in the spirit of the Refugee Convention to ensure family unification. The Conference that completed the drafting and signing of the Refugee Convention, held 2-25 July 1951, unanimously passed a recommendation on the 'principle of unity of the family'. There were two elements to this recommendation, as follows:

- (1) *Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country,*
- (2) *The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.*

91. This principle has been incorporated into the UNHCR Guidelines. Guideline 8 provides:

*Asylum-seekers in detention should be able to make regular contact (including through telephone or internet, where possible) and receive visits from relatives, friends, as well as religious, international and/ or non-governmental organisations, if they so desire. Access to and by UNHCR must be assured. Facilities should be made available to enable such visits. Such visits should normally take place in private unless there are compelling reasons relevant to safety and security to warrant otherwise.<sup>122</sup>*

92. As noted by the NSW Bar Association, the UNHCRG provides that where families are split between countries, every effort should be made to reunite that child with that parent at an early stage before status determination takes place. Tracing for family members should begin as soon as possible, having regard to the need for confidentiality and safety if enquiries might put families at risk.<sup>123</sup>

93. Further, and as outlined above in regards to the safety of children in detention facilities, the UNHCR Guidelines, AHRC Standards and the Law Council's Detention Statement all refer to the fact that children must only be separated from adults if those

<sup>122</sup> UNHCR Guidelines, [48](vii).

<sup>123</sup> UNHCRG, [5.5], [5.17].

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adults are not in their own family unit, thereby emphasising the importance of family unification.

#### Current Legal Barriers to Family Reunification

94. The Law Council understands that the separation of families can occur within and across Australia's immigration detention network and between Australian facilities and regional processing facilities. This can have devastating consequences on the rights and wellbeing of families and children, particularly if the separation is prolonged or potentially indefinite.
95. The Law Council considers that safeguards should be included in all pre-transfer risk assessment procedures that require that consideration be given to the location of the immediate family members of the asylum seeker and the long term prospects of family reunion, particularly in the case of unaccompanied minors.
96. The Law Council has a history of advocacy in respect of the reunification of families and so-called split-family visas, designed to enable unaccompanied minors who have been found to be owed protection in Australia to re-unite with their immediate family members.
97. The legal framework and policy settings surrounding split family visas have been subject to almost continual change over the past five years, giving rise to a state of significant uncertainty and anxiety for applicants who are already among the most vulnerable children those seeking protection in Australia.
98. For example, split family visa eligibility and processes were affected by changes introduced following the report of the Expert Panel on Asylum Seekers released on 13 August 2012. On 28 June 2012, the (then) Labour Government commissioned Air Chief Marshal Angus Houston AC AFC to lead an expert panel and report on the best way forward for Australia to prevent asylum seekers taking boat journeys to seek asylum in Australia.<sup>124</sup> The report recommended that anyone who arrives in Australia by irregular maritime means should not be eligible to sponsor family under the Special Humanitarian Program (SHP) but only through the family stream of the Migration Program.
99. As at August 2012 there was a backlog of 20,000 undecided applications under the SHP of which more than 16,000 were split family visa applications. The Expert Panel estimated that it could take more than 20 years to clear this backlog. The Expert Panel also considered that this backlog was increasing the incentive for family members of Humanitarian Program (HP) visa holders to undertake boat journeys to Australia as there was little prospect of reuniting with the visa holder in Australia under the SHP.
100. The Expert Panel suggested that the concession which meant that immediate family members met the 'compelling reasons' criteria under the SHP should be removed for applicants currently in the backlog unless the proposer was under 18 at the time the application was lodged.
101. The Expert Panel also suggested that the ability of future irregular maritime arrivals to propose family members under the SHP should be removed and that irregular maritime arrivals seeking family reunion should do so under the family stream

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<sup>124</sup> For more, see: Australian Government, *Expert Panel on Asylum Seekers*, available at: <http://expertpanelonasylumseekers.dpmc.gov.au/>.

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of the general Migration Program. It also recommended that an additional 4,000 places per annum be allocated to the family stream and that these should be reserved for HP visa holders.

102. On 28 September 2012, the *Migration Amendment Regulation 2012 (No 5)* (Cth) came into effect to implement these recommendations.
103. These changes imposed considerable practical barriers for unaccompanied minors seeking to reunite with their immediate family members, for example by resulting in significant increased costs for visa applicants and by changing eligibility criteria and evidence required.
104. The Law Council is also concerned by the recent removal of the allocation of 4,000 additional Family Stream places for people who were found to be owed protection in Australia to reunite with immediate family members, recommended by the Expert Panel.<sup>125</sup>
105. The change to a Coalition Government in 2013 saw further changes to the legal framework relating to split family visas, this time in the form of the introduction of temporary protection visas (TPVs) for all boat arrivals who were found to be owed protection obligations by Australia.<sup>126</sup> TPVs have a maximum validity of three years, prohibit the visa holder from accessing family reunion and prohibit the visa holder from applying for a permanent protection visa.
106. On 18 October 2013, the *Migration Amendment (Temporary Protection Visas) Regulation 2013*<sup>127</sup> entered into force (and some of these visas were issued) but the Regulation was subsequently disallowed by the Senate on 2 December 2013.<sup>128</sup> The Government subsequently sought to achieve similar policy ends by the use of *Temporary Humanitarian Concern Visas*, however the use of this form of visa was also blocked by the Senate.<sup>129</sup> Despite this, the Law Council understands that the use of TPV continues to form a central part of the Government's border protection policy.
107. The Law Council has previously opposed the use of TPVs on the grounds that the removal of family reunion rights and the provision of only temporary protection for those found to engage Australia's non-refoulement obligations contrary to Australia's international obligations.<sup>130</sup> Past experience also suggests that the use of TPVs further exacerbates the mental health issues discussed above that arise from

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<sup>125</sup> RCOA Budget analysis, 1.

<sup>126</sup> Australian Customs and Border Protection Service, 'Minister for Immigration and Border Protection and Commander of Operation Sovereign Borders Joint Agency Task Force address press conference on Operation Sovereign Borders', (Transcript, 23 September 2013), available at: [http://www.customs.gov.au/site/130923transcript\\_operation-sovereign-borders.asp](http://www.customs.gov.au/site/130923transcript_operation-sovereign-borders.asp).

<sup>127</sup> Available at: <http://www.comlaw.gov.au/Details/F2013L01811>.

