

# **MODEL RESEARCH ASSIGNMENT**



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Do DIMIA's detention guidelines pay sufficient homage to the best interests of the child as espoused by international law?

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MODEL

## INTRODUCTION

Since Australia's ratification of the United Nations *Convention on the Rights of the Child* 1989 (CROC), our nation has had an obligation to act in the 'best interests' of the child.<sup>1</sup> Empirical evidence clearly demonstrates that placing a child in detention is not in the child's best interests.<sup>2</sup> Children may only be detained as a last resort,<sup>3</sup> not merely for policy reasons and convenience. Despite this, under current Australian immigration legislation potential asylum seekers entering Australian territory face, irrespective of age, compulsory detention until their applications can be processed.<sup>4</sup>

Where children are placed in detention, every effort should be made to minimise the duration of detention and the disruption caused.<sup>5</sup> Currently, DIMIA's Immigration Detention Standards<sup>6</sup> neglect the best interests of the child, representing a policy of administrative convenience, rather than prioritising the protection of children. While international standards premise their guidelines against an assumption of non-detention, DIMIA assumes detention as a central and integral part of the asylum seeker process. This is inconsistent with international standards and represents a fundamental failing in DIMIA's standards.

## IMPLEMENTATION OF CROC

Our ratification of CROC means that there is a legitimate expectation that decision-makers take it into account.<sup>7</sup> The provisions most relevant to

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<sup>1</sup> United Nations Convention on the Rights of the Child 1989, Article 3(1)

<sup>2</sup> Flood, P.AO, *Report of Inquiry into Immigration Detention Procedures* presented to Parliament on 27 February 2001, pp22-24.

<sup>3</sup> UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999, Guideline 3.

<sup>4</sup> s14 *Migration Act 1958* (Cth)

<sup>5</sup> UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999, Guideline 3.

<sup>6</sup> Department of Immigration and Multicultural and Indigenous Affairs, *Immigration Detention Standards*, [http://www.immi.gov.au/detention/det\\_standards1.htm](http://www.immi.gov.au/detention/det_standards1.htm) (last updated 04 March 2002)

<sup>7</sup> *Minister for Immigration, Local Government and Ethnic Affairs v Teoh* (1995) 128 ALR 353 at 365.

children in detention are Articles 9, 12, 37(b) and 39,<sup>8</sup> and it is important that DIMIA seriously consider these.

## THE BEST INTERESTS GUIDELINE

The wording of Article 3(1) is significant. The drafters decided to make the best interests 'a' rather than 'the' primary consideration. Thus, the argument exists that other considerations can supersede the rights of the child. Despite this, DIMIA's actions should almost always be taken in the best interests of the child; other interests should only prevail if DIMIA can 'demonstrate that, under the circumstances, other feasible and acceptable alternatives do not exist.'<sup>9</sup>

The definition of 'best interests' was not discussed during the drafting of the convention, thus the term is open to differing interpretations.<sup>10</sup> The representative of Venezuela maintained that the subjectivity of the term means 'leaving the interpretation of the best interests of the child to the judgment of the person, institution or organisation applying the rule.'<sup>11</sup> This is a problem in the context of DIMIA, as it does not directly address the best interests principle. While 'best interests' is subjective, few would disagree that it is in the child's best interests to enjoy the rights and freedoms set out in CROC.

Part VII of the *Family Law Reform Act* 1995 deals with child custody disputes. In making a parenting order, the Court must regard the child's best interests as the paramount consideration.<sup>12</sup> When considering what amounts to the best interests of the child, no presumptions or questions of onus are permitted.<sup>13</sup> Each case is to be 'approached on its own facts, bearing in mind

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<sup>8</sup> The full text of these Articles can be found at Attachment A

<sup>9</sup> Alston, P (ed.), 1994, The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' in *The Best Interests of the Child: Reconciling Culture and Human Right*, p13.

<sup>10</sup> Detrick, Sharon, 1999, *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers, London, pp88-89.

<sup>11</sup> *The United Nations Convention on the Rights of the Child: a guide to the travaux preparatoires*, p 137.

<sup>12</sup> s65E *Family Law Reform Act* (Cth) 1995.

<sup>13</sup> *B and B* (1998) 23 Fam LR 456.

the paramount status of the best interests of the child.<sup>14</sup> To help it determine what these best interests are, the Court balances a range of factors set out in s68F(2).

While DIMIA is not bound by these factors, the Act does provide some useful guidelines which could be adopted to help remove subjectivity when determining the best interests.

## THE DIMIA GUIDELINES

DIMIA guidelines at no stage explicitly mention the best interests principle. However, children *are* mentioned in provisions relating to:

- Unaccompanied minors;<sup>15</sup>
- Safety and care;<sup>16</sup>
- Social and educational programs.<sup>17</sup>

Additionally, one of the principles underlying DIMIA's standards is that 'the dignity of the detainee is upheld in culturally, linguistically, gender and age appropriate ways.'<sup>18</sup> These sections have been critiqued below, highlighting weaknesses in both their drafting and implementation.

