Mind the gap: the guardianship and detention of unaccompanied minors seeking asylum in Australia

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1. Introduction

According to the UNHCR, approximately one person is forcibly displaced every two seconds due to conflict, persecution or human rights violations.\(^1\) It is estimated there are over 25 million refugees worldwide with almost half of those being under 18 years old and 300,000 being unaccompanied minors.\(^2\) Without a parent or custodian, children travelling alone to seek asylum are particularly vulnerable.\(^3\) Most of these children will experience some level of loss, trauma or violence both in their country of origin and along the journey to their end destination.\(^4\) Moreover, upon reaching that destination, unaccompanied minors continue to face disproportionate difficulties in seeking asylum in systems that often fail to take into account their specific needs and vulnerabilities.\(^5\) One such destination country is Australia. This thesis will examine the rights of unaccompanied minors seeking asylum within this context.

Over the last two decades, there have been two distinct waves of irregular migration to Australia that have dominated the public discourse. The first wave occurred between 1999 and 2003, when 12,230 asylum seekers arrived via boat, including 285 unaccompanied minors.\(^6\) The second wave took place between 2008 and 2013 when there were 51,798 irregular maritime arrivals\(^7\) including, as of December 2012, 1,832 unaccompanied children.\(^8\) Following each

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4 Ibid para 47.
5 Ibid para 3.
7 Phillips (n 6).
8 Australian Government, ‘Report of the Expert Panel on Asylum Seekers’ (August 2012) 95 <http://apo.org.au/system/files/30608/apo-nid30608-47856.pdf> accessed on 20 December 2018. This figure does not take into account unaccompanied minors that arrived in 2013 onwards as any minor arriving after 19 July 2013 were liable to be transferred offshore to Nauru. The government does not provide a breakdown of the overall figures for 2013 to determine how many asylum seekers arriving that year were unaccompanied minors and how many of these minors remained in Australia or were
wave, Australia faced significant criticism over its one-size-fits-all asylum system that does not distinguish between adults and children, and fails to acknowledge the unique vulnerabilities of unaccompanied minors. The harshest criticism was reserved for the mandatory and prolonged detention of children, which led to two national inquiries in 2004 and 2014, following each migration wave respectively.

It is with this history in mind that this thesis seeks to analyse the protection of unaccompanied minors in Australia. The main research question addressed is: does Australia comply with its international obligations regarding the rights of unaccompanied minors who arrive irregularly to seek asylum, in respect to its laws and practice of guardianship and detention? To determine the main research question, the thesis will be divided into three substantive chapters, each addressing a subquestion as follows:

- What are the rights and protections afforded to unaccompanied minors under international law in relation to guardianship and detention?
- Does Australia comply with its international obligations regarding the guardianship of unaccompanied minors within its territory?
- Does Australia comply with its international obligations regarding the detention of unaccompanied minors on its territory?

The relevant treaties analysed are the Convention on the Rights of the Child; the Convention and Protocol Relating to the Status of Refugees; the International Covenant on Civil and Political Rights; and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. These treaties will be interpreted using authoritative and subsidiary sources including general comments and guidelines published by the Committee on the Rights of the Child (CRC Committee) and the UNHCR, as well as any relevant cases determined by the Human Rights Committee (HR Committee). In addition, Australia’s domestic legislation and jurisprudence will be examined followed by an analysis of its application to determine whether it complies with the relevant international norms.

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Notably, the Australian authorities have not processed any new unaccompanied minors travelling irregularly by boat since July 2014. This is largely due to the policy to turn back boats intercepted at sea as well as the policy to transfer all asylum seekers arriving from July 2013 onwards to offshore regional processing countries. Nevertheless, it is still relevant to determine whether Australia’s current legal framework affords unaccompanied minors the protection that is required by international law. Firstly, there are currently about 2865 children living in the community, either on a residency determination or on a bridging visa, as they await a decision on their asylum application. It is not clear how many unaccompanied minors fall within this cohort as the government does not provide a breakdown of these statistics. However, it is necessary to ensure that any unaccompanied children would be provided with an appropriate and legitimate guardian. Additionally, almost all unaccompanied minors who arrived irregularly between 2008 and 2013 would have been detained for some period of time upon their arrival and are liable to be detained again pending a visa being granted, making it essential to determine whether such detention is legal. Finally, it is important to ascertain whether the rights of unaccompanied minors who may arrive irregularly today, tomorrow or in the future are protected under the current domestic legal framework or whether there are gaps in the system that must be closed.

Australia’s immigration legislation is extremely complex, particularly in relation to those who arrive irregularly by boat. In effect, there are two systems in place: one dealing with asylum seekers on Australian territory and directly subject to its jurisdiction, while the other concerns those asylum seekers who arrived after 19 July 2013 and were transferred offshore to regional processing countries like Nauru or Papua New Guinea. An analysis of Australia’s ongoing

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11 Phillips (n 6); Commonwealth of Australia, Senate, ‘Legal and Constitutional Affairs Legislation Committee, Estimates’ (21 May 2018) 79-80


14 ABC News, ‘Fact Check: Has the number of children in detention dropped from 2,000 to about 75 under the Coalition?’ (Australia, 3 March 2016) <www.abc.net.au/news/2016-02-25/fact-check-children-in-detention/7149720> accessed 23 December 2018; Migration Act 1958 (Cth) s 197AD.
responsibility towards unaccompanied minors it transfers offshore falls outside the scope of this study. The thesis will, therefore, only deal with those unaccompanied minors who are both accommodated on Australian territory and whose asylum application is processed under Australian legislation. For this purpose, the definition of Australian territory includes the mainland territory, Norfolk Island, the Territory of Cocos (Keeling Islands) and the Territory of Christmas Island.\textsuperscript{15}

\textsuperscript{15} Migration Act (n 14) s 7; Commonwealth of Australia Constitution Act 1900 (Cth) s 122.
2. **International Law**

What are the rights and protections afforded to unaccompanied minors under international law in relation to guardianship and detention? The relevant international instruments include the Convention and Protocol Relating to the Status of Refugees (*Refugee Convention*); the Convention on the Rights of the Child (*CRC*); the International Covenant on Civil and Political Rights (*ICCPR*); the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (*CAT*); and the Universal Declaration of the Human Rights (*UDHR*). Australia is a party to all of these Conventions. In addition, Australia has declared its acceptance of the individual complaints procedures under the CAT and ICCPR but not the CRC. Unaccompanied minors cannot therefore bring a complaint before the CRC Committee against Australia in relation to their rights under the CRC.

The treaties are interpreted using a number of subsidiary sources. These include guidelines published by the UNHCR as well as general comments and decisions on individual complaints issued by treaty monitoring bodies such as the HR Committee and the CRC Committee. Such sources are often referred to as soft law instruments and are not binding on State parties. Nonetheless, they wield considerable influence in the development of international law by providing evidence of customary law and giving guidance on the application of treaty provisions. Most treaties are drafted in general terms and in order to properly apply the provisions, further guidance is required. In this way, the general comments, guidelines and

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20 Ibid.

judicial decisions provide an authoritative interpretation of the law by shaping the expectations of States bound by the relevant underlying treaty obligation. In addition, these sources may represent States’ agreed understanding of the terms of the treaty. Thus, while these instruments themselves may not be legally binding, disregarding or acting contrary to their authoritative interpretation may lead to a breach of the relevant treaty, which is binding.

2.1. Definition of unaccompanied minors

The Refugee Convention applies to all persons and does not distinguish between adults or unaccompanied minors seeking asylum, nor provide any definitions as to the same. Similarly, the CRC does not define unaccompanied minors, but does state that a child constitutes a person under the age of 18 years unless majority is attained earlier under the laws applicable to the child. This is reflected in the UNHCR guidelines and the CRC Committee in General Comment No. 6 which define an unaccompanied minor as children under the age of 18 years separated from both their parents and other relatives, and who are not in the care of any adult who, by law or custom, are responsible for them.

Both the CRC Committee and the UNHCR differentiate between unaccompanied minors and separated minors on the basis that not all children separated from their parents are found to be unaccompanied. Separated minors are children separated from their parents or primary caregivers but not necessarily from other relatives. Despite this differentiation, the UNHCR notes that separated minors face similar risks as unaccompanied minors. Both categories of minors underscore a lack of parental or custodial care and are therefore equally entitled to special

22 Ibid 175.
24 Ibid.
25 CRC (n 16) art 1.
28 2005 CRC (n 3) para 8; 2009 Guidelines (n 26) para 6.
care and protection. For this reason, the UNHCR uses the term ‘unaccompanied and separated children’. For the purpose of this thesis, the term ‘unaccompanied minor’ also refers to separated minors.

2.2. Guardianship of unaccompanied minors

The Refugee Convention is the key document detailing the rights of asylum seekers and the legal obligations on States to protect them. In the 1951 Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, the Conference unanimously adopted the recommendation that governments should take necessary measures for the protection of refugee children, in particular unaccompanied minors, with ‘special references to guardianship’. Despite this recommendation, the Refugee Convention itself was adopted without any mention of unaccompanied minors seeking asylum and their guardianship rights.

With near universal ratification, the CRC is a far more useful source detailing the civil, political, economic, social and cultural rights of children and the corresponding obligations on States. While the CRC does not specifically require unaccompanied minors to be allocated an appropriate guardian, this obligation can be implied from a number of its articles. Article 22(1) stipulates that child asylum seekers or refugees should receive appropriate protection and humanitarian assistance to ensure their full enjoyment of the rights set out in the convention and other international instruments. Article 20(1) states that where a child is temporarily or permanently deprived of their family, they are entitled to special care and protection provided by the State. Finally, in all actions concerning children, the best interests of the child shall be a primary consideration. These obligations on States to provide appropriate protection and special care in line with the best interests of the child include the requirement to appoint an effective guardian. Although children are rights-bearers of their own accord, they nonetheless rely on adults for protection and access to these rights, and an effective guardian is therefore fundamental.