<sup>128</sup> Refugee Advice & Casework Service, 'Fact Sheet: Introduction and Disallowance of Temporary Protection Visas' (18 December 2013), available at: <http://www.racs.org.au/wp-content/uploads/RACS-FACT-SHEET-Introduction-and-Disallowance-of-Temporary-Protection-Visas-18-Dec-2013.pdf>.

<sup>129</sup> The Greens and Labor Senators voted to disallow the Regulation introducing *Temporary Humanitarian Concern Visas* on 27 March 2014. See "Senate rejects Scott Morrison's temporary visa attempt" *Sydney Morning Herald online* 27 March 2014 available at <http://www.smh.com.au/federal-politics/political-news/senate-rejects-scott-morrison-temporary-visa-attempt-20140327-35kbh.html>

<sup>130</sup> For example, see: Law Council of Australia, '2013 Federal Election: Key Legal Issues' *Law Council Review* (July – September 2013) 20, available at: <http://www1.lawcouncil.asn.au/lawcouncil/images/LawCouncilReview/Issue%207%20Web.pdf>.

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uncertainty over a person's status both within detention, and upon release into the community.<sup>131</sup>

## **The guardianship of unaccompanied minors, as it relates to the appropriateness of the Minister holding both the role of guardian and of ultimate decision-maker concerning an applicant's refugee status**

### Domestic Legal Framework

108. In research published in September 2012, it was found that approximately 5 per cent of asylum seekers coming to Australia were unaccompanied minors.<sup>132</sup> The current Australian process for dealing with unaccompanied children is mandated by the IGOC Act. This legislation provides that the Minister of Immigration and Border Protection is considered to be the legal guardian of every unaccompanied child who arrives in Australia, it states:<sup>133</sup>

*The Minister shall be the guardian of the person, and of the estate in Australia, of every non-citizen child who arrives in Australia after the commencement of this Act to the exclusion of the parents and every other guardian of the child, 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.*

109. Under the IGOC Act, the Minister may delegate his powers and functions as guardian to Commonwealth officers, or officers of a state or territory government. A private individual or entity may be appointed as 'custodian' by the Minister or delegated guardian. The custodian provides for the care and welfare needs of the unaccompanied minors and can make decisions about routine, day-to-day matters. The delegated guardian retains legal responsibility for the unaccompanied minor.

110. The care arrangements for unaccompanied minors in the community will generally be a relative or approved carer under the supervision of the relevant state or territory child welfare agency, or a contracted service provider, such as Life Without Barriers.<sup>134</sup>

111. As Professor Crock and Associate Professor Kenny observe, the IGOC Act provides no guidance on the content of the Minister's rights, powers and duties at section 6 of the Act. However, they note that:

*As a matter of common law and equity a guardian stands in loco parentis to the child. This includes the power to make decisions for the welfare and upbringing of a child. With this power come concomitant obligations such as the duty to protect*

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<sup>131</sup> For example, see: *A last resort?* 20; AHRC, 'Tell Me About: Temporary Protection Visas' (Factsheet, December 2013) 2, available at: <https://www.humanrights.gov.au/publications/last-resort-summary-guide-temporary-protection-visas>; and Shakeh Momartin, Zachary Steel, Marianio Coello, Jorge Aroche, Derrick M Silove and Robert Brooks, 'A comparison of the mental health of refugees with temporary versus permanent protection visas', (2006) 185:7 *Medical Journal of Australia*, 357.

<sup>132</sup> Mary Crock and Mary Anne Kenny, 'Rethinking the Guardianship of Refugee Children after the Malaysian Solution' (2012) 34 *Sydney Law Review* 437, 440.

<sup>133</sup> See: s 6(1).

<sup>134</sup> MYAN Policy Paper, *Unaccompanied Humanitarian Minors in Australia: An overview of national support arrangements and key emerging issues*, September 2012, 8 ('MYAN Policy Paper').

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*the child from harm and to provide maintenance and education. It is also argued that a guardian must provide affection and emotional support. The overarching principle is that a guardian must always act in the best interests of the child.*<sup>135</sup>

112. They state that common law and equity are consistent with the principle of the best interests of the child in the CROC, but that ‘a gulf has opened between notions of guardianship under the common law relative to those pertaining in the immigration context.’<sup>136</sup>
113. On 17 August 2012, the IGOC Act was amended by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (the Regional Processing Act) in August 2012, which amended the *Migration Act* to permit an ‘offshore entry person’ to be taken to a regional processing country. These amendments made it clear that, although the Minister is the guardian of unaccompanied children who arrive in Australia, he or she ceases to be the guardian of any such children who are transferred to a regional processing country under the Migration Act. As a result, the Minister no longer needs to consent in writing to the removal of unaccompanied children from Australia to a regional processing centre.
114. When an unaccompanied child is transferred to a regional processing centre, he or she will be subject to the domestic legal framework governing guardianship of children in that jurisdiction, which in the case of PNG and Nauru appears to fail to adhere to Australian or international standards. For example, in PNG, the *Child Welfare Act 1961* (Papua New Guinea) does not assign automatic guardianship of visa applicants who are unaccompanied minors. The decision over whether an unaccompanied child should be granted guardianship is left to the courts, and laws that provide for child welfare only extend to children who are under the age of 16.<sup>137</sup> In Nauru, guardianship of children is governed by the *Guardianship of Children Act 1975* (Nauru), and as in PNG, there is no provision for automatic guardianship of unaccompanied minors seeking protection status.<sup>138</sup>
115. Currently, there are no unaccompanied minors on PNG, but two unaccompanied minors were transferred to Manus Island in August 2012 due to an administrative error.<sup>139</sup> They were subsequently transferred to Christmas Island in November 2012 once the Minister became aware that they were minors.<sup>140</sup> As indicated above, a number of children have been sent to Nauru. Current Government policy remains that all children including unaccompanied minors who arrive seeking asylum in Australia by boat without a valid visa are liable to transfer. It also remains unclear whether these jurisdictions currently provide the appropriate administrative structures and resources to provide appropriate care for unaccompanied minors transferred under these arrangements.

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<sup>135</sup> Crock and Kenny, Rethinking Guardianship.

<sup>136</sup> Ibid. The Authors further observe that in *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524, 537–8, [41] and [43], ‘North J held that (in principle) the concept of guardianship includes the obligation to ensure the fundamental human rights set out in the [CROC].’

<sup>137</sup> See also: Fact Check, ‘Tony Burke not telling the full story on unaccompanied asylum seeker children’ *ABC News* (online), 21 August 2013, available at: <http://www.abc.net.au/news/2013-08-14/tony-burke-unaccompanied-children-png/4842978>.

<sup>138</sup> Ibid.