## CRITIQUE OF THE GUIDELINES

*9.2.1 'Unaccompanied minors are detained under conditions which protect them from harmful influences and which take account of the needs of their particular age and gender'*

Unaccompanied minors (UAMs) are defined as children who are separated from their parents and are not being cared for by an adult who by law or custom has responsibility for the child.<sup>19</sup> The Minister for Immigration is deemed to be the legal guardian for this group of asylum seekers. While the above guideline seeks to elevate the needs of UAMs over and above those of

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<sup>14</sup> Ibid.

<sup>15</sup> DIMIA Immigration Detention Standard 9.2.1

<sup>16</sup> DIMIA Immigration Detention Standard 9.4.2

<sup>17</sup> DIMIA Immigration Detention Standard 9.4.1

<sup>18</sup> DIMIA Immigration Detention Standards, *Principles underlying care and security*.

<sup>19</sup> UNHCR Guidelines on Unaccompanied Children, para 3.1

accompanied minors, the implementation of this provision is woefully inadequate.

Both anecdotal and empirical evidence exists suggesting that unaccompanied minors are not protected from harmful influences whilst in detention. For example, in January 2002, eleven UAMs made a suicide pact in protest against appalling detention conditions.<sup>20</sup> While widespread cases of self-harm, child abuse and psychological trauma are compelling enough, on an underlying level it can be argued that the very nature of a detention centre is harmful to a child's development and thus contrary to the child's best interests.

DIMIA regularly asserts that asylum seekers without adequate documentation must be detained until authorities have determined the detainee's identity, criminal record and character. By failing to appropriately separate adult asylum seekers from UAMs, DIMIA is exposing unaccompanied minors to individuals of uncertain character, placing them in a potentially dangerous environment and exposing them to harmful influences – in direct contravention of their own guideline.

Requiring the authorities to take the particular needs of UAMs into account is somewhat of an oxymoron, as the Government has no valid reason to keep UAMs in detention. It is clear under international guidelines that UAMs should be placed into alternate care arrangements.<sup>21</sup> Thus, standards applying to UAMs in detention are already failing to protect their particular needs. If DIMIA were considering the best interests of UAMs, they would not be deprived of liberty in the first place.

The figures available clearly indicate that DIMIA is currently unsuccessful in carrying out its obligations under this standard. For example, children, and in particular adolescent girls, are often housed together with single adult males. In one twelve month period, there were 35 cases of suspected child abuse in

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<sup>20</sup> '4 child asylum seekers quit suicide pact, 11 sure to die,' [http://www.inq7.net/brk/2002/jan/28/brkafp\\_7-1.htm](http://www.inq7.net/brk/2002/jan/28/brkafp_7-1.htm)

<sup>21</sup> UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999.

detention centres across Australia.<sup>22</sup> Even a weak interpretation of DIMIA standard 9.2.1 necessitates segregated accommodation for unaccompanied minors based on age and gender. Current practice is a misapplication of this guideline.

Approximately eighty per cent of asylum seekers detained by DIMIA eventually receive refugee status.<sup>23</sup> As such, it is also arguably in the best interests of the community to ensure that all asylum seekers, including UAMs, are not mistreated. If asylum seekers exhibit the mental and physical scars of prolonged detention after release, the adverse effects on society are potentially considerable.

*9.4.2 'Detainees are responsible for the safety and care of their child(ren) living in detention.'*

Australia is required to ensure that asylum-seeking children receive appropriate protection and assistance.<sup>24</sup> Standard 9.4.2, however, is clearly designed to shift the burden of this obligation away from DIMIA, and places an unreasonable burden on parents.

The capacity of a parent to provide appropriate care for their child is greatly compromised when in detention, where the inherent nature of the detention facility exposes children to risks beyond the parent's control.<sup>25</sup> Moreover, it is possible that physical and psychological pressures of detention may affect the capacity of parents to look after their children.

Generally, a child should not be removed from their parents;<sup>26</sup> however, separation may be necessary in the case of abuse or neglect. The *Family Law Reform Act*<sup>27</sup> contains provisions used to determine the best interests of the child, which support the premise that there may be some circumstances where children should be removed from the detention facility and placed in

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<sup>22</sup> Flood, P A.O, para 6.3

<sup>23</sup> Ibid, para 3.9

<sup>26</sup> CROC, Art 9

<sup>27</sup> s65E *Family Law Reform Act* (Cth) 1995.

suitable care. Furthermore, children may be mentally affected by the trauma associated with detention, requiring professional counselling which is only available outside the detention centre.

Children, however, should not be separated from their parents against their will.<sup>28</sup> It is also likely that parents would object to any determination requiring the non-consensual removal of children from their care.

