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Research Brief

AUSTRALIA'S OBLIGATIONS TO ASYLUM SEEKER CHILDREN SENT TO NAURU

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Australia's international law obligations, including its *non-refoulement* obligations, its obligation

authorises the transfer of asylum seekers intercepted at sea to any place, including Nauru, even in circumstances that may amount to *refoulement*.[9]

In the absence of effective domestic legal protections against *refoulement* for asylum seekers being considered for transfer to Nauru (or PNG), the Australian government sought to give effect to its *non-refoulement* obligations by conducting a 'pre-transfer assessment' (PTA) for each asylum seeker prior to removal. The Department[10] described the PTA as being 'used to consider whether appropriate support and services are available [offshore] and confirm that there are no barriers to the transfer occurring'.[11]

Despite the PTA process, in practice asylum seekers appear to have been transferred to Nauru in breach of Australia's *non-refoulement* obligations. The Australian Human Rights Commission described PTAs as focusing more on an asylum seeker's fitness for travel and placement in a regional processing country, rather than on whether the asylum seeker would face risks of persecution or significant harm.[12] Previously, pressure from the Department to complete PTAs within 48 hours also reportedly affected their quality.[13] In light of these issues, the UN High Commissioner for Refugees (UNHCR) expressed concern in December 2012 and again in November 2013 about the effectiveness of PTAs as a mechanism for ensuring that asylum seekers, especially vulnerable asylum seekers such as children, were not transferred to Nauru in breach of Australia's international obligations.[14] Moreover, it is not clear whether PTAs or any other form of pre-transfer assessment is performed when people are re-transferred back to Nauru after being brought to Australia for a temporary purpose.

Obligations to consider the best interests of the child

Australia's obligations under international law

Article 3(1) of the CROC states:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[15]

The 'best interests of the child' is a flexible and dynamic concept.[16] As such, neither international nor Australian law prescribes *what* is in the best interests of a particular child in a given situation. However, international law does provide guidance on *how* the best interests of a child should be assessed.[17] Notably: (a) a 'best interests assessment' (BIA) should be performed on a case-by-case basis; (b) a child's best interests should be identified first, before being weighed against other considerations; and (c) reasons should be given for decisions affecting children.

a) Best interests must be assessed on a case-by-case basis

The first criterion for a BIA is that a child's best interests are determined individually, on a case-by-case basis.[18] Since each child is different, a BIA 'should be adjusted and defined

on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs'.[19] It should not be presumed that an action or decision will affect all children in the same way, and

interests of the child, the grounds for this must be set out in order to show that the child's best interests were a primary consideration despite the result.[28]

When providing these reasons, '[i]t is not sufficient to state in general terms that other considerations override the best interests of the child'.[29]

How Australia's obligations should be implemented

Australia must take '*all* appropriate legislative, administrative, and other measures'[30] to ensure that the best interests of the child principle is properly respected and implemented in decisions concerning children. Accordingly, Australia must at a minimum ensure that:

> the requirement to consider the best interests of asylum seeker children as a primary consideration is reflected and implemented in all national laws and regulations, rules governing the operation of private or public institutions providing services to or impacting on children, and judicial and administrative proceedings at every level;[31]
> a BIA meeting the criteria set out above is conducted whenever a decision concerning a child is made;[32]
> there are formal mechanisms to appeal decisions concerning children whenever the requirements for a BIA do not appear to have been met, or when there appears to have been a procedural or substantive error in a decision concerning a child;[33] and
> to the greatest extent possible, the best interests of children are assessed on an ongoing basis wherever a child continues to be affected by decisions or actions taken by Australian authorities. In the asylum context, BIAs should be conducted for each asylum seeker

Whereas the obligation to consider the best interests of the child under Article 3(1) of the CROC allows some leeway for other considerations to outweigh the best interests of the child, the obligations listed above are expressed in absolute terms. Indeed, as the UN Committee on the Rights of the Child notes in relation to the obligation to protect children against violence and abuse in all their forms:

> 'Shall take' is a term which leaves no leeway for the discretion of States parties. Accordingly, States parties are under strict obligation to undertake 'all appropriate measures' to fully implement this right for all children.[48]

Endnotes

[1] James Robertson, 'Children taken off Manus Island', *Sydney Morning Herald* (online), 20 June 2013, https://www.smh.com.au/politics/federal/children-taken-off-manus-island-20130620-2olze.html.