<sup>139</sup> Oliver Laughland, ‘“Every day I am crying”: boys held on Manus island tell of their despair’, *Guardian Australia* (online) 7 November 2013, available at: <http://www.theguardian.com/world/2013/nov/07/every-day-i-am-crying-manus>.

<sup>140</sup> The Hon Scott Morrison MP, Minister for Immigration and Border Protection, ‘Clarification’ (Media Release, 8 November 2013), available at: <http://www.minister.immi.gov.au/media/sm/2013/sm209427.htm>.

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## International Standards

116. The Australian legislative framework (as well as that of PNG and Nauru), which contains little detail relating to the rights of unaccompanied minors and the duties of their guardians, can be contrasted with the international law framework governing this area.

117. As indicated above, UNHCR has developed two sets of guidelines which detail the essential safeguards for the status determination of such children: Refugee Children: Guidelines on Protection and Care and UNHCRG. The UNHCR has also developed several other publications that are relevant to the guardianship of children, such as:

- (i) A Framework for the Protection of Children;<sup>141</sup>
- (ii) UNHCR Guidelines on Determining the Best Interests of the Child;<sup>142</sup> and
- (iii) Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Refugee Convention and/or 1967 Protocol relating to the Status of Refugees.<sup>143</sup>

118. In particular, UNHCRG mandates:

- (i) *the appointment of an independent and formally accredited organisation that will appoint a guardian or adviser upon identification of an unaccompanied child. This guardian or adviser should have requisite expertise in child caring in order to ensure that the interests of the child are safeguarded, and that the legal, social, medical and psychological needs of the child are met during the refugee status determination procedures;*<sup>144</sup>
- (ii) *the tailoring of the refugee determination procedures to meet the needs of children and in particular:*
  - (i) *a child's refugee status application should be given priority and determined promptly and fairly;*
  - (ii) *the meeting of certain minimum guarantees, such as the opportunity for a personal interview with an official before a decision is made, if the age and maturity of the child permits;*
  - (iii) *an asylum-seeking child should be represented by an adult who is familiar with the child's background and interests and able to promote a decision that is in the child's best interests;*

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<sup>141</sup> Office of the United Nations High Commissioner for Refugees, 'A Framework for the Protection of Children' (2012), available at: <http://www.refworld.org/pdfid/4fe875682.pdf>.

<sup>142</sup> Office of the United Nations High Commissioner for Refugees, 'UNHCR Guidelines on Determining the Best Interests of the Child' (May 2008) ('2008 Report'), available at: <http://www.refworld.org/docid/48480c342.html>.

<sup>143</sup> Office of the United Nations High Commissioner for Refugees, 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Refugee Convention and/or 1967 Protocol relating to the Status of Refugees' (22 December 2009) ('2009 Guidelines'), available at: <http://www.unhcr.org/50ae46309.html>.

<sup>144</sup> UNHCRG, [5.7].

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(iv) access should also be given to a qualified legal representative, including for youth aged 16-18; and

(v) asylum seeking children should be kept informed about the refugee determination process, where they stand in the process, what decisions have been made and the possible consequences.<sup>145</sup>

119. The UNHCR's latter publications reaffirm the procedures and recommendations outlined in *Refugee Children: Guidelines on Protection and Care* and UNHCRG, but it is also important to note the following:

- (i) *During the refugee status determination process, "it may be necessary for an examiner to assume a greater burden of proof in children's claims, especially if the child concerned is unaccompanied";<sup>146</sup> and*
- (ii) *It is not in the best interests of the child to be voluntarily repatriated, even when the child wishes to return, with the support of their guardian, where this would lead to "a "reasonable risk" that such return would result in the violation of fundamental human rights of the child", or where adequate care arrangements did not exist.<sup>147</sup>*

120. The UNHCR Guidelines specifically refer to unaccompanied minors as a group with special circumstances and particular needs. The Guidelines provide:

*As a general rule, unaccompanied or separated children should not be detained. Detention cannot be justified based solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status. Where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements, such as foster placement or residential homes, should be made by the competent child care authorities, ensuring that the child receives appropriate supervision. Residential homes or foster care placements need to cater for the child's proper development (both physical and mental) while longer term solutions are being considered.<sup>148</sup>*

121. Further, and in regard to specific and general protection needs, CROC General Comment<sup>149</sup> addresses the appointment of a guardian and advisor or legal representative pursuant to Articles 18(2) and 20(1) and provides:

*Review mechanisms shall be introduced and implemented to monitor the quality of the exercise of guardianship in order to ensure the best interests of the child are*

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<sup>145</sup> UNHCRG, [8.1]-[8.5].

<sup>146</sup> 2009 Guidelines, [73] citing ExCom, *Conclusion on Children at Risk*, 5 Oct. 2007, No. 107 (LVIII) 2007 para. (g)(viii), which recommends that States develop adapted evidentiary requirements.

<sup>147</sup> 2008 Report, 70, citing: CROC General Comment, [84].

<sup>148</sup> UNHCR Guidelines, [54].

<sup>149</sup> CROC General Comment, [12]-[30]. The following principles of the CROC specifically apply to unaccompanied minors:

- (i) *Legal obligations of State parties for all unaccompanied or separated children in their territory and measures for their implementation;*
- (ii) *Non-discrimination (Article 2);*
- (iii) *Best interests of the child as a primary consideration in the search for short and long-term solutions (Article 3);*
- (iv) *The right to life, survival and development (Article 6);*
- (v) *Right of the child to express his or her views freely (Article 12);*
- (vi) *Respect for the principle of non-refoulement; and*
- (vii) *Confidentiality*

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*being represented throughout the decision-making process and, in particular, to prevent abuse.*<sup>150</sup>

*In large scale emergencies, where it will be difficult to establish guardianship arrangements on an individual basis, the rights and best interests of separated children should be safeguarded and promoted by States and organizations working on behalf of these children.*<sup>151</sup>

