UTS UNIVERSITY OF TECHNOLOGY SYDNEY

Reconceptualising State responses to unaccompanied child asylum seekers to do no (further) harm

by

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under the supervision of Associate Professor Karen O'Connell, Associate Professor Laurie Berg and Emeritus Professor Terry Carney

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Certificate of Original Authorship

I, **Jenni Whelan** declare that this thesis, is submitted in fulfilment of the requirements for the award of Doctor of Philosophy, in the Faculty of Law at the University of Technology Sydney.

This thesis is wholly my own work unless otherwise referenced or acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

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ABSTRACT

Unaccompanied child asylum seekers arrive in States seeking protection with an acute burden of vulnerability due to the absence of their parents and their unauthorised presence, without the legal protections that even the most marginalised citizens possess. This burden of vulnerability is *in addition to* their universal vulnerability as children. This vulnerability is unacknowledged and obscured by global rhetoric of border securitisation that has become increasingly common in domestic public and political discourse since the terrorist attacks of 9/11. State law and policy responses to asylum seekers that prioritise border securitisation over protection obligations exacerbate the vulnerability of unaccompanied child asylum seekers. Human rights and refugee law ought to provide an effective counterbalance to securitisation rhetoric but has not yet done so. This failure is reflected in extensive human rights breaches caused by punitive laws and policies regulating unaccompanied children seeking asylum by boat in Australia. Australia's legal and policy responses have manifested grievous psychological and developmental harms to unaccompanied asylum seeking children while amendments to the *Immigration Guardianship of Children Act 1946* (Cth) and the *Migration Act 1958* (Cth) in 2012, 2013, and 2014 have progressively reduced the protection provided to them. Urgent interim changes to law and policy are required. These changes, which are also necessary beyond the Australian context, require a reconceptualization of the way we comprehend firstly, unaccompanied minor children and the impact of State practice on them, secondly, the relationship between the State and the child seeking asylum and thirdly, States' accountability for the impacts of State practice on the child because of that specific relationship. The convergence of these children's acute vulnerability and their spatial, temporal and relational proximity to the State compels a response by States that neither exacerbates existing nor generates new vulnerabilities whilst their refugee status is determined. This thesis proposes a response informed by vulnerability theory by which States avoid both aggravating these children's existing vulnerabilities and generating new ones while also assisting States to move towards greater compliance with their international legal obligations.

KEYWORDS

Asylum seeker, unaccompanied child, vulnerability theory, human rights, proximity

TABLE OF CONTENTS

1 INTRODUCTION..11
1.1 Introduction..11
1.2 The historical context of this thesis 14
1.3 The problem at the heart of this thesis...25
1.4 What does prior scholarship tell us about this problem? 26
1.4.1 Scholarship regarding the human rights of asylum seeking children 27
1.4.2 Australian scholarship about the impact of Australian migration and guardianship law and policy on unaccompanied children..28
1.4.3 Competing constructions of the conception of childhood in childhood studies scholarship.... 31
1.4.4 Debates about State responsibility and the significance of borders 32
1.4.5 The scope and utility of vulnerability theory 33
1.5 The argument 35
1.6 The original contribution of this thesis 39
1.7 Methodology 40
1.8 Structure 41
1.9 Limitations of the research..44
1.10 Conclusion 44
2 COMPREHENDING THE SPECIFIC VULNERABILITY OF UNACCOMPANIED CHILD ASYLUM SEEKERS..46
2.1 Introduction..46
2.2 The global context..47
2.3 Comprehending unaccompanied children's specific vulnerability.................49
2.3.1 Acknowledging resilience 49
2.3.2 The vulnerability of unaccompanied child asylum seekers: the triple burden 50
2.3.3 Minority 51
2.3.4 Alienage 57
2.3.5 Family separation...60
2.4 Conclusion 64
3 THE UNFULFILLED POTENTIAL OF HUMAN RIGHTS FOR UNACCOMPANIED CHILD ASYLUM SEEKERS 65
3.1 Introduction...65

3.2 State legal obligations towards unaccompanied child asylum seekers in international human rights law....65
3.3 Correlating States' human rights obligations with the triple burdens of vulnerability of unaccompanied child asylum seekers 70
3.3.1 Human rights law and children's minority....72
3.3.2 Human rights law and children's alienage....79
3.3.3 Human rights law and unaccompanied children's separation from their parents....83
3.4 Australia's failure to implement human rights protections in practice....87
3.4.1 The persistence of the practice of onshore mandatory immigration deterntion and offshore immigration detention, despite repeated findings about the awful harms wreaked on children by immigration detention....89
3.4.2 Return to offshore processing and Boat Turnbacks in 2012-2014....91
3.4.3 The subordination of the Minister's guardianship obligations in the IGOC Act to his border control functions in the Migration Act....93
3.5 Conclusion....95
4 THE POTENTIAL OF EXPANDING VULNERABILITY THEORY TO PRIORITISE STATE RESPONSES TO UNACCOMPANIED ASYLUM SEEKING CHILDREN....97
4.1 Introduction....97
4.2 The conceptual foundations of vulnerability theory....98
4.3 Expanding vulnerability theory beyond the citizen insider to encompass unaccompanied child asylum seekers: the Proximate Vulnerable Child....105
4.4 Determining what constitutes a vulnerability informed response....107
4.4.1 Distinguishing between multiple vulnerabilities....109
4.4.2 Prioritising redress....112
4.4.3 Determining the requisite vulnerability informed response of the State to these children....114
4.5 Conclusion....116
5 VULNERABILITY ANALYSIS OF AUSTRALIA'S PROVISION OF CARE TO UNACCOMPANIED ASYLUM SEEKING CHILDREN....117
5.1 Introduction....117
5.2 Operation of the 2012-2014 legislative amendments: environments of care based on date of arrival not care and protection needs....118
5.3 Impact of Australia's punitive environments of care....121
5.3.1 Impacts on the Legacy Caseload cohort (unaccompanied asylum seeker children on the Australian Mainland)....123

5.3.2 Impacts on the Offshore Transferee cohort (unaccompanied asylum seeker children "cared for" on Nauru) ... 130
5.4 Priorities for reform ... 142
5.5 Conclusion ... 144
6 VULNERABILITY ANALYSIS OF AUSTRALIA'S PROCESSING OF ASYLUM CLAIMS OF UNACCOMPANIED CHILDREN ... 145
6.1 Introduction ... 145
6.2 Operation of the 2012-2014 legislative amendments: downgrading unaccompanied children's ability to seek asylum in Australia ... 146
6.3 Impact of denying access to RSD and protections against refoulement: augmenting the protection gap for unaccompanied child asylum-seekers ... 150
6.3.1 Impacts on the Legacy Caseload cohort eligible for processing of their asylum claim on the Australian mainland ... 151
6.3.2 Impacts on the Offshore Transferee cohort ... 155
6.3.3 Impacts on the Boat Turnbacks and Takebacks Cohort (unaccompanied asylum seeker children subject to Boat Turnbacks and Takebacks) ... 160
6.4 Priorities for reform ... 163
6.5 Conclusion ... 165
7 VULNERABILITY ANALYSIS OF AUSTRALIA'S PROVISION OF GUARDIANSHIP TO UNACCOMPANIED ASYLUM SEEKING CHILDREN ... 165
7.1 Introduction ... 166
7.2 Operation of the 2012-2014 legislative amendments: cementing the Minister responsible for border protection as the inherently conflicted guardian ... 167
7.3 Impact of the changes: the guardian gatekeeper vacated the space ... 175
7.3.1 Guardianship of unaccompanied asylum seeker children in the Legacy Caseload cohort on the Australian mainland ... 176
7.3.2 Guardianship of unaccompanied asylum seekers in the Offshore Transferee cohort ... 178
7.3.3 Guardianship of unaccompanied asylum seeker children in the Boat Turnbacks and Takebacks cohort 180
7.4 Priorities for reform ... 180
7.5 Conclusion ... 185
8 CONCLUSION ... 187
8.1 Prising open space to respond to unaccompanied child asylum seekers ... 187
8.2 The acute vulnerability of unaccompanied child asylum seekers ... 190
8.3 Human rights compliance as the long game ... 191

8.4 The novelty of an expanded vulnerability theory in identifying the content of, and prioritising the rollout of, an acute response ... 193
8.5 Roadmap for reform ... 195
8.6 The utility of the vulnerability informed response ... 197
BIBLIOGRAPHY ... 199
A. ARTICLES/BOOKS/REPORTS ... 199
B. CASES ... 214
C. LEGISLATION ... 216
D. TREATIES ... 217
E. OTHER ... 219

LIST OF TABLES

Table 1.1: Asylum seeker cohorts determined by date of arrival

Table 2.1: Inward and outward looking responsibilities of guardians of unaccompanied child asylum seekers

Table 3.1: A comprehensive synthesis of States' extensive legal obligations to unaccompanied child asylum seekers

Table 3.2: Correlation between State human rights obligations to unaccompanied children and their triple vulnerability

Table 6.1: Eligibility to apply for asylum by date of arrival

Table 7.1: Eligibility for guardianship by date of arrival

LIST OF DIAGRAMS

Diagram 1: The triple vulnerability of unaccompanied child asylum seekers

Diagram 2: The relationship between group vulnerability and the responsive state

Diagram 3: Vulnerability theory as a supplementary imperative for an urgent response to non citizen children

Diagram 4: Proximate vulnerable children

1 INTRODUCTION

1.1 *Introduction*

This thesis explores the acute vulnerability of unaccompanied child asylum seekers and States' responsibilities to address that vulnerability in human rights law and in vulnerability theory. It examines the impact of a series of Australian legislative amendments in 2012, 2013 and 2014 on the vulnerability of unaccompanied child asylum seekers and argues for a reconceptualization of States' responsibilities, including Australia's, to respond to that vulnerability.

Unlike unaccompanied child refugees who have already had their protection claim under the Refugee Convention accepted, the claims of unaccompanied child asylum seekers are yet to be determined. In the 2018 calendar year, more than 27,600 unaccompanied or separated children sought asylum in 60 countries.[1] International human rights law establishes substantive and unambiguous obligations on States to protect, assist and act in unaccompanied children's best interests and to provide for their development.[2] It recognises their particular vulnerability as victims of war and persecution and their ongoing susceptibility to abuse, refoulement, trafficking, labour and sex exploitation whilst their asylum claim is determined. The scope of their humanitarian crisis, including vulnerability to assault, sexual abuse and trafficking has been extensively documented.[3] So too, has the causal connection between their exposure to pre-flight traumatic events and their separation from, or loss of, parents and other

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[1] UNHCR, *Refugee Global Trends* (UNHCR, 2019), 49. The UNHCR notes that this is an underestimate because data on displaced unaccompanied and separated children is limited both in availability and the quality of data reported. Accessed on 1 May 2020 at https://www.unhcr.org/dach/wp-content/uploads/sites/27/2019/06/2019-06-07-Global-Trends-2018.pdf

[2] States' extensive human rights obligations to unaccompanied child asylum seekers are examined fully in Chapter 3.

[3] International Federation of Red Cross and Red Crescent Societies reported in 2018 that travelling without an accompanying adult renders unaccompanied minors vulnerable to being assaulted, sexually abused, raped, trafficked into sexual exploitation or forced into "survival sex". See International Federation of Red Cross and Red Crescent Societies, *Alone and Unsafe: Children, Migration and Sexual and Gender-based Violence* (IFRC, 2018) 12. See also Elina Sarantou and Angeliki Theodoropoulou, *Children cast adrift: The exclusion and exploitation of unaccompanied minors (UAMs) in Greece, Spain and Italy* (Rosa Luxemburg Stiftung, 2019).

family members and significant psychological trauma.[4] They present with this trauma when they arrive at the borders of destination countries[5] and it can persist for many years.[6] Yet, over the last two decades, progressive global securitisation of the irregular migration of displaced people has subordinated humanitarian and human rights based responses to asylum seekers, including children.[7]

In practice, the way States receive, process, hold, return or transfer unaccompanied children elsewhere for processing or integrate them into society reflects the extent to which States' domestic laws and policies prioritise and respond to their specific vulnerabilities. Responses, and the capacity of States to respond, vary across jurisdictions, depending on State resources the way that domestic legal systems incorporate international and regional human rights laws and the political will of each State to reconcile its sovereign right to border protection with its extensive obligations to unaccompanied children in international human rights law.

Commonly, the recognition and implementation of human rights in practice becomes thorny at the site where non-citizens' human rights and States' border protection laws clash. As global migration increases the number of unaccompanied asylum seeking children continues to escalate. They are caught in the gaps between international laws that accord them clear rights and national laws and policies that range between offering them special protection because of their status as children or punishing them because they crossed borders "illegally". This results in asylum seeking children's rights being regularly and sometimes egregiously breached.

Unaccompanied children globally seek asylum by land, air and sea. This thesis focuses only on unaccompanied children seeking asylum by sea because boat arrivals have been the focus of Australian law and policy regulating asylum seeker flow. When these children enter Australian waters without a visa, they breach Australian border controls and domestic laws.

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[4] Tine Jensen et al, 'Long-term mental health in unaccompanied refugee minors: pre- and post-flight predictors' (2019) 28(12) *European Child & Adolescent Psychiatry* 1671.

[5] Ilse Derluyn and Eric Broekaert, 'Different perspectives on emotional and behavioural problems in unaccompanied refugee children and adolescents' (2007) 12(2) *Ethnicity & Health* 141.

[6] See for example, Serap Keles et al, 'Resilience and acculturation among unaccompanied refugee minors' (2016) 42(1) *International Journal of Behavioural Development* 52; Tine Jensen et al, 'Development of mental health problems – a follow-up study of unaccompanied refugee minors' (2014) 8 *Child Adolescent Psychiatry Mental Health* 29.

[7] Anthea Vogl, 'Seeking Asylum: Human Smuggling and Bureaucracy at the Border' (review) (2012) 27(1) *Canadian Journal of Law and Society* 159, 159.

The number of unaccompanied children seeking asylum who arrive in Australia by sea are very low compared to the global figures. Over the last decade, 41 unaccompanied children arrived in 2008-2009, 476 in 2009-2010 and 411 in 2010-2011. The highest number of unaccompanied child arrivals in Australia was 1,788 in 2011-2012. The government has not officially recorded any such arrivals since the re-introduction of Australia's Boat Turnback and Takeback policies (respectively, the forced return of unauthorised maritime arrivals to their most recent country of departure - usually Indonesia - in either their own or a substitute vessel and the handing over of unauthorised maritime arrivals to country of origin authorities) in late 2013.