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30 Ibid para 5.
The CRC also includes several other articles that allude to the role of a parent or guardian, and can be used to further interpret the obligations of States in relation to unaccompanied minors and guardianship. Article 3(2) requires States to ensure protection and care as is necessary for a child’s well-being, taking into account the legal responsibilities of their legal guardians and, to this end, all appropriate legislative and administrative measures. Article 14(2) stipulates that States must respect the rights and duties of a child’s legal guardian to provide direction to the child in exercise of their rights. Finally, as per Article 18(1), legal guardians have the primary responsibility for the upbringing and development of the child, with the best interests of the child being their basic concern.

Despite the aforementioned articles alluding to the necessity of a legal guardian for unaccompanied minors, the CRC provides no guidance as to who that guardian should be nor a detailed explanation as to their role. To that end, the CRC Committee and the UNHCR have released several general comments and guidelines respectively on this issue. Although these explanatory documents do not create legally binding obligations on States, they do provide an authoritative interpretation of States’ treaty obligations. According to the UNHCR 1997 Guidelines, and reiterated in the CRC Committee’s General Comment No. 6, a guardian must be appointed immediately as soon as a child is identified as being unaccompanied. Importantly, any individual or organisation whose interests could potentially conflict with those of the child should not be appointed as their guardian. The guardianship arrangements should be maintained until the child in question reaches the age of majority or has permanently left the jurisdiction of the State. During this time, the guardian should be informed of all actions taken in respect to the child and be present in all decision-making processes including immigration interviews and appeal hearings. The guardian should also have relevant expertise in childcare to ensure the best interests of the unaccompanied minor are protected and that their legal, educational and health needs are appropriately met.

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34 1997 Guidelines (n 26); 2005 CRC (n 3); 2009 Guidelines (n 26).
35 Guzmann (n 21) 211.
36 1997 Guidelines (n 26) para 5.7; 2005 CRC (n 3) para 21.
37 2005 CRC (n 3) para 33.
38 Ibid.
39 Ibid.
40 Ibid.
2.3. Immigration detention of unaccompanied minors

While immigration detention is not expressly prohibited under international law, there are a number of international instruments that either directly or indirectly control its use including the Refugee Convention, CRC, CAT, ICCPR and UDHR.

Incorporating the inherent right to liberty enshrined in Article 9 ICCPR and Article 3 UDHR, the CRC stipulates at Article 37(b) that children should not be deprived unlawfully or arbitrarily of their liberty. Moreover, even where detention is in conformity with the law, detention should only occur on an exceptional basis and, according to the *ultima ratio* principle, only as a measure of last resort and for the shortest appropriate time.\(^{41}\) The CRC Committee has yet to publish a decision with an authoritative interpretation of Article 37(b). However, there is extensive jurisprudence from the HR Committee on Article 9 ICCPR, which has found that detention must be reasonable, necessary and proportionate in each individual case, and continuously reviewed.\(^{42}\)

In General Comment No. 35, the CRC Committee stipulated that asylum seekers can be legitimately detained for a short period to document their entry, record asylum claims and determine their identity.\(^{43}\) Detention extended beyond this short period will be deemed arbitrary unless justified in each individual case by specific reasons of danger of absconding, criminal behaviour or on national security grounds.\(^{44}\) Additionally, according to the UNHCR Detention Guidelines, detention for the sole purpose of finalising ongoing asylum proceedings is unlawful.\(^{45}\)

While the right to liberty is not an absolute right, any deprivation of liberty must not be arbitrary and must respect the rule of law.\(^{46}\) The HR Committee has determined that arbitrariness is not merely defined as being against the law but also includes elements of inappropriateness, injustice and lack of predictability.\(^{47}\) States must demonstrate that in each particular circumstance of

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\(^{42}\) Penovic (n 9) 62-64.

\(^{43}\) CRC Committee ‘General Comment No. 35 Article 9 (Liberty and security of person)’ (2014) CCPR/C/GC/35 para 18 (2014 CRC).

\(^{44}\) Ibid.


\(^{46}\) Ibid para 12.

\(^{47}\) A v Australia, HR Committee (3 April 1997) CCPR/C/59/D/560/1993, 5 (A v Australia).
detention there were no less invasive means available.\textsuperscript{48} In addition, Article 31 of the Refugee Convention prohibits States from penalising asylum seekers because of their illegal entry or presence in a State’s territory. States are prevented from restricting the movement of asylum seekers unless necessary, and such restrictions can only apply until their migration status is regularised.\textsuperscript{49} Article 26 of the Refugee Convention stipulates that refugees lawfully in a State’s territory have the right to move freely within that territory and, according to the UNHCR, asylum seekers are to be considered lawful for the purpose of benefiting from this provision.\textsuperscript{50}

However, while immigration detention is not arbitrary \textit{per se}, there is growing international consensus that the detention of children seeking asylum can never be justified on the basis of their migration status or lack thereof.\textsuperscript{51} Furthermore, immigration detention can never be in the child’s best interests.\textsuperscript{52} The 2015 Special Rapporteur on torture stated that, unlike juvenile criminal processes, the \textit{ultima ratio} principle is not applicable to immigration detention as the consequence of irregular migration of children cannot be similar to that of a crime.\textsuperscript{53} In addition, such deprivation of liberty is not essential for immigration proceedings nor for implementing deportation orders.\textsuperscript{54} This line of argument was confirmed in the 2017 Joint General Comment of the CRC Committee and the Committee on the Protection of the Rights of all Migrant Workers and Members of their Families, which stated that the immigration detention of unaccompanied minors breaches the right to liberty and should never be used, even as a measure of last resort.\textsuperscript{55}

However, prior to the adoption of the 2017 Joint General Comment, the CRC Committee held

\begin{footnotesize}
\textsuperscript{49} Human Rights Council, ‘Special Rapporteur for torture and other cruel, inhuman or degrading treatment or punishment’ (March 2015) A/HRC/28/68 para 80 (2015 Special Rapporteur).
\textsuperscript{50} UNHCR Detention Guidelines (n 45) para 13.
\textsuperscript{51} Ibid para 54; Committee on the Protection of the Rights of all Migrant Workers and Members of their Families & CRC Committee, ‘Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of all Migrant Workers and Members of their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return’ (16 November 2017) CMW/C/GC/4-CRC/C/GC/23 3-4 (2017 Joint General Comment).
\textsuperscript{52} 2005 CRC (n 3) para 61; Human Rights Council, ‘Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ (February 2018) A/HRC/37/50 (2018 Special Rapporteur) para 28; 2015 Special Rapporteur (n 49) para 62.
\textsuperscript{53} 2015 Special Rapporteur (n 49) para 80.
\textsuperscript{54} Ibid.
\textsuperscript{55} 2017 Joint General Comment (n 51) 3-4.
\end{footnotesize}
that where detention of minors does occur, it must be conducted in accordance with Article 37 CRC.\textsuperscript{56} That is, it must be in conformity with the law, as a measure of last resort and for the shortest time appropriate. Children who are detained must be treated with humanity and respect in a manner taking into account their needs or age,\textsuperscript{57} and must have the ability to challenge the legality of their detention.\textsuperscript{58} The HR Committee found that the inability to properly challenge detention before a competent and independent body may make detention arbitrary.\textsuperscript{59} Finally, no child should be subjected to torture or cruel, inhuman or degrading treatment or punishment.\textsuperscript{60}

The prohibition on torture and ill-treatment is outlined in the CAT, Article 7 ICCPR and Article 5 UDHR. The 2018 Special Rapporteur on torture stated that intentionally inflicting severe pain or suffering on persons for discriminatory reasons, including migration status, would invariably amount to torture.\textsuperscript{61} The general rule is that the longer arbitrary detention in sub-standard conditions continues, the more likely it is that the prohibition of ill-treatment will be breached.\textsuperscript{62} Moreover, this prohibition could be breached extremely quickly for unaccompanied minors as the threshold at which the deprivation of liberty constitutes cruel, inhuman or degrading treatment is much lower for children.\textsuperscript{63}

The CRC also contains a number of additional provisions that do not specifically deal with deprivation of liberty, but are still relevant to the detainment of unaccompanied minors. Article 2(1) obliges States to respect and ensure the rights under the CRC to all children under their jurisdiction without discrimination of any kind. Unaccompanied minors deprived of their family environment are to receive special protection, care and assistance.\textsuperscript{64} Under Article 19(1), States must protect children from all forms of physical or mental injury, or negligent treatment, while Article 27 compels States to provide a standard of living adequate for a child’s development.\textsuperscript{65} Once again, Article 3(1) requires the best interests of the child to be a primary consideration.

\textsuperscript{56} 2005 CRC (n 3) para 61-63.
\textsuperscript{57} CRC (n 16) art 37(c).
\textsuperscript{58} Ibid art 37(d).
\textsuperscript{59} \textit{F.K.A.G} (n 48) para 9.4.
\textsuperscript{60} CRC (n 16) 37(a).
\textsuperscript{61} 2018 Special Rapporteur (n 52) para 14.
\textsuperscript{62} Ibid para 28.
\textsuperscript{64} CRC (n 16) art 20(1) & 22(1).
\textsuperscript{65} \textit{F.K.A.G} (n 48) para 3.14.
3. Guardianship of unaccompanied minors in Australia

3.1. Introduction

Children travelling alone across borders to seek asylum are a particularly vulnerable cohort of migrants. Moreover, upon reaching a destination country such as Australia, these minors face additional hurdles to seek protection in domestic legal systems that treat them as migrants first rather than children with unique vulnerabilities. This chapter will focus on whether Australia complies with its international obligations regarding the guardianship of unaccompanied minors who arrive irregularly on its territory to seek asylum. The chapter will first discuss the relevant domestic law and jurisprudence followed by an analysis of its application and the implications under international law.