#### Conflict of Interest arising from Minister's Role as Guardian of Unaccompanied Minors

122. The Law Council and a number of its Constituent Bodies are of the view that the dual role of the Minister as Guardian of unaccompanied minors and Minister for Immigration and Border Protection creates a conflict of interest insofar as the Minister must fulfil his role as a guardian for unaccompanied children acting in their best interest, whilst also assessing their visa applications pursuant to the Migration Act.<sup>152</sup> This is consistent with recommendations arising from various parliamentary and independent inquiries, including those made in the March 2012 Report of the Joint Select Committee on Australia's Immigration Detention Network<sup>153</sup> and AHRC's 2004 Report.<sup>154</sup>
123. For example, the NSW Bar Association considers that there is a fundamental conflict between the pursuit of a mandatory detention policy and the interests of the individual children who are detained in furtherance of that policy.<sup>155</sup> It states that this fundamental conflict is exacerbated when mandatory detention is used as a means of deterrence. As identified by the NSW Bar Association, the conflict is apparent from a consideration of the individual responsibilities of the guardian to unaccompanied children under the CROC, as interpreted by UNHCRG. The NSW Bar Association considers that independent guardians unburdened by any conflict of interest with the child's best interest should be appointed for all unaccompanied children in immigration detention to ensure their rights are protected.
124. The Law Council's and its Constituent Bodies' concerns are mirrored by the international community, which has recognised that unaccompanied asylum seeking children warrant special attention in the process of determining their claims to refugee status. For example the CROC Committee, in their concluding observations on Australia's Fourth Report, recommended that Australia '[e]xpediently establish an independent guardianship/support institution for unaccompanied immigrant children'.<sup>156</sup> The Law Council supports this recommendation, and has voiced its concerns directly with DIBP on numerous occasions.
125. Through its meetings with DIBP, the Law Council understands the Department is seeking to address some of these issues for example by establishing a firm separation

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<sup>150</sup> Ibid [35].

<sup>151</sup> Ibid [38].

<sup>152</sup> The Law Council has consistently expressed its concern over this issue in previous submissions to the AHRC, submissions to certain Parliamentary Committees, in communications with DIBP and directly with Ministers. The Law Council's Constituent Bodies have also raised similar concerns. For example, in 2012 the LIV wrote to the then Minister of Immigration, the Hon Chris Bowen MP, outlining its concerns with the Government's implementation of regional processing, including that regional processing risks refoulement and that transfer of unaccompanied minors would be contrary to the CROC.

<sup>153</sup> Joint Select Committee Report, xxi: Recommendation 19: The Committee recommends that relevant legislation be amended to replace the Minister for Immigration as the legal guardian of unaccompanied minors in the immigration detention system.

<sup>154</sup> *A last resort?* 7: Recommendation 3.

<sup>155</sup> Ibid 743.

<sup>156</sup> CROC Committee Report, [81].

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between delegates and staff that work on visa applications, and those delegates and staff who work in the area of guardianship and establishing a clear framework under which guardians operate.

126. While these administrative measures are welcome, the Law Council remains concerned that the current legislative arrangements fall short of internationally accepted standards. Along with a number of its Constituent Bodies<sup>157</sup> the Law Council has recommended that the IGOC Act be reformed or repealed. For example:

- the NSW Bar Association considers that the legislation under which guardians would be appointed should explicitly adopt the CROC. Alternatively, and at the very least, the Minister should, pursuant to section 5 of the IGOC Act, delegate his powers and functions under that Act to the appropriate State child welfare authority.<sup>158</sup>
- the Law Council has recommended that the guardianship of unaccompanied minors form part of the mandate of the National Children's Commissioner.<sup>159</sup> For example, in its submissions to the Senate Legal and Constitutional Affairs Committee (Senate Committee) on the *Commonwealth Commissioner for Children and Young People Bill 2010* (Cth) ('the 2010 Bill') and *Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012* (Cth) ('the 2012 Bill'), the Law Council recommended that the mandate and role of the Commissioner be amended to include, 'promoting and protecting the rights of children and young people seeking asylum or in immigration detention in Australia, or children and young people whose parents or guardians are seeking asylum or in immigration detention in Australia'.<sup>160</sup> The Law Council maintains that the Commissioner should have guardianship over unaccompanied minors and that amendments be made to the IGOC Act to effect this recommendation.

#### Other Concerns relating to Unaccompanied Minors

127. As the LSSA has recognised, many of the unaccompanied minors coming out of the closed detention facilities have significant mental health problems due to past traumas, ongoing family separation, the length of time they have spent in detention

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<sup>157</sup>The NSW Bar Association, the LIV, the LSNT and the LSSA .

<sup>158</sup> A private members Bill was introduced to this effect on 27 June 2013, but it lapsed at the end of Parliament on 12 November 2013. See:

[http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=s930](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s930).

<sup>159</sup> See: Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, *Commonwealth Commissioner for Children and Young People Bill 2010*, 6 January 2011 ('Law Council submission 2010 Bill'), available at:

[http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=5C22F15C-9E89-369E-BE52-93A40A939816&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=5C22F15C-9E89-369E-BE52-93A40A939816&siteName=lca); Law Council of Australia, Supplementary submission to Senate Legal and Constitutional Affairs Committee, *Commonwealth Commissioner for Children and Young People Bill 2010*, 21 April 2011, available at:

[http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=5C22F2B2-BF6E-4C8A-CF3F-90F0E8C0FE5E&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=5C22F2B2-BF6E-4C8A-CF3F-90F0E8C0FE5E&siteName=lca); and Law Council of Australia, Senate Legal and Constitutional Affairs Committee, *Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012*, 1 June 2012, ('Law Council submission 2012 Bill'), available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2500-2599/2593%20-%20Australian%20Human%20Rights%20Commission%20Amendment%20%28National%20Children%27s%20Commissioner%29%20Bill%202012.pdf>. The Law Council also appeared before the Senate Legal and Constitutional Affairs Committee on 29 March 2011 to give evidence at its Inquiry into the *Commonwealth Commissioner for Children and Young People Bill 2010* (Cth).

<sup>160</sup> Law Council submission 2010 Bill, 5, [13]. The Law Council notes that the 2010 Bill did not proceed, and regrets that its suggestion, and the Senate Committee's recommendation, although not what the Law Council had suggested in its submission, was not incorporated into the 2012 Bill.

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and the ongoing uncertainties surrounding their status in Australia with constant policy changes which are confusing and highly frustrating.