The key changes to Australian migration law and policy in the last fifty years correlate with the arrival of waves of maritime asylum seekers. Following the 2011-2012 arrivals, a series of rapid amendments to the *Migration Act 1958* (Cth) ('*Migration Act*') introduced increasingly harsher and more punitive forms of control which culminated in the prevention of all asylum seekers arriving by boat from claiming Australia's protection.[8] This is despite the fact that Australia has extensive human rights obligations under international law to unaccompanied child asylum seekers who have arrived on its shores. It is also despite Australia's common law tradition of providing specific protection to children without adult carers.

This harsh treatment in contravention of international human rights law generates the questions interrogated by this thesis. The questions address both global approaches and Australia's particular response: are unaccompanied children vulnerable in a way that generates a moral obligation that supplements international law obligations to respond to, not exacerbate, their vulnerability? How effectively does international human rights law respond to their vulnerability? How did amendments to Australian laws and policies in 2012, 2013 and 2014 respond to the complex vulnerabilities of these children and was this response adequate? How should Australian law and policy be amended to respond to the vulnerability of these children?

[8] These changes were achieved through a series of amendments to the *Migration Act 1958* (Cth) overseen by the Minister for Immigration and Border Protection (the Minister).

1.2 The historical context of this thesis

Australia's migration policies over the last three decades have a lengthy and controversial history.[9] Australia has had essentially five legal responses to asylum seekers arriving by boat. In chronological order these were:

i. regulation (1980s)
ii. mandatory onshore immigration detention (1990s)
iii. deterrence by utilising offshore processing of Refugee Status Determinations with prospects of being settled in Australia while also implementing Boat Turnback and Takeback policies (2002-2007)
iv. a humane New Direction response (2008-2011)
v. a return to deterrence by utilising offshore processing of Refugee Status Determinations but with no prospect of being settled in Australia while implementing comprehensive Boat Turnback and Takeback policies (2012-present).

All but the "New Direction" response broadly correlate with four waves of arrivals of asylum seekers by sea.

Australia's relationship with asylum seekers occurs in a world context where refugee regimes in the Global North are fundamentally based on the principle of deterrence rather than human rights protection.[10] Gammeltoft-Hansen and Tan's analysis of the development of deterrence policies by western States in the past 30 years, including interdiction at sea, concluded that "restrictive migration control policies are today the primary, some might say only, response of the developed world to rising numbers of asylum seekers and refugees."[11] Despite there being comparatively small numbers of people seeking asylum in Australia, Australia's response to boat arrivals has largely been deterrent based, in breach of its human rights obligations. Gelber and McDonald in 2006 characterised Australia's response as

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[9] Academic literature has comprehensively canvassed successive Australian governments' domestic law responses to asylum seekers. See Mary Crock and Ben Saul, *Future Seekers: Refugees and the Law in Australia,* (The Federation Press, 2002); Don McMaster, *Asylum Seekers: Australia's Response to Refugees*, (Melbourne University Press, 2001); David Marr and Marian Wilkinson, *Dark Victory: The Military Campaign to Re-elect the Prime Minister* (Allen & Unwin, 2003).

[10] Thomas Gammeltoft-Hansen and Nikolas Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) 5(1) *Journal on Migration and Human Security* 28.

[11] Ibid 28.

manifesting a "right to exclude."[12] Analysis of the legal responses to boat arrivals reveal a mostly bipartisan creep towards a brutal exclusionary legislative regime.

The first wave of asylum seeking boat arrivals in Australia comprised 2059 asylum seekers from Vietnam between 1976 and 1981. The Fraser Liberal/National (Coalition) government responded by establishing a regulatory border control framework through the *Migration Act* to conduct an individual refugee status determination for persons arriving unauthorised by boat.[13] It gave the Minister for Immigration and Ethnic Affairs ("the Minister") and the officers of the Department of Immigration and Ethnic Affairs ("the Department")[14] a range of powers and duties including a discretion to *detain* asylum seekers until their claim was processed.[15] Following the second wave of approximately 300 asylum seekers a year from predominantly Cambodia, southern China and Vietnam beginning in 1989,[16] the Hawke (Labor) government amended the *Migration Act,* effectively introducing a policy of "administrative detention" for all people entering Australia without a valid visa while

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[12] Katherine Gelber and Matt McDonald, 'Ethics and Exclusion: Representations of Sovereignty in Australia's Approach to Asylum Seekers' (2006) 32(2) *Review of International Studies* 269. They argue that conceiving sovereignty as the right to exclude requires denying responsibility to the most vulnerable in global politics and that the Australian government has garnered domestic support for this conception of sovereignty and ethical responsibility by marginalising alternative voices and emphasising asylum-seekers' and refugees' otherness.

[13] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 March 1982, 991 (Ian Macphee (Minister for Immigration and Ethnic Affairs) < http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F1982-03-16%2F0058%22>:

> We have a solemn humanitarian obligation to ensure that our limited program places are reserved for the genuine refugees. We must exclude those people whose claims for refugee status are suspect. This is a most difficult task… Australia will:
>
> Tighten refugee selection criteria and procedures for all programs with the particular objective of excluding from refugee entry those persons who do not meet the criteria allowed for in the United Nations Convention;
>
> …refugee determination will be made according to the application of these criteria on an individual basis….

[14] The name of the portfolio of the Minister responsible for immigration in Australia and the corresponding Commonwealth government department have changed regularly since the 1980s. In this thesis, for expediency and unless otherwise necessary for the context of the discussion, I refer to the Minister and the Department.

[15] This and the second wave also precipitated amendments to the *Migration Act* regulating asylum seekers' eligibility to apply for a protection visa in Australia.

[16] Don McMaster, *Asylum Seekers: Australia's response to refugees* (Melbourne University Press, 2001) 73.

their immigration status was resolved.[17] The Keating (Labor) government amended the *Migration Act* in 1992[18] to mandate detention for up to 273 days of unauthorised non-citizens, including children, in Australia's migration zone[19] unless they were afforded temporary lawful status by being granted a bridging visa.[20] Subsequent amendments in 1994 permitted the indefinite detention of all unlawful arrivals, pending processing of their applications for asylum and final determination of their status.[21]

Between 1999 and 2002, a third wave of 11,430 asylum seekers arrived by boat predominantly from the Middle East fleeing the war in Afghanistan. This included 344 unaccompanied child asylum seekers.[22] The Howard (Coalition) government introduced a new tranche of punitive amendments to the *Migration Act* known as "the Pacific Solution". The amendments excised outer Australian territory islands where the boats most commonly arrived and unauthorized arrivals who entered Australia at an 'excised offshore place' were deemed to be 'offshore entry persons' who were barred from making a visa application unless the Minister intervened personally to permit it.. [23] They were thus deemed to be located outside of Australia's migration zone,[24] ineligible to apply for a visa[25] and subject to removal to asylum claim processing centres on Nauru and Manus Island. The amendments also used the Defence Force to intercept boats carrying asylum seekers. Operation Relex (3 September 2001 - 13

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[17] The *Migration Legislation Amendment Act 1989* (Cth). See also Janet Phillips and Harriet Spinks, 'Immigration detention in Australia' *Parliamentary Library Research Paper* (Commonwealth Parliamentary Library, 2013) 3.

[18] The *Migration Amendment Act 1992*. Prior to this amendment, unauthorised boat arrivals were detained on a discretionary basis only. See Janet Phillips and Harriet Spinks, 'Boat arrivals in Australia since 1976', *Parliamentary Library Research Paper* (Commonwealth Parliamentary Library, 2017) 12.

[19] The migration zone refers to any place in Australian territory where a person arriving without a valid visa can make a visa application.

[20] Or, alternatively, unless arrangements were made for their departure or for an application for an alternative visa.

[21] The *Migration Reform Act 1992* came into effect on 1 September 1994.

[22] Based on the data contained in Janet Phillips and Harriet Spinks (n 17) 22.

[23] The islands excised by the *Migration Amendment (Excision from Migration Zone) Act 2001* and *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* included Ashmore and Cartier Islands, Christmas Island and Cocos (Keeling) Islands where asylum seeker boats commonly arrived.

[24] The *Migration Act* defines the migration zone as 'an area consisting of land that is part of the states and territories at mean low water, Australian resource installations and sea installations, sea within a port and piers or similar structures, but not including sea that is within the State or Territory limits but not within a port'.

[25] Unless the Minister for Immigration exercised a discretionary power to allow an application for protection by determining that their application was in the public interest.

March 2002) and Operation Relex II (14 March 2002 - 16 July 2006) directed the Royal Australian Navy to intercept and board boats suspected of carrying people without a visa once they had entered Australia's contiguous zone.[26] They were then to return the asylum seekers to the edge of Indonesian territorial waters. Between 19 October 2001 and 8 November 2003 the Navy turned around five boats carrying 614 asylum seekers.[27]

With a near cessation in boat arrivals the government briefly relaxed its immigration policies in 2005 with amendments to the *Migration Act*. They gave the Minister a broad discretionary power to grant detainees a visa without an application,[28] to approve the placement of individuals in the community while their protection claims were processed (residence determinations)[29] and inserted a new principle in the Migration Act that "a minor shall only be detained as a measure of last resort."[30]

The incoming Rudd (Labor) government in December 2007 oversaw several years of reversal of the previous punitive trend. Its more humane approach, especially to children and families seeking asylum, included requiring justification for detention based on risk, ending the detention of children, and ensuring administrative review of the length and conditions of detention. The Rudd government went on to dismantle the Pacific Solution by closing the detention centres on Nauru and Manus Island, resettling the final 21 of the 1637 asylum seekers that had been detained offshore in Australia on 8 February 2008 and abolishing Temporary Protection Visas.[31]

However, with a flare up of hostilities in Afghanistan, the resumption of the civil war in Sri Lanka and crises in Myanmar, the Middle East and Africa, the numbers of asylum seekers arriving in Australia by boat escalated dramatically: 161 arrived in 2008, 2,726 in 2009, 6,555

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[26] This zone is 24 nautical miles from the Australian coast.

[27] Janet Phillips, 'A comparison of Coalition and Labor Government asylum policies in Australia since 2001' *Parliamentary Library Research Paper Series* (Commonwealth Parliamentary Library, 2013).

[28] *Migration Act* s 195A, as inserted by *Migration Amendment (Detention Arrangements) Act 2005* (Cth) sch 1 item 10.

[29] *Migration Act* pt 2 div 7 sub-div B, as inserted by *Migration Amendment (Detention Arrangements) Act 2005* (Cth) sch 1 item 11.

[30] *Migration Act* s 4AA, as inserted by *Migration Amendment (Detention Arrangements) Act 2005* (Cth) sch 1 item 1. The amendments also introduced reporting requirements for the Commonwealth Ombudsman regarding persons who had been detained for over 2 years. See *Migration Act* Part 8C, as inserted by *Migration Amendment (Detention Arrangements) Act 2005* (Cth) sch 1 item 19.

[31] Janet Phillips and Harriet Spinks (n 17) 17. See also Alperhan Babacan and Hurriyet Babacan, 'Detention downunder: New directions in the detention of asylum seekers in Australia' (2008) 4(15) *Review of International Law and Politics* 137.

in 2010, 4,565 in 2011, and 17,202 in 2012.[32] The numbers of unaccompanied children also increased from 470 in 2011 to 889 in 2012.[33] The Abbott (Coalition) government was vocal and persistent in calling for a return to offshore processing on Nauru, Boat Turnbacks and Takebacks and the resumption of Temporary Protection Visas. Advocates for Australia's responsibility for unaccompanied children as a "special case" were marginalised by consistent and voluble domestic public and media disapprobation of asylum seekers and a political debate that narrowed to the point that governments seemed unelectable without policies that punished unauthorised boat arrivals and "stopped the boats."

In an attempt to circumvent continued arrivals, the Gillard (Labor) government entered into an agreement with the Malaysian government that Australia would transfer 800 asylum seekers to Malaysia for offshore processing and, in return, would accept 4000 refugees as part of Australia's humanitarian resettlement program.[34] In a successful challenge to the agreement in *Plaintiff M70/2011 & Plaintiff M106/2011 by his Litigation Guardian v. Minister for Immigration and Citizenship* ('*M70/2011*') the High Court declared the policy invalid.[35]

M70/2011 was a watershed moment which led to the establishment of the Expert Panel on Asylum Seekers by the Gillard (Labor) government in an attempt to resolve the political deadlock.[36] The panel, commissioned to examine and provide a roadmap for Australian refugee policy, recommended legislative amendments to the *Migration Act* so that boat arrivals

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[32] Janet Phillips and Harriet Spinks (n 17) 22

[33] Ibid.

[34] Having first unsuccessfully attempted to enter into a regional agreement with East Timor to manage asylum seekers. See Janet Phillips and Harriet Spinks (n 17) 11. See also Angus Houston, Michael L'Estrange and Paris Aristotle, *Report of the Expert Panel on Asylum Seekers* (Commonwealth Government, 2012) ('*Expert Panel report*') 137.

[35] (2011) 244 CLR 144. The High Court held by majority that the sole source of power under the *Migration Act* to take asylum seekers from Australia to another country for determination of their refugee status was conferred by section 198A and that the declaration that Malaysia was a specified third country for the purposes of section 198A was made without power. So far as that case related to unaccompanied child asylum seekers, solicitors for a 16 year old Afghan unaccompanied child sought an injunction from the High Court restraining the Minister for Immigration and Citizenship (as he then was) from removing him to Malaysia. They challenged firstly, the lawfulness of Australia's proposed agreement with Malaysia and secondly, whether the Minister was able to give a blanket direction that all Unaccompanied Child Asylum Seekers were to be transferred to Malaysia for processing of their asylum claim without the Minister's written consent under the *Immigration (Guardianship of Children) Act 1946* (Cth) ('*IGOC Act*'). The case thus involved consideration of whether and to what extent the Minister's obligations as guardian under the Act informed the conferral of power on immigration officers to take an Unaccompanied Child Asylum Seeker (as an "offshore entry person") from Australia to a declared third country (Malaysia, in this instance) pursuant to the *Migration Act*.

[36] Angus Houston, Michael L'Estrange and Paris Aristotle comprised the Expert Panel on Asylum Seekers.

anywhere on Australia would have the same legal status as those deemed to have arrived in an excised offshore place so they would be subject to the same bar on visa applications. [37] The panel also recommended that capacity be established in Nauru and Papua New Guinea ('PNG') as soon as practical to process the claims of Irregular Maritime Arrivals,[38] that people be transferred via regional processing arrangements as a matter of urgency[39] and that the "Malaysia Agreement" be built on further, rather than being discarded or neglected.[40] The panel recommended too that the regional transfers occur in ways consistent with Australian, Nauruan and PNG responsibilities under international law.[41] The panel noted that the existing "conditions necessary for effective, lawful and safe turnback of irregular vessels carrying asylum seekers to Australia" were "not currently met" but that the situation could change in the future "if appropriate regional and bilateral arrangements" were implemented.[42]

The Gillard (Labor) government and then the second Rudd (Labor) government responded to the High Court decision and the report of the expert panel with a rapid series of amendments to the *Migration Act* in 2012 and 2013 and the Abbott (Coalition) government continued those amendments in 2014.[43] The amendments did not, contrary to the recommendations of the panel, incorporate adherence by Australia to its international obligations, build on the Malaysia Agreement, or facilitate a comprehensive and integrated regional system of asylum processing. Instead, these amendments, progressively implemented offshore processing (initially with, and subsequently without, an ultimate entitlement to settle in Australia) and culminated in a right to exclude all unauthorised boat arrivals, including unaccompanied children, via Boat Turnbacks and Takebacks in December 2013.

