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1 June 2018

National Children's Commissioner
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2000

By email: kids@humanrights.gov.au

Dear Committee Secretary,

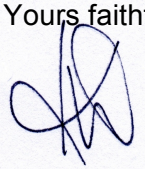
Submission: Australia's progress in implementing the Convention on the Rights of the Child (CRC)

Please find attached a submission from Australian Lawyers for Human Rights (**ALHR**) in response to your call for submissions as part of consultations on the progress that Australia has made in terms of implementing the United Nations Convention on the Rights of the Child (**CRC**).

We thank you for the grant of an extension of time in which to lodge our submission.

If you would like to discuss any aspect of this submission, please contact Kerry Weste, President Australian Lawyers for Human Rights, by email at president@alhr.org.au

Yours faithfully,



Kerry Weste
President
Australian Lawyers for Human Rights

AUSTRALIAN LAWYERS FOR HUMAN RIGHTS

Australia's progress in implementing the Convention on the Rights of the Child (CRC)

Contents

1. About Australian Lawyers for Human Rights (ALHR)

Australian Lawyers for Human Rights (**ALHR**) was established in 1993 and is a national network of over 1,000 Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees as well as specialist national thematic committees.

ALHR utilises its extensive experience and expertise in the principles and practice of international human rights law in Australia in order to advocate for greater Australian compliance with international human rights standards at a domestic and international level and promote and support lawyers' practice of human rights law in Australia.

2. Executive Summary

ALHR thanks the National Children's Commissioner for the opportunity to make this submission in the lead up to Australia's appearance before the United Nations Committee on the Rights of the Child (**the Committee).** ALHR notes the Commission's vital role as a national human rights institution which independently reports to the UNCRC about Australia's implementation of:

- The Convention of the Rights of the Child (**CRC**);
- The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (**OPSC**); and
- The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (**OPAC**).

We commend the Commissioner for seeking the views of stakeholders and civil society in preparing its report.

In preparing this submission ALHR has utilised the expertise within our specialist thematic subcommittees. As such our submission is broken down into thematic human rights areas of concern. Under each of these thematic headings ALHR then makes reference to the clusters of articles identified by the Committee to comment on Australia's progress in implementing or not implementing the CRC.

ALHR notes that due to the immense breadth of the subject matter of children's rights in Australia, we have not been able to cover all areas of concern in relation to Australia's compliance with the CRC. As such the feedback that ALHR has been able to provide does not constitute a comprehensive summary of our concerns regarding Australia's compliance with the CRC during the reporting period.

3. General Measures of Implementation

3.1 Reservations and Declarations

Cluster: Special Protection Measures

Concluding Observation 8, 9, 10

Australia's Reservation to Article 37(c)

The Committee on the Rights of the Child has repeatedly urged Australia to reconsider its reservation to Article 37(c) of the CRC[1], stating it:

"*is unnecessary since there appears to be no contradiction between the logic behind it and the provisions of article 37 (c) of the Convention. The Committee further reiterates its view that the concerns expressed by the State party in its reservation are well addressed by article 37 (c), which provides that every child deprived of liberty shall be separated from adults "unless it is considered in the best interests of the child not to do so" and that the child "shall have the right to maintain contact with his or her family".*[2]

ALHR notes that despite stating in its Response to the List of Issues[3] that it was reviewing its reservation to Article 37(c) and would be consulting with States and Territories in 2012, Australia's joint fifth and sixth report[4] to the Committee states only that "*Australia is not considering withdrawing its reservation at this time*"[5] and considers the reservation to be "*consistent with the object and purposes of the CRC*".[6]

Given that Australia had undertaken to explore with the States and Territories the possible withdrawal of this reservation, ALHR is disappointed that Australia's joint fifth and sixth report contains no information regarding any consultation and review. Indeed, no explanation is given as to why this is the case.

ALHR notes that during the reporting period Australian children were detained in damaging and inappropriate conditions in adult prison facilities in multiple Australian States and Territories. We draw your attention in particular to the detention of children as young as 16 in Victoria's HM Prison Barwon high-risk maximum security prison for males who were subjected to treatment that was found by the Supreme Court of Victoria to be in breach of their human rights.[7] Further, the recent report of the Royal Commission into the Protection and Detention of Children in the Northern Territory (**NT**

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[1] See CRC/C/AUS/CO/4 paras 8, 9, and 10 and CRC/C/15/Add.268, para 7 and 8
[2] Ibid para 9
[3] Attorney-General's Department, Australian Government, 'Australia's response to the List of Issues-Convention on the Rights of the Child
[4] Australia's joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography and second report on the Optional Protocol on the involvement of children in armed conflict submitted on 15 January 2018 available here: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/AUS/5-6&Lang=en
[5] Ibid p1
[6] Ibid p1
[7] Certain Children by their litigation guardian Sister Marie Brigid Arthur v Minister for Families and Children & Ors [2017] VSC 251

Royal Commission) found that children, including some under the age of 15 years, were transferred and accomodated in adult correctional facilities and that the "*consequences of transfers have, at times, included the improper treatment of children and young people.*"[8]

In ALHR's view children detained in adult prisons during the reporting period have been subjected to systemic human rights violations under the CRC, the International Covenant of Civil and Political Rights (**ICCPR**) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**UNCAT**).

ALHR remains concerned that Australia's reservation to Article 37(c) whilst not endorsing such treatment, lends legitimacy to State and Territory governments seeking to detain children in adult prisons in circumstances where their human rights are likely to be infringed and where the core principles of the CRC are not prioritised.

No child under the age of 18 should be placed in an adult prison unless a court decides that it is in the best interests of the child to do so.

Concluding Observations 11, 12, 13,14, 17, 18

3.2 Legislation, Coordination and Independent Monitoring

There remains no Commonwealth legislation to comprehensively address children's rights at a national level. Australia should implement national child rights legislation to encourage uniformity across the legal system.

ALHR notes also that Australia remains the only Western democracy bereft of a Federal Bill of Rights or Human Rights Act.

In its CRC/C/AUS/CO/4 Concluding Observations the Committee recommended a technical body for advising upon the policies and strategies of its entities, with corresponding human, technical and financial resources[9].

ALHR strongly welcomes the appointment of the first National Children's Commissioner, Megan Mitchell, in March 2013.[10] This appointment has partly implemented the Committee's recommendation and the Commissioner is undertaking highly valuable work. Yet, it remains at the state's discretion whether recommendations made by the Commissioner are implemented through legislation and policies.

The Department for Families, Community Services and Indigenous Affairs does not appear to have been provided with specific mandate, capabilities and resources to ensure a coordinated response for the rights of children. Nor, has there been an effort

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[8] Report of the Northern Territory Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory Vol 2A, p. 145

[9] Paragraphs 14 and 18, United Nations Committee on the Rights of the Child Concluding Observations, Sixtieth session29 May–15 June 2012 CRC/C/AUS/CO/4 available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/AUS/CO/4&Lang=en

[10] As supported by the *Australian Human Rights Commission Amendment (National Children's Commissioner) Act 2012* (Cth).

to establish a National Deputy Commissioner for Aboriginal and Torres Strait Islander children.

ALHR also strongly welcomes Australia's ratification of the Optional Protocol to the Convention Against Torture (**OPCAT**) and the National Preventive Mechanism (or **NPM**) that we trust will be in place for children in places of detention throughout Australia by the time Australia submits its seventh report under the CRC.

ALHR notes that Australia's joint fifth and sixth report has not identified any areas for improvement in the independent monitoring of children's rights across the States and Territories. In that regard we particularly note the findings of Commissioner Mitchell in her Children's Rights Report 2016[11] wherein she stated:

"….some jurisdictions have independent inspectorates but questions have been raised about the extent of their independence from government departments running the youth justice systems. Several jurisdictions rely on independent Ombudsmen which have generally have strong powers in relation to investigations. However, they do not all have mandates to regularly visit youth justice centres and tend to play a more complaints-based role. Most states and territories have Children's Commissioners or Guardians but many are not specifically mandated to undertake inspections or access or publish information.

All jurisdictions have reporting requirements, to varying extents, for things like the use of force, restraint and isolation. However, these are often not comprehensive and are often prescribed as policy rather than in legislation. And they mostly do not come with any requirement of transparency – that is, there is rarely any public reporting of those records. Even the jurisdictions with some of the more comprehensive and public reporting appear to be falling short in practice. For example, somehow, even with compulsory reporting of segregation to the Ombudsman NSW, there appears to have been young people in NSW kept in solitary confinement for extended periods of time. In summary, the legislative and regulatory regimes in all jurisdictions need reviewing and tightening up.

In this respect we also note the recent Recommendation 22.4 of the NT Royal Commission that the powers of the Northern Territory Commission for Children and Young People be expanded to

"a. allow free and unfettered access to:

- *youth detention facilities and any part of such facilities*
- *children and young people in youth detention*
- *people whose work is concerned with youth detention facilities and services documents and records in the possession of the department and its contractors, and*

[11] Children's Rights Report 2016, Megan Mitchell, Children's Commissioner,

b. allow investigation of matters of a systemic nature[12]

4. Definition of the Child (Art. 1 and 40)

Concluding Observation 84(a)

4.1 Age of Majority – Criminal Responsibility

The Committee has repeatedly recommended that Australia, "consider raising the minimum age of criminal responsibility to an internationally acceptable level."[13] Australia has failed to implement this recommendation.

In Australia, children under 10 years of age may not be held criminally responsible.

ALHR notes with disappointment and concern that Australia's joint fifth and sixth report states that Australia is not considering changing the minimum age of criminal resposnsibility from 10 years of age to 12 years of age.

For children between the ages of ten and 14 years, the presumption of *doli incapax* is said to protect children from the harshness of criminal proceedings.

However, *doli incapax* does not apply where confessions are given by children. Considering that children are more likely to give confessions to police, it is arguable that *doli incapax* does not act as an effective barrier to the prosecution of children.

ALHR notes the very recent and unequivocal recommendation 27.1 of the NT Royal Commission that the age of criminal responsibility be raised from 10 to 12 years and that children under the age of 14 years not be sentenced to detention except in the most serious cases.[14]

It is abundantly clear from the findings and recommendations of the NT Royal Commission that the doctrine of *doli incapax* alone is not "providng an adequate safeguard for children between the ages of 10 and 14 years."[15]

Australia should bring its law and practice into line with other like countries and raise the age of criminal responsibility to 14 years.

This reform would be particularly significant for Aboriginal and Torres Strait Islander children, who make up almost 70 per cent of the population of juvenile detention facilities. For further discussion of the human rights issues faced by Aboriginal and Torres Strait Islander children see section 11 below.

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[12] Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children, Findings and Recommendations, Recommendation 22.4 p.44
[13] CRC/C/AUS/CO/4 para 84(a) and (CRC/C/15/Add.268, para. 74(a));
[14] OPCIT Recommendation 27.1 Findings and Recommendations page 46
[15] Australia's Fifth and Sixth Report OPCIT

5. Australia's Treatment of Children who are Refugees or Seeking Asylum

Concluding Observations 80-81

5.1 Policies affecting children seeking asylum

Cluster: Special Protection Measures

(Article 22) - children outside their country of origin seeking refugee protection, unaccompanied children seeking asylum, internally displaced children, migrant children and children affected by migration

ALHR notes with deep concern that the period for reporting represents a tumultuous and regressive chapter for the human rights of children seeking asylum in Australia. Under Australia's offshore processing policy re-established in August 2012, those who arrived in Australia by sea without a visa were required to be sent to Nauru or Papua New Guinea where they were detained. In a subsequent announcement in July 2013, the Australian Prime Minister declared that none of those sent to Nauru or Papua New Guinea would ever settle in Australia.