128. Whilst in the community detention program, unaccompanied minors receive 24 hour on-call case management support. They receive welfare support, cultural support, recreational activities and activities to support them to develop independence. However, as soon as unaccompanied minors turn 18, they are transferred from community detention to a Bridging Visa and more recently (although since disallowed in the Senate), to a Temporary Humanitarian Concern Visa. This means that their support is limited to a period of six weeks following which time they are required to find their own accommodation with very little available support from a case worker and a low level fortnightly payment. Although permitted to work, many of these young people are struggling to adapt to these new conditions, as they lack the necessary community links needed to gain accommodation and employment on their own.
129. As the LSSA has noted, there is a lack of clarity within the service system about whose responsibility it is to support young people in this transition, and a lack of knowledge from some services about service eligibility for this group. Current transition arrangements often lack the support that these young people need at a time of heightened vulnerability.<sup>161</sup>
130. In addition to the concerns, the Law Council further notes the particular vulnerabilities of unaccompanied minors in regional processing facilities where there is a lack of clear legislative framework for the guardianship of unaccompanied children seeking protection.
131. The Law Council also notes the work of community organisation such as the Australian Churches Refugee Taskforce and ChilOut. These organisations have looked at the issues facing unaccompanied minors in detail. For example, the Churches Taskforce has prepared a discussion paper specifically on unaccompanied minors.<sup>162</sup> Further, in 2013 ChilOut formed the first national roundtable of child experts from within and outside the refugee sector to examine issues affecting asylum-seeker children in immigration detention.<sup>163</sup> It also presented at the 13th Australasian Conference on Child Abuse and Neglect in November 2013 and has made various submissions to Parliamentary and other Inquiries including to the Inquiry by the Parliamentary Standing Committee on Public Works into Infrastructure and upgrade works to establish a regional processing centre on Manus Island, Papua New Guinea.<sup>164</sup> The Law Council recommends the work of these organisations to the AHRC.

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<sup>161</sup> MYAN Policy Paper, 8.

<sup>162</sup> Australian Churches Refugee Taskforce, 'All the Lonely Children: Questions for Policy Makers Regarding Guardianship for Unaccompanied Minors' (October 2013), available at: <http://www.australianchurchesrefugeetaskforce.com.au/wp-content/uploads/2013/10/AllTheLonelyChildren-Draft1.pdf>.

<sup>163</sup> See generally: <http://www.chilout.org/home>.

<sup>164</sup> See: Parliamentary Standing Committee on Public Works, *Infrastructure and upgrade works to establish a regional processing centre on Manus Island, Papua New Guinea* (15 May 2013), available at: [http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=pwc/regionalprocessing/subs.htm](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=pwc/regionalprocessing/subs.htm). Recommendations included: 'That privacy be a consideration in all facets of planning and construction' and '[t]hat there is a clear distinction between the areas housing children and people not in a family group.'

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## Assessments for transfer, as it relates to international obligations

### Relevant Legal Principles

132. The Law Council believes that the following rights apply specifically to the assessments for transfer of children, whether transferred within Australia, or transferred to a regional offshore processing centre:

- Article 33 of the Refugee Convention: a contracting State shall not expel or return 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
- Article 3 of the CAT: a State shall not expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture
- Articles 3(1) and 18(1) of the CROC: the best interests of the child should be a primary consideration in all actions concerning children (and the 'basic concern' of their legal guardians);
- Articles 8 and 10 of the CROC: transfers should not interfere with or separate families;
- Article 37(d) of the CROC: children who are in detention have the right to prompt access to legal and other appropriate assistance, and the right to challenge the legality of their detention before a court or other independent body; and
- Articles 17 and 23 ICCPR: concerning unlawful or arbitrary interference with the family.

133. In terms of Article 33 of the Refugee Convention and Article 3 of the CAT, it is necessary for a contracting State to determine whether a person who will be transferred will have their life or freedom threatened, or would be subject to torture. Article 3(2) of the CAT further provides that:

*For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.*

134. It therefore incumbent upon Australia, pursuant to these Articles, that a pre-transfer assessment be of such a nature as to ensure that none of the particular rights outlined above will risk be violated if transfer were to occur.

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135. In addition to the rights outlined above, the following minimum condition of Guideline 8 of the UNHCR Guidelines is relevant to the assessments for transfer of children:

*The frequent transfer of asylum-seekers from one detention facility to another should be avoided, not least because they can hinder access to and contact with legal representatives.*<sup>165</sup>

136. Further, the NSW Bar Association notes that, in relation to unaccompanied minors, the UNHCRG provides that because of their vulnerability, unaccompanied and separated children seeking asylum should never be refused access to mainland Australia and their claims for asylum should always be considered under the normal refugee determination procedure. Upon arrival these children should be provided with a legal representative and their claims examined in a manner which is both fair and age appropriate.<sup>166</sup>

### Concerns relating to Assessments for Transfer

137. The Law Council has long opposed measures that authorise the transfer of asylum-seekers to regional offshore processing centres. It notes that the approach to transferring asylum-seekers to offshore detention was taken by the previous and current Governments on the basis that regional processing and regional resettlement would act as a deterrent to asylum-seekers.<sup>167</sup> Indeed, the Expert Panel on Asylum Seekers, established in 2012, recommended the re-introduction of an offshore processing regime to act as a deterrence measure.<sup>168</sup> The Minister's inaugural Operation Sovereign Borders briefing on 23 September 2013 suggests that the current Government also sees offshore detention as a strong deterrent.<sup>169</sup>

138. In its submission to the Senate Legal and Constitutional Affairs Committee on the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012* (UMA Bill),<sup>170</sup> the Law Council articulated its concerns with transfer to regional processing centres. That Bill, receiving Royal Assent on 20 May 2013, implemented several recommendations made by the Expert Panel, such as providing that asylum-seekers who 'unlawfully' arrive anywhere in Australia will be subject to the same regional processing arrangements as those asylum-seekers who arrive at an excised offshore place. The Law Council opposed the passage of the Bill on the basis that it:

- was inconsistent with the spirit and purpose of the Refugee Convention, to which Australia is party;
- undermined Australia's obligations under other human rights Conventions to which it is party; and

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<sup>165</sup> UNHCR Guidelines, [48](xiv).

<sup>166</sup> UNHCRG, [4.1]-[4.2].

<sup>167</sup> Janet Phillips, 'A comparison of Coalition and Labor government asylum policies in Australia since 2001' (Research paper, Parliamentary Library, Parliament of Australia, 28 February 2014) 3.

<sup>168</sup> Ibid, citing: Expert Panel on Asylum Seekers, *Report of the Expert Panel on Asylum Seekers*, Canberra, August 2012.

<sup>169</sup> The Hon Scott Morrison MP, Minister for Immigration and Border Protection and Lieutenant General Angus Campbell, Commander of Operation Sovereign Borders, 'Operation Sovereign Borders' (Joint Press Conference, 23 September 2013), available at:

<http://www.minister.immi.gov.au/media/sm/2013/sm208387.htm>. The Minister referred specifically to the 'development of a campaign plan approach to a border security operation and the associated regional deterrent framework'.

<sup>170</sup> LCA UMA submission, 28.

- expanded the current arrangements for transfers of asylum seekers to regional processing countries which do not adhere to human rights and rule of law principles.