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[37] *Expert Panel report* (n 34) [3.72-3.73].

[38] Ibid [3.44-3.57].

[39] Ibid [3.54 and 3.57]. The panel further recommended at [3.43] that this legislation should require that any future designation of a country as an appropriate place for processing be achieved through a further legislative instrument that would provide the opportunity for the Australian Parliament to allow or disallow the instrument.

[40] Ibid [3.58-3.70]. The Panel recommended that this be achieved through "high-level bilateral engagement focused on strengthening safeguards and accountability as a positive basis for the Australian Parliament's reconsideration of new legislation that would be necessary."

[41] Ibid [3.44-3.57].

[42] Ibid [3.77-3.80].

[43] See the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth), the *Maritime Powers Act 2013* (Cth), the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth), and the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

These progressive amendments generated four distinct categories of asylum seekers, all of which included unaccompanied children, differentiated only by their date of arrival and not by their relative vulnerability as demonstrated in Table 1.1 “Asylum seeker cohorts determined by date of arrival”.

Table 1.1: Asylum seeker cohorts determined by date of arrival

Date of arrival	Processing of asylum claim	Cohort
Pre 13 August 2012	Asylum claim processed in Australia	Onshore claimants
Post 13 August 2012 and pre-19 July 2013	Transferred initially to a third country (Nauru or Papua New Guinea) for asylum claim processing after "transiting" in Australia on Christmas Island or processed on the Australian mainland/ awaiting finalisation of their claim. Eligible to settle in Australia if found to be a refugee.	Legacy Caseload (approximately 30,000)
Post 19 July 2013	Transferred to a third country (Nauru or Papua New Guinea) to have their asylum claim processed after "transiting" in Australia (on Christmas Island). Ineligible to settle in Australia if found to be a refugee.	Offshore Transferees (approximately 3,000)
Post September 2013	Ineligible to make a claim for asylum in Australia. Boats are returned to their departure port.	Boat Turnbacks and Takebacks or Transfer to a regional processing country'

M70/2011 was also a critical historical watershed moment for unaccompanied child asylum seekers because it concerned the Minister's obligations as their guardian. As a consequence of the legislative amendments that followed that decision, unaccompanied child asylum seekers are represented in each cohort in Table 1. Australia is unique amongst common law countries in having a Minister that is simultaneously these children's sole statutory legal guardian and responsible for enforcing border protection laws and policies. Since 1946, the *Immigration (Guardianship of Children) Act 1946* (Cth) ('*IGOC Act'*) automatically appointed the Minister with the Immigration portfolio as the legal guardian of unaccompanied children.[44] The *IGOC Act* was enacted to provide for the reception of predominantly British immigrant children whose arrival was authorised post World War

[44] *IGOC Act* s 6. The Minister has the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have.

Two.[45] Although it appointed the Minister for Immigration as legal guardian, the Minister's powers and duties were never the subject of real consideration or focus. In reality, the children's immigration status was determined before they arrived in Australia; once they arrived the Minister delegated their custodial powers to state welfare organisations.

In 1958, when the Australian parliament enacted the *Migration Act* to regulate "in the national interest, the coming into, and presence in, Australia of non-citizens",[46] neither the *Migration Act* nor the *IGOC Act* contained a provision expressly providing how the Acts were to be read in relation to each other.[47] Nor did the *IGOC Act* expressly refer to unaccompanied refugees or asylum seekers. The first mention of unaccompanied refugee minors appears in Minister Ruddock's second reading speech on the 1994 Bill stating:

> Under the current provisions of the Immigration (Guardianship of Children) Act 1946 the Minister for Immigration and Ethnic Affairs has guardianship of non-citizen children, including those entering Australia for adoption, **and unaccompanied refugee minors**. In practice, the minister immediately delegates his powers, as has been said, of guardianship of adoptive non-citizen children to the relevant state or territory welfare administrator (emphasis added).[48]

That Bill proposed the transfer from the federal Minister to state and territory governments of guardianship powers of non-citizen children entering Australia for adoption. Although Minister Ruddock explained at length why the inter-country adoption provisions were being introduced, there was no mention whatsoever of refugee children, their unique needs, or his role as their guardian.

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[45] Significant research has been conducted about the history, and impact on the lives, of former unaccompanied child migrants including: Barry Coldrey, *Good British stock: child and youth migration to Australia* (National Archives, 1999); Philip Bean and Joy Melville, *Lost Children of the Empire* (Unwin Hyman, 1989); Margaret Humphreys, *Empty Cradles* (Transworld, 2009); and Alan Gill, *Orphans of the Empire: the Shocking Story of Child Migration to Australia* (Random House, 1998). Several state government inquiries and reports have added significantly to this scholarship and the Inquiry by the Senate Community Affairs References Committee *Lost Innocents: Righting the Record* (Commonwealth Government, 2001) comprehensively investigated unaccompanied child migration to Australia under approved schemes during the twentieth century.

[46] *Migration Act* s 4.

[47] The Courts subsequently acknowledged that the Minister's statutory obligations as the legal guardian of a non-citizen child may give rise to a potential "conflict of roles" in respect of the performance of functions under the *Migration Act*, See *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 29 at 47-48 [90].

[48] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 March 1994, 1694 (Minister Ruddock) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=_fragment_number,doc_date-rev;page=0;query=Immigration%20Guardianship%20of%20Children%20Act%201946%20Decade%3A%221990s%22%20Year%3A%221994%22;rec=1;resCount=Default>.

Section 6 of the *IGOC Act* provides that the Minister shall have the rights, powers, duties, obligations and liabilities of a natural guardian of unaccompanied children under common law but does not identify the corresponding rights of the child wards. At common law, guardianship encompasses the full range of rights and powers that can be exercised by an adult in respect of the welfare and upbringing of a child.[49] These include the duty to protect the child from harm and the right to make decisions relating to the long-term welfare of the child.[50] Australian courts have held that s 6 confers on the Minister all the usual incidents of guardianship, a set of rights and responsibilities analogous to those of a parent (or "natural guardian").[51] They have also held that concept of guardianship for the purposes of the Act confers a "varying spectrum of powers and duties",[52] whose nature and extent must be assessed and evaluated from the language, scope and object of the applicable statute. Finally, they have distinguished the guardianship of a child from the care and custody of the child, noting that guardianship can involve duties that encompass "the defence, protection and guarding of the child, or his property, from danger, harm or loss that may enure from without".[53]

It was not until the 1990s that the Minister's duties as guardian under the *IGOC Act* were tested in litigation in relation to unaccompanied children arriving without pre-authorisation who were claiming asylum. The courts have been reluctant to identify the corresponding rights held by unaccompanied child wards. One exception is the decision of *X v Minister for Immigration and Multicultural Affairs*[54] where North J accepted that the responsibilities of a guardian under s 6 included the responsibilities concerned with according fundamental human rights to children which are the subject of the Convention on the Rights of the Child and went on to find:

> The guardian must therefore address the basic human needs of a child, that is to say, food, housing, health and education. Over the course of this century, attention to the needs has come to be recognised as a fundamental human right of children, including in various international instruments to which Australia is a party [at [34]].[55]

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[49] Anthony Dickey, *Family Law* (Law Book Co, 2002) 341.

[50] Ibid 344.

[51] *Sadiqi v Commonwealth* of *Australia (No* 2) [2009] FCA 1117 at [299].

[52] Compare *Trevorrow v South Australia (No.5)* (2007) 98 SASR 136 at 240-243 [439]-[450] and *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331 at 376 [209], 378-379 [222]-[226].

[53] *Wedd v Wedd* [1948] SASR 104 at 106-107, cited in *Trevorrow v South Australia (No.5) (2007)* 98 SASR 136 at 241 [442].

[54] (1999) 92 FCR 524 at 535-538 [34]-[43].

[55] Ibid.

Unaccompanied children have been spectacularly unsuccessful in any litigation against the Minister alleging a failure to diligently or fully discharge their guardianship obligations. Ironically the only exception to this trend was *M70/2011* where the High Court held that the unaccompanied child asylum seeker could not be removed lawfully from Australia under the *Migration Act* unless the Minister, exercising a separate statutory power as guardian, gave written consent to the removal. The Court found that departmental officers had not "shown any consideration of whether the Minister's consent was necessary or whether taking the second plaintiff [who was an unaccompanied child asylum seeker] from Australia would be in his interests."[56] The Court granted an injunction restraining the Minister from removing the child from Australia without that consent.

The Gillard (Labor) government responded by making amendments to the *IGOC Act* between 2012 and 2014 that corresponded with the amendments to the *Migration Act* discussed above. These amendments progressively restricted the provision of meaningful guardianship to unaccompanied child asylum seekers in the Offshore Processing and Boat Turnback and Takeback cohorts by effectively nullifying the Minister's guardianship obligations when exercising powers to remove non-citizens under the *Migration Act*.[57] The establishment of offshore processing of protection claims removed altogether the previous *IGOC Act* requirement that the Minister consent in writing to remove a non-citizen child, bearing in mind their interests.[58] These amendments also stipulated that the *IGOC Act* does not affect the exercise of any function, duty or power of the Minister to remove an unaccompanied child asylum seeker to a place outside Australia or impose any obligation on the Minister to exercise a power conferred on them by migration law.[59]

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[56] *M70/2011* (n 35) at [142].

[57] The government first introduced the Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011 which did not gain the support of the Coalition, Greens and the required number of independents in October 2011. On 13 October 2011 the government announced it would not pursue the amendments. See Julia Gillard, Prime Minister, 'Asylum Seekers; Malaysia Agreement; Commonwealth Ombudsman' (Transcript of press conference, 13 October 2011) <http://www.pm.gov.au/ press-office/transcript-joint-press-conference-canberra-17>. However, it was subsequently reintroduced and passed as the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* receiving Royal assent on 18 August 2012.

[58] *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth).

[59] Ibid.

1.3 The problem at the heart of this thesis

Australia's policies of mandatory immigration detention, deterrence through offshore processing and through Boat Turnbacks and Takebacks have subjected asylum seekers to grievous harms and critical human rights abuses including physical and psychological abuse, torture and inhumane treatment and exposure to refoulement. Reports have thoroughly documented the predictable, egregious and long term harms of both onshore and offshore immigration detention on children and have catalogued the legion of human rights abuses inflicted on them by these policies.[60] International human rights bodies have repeatedly found that Australia's detention policies breach its obligations under international law.[61] Australian law has failed to prevent these abuses and the High Court has upheld the legality of detention of asylum seekers in offshore detention centres under the Australian Constitution.[62]

Unaccompanied children have been subjected to these abuses and punitive policy measures while also receiving compromised guardianship – their key potential source of legal protection – because their statutory guardian was, and remains, the Minister with the Commonwealth immigration portfolio. The *IGOC Act* was not initially intended to apply to asylum seeking children, and it was not subsequently adapted to resolve this critical conflict of interest for unaccompanied child asylum seekers in the Onshore Claimants and Legacy Caseload cohorts. Amendments to the *IGOC Act* post *M70/2011* explicitly avoided the provision of even this compromised guardianship to unaccompanied child asylum seekers in the Offshore Transferee and Boat Turnback and Takeback cohorts.

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[60] Human Rights and Equal Opportunity Commission, *Those who've come across the seas: Detention of unauthorised arrivals* (Commonwealth of Australia, 1998); UNHCR, *Mission to the Republic of Nauru 3 to 5 December 2012: report* (14 December 2012) ('*Mission to the Republic of Nauru*'); UNHCR, *Monitoring visit to the Republic of Nauru 7 to 9 October 2013* (26 November 2013) ('*Monitoring Visit to the Republic of Nauru*'); Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (Commonwealth Government, 2014) ('*The Forgotten Children*'); UNHCR, 'Returns to Sri Lanka of individuals intercepted at sea' (Media Release, 7 July 2014) http://www.unhcr.org/afr/news/press/2014/7/53baa6ff6/returns-sri-lanka-individuals-intercepted-sea.html

[61] UN Human Rights Committee, *A v Australia* Communication No. 560/1993 U.N. Doc. CCPR/C/59/D/560/1993 [30 April 1997]; UN Human Rights Committee, *C v Australia* U.N. Doc. CCPR/C/76/D/900/1999 [13 November 2002]; UN Human Rights Committee *Baban v Australia*, U.N. Doc. CCPR/C/78/D/1014/2001 [18 September 2003].

[62] In *Plaintiff M68-2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 the High Court of Australia rejected a challenge to the legality of the immigration facility on Nauru. The case was brought by a Bangladeshi detainee on Nauru brought to Australia for medical treatment. In a six to one decision, the High Court of Australia held that s 198AHA of the *Migration Act* 1958 authorised the Commonwealth's participation, to the extent that the Commonwealth did participate, in the plaintiff's detention.

Since 2011, the increasingly punitive treatment of all asylum seekers arriving in Australia by boat, alongside the progressive dilution of guardianship for unaccompanied children seeking asylum in Australia by boat, has resulted in a very specific human rights crisis for these children. As illustrated in Section 1.2 Australia has not "welcomed" boat arrivals since the 1980s. However, the re-introduction of offshore processing and Boat Turnbacks and Takeback for all asylum seekers who arrive in Australian waters or who are intercepted at sea has effectively prevented anyone from seeking asylum from Australia if they arrived by boat. Since 2012, unaccompanied child asylum seekers have been increasingly dealt with in the same way as all other asylum seekers with minimal concessions to their relative vulnerability. Their eligibility for the processing of their protection claim by, and settlement as a refugee in, Australia is determined entirely by their date of arrival rather than their age or other relevant characteristics. As a result, the care and protection afforded to unaccompanied children arriving by boat under Australia's migration and guardianship regime is nugatory.

This thesis exposes what is as stake for unaccompanied child asylum seekers when laws and policies close off the possibility of human rights protections. It proposes a supplementary approach informed by vulnerability theory to prioritise responding to the sites of unaccompanied minors' most acute vulnerability.

