

# Research Brief

# AUSTRALIA'S OBLIGATIONS TO ASYLUM SEEKER CHILDREN SENT TO NAURU

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## Introduction

Between November 2012 and June 2013, asylum seeker children were sent to the regional processing centre (RPC) on Manus Island, Papua New Guinea (PNG) to be detained while they waited to have their claims processed. They were removed from Manus Island in June 2013, in response to concerns that the facilities there were not appropriate for children.<sup>1</sup> After new offshore processing arrangements were announced on 19 July 2013 (according to which all asylum seekers arriving by boat would not only be sent offshore, but also permanently denied the possibility of settlement in Australia), the Australian policy changed to transferring children only to the RPC on Nauru.<sup>2</sup> No new asylum seekers were transferred offshore after 2014. While all children were removed from Nauru in 2019, those who are back in Australia remain liable to transfer back to Nauru under Australian law.

Prior to transferring a child from Australia to Nauru (either initially, or as a subsequent transfer), the relevant authorities must consider whether removal is consistent with

Australia's international law obligations, including its *non-refoulement* obligations, its obligation to take the best interests of the child into account as a primary consideration, and its obligations with respect to unaccompanied asylum seeker children.

## ***Non-refoulement* obligations**

### **Australia's obligations under international law**

Under international refugee and human rights law, Australia has obligations to ensure that it does not expel, extradite, deport or otherwise remove from its territory or jurisdiction anyone who has a well-founded fear of persecution or who faces a real risk of significant harm either in the country to which he or she is removed, or in any other place to which that country might send them.<sup>3</sup> Significant harm includes the risk of being exposed to arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment.

The UN Committee on the Rights of the Child has also emphasized the *non-refoulement* obligations that bind States parties to the UN Convention on the Rights of the Child (CROC) (including Australia). According to the Committee:

in fulfilling obligations under the Convention, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed.<sup>4</sup>

These obligations, which sit at the 'core' of international refugee and human rights law,<sup>5</sup> require that:

- the principle of *non-refoulement* be respected whenever the movement of an asylum seeker to another State's territory is contemplated;
- all decisions about removing an asylum seeker from Australia be made on a case-by-case basis, after proper consideration of all the facts as they stand at the time the decision to remove is made;
- in deciding whether an asylum seeker can be removed from Australia, consideration be given to whether the asylum seeker will face a risk of: (a) persecution or significant harm (including cruel, inhuman or degrading treatment) in Nauru; and/or (b) being sent on from Nauru to a country where such harm is feared; and
- *non-refoulement* obligations not be overridden by invoking national security, the integrity of Australia's migration system or any other general policy objective.<sup>6</sup>

### **Australia's compliance with its obligations in law and practice**

Although Australia has incorporated certain of its *non-refoulement* obligations into domestic law,<sup>7</sup> the *Migration Act 1958* (Cth) (*Migration Act*) effectively excludes asylum seekers subject to offshore processing from their protection.<sup>8</sup> Australian law also expressly

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

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<sup>10</sup> 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'.<sup>11</sup>

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.<sup>12</sup> Previously, pressure from the Department to complete PTAs within 48 hours also reportedly affected their quality.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

The 'best interests of the child' is a flexible and dynamic concept.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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'.<sup>19</sup> It should not be presumed that an action or decision will affect all children in the same way, and '[d]etermining what is in the best interests of the child should start with an assessment of the specific circumstances that make the child unique'.<sup>20</sup> Further, since not all children will have the same special needs, the relevant '[a]uthorities and decision makers need to take into account the different kinds and degrees of vulnerability of each child, as each child is unique and each situation must be assessed according to the child's uniqueness'.<sup>21</sup>

b) Best interests must be identified first, then weighed

The second criterion for a BIA is that it is performed in two stages. First, the decision maker must identify what is in the child's best interests. Then, he or she must assess whether those interests are outweighed by any other consideration (or the cumulative effect of other considerations).<sup>22</sup> This two-stage process has been affirmed by Australian courts.<sup>23</sup>