Despite the expenditure of more than $4.8 billion by the Australian government,[16] conditions in the facilities have been poor and have been found to violate a wide range of international standards.[17] Reports of abuse, neglect and self-harm have been commonplace, including cases involving children.[18] The rates of mental illness among those detained in the Manus Island facility were reported to be among the highest recorded rates of any surveyed population.[19] In early 2018 several hundred people

[16] Tom McIlroy, 'Cost for Australia's offshore immigration detention near $5 billion' *Canberra Times* 18 July 2017, http://www.canberratimes.com.au/national/public-service/cost-for-australias-offshore-immigration-detention-near-5-billion-20170716-gxci97.html

[17] UNHCR monitoring missions in October 2013 found the situation for refugees transferred by Australia constituted arbitrary and mandatory detention under international law and did not provide safe and humane conditions of treatment in detention: UNHCR, *Monitoring Visit to the Republic of Nauru: 7–9 October 2013*, 1; UNHCR, *Monitoring Visit to Manus Island, Papua New Guinea: 23–25 October 2013*, 1; In 2015, the UN Special Rapporteur on Torture reported that aspects of the offshore processing policy violated the Convention Against Torture: Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN Human Rights Council, 28th session, Observations on communications transmitted to Governments and replies received, A/HRC/28/68/Add.1. See also this summary of criticisms and findings from various UN agencies, review bodies and Special Rapporteurs: Josh Butler, 'All The Times The UN Has Slammed Australia's Asylum Seeker Policy', *Huffington Post*, 25 July 2017, http://www.huffingtonpost.com.au/2017/07/25/all-the-times-the-un-has-slammed-australias-asylum-seeker-polic_a_23046469;

[18] Parliament of Australia, Senate Legal and Constitutional Affairs Committee, *Inquiry into the serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre,* https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Report. See also *The Guardian,* 'The Nauru Files' https://www.theguardian.com/news/series/nauru-files

[19] Parliament of Australia, Senate Legal and Constitutional Affairs Committee, Inquiry into the serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre, Submission of the United Nations High Commissioner for Refugees, 12 November 2016 (submission 43) https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Submissions

remained on Manus Island and 309 remained in Nauru, including 30 children.[20] For the children affected, the protracted period of arbitrary detention and exposure to serious risks of abuse renders the enjoyment of many of the CRC rights illusory.

Meanwhile, although a rapid decrease in the number of asylum seeking people arriving in Australia by boat has provided the conditions for a dramatic decrease in the number of children being held in immigration detention in Australia, Australia's policy of intercepting boats carrying children seeking asylum and returning the passengers to other countries raises serious concerns regarding a violation of Australia's *non-refoulement* obligations in respect of those children seeking asylum.

Cluster: General Principles

5.2 Non-discrimination (art 2)

In ALHR's considered view Australia's policy for offshore processing of people seeking asylum is inherently discriminatory. The enjoyment of rights under the CRC is not limited to children who are nationals of a State Party, and apply irrespective of immigration status.[21] Contrary to the provisions of the Refugee Convention, which prohibits the penalisation of people seeking asylum for irregular entry, offshore processing is targeted only at children seeking asylum from some countries who arrive by boat without a visa. By law, the holders of passports of certain – mainly OECD – countries are not liable to transfer under the policy.[22]

5.3 Best interests of the child (art 3)

In its Concluding Observations in 2012, the Committee urged Australia to strengthen its efforts to ensure the integration of the principle of the best interests of the child in policy and legislation, with a particular emphasis on the context of immigration and refugee policy.[23] It is difficult to identify any field in which Australia has made progress on this front.

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[20] Department of Home Affairs, Immigration Detention and Community Statistics Summary 28 February 2018, 4, https://www.homeaffairs.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-28-feb-2018.pdf. This figure does not include those children who were over 13 years of age when they were transferred to Nauru in 2013 and 2014 and who have since turned 18. It also does not include those children who were more recently relocated to the United States of America. Dozens of children born to asylum seekers have spent their entire lives in detention-like conditions: UN News, 'Australia-bound asylum seekers left mentally scarred by years of detention on Pacific islands, warns UN refugee official' 4 April 2018, https://news.un.org/en/story/2018/04/1006501

[21] UN Committee on the Rights of the Child, *General comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6. Other treaty bodies and regional human rights courts have made similar statements. Indeed, article 22 of the CRC explicitly extends its protections to children who are seeking asylum, and underscores the importance of rights applicable to children under other international agreements. See eg UN Human Rights Committee, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986; UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20 on Non-discrimination in economic, social and cultural rights (art. 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009 (E/C.12/GC/20), [30].

[22] See definition of *unauthorised maritime arrival* in s 5(1) and definition of *excluded maritime arrival* in s 5AA(1)(c) of the *Migration Act 1958*; Migration Regulations 1994 regulation 1.15J; regulation 1.11B; Specification of ETA-Eligible Passports 2016/066 - IMMI 16/066 (F2016L01198): https://www.legislation.gov.au/Details/F2016L01198

[23] [Concluding Observations 2012, [32]]

a) *Children Seeking Asylum: Bests interests assessments in the context of transfers to regional processing countries (art 3)*

Transfers of children to Nauru or Papua New Guinea ostensibly involved best interests assessments for each child.[24] The children were in Australia at the time of the assessment. Given the uncertainty surrounding the conditions for children seeking asylum transferred to those countries, and the clear policy of detention or detention-like conditions, transfer was extremely unlikely to have been in the best interests of any child. Given that non-rights based arguments (such as those relating to general migration control) cannot legitimately override the child's best interests,[25] it is difficult to determine how any such assessment could have recommended transfer to Nauru or Manus Island in compliance with international standards. UNHCR also raised concerns about the speed of pre-transfer assessments and questioned their ability to take account of the individual needs of children.[26] Such doubts have been borne out by several years of reports of abuse, family separation, medical neglect, mental illness and self-harm.[27]

The legal framework for offshore processing contains provisions that contemplate the need for some people seeking asylum to be returned to Australia for certain purposes, such as emergency medical care.[28] The high degree of control that Australia maintained over the facilities in Papua New Guinea and Nauru, suggests that its obligations to treat as a primary consideration the best interests of the children who it sent to those countries continued throughout the relevant period, including in relation to consideration as to whether a child should be brought to Australia. In some cases where the Australian government has refused to bring children to Australia in the face of urgent protection needs, it has only done so when ordered by a court.[29]

b) *Immigration: Conflict of Ministerial obligations in relation to unaccompanied minors (Art 3)*

Australia's draft report refers to the legal guardianship responsibilities of the relevant Minister under the *Immigration (Guardianship of Children) Act 1946*, but fails to mention the significant, irremediable conflicts between these responsibilities and the Minister's obligations under the *Migration Act 1958*.[30] This is a longstanding and irreconcilable tension in Australia's system of immigration law. In order to give effect to Australia's offshore processing policy in relation to people seeking asylum, Australian law requires

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[24] Department of Immigration and Border Protection, *Best interests assessment for transferring minors to an RPC*, released under the *Freedom of Information Act 1982,* 6 May 2014 https://www.homeaffairs.gov.au/AccessandAccountability/Documents/FOI/FA140400247.pdf

[25] UN Committee on the Rights of the Child, *General comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6 ,[86].

[26] UNHCR, *Monitoring Visit to the Republic of Nauru: 7–9 October 2013*, 26 October 2013, 25-27.

[27] Incident reports from the Nauru centre leaked by whistle-blowers contained 57 reported cases of "assault on a minor" between 2013 and 2015: *The Guardian,* 'The Nauru Files' https://www.theguardian.com/news/series/nauru-files; Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention*, November 2014, https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf

[28] *Migration Act 1958* ss 198B; 198AH.

[29] See eg AYX18 v Minister for Home Affairs [2018] FCA 283; FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection [2018] FCA 63.

[30] [Australia, Draft Report] 37.

that any person, including a child, who arrives in Australia by boat without a visa must be taken to Nauru or Papua New Guinea as soon as reasonably practicable, subject only to exemption by the Minister.[31] In addition, under Australia's policy of mandatory, open-ended detention of any unlawful non-citizen, the Minister makes decisions about whether detained children can be released from detention centres. In short, Australian law requires the Minister to perform a range of tasks that will often be in tension with the best interests of the child affected. ALHR is not aware of any actions undertaken by the government in response repeated recommendations that an independent guardian be appointed for all unaccompanied minors seeking asylum in Australia.[32]

Cluster: Violence against children

5.4 Right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment (Art 37)

a) Offshore processing - Arbitrary detention and cruel, inhuman or degrading treatment or punishment (art 37(a)-(c); art 2)

Australia's offshore processing policy has involved the long-term detention of children for reasons of their immigration status.[33] This was found to amount to arbitrary detention,[34] which is prohibited in relation to children by article 37 of the CRC. Article 37 references several other obligations in core human rights treaties, including the prohibition on cruel, inhuman or degrading treatment or punishment. An Australian government commissioned review into the safety of children held on Nauru found "there were both reported and unreported allegations of sexual and other physical assault" in relation to children.[35] It also found that the tent accommodation in Nauru presented "significant personal safety and privacy issues" and the "lack of privacy may be a factor in the sexualised behaviours of some children in the Centre through observing adult sexual activity."[36] In addition to article 37(c), these conditions are relevant to articles 19 and 39 of the CRC.

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[31] *Migration Act 1958* ss 198AD; 198AE.
[32] See eg, Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention*, November 2014, 35; 38 (Recommendation 6); 170-1, https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf; Australian Human Rights Commission, *A Last Resort? National Inquiry into Children in Immigration Detention*, April 2004, 17.4.7 (Recommendation 3), https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/last-resort-national-inquiry-children-immigration
[33] A UNHCR monitoring mission in October 2013 found the situation for refugees transferred by Australia constituted arbitrary and mandatory detention under international law and did not provide safe and humane conditions of treatment in detention: UNHCR, *Monitoring Visit to the Republic of Nauru: 7–9 October 2013*, 26 October 2013, 1.
[34] UNHCR, *Monitoring Visit to the Republic of Nauru: 7–9 October 2013*, 26 October 2013.
[35] Philip Moss, *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru: Final Report*, February 2015, [21], https://www.homeaffairs.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-conditions-circumstances-nauru.pdf
[36] Philip Moss, *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru: Final Report*, February 2015, [3.147] and [3.149.21] https://www.homeaffairs.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-conditions-circumstances-nauru.pdf

b) Children in immigration detention in Australia - Arbitrary detention (art 37(b); art 22; art 2, art 3)

Meanwhile, Australia's legislative framework for immigration detention in Australia also continues to make no exception for the treatment of children. In its Concluding Observations in 2012, the Committee urged Australia to bring its legal framework for immigration and asylum into line with international standards, including by reforming its immigration detention policy to impose time limits and judicial oversight.[37] This has not occurred and must be addressed. The average period that children spent in detention increased throughout 2013 and 2014.[38] The legislative initiatives pursued by the Australian government in relation to immigration detention have been focused on expanding search and seizure powers and increasing the level of force that may be used against detainees.[39]