3.2. Domestic law and jurisprudence

In Australia, the Immigration (Guardianship of Children) Act\(^\text{68}\) (IGOC Act) administered by the Department of Home Affairs grants legal guardianship of unaccompanied minors to the Minister for Home Affairs (the Minister).\(^\text{69}\) The Minister is accorded the same rights, powers and obligations as a parent or guardian would ordinarily have. Section 6 of the IGOC Act states:

\begin{enumerate}
\item 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.
\end{enumerate}

A non-citizen child is defined as being under 18 years of age, who has entered Australia as a

\begin{itemize}
\item[66] 2005 CRC (n 3) para 4.
\item[67] Ibid para 3; Crock, ‘Relative rights’ (n 33) 11.
\item[68] 1946 (Cth) s6.
\end{itemize}
non-citizen intending to become a permanent resident, and who is without parents or without being in the charge of a relative over the age of 21 years. The term Australia includes the mainland territory, Norfolk Island, the Territory of Cocos (Keeling Islands) and the Territory of Christmas Island. Unaccompanied minors who arrive irregularly in Australia to seek asylum have the requisite intention to become a permanent resident of Australia and would, therefore, become a ward of the Minister. However, if an unaccompanied minor is separated from their parents but is with other relatives over the age of 21 years who intend to care for the minor, then the minor is not subject to the guardianship of the Minister. Notably, the legal framework dealing with unaccompanied non-citizen children differs from the regime covering Australia children, where the state governments are responsible for child protection services rather than the Australian government.

Section 5 of the IGOC Act allows the Minister to delegate any or all of their powers to an officer of the Commonwealth or of any State or Territory. Such a delegation is revocable at will and cannot prevent the exercise of any power or function of the Minister. In addition to the delegation of powers, the Minister can also place an unaccompanied minor into the custody of a suitable person. Finally, the IGOC Act does not affect the operation of the Migration Act; the performance or exercise of any function, duty or power under the Migration Act; or impose any obligation on the Minister to exercise any power conferred by the Migration Act.

Although it designates the Minister as guardian, the IGOC Act does not specify what the role entails. To some extent, this lack of specificity is remedied through domestic jurisprudence, which found that the relationship between a guardian and ward constitutes a fiduciary relationship under common law. Where such a relationship exists, the fiduciary, in this case the guardian, must act in the best interests of the person to whom the duty is owed. The guardian

70 IGOC Act (n 68) s 4AAA.
71 Ibid s 4.
72 Ibid s 4AAA(2).
74 IGOC Act (n 68) s 5(3).
75 Ibid s 7.
77 IGOC Act (n 68) s 8(2).
stands in the place of a parent and has the power to make decisions regarding the care and welfare of the child as well as a duty to protect them from harm. These fiduciary obligations are implicit in the IGOC Act, which specifically states that the Minister is granted the ‘same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have’. It is also consistent with Australia’s responsibilities under the CRC to provide appropriate protection and special care to unaccompanied minors seeking asylum. Overall, and similar to Article 3(1) and Article 18(1) of the CRC, the overarching principle is the guardian’s duty to act in the best interests of the child, as a fiduciary obligation is one of ‘undivided loyalty’.

In practice, the guardianship of unaccompanied minors living in the community is delegated to officers employed by the Department of Home Affairs or to state or territory welfare agencies, although the Minister always maintains legal guardianship. The delegated officer must be employed at an Executive Level 2, which is considered a high-level position. For unaccompanied minors who are in detention, guardianship is normally delegated to the detention centre managers who are also employed at an Executive Level 2. According to the government, delegation is made to executive level officers in recognition of the important role a guardian plays in the care and welfare of unaccompanied minors, such as in decisions about education and medical treatment. However, despite their important role, these delegated guardians are not required to have any specific qualifications or experience relating to children.

Once the guardianship is delegated, the relevant officer, including detention centre managers, will place an unaccompanied minor in the custody of a suitable person or agency under s 7 of the IGOC Act. This person or organisation is then known as the custodian. Custodians provide

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80 Ibid.
81 IGOC Act (n 68) s6.
82 CRC (n 16) art 22(1) & 20(1); Mary Crock & Mary Kenny, ‘Rethinking the Guardianship of Refugee Children after the Malaysian Solution’ (2012) 34 SLR 437, 449 (Rethinking).
83 Beach Petroleum NL v Abbot Tout Russell Kennedy & Ors [1999] NSWCA 408 para 201 (Beach Petroleum).
85 Forgotten Children (n 10) 166.
86 Ibid.
87 Ibid.
88 Ibid 167.
accommodation, day-to-day care, and make decisions for routine or everyday matters.\textsuperscript{90} Decisions on matters that are non-routine can only be taken after consultation with the delegated officer and upon approval from the Department of Home Affairs.\textsuperscript{91} Such non-routine decisions range from obtaining medical treatment to determining whether an unaccompanied child can visit friends or other family members.\textsuperscript{92} In detention, a private organisation called MAXimus Solutions is the custodian responsible for providing care and support to unaccompanied minors.\textsuperscript{93} Employees of MAXimus Solutions must hold, as a minimum, a Certificate IV in Social, Community or Child Welfare.\textsuperscript{94} For unaccompanied minors who are residing in the community and waiting a decision on their asylum application, custody is normally given to an organisation called Life Without Barriers, operator of the National Immigration Support Service programme. Under this service, unaccompanied minors are placed in supported shared accommodation where the organisation provides daily care including supervision, preparing meals, and taking children to school.\textsuperscript{95}

3.3. Application of guardianship laws

When the IGOC Act is considered on its own and read in line with the common law notions of a fiduciary relationship, the Minister’s appointment as guardian of unaccompanied children does not necessarily offend international law. Indeed, for children entering Australia through an organised programme with a legitimate visa, the application of the Act is not problematic. In this scenario, the main purpose of the Minister as guardian is simply to coordinate services for unaccompanied minors entering with a settled migration status.\textsuperscript{96} It is when unaccompanied minors enter Australia irregularly to seek asylum that complex issues of conflict of interest and breach of duties arise. In these circumstances, the Minister is confronted with two very different roles. First, the role as the Minister for Home Affairs dealing with immigration and all the powers, obligations and politics that this role involves. And, second, the role as the guardian of

\textcolor{red}{\textsuperscript{90} The Senate (n 84) para 1.18.}
\textcolor{red}{\textsuperscript{91} Ibid.}
\textcolor{red}{\textsuperscript{92} Hosseini v Life Without Barriers [2017] SEAT 146, para 33 (Hosseini).}
\textcolor{red}{\textsuperscript{93} Forgotten Children (n 10) 166.}
\textcolor{red}{\textsuperscript{94} Ibid 303.}
\textcolor{red}{\textsuperscript{96} Taylor (n 79) 186.}
unaccompanied minors with all the powers, obligations and ‘undivided loyalty’\(^{97}\) that this entails. A conflict of interest arises between these two roles, as the Minister becomes both guardian, prosecutor, judge and jailer.\(^{98}\) As will be demonstrated, this conflict of interest is not cured through a delegation of guardianship duties as the Minister continues to retain legal control over all unaccompanied minors.

The provisions of the Migration Act under which asylum seekers are processed do not differentiate between adults or minors nor provide any concession for unaccompanied minors.\(^{99}\) In this way, the laws reflect the Refugee Convention which obliges States to give asylum to refugees but remains silent on the specific vulnerabilities faced by unaccompanied minors.\(^{100}\)

The Migration Act also gives the Minister wide-ranging and un-reviewable discretionary powers including the ability to detain, to determine whether or not asylum applications can be made, to refuse visas on character or public interest grounds, and to transfer asylum seekers to third countries for processing.\(^{101}\) These powers are applied indiscriminately to all asylum seekers including unaccompanied minors and require the Minister to take decisions in direct conflict with their role as a guardian. In this context, the lack of statutory guidance as to the content of a guardian’s role under the IGOC Act becomes problematic.

A number of cases concerning unaccompanied minors have been brought before Australian courts in an attempt to give substance to the Minister’s role as their guardian and bring it in line with Australia’s international obligations. In \(X\) \(Case\), the Federal Court of Australia held that the well-established legal concept of guardianship included the full range of rights, powers and obligations exercised by an adult in regards to a child.\(^{102}\) The courts have found that the basic needs of an unaccompanied minor must be met including food, housing, health and education, and the provision of legal advice and assistance where appropriate.\(^{103}\) These needs have been recognised as ‘a fundamental human right of children including in international instruments to which

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\(^{97}\) \textit{Beach Petroleum} (n 83) para 201.


\(^{99}\) Migration Act (n 14) s 35A-36 & 46A.

\(^{100}\) Evenhuis (n 32) 543.

\(^{101}\) Migration Act (n 14), s 189, s 46A, s 501 & s 198AD; Law Council of Australia, ‘Submissions, Guardian for Unaccompanied Children Bill 2014’ (5 November 2014) para 13.

\(^{102}\) [1999] FCA 995, para 33 (\(X\) \(Case\)).