139. The Law Council noted that the UMA Bill further exacerbated the Law Council's earlier concerns with *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) (the Regional Processing Act), that authorised the offshore processing regime. Those concerns were that such a regime would undermine and risk breaching Australia's obligations under Articles 17 and 23 of the ICCPR and Article 3 of the CROC.
140. The Law Council expressed concern that the transfer process would expose children to prolonged periods in remote offshore processing centres while they await the processing of their claims, circumstances which may exacerbate the already tenuous physical and mental health of such children, discussed above.
141. As discussed above, the criteria upon which a person is determined to be ineligible for transfer is unclear.<sup>171</sup> This in turn gives rise to concerns over whether children are aware of their rights prior to transfer; whether they are receiving adequate information about the transfer, such as whether they are aware of the consequences of the transfer (i.e. that they will not be settled in Australia), in an appropriate form; and, whether they have access to legal advice. These concerns about regional processing are further compounded by the issues relating to guardianship of unaccompanied minors, discussed above.
142. Concerns relating to the assessments to transfer are also often confounded by the use of 'screening' of asylum seekers that occurred under the former Government and appears to form part of the current Government's policies.
143. The 'Enhanced screening' policy was introduced on 27 October 2012 in order to respond to an increase in boat arrivals from Sri Lanka.<sup>172</sup> Sri Lankans who arrived by boat were subject to a short screening interview by DIBP officers.<sup>173</sup> As noted by the Kaldor Centre:

*...people are not informed of their right to seek asylum. They are also not informed of their right to seek legal advice: instead, they are only provided with 'reasonable facilities' to contact a legal advisor (that is, a telephone book, a telephone, and an interpreter, if necessary), and are only provided with such access if they make a specific request.*<sup>174</sup>

144. During the Federal Election Campaign in 2013, the current Government explained that the process of enhanced screening will apply to all Sri Lankan arrivals, regardless of whether they have arrived in Australia by boat, and there are suggestions that it will not be limited to Sri Lankans, but will apply to other nationals.<sup>175</sup> Another key policy of the current Government outlined during the Election Campaign was a new 'Fast Track and Assessment Removal' process that comprises of the following steps: triaging of the caseload of applications; rapid assessment; rapid review and rapid removal.<sup>176</sup> It is

<sup>171</sup> See also: Alex Reilly and Rebecca La Forgia, 'Secret "enhanced screening" of asylum seekers' 38(3)

<sup>172</sup> Andrew and Renata Kaldor Centre for International Refugee Law, 'Factsheet: "Enhanced Screening" and "Fast Track Policies"' (7 November 2013) 1, available at:

[http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/enhanced\\_screening.pdf](http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/enhanced_screening.pdf)

<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid 2.

<sup>176</sup> Ibid.

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difficult to obtain detailed publicly available information about the nature of these policies and the extent to which they may be currently being implemented. However, it is clear that if implemented, these two policies could have particularly concerning implications for children, especially unaccompanied minors.

## Policy Alternatives

### Alternatives to detention

145. The Law Council does not underestimate the scale of the policy challenge posed by irregular migration to Australia, which includes the need adopt measures that successfully guard against the loss of life, including children's lives, at sea. In response to these challenges, a range of policy settings have been adopted by successive Governments over recent years, all of which included the mandatory detention of children and many included the transfer of children to offshore locations.
146. The Law Council looks forward to the outcome of this Inquiry identifying a range of policy alternatives to the mandatory detention of children for the purpose of determining their protection status, that would also fit within policy settings designed to prevent or discourage families or children undertaking dangerous journeys by boat, when seeking protection in Australia.
147. For example, the IDC has undertaken an international empirical study on the alternatives to detention, and has developed a Community Assessment and Placement (CAP) model that offers important possibilities for Australia's approach to determining protection status.
148. The IDC's study on alternatives to detention provides evidence to contradict assertions that alternatives to detention pose a risk to society, are costly, and do not act as a deterrent to irregular maritime arrivals. The CAP model enables governments to prevent and reduce unnecessary detention and builds on the Law Council's primary position that detention of children should only occur as a last resort and only for the shortest possible time. It also demonstrates that practical alternatives to detention have been considered by the international community.
149. The IDC's handbook on alternatives to immigration detention outlined its research into alternatives to immigration detention, in line with the requirement at international law that immigration detention is to be treated as a last resort.<sup>177</sup> The study looked at existing legislation, policies, practices and mechanisms that are already in place and can assist in identifying unnecessary detention in order to ensure it is only applied as a matter of last resort.<sup>178</sup>
150. The CAP model has been proposed in order to assist governments in developing alternatives to immigration detention. The model has five steps to prevent and reduce the likelihood of unnecessary detention, as follows:
- (i) Presume detention is not necessary.
  - (ii) Screen and assess the individual case.

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<sup>177</sup> International Detention Coalition, 'There are alternatives: Policy Guide' (8 October 2013) 4, available at: <http://idcoalition.org/blog/publications/there-are-alternatives-policy-guide/>.

<sup>178</sup> Ibid.

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- (iii) Assess the community setting.
  - (iv) Apply conditions in the community if necessary.
  - (v) Detain only as the last resort in exceptional cases.<sup>179</sup>

151. In addition to this alternative model, the IDC's research identified the following benefits that derive from the use of alternative detention in place of immigration detention:

- *Cost less than detention*
- *Maintain high rates of compliance and appearance*
- *Increase voluntary return and independent departure rates*
- *Reduce wrongful detention and litigation*
- *Reduce overcrowding and long-term detention*
- *Respect, protect and fulfil human rights*
- *Improve integration outcomes for approved cases*
- *Improve client health and welfare*<sup>180</sup>

152. The study made several findings that suggest that alternatives to detention are beneficial to both the State, and asylum-seekers. Findings were made on the basis of literature review; an international internet-based survey; and international field work, including in the United Kingdom and the United States of America.<sup>181</sup> The findings were (emphasis in original):

- *Irregular migrants and asylum seekers rarely abscond while awaiting the outcome of a visa application, status determination or other lawful process, if in their destination country.*
- *Irregular migrants and asylum seekers appear less likely to abscond in a country of 'transit' if they can meet their basic needs through legal avenues, are not at risk of detention or refoulement, and remain hopeful regarding future prospects.*

***Successful programs understand and break down the population to make informed decisions about management and placement options.***

- *Irregular migrants and asylum seekers are better able to comply with requirements if they can meet their basic needs while in the community.*

***Successful programs ensure basic needs can be met.***

- *Irregular migrants and asylum seekers are more likely to accept and comply with a negative visa decision if they believe:*

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<sup>179</sup> Ibid 5.