While Australia's fifth and sixth report states that "detention of children is always a last resort and children are detained for the shortest practicable time and in alternative places of detention wherever possible", where children who are refugees are concerned, such outcomes rely on Ministerial or executive discretion to override the ordinary application of law.[40] The continuing inadequacy of this legal framework in its application to children was noted by the Human Rights Committee's Concluding Observations on Australia's fulfilment of its obligations under the ICCPR in 2017.[41]

The Australian government's ratification OPCAT is a positive development in relation to protections against arbitrary detention. The effectiveness of Australia's implementation of mechanisms for compliance with OPCAT is worthy of close attention in the coming years.

c) Non-refoulement and offshore processing (art 37(a)-(b); art 22)

The legal framework for offshore processing in the *Migration Act 1958* establishes a special category of non-citizens known as "transitory persons".[42] These are asylum seekers who have previously been sent to Nauru or Papua New Guinea, but who have since been brought back to Australia for certain purposes, such as medical treatment.[43] Australian law and policy requires that these asylum seekers must be returned to Nauru

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[37] Committee on the Rights of the Child, Concluding observations (2012) CRC/C/AUS/CO/4, [81].
[39] See eg Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017; Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015.
[39] See eg Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017; Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015.
[40] See eg the framework for residence determinations (known as "community detention" under the *Migration Act 1958* (Cth) s 197AB.
[41] Human Rights Committee, *Concluding observations on the sixth periodic report of Australia* (CCPR/C/AUS/CO/6, 9 November 2017) [37]-[38]: "The Committee is particularly concerned about … the use of detention powers as a general deterrent against unlawful entry rather than in response to an individual risk, and the continued application of mandatory detention in respect of children and unaccompanied minors, despite the reduction in the number of children in immigration detention."
[42] *Migration Act 1958* (Cth) s 198AH. Australian law and policy requires that these asylum seekers must be returned to Nauru as soon as reasonably practicable. In September 2017 this group was estimated to number more than 400 people "including more than 50 babies and toddlers born in Australia and who have never left Australia (but who are nevertheless classified as unauthorised maritime arrivals under Australian law) and 66 children currently attending Australian schools.
[43] *Migration Act 1958* ss 198AH.

as soon as reasonably practicable. In September 2017 this group was estimated to number more than 400 people "including more than 50 babies and toddlers born in Australia and who have never left Australia (but who are nevertheless classified as unauthorised maritime arrivals under Australian law) and 66 children currently attending Australian schools."[44]

The removal of children seeking asylum from Australia to Nauru or Papua New Guinea in these circumstances may amount to a breach of Australia's *non-refoulement* obligations. This will be the case where the consequence of removal is exposure to forms of harm that amount to persecution, torture or cruel, inhuman or degrading treatment or punishment. The substantial body of evidence of harm of this kind may support a conclusion that return of children who are refugees or seeking asylum to Nauru would amount to *refoulement* in violation of article 37 and 22 of the CRC.

d) Non-refoulement and Australia's maritime interception and return policy (art 37(a)-(b); art 22)

A major and notable factor underscoring the reduced numbers of children in detention in Australia is the government's policy of maritime interdiction of boats carrying people seeking asylum. Under this policy, 32 vessels carrying 800 people have been intercepted since September 2013.[45] After intercepting the boats, passengers have been returned to Indonesia, Sri Lanka and Vietnam.[46] Although these children were not subjected to mandatory, open-ended detention in Australia or transfer to Nauru or Papua New Guinea, their return to other countries raises serious concerns that Australia has violated its *non-refoulement* obligations under this policy, and as such may have placed children at serious risk of harm. On-water screening of protection

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[45] Parliament of Australia, Senate Legal and Constitutional Affairs Committee, 2017-18 Supplementary Budget Estimates, Questions on Notice, SE17/118, https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestionCommitteeId6-EstimatesRoundId1-PortfolioId13-QuestionNumber117; Parliament of Australia, Senate Legal and Constitutional Affairs Committee, 2017-18 Additional Estimates, Official Committee Hansard, 26 February 2018, 89, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2F2c68087e-f913-401c-88da-f76e4cc7f2fc%2F0000%22. This figure excludes the 157 asylum-seekers (including up to 50 children) that were intercepted in June 2014 who were subsequently taken from Australia to Nauru, see: S Morrison (then Minister for Immigration and Border Protection), 'Transfer of 157 IMAs from Curtin to Nauru for offshore processing', Media release, 2 August 2014, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F331730 0%22

[45] Parliament of Australia, Senate Legal and Constitutional Affairs Committee, 2017-18 Supplementary Budget Estimates, Questions on Notice, SE17/118, https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestionCommitteeId6-EstimatesRoundId1-PortfolioId13-QuestionNumber117; Parliament of Australia, Senate Legal and Constitutional Affairs Committee, 2017-18 Additional Estimates, Official Committee Hansard, 26 February 2018, 89, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2F2c68087e-f913-401c-88da-f76e4cc7f2fc%2F0000%22. This figure excludes the 157 asylum-seekers (including up to 50 children) that were intercepted in June 2014 who were subsequently taken from Australia to Nauru, see: S Morrison (then Minister for Immigration and Border Protection), 'Transfer of 157 IMAs from Curtin to Nauru for offshore processing', Media release, 2 August 2014, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F331730 0%22

[46] Parliament of Australia, Senate Legal and Constitutional Affairs Committee, 2017-18 Additional Estimates, Official Committee Hansard, 26 February 2018, 89; *The Australian*, 'People-smugglers downsize to beat barricade', 29 June 2017, http://www.theaustralian.com.au/national-affairs/immigration/peoplesmugglers-downsize-in-bidto-beat-asylum-barricade/news-story/149610b3f255ea7167817407bed7b0b6 (citing information supplied by the Department of Immigration and Border Protection).

claims is unable to guarantee the range of procedural safeguards required for fair and efficient assessment of international protection needs [47] and in ALHR's view is fundamentally in conflict with the general guiding principles of the CRC[48]

Cluster: Family environment and alternative care

Australia's offshore processing policies have resulted in dozens of cases of family separation, with requests for reunification actively resisted by the Australian government.[49] The Australian government policy of not transferring family members to Australia when another family member is taken there from Nauru or Manus Papua New Guinea for urgent medical treatment has resulted in the long-term separation of multiple family groups. Where they involve children, these cases raise serious questions about Australia's compliance with Article 7 (a child's right to know and be cared for by her or his parents) Article 9 (in relation to separation of a child from her or his parents) and Article 10, which requires applications by a child or her or his parents to enter Australia for the purposes of family reunification to be considered "in a positive, humane and expeditious manner". Many cases have involved pregnant women being separated from their partners and children.[50] It is of particular concern that multiple government sources, and sources on Nauru, reportedly confirmed that the use of family separation as a coercive measure to encourage refugees to agree to return from Australia to Nauru is "unofficial policy".[51] In addition to constituting potential breaches of the aforementioned articles, such a practise is inconsistent with the CRC's guiding principles, particularly Articles 3, 6 and 12.

Cluster: Disability, basic health and welfare

5.5 Health of children subject to offshore processing policy (Art 6, art 24, Art 27, Art 23)

The documented impact of the offshore processing on children's health is profound, and raises significant concerns for the development of the children affected. The UNHCR reported in 2016 that many children display severe psychiatric symptoms and

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[47] UNHCR, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010, [2] http://www.refworld.org/docid/4cd12d3a2.html

[48] Articles 2, 4, 6 and 12

[49] UNHCR, 'UNHCR chief Filippo Grandi calls on Australia to end harmful practice of offshore processing' 24 July 2017 http://www.unhcr.org/en-au/news/press/2017/7/597217484/unhcr-chief-filippo-grandi-calls-australia-end-harmful-practice-offshore.html

[50] Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention*, November 2014, 6.6, https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf

[51] Ben Doherty "An impossible choice: the Nauru refugee forced to choose between family and freedom" 22 September 2017, https://www.theguardian.com/world/2017/sep/22/an-impossible-choice-the-nauru-refugee-forced-to-choose-between-family-and-freedom; Ben Doherty "Peter Dutton defends Nauru policy after refugees told to separate from family" 7 December 2017, https://www.theguardian.com/australia-news/2017/dec/07/peter-dutton-defends-nauru-policy-after-refugees-told-to-separate-from-family; Australian Border Force, 'Misreporting on family separation' 6 December 2017, http://newsroom.border.gov.au/releases/misreporting-on-family-separations[52] Parliament of Australia, Senate Legal and Constitutional Affairs Committee, Inquiry into the serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre, Submission of the United Nations High Commissioner for Refugees, 12 November 2016 (submission 43) [43].

children were nocturnally bedwetting until early to mid-adolescence.[52] A government commissioned review found that 17 children engaged in self-harm in the 12-month period between October 2013 and October 2014. These included lip stitching by 16 and 17 year olds and one attempted hanging.[53] In 2016 the government reported that almost half of the children returned to Australia from Nauru had a clinically diagnosed mental health condition.[54]

These conditions raise a range of issues surrounding Australia's compliance with the CRC, including:

- Australia's ongoing responsibility to treat the bests interests of children affected as a primary consideration, particularly in relation to decisions to bring asylum seekers to Australia for safety or medical treatment;
- Whether original or subsequent transfers of children to regional processing countries violated the prohibition on *refoulement* in the CAT, ICCPR or Refugee Convention.

6. Article 23: Disability

6.1 General

The main concerns outlined in the Committee's 2012 report have not been addressed: namely, the Disability Support System remains underfunded and inefficient. A 'clear legislative definition' of disability, as recommended by the Committee, arguably remains elusive.[55] Australia is also yet to provide adequate support measures for parents of disabled children.

6.2 Non-citizen children with a disability (Arts 23-24 and Art 2 non-discrimination)

In its fifth and sixth report Australia states that in relation to immigrant children with a disability, "whether any visa applicant meets the health requirement does not discriminate between applicants who have a disability and/or disease".[56] This is inaccurate. Applicants for a permanent visa are required to satisfy "health requirements".[57] They require applicants to be free from tuberculosis or any other contagious disease that is a threat to Australian public health.[58] For some visas, the health criterion can be waived if applicants can demonstrate that the grant of the visa

[52] Parliament of Australia, Senate Legal and Constitutional Affairs Committee, Inquiry into the serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre, Submission of the United Nations High Commissioner for Refugees, 12 November 2016 (submission 43) [43].
[53] Philip Moss, *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru: Final Report*, February 2015, [3.92]-[3.93] https://www.homeaffairs.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-conditions-circumstances-nauru.pdf
[54] Parliament of Australia, Senate Legal and Constitutional Affairs Committee, 2016 Budget Estimates, Questions on Notice, 8 February 2016, Immigration and Border Protection Portfolio (AE16/009) - Conditions of children transferred to Australia - Programme 1.5: IMA Offshore Management.
[55] See s4 *Disability Discrimination Act 1992* (Cth).
[56] [Australia, Draft Report, 39].
[57] These are among the Public Interest Criteria in Schedule 4 to the *Migration Regulations 1994* (Cth).
[58] Migration Regulations 1994 (Cth) Schedule 4, Public Interest Criterion 4005, 4006A and 4007.

would not impose significant costs to the Australian community or prejudice the access to health care or community services for Australian citizens and residents.