\(^{103}\) Ibid para 34; \textit{Odhiambo v Minister for Immigration & Multicultural Affairs} [2002] FCAFC 194, para 88 (\textit{Odhiambo}).
Australia is a party’.104 In Odhiambo, it was acknowledged that the wording of the IGOC Act could lead to a conflict of interest where the Minister was the guardian of unaccompanied minors.105 Nonetheless, it went on to disregard the argument that the Minister’s powers under the Migration Act should be limited in light of their corresponding guardianship role or to ensure compliance with Australia’s international obligations under the CRC.106 This was confirmed by the High Court of Australia (High Court), which held that the general powers and obligations of the Minister under the IGOC Act are subjected to the more specific powers granted under the Migration Act.107 In other words, where a conflict arises between guardianship responsibilities and migration policies, priority is to be given to the Minister’s role under the Migration Act. Furthermore, unless directly incorporated into the legislation, international treaties such as the CRC are of only persuasive value and are not binding.108 It is therefore impossible for the Minister to be a guardian acting with the best interest of unaccompanied minors as a primary concern when their role under the Migration Act takes precedent.109 This is in breach of Australia’s obligations under the CRC, including the requirement to provide child asylum seekers with appropriate protection and special care, and to ensure the best interests of the child are a primary consideration.110

The Minister’s conflict of interest and Australia’s breach of international law has been widely condemned, including by the CRC Committee in its last Concluding Observations where it recommended the establishment of an independent guardianship institution.111 The Australian government, however, has not accepted this recommendation. Rather, in response to the criticism, the government oscillates between two separate positions. First, it states that the conflict is merely perceived, as the day-to-day guardianship role is delegated onwards to officials, state departments or welfare organisations.112 In the alternative, it implicitly acknowledges the conflict but states that transferring the guardianship role to a different department will have no

104 X Case (n 102) para 34.
105 Odhiambo (n 103) para 92.
106 Ibid para 65.
107 WACB (n 76) para 42 & 106.
109 CRC (n 16) art 3 & 18(1).
110 Ibid art 22(1), 20(1) & 3.
112 Forgotten Children (n 10) 167.
practical benefits. These arguments are implausible and do not stand up to scrutiny. Australia is in breach of its international obligations regarding guardianship once unaccompanied minors are within its jurisdiction until the end of the asylum process. To demonstrate the breaches that occur, examples of different aspects of the asylum procedure will be analysed.

**Initial screening interview**

Australia’s obligations under international law are engaged from the moment unaccompanied minors are within its jurisdiction or on its territory. This is most likely to occur when the boats on which unaccompanied minors are travelling either make it to Australian territory or are intercepted at sea. According to the UNHCR 1997 Guidelines, States should establish special identification procedures for unaccompanied minors. As soon as a minor is identified as unaccompanied, Australia is obliged to provide special care and protection, which includes appointing an appropriate guardian. The guardian should have expertise in childcare to advocate on behalf of the minor and ensure their best interests are protected. In reality, however, unaccompanied minors are not provided any guardian, let alone an appropriate one, until sometime after the initial interview has taken place.

Unaccompanied minors are first interviewed by immigration officers in what is referred to as a screening interview. The interview is used to determine identity, nationality, reasons for travelling to Australia, and whether Australia’s protection obligations should be engaged. During the screening interview, unaccompanied minors are only provided an interpreter and do not have access to a guardian, legal advice or legal representation. The interviews are recorded and the information can be used to reject asylum on the basis of an adverse credibility finding if contradictory information is subsequently provided in the asylum application. In addition, the

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113 CRC Committee, ‘Summary record of the 1708th meeting, Consideration of the reports of State parties continued’ (11 June 2012) CRC/C/SR.1708 para 23.
114 1997 Guidelines (n 26) para 5.1.
115 CRC (n 16) art 18(1).
116 1997 Guidelines (n 26) para 5.7.
118 Ibid 124.
119 Ibid.
government does not provide copies of the tapes and transcripts unless a specific request is filed.\textsuperscript{121} The use of the initial interview is of particular concern as minors may give incorrect or incomplete information that could then be used against them at a later stage of the process. There are many reasons why incorrect information is given including shame, avoidance, dissociation or cultural pressures.\textsuperscript{122} Without a guardian explaining each step of the process and its purpose, minors may give incorrect information, not understanding the serious consequences.

In addition, an unaccompanied minor who had a difficult and possibly traumatic journey to Australia may not have the capacity to articulate information in a way that engages the State’s protection obligations. By way of example, an unaccompanied 13-year-old and her 11-year-old brother from Afghanistan were screened out of Australia’s asylum process in their initial interview after being unable to properly articulate a need for asylum.\textsuperscript{123} The minors were then detained for almost eight months in an area reserved for those to whom Australia did not owe protection, until they were eventually discovered by a refugee advocate who had them transferred into the asylum process.\textsuperscript{124} Had these minors been allocated an independent guardian or advisor as soon as their unaccompanied status had been determined, as required under international law, they may not have fallen through the gaps in the system.

Although the aforementioned example took place in 2001, Australia has yet to improve its policy regarding screening interviews and bring it in line with its obligations under international law. Indeed, if anything, the policy has been amended in a manner that is even more adverse to the interests of unaccompanied minors. Currently, the occupants of any irregular boats that are intercepted at sea are subjected to the turn-back policy.\textsuperscript{125} While an analysis of the policy’s legality goes beyond the scope of this paper, it is worth noting that Australia has an obligation to determine if any unaccompanied minors are on those boats.\textsuperscript{126} It must then provide them with special care and protection including the immediate appointment of an appropriate guardian.\textsuperscript{127}

\textsuperscript{121} Ibid.
\textsuperscript{123} Crock, ‘Travelling Solo’ (n 117) 119.
\textsuperscript{124} Ibid.
\textsuperscript{126} 1997 Guidelines (n 26) para 5.1.
\textsuperscript{127} CRC (n 16) art 20(1), 22(1).
Due to the government’s secrecy around push-back operations, obtaining verifiable information is difficult, however, it has been reported that officers involved in these operations ask only four questions to determine whether Australia’s protection obligations are engaged. It is also known that at least one of the boats returned included children although it is not clear if they were unaccompanied. In any event, a process involving four questions is unlikely to constitute an adequate identification procedure for unaccompanied minors seeking asylum as recommended by the UNHCR 1997 Guidelines. Furthermore, by turning boats back with the unaccompanied minors aboard, Australia would be in breach of its international obligations to provide care and protection.

Applying for asylum

According to the UNHCR Guidelines, the special care and protection unaccompanied minors are entitled to requires States to give priority to their asylum applications. As outlined in the previous chapter, soft law such as the UNHCR guidelines, provide authoritative interpretations of the relevant treaty provisions and should, therefore, be followed by States to prevent a breach of their obligations. However, under s 46A of the Migration Act, those who arrive irregularly by boat cannot apply for asylum unless the Minister considers it to be in the public interest and provides written consent for them to do so. The Minister’s consideration of the public interest is in direct conflict with the role as a guardian who must have the best interests of the child as a primary and basic consideration. This conflict is particularly pertinent given that the Minister is known to refuse consent under s 46A of the Migration Act. Until around December 2016, approximately 30,000 asylum seekers, including unaccompanied minors, who arrived between August 2012 and January 2014 were prevented from applying for asylum for almost four years.

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130 1997 Guidelines (n 26) para 5.1.
131 CRC (n 16) art 20(1) & 22(1).
133 Boyle (n 23) 906.
134 Law Council of Australia (n 101) para 12.
135 Reliefweb, Report from Government of Australia, ‘Reintroducing TPVs to resolve Labor’s asylum legacy caseload, Cambodia’ (26 September 2014) <https://reliefweb.int/report/australia/reintroducing-
As guardian, the Minister should have been advocating on behalf of these unaccompanied minors to ensure their application for asylum was considered in the shortest amount of time possible. Instead, however, the Minister used the powers under the Migration Act to personally preclude them from accessing the asylum procedures.

Once the Minister lifts the bar under s 46A of the Migration Act, asylum applications can be made. At this point, unaccompanied minors are provided a registered migration agent who will prepare the asylum application as well as a first instance review application to the Administrative Appeals Tribunal if a negative decision is received.136 Migration agents, who do not have to be lawyers, are qualified to give immigration assistance including applying for visas but are not the delegated guardians of unaccompanied minors.137 The Minister alleges that the allocation of this independent assistance is enough to remove any potential conflict between the dual role of guardian and decision-maker of the asylum application.138 However, according to the CRC Committee, a guardian should be actively involved throughout the asylum process and present during all interviews and appeals.139 In addition, an independent lawyer should be appointed to represent the minor through the entire process.140

In practice, unaccompanied minors are required to attend asylum interviews and subsequent review hearings alone without anyone advocating on their behalf.141 Furthermore, the government provides no assistance beyond the review in the Administrative Appeals Tribunal.142 This is despite the fact that the Minister has an interest in resisting challenges to its migration decisions, in direct opposition to the interests of unaccompanied minors to have unfavourable decisions set aside.143 In effect, unaccompanied minors are left to navigate Australia’s extremely

138 Forgotten Children (n 10) 167.
139 2005 CRC (n 3) para 33.
140 1997 Guidelines (n 26) para 8.3; 2009 Guidelines (n 26) para 69.
141 Evenhuis (n 32) 556.
142 Evenhuis (n 32) 557; Government of Australia (n 136).
143 Odhiambo (n 103) para 91.
complex migration system and court appeals procedures alone, or to somehow obtain pro bono representation. Notably, the Minister has previously attempted to stop unaccompanied minors from accessing the judiciary in respect to their asylum claims by arguing that minors do not have capacity and only a guardian can commence such proceedings.\textsuperscript{144} While this argument was firmly rejected by the court, it nonetheless demonstrates the ways in which the Minister’s conflict of interest could be exploited.\textsuperscript{145}

Role of the guardian in immigration detention

While the legality of detention will be discussed at length in the next chapter, it is relevant to note that a conflict of interest arises between the Minister’s guardianship role and corresponding power to detain unaccompanied minors.\textsuperscript{146} International organisations and human rights groups have unanimously found that the detention of children is never in their best interests.\textsuperscript{147} A guardian advocating on behalf of the child should seek to have an unaccompanied minor placed in community accommodation rather than mandating their detention.\textsuperscript{148} In this way, the Minister’s dual role as both guardian and jailor is irreconcilable and in breach of the CRC.\textsuperscript{149}

The Minister has a discretionary power to release asylum seekers from detention and to revoke this release on public interest grounds.\textsuperscript{150} In practice, the use of these powers, or lack thereof, contradicts the Minister’s responsibility as guardian. In 2014, two unaccompanied minors were presented with a letter from the Minister, their guardian, before being immediately removed from community accommodation back into detention. The letter stated that the Minister ‘has made the decision that your residence determination is no longer in the public interest’.\textsuperscript{151} This particular example raises a number of concerning issues. First, as stated above, the public interest determination is in direct conflict with the Minister’s requirement as guardian to have the best interests of the child be a primary consideration. Second, it was not explained why the minors residing in the community was no longer in the public interest and they were not provided with

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\textsuperscript{144} \textit{WACA v Minister for Immigration & Multicultural Affairs} [2002] FCAFC 163, para 8.  \\
\textsuperscript{145} Ibid.  \\
\textsuperscript{146} \textit{Odhiambo} (n 103) para 90.  \\
\textsuperscript{147} Forgotten Children (n 10).  \\
\textsuperscript{148} Migration Act (n 14), s 189.  \\
\textsuperscript{149} CRC (n 16) art 20(1), 22(1) & 3.  \\
\textsuperscript{150} Migration Act (n 14) s 197AB & 197AD.  \\
\end{flushleft}
any legal assistance. Given only a few minutes notice before being detained, the minors were not able to seek independent legal advice. In such a scenario, the role of a guardian would be to advocate on behalf of the now detained minors, seek advice and potentially instruct a solicitor. Under the current law, however, the person to whom the unaccompanied minors should have turned to for help was the very same person detaining them.