<sup>180</sup> Ibid 5-6.

<sup>181</sup> Ibid 14.

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- (i) *They have been through a fair visa determination or refugee status determination process.*
  - (ii) *They have been informed and supported through the process.*
  - (iii) *They have explored all options to remain in the country legally.*

***Successful programs support clients through the bureaucratic process with information and advice to explore all options to remain in the county legally and, if needed, to consider all avenues to depart the country.***<sup>182</sup>

153. The Law Council encourages the AHRC to consider the IDC's research and findings, and to consider recommending the CAP model as a policy alternative to immigration detention. This model offers a practical alternative to detention that enables States to determine protection status pursuant to their sovereign procedures in a way that guards against certain risks, such as security risks, but importantly does so in such a way as to avoid the adverse human rights implications of a mandatory detention regime which, as discussed above, are particularly grave for children.

## **International Monitoring**

154. As discussed above, the Law Council opposes mandatory immigration detention and queries whether detention of children in closed facilities for the purpose of determining their protection status, even for short periods, can ever comply with the 'best interest of the child' principle recognised under Australian and international law.

155. However, if mandatory detention of children continues to form part of Australia's immigration policy, the Law Council believes that there is a need for legislative reform to guard against the long term deleterious impacts of restrictive detention and to protect and promote children's rights. This should include:

- judicial oversight of the decision to detain a child for protection status determination;
- legislative limits on the maximum period of detention in closed facilities and mechanism to review other forms of detention, for example, in APODs;
- regular, comprehensive, independent review of the whole immigration detention network, including offshore detention that investigates and reports on the extent to which these facilities comply with the relevant international human rights law framework, set out above; and
- specific safeguards to protect the rights and interests of unaccompanied minors, as outlined above.

156. The following section proposes two forms of monitoring and review, utilising existing international mechanisms:

- ratification and implementation of the OPCAT,<sup>183</sup>
- ratification and implementation of the CROC-OP3, and the extension of the role of the National Children's Commissioner.<sup>184</sup>

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<sup>182</sup> Ibid 7.

<sup>183</sup> On 19 May 2009, Australia signed the OPCAT, but has not ratified this instrument.

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157. In setting out these options, the Law Council acknowledges the critical review and monitoring role currently provided by both the AHRC and the Commonwealth Ombudsman in respect of certain immigration detention facilities in Australia.<sup>185</sup> If implemented, the options below would complement and support the continuation of these important existing mechanisms.

### OPCAT

158. The Law Council has previously made several submissions in support of the ratification and implementation of the OPCAT.<sup>186</sup> The key features of the OPCAT are that it establishes a two-tiered prevention mechanism: the UN Subcommittee on the Prevention of Torture (the Subcommittee), and a national preventative mechanism (NPM).

159. The Subcommittee is an independent committee of international experts with a mandate to regularly<sup>187</sup> carry out country missions to monitor all places of detention within that country.<sup>188</sup> The Subcommittee also has a role in relation to NPMs: it advises and assists State's with the establishment of NPMs; maintains direct and confidential contact with NPMs, where necessary, assisting them with strengthening their capacities; advises NPMs on how to strengthen the protection of victims; and makes recommendations to States about strengthening the capacity and mandate of NPMs.<sup>189</sup>

160. The State bears several obligations concerning the ability of the Subcommittee to comply with its mandate, including:<sup>190</sup>

- (i) To receive the Subcommittee on Prevention in their territory and grant it access to the places of detention as defined in article 4 of the present Protocol;
- (ii) To provide all relevant information the Subcommittee on Prevention may request to evaluate the needs and measures that should be adopted to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;
- (iii) To encourage and facilitate contacts between the Subcommittee on Prevention and the national preventive mechanisms;
- (iv) To examine the recommendations of the Subcommittee on Prevention and enter into dialogue with it on possible implementation measures.

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<sup>184</sup> Australia has not signed or ratified CROC-OP3.

<sup>185</sup> For the work of the Subcommittee, including its reports, see:

<http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIndex.aspx>.

<sup>186</sup> See for example the following: Law Council of Australia, submission to Joint Standing Committee on Treaties, *Inquiry into the Optional Protocol to the Convention Against Torture*, 30 March 2012, available at:

<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2628%20-%20Optional%20Protocol%20to%20the%20Convention%20against%20Torture.pdf>;

Law Council of Australia, submission to Attorney General's Department, *Optional Protocol to the UN Convention Against Torture*, 1 July 2008; Law Council of Australia, 'Shadow Report to Australia's Common Core Document', Report to the United Nations Human Rights Committee, 29 August 2008, available at:

[http://www2.ohchr.org/english/bodies/hrc/docs/ngos/LCA\\_Australia95.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/LCA_Australia95.pdf).

<sup>187</sup> OPCAT, art 13.

<sup>188</sup> OPCAT, art 11(1)(a).

<sup>189</sup> OPCAT, art 11(1)(b).

<sup>190</sup> OPCAT, art 12.

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161. The obligations on States under the OPCAT also extend to providing unrestricted access to the Subcommittee, including conducting private interviews, and choosing the people that will be interviewed.<sup>191</sup>
162. Within one year of ratification of the OPCAT, State parties are obliged to establish an NPM, or series of NPMs.<sup>192</sup> The NPM is independent of government, and should be granted the following powers, at minimum:
- (i) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4 [any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority], with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
  - (ii) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;
  - (iii) To submit proposals and observations concerning existing or draft legislation.<sup>193</sup>
163. The Law Council supports the ratification of OPCAT, which would allow independent domestic and international monitoring of immigration detention facilities. This will likely lead to the improvement of conditions of detention in Australia to be in line with rule of law principles and human rights standards, ensuring that any cruel, inhuman or degrading treatment that currently occurs in Australia's detention facilities, for example in relation to the mental health of children, would be addressed.
164. The Law Council notes the AHRC's 2008 research on the implementation of the OPCAT, including into what model of NPM may be the most appropriate to Australia.<sup>194</sup> There were several recommendations arising from that research, including that 'Australia should adopt a "mixed" model for its NPM in which responsibility is shared between the States, the Territories and the Commonwealth, but there must be (i) a national coordinating NPM and (ii) a single coordinating agency within each State and Territory',<sup>195</sup> and, that 'the Australian Human Rights Commission should be designated as the national coordinating NPM'.<sup>196</sup>
165. In its 2012 submission to the Joint Standing Committee on Treaties regarding the ratification of the OPCAT, the Law Council considered, in line with the AHRC's 2008 recommendations, that the monitoring mechanisms in OPCAT should build upon and coordinate the existing monitoring mechanisms that operate in respect of certain

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<sup>191</sup> OPCAT, art 14.