When determining whether the grant of the visa would result in significant cost to the Australian community, the level of cost is determined over an applicant's lifetime. This actively discriminates against children with disability as they must 'justify' costs over a longer period of time. Further, the costs are calculated irrespective of whether these health services will actually be used by the applicant and do not take the financial position and contribution of the disabled child and their family members into account. It is arguable that the health requirements are inherently discriminatory on this basis. Logically, if cost were an objective criterion, then all migrants should be costed (including smokers, for example). Conversely, if cost were a valid and decisive screening factor, visas should be granted to those undertaking to self-finance all disability and health related costs.

In this way Australian migration law is discriminatory in its effect on people with disability, in particular children. Although the *Disability Discrimination Act 1992* (Cth) makes both direct and indirect discrimination against people with disability and their family members illegal, Australian immigration law is exempt.[59] The Law Council of Australia remains concerned about this exemption, which in effect allows the State party to disregard its obligations under the United Nations *Convention on the Rights of Persons with Disabilities.* [60]

While we welcome the fact that the Australian government has implemented some of the recommendations of the 2010 Joint Standing Committee on Migration Inquiry into Migration Treatment of Disability, the matters above need to be addressed.

7. Child Rights and the Business Sector

7.1 Commentary on Article 32 and the Australian Business Sector

Concluding Observations 26 – 28

Cluster: Special Protection Measures - economic exploitation, including child labour, with specific reference to applicable minimum ages (art. 32)

Article 32 of the CRC states*:*

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to

[59] *Disability Discrimination Act 1992* (Cth) s 52.

the relevant provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Each State and Territory in Australia currently has unique laws in relation to minimum employment age and conditions of employment. [61] Australia should implement national child rights legislation to encourage uniformity across the legal system.

Australia does not appear to have strengthened domestic laws to address beaches of child rights by State companies or their subsidiaries operating abroad. Child rights impact assessments are not being conducted as a requisite part of trade negotiations.

In its 2012 concluding observations, the Committee raised concerns at reports of participation and complicity of Australian corporates in serious violations of human rights in foreign countries. [62]

While Australia can be commended on the proposed plans to introduce legislation in 2018 to deal with modern slavery in supply chains, disappointingly the Australian government announced in October 2017 that it will not proceed in developing a National Action Plan on business and human rights.[63] Australia has also not implemented any of the recommendations of the Committee set out in its 2012 concluding observations with respect to child rights and the business sector.[64]

This is particularly concerning given recent reports indicating that Australian companies have a low level of understanding of human rights risk and low levels of engagement with leading practices on risk management.[65] Given the vulnerability of children to human rights violations by businesses, [66] this lack of focus by Australian business on human rights issues, coupled with the lack of leadership on the issue from the Australian government, will likely lead to further breaches of the rights of the child under Article 32.

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[61] *Children and Young People Act 2008* (ACT), *Children and Community Services Act 2004* (WA), *Child Employment Act 2006* (QLD), *Child Employment Act 2003* (Vic), *Industrial Relations (Child Employment) Act 200*6 [NSW].
[62] Paragraph 27 of the Concluding Observations.
[63] https://globalnaps.org/country/australia/.
[64] Paragraph 28 of the Concluding Observations.
[65] Australasian Centre for Corporate Responsibility, 'Human Rights and Australian Listed Companies: Benchmarking Report, October 2017'. See also the 2017 study by KPMG which indicates that only 55% of Australia's top 100 entities acknowledge human rights as an issue for their business: https://www.businessinsider.com.au/australian-companies-lag-the-rest-of-the-world-when-it-comes-to-corporate-responsibility-2017-10.
[66] According to World Vision, 168 million children are involved in child labour in a range of industries from agriculture to manufacturing, services to construction, and textiles to fashion, see: https://www.worldvision.com.au/get-involved/advocacy/vgen-youth/child-labour-in-supply-chains; Further, according to a 2017 report on global estimates of modern slavery, 1 in 4 victims of modern slavery are children, see: https://www.alliance87.org/global_estimates_of_modern_slavery-forced_labour_and_forced_marriage.pdf.

ALHR notes that a number of Australian mining companies have been linked to human rights violations across Africa according to a detailed investigation undertaken by the International Consortium of Investigative Journalists ("ICIJ"), with the investigation also finding that Australian mining companies in Africa were more numerous than other countries.[67] This poses significant risks to the rights of a child under Article 32. A recent study by UNICEF on the rights of a child and the mining sector highlighted the vulnerability of children to the impacts of mining, and raised concerns such as the security of livelihoods for children, access to education and health services, protection from sexual and economic exploitation, protection from exposure to harmful waste materials and a safe living environment. [68]

The prevalence of Australian mining companies in Africa also highlights the potential for the State Party to make a long lasting and positive difference in the area by demonstrating greater leadership on human rights in the business sector. ALHR recommends, as a matter of urgency, that the Australian government conduct a baseline assessment to identify priority areas for the implementation of the UN Guiding Principles on Business and Human Rights, and commit to a National Action Plan on Business and Human Rights in Australia.

7.2 Sale, Trafficking and Abduction: Commentary on Article 32 and the Australian Business Sector

Cluster: Special Protection Measures - sale, trafficking and abduction (art. 35)

Article 35 of the CRC stipulates that "*States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form*."

An estimated 1 million children around the world are forced into sexual servitude every year and a further 1.8 million children are exploited in the global commercial sex trade.[69] In reality, this figure is thought to be much higher due to the underground operations of human traffickers, and lack of reporting[70]

Australians have been identified as participating in commercial child sexual exploitation in 25 countries and is one of the largest group of sex tourists prosecuted in Thailand for child sex offences.[71] Australia continues to play a significant role in strengthening the anti-trafficking regime in Asia-Pacific,[72] given its geographic position within the region

[67] See, https://www.icij.org/investigations/fatal-extraction/. The investigation by ICIJ found that there were more than 150 Australian mining companies holding about 1,500 licenses and managing dozens of mining operations across Africa.
[68] See, Unicef, 'Children's Rights and the Mining Sector, p7.
[69] Child Wise, Homepage [https://www.childwise.org.au/page/34/stop-sex-trafficking]
[70] Ibid.
[71] Ibid.
[72] The Department of Foreign Affairs and Trade and the Attorney General's Department have been engaged in capacity-building efforts in Southeast Asia, e.g. the Australia-Asia Program to Combat Trafficking in Persons.

where several countries are variously affected by problems such as weak migration systems, poor governance and victim protection, and transnational crime.[73]
Article 35 of the CRC stipulates that States take bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children. These measures shall be taken without discrimination of any kind[74] and shall equally apply to a child with a disability.[75]

The Optional Protocol to the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (**OPSC**) is relevant in that a State Party shall ensure the following as a minimum standard of action:

a) Penalising the sale of children, the sexual exploitation of the child, offering, obtaining, procuring or providing a child for child prostitution through criminal code (Article 3) and establishing its jurisdiction over such offences (Article 4);
b) Providing assistance to victims of such offences, including their full social reintegration and their full physical and psychological recovery (Article 9); and
c) Strengthening international cooperation for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism (Article 10).

Since 2012, Australia has taken the following measures in response to its obligations under Article 35 and the OPSC:

a) In 2013, the new offences of forced marriage, harboring a victim and organ trafficking were introduced and the application of existing offences of deceptive recruiting and sexual servitude extended.[76] The Crimes Act was also amended to include wider provisions for victim support including child victims;[77]
b) The Support for Trafficked People Program was launched for victims of slavery and trafficking including children, administered by the Department of Social Services and delivered by Australian Red Cross;[78]
c) Registered child sex offenders with reporting obligations are prohibited from (attempting to) travelling overseas without permission from a relevant authority;[79]
d) The Protocol for Responding to Allegations of Child Trafficking In Inter-country Adoption[80] was developed which provides information about assistance and support available to adoptive parents and adoptees where there are allegations

[73] Jiyoung Song, *Australia and the anti-trafficking regime in Southeast Asia*, Number 1 November 2016, Lowy Institute for International Policy [https://www.lowyinstitute.org/sites/default/files/documents/Song%2C%20Australia%20and%20the%20anti-trafficking%20regime%20in%20Southeast%20Asia%2C%20WP1%5B1%5D.pdf]
[74] Article 2 of *the Convention of the Rights of Child*.
[75] Article 23 of *the Convention of the Rights of Child*.
[76] *The Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013*.
[77] *The Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Bill 2013*.
[78] Australian Government, Department of Social Services' webpage [https://www.dss.gov.au/women/programs-services/reducing-violence/anti-people-trafficking-strategy/support-for-trafficked-people-program]
[79] *The Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Act 2017*.
[80] Australian Government, Attorney-General's Department's webpage, April 2015 [https://www.ag.gov.au/FamiliesAndMarriage/IntercountryAdoption/Pages/Hague-convention-on-intercountry-adoption.aspx]

or concerns about child trafficking within a country of origin, from where a child has been adopted to Australia, or there have been specific concerns raised in an individual case.

In February 2018, the Australian government increased access to the Support for Trafficked People Program from 45 days to 200 days before they have to assist the prosecution investigation.[81] This is a promising step. However from 2004 to 2017 there were only 3 prosecutions for child trafficking and 4 for sexual servitude.[82]

As a recommendation, Australia should continue to widen access to the Support for Trafficked People Program, improve co-ordination between relevant agencies to support the prosecutions of child trafficking related offences and ensure adequate victim support during any investigations of child trafficking related offences. ALHR also notes that the proposed introduction of the national *Modern Slavery Act*, discussed in the *Hidden in Plain Sight* report, has recommended the provision of independent child trafficking advocates to work with the Independent Slavery Commissioner.[83]

7.3 The intersection with OPSC and Article 35 of the CRC

For the past three years, Australia has not convicted any labor or sex traffickers under the trafficking provisions of the Criminal Code Act 1995 (Cth). [84] Nonetheless, Australia can be commended for its continued effort to implement the National Action Plan to Combat Human Trafficking and Slavery 2015-2019. This new interagency taskforce has focused on regional task groups for the purpose of expanding the scope of its research to strengthen its capacity to respond to trafficking offence.

The introduction of the Migrant Worker Strategy and Engagement Branch by the Fair Work Commission to deal specifically with migrant worker rights is a welcomed initiative, to raise awareness in relation to potential abuses suffered by this vulnerable community. However, it is noted that no traffic victim referrals or investigations materialised as a result of this initiative. [85]

8. Children's Rights and Gender

Cluster: Disability, Basic Health and Welfare - health and health services, in particular primary health care (Art. 24)

Pursuant to Article 24(3) of the CRC States Parties are obliged *to:*

"take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children."

[81] http://minister.homeaffairs.gov.au/alexhawke/Pages/support-for-victims-of-modern-slavery.aspx
[82] Commonwealth of Australia, *Hidden in Plain Sight* report, p 236.
[83] Ibid, page 65
[84] US Department of State, 2017 Trafficking in Persons Report: Australia, from: https://www.state.gov/j/tip/rls/tiprpt/countries/2017/271137.htm.
[85] US Department of State, 2017 Trafficking in Persons Report: Australia, from: https://www.state.gov/j/tip/rls/tiprpt/countries/2017/271137.htm.

8.1 Female Genital Mutilation (FGM)

A survey of Australian paediatricians found 10% had treated at least one child with Female Genital Mutilation (**FGM**).[86] Most children affected had parents born in Africa (99%).[87] In line with its obligations under Article 24(3), conducting FGM in Australia or overseas on a child, usually resident in Australia, is a criminal offence in all Australian States and Territories.[88] Despite this, successful prosecutions are rare[89], the first prosecution taking place in 2016.[90] Awareness and training programs are available in most jurisdictions and a national education toolkit was developed for medical practitioners in 2014.[91] However, there has been a significantly increased demand for female genital cosmetic procedures since FGM criminalisation,[92] due to the lack of delineation, and arguably artificial distinction, between the procedures.