1.4 What does prior scholarship tell us about this problem?

The broad problem that this thesis addresses – how ought Australia respond better to unaccompanied asylum seeking children – is situated at the intersection of multiple areas of scholarship: law, human rights, vulnerability studies, citizenship and transnational migration studies, and childhood studies. There are core tensions which are clearly manifest in this academic literature. On the one hand, there is literature that illuminates the relevance of conceptualising what it means to be "a child", States' obligations to realise human rights as a matter of international law, Australian legal scholarship about the impact of Australian migration and guardianship law and policy on unaccompanied children and the particular vulnerabilities of these children. On the other, there are debates about the extent to which citizenship ought to be an essential precondition for enforceable rights as a matter of domestic law or normative theory. There are also competing constructions of childhood and potential gaps in the scope and the utility of vulnerability theory regarding its application to asylum seeking children. This section explores these tensions in the intersecting fields of inquiry which

underpin this thesis before turning in more detail to how the thesis argument contributes to resolving these tensions.

1.4.1 Scholarship regarding the human rights of asylum seeking children

International human rights law scholars have written extensively on the human rights of migrants[63] and child refugees,[64] and on international and regional protection frameworks for child migrants.[65] Human rights scholars have also examined the human rights implications of specific legal challenges faced by child and adolescent unaccompanied asylum seekers, such as age assessment procedures,[66] family reunification and participation in decision-making,[67] and what constitutes best practice in the management of children seeking asylum.[68] Australian legal scholars Mary Crock and Jane McAdam have produced significant scholarship about refugees and irregular migration in Australia.[69] However, holistic analysis of the ways in which State human rights obligations correlate with the sites of vulnerability of unaccompanied child asylum seekers remains under-theorised.

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[63] Vincent Chetail, 'The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights' (2013) 28(1) *Georgetown Immigration Law Journal* 225.

[64] Lawrence, Jeanette et al, 'The Rights of Refugee Children and the UN Convention on the Rights of the Child' 2019 8(3) *Laws* 20.

[65] For example, see Mary Crock and Lenni Benson (eds), *Protecting Migrant Children: In Search of Best Practice* (Edward Elgar Publishing, 2018).

[66] For example, see Mary Anne Kenny and Maryanne Loughry, ''These don't look like children to me': age assessment of unaccompanied and separated children' in Mary Crock and Lenni Benson (eds), *Protecting Migrant Children: In Search of Best Practice* (Edward Elgar Publishing, 2018).

[67] Jacqueline Bhabha and Nadine Finch, *Seeking Asylum Alone* (Harvard University Press, 2006). The lack of focus on guardianship may be attributed to the fact that guardianship necessarily entails the consideration of the content and limits of parental and state responsibility for children's upbringing and this is necessarily more contentious than, for example a child's right to family reunification. Similarly, in the succession of NGO, NHRI and UN reports regarding Australia's treatment of child asylum seekers, guardianship is scarcely ever mentioned.

[68] Mary Crock, Kate Bones, Daniel Ghezelbash, Jemma Hollonds and Mary Anne Kenny, *Children and Young People in Asylum and Refugee Processes: Towards best practice in the management of children seeking asylum* (Federation Press, 2020).

[69] Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers Future Seekers II: Refugees and Irregular Migration in Australia* (Federation Press, 2006); Jane McAdam and Fiona Chong, *Refugees: Why Seeking Asylum Is Legal and Australia's Policies Are Not* (UNSW Press, 2014); Jane McAdam, 'Leading on Protection' in Bob Douglas and Jo Wodak (eds), *Refugees and Asylum Seekers: Finding a Better Way: Essays by Notable Australians* (Australia 21, 2013) 11-14

1.4.2 Australian scholarship about the impact of Australian migration and guardianship law and policy on unaccompanied children

Australia's migration policies have a lengthy and controversial history comprehensively canvassed in the literature.[70] In 2004 Julie Taylor first traced the evolution of the *IGOC Act* and identified its shortcomings, notably the conflict inherent in the unaccompanied children needing advice in applying for a visa while their legal guardian was the Minister.[71] Crock has also produced targeted scholarship about the operation and impact of Australian migration law and policy on unaccompanied children between 2005 and 2011,[72] and in conjunction with other academics, notably Laurie Berg in 2011.[73] Crock and Mary-Anne Kenny have also thoroughly examined legislative changes and case law about the guardianship of unaccompanied children in 2012 [74] . In 2013, Maria O'Sullivan and Mark Evenhuis separately argued the imperative for legislative reforms because the existing legislation could not guarantee children's best interests[75] and children's protection needs could not be met in accordance with Australia's human rights–based legal requirements.[76]

This existing scholarship has primarily framed the discussion around the failure of existing legal mechanisms to realise the best interests of these children, principally because of the conflict of interest inherent in the Minister being their legal guardian. Limited historical,[77]

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[70] Mary Crock and Ben Saul, *Future Seekers: Refugees and the Law in Australia* (The Federation Press, 2002); Don McMaster *Asylum Seekers: Australia's Response to Refugees* (Melbourne University Press, 2001); David Marr and Marian Wilkinson, *Dark Victory: The Military Campaign to Re-elect the Prime Minister* (Allen & Unwin, 2003).

[71] See Julie Taylor, 'Guardianship of Child Asylum-Seekers' (2006) 34(1) *Federal Law Review* 185.

[72] Mary Crock, 'Lonely Refuge: Judicial Responses to Separated Children Seeking Refugee Protection in Australia' (2005) 22(2) *Law in Context* 120; Mary Crock, *Seeking Asylum Alone, Australia: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* (Themis Press, 2006); Mary Crock, 'Of Relative Rights and Putative Children: Rethinking the Critical Framework for the Protection of Refugee Children and Youth' (2013) 20 *Australian International Law Journal* 33.

[73] Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press, 2011).

[74] Mary Crock and Mary Anne Kenny, 'Rethinking the Guardianship of Refugee Children after the Malaysian Solution' (2012) 34(3) *Sydney Law Review* 437.

[75] Maria O'Sullivan, 'The "Best Interests" of Asylum-Seeker Children: Who's Guarding the Guardian?' (2013) 38(4) *Alternative Law Journal* 224.

[76] Mark Evenhuis, 'Child-Proofing Asylum: Separated Children and Refugee Decision Making in Australia' (2013) 25(3) *International Journal of Refugee Law* 535.

[77] Jordana Silverstein, 'I Am Responsible: Histories of the Intersection of the Guardianship of Unaccompanied Child Refugees and the Australian Border' (2016) 22(2) *Cultural Studies Review,* 65. Silverstein examines the construction of children, families and the role of the Minister in child refugee policies by analysing the evolution of the *IGOC Act*. She argues that it functions as a form

medical and psychological,[78] and social work scholarship also illuminates the evolution of the relevant legislation and the medical, psychological and socio-economic impact of Australian law and policy on unaccompanied child asylum seekers.[79] However, existing scholarship has not analysed and addressed the evidence of Australia's treatment of unaccompanied asylum seeking children scattered through multiple reports and inquires capturing the lived experiences of asylum seekers as a result of the 2012-2014 changes to law and policy.[80] With the exception of the Australian Churches Refugee Taskforce that identified six key issues with Australia's provision of guardianship of asylum seeking children in 2012-2013,[81] limited research has specifically focused on unaccompanied child asylum seekers in this period. Nor has any existing scholarship comprehensively analysed the evidence of Australian law, policy and practice and their impact on these children diffused across the following material: Department

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of bio-politics that has produced a set of historically specific interdependent relationships for child refugees that have enabled successive governments to subordinate concerns for the "best interests of the child" to border-policing concerns.

[78] Key studies have examined the medical and psychological impact of existing Australian law and policy on child asylum seekers, including Unaccompanied Child Asylum Seekers. See Karen Zwi and Sarah Mares, 'Stories from Unaccompanied Children in Immigration Detention: A Composite Account' (2015) 51(7) *Journal of Paediatrics and Child Health* 659; Louise Newman and Zachary Steel, 'The Child Asylum Seeker: Psychological and Developmental Impact of Immigration Detention' (2008) 17 *Child and Adolescent Psychiatric Clinics of North America* 665; Mary Crock and Jacqueline Bhabha, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the US* (Themis Press, 2007); Ignacio Correa-Velez, Sandra M Gifford and Sara J Bice, 'Australian Health Policy on Access to Medical Care for Refugees and Asylum Seekers' (2005) 2 *Australia and New Zealand Health Policy* 23.

[79] Pockets of social work research have shed light on the suitability of guardianship mechanisms, care arrangements and income support mechanism in both policy and legislative provisions for unaccompanied refugee minors. See, for example, Diane Zulfacar's analysis, in the context of refugee minors rather than unaccompanied child asylum seekers, provides useful insight into the limitations of the *IGOC Act* caused by its genesis to deal with British child evacuees, not refugees or unaccompanied child asylum seekers: Diane Zulfacar, *Surviving Without Parents: Indo-Chinese Refugee Minors in NSW* (Government Printing Office, 1984).

[80] See the UNHCR, *Mission to the Republic of Nauru* (n 60); UNHCR, *Monitoring visit to the Republic of Nauru* (n 60); Australian Human Rights Commission, *The Forgotten Children* (n 60); Philip Moss, *Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru Final report* (Department of Immigration and Border Protection, 2015); Senate Legal and Constitutional Affairs Committee *Conditions and Treatment of Asylum Seekers and Refugees at the Regional Processing Centres in the Republic of Nauru and Papua New Guinea* (2016); Amnesty International, *Nauru Offshore Processing Facility Review 2012* (Amnesty, 2012); Amnesty International, *Island of Despair: Australia's "Processing" of Refugees on Nauru*, (Amnesty 2016).

[81] The Australian Churches Refugee Taskforce was an initiative of the National Council of Churches in Australia. The Taskforce published a discussion paper in 2012 and a report in 2013. See Jennifer Basham, *Protecting the Lonely Children* (Australian Churches Refugee Taskforce, 2012). The ACRT also circulated a discussion paper, *All the Lonely Children: Questions for the Incoming Government Regarding Guardianship of Unaccompanied Minors* to all Members and Senators of the Federal Parliament of Australia in October 2013.

("the Department") Procedure Manuals,[82] Annual Reports and audits,[83] the AHRC 2014 National Inquiry into Children in Immigration Detention, (*Forgotten Children*)[84] and a Community Detention evaluation conducted in 2013.[85] Lastly, no reports to date have focused exclusively on unaccompanied children on Nauru, as distinct from adult or child asylum seekers generally. Instead, that evidence detailing the experiences of these children is dispersed across the following material: UNHCR Monitoring Reports of Nauru;[86] the *Forgotten Children* Inquiry; the 2014 Moss Inquiry;[87] the 2015 Senate Select Committee Inquiry on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru (*Taking Responsibility* Inquiry);[88] the subsequent Senate Legal and Constitutional

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[82] See Department of Immigration and Border Protection, *Status Resolution Support Services Policy Advice Manual* and *SRSS Operational Procedures Manual* <https://www.border.gov.au/AccessandAccountability/Documents/20161006_FA160700108_documents_released.pdf.>

[83] Department of Immigration and Border Protection, *Annual Report 2014-2015* (Commonwealth Government, 2015) and Department of Immigration and Border Protection *Annual Report 2015-2016* (Commonwealth Government, 2016).

[84] Australian Human Rights Commission, *The Forgotten Children* (n 60). On 3 February 2014, the President of the AHRC launched an inquiry into children in enclosed immigration Detention. The inquiry received 239 submissions, conducted five public hearings and 13 visits to 11 immigration detention centres, and conducted interviews with 1,233 current and former detainees. Its report, *The Forgotten Children,* was provided to the government in November 2014, and tabled in the Senate on 11 February 2015.

[85] Ilan Katz, Geraldine Doney and Effie Mitchell, *Evaluation of the expansion of the CD program: Final Report SPRC 12/13 to the Department of Immigration and Citizenship* (DIAC, 2013). This is the only publicly available evaluation of the Community Detention program during the period of the 2012-2014 legislative amendments.

[86] UNHCR, *Mission to the Republic of Nauru* (n 60); UNHCR, *Monitoring visit to the Republic of Nauru* (n 60).

[87] Philip Moss, *Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru*, Final report, (Department of Immigration and Border Protection, 2015) ('the Moss Review'). The Moss Review was announced by the then Minister for Immigration on 3 October 2014 to identify and report on claims of sexual and other physical assault of asylum seekers; and conduct and behaviour of staff members employed by contracted service providers between July 2013 and October 2014. The report was provided to the Department of Immigration and Border Protection on 9 February 2015, and a redacted version of the report was published on the department's website on 20 March 2015.

[88] On 26 March 2015 the Senate established the Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru to inquire into the responsibilities of the Commonwealth government in connection with the management and operation of the Nauru RPC. The Inquiry received 101 submissions, held public hearings in Canberra on 19 May, 9 June, 20 July and 20 August 2015 and tabled its final report on 31 August 2015: *Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru* (2015) ('*Taking Responsibility*').

Affairs Committee Inquiry;[89] and reports by advocacy groups[90] and individuals regarding children in detention.[91] Extracting and examining the evidence regarding unaccompanied child asylum seekers from these reports brings to light critical evidence about the impact and effect of Australian policy on those children in this period.

1.4.3 Competing constructions of the conception of childhood in childhood studies scholarship

Alongside these more technical studies of the legal treatment of child asylum seekers, childhood studies scholarship has argued for differing constructions of "childhood" focusing alternatively on the salience of the "being" or "becoming" child.[92] As discussed in detail in Chapter 2, merging childhood studies and human rights scholarship have articulated the significance of construing childhood holistically as simultaneously "being/becoming".[93] This scholarship has significantly advanced understandings of the vulnerabilities and needs of children but falls short of articulating what this means for a State's human rights obligations. Michael Freeman, a human rights scholar, began the case for an holistic understanding of children in human rights law in 2010, arguing that "[i]t is important to recognise that children

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[89] Senate Legal and Constitutional Affairs Committee, *Conditions and Treatment of Asylum Seekers and Refugees at the Regional Processing Centres in the Republic of Nauru and Papua New Guinea*, Interim report (2016).

[90] Amnesty International, *Nauru Offshore Processing Facility Review 2012* (Amnesty, 2012); Amnesty International, *Island of Despair: Australia's "Processing" of Refugees on Nauru*, (Amnesty, 2016) <https://www.amnesty.org/en/latest/news/2016/08/australia-abuse-neglect-of-refugees-on-nauru/>; Human Rights Watch and Amnesty International, *Australia: Appalling Abuse, Neglect of Refugees on Nauru* (Human Rights Watch and Amnesty, 2016).

[91] See for example, Keith Hamburger, AM, *Nauru Review 2013: Executive Report of the Review into the 19 July 2013 Incident at the Nauru Regional Processing Centre* (Knowledge Consulting, 8 November 2014); Wendy Bacon, Pamela Curr, Carmen Lawrence, Julie Macken and Claire O'Connor, *Protection denied, Abuse Condoned: Women on Nauru at Risk*, Australian Women in Support of Women on Nauru (Australia, June 2016) <https://www.asrc.org.au/2016/07/22/protection-denied-abuse-condoned-women-on-nauru-at-risk-report/>. Lastly, see Paul Farrell, Nick Evershed and Helen Davidson, 'The Nauru Files: Cache of 2,000 Leaked Reports Reveal Scale of Abuse of Children in Offshore Detention', *The Guardian (Australia)*, (online edition), 10 August 2016.