The words 'shall be a primary consideration' in Article 3(1) of the CROC 'place a strong legal obligation on States and mean that States may not exercise discretion as to whether children's best interests are to be assessed and ascribed the proper weight as a primary consideration in any action undertaken'.<sup>24</sup> Accordingly, when weighing the best interests of the child against other factors, 'a larger weight must be attached to what serves the child best'.<sup>25</sup> As the UN Committee on the Rights of the Child has explained:

The expression 'primary consideration' means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.<sup>26</sup>

Courts in Australia and comparable jurisdictions have affirmed that while the best interests of the child need not always outweigh other considerations, a decision maker must not treat any other consideration as *inherently* more significant than the best interests of the child.<sup>27</sup>

c) Reasons must be provided for decisions

In order to ensure that a BIA meets the two criteria set out above, decision makers must give reasons for their findings. These reasons:

should state explicitly all the factual circumstances regarding the child, what elements have been found relevant in the best-interests assessment, the content of the elements in the individual case, and how they have been weighted to determine the child's best interests. If the decision differs from the views of the child, the reason for that should be clearly stated. If, exceptionally, the solution chosen is not in the best

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.<sup>28</sup>

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

## **How Australia's obligations should be implemented**

Australia must take 'all appropriate legislative, administrative, and other measures'<sup>30</sup> 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;<sup>31</sup>
- a BIA meeting the criteria set out above is conducted whenever a decision concerning a child is made;<sup>32</sup>
- 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;<sup>33</sup> 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 child at all stages of the asylum process, including, at a minimum, each time a child is to be transferred (or re-transferred) to Nauru, and each time new information becomes available about the conditions for children in Nauru.<sup>34</sup> It is not sufficient to perform a single BIA when a child is first considered for transfer to Nauru and not to review this assessment on a continuous basis.<sup>35</sup>

## **Australia's compliance with its obligations in law and practice**

### ***General concerns***

Australian law contains no requirement that the best interests of the child be taken into account as a primary consideration when deciding whether to remove asylum seeker children from Australia. This position is in contrast to the position in comparable jurisdictions, such as the United Kingdom.<sup>36</sup>

In the absence of any legal requirement, the Australian government sought to give effect to its obligations regarding the best interests of asylum seeker children by requiring a version of a BIA to be performed as part of the PTA in some circumstances.

However, this purported BIA is insufficient to meet Australia's obligations for the following reasons:

- it does not meet the criteria for a BIA set out above (see below for more information);

- it does not appear to be performed for children in Australia who have already been to Nauru previously and are being re-transferred there; and
- it is particularly inappropriate in cases involving unaccompanied asylum seeker children (see below for more information).

These deficiencies led UNHCR to conclude in 2013 that ‘children have been transferred [to the Nauru RPC] without an assessment of their best interests and without adequate services in place to ensure their mental and physical well-being’.<sup>37</sup> They also reflect broader problems with Australia’s implementation of the best interests of the child principle. In its review of Australia’s compliance with the CROC in 2012 (prior to the reintroduction of offshore processing), the UN Committee on the Rights of the Child stated that it was:

concerned that the principle of the best interests of the child is not widely known, appropriately integrated and consistently applied in all legislative, *administrative and judicial proceedings and in policies, programmes and projects* relevant to and with an impact on children. In this context, the Committee is particularly concerned at the inadequate understanding and application of the principle of the best interests of the child in asylum-seeking, refugee and/or immigration detention situations.<sup>38</sup>

The Committee ‘stresse[d] the need for [Australia] to pay particular attention to ensuring that its policies and procedures for children in asylum seeking, refugee and/or immigration detention give due primacy to the principle of the best interests of the child’,<sup>39</sup> and to ensure that ‘determinations of the best interests are consistently conducted by professionals who have been adequately trained on best-interests determination procedures’.<sup>40</sup>

### ***In what ways did the Australian assessments not meet the criteria for a BIA?***

Limited information is publicly available about whether and how the Department seeks to ensure that decisions to transfer children to the Nauru RPC comply with Australia’s obligations under international law. The following analysis is based on a Department form entitled ‘Best Interests Assessment for transferring minors to an RPC’ (BIA Form), specifically versions 1.2 (valid as at September 2013) and 1.4 (dated 13 February 2014).<sup>41</sup> It is not clear whether this form has ever been used for children being retransferred to Nauru.