8.2 Involuntary or Forced Sterilisations

Involuntary or coerced sterilisation is a practice that disproportionately impacts on girls with intellectual disabilities in Australia. The sterilisation of children with a disability has been justified for a range of reasons, including as a means of preventing sexual abuse and any subsequent pregancies; preventing unplanned pregnancies generally; managing menstruation and sexual behaviour so as to reduce the burden on parents, carers and public resources; perceived incapacity of adolescents with learning disabilities to be a parent; and to stop the passing of genetic irregularity.[93]

Evidence of forced sterilisations of children in Australian is generally poor, however one study found at least 1045 of forced sterilisations of girls between 1992 and 1998.[94] Australia sanctions these forced sterilisations despite breaches of Articles 2, 23, and 24(3) of the CRC.

Sterilisation of a child in Australia can occur with an order from the Family Court or a guardianship tribunal, having consideration to the best interests of the child.[95] ALHR is concerned that, in some cases, the 'best interests' of the child with a disability will be impacted upon by consideration of the interests of parents, carers and the broader health and disability support system, which may be contrary to the child's wishes.

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[86] Varol et al, 'Evidence-based policy responses to strengthen health, community and legislative systems that care for women in Australia with female genital mutilation/cutting' (2017) 14 *Reproductive Health* 63, 67

[87] Zurynski et al, 'Female genital mutilation in children presenting to Australian paediatricians' (2017) 102 Archives of Disease in Childhood 509, 509

[88] Attorney General's Department, 'Review of Australia's Female Genital Mutilation legal framework: Final Report' (March 2013) p. 3

[89] Ibid

[90] https://www.theguardian.com/society/2016/mar/18/three-sentenced-to-15-months-in-landmark-female-genital-mutilation-trial

[91] Australian Medical Association, *Female Genital Mutilation* (23 March 2017) <https://ama.com.au/position-statement/female-genital-mutilation-2017>

[92] Ibid

[93] Women With Disabilities Australia (WIù/DA), Moving Forward and Gaining Ground: The Sterilisation of Women and Girls with Disabilities in Australia, June 2012

[94] Laura Elliot, 'Victims of Violence: The Forced Sterilisation of Women and Girls with Disabilities in Australia' (2017) 6 *Laws* 8, 11

[95] Paul Gregorie, 'Stop the Forced Sterilisation of Females with Disabilities' (16 November 2017, Sydney Criminal Lawyers)

A 2013 Australian Senate Committee report into these practices made several recommendations for reform.[96] The UN Committee on the Rights of the Child recommended in 2012 that Australia prohibit non-therapeutic sterilisation of all children,[97] and the UN Human Rights Committee made similar recommendations in 2017.[98] Despite this, the Australian government has not made significant changes or introduced legislation criminalising these practices.[99] Replacement of 'best interest' frameworks with supported decision-making, as well as greater support and education for children, families, and medical practitioners would also assist in preventing these practices, and any subsequent harm to the child.

8.3 Forced Marriage

Forced marriage is still a practice that occurs in Australia with a report conducted in 2014 from Plan International Australia finding that there were as many as 250 cases 'of children being forced into marriage in the past two years.'[100] Forced marriage is form of slavery provided for in section 270.7B. of the *Criminal Code Act 1995 (Cth).* It is a new offence enacted in 2013 and, like all offences within Division 270 of the *Criminal Code,* the offence has extra-territorial, universal jurisdiction and applies to conduct within or outside of Australia.

Further, the *Marriage Act 1961 (Cth)* "includes provisions whereby a marriage may be void if the consent of a party was not real, or if a party was not of a marriageable age".[101] This is in line with Article 24(3) of the Convention on the Rights of a Child relating to abolishing "traditional practices"[4] that are "prejudicial to the health of children".

The Salvation Army reports that early and forced marriage is "an emerging issue in Australia with the number of reports rising since it was criminalised in March 2013. Australian Federal Police figures show there were 69 allegations of forced marriage in Australia in 2015/16 (36 cases in NSW, and 19 cases in VIC), compared to 33 in 2014/15 and 11 in 2013/14. Alarmingly a high percentage of these investigations were related to persons under the age of 18".[102] In 2016/2017, forced marriage was the highest referral to the Australian Federal Police for human trafficking and slavery offences.[103]

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[96] Senate Community Affairs References Committee, 'Involuntary or coerced sterilisation of people with disabilities in Australia' (July 2013, Commonwealth of Australia)
[97] United Nations Committee on the Rights of the Child, 'Consideration of reports submitted by States parties under article 44 of the Convention – Concluding observations: Australia' (28 August 2012, CRC/C/AUS/CO/4)
[98] Gregorie, above n 9
[99] Elliott, above n 8
[100] Liz Hobday, 'Forced Marriage, an emerging problem in Australia despite laws, welfare group says', http://www.abc.net.au/news/2014-07-23/forced-child-marriage-continuing-in-australia:-report/5613700, 23 July 2014
[101] Department of Home Affairs, 'Understanding Forced Marriage', (2017-2018)
[102] The Salvation Army, 'Identifying Slave-like, Early and Forced Marriages', (2014)
[103] Australian Government, Response to Questions on Notice, 22 June 2017, p. 1

Further, the United Nations Population Fund estimates that "one in five girls is married before age 18, with one in nine being married under the age of 15 on a global scale. This is an average of tens of thousands of girls every single day.[104]

Despite this, SBS reports that "*encouragingly, since forced marriage has been criminalised, the number of referrals received by the AFP involving people in, or at risk of, forced marriage has been on the rise*."[105] Nonetheless, there remain significant gaps in interagency coordination in Australia to address the issue of forced marriage. Further, the Australian Government needs to continue to fund organisations and programs that engage in outreach, education and awareness-raising activities, including information on forced marriage in school curricula, and that information on forced marriage be 'consistently and routinely' provided to new migrants.[106]

9. LGBTI Children in Australia

ALHR notes that Australia's fifth and sixth report contains little detail regarding the protection of the rights of LGBTI children in Australia. LGBTI students find school to be a harmful and hurtful space where they have an 80% chance of being subjected to bullying[107]. This is not only harmful to students' mental state, but discourages them from learning, further restricting their futures. Young LGBTI students are disproportionately affected by mental health issues and at a much higher risk of youth suicide, particularly where they receive abuse and harassment, as confirmed by the National LGBTI Health Alliance[108].

Cluster General principles and Violence Against Children

Concluding Observations 29(e), 30(e), 78 and 79

9.1 Non-discrimination (art. 2)

In its Concluding Observations the Committee noted, *"the absence of federal legislation protecting against discrimination on the basis of sexual orientation or gender identity"*[109] and called upon Australia to enact such legislation.[110]

However, Australia's discrimination law framework continues to comprises state, territory and commonwealth laws that provide limited protection for LGBTI children.

A La Trobe University study of 3,134 same-sex-attracted and gender questioning (**SSAGQ**) young people, *Writing Themselves In,* found that:

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[104] United Nations Population Fund, 'Child Marriage Overview', (2018)
[105] Elise Potaka, Marcus Costello, 'It happens here, underage forced Marriages in suburban Australia', https://www.sbs.com.au/news/the-feed/it-happens-here-underage-forced-marriage-in-suburban-australia, (2018)
[106] *Hidden in Plain Sight*, An inquiry into establishing a Modern Slavery Act in Australia, Parliament of the Commonwealth of Australia
[107] according to La Trobe University, *Writing Themselves In 3 Report,* 2010 p 39
[108] See https://lgbtihealth.org.au/resources/snapshot-mental-health-suicide-prevention-statistics-lgbti-people/
[109] OPCIT Concluding Observations 29(e)
[110] IBID Concluding Observations 30(e)

- 10% of young people reported that their school did not provide any form of Sexuality Education at all;
- 40% attended a school with no social or structural support features for sexual difference;
- Only 19% of young people attended a school that was supportive of their sexuality; and
- Over a third described their school as homophobic.

A survey of 564 LGBTI individuals in 2015 by the Bully Zero Australia Foundation reported that:

- Over 50% of SSAGQ young people in Australia have experienced verbal abuse;
- Over 15% of SSAGQ young people in Australia have experienced physical abuse; and
- Over 70% of these homophobic and transphobic incidents take place in schools.

ALHR remains concerned that LGBTI children are exposed to discrimination in everyday life including within their schools, workplaces in public life. Their remedies in respect of that discrimination are limited because of religious exemptions to discrimination laws.

9.2 Best interests of the child (art. 3)

Because of Australia's largely heteronormative culture, the best interests of LGBTI children are sometimes ignored by Government agencies and institutions.

This is particularly so in our school system. Australia's primary and high school curriculum is void of any specific LGBTI bullying program, leaving the states and territories to fill the gap. Unfortunately, most states and territories have not provided or have cut specific funding in respect of LGBTI children at school.

The Australian Human Rights Commission has reported that:

- A large number of LGBTI people hide their sexuality or gender identity when accessing services (34 per cent), at social and community events (42 per cent) and at work (39 per cent). Young people aged 16 to 24 years are most likely to hide their sexuality or gender identity.
- LGBTI young people report experiencing verbal homophobic abuse (61 per cent), physical homophobic abuse (18 per cent) and other types of homophobia (9 per cent), including cyber bullying, graffiti, social exclusion and humiliation.
- 80 per cent of homophobic bullying involving LGBTI young people occurs at school and has a profound impact on their well-being and education.
- Around 61 per cent of same-sex attracted and gender-questioning young people said they experienced verbal abuse because of their sexuality, while 18 per cent reported experiencing physical abuse. Young men (70 per cent) and gender-questioning young people (66 per cent) were more likely than young women (53 per cent) to experience verbal abuse.

9.3 Respect for the views of the child (art. 12)

LGBTI children are largely left out of consultations with respect to laws that affect them. There is no Australian Government organisation that provides a framework for regular hearings of the views of children within the LGBTI community. It follows that data on LGBTI children is lacking and inconsistent.

Indeed, the views of LGBTI children are largely ignored unless a non-government organisation considers them. Rainbow Families NSW is one such organisation forming a youth advisory council this year to hear from LGBTI and heterosexual young people from LGBTI families.

Concluding Observation 40

Cluster: Civil rights and freedoms

Australian transgender young people have benefited from more awareness of their identities in Australian society and their journey to gender identity in the health and legal systems. Recent judgments of the Family Court of Australia and commentary from a former Chief Justice of that court mean that transgender children have growing civil rights and freedoms in Australia.

ALHR welcomes the decision of the Full Court of the Family Court in *Re: Kelvin* on 30 November 2017which means that Family Court approval is no longer required in Australia to authorise stage two treatment in instances where there is no conflict between the child and their parents or doctors.

9.4 Privacy and protection of image (art. 16)

Australia lacks sufficient privacy protections for children and young people. There is no common law tort of privacy and there is no legislation giving effect to the common law tort of privacy in Australia. LGBTI children and young people are particularly vulnerable to invasions of their privacy and illegal use of their image because they are sexual minorities in a heterosexual society and remain the target of hatred within their peer groups as well as in broader society. In the age of social media LGBTI children's privacy significantly at risk during a time of evolution of their identity and sexual attraction.