Where it is not possible to release child detainees into the care of family members already residing in Australia, alternative care arrangements should be made to guarantee children appropriate accommodation and supervision. Residential homes and foster care placements can ensure children's needs are catered for while longer term solutions are considered. The 'Alternative Model of Detention' proposed by the Refugee Council of Australia provides for a community release system along these lines. After a period of initial detention, if possible, child detainees are to be released into the care of family members who already reside in Australia. Where this is not possible, alternative care arrangements are to be made. This model is preferable to the Woomera pilot scheme where in effect, children are under house arrest.<sup>29</sup>

Alternately, Swedish law makes it illegal to detain children for a period of more than three days. All unaccompanied minors are removed from closed detention as soon as possible and placed in supervised group homes that are run by the Immigration Department. While this may be a distressing time for the family, commentators believe that in many cases the 'parents would rather the family split than their child be held in detention for an extended period.'<sup>30</sup>

#### *9.4.1 'Social and educational programs appropriate to the child's age and abilities are available to all children in detention'*

The best interests of children in immigration detention centres are being subverted, despite DIMIA's own explicit guideline asserting that each and every person under the age of eighteen ought to have access to a sufficient

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<sup>28</sup> CROC, Art 9

<sup>29</sup> 'Free the Refugees' talk at the Canberra Labour Club, 10 April, 02

<sup>30</sup> Mitchell, Grant, The Swedish Model of Detention, in *Refugee Council of Australia: Alternatives to Detention*, <http://www.refugeecouncil.org.au/alternativesSwedish.htm>

education. However, due to the inadequate implementation of this provision, the right to education is being denied to children whilst in detention.

The right to education for all children is enshrined in Article 28(1) of CROC and Article 13 of ICCESCR.<sup>31</sup> However, empirical evidence suggests that detention centres are not providing education consistently to all children. At Woomera education is confined to those under twelve,<sup>32</sup> blatantly neglecting the needs of older children.

Unlike at Australian public schools, attendance is generally voluntary. The guidelines fail to require that a minimum number of subjects be made available, nor do they specify a minimum number of hours per day and days per week that schooling should occur. The guidelines do not stipulate a minimum number of teachers per class nor the qualifications required of the teacher. Furthermore, children with cognitive or learning disabilities are not adequately assisted.

HREOC has recommended education take place outside detention centres wherever possible. While there are a small number of individuals attending local primary and secondary schools in Derby and Maryburnong, this has not been translated into a general policy.

Although there are geographic and economic factors that hamper transportation of detainee children to local schools, measures to provide education within the centres are inconsistent. According to a former teacher at Port Hedland detention centre, 'there is no curriculum, no accountability.'<sup>33</sup> Reports from Commissioners of HREOC after visiting Woomera found that education standards were lacking.<sup>34</sup>

Unlike detention centres, Australian schools provide ESL services for students who do not speak English as a primary language. Having been typically

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<sup>31</sup> *International Covenant on Economic, Social and Cultural Rights*

<sup>32</sup> Tay, A. AM, and Ozdowski, S, Woomera Immigration Detention Centre, Report of visit by HREOC Officers, February 2002,

<http://www.refugeecouncil.org.au/detentionHREOC.STATEMThm.htm>

<sup>33</sup> Interview with Brosnan, K, 7:30 Report, ABCTV, 9 April 2002

<sup>34</sup> Tay, A. AM, and Ozdowski, S, Woomera Immigration Detention Centre, Report of visit by HREOC Officers, February 2002, <http://www.refugeecouncil.org.au/detentionHREOC.STATEMThm.htm>

exposed to social, cultural and familial fragmentation in their home countries, asylum-seeking children are among those most in need of services and staff to enhance their learning capability.

DIMIA argues that because it is unaware of the numbers of children arriving each year it is unable to provide sufficient plans for educational institutions,<sup>35</sup> and that in any case the educational opportunities afforded female asylum seekers outshine those under the Taliban in Afghanistan. However, it is the responsibility of DIMIA to provide asylum-seekers with educational opportunities that match those afforded to Australian citizens. For DIMIA to simply provide services of a higher standard than available in their country of persecution is laughable, especially since Australia holds itself out to be a world humanitarian leader.

## CONCLUSION

When dealing with children seeking refugee status, DIMIA has a clear obligation to act in the 'best interests' of the child. This paper has highlighted that DIMIA fails to give adequate consideration to this issue, and often acts contrary to this principle. The CROC recognises children are more vulnerable to harm than adults. Despite this, the detention environment in Australia places children at risk of physical and sexual abuse. It is unacceptable to keep children in detention, where their rights are not protected. Every effort should be made to ensure that children are relocated into the community as quickly as possible.



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<sup>35</sup> Interview with Ruddock, P, 7:30 Report, ABCTV, 9 April 2002

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MODEL

**Attachment A**

- A child is not to be separated from his or her parents against their will, except where this is in the child's best interests [art 9]
- a child capable of forming a view on his or her best interests must be able to give it freely and it must be taken into account [art 12].
- The detention of a child must be in conformity with the law and only be used as a measure of last resort [art 37(b)]
- The State party must undertake all appropriate measures to promote physical and psychological recovery for child victims of neglect, exploitation, torture or any other form of cruel treatment. [art 39]

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