Both versions of the BIA Form allowed decision makers to make one of only two decisions: that there were no barriers to a child being transferred to Nauru, or that the child should be reconsidered for transfer at a later date. Version 1.4 also included an explicit acknowledgment of Australia’s obligations under Article 3(1) of the CROC, but stated:

In so far as the requirement under section 198AD of the Migration Act 1958 to take unauthorised maritime arrivals to an RPC extends to unauthorised maritime arrivals who are children, the best interests of such children are outweighed by other countervailing primary considerations, including the need to preserve the integrity of Australia’s migration system and the need to discourage children taking, or being taken on, dangerous illegal boat journeys to Australia.



Accordingly, while this assessment considers a range of factors to ensure that care, services and support arrangements are available to meet the needs of the individual child, it does not consider whether the best interests of the child would be served by the individual child being transferred to an RPC.<sup>42</sup>

The Australian Human Rights Commission described the process of considering whether a child should be transferred to Nauru pursuant to this form as a best interests assessment 'in name only'.<sup>43</sup> It did not meet Australia's obligations under the CROC because:

- the best interests of children were automatically outweighed by other factors as a rule, without the best interests of children being identified on an individual basis first and *then* weighed against any relevant criteria;
- due to the Australian government's policy that all asylum seekers who arrived by boat after 19 July 2013 would be transferred to a regional processing country without exception, decision makers were prevented from concluding that a child should not be transferred to Nauru, even if exemption from transfer would have been in that child's best interest;
- decision makers were limited in their ability to identify properly what was in the best interests of a child because the BIA Form instructed them to take into account certain information about the availability and quality of 'arrangements, support and services' for children on Nauru which did not necessarily exist; and
- children (or their families) were not afforded an opportunity to appeal or seek independent review of any decision concerning them.

## Other obligations with respect to children sent to Nauru

### General obligations

Australia has other human rights obligations concerning children which may extend to children following their transfer to Nauru, including obligations to:

- ensure that children have a standard of living adequate for their physical, mental, spiritual, moral and social development, and are not subjected to torture or other cruel, inhuman or degrading treatment or punishment;<sup>44</sup>
- protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse and all other forms of exploitation prejudicial to any aspect of their welfare;<sup>45</sup>
- promote the physical and psychological recovery and social reintegration of all children who are victims of any form of neglect, exploitation, abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment;<sup>46</sup> and
- ensure that children are only detained as a measure of last resort, for the shortest possible time, and never in circumstances where the detention is unlawful or arbitrary.<sup>47</sup>

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.<sup>48</sup>

The UN Committee on the Rights of the Child also ‘emphasizes in the strongest terms that child protection must begin with proactive prevention of all forms of violence as well as explicitly prohibit all forms of violence’.<sup>49</sup> If mental, physical and/or sexual harm is a systemic and inherent part of the arrangements for hosting and processing asylum seekers and refugees in Nauru, ‘proactive prevention’ could arguably have required Australia to suspend all transfers of children to Nauru, and/or to bring those children still there back to Australia to await identification of a durable solution in a safe environment.