3.4. Conclusion

The analysis above demonstrates that Australia does not comply with its international obligations regarding guardianship of unaccompanied minors and that its current laws are both inappropriate and ineffective. The government’s argument that the conflict is merely perceived does not stand up to scrutiny. Granting guardianship of unaccompanied minors to the Minister for Home Affairs creates an unjustifiable conflict of interest. In addition, unaccompanied minors are effectively left without a guardian as they navigate Australia’s extremely complex migration and court system alone. This is in direct violation of Australia’s obligation to provide special care and protection, and to ensure that all acts are taken in line with the best interests of the child as a primary consideration.

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152 Ibid.
4. The detention of unaccompanied minors on Australian territory

4.1. Introduction

Following the success of Australia’s policies to prevent asylum seekers from arriving irregularly to its territory, almost all minors have been moved from detention facilities to community accommodation. Nonetheless, Australia’s legislation continues to mandate immigration detention of all irregular arrivals. This chapter examines the legality of detaining unaccompanied minors on Australian territory and determines whether Australia complies with its international obligations. The definition of Australian territory refers to both the mainland territory and the relevant territorial islands including Christmas Island. This chapter is divided into two sections. The first section outlines the domestic legislation and jurisprudence relevant to the detention of unaccompanied minors. The second section will then analyse the application of that legislation and whether it is in breach of international law.

4.2. Domestic laws and jurisprudence

Australia’s immigration detention regime is governed by the Migration Act and is based on the policy of mandatory detention. Section 189 requires officers to detain in immigration detention any unlawful non-citizen on or attempting to access Australian territory. An unlawful non-citizen is a person who does not have a valid visa to enter Australia and who is not an Australian citizen. Section 4AA of the Migration Act stipulates that ‘as a principle [...] a minor shall only be detained as a measure of last resort’. However, this principle does not override the statutory requirement to detain which remains mandatory and must be applied to all asylum seekers including minors.

154 Migration Act (n 14) s 189.
155 Ibid s 7; Commonwealth of Australia Constitution (n 15).
156 Migration Act (n 14) s 189.
157 Re Kit Woolley; Ex parte Applicants M276/2003 by their next friend GS [2004] HCA 49 (Re Kit Woolley).
The legislation does not prescribe a set time limit to the duration of detention but rather stipulates that detention must continue until a visa is granted, deportation occurs, or the person is removed from Australia either at their request or upon transfer to a regional processing country such as Nauru.\(^{158}\) The High Court held that the Migration Act legitimately authorises indefinite detention even where the removal of a person is not reasonably practicable in the foreseeable future.\(^ {159}\) The Migration Act further states that courts do not have the power to order the release of a person in immigration detention unless a visa has been granted.\(^ {160}\) Moreover, s 494AA prevents asylum seekers who arrive by boat from instituting certain proceedings against the Australian government, including proceedings relating to the lawfulness of their immigration detention.\(^ {161}\) Nonetheless, neither of these provisions affect the competence of the High Court to hear applications for *habeas corpus*.\(^ {162}\)

In addition to the three aforementioned statutory grounds under which detention can end, the Minister also has significant discretionary powers to remove persons from detention facilities by either granting a bridging visa or a residency determination on public interest grounds.\(^ {163}\) Bridging visas allow asylum seekers to live in the community legally while waiting for a determination on their asylum application. A residency determination, commonly referred to as community detention, allows persons to reside in the community rather than in a detention facility. However, for the purposes of the Migration Act, a person with a residency determination is still considered to be in detention as a visa has not been granted.\(^ {164}\) The Minister’s discretionary power to grant a bridging visa or residency determination is non-delegable, non-compellable and non-reviewable.\(^ {165}\) This means that the Minister must make the decision personally, there is no obligation to consider exercising the power even when a request has been made, and the decision cannot be judicially reviewed. The legislation does not set out what constitutes public interest grounds under which a visa or residency determination can be made. According to the Australian government, it is for the Minister to decide ‘*what is and what is not in the public interest*’.\(^ {166}\) This view has been confirmed by the High Court, which

\(^{158}\) Migration Act (n 14) s 196(1).

\(^{159}\) *Al-Kateb v Godwin* [2004] HCA 37, para 74, 232, 290, 298 & 303 (*Al-Kateb*); *Plaintiff M47/2012 v Director General of Security* [2012] HCA 46, para 516 (*Plaintiff M47*).

\(^{160}\) Migration Act (n 14) s 196(3).

\(^{161}\) Ibid s 494AA(1)(c).

\(^{162}\) *Plaintiff M47* (n 159), para 108.

\(^{163}\) Migration Act (n 14) s 195A & 197AB.

\(^{164}\) Ibid s 197AC(1).

\(^{165}\) Ibid s 195A, 197AE & 197AF.

\(^{166}\) Australian Government Department of Home Affairs, ‘Status Resolution Service: Ministerial
found that ministerial policy giving effect to the general public interest was a political issue.\footnote{167} The court held that ‘[i]n that field a Minister or a Cabinet may determine general policy or the interests of the general public free of procedural constraints’.\footnote{168} In addition, the High Court has established that when determining whether or not to exercise their discretionary power, the Minister is not obliged to observe principles of procedural fairness or natural justice.\footnote{169}

There are several different types of immigration detention facilities in Australia that have been used to detain unaccompanied minors, with the most relevant being closed detention centres, alternative places of detention and community detention.\footnote{170} Although a residency determination is referred to as community detention, it does not actually involve any deprivation of liberty. Instead, it allows unaccompanied minors to reside freely in the community with only a few conditions imposed, including having to live at a specified address and being unable to work.\footnote{171} For this reason, community detention is not considered detention for the purpose of this thesis.

On the other hand, most alternative places of detention constitute detention centres in all but name. This is despite the government’s attempt to differentiate these facilities from closed detention centres - the implication being that if an asylum seeker was accommodated at an alternative place of detention this did not constitute detention \textit{per se}.\footnote{172} For example, there were two alternative places of detention on Christmas Island that held unaccompanied minors for prolonged periods between 2008 and 2012.\footnote{173} However, both were secure prison-like facilities surrounded by high wire fencing where unaccompanied minors were either unable or had little opportunity to leave.\footnote{174} Furthermore, the island itself constitutes a prison-like environment in light of its size, remoteness and the inability of detainees to leave.\footnote{175} Similar concerns were

\begin{itemize}
\item \textit{Plaintiff S156/2013 v Minister for Immigration and Border Protection} [2014] HCA 22, para 40.
\item Forgotten Children (n 10) 44.
\item \textit{Plaintiff M70/2011 et al v Minister for Immigration and Citizenship & Anor} [2011] HCA 32, para 45 (\textit{Plaintiff M70}).
\item Ibid.
\item Ibid.
\end{itemize}
raised about the alternative places of detention on mainland Australia. Although these facilities ranged from motels, to purpose built housing complexes, to old army barracks, all were closed facilities with guards, where asylum seekers were not free to leave unless on an escorted excursion or to attend school.\textsuperscript{176} The following analysis of Australia’s detention regime will, therefore, be in reference to closed detention centres and alternative places of detention.

4.3. Application of detention laws

According to the recent 2017 Joint General Comment, there is an absolute prohibition on the immigration detention of children under international law.\textsuperscript{177} Under this line of argument, little analysis is required to determine that Australia’s policy of mandatory detention of all asylum seekers including unaccompanied minors is in breach of international law. Nevertheless, it is still important to provide an in-depth and nuanced analysis of Australia’s detention regime. First, the 2017 Joint General Comment is only a subsidiary non-binding source of law and State practice across the world shows an increasing trend towards the immigration detention of minors.\textsuperscript{178} Second, Australia has consistently maintained that its detention policies are lawful and do not constitute an unlawful deprivation of liberty.\textsuperscript{179} It is therefore necessary to analyse whether, outside of an absolute prohibition on detention, Australia’s laws and practice of detaining unaccompanied minors is in accordance with its obligations under international law and, specifically, the provisions of Article 37 CRC.

Lawfulness of detention

Article 37(b) CRC states that no child shall be deprived of their liberty unlawfully or arbitrarily. To meet the lawful element, detention of unaccompanied minors must comply with


\textsuperscript{177} 2017 Joint General Comment (n 51) para 10.


\textsuperscript{179} HR Committee, ‘Sixth periodic reports of States parties due in 2013: Australia’ (2 May 2016) CCPR/CAUS/6 para 111; \textit{M.M.M} (n 48) para 6.2 (Australia’s Sixth Periodic Report); \textit{Bakhtiyari et al v Australia}, HR Committee (6 November 2003) CCPR/C/79/D/1069/2002 para 5.8 (Bakhtiyari).
international law as well as national law. It is, therefore, not enough for Australia to rely on detention being deemed lawful under its domestic legislation by the highest court in its land. To this end, the Australian government also alleges that the detention of unaccompanied minors does not fall foul of Article 37(b) CRC as it occurs for the lawful purpose of conducting health, identity and security checks. In theory, this position complies with commentary from the CRC Committee and the UNHCR who have both stipulated that detention can occur in exceptional circumstances including for health, identity and security checks. However, a close analysis of both the legislation and its application reveals this position to be untenable.