[92] See, for example, Emile Durkheim, 'Childhood' in William Stuart Frederick Pickering (ed), *Durkheim: Essays on morals and education* (Routledge, 1979) 150 and Allison James, Chris Jenks and Alan Prout, *Theorizing Childhood* (Teachers College Press, 1998) 124-145, 130.

[93] Nick Lee, *Childhood And Society* (Open University Press, 2001); Nicola Ansel, *Children, Youth, And Development* (Routledge, 2005; Emma Uprichard, '"Children As Being And Becomings": Children, Childhood And Temporality' (2008) 22 *Children & Society* 306; Ancus Gheaus 'Unfinished Adults And Defective Children: On The Nature And Value Of Childhood' (2015) 9(1) *Journal Of Ethics & Social Philosophy* 21.

are more than pre-adult becomings."[94] Nevertheless, the holistic comprehension of childhood and children in rights scholarship generally still remains very under-developed and particularly so where an unaccompanied asylum seeking child is concerned.[95] This thesis embeds the being/becoming child in the analysis in Chapter 3 of State's human rights obligations to unaccompanied child asylum seekers.

1.4.4 Debates about State responsibility and the significance of borders

A further body of scholarship considers the extent to which a State's moral obligations to people end at its borders. This scholarship is of particular relevance to this thesis, in that it debates the appropriate limits of and justification for State responsibility for non-citizens in the context of transnational migration,[96] the limits of a State's ethical and moral obligations to its citizens[97] and the prospects and limits of refugee responsibility sharing.[98] Seyla Benhabib has

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[94] Michael Freeman (ed), *Children's Rights: Progress and Perspectives* (Martinus Nijhoff, 2011) 13-15.

[95] An exception is Noam Peleg's scholarship that has examined how an incomplete conception of childhood leads to a skewed understanding of the child's right to development. See Noam Peleg, 'What Do We Mean When We Speak About Children's Right to Development?' in Farhad Malekiam and Kerstin Nordlof (eds), *The Sovereignty of Children in Law* (Cambridge Scholarly Publishing, 2012) 134-156. Peleg argues the case for a right to development and rejects the "human becomings" idea, which interprets the child's right to development as a means to an end (merely a right to ensure that the child "survive" the time of childhood and becomes an adult). His hybrid conception of childhood is the foundation of his holistic theory of the child's right to development which respects the child's wishes for what she is now and for what she can be, but also includes what she would like to be in the future.

Recently Jeanette Lawrence et al, 'The Rights of Refugee Children and the UN Convention on the Rights of the Child' 2019 8(3) *Laws* 20 acknowledge the significance of the inextricable intertwining of the child's present being and lifetime becoming to understanding how past events of trauma are reiterated in children's present happenings: at 22-23.

[96] See, for example, David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity Press, 1995); Andrew Linklater, 'Cosmopolitan Citizenship' (1998) 2(1) *Citizenship Studies* 23; Thomas Pogge, 'Cosmopolitanism and Sovereignty' (1992) 103(1) *Ethics* 48; Nira Yuval-Davis, 'The "Multi-Layered Citizen": Citizenship in the Age of "Glocalization"' (1999) 1(1) *International Feminist Journal of Politics* 119, 122; Joseph Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 *Review of Politics* 251; Rainer Bauböck, *Transnational Citizenship: Membership Rights in International Migration* (Edward Elgar, 1994); Linda Bosniak, 'Citizenship Denationalized' (2000) 7 *Indiana Journal of Global Legal Studies* 447.

[97] See, for example, David Miller, 'The Ethical Significance of Nationality' (1988) 98 *Ethics* 647; Mark Gibney, 'Introduction' in Mark Gibney (ed), *Open Borders? Closed Societies? The Ethical and Political Issues* (Greenwood Press, 1988) xiii-iv; Kwame Anthony Appiah, 'Cosmopolitan Patriots' in Martha C Nussbaum and Joshua Cohen (eds), *For Love of Country?* (Beacon Press, 1996) 21, 28; Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace, 1951).

[98] Michelle Foster, 'The Implications of the Failed Malaysian Solution: The Australian High Court and Refugee Responsibility Sharing at International Law' (2012) 13 *Melbourne Journal of International Law* 395.

best captured the central challenge generated by this distinction between citizen and non-citizen by identifying: the "constitutive dilemma at the heart of liberal democracies: between sovereign self-determination claims on the one hand and adherence to universal human rights principle on the other".[99]

Scholarship responding to this dilemma is deeply divided. Some scholars argue for the primacy of sovereignty as a foundational organising principle in the contemporary world,[100] with citizenship an essential precondition for enforceable rights.[101] Alternatively, at the most inclusive end of responses, Linda Bosniak argues for "ethical territoriality" where States bear responsibility for all geographically present non-citizens, regardless of their immigration status or the duration of stay.[102] There is literature that argues that asylum seekers are a special exception to the primacy of State sovereignty.[103] However, there is no literature which argues, as this thesis does, that States bear responsibility for unaccompanied child asylum seekers as a "special case" on account of their unique vulnerability and that this provides a further legitimate limit on States' sovereign right to protect their borders.

1.4.5 The scope and utility of vulnerability theory

Beyond these concerns about migration and borders, significant scholarly research on ethics, law and human rights has canvassed the specific vulnerability of certain populations and groups and the adequacy of legal responses. Vulnerability theory, as articulated by Martha Fineman in 2008, is a distinct theory that identifies both the universality of vulnerability as an inevitable and enduring aspect of the human condition and the significance of the role of the State in responding to and alleviating vulnerability or, conversely, in compounding it.[104]

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[99] See Seyla Benhabib, *The Rights of Others: Aliens Residents and Citizens* (Cambridge University Press, 2004) 4.

[100] Kim Rubenstein, *Australian Citizenship Law in Context* (Lawbook Co, 2002) 230.

[101] Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press, 2012).

[102] Linda Bosniak, 'Being Here: Ethical Territoriality and the Rights of Immigrants' (2007) 8(2) *Theoretical Inquiries in Law* 389.

[103] Joseph Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 *Review of Politics* 251; Joseph Carens, 'The Case for Amnesty: Time Erodes the State's Right to Deport' (2009) 34(4) *Boston Review* 7.

[104] Martha Alberston Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1 ('Anchoring Equality') 9; Martha Alberston Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251 ('The Responsive State').

There are early signs that scholarship is beginning to attend to the application of vulnerability theory in practice.[105] However, in the context of legal studies, vulnerability theory has been criticised for a lack of analytical force when applied to legal analysis. Certainly, there is theoretical work to be done to sharpen vulnerability theory as a tool for legal analysis in concrete settings.[106] In particular, there is a problematic lack of distinction in the scholarship between discussions explicitly applying vulnerability theory and those discussing the law's treatment of vulnerable populations.[107] This distinction is instrumental and the perception that vulnerability theory is capacious or ill-adapted for law reform agendas may stem from a failure to make it explicit.[108] This perception may also be due to the fact that taxonomies of vulnerability (that distinguish between inherent and situational vulnerabilities, for example) that have been utilised in the social sciences remain under-theorised in law.[109]

Lastly, in the context of applying vulnerability theory to asylum seeking children, there is a further substantial theoretical gap. Fineman and subsequent vulnerability scholars have largely restricted the scope of States' obligations because of vulnerability to a State's own citizens. Thus, vulnerability theory's focus on the relationship between people's inherent

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[105] See for example, Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016); Beverley Clough, 'Disability and Vulnerability: Challenging the Capacity/Incapacity Binary' (2017) 16 *Social Policy and Society* 469; Terry Carney, 'Vulnerability: False Hope for Vulnerable Social Security Clients?' (2018) 41(3) *University of New South Wales Law Journal* 783; Laurie Berg, *Migrant Rights at Work: Law's Precariousness at the Intersection of Immigration and Labour* (Routledge, 2016); Mikaela Heikkilä, Hisayo Katsui and Maija Mustaniemi-Laakso, 'Disability and vulnerability: a human rights reading of the responsive state' (2020) 24(8) *The International Journal of Human Rights* 1180 https://doi.org/10.1080/13642987.2020.1715948.

[106] Terry Carney, in particular, has argued that "vulnerability theory remains too capacious and ill-defined to provide more than false hope in substantive reform of social security law": Terry Carney (n 105) 786.

[107] To illustrate, in a Special Issue on vulnerability of the (2018) 41(3) *University of New South Wales Law Journal* Jonathan Herring acknowledged that the articles primarily focused on practical issues around vulnerability: Jonathan Herring 'Foreword' (2018) 41(3) *University of New South Wales Law Journal* 624. I would argue by so doing he highlighted the crucial distinction between legal analysis of vulnerable populations and targeted applications of vulnerability theory such as Terry Carney's article (ibid) which analyses the application of vulnerability literature to the use of substituted decision-making in social security law.

[108] In this thesis I address this distinction in practice by distinguishing between the vulnerability of unaccompanied child asylum seekers in the ordinary sense in the discussion in Chapters 2 and 3 and the application of vulnerability theory in Chapters 4-7.

[109] Catriona Mackenzie, Wendy Rogers and Susan Dodds, 'Introduction: What is Vulnerability and Why Does it Matter for Moral Theory?' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford Publishing, 2014).

shared vulnerability and social and State responsibility[110] makes it a promising but yet underutilised frame to analyse the adequacy of State responses to this cohort of children.

Human rights law, Australian legal scholarship, citizenship and transnational migration studies, childhood studies and vulnerability studies each respond to facets of the predicament of how Australia ought to respond better to the vulnerabilities of unaccompanied asylum seeking children. None on their own answer the questions posed in Section 1.1. To answer these questions, this thesis looks to the points of intersection between these areas of scholarship.

1.5 The argument

In Australia, unaccompanied child asylum seekers have overlapping vulnerabilities: as children, as humans who are seeking protection from fear of persecution or serious harm in their State of nationality in a receiving State where their entry is unauthorised, and due to their separation from their parents or guardians. Their needs and vulnerabilities arising from this triple burden of vulnerability are overshadowed by global rhetoric of border securitisation that has increasingly become the norm in domestic public and political discourse in this country. They are exacerbated by laws and policies that prioritise border securitisation over human rights obligations.

Human rights law, in theory, provides an effective counterbalance to securitisation rhetoric and punitive laws and policies because States have extensive human rights obligations to unaccompanied child asylum seekers that are located across multiple treaties. Correlating these obligations with the three sites of vulnerability of these children (which I do in Chapter 3) makes it apparent that if States' human rights obligations were realised in State law and policy they would amply ameliorate these children's vulnerability.

However, States routinely fall far short of human rights legal standards in practice, particularly in dualist legal systems such as Australia where treaty ratification does not create domestic legal obligations unless the provisions are incorporated into domestic law. The unfulfilled potential of human rights law is vividly manifest in the egregious harms caused by the Australian government's progressively degrading treatment of unaccompanied children seeking asylum by boat in the last two decades. Advocacy will, and should, continue

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[110] Martha Alberston Fineman, 'The Responsive State' (n 104) 267, 273.

urging legal and policy changes that balance border control priorities with human rights obligations. However, pressing interim changes to law and policy are required that respond to the obvious considerable and lasting harm that Australian laws and policies are causing to unaccompanied children on account of their specific vulnerability. These changes require a reconceptualization of:

- the way we comprehend these children and the impact of State practice on them
- the relationship between the State and the child seeking asylum, and
- States' accountability for the impacts of State practice on the child because of that special relationship.

I argue that vulnerability theory can be expanded to offer a new way of delineating the precise nature of the vulnerabilities of particular groups, the significance of the impact of State practice, the role of the State in ameliorating or exacerbating those vulnerabilities, and the changes required to laws and policies to redress vulnerability. Like human rights law, vulnerability theory, pioneered in law by Martha Fineman, is conceptually grounded in the universality of the *a priori* right of all people to care and protection. But, for vulnerability theory, the corollary of recognising the particular vulnerability of people is a response by the State that eliminates and does not create sites of vulnerability.

A human rights approach provides a universal, indivisible and aspirational *standard* for asylum seeker rights in all legal systems. But it has a central weakness depending on the nature of the relationship between different domestic legal systems and the international human rights system. The normative rationale and explicit standards of human right law can lack a compelling domestic accountability mechanism to ultimately "close the case" for specifically and acutely vulnerable groups to have these vulnerabilities addressed by the State, including where that relationship may be transitory. I argue that vulnerability theory provides a compelling argument to fill that gap. Further, human rights compliance takes time. Agreement is urgently needed about parameters for responding to unaccompanied child asylum seekers *in the meantime* that does not exacerbate their vulnerability.

I argue that an expanded version of vulnerability theory could complement and bolster human rights advocacy. This would justify and provide a supplementary framework for States' theoretically grounded moral obligation to not exacerbate their vulnerability, without displacing the broader framework of human rights in which this is embedded. Vulnerability theory has underutilised application to inform and reinvigorate advocacy for principled leadership. It may do so by broadening political debates about asylum seekers (from whether

governments are unelectable without policies that punish unauthorised boat arrivals and promise iron clad maritime borders) to foster greater recognition of Australia's responsibility for unaccompanied children as a "special case."

However, traditional conceptions of vulnerability theory are silent about including unaccompanied non-citizen children within their protective scope. As explored in more detail in Chapter 4, when pressed on whether State obligations to address vulnerability can be justly limited by the bonds of citizenship, Fineman reserves some acknowledgement of the difficulty of excluding citizens to a footnote. She briefly signals that non-citizens "should be afforded equality on the same terms as citizens if they are residents of the state or long term visitors or have *some other connection* that would make placing state responsibility for them and their situation appropriate" (emphasis added).[111] However, to date there has not been scholarship that has developed what constitutes a sufficient *other connection*.

As a result, unaccompanied child asylum seekers fall between the gaps of both human rights and vulnerability frameworks. The international human rights system recognises extensive State obligations owed to them *because they are non-citizen asylum seeking children* but it does not (in Australia) create domestic legal obligations. Vulnerability theory provides a normative framework for holding States to account for their role in ameliorating or exacerbating people's vulnerabilities but it appears to exclude these children *because they are non-citizen asylum seeking children*.

My thesis, therefore, argues for an extension of vulnerability theory to include analysis of States' obligations to non-citizen children who have entered the State without permission. This expansion of vulnerability theory acknowledges that unaccompanied child asylum seekers are present in the State without the legal protections possessed by even the most marginalised citizens *and* with complex dependencies on the State. They are children; they are without their parents; and they are seeking asylum in circumstances where their presence is unauthorised. The convergence of these acute dependencies generates the sufficient *other connection* that makes it appropriate to extend State responsibility for them by expanding the protective scope of Fineman's vulnerability theory to include these "proximate vulnerable children."