[2] Some asylum seeker children were also reportedly sent to the RPC on Manus Island by mistake. See: Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (New South, 2016), 127-130.

[3] These obligations arise *inter alia* from the express prohibitions on *refoulement* in article 33(1) of the 1951 Convention Relating to the Status of Refugees (Refugee Convention) and article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Australia is also bound by an implicit prohibition on refoulement in articles 2, 6 and 7 of the ICCPR. According to the UN Human Rights Committee, 'the article 2 obligation requiring that States Parties respect and ensure the [ICCPR] rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed': UN Human Rights Committee, *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), para 12.

[4] UN Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, UN Doc CRC/GC/2005/6 (1 September 2005), para 27. Article 6 of the CROC affirms the right to life of each child and establishes States' obligations to 'ensure to the maximum extent possible the survival and development of the child'. Article 37 prohibits the torture, cruel, inhuman or degrading treatment or punishment, and arbitrary detention of children, and guarantees rights to children deprived of their liberty.

[5] At the Ministerial Meeting of States Parties to the Refugee Convention in 2001, States acknowledged 'the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*': Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (Geneva, 12-13 December 2001), para 4. The principle of *non-refoulement* is also described as the 'cornerstone' of international refugee law: UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (26 January 2007), para 5; UNHCR Executive Committee Conclusion No. 6 (XXVIII), 'Non-refoulement' (1977), para (c).

[6] Although the Refugee Convention contains an exception to the principle of *non-refoulement* in article 33(2), such that a refugee will not be protected against *refoulement* if there are reasonable grounds for regarding him or her as a danger to the security of Australia, or if he or she has been convicted by a final judgment of a particularly serious crime and constitutes a6(.)] 9.e reaal(Ref)-3(t0.000008871 0 595.32 841.92 reW*nBT/F1 9 Tf1 0 0 1 318-3(n)-3(t)] TJETQ(T

international obligations; (b) there has been a 'defective consideration' of those obligations; or indeed (c) the taking of a person to that place is inconsistent with these obligations.

[10] The Department of Home Affairs. Previously the Department of Immigration and Border Protection (DIBP).

[11] DIBP, 'Submission to the Australian Human Rights Commission's National Inquiry into Children in Immigration Detention 2014' (30 May 2014), https://www.humanrights.gov.au/sites/default/files/Submission%20No%2045%20-%20Department%20of%20Immigration%20and%20Border%20Protection.pdf, 73.

[12] Australian Human Rights Commission, The Forgotten Children: National Inquiry into Children in Immigration Detention 2014 (November 2014), (The Forgotten Children), 190-192.

[13] Ibid; UNHCR, 'UNHCR Monitoring Visit to the Republic of Nauru - 7 to 9 October 2013' (26 November 2013), 25-26.

[14] UNHCR, 'UNHCR Mission to the Republic of Nauru: 3-5 December 2012' (14 December 2012), 2, 13-14; UNHCR, 'UNHCR Monitoring Visit to the Republic of Nauru - 7 to 9 October 2013' (26 November 2013), 3, 25-27.

[15] CROC, art 3(1).

[16] UN Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, UN Doc CRC/C/GC/14 (29 May 2013) (General Comment No. 14), para 1.

[17] Ibid, para 11.

[18] The UN Committee on the

[34] UN Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of all Children in the Context of International Migration* (2013) https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf, paras 72, 74.

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