ALHR is aware of a recent case where a trans boy's photograph in a Minus18 online information page was stolen by a Christian Democratic Party candidate in a state election and used by that candidate to propagate hatred of the transexual community and organisations like Minus18 who support LGBTI children. The child involved did not have legal resources to protect his image and his image was circulated on the Internet without his permission and for the purposes of spreading hate.

9.5 Access to information from a diversity of sources and protection from material harmful to his or her well-being (art. 17)

The lack of any structural platform for specific LGBTI-inclusive curricula in Australian schools means LGBTI children and young people are dependent on their individual schools for access to information from a diversity of sources and protection from material harmful to their well-being.

Australia is failing to protect LGBTI children and young people in this regard because early teenage years, in particular, are formative years for children's maturity and sexual exploration. LGBTI children and young people need access to information about their sexual identities, the organisations that can support them, the history of law reform affecting the LGBTI community and the social networks that they can access to meet other children like them.

10. Democratic Freedoms and Children

10.1 The right to seek, receive and impart information (art. 13) and the protection of privacy and protection of the image (art. 16)

Children suffer just as much as adults from the current moves within Australia, in the name of national security, towards a surveillance State. Like adults they have their metadata collected and kept until at least two years after the provider contract ends[111]. Like adults they will have their image collected by public and private entities for facial identification purposes and perhaps also sold for profit[112].

10.2 Freedom of thought, conscience and religion (art. 14)

The Australian school chaplains programme has as of the Federal Budget of 8 May 2018 been given an increased funding of $250 million over the next 4 years, at a time when the independent public broadcaster has been stripped of $84 million. The programme has been criticised for its adverse impact on freedom of religion for children and particularly for its adverse impact on the right to freedom from religion[113] (which is a logical attribute of the right to freedom of religion[114]), given that the programme does not allow secular teachings/ teachers.

10.3 Freedom of association and peaceful assembly – public order offences

Freedom of expression (Art 13), freedom of thought, conscience and religion(Art 14) and freedom of association and of peaceful assembly (Art 15) (Concluding Observation 40)

ALHR notes the comments in Australia's fifth and sixth report on public order offences, particularly the statement that "*In Australia children are able to freely congregate in public* spaces."[115] We note that the draft report is silent on the impact of the over-use of public order offences, consorting laws and other forms of policing on children, particularly Aboriginal and Torres Strait Islander children.

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[111] Telecommunications (Interception And Access) Amendment (Data Retention) Act 2015 (No. 39, 2015)

[112] Australian Passports Amendment (Identity-matching Services) Bill 2018

[113] Paul Karp, "School chaplain program's $247m budget extension rejected by teachers' union", *Guardian Online*, 9 May 2018, https://www.theguardian.com/australia-news/2018/may/09/school-chaplain-programs-247m-budget-extension-rejected-by-teachers-union

[114] Heiner Bielefeldt, Special Rapporteur on Freedom of Religion or Belief, A/70/286 *Interim Report: Elimination of all forms of religious intolerance* (2015), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/245/07/PDF/N1524507.pdf

[115] Australia's Fifth and Sixth Report OPCIT p.12

For example, during the reporting period the NSW Ombudsman published a Report on the operation of Part 3A, Division 7 of the *Crimes Act 1900 (NSW)*[116] following concern the new consorting law may criminalise social interactions in circumstances where there is no requirement for police to suspect any link between the consorting and planning or undertaking criminal activity, organised or otherwise, or building criminal networks.

The report found that 201 children aged between 13 and 17 years had been subject to consorting laws and shockingly that more than three quarters of the consorting warnings issued about children and young people were unlawful. Nearly 60% of the children and young people subject to the NSW consorting law were Aboriginal and the highest proportion of Aboriginal people was in the youngest category of children aged between 13 and 15 years.[117] Clients accessing homelessness services reported that they had been issued consorting warnings while spending time with friends in public areas, including parks and outdoor seating areas.[118]

Cluster Education, Leisure and Cultural Activities

10.4 Right to education, including vocational training and guidance (art. 28)

The Federal Budget of 8 May 2018 has frozen university funding, which was already down to only 16% of revenue in some cases.[119] Happily the State of Victoria has not followed the general trend to defund education, having announced in May 2018 that 30 core vocational TAFE courses and 18 pre-apprenticeship packages will be free in that State from 2019[120]. However generally it can be said that the right to education through vocational training has been greatly diminished by cuts across Australia to TAFE colleges and to universities.

Educational programmes on the public broadcaster have also shown a steady decline in number, no doubt linked to its defunding and changes in management.

10.5 Potential impact on civil society organisations advocating for children's rights

Also connected with the move towards a surveillance State is a package of proposed legislation which, if implemented, will have the potential to largely silence civil society organisations (**CSOs**) and greatly restrict their ability to advocate on behalf of children and families in all areas of childrens' rights.

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[116] NSW Ombudsman Report on the operation of Part 3A, Division 7 of the *Crimes Act 1900 (NSW) April 2016*
[117] Ibid p71
[118] Ibid p73
[119] Speech by University of Sydney Vice-Chancellor to alumni, Sydney University, 28 March 2018.
[120] This apparently represents an investment of approximately $800 million. See http://www.abc.net.au/news/2018-05-02/free-tafe-course-student/9716470 and John Pardy, "Free TAFE in Victoria: who benefits and why other states should consider it", *The Conversation*, 4 May 2018 at https://theconversation.com/free-tafe-in-victoria-who-benefits-and-why-other-states-should-consider-it-96102.

The legislation which provides for a new, more secretive government framework with reduced checks and balances through the mergers of several departments and the changing of function between departments was passed by the Senate on 9 May 2018 with little opposition from any party but the Greens. It is the *Home Affairs and Integrity Agencies Legislation Amendment Act 2018.*

Related proposed legislation which have overlapping effects both on individuals and civil society organisations, include the:

- *Criminal Code Amendment (Impersonating a Commonwealth Body) Act* 2017
- *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*
- *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*
- *Foreign Influence Transparency Scheme Bill 2017*

The *Foreign Influence Transparency Scheme Bill 2017* potentially criminalises relationships between Australian citizens or permanent residents with foreign persons where the foreign recipient of information from the Australian knows or expects that the Australian would or might undertake some political activity. The legislation will cover disclosures between individuals as well as between organisations. Political activity is defined extremely broadly and would cover most ordinary activities like contacting one's MP, going to a demonstration, perhaps even attending a party meeting or signing a petition. If the Australian does not self-register with the regulator (which involves paying fees) and report the relationship to the regulator, they are guilty of a crime – whether or not they actually carry out the political activity which has been discussed, and irrespective of the fact that no harm has been caused. The penalty is up to 7 years' jail for intentional non-registration, and up to 5 years' jail for reckless non-registration. If the activity is not carried out (e.g. you end up sleeping in rather than going to the demonstration) the penalty for non-registration is 12 months' jail. There are no exemptions for children or for private or family relationships. Potentially, an Australian citizen or permanent resident would need to register their relationship with every non-Australian family member and every non-Australian friend (fees apply) in order to avoid the possibility of criminal penalties.

The *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* is the piece of legislation which will have most impact on CSOs irrespective of whether or not they have any foreign connections or receive any foreign donations. If a CSO is involved in 'political expenditure' above a certain indexed minimum (currently $13,500) then it is regarded as a 'third party campaigner' and must register with the regulator and face a host of expensive and difficult procedural requirements, irrespective of whether or not it receives foreign donations. These include the appointment of a financial controller who can be personally liable as a crime for any breach of the legislation by the CSO with penalties of up to 10 years imprisonment. This provision [121] alone is likely to seriously chill the speech of CSOs, and make it virtually impossible for volunteer organisations to find a treasurer. Senior staff must

[121] See International Centre for Not-for-Profit Law, www.icnl.org

also disclose their political party membership to the regulator (query whether this information will be made public), whether or not the CSO accepts foreign money. CSOs must obtain statutory declarations from donors that they are Australians.

Political expenditure is defined as expenditure for a political purpose. Political purpose includes "*(b) the public expression by any means of views on an issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election)."* Thus any advocacy around what a government should or should not do in the interests of children is likely to be caught by this legislation.
If the CSO receives foreign income, it is restricted as to how it can use that income and basically is not allowed to use that income for its advocacy work.

Similar legislation has been passed in Russia and a host of countries known for repression of political speech, such as Egypt, Malaysia, Nepal, Algeria, Jordan, Afghanistan, Ethiopia, India, Yemen, Indonesia, Kenya, Turkmenistan, China and Cambodia. It has also been passed in some first world common law countries, but generally not in first world civil law countries, which are more protective of free speech rights and of the role of civil society organisations in a democracy.

However other countries have rejected attempts to introduce this type of legislation restricting political advocacy by CSOs. If Australia introduces this legislation it will become more repressive than Costa Rica, the Kyrgyz Republic and Kazakhstan, Lebanon and Morocco.

11. Aboriginal and Torres Strait Islander Children in Australia

Cluster General Principles

11.1 Non-Discrimination (Art. 2)

In its 2012 concluding observations, the Committee noted that racial discrimination in general remains a problem, specifically in relation to ATSI people and particularly in relation to the family unit's access to services, along with child development, well-being and protection.

Australia can be commended for its efforts in the Closing the Gap policy ("CTG"), however, four of the eight existing targets are set to expire in 2018 and have not yet wholly been met. Most notably as to the overall effectiveness of the policy's implementation, there remains no independent evaluation of the effectiveness of the CTG programmes.[122]

There has however been significant funding for the Better Start to Life approach, which commenced in July 2015[123] and includes the Australian Nurse Family Partnership Programme and the New Directions: Mothers and Babies Service Programme. Funding has also been used to support early childhood and adolescent education initiatives in

[122] Concluding Obs para 30(b).
[123] CGT PM report 2018 P41.

the indigenous sector with attendance rates stabilising for indigenous students nationally between 2014 and 2017.[124]

11.2 Best interests of the child (Art 3)

Currently 56.6 per 1000 First Nations or Aboriginal children are removed from their homes compared to 5.8 per 1000 non-Indigenous children. The removal is said to be in the best interests of the child. The *Family Law Act* 1975 (Cth) s 60CA provides that a child's best interest is a *paramount* consideration and notwithstanding the legislative changes to placements into Indigenous families, the concept of the best interests of the child ideology as applied by all decision makers in Australia tends to construct the best interests of First Nations or Aboriginal children as separate, distinct and abstracted from their cultural contexts. Indeed, child welfare practices have been, and continue to be, a major factor in the deterioration of aboriginal culture and their practical impact runs contrary to the CRC's guiding principles.

In the context of child welfare and the determination of placement decisions and custody disputes, it seems that the 'best interests of the child' test is the yardstick. The word "concerning' in article 3 of the CRC potentially has wide-reaching application. In order to achieve the objects of the**,** the word 'concerning', when applying the best interests of the child ideology, Australian legislation needs to be amended and interpreted to acknowledge the unique nature of Indigenous culture, identity and child care practices, and the concomitant conceptions of where a First Nations or Aboriginal child's best interests may lie.

Indigenous people are bound in a definitive way to their own cultural community. A key focus on acting in the best interest of an indigenous child must include the spiritual and emotional welfare of the child. There are numerous spiritual and emotional disadvantages associated with not bringing up an Indigenous child within his or her own community of kin.