Thus situated, we must determine what is the State's required vulnerability informed response to these children? Is this *other connection* sufficient to generate obligations

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[111] Martha Alberston Fineman, 'The Responsive State' (n 104) 256.

identical to those that the State has to its citizens or are the obligations different? Unless they are granted residence as refugees their connection is temporary. As I argue more fully in Chapter 4, given the urgency and acuteness of their vulnerability at the point of arrival, and the temporal nature of their proximity to the State, the requisite response should prioritise not exacerbate existing vulnerabilities and avoid generating new vulnerabilities for the period that the child is physically or relationally proximate to the State.

Fineman's vulnerability theory also does not reach to the level of specificity required to distinguish between types of vulnerabilities in practice or to a method to determine what action is required of the responsive state in particular contexts. I argue that embedding a taxonomy that distinguishes between types of vulnerabilities (dispositional, occurrent, inherent, situational and pathogenic) is necessary for vulnerability theory to be utilised in practice in differing contexts. [112] This distinction facilitates characterisation of interactions between an individual or group and the relevant social, political and legal structures that ameliorate or worsen vulnerability, delineates sources of vulnerabilities, and can inform and prioritise law and policy reforms. This thesis argues that a three stage process can be utilised to determine the necessary State response to vulnerability. Stage one requires an examination of the legal and policy context defining the relationship between the responsive state and the subject(s) of the inquiry. Stage two examines the impact of those laws and policies by applying the embedded vulnerability taxonomy to distinguish between and characterise those impacts that have ameliorated vulnerabilities and decreased dependencies from those that have created or exacerbated harms. Stage three identifies priorities for reform based on a

[112] The vulnerability informed response that I propose embeds a vulnerability taxonomy developed in philosophy scholarship by Mackenzie, Rogers and Dodds to distinguish between vulnerabilities. See Catriona Mackenzie, Wendy Rogers and Susan Dodds, 'Introduction: What is Vulnerability and Why Does it Matter for Moral Theory?' in Catriona Mackenzie, Wendy Rogers, and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford Publishing, 2014) 32.

Mackenzie, Rogers and Dodds distinguish between two states of vulnerability: dispositional (individual attributes that render an individual at risk of sustaining a particular harm) and occurrent (circumstances in which individuals are acutely at risk of sustaining harm). They characterise sources of vulnerability as inherent, situational and pathogenic. Inherent vulnerability arises from "sources of vulnerability that are inherent to the human condition and that arise from our corporeality, our neediness, our dependence on others, and our affective and social natures." Situational vulnerability arises in a context and is "caused or exacerbated by the personal, social, political, economic or environmental situations of a person or social group". In contrast, pathogenic vulnerability is a state of being at risk of having situational or inherent vulnerabilities increased or created as a result of ongoing relationships or socio-political situations that have negative or harmful effects. See Catriona Mackenzie, Wendy Rogers and Susan Dodds, 'Why Bioethics Needs a Concept of Vulnerability' (2012) 5(2) *International Journal of Feminist Approaches to Bioethics* 11, 24-25.

gravity of consequences rationale.

The thesis then uses this vulnerability informed response frame to evaluate the impact of successive policies regulating the entry, treatment of and guardianship arrangements for unaccompanied asylum seeking children in Australia implemented by amendments to the *Migration Act* and the *IGOC Act* between 2012 and 2014. This analysis reveals that political and border securitisation imperatives have radically exacerbated and generated new vulnerabilities for these children regarding:

- their care, protection and development needs arising from their minority by subjecting them to physical and mental violence and foreseeable harm and neglect in the arrangements for their care;
- their legal precariousness and unauthorised presence by failing to ensure that they are not refouled or refused access to a Refugee Status Determination Procedure; and
- their separation from their parents by failing to appoint them with an independent guardian with the above two legislative and functional responsibilities.

I argue that this targeted focus on the impact of these laws and policies on these children through the application of vulnerability theory supplements traditional human rights analysis. It identifies the relationship between the egregiousness of harm caused by State laws and policies and the relative degree of vulnerability of these children in a way that human rights law does not. It also provides a method to identify and prioritise the specific law and policy sites requiring urgent responsive action. So doing, it provides an additional imperative for, and clarifies the components of, necessary adjustments to Australia's response to these children until it moves towards fuller human rights compliance.

1.6 The original contribution of this thesis

This research proposes feasible human rights compliant and vulnerability informed alternatives to current law and policy responses regulating unaccompanied child asylum seekers. In doing so, it makes three contributions to existing scholarship with both global and national significance.

In comprehending unaccompanied child asylum seekers as simultaneously being children and becoming adults, this thesis reconceptualises the human rights/ state sovereignty conflict from a child-centric perspective by placing the nature of the lived experience of these children, and their needs, at the heart. This is crucial to ensure that both their right to care and protection in the present and their right to develop towards adulthood with sufficient

capabilities and resilience are seen as equally important considerations within the context of discussions about the legitimacy and impact of State border security measures. The thesis contributes to existing scholarship by explicitly articulating the nature of their "triple burden"– the sites where their dependencies and State responsibility interact – their age, their legally unauthorised presence and their seeking asylum, and their presence without a parent or legal guardian to care for them, protect them or represent their interests. It also contributes by correlating States' existing human rights obligations with these three sites of vulnerability to facilitate focused analysis of the promise, and the actual delivery, of these obligations.

Next, it proposes the category of the "proximate vulnerable child" as justification for expanding the protective scope of Fineman's vulnerability theory beyond citizens to interrogate the relationship between unaccompanied children and the State. Although it is beyond the scope of this thesis to resolve the complex broader debate about the full scope of State obligations to non-citizens, in proposing a vulnerability informed response, the research proposes an urgent ethical justification for not enacting laws and policies that exacerbate the existing vulnerabilities of these children or generate new ones.

Lastly, this thesis proposes a vulnerability informed response with an embedded taxonomy to distinguish between sources and states of vulnerability that it then applies to the concrete context of changes to Australian law and policy regulating unaccompanied child asylum seekers between 2012 and 2014. The resulting analysis proposes a viable model for reform that is embedded in contemporary childhood and vulnerability scholarship, complements a human rights based approach and can provide a point of consensus for stakeholders contributing to future law reform advocacy. By doing so, it counters criticisms to date that vulnerability as a concept "is too capacious and vague to be useful".[113]

1.7 Methodology

My research approach in this thesis is interdisciplinary, informed by critical scholarship in children's rights and legal theory, and human rights. My research methodology employs both traditional "black letter" doctrinal analysis and documentary analysis. I employ traditional "black letter" doctrinal analysis of intersecting areas of Australian law: immigration law, refugee law, human rights law and child care and protection legal and policy frameworks to identify with precision the technical ambit of the scope and content of the relevant law. I use

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[113] Terry Carney (n 105) 783 and Jonathan Herring (n 107) 624.

"black letter" legal analysis to articulate the technical scope and content of State's human rights obligations to these children in Chapter 3 by close analysis of the relevant treaty provisions, General Comments,[114] State Reports to treaty monitoring committees,[115] the complaints jurisprudence of each applicable Treaty body, UNHCR, and OHCHR Guidelines, and academic scholarship. My analysis of the effect of the relevant legislative amendments in Chapters 5 to 7 enables critical evaluation of the technical effect of those amendments and the underlying regulatory system created by them.

I also use a documentary analysis methodology in Chapters 5, 6 and 7 to access data that details evidence of the specific treatment of unaccompanied child asylum seekers at the time the legislative amendments were introduced and to give voice to their experiences of the impact of the changes to Australian law and policy on them. I extracted this research data from existing documentary material available on the public record regarding asylum seekers generally, as noted in Section 1.4.2. This extracted evidence and analysis begins to fill the evidentiary lacuna that exists by the lack of studies, reports and evaluations on the care provided to unaccompanied child asylum seekers in Australia as a focal group.[116]

1.8 Structure

The thesis begins by introducing the conceptual vulnerability theory framework underpinning the argument, before turning to the deficiencies of the current human rights approach. Chapter 2 situates the acute precariousness of unaccompanied child asylum seekers globally in order to place these children at the heart of the problem that this thesis addresses. Here, I use the terms "precariousness" and "vulnerability" descriptively to establish the vulnerability of these children as a matter of fact. I argue that, to properly comprehend these children and the impact of State practice on them, we must interrogate their "triple burden" of vulnerability when they come into contact with the State generated by their minority, alienage (asylum seeking and unauthorised presence in the territory) and separation from their parents.

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[114] General Comments are authoritative explanations published by treaty bodies about how the provisions of the treaties overseen by that body are to be interpreted and applied in practice.

[115] For example, the Human Rights Committee, the Committee Against Torture, the Committee for the Rights of Persons with Disabilities, the Committee for the Elimination of Discrimination against Women, and the Committee on the Rights of the Child.

[116] The exception is Ilan Katz, Geraldine Doney and Effie Mitchell (n 85). Although they interviewed some unaccompanied child asylum seekers, their focus was on the implementation of community detention (satisfaction with decision making and communication processes and with support and service delivery) not on the suitability of existing guardianship arrangements for unaccompanied children.

Chapter 3 turns to a number of deficiencies in the international human rights framework. First, the dispersal of these obligations across the core international human rights legal instruments and the Refugee Convention obscures both the extensive nature and a holistic conception of the obligations. I address this weakness by correlating the extensive dispersed human rights obligations with each of the three sites of vulnerability identified in Chapter 2 (their minority, alienage and separation from their parents). Examination of the scope and content of these human rights obligations reveals that if they were firstly, so conceptualized, and secondly, fully realised, they ought to amply protect these children. However, secondly, I suggest that Australia's harsh, unempathetic and rejecting response to these children over successive changes in law and policy illustrates how human rights law has failed to provide the necessary check on securitisation policies to prevent real harms being perpetrated on them. This chapter concludes by arguing that while advocacy will, and should, continue, urging legal and policy changes that balance border control priorities with human rights obligations, an urgent interim change to the approach of law and policy is necessary to halt these grave breaches. Further, these changes require a reconceptualization of our understanding about the relationship between unaccompanied child asylum seekers and the State where they are seeking asylum and the obligations that arise because of that relationship.

Chapter 4 proposes a solution: that States continue to be pressed to move towards human rights compliance but, in the interim, that State attention be drawn to the fact they have a supplementary moral obligation to not exacerbate or generate new vulnerabilities for these children. It argues for an expanded and radical application of vulnerability theory outside the traditional context of nation State obligations to citizens. It contends that unaccompanied child asylum seekers as "proximate vulnerable children" have a sufficient "other connection" required by vulnerability theory to hold States to account for responses that exacerbate or generate new vulnerabilities in these children. It argues that so extended, vulnerability theory provides the necessary normative justification for a supplementary framework that grounds States' domestic obligation to respond to their vulnerability without displacing the broader framework of human rights. It contends that based on the criteria of context dependency and response prioritisation according to gravity of consequences a universal three stage process can be applied to determine the appropriate vulnerability informed response in particular contexts.[117]

[117] As set out in Section 1.5 above this process is firstly, examining the operation of laws and policies governing the relationship between the child and the State in a specified context and time period to

Chapters 5 to 7 then apply the vulnerability informed response to examine the effect and impact of the legislative changes to the *Migration Act* and the *IGOC Act* between 2012 and 2014 on the vulnerabilities of unaccompanied children generated respectively by their minority, alienage, and their separation from their parents. The analysis in these chapters demonstrates the utility of an expanded and modified vulnerability theory for comprehending the complex vulnerability of unaccompanied asylum seeking children, as a normative framework calling for action by demonstrating what is at stake when States fail to have regard to vulnerability and in clarifying the imperative for, and the components of, necessary response adjustments. Chapter 5 assesses the effect and impact of the legislative changes on the environments of care provided to children in the Legacy Caseload cohort, offshore transferees and children subject to boat turnbacks and Takeback .[118] It demonstrates how initial mandatory immigration detention of the first two cohorts generated new occurrent vulnerabilities that they would not be adequately cared for or protected whilst in detention, exacerbated existing trauma and generated new trauma that persisted post release. It contends that the vulnerabilities of the Legacy Caseload children released into Community Detention on the Australian mainland were largely not exacerbated by the care arrangements provided for them but that the manifestly inadequate environment of care for unaccompanied children transferred to Nauru generated new pathogenic vulnerabilities for this cohort. Chapter 6 assesses the effect and impact of the legislative changes on unaccompanied children's vulnerability arising from their alienage. It establishes how the progressive restriction of access to Refugee Status Determination on the mainland, the winding back of Australia's non–refoulement obligations, and ultimately the restriction of entry completely, generated increasingly serious occurrent and pathogenic vulnerabilities. Lastly, Chapter 7 assesses the effect and impact of the amendments to the *IGOC Act* on the vulnerabilities of unaccompanied children generated by their separation from their parents. It contends that these children were occurrently vulnerable to not having their best interests represented because of the pre-existing conflict of interest inherent in the Minister being both their sole legal statutory guardian and responsible for enforcing Australia's migration laws. It argues further, that the trajectory of legislative changes generated profound

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understand the legal context resulting from government choices about laws and policies in practice. Secondly, discerning the influence of those laws and policies on unaccompanied children's minority, alienage and separation from their parents to identify which changes have ameliorated, or generated occurrent or new pathogenic vulnerabilities. Thirdly, identifying the impacts that legislative and policy change can address and proposing the content of those changes and priorities for reform to first address impacts that create occurrent or new pathogenic vulnerabilities.

[118] Table 1 in Section 1.2 describes these cohorts.

occurrent and pathogenic vulnerabilities that unaccompanied children in the Offshore Processing and Boat Turnback and Takeback cohorts would not have their individual best interests considered or be provided with any of the core protections guardians are mandated to extend to their wards. Each of Chapters 5 to 7 conclude with recommendation for reform.

Chapter 8 concludes the thesis. It draws together the key findings and theoretical questions that guided and challenged this study and proposes a roadmap for urgent responsive action by the Australian government that at least prevents these children being subjected to further harm as a consequence of Australian law until such time as Australia fully realises the obligations it has voluntarily assumed at international law.

1.9 Limitations of the research

This research is focused on the obligations of the State in which asylum is being sought to proximate vulnerable children. However, I do not assert that *only* these children are so vulnerable to be able to establish a "sufficient connection" to invite a vulnerability informed response. Although it is beyond the scope of this current research, provided a sufficient connection can be established, the case for a vulnerability informed response ought to be able to be made out for different cohorts. For example, internally displaced refugee children in conflict corridors could require a different vulnerability informed response based on their specific vulnerabilities of minority, separation from their parents and susceptibility to imminent violence.