### **Specific obligations with respect to unaccompanied asylum seeker children**

Australia has additional obligations under the CROC with respect to the best interests of unaccompanied asylum seeker children. Under the CROC, ‘[a] child temporarily or permanently deprived of his or her family environment ... shall be entitled to special protection and assistance provided by the State’, and ‘States Parties shall in accordance with their national laws ensure alternative care for such a child’.<sup>50</sup>

Moreover, as the guardian of asylum seeker children in Australia,<sup>51</sup> the Home Affairs Minister has an additional duty under the CROC to act with the best interests of each child as his or her ‘basic concern’.<sup>52</sup> The Australian Human Rights Commission has stated that in fulfilling this duty, ‘the best interests of an unaccompanied child must not only be a primary consideration (as suggested by article 3(1) of the Convention), but *the* primary consideration for the person acting as a child’s legal guardian’.<sup>53</sup>

However, there is an ‘unambiguous conflict of interest’ between the Minister’s dual roles of guardian and administrator of the *Migration Act*.<sup>54</sup> As a result, there is a real risk that unaccompanied asylum seeker children were transferred to Nauru without their best interests being taken into account as *the* primary consideration.<sup>55</sup>

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## Endnotes

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<sup>1</sup> 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>.

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> 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).

<sup>6</sup> 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 a danger to the Australian community, Australia's *non-refoulement* obligations under the ICCPR and CAT apply without exception. In this respect, human rights law has, in effect, limited the application of the article 33(2) exception: Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> ed, Oxford University Press, 2007), 243-244.

<sup>7</sup> Australia's *non-refoulement* obligations are incorporated into domestic law to a limited extent through provisions of the *Migration Act* that allow for the grant of a protection visa to a person who is owed protection obligations under the Refugee Convention, or who would face a real risk of significant harm if removed from Australia: *Migration Act 1958* (Cth), s 36.

<sup>8</sup> Under the *Migration Act*, all 'unauthorised maritime arrivals' and 'transitory persons' are barred from applying for a visa, including a protection visa, unless the Minister thinks that it is in the 'public interest' to lift this bar and exercises a non-compellable discretion to do so: ss 46A, 46B. These sections effectively preclude asylum seekers who are in Australia after having arrived by boat without a visa, or who have been transferred back to Australia from Nauru on a temporary basis, from accessing the visas that give effect to Australia's *non-refoulement* obligations.

<sup>9</sup> Under section 72 of the *Maritime Powers Act 2013* (Cth), Australian maritime officers are authorised to take any person found on a vessel in or outside of Australian waters to any place in or outside of Australia. Section 75A provides that the exercise of this power is not invalid even if (a) there has been a failure to consider Australia's

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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.

<sup>10</sup> The Department of Home Affairs. Previously the Department of Immigration and Border Protection (DIBP).

<sup>11</sup> 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.

<sup>12</sup> Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014* (November 2014), (The Forgotten Children), 190-192.

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

<sup>14</sup> 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.

<sup>15</sup> CROC, art 3(1).

<sup>16</sup> 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.

<sup>17</sup> Ibid, para 11.

<sup>18</sup> The UN Committee on the Rights of the Child has noted that in a decision concerning an individual child, his or her interests should not be understood as being the same as those of children in general. Rather, 'the best interests of a child must be assessed individually': Ibid, paras 24, 32, 34.

<sup>19</sup> Ibid, para 32.

<sup>20</sup> Ibid, para 49.

<sup>21</sup> Ibid, para 76.

<sup>22</sup> The UN Committee on the Rights of the Child has noted that '[t]he best interests of the child – *once assessed and determined* – might conflict with other interests or rights': Ibid, para 39 (emphasis added).

<sup>23</sup> For example, the Federal Court of Australia held in *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133 (*Wan*) that the Administrative Appeals Tribunal 'was required to identify what the best interests of Mr Wan's children required ... *and then* to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration': para 32 (emphasis added). This passage was approved by Lady Hale giving the leading judgment for the Supreme Court of the United Kingdom in *ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4 (*ZH*), para 26.

<sup>24</sup> General Comment No. 14, para 36.

<sup>25</sup> Ibid, para 39.

<sup>26</sup> Ibid, para 37.

<sup>27</sup> For example, the Full Court of the Federal Court of Australia held in *Wan* that '[p]rovided that the tribunal did not treat any other consideration as inherently more significant than the best interests of [the] children it was entitled to conclude, after proper consideration of the evidence and other material before it, that the strength of other considerations outweighed the best interests of the children': para 32. See also Lady Hale in *ZH*, paras 26, 33.