According to an audit into the administration of health services in detention facilities, an induction health assessment occurs when a person first enters detention. Its purpose is to identify any health conditions that could pose a threat to the public such communicable diseases like tuberculosis, hepatitis B and C, HIV and syphilis. Taken at face value, the induction health assessment appears reasonable to ensure the health of both the unaccompanied minor and the Australian community. However, it is difficult to see how ongoing and prolonged detention beyond the initial assessment can be justified. Indeed, during the last surge of unaccompanied minors arriving in Australia between 2008 and 2012, the average time spent in detention was one year and two months. This is excessive when justified on the basis of health checks, even if treatment of a communicable disease requiring segregation is taken into account. In addition, justification for ongoing detention based on health reasons is particularly illogical in light of the known detrimental effects that prolonged detention has on the well-being of unaccompanied minors.

In a similar line of argument, it is hard to accept Australia’s justification for the detention of minors for the purpose of identity and security checks. According to the UNHCR Detention Guidelines, which provide an authoritative interpretation of the international obligations of

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180 Forgotten Children (n 10) 82.
181 Al-Kateb (n 159).
182 Australia’s Sixth Periodic Report (n 179) para 111-114, 118; Penovic (n 9) 64.
183 2014 CRC (n 43) para 18; UNHCR Detention Guidelines (n 45) 16-19.
185 Ibid.
186 Ibid.
States, it is unlawful to detain unaccompanied minors on the basis that they arrived without any official documents.\(^\text{188}\) Rather, detention for identity and security checks is only permissible where there is a clear intention to mislead or a refusal to cooperate.\(^\text{189}\) Furthermore, strict time limits for detention while identity and security checks are conducted must be clearly articulated in domestic law.\(^\text{190}\) Both Australia’s written laws and its practice of detaining children for prolonged periods of time contradict its rhetoric that detention is merely for health, identity and security checks.\(^\text{191}\) Notably, the government has previously rejected recommendations to establish policy guidelines that would provide a minimum timeframe for detention in order to conduct these assessments, and for the requirement to provide reasons where additional time is needed.\(^\text{192}\) It also rejected the recommendation that in the absence of a demonstrated and specific risk, asylum seekers should be released into the community.\(^\text{193}\) In addition, the Migration Act does not prescribe any time limit for detention and the High Court has found that it legitimately provides for indefinite detention of all asylum seekers.\(^\text{194}\) In effect, the legislation allows an unaccompanied minor to be detained indefinitely when it is not possible to definitively establish their identity even where there is no evidence of a specific security risk. This does not fall within the exceptional circumstances under which the immigration detention of children may be permissible.\(^\text{195}\) This view was confirmed by the HR Committee in \textit{Bakhtiyari v Australia} where it found that the detention of children for over two years for alleged identity and security checks was not justified.\(^\text{196}\)

The UNHCR Detention Guidelines stipulate that the grounds for detention must be clearly defined in the legislation.\(^\text{197}\) Neither the Migration Act nor the regulations expressly stipulate the purpose of detention as being for health, identity and security reasons. On the contrary, the wording of the legislation explicitly provides for detention that goes beyond such assessments. Section 196(1) of the Migration Act outlines the conditions under which detention may end including when a visa is granted. Normally, a visa will only be granted when there is a positive

\(^{188}\) UNHCR Detention Guidelines (n 45) 17; Chetail (n 19) 85.

\(^{189}\) Ibid.

\(^{190}\) UNHCR Detention Guidelines (n 45) 18.

\(^{191}\) Forgotten Children (n 10) 56.


\(^{193}\) Ibid.

\(^{194}\) \textit{Al-Kateb} (n 159).

\(^{195}\) 2014 CRC (n 43) para 18; UNHCR Detention Guidelines (n 45) 16-19.

\(^{196}\) \textit{Bakhtiyari} (n 179) 18.

\(^{197}\) UNHCR Detention Guidelines (n 45) para 21.
determination on an asylum application, thereby allowing detention to occur for the entirety of the asylum process including during any appeals procedures. This is despite the fact that, according to the UNHCR Detention Guidelines, detention for the purpose of ongoing asylum proceedings is unlawful.\(^\text{198}\) In addition, it is well publicised that the Australian government uses detention as a policy of deterrence, even in the case of unaccompanied minors.\(^\text{199}\) As recent evidence of this, Australia has stated that it will not sign the Global Compact for Migration as the agreement requires that immigration detention only be used as a last resort which will ‘risk encouraging illegal entry into Australia’.\(^\text{200}\) This directly links Australia’s laws on mandatory detention with a policy of deterrence. Moreover, this is in direct violation of Article 31(1) of the Refugee Convention prohibiting States from penalising those who seek asylum.

**Arbitrary deprivation of liberty and the ability to challenge immigration detention**

As well as requiring the deprivation of liberty to be lawful, Article 37(b) CRC also stipulates that it cannot be arbitrary. There is extensive jurisprudence from the HR Committee outlining the definition of arbitrary in the context of Australian immigration detention.\(^\text{201}\) Although the Committee is unable to apply the CRC, general principles from its decisions can be extrapolated and applied by analogy. Importantly, arbitrariness cannot be equated with unlawfulness – that is, even where detention is lawful it may nonetheless be arbitrary.\(^\text{202}\) Arbitrariness must be interpreted broadly to include elements of injustice, inappropriateness or lack of

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\(^{198}\) UNHCR Detention Guidelines (n 45) para 28.


\(^{201}\) Matthew Stubbs, ‘Arbitrary Detention in Australia: Detention of Unlawful Non-Citizens under the Migration Act 1958 (Cth) (2006) 25 AYBIL 273, 295; M.M.M (n 48); F.K.A.G (n 48); A v Australia (n 47).

\(^{202}\) Kate Chetty, ‘Protection from Arbitrary Detention in Australia: A Proposal for an Explicit Constitutional Right’ (2016) UTLR 79, 83; Stubbs (n 201) 290; A v Australia (n 47) para 9.2.
predictability. Detention must, therefore, be necessary in all the circumstances of a particular case, be proportionate to achieving a legitimate aim, and be reassessed as it extends in time.

In response to criticism of its detention regime, the Australian government emphasises the HR Committee’s findings that immigration detention is not arbitrary per se. To that end, it argues that the determining factor is not the length of detention but rather whether the grounds for detention are justifiable. According to the government, detention is necessary and reasonable to achieve the aims of its immigration policy, namely to allow an asylum application and any appeals to be properly considered, and to ensure its territorial integrity. Moreover, it alleges there are appropriate procedural safeguards in place as a person’s detention is subject to regular review. On this basis, Australia maintains that its immigration detention regime is not arbitrary. However, a detailed analysis of Australia’s laws and their application reveals the flaws in this argument.

Mandated detention does not allow for specific consideration to be given to the circumstances of each individual unaccompanied minor. There is no scope to conduct individual assessments to determine if detention is necessary, if it is in the best interests of the child, and if there are less invasive means available, including being released into the community with relevant reporting conditions imposed. Indeed, in complaints involving the detention of children, the HR Committee has consistently held that Australia failed to demonstrate that other less invasive measures would not have sufficed. The HR Committee has also expressly stated that the best interests of the child should be a primary consideration in any decision taken to detain minors. Under the current legislation, unaccompanied minors are subjected to the same detention regime as adults where their particular vulnerabilities are not taken into

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203 Chetty (n 202) 83.
204 Stubbs (n 201) 294; 2014 CRC (n 43) para 18; Penovic (n 9) 63.
205 Ibid; Shafiq v Australia, HR Committee (13 November 2013) CCPR/C/88/D/1324/2004 para 4.10 (Shafiq).
206 Shafiq (n 205) para 4.10; Stubbs (n 201) 294.
207 Australia’s Sixth Periodic Report (n 179) para 111; Shafiq (n 205) para 4.13.
208 Australia’s Sixth Periodic Report (n 179) para 114.
209 Ibid.
210 Stubbs (n 201) 306.
211 Penovic (n 9) 64; Chetty (n 202) 88.
212 Bakhtiyari (n 179) 18; F.K.A.G (n 48) para 9.3; M.M.M (n 48) para 9.2; D & E v Australia, HR Committee (9 August 2006) CCPR/C/87/D/1050/2002 para 7.2.
213 Seoul (n 187) 65; Bakhtiyari (n 179) para 9.7; F.K.A.G (n 48) para 9.3; A v Australia (n 47) para 9.7.
account.\textsuperscript{214} In addition, the purpose of detention as a deterrent or to allow for a final decision on an asylum claim is not considered a legitimate aim under international law.\textsuperscript{215} Finally, the duration of detention in Australia has generally been prolonged and occurred on average for over one year, meaning that any detention that was initially justified becomes disproportionate over time.\textsuperscript{216} The purpose and length of detention is therefore unnecessary, excessive and disproportionate, with one detained unaccompanied minor stating “[w]e don’t know when we will be free... our hope is slowly going.”\textsuperscript{217}

To guard against arbitrariness, detention should be continuously reassessed as it extends in time.\textsuperscript{218} In 2005, the Migration Act was amended to introduce a statutory reporting regime.\textsuperscript{219} Under this provision, the Commonwealth Ombudsman must compile a report for the Minister outlining the individual circumstances of persons detained, assessing the appropriateness of their detention, and providing necessary recommendations.\textsuperscript{220} Australia alleges that this review provides a procedural safeguard against arbitrary detention.\textsuperscript{221} However, these powers of review are not sufficient to ensure that detention does not become arbitrary. The Ombudsman has the capacity to review detention every six months but only once a person has already been detained for two years.\textsuperscript{222} As confirmed in Bakhtiyari v Australia, holding an unaccompanied minor in immigration detention for two years without any mechanism for review is considered arbitrary.\textsuperscript{223} Furthermore, although the Ombudsman can urge the Minister to release unaccompanied minors from detention, the Minister is not obliged to accept any of the recommendations.\textsuperscript{224}