1.10 Conclusion

Although Australia currently turns back all unaccompanied child asylum seekers who seek Australia's protection by boat, it is vitally important to assess the adequacy of Australia's treatment of them measured against international human rights law standards. There is inherent value in evaluating the laws and policies as a matter of historical fact. However, history suggests that irregular refugee flows have always been and will continue to be a feature of the global and Australian landscape and it is a matter of time before Australia will be forced, once again, to deal with the desperation of people fleeing war and persecution by boat in our region. Given the fluctuations in Australian migration law and policy over time it is foreseeable that Australia will again have to deal with boat arrivals and thus be faced with the question of how to respond to unaccompanied children seeking asylum. An assessment now of the adequacy and impact of the legislative amendments between 2012 and 2014 allows an evaluation of

whether there is more appropriate way forward in Australian law and policy to deal with these future arrivals and for preparation of a new model if law reform is proposed.

2 COMPREHENDING THE SPECIFIC VULNERABILITY OF UNACCOMPANIED CHILD ASYLUM SEEKERS

I am a child and have not yet reached 17 years of age. I am living in Nauru for the last 2 months, and I was at Christmas Island for 8 months. You have not looked after those children who came from oppressing countries where there is no freedom, security and living. We have not seen from life except wars and killing. We fled the country seeking asylum and freedom but we did not find except harshness and bad treatment. I am alone here without my father, my mother, or my family. Where is the future? I have not found any future in Nauru.[1]

2.1 Introduction

Unaccompanied child asylum seekers experience layers of intersecting precariousness because of their minority, alienage and separation from their parents. The relevance of the intersectional layering of the vulnerabilities explored in this chapter is hinted at in the opening quote. The excerpt, from a letter written by a 16-year-old who had been detained on Nauru for 10 months pursuant to Australia's policy of mandatory offshore processing of all asylum seekers who arrive by boat, exposes glimpses of the complex vulnerability of unaccompanied asylum seeking children.[2] He is a child with a lived experience of war and death. He is experiencing both the trauma that led him to seek asylum and the trauma of the process of seeking asylum without parents. The conditions of his detention on Christmas Island and then Nauru have left him unable to imagine a future for himself.

This chapter situates the unaccompanied child asylum seeker at the centre point of the thesis' factual and conceptual landscape and examines the sites where their dependencies and State responsibility interact in order to lay the foundations for the argument in the chapters that follow. I use the term "vulnerability" in this chapter to describe unaccompanied child asylum seekers' susceptibility to harm as a matter of fact. I will draw on this analysis in Chapter 3 to

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[1] Anonymous Unaccompanied Child, Submission 146, Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (AHRC, 2014) 1 ('*The Forgotten Children*').

[2] Internationally these children are variously called; "Unauthorised Unaccompanied Minors", "Unaccompanied Minor Asylum Seekers" or "Unaccompanied Asylum Seeking Children". I prefer the term unaccompanied asylum seeking children because the use of the term "children" is, as I will argue, purposive.

assess the adequacy of States' existing human rights obligations to attend to unaccompanied child asylum seekers and to identify the protection gap between Australia's human rights obligations and its actual response. I also draw on this analysis in Chapter 4 to argue the imperative of utilising a modified version of vulnerability theory to respond to these children. I begin here by considering the global geo-political framework in which their vulnerability is produced.

2.2 The global context

Notwithstanding difficulties in accurately capturing comprehensive data about the number of unaccompanied and separated child migrants globally because their movements are mostly irregular and involve smuggling networks, the current worldwide displacement of children is the highest level ever recorded. In 2012, 50,000 unaccompanied and separated child migrants were in transit in 80 countries but by 2017, this had ballooned to an estimated 300,000 unaccompanied and separated child migrants in transit.[3] In this period, unaccompanied child asylum seekers, as a portion of this unaccompanied cohort has also grown significantly. In 2014, 34,300 unaccompanied children lodged asylum applications worldwide but, by 2017, 75,000 unaccompanied or separated children had lodged applications for asylum in 70 countries.[4] Although, as noted in Chapter 1, the recorded number of applications in 2018 was 27,600, the actual number is likely to be much higher because data recording is unreliable and incomplete. Further, annual figures obscure the accumulation of backlogged unprocessed claims.

The impact of the humanitarian crisis generated by this displacement is difficult to overstate. A substantial body of literature has documented the acute vulnerability of unaccompanied child asylum seekers as survivors, as well as the victims, of persecution and

[3] UNICEF *A Child is a Child: Protecting Children on the Move from Violence, Abuse and Exploitation* (Geneva, 2017).
Even when such data is collected, it is "rarely disaggregated by nationalities, risk category, gender or age". See UNHCR, UNICEF, IOM, *Refugee and Migrant Children in Europe: Overview of Trends* (UNHCR, 2017) 6.

[4] UNHCR, *Refugee Global Trends* (UNHCR, 2017) 3, 47 <http://www.unhcr.org/5943e8a34.pdf>. Moreover, the UNHCR states that this is likely to be an underestimate.

war, while their asylum claim is determined[5] and their heightened risk of mental health problems, both upon[6] and post their arrival at the borders of destination countries.[7]

In recognition of their specific and acute susceptibility to harm, most States provide for the appointment of a guardian for unaccompanied child asylum seekers presenting in their jurisdiction although state asylum processes vary widely.[8] Typically, State sponsored guardianship is afforded to these children.[9] Additionally, the acute impact of the separation of these children from their parents and the significance of the provision of effective guardianship is acknowledged in an extensive body of international soft law.[10] The UNHCR developed guidelines decades ago for the appointment of an independent guardian or adviser to promote decisions in the child's best interests.[11] European States, in particular, have developed clear

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[5] International Federation of Red Cross and Red Crescent Societies, *Alone and Unsafe: Children, migration and sexual and gender-based violence* (IFRC, 2018) reported that travelling without an accompanying adult renders unaccompanied minors vulnerable to being assaulted, sexually abused, raped, trafficked into sexual exploitation or forced into "survival sex", 12. See also Ilse Derluyn et al, 'Minors travelling alone: a risk group for human trafficking?' (2009) 48(4) *International Migration* 164; Jacqueline Bhabha et al, *Children on the move: An urgent human rights and child protection priority* (Harvard University, 2016); Tine Jensen et al, 'Stressful life experiences and mental health problems among unaccompanied asylum-seeking children' (2013) 20(1) *Clinical Child Psychology and Psychiatry* 106; Matthew Hodes et al, 'Risk and Resilience for Psychological Distress Amongst Unaccompanied Asylum Seeking Adolescents' (2008) 49(7) *Journal of Child Psychology and Psychiatry* 723.

[6] See Marianne Vervliet et al, 'The mental health of unaccompanied refugee minors on arrival in the host country' (2014) 55(1) *Scandinavian Journal of Psychology* 33.

[7] Tine Jensen et al, 'Long-term mental health in unaccompanied refugee minors: pre- and post-flight predictors' (2019) 28(12) *European Child & Adolescent Psychiatry* 1671. See also Tammy Bean et al, 'Comparing psychological distress, traumatic stress reactions and experiences of unaccompanied refugee minors with experiences of adolescents accompanied by parents' (2007) 195(4) *Journal of Nervous and Mental Disease* 288; Ilse Derluyn and Eric Broekaert, 'Different perspectives on emotional and behavioural problems in unaccompanied refugee children and adolescents' (2007) 12(2) *Ethnicity & Health* 141.

[8] European Union Agency for Fundamental Rights, *Separated, asylum-seeking children in European Union Member States: Comparative Report* (Austria, 2011) 49-53.

[9] The exception is the United States which has the largest number of unaccompanied child asylum seekers globally but does not appoint them a guardian. Instead, unaccompanied child asylum seekers who reach the United States who are not released quickly to relatives, without any formal legal process, remain in a pseudo guardianship relationship with the federal agency within Health and Human Services.

[10] Soft law refers to "normative provisions contained in non-binding texts": Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press, 2000) 292.

[11] UNHCR, *Refugee Children: Guidelines on Protection and Care* (United Nations, 1994), 101, 126 <http://www.unhcr.org/refworld/docid/3ae6b3470.html>; UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (United Nations, 1997) [5.7] <http://www.unhcr.org/3d4f91cf4.html>.

practice standards to address the vulnerabilities of these children generated by their separation from their parents.[12]

2.3 *Comprehending unaccompanied children's specific vulnerability*

2.3.1 Acknowledging resilience

As noted above, scholarship regarding unaccompanied children frequently emphasizes their vulnerability as the survivors as well as the victims of war and dislocation and highlights their acute vulnerability to abuse, refoulement and susceptibility to trafficking and sex and labour exploitation. Such research necessarily focuses on their vulnerability and victimhood more frequently than their independence and resilience. A focus of this thesis is the need for States to better comprehend and attend to these children. Underpinning this, I explicitly acknowledge the complex and nuanced relationship between the vulnerability and the agentic capacity of unaccompanied children. As noted in section 2.2 above, the literature clearly establishes that these children have experienced deep traumas that forced them to flee alone and that their journeys seeking asylum entail varying degrees of uncertainty, fear, abuse or deprivation. But the literature also establishes that they, like all children, possess resiliencies and a desire to be agentic.[13] We should therefore not assume that they lack the capacity, agency or desire to rebuild their lives and pursue their own choices in environments that are free from persecution and violence. It is in fact this deep and real tension between vulnerability and agency/resilience that necessitates both properly comprehending these children's complexity and defining the

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The UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (United Nations, 2011) also reiterated the requirement that a legal guardian be appointed to promote a decision that is in the best interests of an unaccompanied or separated child. The UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (United Nations, 2012) reaffirm the need for an independent and qualified guardian as well as a legal adviser to be appointed for unaccompanied or separated children.

[12] These include the *Inter-Agency Guiding Principles on Unaccompanied and Separated Children* (International Committee of the Red Cross, 2004); Separated Children in Europe Programme*, Statement of Good Practice* (SCEP, 4th ed, 2009) and Defence for Children International *Core Standards for guardians of separated children in Europe* (DFCI, 2014). States in the Asia Pacific region are lagging far behind our European counterparts in agreeing on and articulating similar regional State guidelines for acknowledging the vulnerabilities of children generated by their separation from their parents.

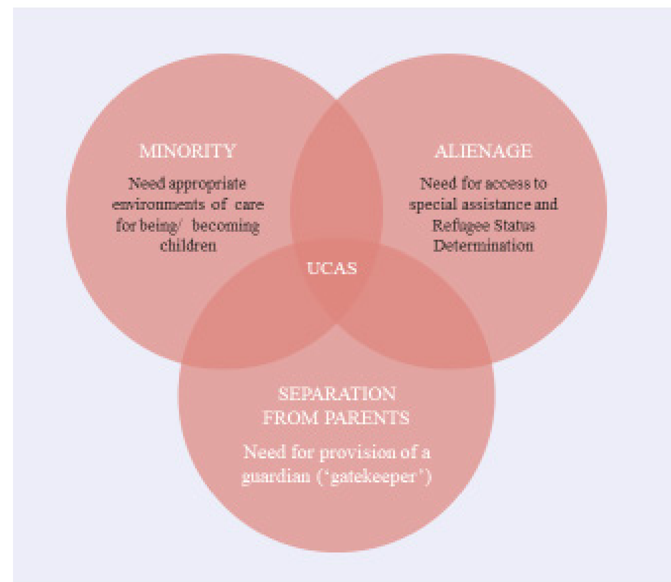
[13] See for example, Jonathan Herring, *Vulnerability, Childhood and the Law* (Springer, 2018) who resists the broad construction of children as a vulnerable group who are particularly susceptible to harm and unable to look after themselves. See also Serap Keles et al, 'Resilience and acculturation among unaccompanied refugee minors' 42(1) *International Journal of Behavioural Development* 52, and Brit Oppedal and Thormod Idsoe, 'The role of social support in the acculturation and mental health of unaccompanied minor asylum seekers' (2015) 56(2) *Scandinavian Journal of Psychology* 203.

role of the State in attending to it in a way that maintains or develops their resilience without exacerbating existing, or generating new, vulnerabilities.

2.3.2 The vulnerability of unaccompanied child asylum seekers: the triple burden

Regardless of their immigration and citizenship status, unaccompanied child asylum seekers are first and foremost children. Just as there is no single universal experience of childhood, there is no single universal experience of being an unaccompanied child asylum seeker. But notwithstanding variances in their age, cultural background, prior experiences of displacement, persecution or trauma, in their family circumstances, as well as differences in their personalities and cognitive abilities and life circumstances, these children all experience the simultaneous and intersecting "triple burden" of minority, alienage and family separation[14] as captured in Diagram 1 below.

Diagram 1: The triple vulnerability of unaccompanied child asylum seekers



[14] Jacqueline Bhabha, 'Independent Children, Inconsistent Adults: International Child Migration and the Legal Framework', *Innocenti Discussion Paper* (UNICEF Innocenti Research Centre, 2008). Bhabha references the "triple burden" as a statement of fact but she does not theorise its content.

It is their location at the junction of the universal vulnerability of all children and their specific vulnerabilities that makes unaccompanied child asylum seekers so profoundly dependent on the State where they seek asylum. To illustrate, recalling the extract that opens this chapter, the 16 year old was grappling with fleeing a country where he had experienced war and murder. He was alone without his parents and was being detained by the State where he sought asylum on a remote outpost island, away from any services available to children on the Australian mainland. Additionally, and without family support, he had to grapple with the fact that the State refused to process his claim and instead sent him to Nauru. A child is intellectually, psychologically, emotionally and physically distinct from an adult. Children's experience, understanding of, response to and recovery from war is different to that of adults. A child's fears and anxieties about being in immigration detention and about being transferred to a State other than the one in which they sought asylum will be different from an adult's. Thus, a child seeking asylum alone has distinct care and protection needs compared to adults or family groups seeking asylum. Each of these attributes do not exist in isolation, rather they intersect with and affect the weight and depth of the impact of the other attributes.

2.3.3 Minority

In this section I use "minority" in its legal sense as referring to children under 18 years of age but also to capture the complexities of childhood and being a child. Within the literature addressing the vulnerabilities of unaccompanied asylum seeking children generated by their minority, the extent to which the meaning and function of "childhood" itself generates vulnerability and ought to inform and impact on legal and policy responses to them has been neglected. Social constructions of childhood vary across time and contexts.[15] It follows that the childhoods of unaccompanied child asylum seekers are not homogenous, with multiple factors – including a child's gender, race, ethnicity, class, (dis)ability, and location – influencing every childhood. But still, the varying experiences of childhood do not preclude a common comprehension of the core objective realities of "childhood" and of being a "child". These notions have been extensively theorised, as have notions of "childhood" and "the child".

[15] A substantial body of literature has acknowledged the differences between childhood in the Global North and South. See, for example, Nicola Ansell, *Children, Youth, And Development* (Routledge, 2005) 8, 23-24.