In ALHR's view the decision-making process for child welfare law policy and practice as it applies to First Nations and Aboriginal Peoples needs to shift responsibility, or at the very least to include, Aboriginal and First Nations communities. In many cases, this will require that First Nations and Aboriginal persons and groups be given standing in all aspects relating to Indigenous issues as these issues directly concern the best interests of the child.

Cultural considerations are in the best interests of First Nations and Aboriginal children and should be compulsory in any case involving a First Nations or Aboriginal child.

11.3 Removal of Children

Cluster Violence against children

[124] CGT PM report 2018.

Abuse and neglect, including physical and psychological recovery and social reintegration (arts. 19 and 39)

Right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, including corporal punishment (arts. 37(a) and 28(2))

Cluster Family environment and alternative care

Separation from parents (art. 9) and children deprived of family environment (art. 20)

First Nations or Aboriginal Children represent 5.5% of Australian youth, but over 35% of children in out-of-home care.[125]

The experiences of First Nations or Aboriginal children and their families with the care and protection systems in Australia continues to be characterised by fear, mistrust and disempowerment, with the experience of the Stolen Generation and its transgenerational impact insufficiently addressed by Australian authorities.[126]

The *Aboriginal and Torres Strait Islander Child Placement Principle* (**Indigenous Placement Principle**) has been a laudable development in aiming to ensure the culturally appropriate placement of children removed from family care. However, implementation rates vary widely, from 80% in NSW to 12.5% in Queensland.[127] All jurisdictions must aim for comprehensive implementation of the Indigenous Placement Principle in each case where a child is removed to out-of-home care.

Periodic review of placement (art. 25)

11.4 Adoption

Concluding Observations 53 and 54
General Principles (Arts. 3, 12)

ALHR remains concerned that adoption proceedings in Australia are not undertaken with the best interests of the child as the paramount consideration.

ALHR notes that if Australia is to comply with its CRC obligations it must pursue measures to ensure that all its states and territories amend legislation on adoption, as required, in order to comply with its obligations under the Convention and the Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoption to give full effect to the provisions on consent, access to legal representation in adoption proceedings, and to ensure that adoption proceedings are decided upon with the best interests of the child as the paramount consideration.

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[125] Joseph McDowell, 'Connection to Culture by Indigenous Children and Young Peoples in Out-of-Home Care in Australia' (2016) 10 Communities, Children and Families Australia 5.
[126] Adelaide Titterton, 'Indigenous Access to Family Law in Australia and Caring for Indigenous Children' (2017) 40 *University of New South Wales Law Journal* 146.
[127] McDowell OPCIT

ALHR further notes with much concern the recent tone of debate at both a Federal and State level concerning the adoption of children in out of home care in Australia, particularly relating to First Nations and Aboriginal Children.

The Assistant Minister for Children, David Gillespie, has stated that the interests of First Nations and Aboriginal children might be better served through adoption outside of their culture, rather than being placed within their communities.

As a signatory to the CRC Australia is legally obliged to ensure that in all actions concerning children the best interests of the child are a primary consideration. Under the CRC children also have rights, as far as possible, to be known and cared for by their parents, not to be separated from them and to have their identity preserved.

ALHR is troubled by an apparent push for the permanent removal of First Nations and Aboriginal children from their families and culture. It is clear following *The Bringing Them Home Report*[128] that such removal of Indigenous children and separation from culture has devastating impacts and is generally not in the best interests of the child.

In order to realise its obligations under the CRC the Australian Government should strongly support *The Aboriginal and Torres Strait Islander Child Placement Principle* — in place in every State and Territory — which aims to keep Indigenous children in care placed with relatives or Aboriginal foster carers. Aboriginal child-protection organisations oppose the adoption of First Nations and Aboriginal children because it takes away safeguards to connect a child with their wider family and culture.

Self-determination is the cornerstone of an effective Aboriginal child and family system and the Assistant Minister for Children should be advancing policy initiatives that are consistent with the CRC and the United Nations *Declaration on the Rights of Indigenous Peoples*.

The work of Australia's first and only Aboriginal Children's Commissioner, Andrew Jackomos, revealed that children in Victorian State care had been denied contact with relatives and their culture. In February 2018 an AbSec report found that the NSW Government is failing across four out of five measures to support First Nations and Aboriginal children and families. Further, the number of First Nations and Aboriginal children placed with relatives and kin, or with Indigenous foster carers, has decreased in the past decade, according to the Productivity Commission.

ALHR supports calls by Commissioner Jackomos for the immediate appointment of Aboriginal Children's Commissioners in every Australian jurisdiction to investigate these failings.

For many years AbSec has been calling for greater investment in early intervention services, to be delivered through Aboriginal community-controlled organisations."

[128] Bringing them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families April 1997

We cannot look at child protection issues in isolation from the other issues faced by Indigenous communities. We need to look at a holistic service system. Suggesting that the solution is simply to allow for the open adoption of kids in care outside of their culture completely ignores the complex nature of intergenerational trauma and the need for investment in long term solutions that will stop the cycle of trauma.

Cluster Education, leisure and cultural activities

11.5 Right to education (art. 28) and aims/quality of education (art. 29)

First Nations and Aboriginal children in Australia have significantly higher rates of school absence and attrition and significantly lower rates of progression to higher education.[129]

All Australian jurisdictions can do more to develop teachers' cultural competency and understanding of First Nations and Aboriginal peoples, histories and issues.[130]

The tertiary education sector is improving in its efforts to integrate Indigenous-related content, knowledges and perspectives – through a process known as Indigenisation of curriculum – but much more can be done to promote social and curricular justice through the design of university curricula.[131]

11.6 Cultural rights of children belonging to Indigenous groups (art. 30)

A key focus for realising the cultural rights of First Nations and Aboriginal children must be the preservation of Indigenous languages and the promotion of language learning.

English is such a dominant language, due in part to its saturation across all forms of media.[132]

In this regard, it is positive to observe the growth of Indigenous cultural and linguistic content across a range of media in Australia, notably through the establishment of the National Indigenous Television network.

However, much more could be done to ensure that First Nations and Aboriginal peoples, issues and stories are represented effectively across the range of media in Australia.

In terms of linguistic preservation, small-scale efforts in individual schools have shown promise in building the cultural capital of communities via the teaching of Indigenous languages.

The Australian state can and must do much more to support Indigenous languages[133]. Indigenous languages should be recognised as official languages of Australia, offering

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[129] Larissa Behrendt, *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People: Final Report* (2012).
[130] Neil Harrison and Maxine Greenfield, 'Relationship to place: positioning Aboriginal knowledge and perspectives in classroom pedagogies' (2011) 52(1) *Critical Studies in Education* 65.
[131] Amy Maguire and Tamara Young, 'Indigenisation of Curricula: Current Teaching Practices in Law' (2015) 25 *Legal Education Review* 95.
[132] Marcus Schulzke, 'The Prospects of Global English as an Inclusive Language (2014) 11(2) *Globalizations* 225.
[133] Laura Beacroft, 'Indigenous language and language rights in Australia after the 'Mabo (No.2)' decision – a poor report card' (2017) 23 *James Cook University Law Review* 113.

legal, financial and policy support to their preservation and promotion. This includes nation-wide integration of Indigenous language content into the school curriculum[134] and the support of Indigenous languages at family and community levels.[135]

11.7 Sentencing

Cluster Special protection measures

Sentencing of children, in particular … the existence of alternative sanctions based on a restorative approach; children deprived of their liberty, and measures to ensure that any arrest, detention or imprisonment of a child shall be used as a measure of last resort and for the shortest appropriate time and that legal and other assistance is promptly provided (art. 37 (b)–(d))

First Nations and Aboriginal people between ten and 17 years of age are 24 times more likely than non-Indigenous youth to be in police custody or detention.[136]

Discretionary police powers are being used disproportionately against Indigenous youth, who are far more likely to be stopped and searched and arrested or summonsed for public order offences.[137]

All Australian jurisdictions must move immediately to confirm that detention is a last resort when sentencing children. The focus should instead be on community programs, justice reinvestment and evidence-based approaches to discourage recidivism.

We refer to our discussion below on the administration of juvenile justice for further information on the human rights situation of First Nations and Aboriginal Children in conflict with the law.

11.8 Administration of juvenile justice (art. 40), the existence of specialised and separate courts and the applicable minimum age of criminal responsibility

We refer to our discussion of the criminal age of responsibility above under Definition of the Child and to our discussion below on the administration of juvenile justice for further information on the human rights situation of First Nations and Aboriginal Children in conflict with the law.

12. Birth Registration, name and nationality

Concluding Observation 36

[134] Marian Souza and Richard Rymarz, 'The role of cultural and spiritual expression in affirming a sense of self, place and purpose among young Indigenous Australians' (2007) 12(3) *International Journal of Children's Spirituality* 277.
[135] Walter Forrest, 'The Intergenerational Transmission of Australian Indigenous Languages: Why language maintenance programs should be family focused' (2019) 41(2) *Ethnic and Racial Studies* 303.
[136] Australian Institute of Health and Welfare Bulletin, *Report No. 10: Youth Detention* (2017).
[137] Chris Cunneen, Barry Goldson and Sophie Russel, 'Juvenile Justice, Young People and Human Rights in Australia' (2016) 23 *Current Issues in Criminal Justice* 178.
Walter Forrest, 'The Intergenerational Transmission of Australian Indigenous Languages: Why language maintenance programs should be family focused' (2019) 41(2) *Ethnic and Racial Studies* 303.

Cluster Civil rights and freedoms
Preservation of name and nationality (Art.7)
Preservation of Identity (Art.8)
Right to seek, receive and impart information (Art.13)

Cluster Family environment and alternative care

Cluster Education, leisure and cultural activitiues
Right to an education (Art 28)
Cultural rights of children belonging to Indogneous and minority groups (Art.30)

ALHR welcomes the positive work of the Australian Government's Identity Documents Working group.

We note that Australia's fifth and sixth report is silent on the ongoing difficulties faced by children and young people in out-of-home care in obtaining identity documents. In that regard we particularly note the findings of Commissioner Mitchell in her Children's Rights Report 2016[138] that foster and kinship carers often experience difficulties in obtaining timely access to identity documents, for children and young people in their care.

The Commissioner reported that this can mean that children and young people in out-of-home care do not receive timely treatment for health conditions, have difficulties enrolling in school, miss out on school excursions, sporting and cultural opportunities, and families may be prevented from taking overseas holidays together. This kind of differential treatment raises significant cant human rights issues for children, including: the right to be recognised as Australian citizens, the right to access health services and income support. It also significantly impacts on children's sense of identity and belonging and the quality of their relationships with carers.[139]

The Commissioner further noted that, "this issue needs to be addressed at all levels of government. [140]

13. Children deprived of citizenship

Concluding Observation 38

Cluster Civil rights and freedoms
Preservation of name and nationality (Art.7)
Preservation of Identity (Art.8)
Right to seek, receive and impart information (Art.13)

[138] Children's Rights Report 2016, Megan Mitchell, Children's Commissioner,
[139] IBID p.23
[140] IBID p.23

Cluster Special protection measures

Sentencing of children, in particular … the existence of alternative sanctions based on a restorative approach; children deprived of their liberty, and measures to ensure that any arrest, detention or imprisonment of a child shall be used as a measure of last resort and for the shortest appropriate time and that legal and other assistance is promptly provided (art. 37 (b)–(d))

During the reporting period in December 2015 amendments to the *Australian Citizenship Act 2007* (Cth) passed which allow young children who engage in or are convicted of certain foreign fighting or terrorism related conduct to potentially to be stripped of their Australian citizenship where they are dual nationals. Two of the mechanisms apply to children as young as 14 years of age and the third mechanism has the potential to apply to a child of any age.