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\textsuperscript{214} Penovic (n 9) 62. \\
\textsuperscript{215} HR Committee, ‘Concluding observations on the sixth periodic report of Australia’ (1 December 2017) CCPR/C/AUS/CO/6 para 37 (HRC Concluding Observations); Stubbs (n 201) 294. \\
\textsuperscript{216} Forgotten Children (n 10) 56; Seul (n 187) 64. \\
\textsuperscript{217} Ibid. \\
\textsuperscript{218} 2014 CRC (n 43) para 18; Stubbs (n 201) 306. \\
\textsuperscript{220} Ibid. \\
\textsuperscript{221} Australia’s Sixth Periodic Report (n 179) para 114. \\
\textsuperscript{222} Commonwealth Ombudsman (n 219) 1. \\
\textsuperscript{223} Bakhtiyari (n 179) para 18. \\
\textsuperscript{224} Commonwealth Ombudsman (n 219) 1. 
\end{flushright}
While the Ombudsman’s role is an important mechanism to ensure transparency of the detention regime, it cannot substitute the review functions of a proper judicial body. The notion of arbitrariness is closely linked to the right to challenge detention before a competent and independent court or tribunal. The HR Committee has considered the inability to properly challenge detention a relevant factor that may contribute to detention becoming arbitrary. The right to contest the lawfulness of detention is reflected in both Article 37(d) CRC and Article 9(4) ICCPR. Importantly, the ability to challenge detention is not limited to a court ensuring compliance with domestic legislation, but must also incorporate compliance with international obligations. Furthermore, the effects of the review must be real and not merely formal, meaning that the judicial body must actually have the power to order a person’s release from detention.

Australian courts, including the High Court, can only order the release of a person from detention if the detention is found to be unlawful under domestic law. The court is therefore limited to determining whether a person is an unlawful non-citizen within the meaning of the Migration Act and has no discretion to review the substantive necessity of detention. There have been a number of cases before the High Court challenging the detention of asylum seekers. In Re Kit Woolley, the High Court found that the detention of children is a legitimate aim of the government and that the special vulnerabilities of children are not relevant to its validity under domestic law. It further determined that Australia’s obligations under the CRC and other international instruments have no bearing on its ability to order the release of minors from detention. In Behrooz, it held that it does not have the power to order release from detention even where conditions are inhumane or intolerable. Finally, in Al-Kateb, the High Court found that indefinite detention is permissible under the current legislation. According to the HR Committee, the ability to challenge deprivation of liberty encompasses the right to legal

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225 Penovic (n 9) 62.
226 F.K.A.G (n 48) para 9.4.
227 Stubbs (n 201) 300.
228 Ibid; A v Australia (n 47) para 9.5.
229 Penovic (n 9) 63; Stubbs (n 201) 307; Migration Act (n 14) s 189; A v Australia (n 47) para 9.5; F.K.A.G (n 48) para 9.6.
230 Re Kit Woolley (n 157).
231 Ibid.
232 Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs [2004] HCA 36 (Behrooz).
233 Al-Kateb (n 159).
assistance as this ultimately facilitates access to courts. Legal assistance provided to unaccompanied minors in Australia is limited to drafting the asylum application and a first instance review to the Tribunal. It does not involve ongoing representation for the asylum application process let alone representation or assistance to challenge detention.

In light of the above, under the current legislation and its application, the detention of unaccompanied minors in Australia is unlawful and arbitrary in contravention of Article 37(b) CRC. In addition, Australia is in violation of the right to challenge the lawfulness of detention under Article 37(d) CRC. In its 2017 Concluding Observations on the sixth periodic report of Australia, the HR Committee recommended that Australia amend its legislation to ensure that detention for unaccompanied minors only occurs as a last resort; is reasonable, necessary and proportionate in each individual circumstance; and subject to judicial review. The government, however, has not publicly endorsed these recommendations nor made any of the required changes to Migration Act.

Detention as measure of last resort and for the shortest appropriate time

Even if the detention of unaccompanied minors is lawful and not arbitrary, according to the ultima ratio principle it can only be used as a measure of last resort and for the shortest appropriate time. In 2005, following prolonged condemnation of children in detention, the Australian government amended the Migration Act to include s 4AA which states ‘[p]arliament affirms as a principle that a minor shall only be detained as a measure of last resort’. On face value, the inclusion of this provision could be seen as an important step towards complying with the ultima ratio principle. However, on closer inspection both its wording and implementation fall well short of the protection required under international law.

234 A v Australia (n 47) para 9.6.
235 Mark Evenhuis (n 32) 556-557; Government of Australia (n 136).
236 Forgotten Children (n 10) 74.
237 HRC Concluding Observations (n 215) para 38.
239 CRC (n 16) art 37(b); HRC Concluding Observations (n 215) para 38; Seul (n 187) 64.
240 Migration Act (n 14) s 4AA.
Importantly, s 4AA merely affirms the principle of detainment as a measure of last resort and does not creating any legally enforceable rights. The provision sits fundamentally at odds with s 189 of the Migration Act, which provides for the mandatory detention of all minors. In practice, the provision on mandatory detention has taken precedent over the principle of detaining children as a last resort. This is particularly apparent when analysing the last wave of irregularly migration to Australia between 2008 and 2012. Faced with the arrival of approximately 1,832 unaccompanied minors, the principle of detaining minors as a last resort was abandoned and children were detained in increasing numbers. Proceedings before the High Court regarding an unaccompanied minor revealed that the government deemed the principle articulated in s 4AA as satisfied merely by an official reading a statement to a group of new arrivals on Christmas Island that said: “if you are a child, I am satisfied that in all circumstances your detention is measure of last resort. In accordance with Australian Government policy, you will be detained in alternative accommodation, not a detention centre”. First, the reference to alternate accommodation is misleading as the unaccompanied minors were housed in secure facilities on Christmas Island that were detention centres in all but name. Second, there was no real attempt to ascertain whether other means of accommodation were available including community accommodation on mainland Australia. Finally, the statement evidences a blanket approach to detaining children without any individual assessment being done and without taking into account the best interests principle.

In addition to requiring immigration detention to be a measure of last resort, Article 37(b) CRC also stipulates that it occur only for the shortest appropriate time. The Migration Act does not provide any timeframe for the detention of children nor any reference to it occurring for the shortest time possible. Moreover, the High Court held that it legitimately provides for indefinite detention. Notably, this decision was determined by a slim majority and several subsequent judgments have indicated that it may have been wrongly decided. However, until such time as it is overturned or the legislation is amended, indefinite detention of unaccompanied

242 Crock, ‘Rethinking’ (n 82) 443.
243 Ibid 440.
244 Ibid 440 & 443.
245 Plaintiff M70 (n 172) para 45.
246 AHRC 2012 (n 173) 16-17.
247 Stubbs (n 201) 307.
248 Al-Kateb (n 159).
249 Plaintiff M47 (n 159); Plaintiff M76/2013 v Minister For Immigration, Multicultural Affairs and Citizenship & Ors [2013] HCA 53.
minors is provided for in Australia’s domestic law. Furthermore, unconstrained by any timeframes, in practice the Australian government tends to detain unaccompanied minors for prolonged periods. This conduct, however, stands in diametric opposition to the requirement under the CRC that detention only occur for the shortest appropriate time.

Cruel, inhuman or degrading treatment

According to Article 37(a) CRC, no child should be subjected to cruel, inhuman or degrading treatment. While the Migration Act articulates when and where detentions can occur, it remains silent as to the conditions of detention. To this end, the High Court found that inhumane or intolerable conditions are not relevant to determining the lawfulness of detention under the Migration Act although, in a dissenting opinion, the alleged treatment of children in detention was described as ‘particularly distressing’. However, in contrast to the lack of guidance under domestic law, the 2018 Special Rapporteur on torture held that intentionally inflicting severe pain or suffering on persons for discriminatory reasons, including for their migration status, will invariably lead to torture.

Australia has detained children seeking asylum in crowded prison-like facilities guarded by security with limited access to recreational activities, where they are unable to leave or have strict constraints on their freedom. This includes children detained in facilities on Christmas Island and mainland Australia. Most detention facilities are in remote locations with institutional routines such as head counts and limited access to meaningful activities and appropriate schooling for minors. Even a motel in Darwin that was used as an alternative place of detention for unaccompanied children was deemed more inappropriate than a normal detention centre as it was significantly overcrowded and the mobility of children was severely restricted. Detention facilities are particularly dangerous for unaccompanied minors as they are exposed to physical assault, sexual assault and self-harm leading to feelings of injustice.

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250 Last Resort (n 6) para 280; Forgotten Children (n 10) para 56.
251 CRC (n 16) art 37(b).
252 Behrooz (n 232) para 97.
253 2018 Special Rapporteur (n 52) para 14.
254 AHRC 2012 (n 173) 16-17; Crock, ‘Rethinking’ (n 82) 443.
255 Zwi (n 176) 89.
256 Zwi (n 176) 89.
257 Crock, ‘Rethinking’ (n 82) 443.
frustration and severe depression. Many minors will have experienced trauma before arriving in Australia and detention only increases this trauma causing neuro-developmental and emotional damage. Children have described their detention as being punishment for seeking asylum and compared their treatment to that of criminals. A pertinent example often cited is detention officials referring to children by their boat number rather than their names. Furthermore, prolonged detention and the uncertainty over when they would be released increases already existing mental health issues, with one unaccompanied minor stating ‘our hoping is slowly going, maybe I will be killed [...].’