<sup>192</sup> OPCAT, art 17.

<sup>193</sup> OPCAT, art 19.

<sup>194</sup> Professors Richard Harding and Neil Morgan, Centre for Law and Public Policy, The University of Western Australia, 'Implementing the Optional Protocol to the Convention against Torture : Options for Australia' (2008), available at: [http://www.hreoc.gov.au/human\\_rights/publications/opcat/index.html#1](http://www.hreoc.gov.au/human_rights/publications/opcat/index.html#1)

<sup>195</sup> Ibid 4: Recommendation 2.

<sup>196</sup> Ibid: Recommendation 3.

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detention facilities around the country in order to apply to all places of detention, including immigration detention, police cells and mental health facilities.<sup>197</sup>

### CROC-OP3

166. The Law Council has a history of advocating its support the signature and ratification of the CROC-OP3.<sup>198</sup> The Third Optional Protocol to the CROC was opened for signature on 19 December 2011 and entered into force on 14 April 2014, after its tenth ratification. As with all other conventions and their optional protocols, it does not create new rights, but provides a redress mechanism for violations of rights that are articulated in the CROC and its First and Second Optional Protocols.

167. The Third Optional Protocol provides for three separate procedures:

- an 'individual communication procedure', where individuals and groups of individuals may submit a complaint of an alleged violation of any of the rights contained in the CROC or the First or Second Optional Protocol;<sup>199</sup>
- an 'Inter-State complaints procedure', which allows the CROC Committee to consider communications from one State party alleging that another State party is not fulfilling its obligations under the CROC or its Optional Protocols;<sup>200</sup> and
- an inquiry procedure, which allows the CROC Committee, upon receipt of reliable information, to initiate inquiries into grave or systemic violations by a State party of any of the rights contained in the CROC or its Optional Protocols.<sup>201</sup>

168. The Law Council supports the ratification of CROC-OP3. It will allow for children whose rights have been violated in immigration detention to have recourse and remedy for this violation. This is particularly important due to the limited recourse that is currently available to children in immigration detention regarding, for example, the standards of detention facilities, the impacts of detention on a child's mental health and transfer to offshore processing. It is particularly important for unaccompanied minors, especially where the Minister of Immigration and Border Protection also serves as their guardian. Ratification of CROC-OP3 will complement and strengthen existing mechanisms that provide for remedies under international law when domestic measures fail and will also address the concerns of the CROC Committee that adopted its concluding observations on 15 June 2012 at its 1725th meeting, including that the Government accede to CROC-OP3.

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<sup>197</sup> See for example: Law Council of Australia, submission to Joint Standing Committee on Treaties, *Inquiry into the Optional to the Convention Against Torture*, 30 March 2012, 28, available at:

<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2628%20-%20Optional%20Protocol%20to%20the%20Convention%20against%20Torture.pdf>.

<sup>198</sup> See for example: Law Council of Australia, submission to Attorney General's Department, *Third Optional Protocol to Convention on the Rights of the Child*, 10 April 2012, available at:

<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2613%20-%20Third%20Optional%20Protocol%20to%20the%20Convention%20on%20the%20Rights%20of%20the%20Child.pdf>. The Law Council has also engaged in extensive correspondence with the Attorney-General's Department on this issue.

<sup>199</sup> CROC-OP3, art 5.

<sup>200</sup> Ibid art 12.

<sup>201</sup> Ibid art 13.

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169. The Law Council encourages the AHRC to consider recommending the ratification of the OPCAT and the CROC-OP3 as an additional and necessary form of independent scrutiny of Australia's immigration detention network.

## Conclusion

170. The Law Council regrets that ten years after AHRC's 2004 Report many hundreds of children remain detained in restrictive environments in Australia awaiting determination of their protection status. Hundreds more face detention in remote facilities in Nauru and PNG and must accept the prospect of resettlement in these countries if found to be owed protection. Thousands more children have been released into community arrangements, but in circumstances where their families are unable to work and where it remains unclear when and how their protection claims will be assessed and what form any protection might take.

171. These experiences of detention persist in the face of strong evidence that immigration detention is detrimental to mental and physical health and despite the genuine efforts of successful Commonwealth Governments to adjust policy settings and move children and families out of closed detention environments.

172. The statistics also reflect the scale of the challenge posed by irregular migration in the Asia-Pacific region and the many complex consequences of the laws and policies that have been implemented by successive Governments for the purpose of deterring people from seeking asylum in Australia by boat.

173. The Law Council does not suggest that there is an easy answer to these persistent and intractable policy challenges, however it queries whether – after decades of detaining children in the name of deterrence – the mandatory, long term detention of children (either in Australia or in regional processing countries) should continue to form part of Australia's border protection strategy.

174. The Law Council hopes that this Inquiry will shine the spotlight on the lived experiences of children in detention and the impacts that immigration detention can have on the health and wellbeing of families and individuals. The past documentation of these experiences, coupled with expert evidence from those providing medical and other services to children in detention, has strongly supported the urgent and critical need to re-examine the current legal and policy framework in this area.

175. The Law Council has used this submission to outline the relevant legal principles - domestic and international - that apply to the detention of children for immigration purposes in respect of the Inquiry's Terms of Reference. Many of these principles are reflected in the Law Council's Detention Statement and the AHRC Standards which the Law Council considers provide a useful framework for evaluating existing legislative and policy settings. In addition, the Law Council has made the following specific recommendations:

- That all children be removed from closed immigration detention facilities and that genuine efforts are made to temporarily house asylum-seekers in alternative detention facilities;
- That children not be transferred to third countries under regional processing arrangements;
- That the IGOC Act be amended to provide that the National Children's Commissioner assumes the role of guardian of unaccompanied minors;

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- That minimum standards for detention and alternatives to detention be codified in legislation, including maximum time limits on detention where immigration detention is deemed a necessary last resort;
  - That the following review mechanisms and alternatives to detention are given consideration:
    - Australia ratify and implement the OPCAT and the CROC-OP3;
    - extend the role of the National Children's Commissioner to allow for regular reviews into immigration detention; and
    - the IDC's five-step model to prevent and reduce the likelihood of unnecessary detention.

176. The Law Council trusts that this submission will be of assistance to the AHRC in formulation of its own recommendations.

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.