<sup>28</sup> General Comment No. 14, para 97.

<sup>29</sup> Ibid.

<sup>30</sup> CROC, art 4 (emphasis added).

<sup>31</sup> General Comment No. 14, para 15(a).

<sup>32</sup> Ibid, paras 6(c), 14(b).

<sup>33</sup> Ibid, para 98.

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<sup>34</sup> 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.

<sup>35</sup> In the United Kingdom, this rule was previously recognised in an earlier version of the UK Home Office's guidelines about processing asylum applications from children, which stated that the best interests principle requires 'a continuous assessment that starts from the moment the child is encountered and continues until such time as a durable solution has been reached': United Kingdom Border Agency, 'Asylum Process Guidance: Processing an Asylum Application From a Child', version 6 (16 April 2013), para 1.3.

<sup>36</sup> Section 55 of the *Borders, Citizenship and Immigration Act 2009* (UK) provides *inter alia* that the Secretary of State must make arrangements for ensuring that a range of functions relating to immigration and customs 'are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'. Statutory guidance in relation to this provision also states: 'in accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children': UK Border Agency, *Every Child Matters: Statutory Guidance to the UK Border Agency on Making Arrangements to Safeguard and Promote the Welfare of Children*, November 2009, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257876/change-for-children.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257876/change-for-children.pdf), para 2.7.

<sup>37</sup> UNHCR, 'UNHCR Monitoring Visit to the Republic of Nauru - 7 to 9 October 2013' (26 November 2013), para 105.

<sup>38</sup> UN Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention. Concluding observations: Australia*, UN Doc CRC/C/AUS/CO/4 (28 August 2012), para 31.

<sup>39</sup> *Ibid*, para 32.

<sup>40</sup> *Ibid*, para 81(b).

<sup>41</sup> Department of Immigration and Border Protection, 'Best Interests Assessment for transferring minors to an RPC (forming part of the Pre-Transfer Assessment)', version 1.2 (2013); Department of Immigration and Border Protection, 'Best Interests Assessment for transferring minors to an RPC (forming part of the Pre-Transfer Assessment)', version 1.4 (13 February 2014) (BIA Form v 1.4).

<sup>42</sup> BIA Form v 1.4, 1. (emphasis added)

<sup>43</sup> *The Forgotten Children*, 192.

<sup>44</sup> CROC, arts 27(1), 37(a).

<sup>45</sup> *Ibid*, arts 19, 24, 36.

<sup>46</sup> *Ibid*, art 39.

<sup>47</sup> International Covenant on Civil and Political Rights (ICCPR), art 9(1); CROC, art 37(b).

<sup>48</sup> UN Committee on the Rights of the Child, *General Comment No. 13 (2011) on the right of the child to freedom from all forms of violence*, UN Doc CRC/C/GC/13 (18 April 2011), para 37.

<sup>49</sup> *Ibid*, para 46.

<sup>50</sup> CROC, art 20(1) and (2).

<sup>51</sup> *Immigration (Guardianship of Children) Act 1946* (Cth), s 6.

<sup>52</sup> CROC, art 18(1).

<sup>53</sup> *The Forgotten Children*, 192 (emphasis in original).

<sup>54</sup> UNSW Human Rights Law Clinic, Andrew & Renata Kaldor Centre for International Refugee Law and UNSW Faculty of Arts and Social Sciences, *Submission to the Australian Human Rights Commission National Inquiry into Children in Immigration Detention*, June 2014, [http://www.kaldorcentre.unsw.edu.au/sites/default/files/ahrc\\_submission\\_children\\_in\\_detention.pdf](http://www.kaldorcentre.unsw.edu.au/sites/default/files/ahrc_submission_children_in_detention.pdf), 14.

<sup>55</sup> For more information, see: *The Forgotten Children*, 187-188.