According to the 2018 Special Rapporteur on torture, the threshold at which immigration detention will constitute cruel, inhuman or degrading treatment is much lower for children. By using immigration detention as a punitive policy of deterrence in full knowledge of its detrimental effects, Australia is intentionally inflicting suffering on unaccompanied minors on the discriminatory basis of their migration status, resulting in ill-treatment. Moreover, given the severe conditions of detention facilities in Australia, the detention of unaccompanied minors is likely to constitute cruel, inhuman or degrading treatment or punishment in violation of Article 37(a) CRC.

**Humanity and respect for inherent dignity**

Under Article 37(c) CRC, children deprived of their liberty should be treated with humanity and respect for their inherent dignity in a manner that takes into account any special needs in light of their age. To this end, extensive research has been conducted into the effects of immigration detention on children. Along with academic research, the Australian Human Rights Commission has conducted two national inquiries into the detention of children in 2004 and 2014 respectively. Both inquiries provided detailed evidence that the detention of

258 Zwi (n 176) 89; Forgotten Children (n 10) 10.
259 Penovic (n 9) 57.
260 Forgotten Children (n 10) 30.
261 Ibid 72-73.
262 Ibid 56.
263 2018 Special Rapporteur (n 52) para 28.
264 Crock, ‘Rethinking’ (n 82) 438; Penovic (n 9) 78; Schloenhardt (n 199) 54; 2018 Special Rapporteur (n 52) para 14.
265 Zwi (n 176); Fiona Martine and Terry Hutchinson, ‘Mental Health and Human Rights Implications for Unaccompanied Minors Seeking Asylum in Australia’ (2005) 1 JMRI 1.
266 Forgotten Children (n 10); Last Resort (n 6).
unaccompanied minors had a significant impact on their development and mental health.\textsuperscript{267} Additionally, a report on mental health assessments conducted in 2014, which the government sought to suppress, provided a revealing insight into the impact of detention on children.\textsuperscript{268} It found that 34\% of children in Australian detention facilities had mental health disorders that were so serious they would normally require hospital-based services.\textsuperscript{269} In a compelling comparison, the same report found that only 2\% of all Australian children had a disorder at the same level.\textsuperscript{270} Additionally, as detailed above, the harsh conditions in detention facilities and the lack of recreational activities and appropriate education also demonstrate that children are not treated in a manner that takes into account their special needs as minors.\textsuperscript{271} Moreover, referring to asylum seekers by their boat numbers instead of their names is not only disrespectful but also dehumanizing, in direct contravention of Article 37(c). Finally, detaining unaccompanied minors is known to have a lasting and ongoing effect on their development and mental health even once they are released into the community.\textsuperscript{272} Given the detrimental effect of the detention itself as well as the conditions outlined above, it is likely that Australia’s detainment of unaccompanied minors violates their right to be treated with respect and humanity.\textsuperscript{273}

\textbf{4.4. Conclusion}

Although the Australian authorities have not processed any new unaccompanied minors travelling irregularly by boat since 2014,\textsuperscript{274} it is important to note that the substance of Australia’s legislation has not changed and detention of minors is still mandated in violation of international law.\textsuperscript{275} Australia has not amended the Migration Act to bring it in line with its obligations under Article 37 CRC. Even if one does not accept an absolute prohibition on the

\textsuperscript{267} Forgotten Children (n 10) 29; Last Resort (n 6) 411-412.
\textsuperscript{269} Forgotten Children (n 10) 59.
\textsuperscript{270} Forgotten Children (n 10) 59.
\textsuperscript{271} CRC (n 16) art 37(c).
\textsuperscript{272} Forgotten Children (n 10) 72-73.
\textsuperscript{273} CRC (n 16) art 37(c).
\textsuperscript{274} Phillips (n 6); Commonwealth of Australia (n 11); Martino (n 11).
\textsuperscript{275} CRC (n 16) art 37; ICCPR (n 16) art 9; UDHR (n 16) art 3.
detention of children, Australia’s legislation nevertheless violates the requirement that detention be lawful, not arbitrary, a measure of last resort, and for the shortest appropriate time. In addition, an analysis of the application of Australia’s laws reveals a detention regime that fails to treat children with respect and dignity, and amounts to cruel, inhuman or degrading treatment. In light of this, and unless clear protections are incorporated into domestic law, unaccompanied minors seeking asylum in Australia remain extremely vulnerable and susceptible to detainment.

276 Stubbs (n 201) 306-307.
5. Conclusion

Unaccompanied children travelling alone to seek asylum are a particularly vulnerable cohort of migrants. Without the protection of a parent or custodian, these children are more susceptible to abuse, trafficking and forced labour in what is often a dangerous journey to their end destination. Moreover, upon reaching countries such as Australia, unaccompanied minors then face an uphill battle in navigating a migration system that does not distinguish between children and adults, and does not take into account their unique vulnerabilities. It is within this context that this thesis sought to determine whether Australia’s domestic laws and practice comply with its international obligations regarding the guardianship and detention of unaccompanied minors.

Under the IGOC Act, guardianship of unaccompanied minors seeking asylum is granted to the Minister for Home Affairs who is accorded the rights of a natural guardian. The same Minister is also responsible for the migration portfolio under which they have wide-ranging, un-reviewable and discretionary powers. Based purely on the written laws, a conflict of interest arises between the Minister’s multiple roles. However, this study goes further to demonstrate that the conflict of interest is not purely theoretical but also manifests itself in practice. A clear illustration of this is the finding by the High Court that where a conflict arises between the Minister’s guardianship and migration responsibilities, their role under the Migration Act will take precedence. In effect, the Minister can refuse asylum, detain and deport unaccompanied minors without any regard to their duty as the legal guardian or to the best interests of the child. This constitutes a breach of Australia’s obligations under the CRC to provide unaccompanied minors with special care and protection, humanitarian assistance, and to ensure all decisions are taken with the best interests of the child being a primary consideration. Moreover, a detailed analysis of Australia’s laws through the different aspects of the asylum procedure revealed that the conflict is not cured through delegation. Rather, the

278 Penovic (n 9) 78.
279 IGOC Act (n 68) s 6.
280 Law Council of Australia (n 101) para 13.
281 WACB (n 76) para 42 & 106.
282 CRC (n 16) art 22(1), 20(1) & 3(1).
practical outcome is that unaccompanied minors are left without a proper legal guardian and are effectively navigating Australia’s extremely complex migration system alone. To resolve the conflict of interest and ensure proper protection of unaccompanied minors, Australia should endorse the recommendations of the CRC Committee and establish an independent guardianship institution.\(^{283}\)

In addition, Australia’s current laws of mandatory and indefinite detention is in direct violation of its obligations under the CRC, ICCPR, UDHR and the Refugee Convention.\(^{284}\) This is particularly so in light of growing international consensus that the immigration detention of children is never permitted.\(^{285}\) However, even absent an absolute prohibition, this study demonstrates that Australia’s mandated detention of unaccompanied minors is both arbitrary and cannot be justified under international law. Australia’s detention regime also fails to comply with the *ultima ratio* principle in Article 37(b) CRC. The inclusion of s 4AA of the Migration Act affirming the principle of detention as a last resort has had no practical effect.\(^{286}\) Moreover, until the *Al-Kateb* decision is overturned or the Migration Act is amended, indefinite detention of unaccompanied minors is provided for in Australia’s domestic law. Indeed, a close analysis of the application of the legislation demonstrates that the principle of detaining children as a last resort is likely to be abandoned in favour of prolonged detention. While almost all children have now been removed from detention and are residing in the community, this policy shift cannot solely be attributed to Australia’s recognition of the negative impact detention has on unaccompanied minors. Rather, it can be more realistically explained by the effectiveness of Australia’s policies to ‘stop the boats’, the subsequent reduction in maritime arrivals, and the transfer of unaccompanied minors arriving after July 2013 to Nauru.\(^{287}\) To ensure compliance with its international obligations, Australia must adopt the latest recommendations of the HR Committee and amend its legislation to abolish mandatory detention or, at the very least, ensure any detention occurs only for the shortest time possible and truly as a measure of last resort.\(^{288}\)

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\(^{283}\) CRC Concluding Observations (n 111) para 80.

\(^{284}\) CRC (n 16) art 37; ICCPR (n 16) art 9; Refugee Convention (n 16) art 31.

\(^{285}\) 2017 Joint General Comment (n 51).

\(^{286}\) Nardone (n 241) 296.


\(^{288}\) HRC Concluding Observations (n 215) para 38.
Given that no new unaccompanied minors arriving irregularly have been processed by Australia since 2014 and almost all children have been removed from detention, the rights of unaccompanied minors is not currently a live issue in the Australian political or public discourse. Nevertheless, it is still important to determine whether Australia provides proper protection to unaccompanied minors in respect to guardianship and detention. Firstly, there are currently about 2865 children living in the community as they await a decision on their asylum application and it is necessary to ensure that any unaccompanied minors are provided with an appropriate guardian. Additionally, almost all unaccompanied minors who arrived irregularly between 2008 and 2013 would have been detained for some period of time upon their arrival and are liable to be detained again pending a visa being granted, making it essential to determine whether or not such detention is legal. Finally, it is important to ascertain whether the rights of unaccompanied minors who may arrive irregularly today, tomorrow or in the future are protected under the current domestic legal framework or whether there are gaps in the system that must be closed. Indeed, by undertaking this study, the thesis has demonstrated that there is a significant gap between Australia’s domestic laws and its obligations under international law. Moreover, a close analysis of its past practice reveals that unaccompanied minors routinely fall through these gaps, leaving them unable to access their rights and rendering Australia in breach of its international obligations. Without clear protections incorporated into domestic law allocating an independent guardian and prohibiting detention, unaccompanied minors seeking asylum in Australia will continue to remain extremely vulnerable.

289 Phillips (n 6); Commonwealth of Australia (n 11); Martino (n 11).
290 Detention Statistics 2018 (n 13).
291 ABC News (n 14); Migration Act (n 14) s 197AD.
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