ALHR notes with significant concern the statement Australia's fifth and sixth report[141] that these provisions are consistent with Australia's international obligations. The Australian Human Rights Commission has raised significant concerns with these measures being in conflict with Australia's obligations under the ICCPR, Article 8(1) of the CRC and the guiding principle of the best interests of the child under Article 3 of the CRC:

"In assessing the best interests of a child, it is necessary to take into account all the circumstances of the particular child and the particular action, It is also necessary to ensure that procedural safeguards are implemented, including that children are allowed to express their views, that decisions and decision making processes be transparent and that there be mechanisms to review decisions For the reasons given above, these criteria will not be met by the proposed loss of citizenship provisions contained in the Bill. Loss of a child's citizenship, and consequent loss of their right to enter or remain in Australia, is even more likely to be arbitrary than in the case of an adult. That is so for a range of reasons, including that a child is less culpable for wrongdoing, is more vulnerable to any adverse consequences, any may suffer loss of citizenship through no fault of their own."[142]

14. Further comments on cruel, inhuman or degrading treatment & corporal punishment

14.1 Treatment of student with disabilities

Concluding Observations 44–45

Cluster Violence Against Children (Arts. 37(a) and 28(2)

Cluster Disability Basic Health and Welfare (Arts. 23, 6(2), 27 and 33)

[141] Australia's joint fifth and sixth report OPCIT at page 12
[142] AHRC Submision to the Parliamentary Joint Committee on Intelligence and Security 16 July 2015 https://www.humanrights.gov.au/sites/default/files/2015-07-16_AHRC_Submission.pdf

ALHR notes the content of Australia's fifth and sixth report concerning the use of corporal punishment in schools[143] and that the report is silent on contraventions of Article 28(2) with respect to the treatment of children with disabilities in Australian schools during the reporting period[144].

ALHR is outraged at the use of restrictive practices against children with disabilities in schools. The use of restrictive practices, such as restraint and seclusion, to manage classroom behaviour is a clear violation of human rights standards. Children with disabilities are entitled to the same human rights as other children and to be treated with respect. ALHR is deeply troubled that children with disabilities are denied their rights to bodily integrity, liberty of person and inclusive education in classrooms across Australia. ALHR is alarmed that restrictive practices are often dressed up as behavioural management techniques to address the challenging behaviours that may be exhibited by children with disabilities. The use of restrictive practices upon children with disabilities must be abolished and outlawed to ensure Australia's compliance with Article 28(2).

14.2 Violence against girls and girls with disabilities

Cluster Violence Against Children (Arts. 37(a) and 28(2)

ALHR is alarmed by the latest findings reported by Australia's National Research Organisation for Women and Girls' Safety (ANROWS) in its *Women and girls, disability and violence: Barriers to accessing justice report*[145]. ALHR is deeply concerned by the pervasive and widespread violence and abuse experienced by girls and girls with disabilities across a range of settings in Australia. It is apparent that despite numerous reports and inquiries, there has been no meaningful action on existing recommendations to ensure everyday security and safety for girls and girls with disabilities.

ALHR calls for immediate, fully funded action at the State, Territory and Federal level to address violence perpetrated against all persons with disabilities. It is unacceptable that Australian girls with disabilities experience disproportionately high rates of violence and abuse. Not only is this a violation of their fundamental human rights, but it perpetuates the hardship and denial of equitable opportunities experienced by girls with disabilities in all spheres of life. The devaluing of the lives and status of girls with disabilities is the root cause of much of the violence and abuse against women and girls with disabilities.

International Human Rights standards recognise that women and girls with disabilities are particularly vulnerable and that children with disabilities are subject to multiple forms of discrimination that warrant specific protection. In order to comply with its obligations under the CRC the Australian Government must fund and implement specific measures

[143] Australia's joint fifth and sixth report OPCIT at page 14
[144] see https://alhr.org.au/restraint-disabled-children/
[145] Women, disability and violence: Barriers to accessing justice: Final Report *Friday, 27th April 2018*

aimed at protecting girls from violence and abuse.

The types of violence and abuse reported by ANROWS violate international human rights laws, including the right to liberty and security of person, the right to freedom from torture or cruel, inhuman or degrading treatment or punishment, and the right to freedom from exploitation, violence and abuse. Australia is obliged to act to prevent such human rights abuses and should do so as a matter of urgency.

There is a clear need for domestic law reform within Australia and for the Federal Government to step up as a leader in the development of enhanced, international measures consistent with the CRC as well as the *UN Convention on the Rights of Persons with Disabilities* (**CRPD**) and the *UN Convention on the Elimination of All Forms of Discrimination against Women and girls* (**CEDAW**), to protect the human rights of all women and girls with disabilities to be free from violence and abuse."

14.3 Administration of Juvenile Justice

Concluding Observation 84

Cluster General Principles

Cluster Violence Against Children (Arts. 37(a) and 28(2)

Cluster Special Protection Measures (Art 37)

ALHR notes that during the reporting period in multiple states and territories in Australia there have been revelations of the cruel, inhuman and degrading treatment or punishment of children in Australian detention. Australia is bound by international human rights laws that oblige the Government to ensure every child deprived of their liberty is treated with humanity and no child is subjected to torture or other cruel, inhumane or degrading treatment or punishment.

ALHR has welcomed the report of the NT Royal Commission but it's findings and recommendations make it clear that deep systemic failures exist in Australia's treatment of children within the criminal justice system.

Thus far the Australian Government has failed to adequately address these by shifting responsibility for compliance with Australia's obligations under the CRC to the States and Territories. We note also the failure of the Federal Government to either offer adequate funding, or take responsibility for the implementation of the recommendations of the NT Royal Commission. The Federal Government bears responsibility for protecting, respecting, promoting and fulfilling human rights in Australia. That responsibility includes ensuring that human rights obligations are met by other levels of government, by non-state actors such as corporations, and by individuals. According to Article 27 of the Vienna Convention on the Law of Treaties of 1969, a state cannot use the provisions of its own law or deficiencies in that law to answer a claim against it for breaching its obligations under international law.

The footage of serious human rights abuses against children in the Don Dale Youth Detention Centre revealed treatment of children that should be unthinkable in a nation such as Australia. However, it is clear that these serious violations of Australia's international human rights obligations are not an isolated incident nor confined to the Northern Territory.

In March 2015, the United Nations Special Rapporteur on Torture, Juan Mendez, tabled a report outlining the current international benchmarks that are expected of countries when it comes to detaining children[146].

Juan Mendez, in interpreting and setting standards under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in the context of Australia's youth detention policies said,

> *"…Australia's youth detention policies are out of date. We're allowing a number of physically and psychologically harmful practices to continue, and permitting punitive policies and practice, which do not prioritise young people's rehabilitation or reintegration"*[147].

Further, Mr Mendez specifically raised concerns with respect to the mandatory sentencing of young people and imposing life sentences without parole in Australia and asserted that no circumstances warrant these practices. His report makes it clear that the use of practices such as strip searches and solitary confinement on children in Australia are inherently dangerous, cause irreversible psychological trauma and are completely inconsistent with Australia's legal human rights obligations.

Solitary confinement of juveniles does not only occur in the Northern Territory. Indeed it is still used in many other states in Australia including Western Australia, Queensland and Victoria. Spit-hoods are not only used in the Northern Territory. South Australia uses them, they are available for use in Queensland watch houses and Western Australia has just finished trialling them with a view to use across their police force. Children in these States are therefore not guaranteed protection from their use. Queensland imprisons 17-year-old children in adult gaols, a practise which is entirely inconsistent with international human rights norms.

It is unfathomable that a democratic developed nation such as Australia could allow a level of abuse against juveniles that includes the use of chemical weapons (tear gas), water torture, physical abuse, the use of cable ties, mechanical restraints, restraint chairs and spit hoods, and extended periods of solitary confinement. All of these abusive measures have been used on children. Our children.

We note also the recent findings and recommendations of the NT Royal Commission[148]:

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[146]Human Rights Law Centre, Torture Convention Standards (March 2015) <http://hrlc.org.au/wp-content/uploads/2015/04/TortureConventionStandards_March2015.pdf>.
[147] Human Rights Law Centre, *Australian Youth Justice Practices are Failing* (17 April 2015) <hlrc.org.au/ausyouthjusticepracticesarefailing/>.
[148] OPCIT Vol 2A, p.164-165

Chapter 12 (Verbal abuse, physical control and humiliation)
Detainees were frequently subjected to verbal abuse and racist remarks. Vol 2A, p. 159
At times, youth justice officers deliberately withheld detainees' access to basic human needs such as water, food and the use of toilets. This conduct was inconsistent with the basic human right contained in Article 37(c) of the *United Nations Convention on the Rights of the Child* that a child treated with humanity and respect for the inherent dignity of the human person, as well as the special rights contained in the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, namely: • Article 31, which states that juveniles in detention should be afforded access to facilities and services that meet all the requirements of health and human dignity, • Article 34, which mandates access to sanitary installations of a sufficient standard to enable every juvenile to fulfil their physical needs in privacy, cleanliness and decency, and • Article 37, which mandates that every detention facility must ensure that youth detainees be given access to suitable food and that clean drinking water be available to detainees at any time, all of which the Superintendent had a responsibility under section 151(2) of the *Youth Justice Act* (NT) for the physical, psychological and emotional welfare of the detainees. Vol 2A, p.164-165

Conclusion

As noted in the Executive Summary of this submission the breadth of subject matter that can potentially be covered in discussing Australia's compliance with the CRC is immense. ALHR has chosen to focus on areas of strategic priority to ALHR but we stress that there remain areas of concern that we have not been able to cover.

All levels of government in Australia have to play a role in protecting children's human rights, but it will always be the Federal Government that is ultimately accountable for any violations of the CRC to the international community.

The shocking findings of NT Royal Commission should motivate Australia to strengthen international protections for Australian children.

ALHR calls upon Australian to sign the United Nations Optional Protocol to the Convention on the Rights of the Child (**CRC-OP-CP**) that would allow individual children to submit complaints regarding specific violations of their human rights to the United Nations.

Australia is still failing to give vulnerable children the voice and protection they need. If it is serious about complying with its international obligations to children, Australia should join the 51 other countries around the world who have signed the CRC-OP-CP.

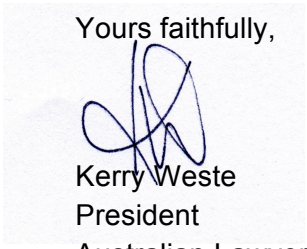
By becoming a Party to the Optional Protocol, the Government can demonstrate a

commitment to its own policies and to protecting human rights and eradicating the systemic abuse of children. This would also send an important signal to other States in our region that it is now time to ensure access to remedies for child victims of all forms of human rights violations.

In a nation that has no Federal Human Rights Act, the Optional Protocol is a much needed and concrete step that the Australian Government can easily take towards strengthening the recognition and implementation of children's rights and access to justice for all victims. Children should have an international mechanism to appeal to when national remedies do not exist or are ineffective.

If you would like to discuss any aspect of this submission, please contact Kerry Weste, President Australian Lawyers for Human Rights, by email at president@alhr.org.au

Yours faithfully,



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