Two different conceptions of childhood and the child, in particular, have been acknowledged and debated in scholarship about children.[16] The first conception is the *becoming child*. In this construct, childhood is understood as the specific period between birth and the attainment of adulthood in a particular culture.[17] The "child" is perceived as "a becoming, an incipient being, a person in the process of formation."[18] So construed, childhood is a time "in which the individual, in both the physical and moral sense, does not yet exist, the period in which he is made, developed and is formed."[19] In contrast, in the second conception, the *being child*, childhood is understood as significant for reasons beyond the way it prepares a child to function fully as an adult.[20] For these scholars, because all children experience, and

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[16] This led to the emergence of parallel discourses about children and childhood and the evolution of binary constructions of the child as either a being or a becoming person in developmental psychology, social anthropology and sociology. Developmental psychologists — devising theories and explanations for how children develop specific competencies — reinforced the construction of childhood as a period. Piaget's stages of childhood, in particular, set premises for children passing through defined cognitive and moral stages to develop into competent adults. See Jean Piaget, *The Childs Conception of the World* (Routledge, 1929). Piaget's work remained the key lens through which parents, teachers, social workers and health care professionals (particularly in the Global North) socially constructed childhood until the early twenty-first century. Although from the late 1970s Piaget's stages of development were critiqued for their emphasis on children's lack of skills, knowledge, and "faulty reasoning." See Martin Woodhead, Dorothy Faulkner and Karen Littleton (eds), *Cultural Worlds of Early Childhood* (Routledge, 1998). They were also critiqued for their questionable applicability across contexts and cultures. See Robert Serpell, 'How specific are perceptual skills? A cross-cultural study of pattern reproduction' (1979) 70(3) *British Journal of Psychology* 365 who argued that children's competencies and skills are heavily influenced by their daily experience in their particular contexts. In contrast, social anthropologists examining the experience of childhood across cultures had long recognised that childhood differs across time and place. Developments in social anthropology generated understandings of childhood that encompassed the inter-connections between childhood and adulthood in economic and social life. They also enabled analysis of how age, gender, class and race differentiate childhoods across different times and contexts and led to the inclusion of children's experiences in research and reports acknowledging the significance of children's voices. See, for example Margaret Mead and Martha Wolfenstein (eds), *Childhood in Contemporary Cultures* (University of Chicago Press, 1955); Enid Schildkrout, *People of The Zongo* (Cambridge University Press, 1978).

[17] Adulthood is marked by reaching the legal age of majority or satisfying cultural customary practices.

[18] Emile Durkheim, 'Childhood' in William Pickering (ed)*, Durkheim: Essays on morals and education*. (Routledge, 1979) 150.

[19] Ibid.

[20] Loren Lomasky, *Persons, Rights and the Moral Community* (Oxford University Press, 1987), 202: 'If one were one condemned … to remain a child throughout one's existence…it would be a personal misfortune of the utmost gravity.' See also Colin MacLeod, 'Primary goods, capabilities and children' in Ingris Robeyn and Harry Brighouse (eds), *Measuring Justice: Primary goods and capabilities* (Cambridge University Press, 2010); Ancus Gheaus, 'Unfinished Adults And Defective Children: On the Nature and Value of Childhood' (2015) 9(1) *Journal Of Ethics & Social Philosophy* 21.

have agency in, their lives in the "here and now" independently of the perspectives and concerns of adults,[21] the child is already:

> a person, a status, a course of action, a set of needs, rights or differences – in sum as a social actor… It does not have to be approached from an assumed shortfall of competence, reason or significance.[22]

Uprichard has neatly captured the problem generated by either binary construction:

> ..the notion of the being child in the world has been separated from that of the child becoming in the world to such an extent that each has generated its own childhood discourse…whilst the discourse of the 'being' child accentuates the present, and that of the 'becoming' child stresses the future, both the present and the future interact together in the course of everyday life.[23]

I agree with the increasing cohort of scholars who argue that adopting either binary gives rise to a construction of children and childhood which is incomplete on its own.[24] Rather, an holistic conception of childhood as a period of time in which all children are being children and becoming adults[25] is necessary to comprehend the complexity and actuality of children's lives.

This holistic conception has particular relevance to properly comprehending the vulnerability of *unaccompanied child asylum seekers* arising from their minority and has direct application to the consideration of the nature and impact of States' obligations to them. Specifically, I argue that comprehending the complexity and actuality of the co-existing binaries generates distinct but overlapping State care and protection and development

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[21] Allison James, Chris Jenks and Alan Prout, *Theorizing Childhood* (Teachers College Press, 1998) 8.

[22] Ibid 207.

[23] Emma Uprichard, 'Children As 'Being And Becomings': Children, Childhood And Temporality' (2008) 22 *Children & Society* 306, 308.

[24] There has been increasing recognition, since Nick Lee's seminal work on constructions of childhood in 2001, that both children and adults are alike in their ongoing experience of the dual processes of being and becoming; and, that adults and children, in relationship to each other, are more and less competent at certain things over the life course. See Nick Lee, *Childhood and Society* (Open University Press, 2001). Also the becoming conception of children, for example, has been criticised for comprehending children as inadequate, incomplete or incompetent by virtue of focusing on adult capabilities that the child has not yet acquired and not on what the child can do differently to, or sometimes better than, adults. See Gareth Matthews, 'Philosophy and developmental psychology: outgrowing the deficit conception of childhood' in Harvey Siegel (ed), *The Oxford Handbook of Philosophy of Education* (Oxford University Press, 2009).

[25] See Michael Freeman (ed), *Children's Rights: Progress and Perspectives* (Martinus Nijhoff, 2011), 13-15. Michael Freeman, a human rights scholar, began the case for the dissolution of the binary construction in human rights law in 2010:

> It is important to recognise that children are more than pre-adult becomings. But it is equally important to understand that appreciating that they are 'beings' does not preclude their also 'becomings'… The child is both a 'being' and a 'becoming'… the being child will become an adult.

See Michael Freeman 'The Human Rights of Children' (2010) 63 *Current Legal Problems* 1, 13.

obligations to these children. Where States ignore these obligations they impact on these children both in the present and, potentially, over their life course because given the degree of vulnerability and trauma, it is very likely to create abiding harm if not addressed and ameliorated.

These obligations to protect and care for unaccompanied children as minors necessarily serve a double purpose: children need protection to reach adulthood and to bring to fruition some of their childhood potential and also protect and fully realise their current selves as children.[26] The "child" is both current need and future potential simultaneously.[27] A State may be able to argue that it is adequately discharging its "here and now" obligations to the "being" child by providing minimal food and shelter and urgent medical care. However, it could not contend that it is meeting the needs of the "becoming" child if it provides no mechanism for that child to develop by not delivering, for example, adequate access to education or medical and psychological support to enable the child to recover from past trauma.

The "child" stands in front of an adult decision-maker or care-giver at their specific stage of development and as the embodiment of the potential for growth and development possessed by that young person. So understood, these children, like all children, need the constant provision of food, shelter and adequate healthcare and the provision of appropriate education, training and opportunities to foster their expanding abilities. They are also likely to have specific care and protection and development needs as unaccompanied children who have fled war or persecution without their parents. Whether or not these needs are adequately responded to, for example, through the provision of additional educational services to remediate disruptions to education or appropriate psychological care to enable recovery from past trauma, is crucially important. The response determines whether the child can achieve age appropriate developmental benchmarks compared to their peers, whether they can be psychologically well in the present as well as whether they are able to reach normal developmental and psychological maturity milestones in their futures. Thus, construing "childhood" as simultaneously a period and a state, and "the child" as simultaneously a becoming person and an extant being is essential to capture the complex actuality of children's

[26] Ancus Gheaus (n 20) 21.

[27] Michael Freeman (ed), *Children's Rights: Progress and Perspectives* (n 25) 15. Accepting that childhood is simultaneously a period and a state and that children are simultaneously beings and becomings necessarily alters our understanding of the role and realities of childhood, provides significant challenges to established paradigms and has significant implications for children's rights scholarship.

lives and to avoid responses to unaccompanied children that are unduly restricted by reference to only their care and protection vulnerabilities while neglecting their evolving capacities.[28]

Further, this holistic conception recognises the significance of the interacting biological, developmental and social processes that impact the life course of every human – there is no single biologically predetermined process of development for any child.[29] This is significant because State choices about the quality of care and protection and opportunities for development afforded to unaccompanied children who seek asylum from the State impact directly and inexorably on that child's present physical and mental well-being as well as their biological, social and developmental processes in the present and in their future trajectory. States choose whether to enhance or inhibit each asylum seeking child's development through the care, protection and development opportunities with which they provide them. In balancing competing public policy objectives, States thus choose whether or not to meet the immediate interests and needs of unaccompanied children and whether or not to ensure that their potential for growth as becoming children into mentally and physically healthy adults is not thwarted.

Moreover, how we construe "childhood" and "the child" has a direct and material impact on the nature and scope of State's obligations. The extent to which that child is also entitled to, for example, opportunities for play or freedom from adult responsibilities depends on whether the experience of childhood is seen as qualitatively different from that of adulthood and as a good in itself. Similarly, the extent to which the State comprehends the complexity of the lived experience of children impacts the responsiveness of policies to their particular vulnerabilities. For example, unaccompanied children assimilating into foreign cultures are negotiating deeply traumatic separations in their primary relationships as well as stark changes in cultural contexts, language, laws and social expectations at the same time that they are "adjusting to changes within themselves and their close relationships."[30]

Lastly, the holistic conception of childhood recognises that unaccompanied child asylum seekers anticipation of their futures contributes to forming their childhood and shaping

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[28] This addresses John Tobin's concern that the "characterisation of children as vulnerable carries the risk that they will be defined by their vulnerabilities. To address the unintended consequences of a vulnerability paradigm, there is a need to expand the conception of children in a way that recognises their evolving capacities and right to participation": see John Tobin, 'Understanding Children's Rights: A Vision beyond Vulnerability' (2015) 84 (2) *Nordic Journal of International Law* 155.

[29] Harriet Nielson, 'The Arrow of Time in the Space of the Present: Temporality as Methodological and Theoretical Dimension in Child Research' (2016) 30 *Children and Society* 1, 7.

[30] See Jeanette Lawrence et al, 'Understanding the Perspectives of Refugee Unaccompanied Minors Using a Computer-Assisted Interview' (2016) 17(2) *Forum: Qualitative Social Research* 1, 2.

their experiences in the present.[31] All children construct their own lives and their environment both in the present and with an eye to the future – their present choices are shaped by what they imagine their future possibilities are. As much as they are inexorably shaped by their traumatic circumstances, unaccompanied children are agents shaping their lives in response to their surroundings. Social scientists researching the perspectives of these children and young refugees have found that they "are active in forming perspectives about…what is expected of them and what they can expect for themselves".[32] For all adolescents, goals and aspirations give their life meaning and direction and "are endemic to feeling good about one's life in the present as well as in the future",[33] and future goals are particularly important for young people's well-being when they are living in challenging circumstances.[34] For unaccompanied child asylum seekers, in particular, having an orientation towards the future and a means of achieving future goals is particularly important to integrate their past experiences and to reduce the extent of their particular vulnerabilities brought about by experiences of past trauma.

Researchers working with asylum seeking and refugee children have established how "possibilities and hopes intertwine with other aspects of refugees' thoughts to help them 'make sense' of events".[35] This is particularly significant where punitive State laws and policies keep them in held-detention or a prolonged state of stasis or uncertainty regarding their application for asylum. The literature highlights the correlation between their feelings of hopelessness and mental health issues where their future goals are thwarted. For the being/becoming child the "limitations on future possibilities detract from the quality of life in the present".[36] The denial of their need for a future orientation to heal and to continue to develop transforms into a very

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[31] Jens Qvortrup et al (eds), *Childhood Matters: Social theory, practice and politics* (Ashgate, Farnham 1994) 125-134, 269.

[32] Jacqueline Goodnow, 'Refugees, asylum seekers, displaced persons: Children in precarious positions' in Gary Melton et al (eds), *The Sage Handbook of Child Research* (Sage, 2014) 339-360.

[33] Sarah Johnson, Robert Blum, Tina Cheng, 'Future orientation: A construct with implications for adolescent health and wellbeing' (2014) 26(4) *International Journal of Adolescent Medicine & Health* 459, 468.

[34] Rachel Seginer, *Future orientation: Developmental and ecological perspectives* (Springer, 2009). See also Thomas Weisner, 'Culture, context, and well-being' in Asher Ben-Arieh et al (eds), *Handbook of Child Well-being* (Springer, 2014) 87-103.

[35] See Mark Brough et al, 'Unpacking the micro-macro nexus: Narratives of suffering and hope among refugees from Burma recently settled in Australia' (2012) 26(2) *Journal of Refugee Studies* 207-225.

[36] Guy Coffey et al, 'The meaning and mental health consequences of long-term immigration detention for people seeking asylum' (2010) 70 *Social Science & Medicine* 2070-2079.

specific vulnerability.[37] Although the receiving State is not accountable for the impact on unaccompanied children of their lived experience in the State from which they fled, it is accountable for the present experiences of that child *and* the psychological, emotional, physical and educational impact that those experiences have on the child's development into the future.[38]

Although the receiving State is not accountable for the impact on unaccompanied children of their lived experience in the State from which they fled, it is accountable for the present experiences of that child *and* the psychological, emotional, physical and educational impact that those experiences have on the child's development into the future. This scrutiny of the complex actuality of unaccompanied child asylum seekers as simultaneously *becoming adults* and *child beings* not only illuminates why an holistic construction is instrumental in determining the proper scope of requisite State responses to them as children, it is also fundamental to comprehending the impact of State's hostile securitised responses to them on account of their alienage.

2.3.4 Alienage

Frequently, in migration literature, "alienage" refers to a person's legal status as non-citizen. However, when examining the precarious "alienage" of unaccompanied child asylum seekers in the analysis that follows, I use the term more expansively to encompass their particular condition of alienage: not only their non-citizenship but also their unauthorised presence and the fact that they are seeking asylum after fleeing persecution in their homeland.

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[37] See Elizabeth Grosz, *The Nick of Time: Politics, Evolution and the Untimely* (Duke University Press, 2004), 184 who argues that "the past is the condition of every future; however the future that emerges is only one of the possibilities that was given by the past."

[38] Related to children's own construction of their lives and their futures is the relationship between vulnerability and the agentic capacity of unaccompanied children as minors. This relationship is complex and nuanced. Much research about unaccompanied child asylum seekers emphasizes their vulnerability and passivity more frequently than their independence and resilience as the survivors, as well as the victims, of war and dislocation. However, acknowledging their vulnerability as minors, does not negate that they also, like all children, possess resiliencies and a desire to be agentic. While many unaccompanied asylum seekers have experienced deep traumas that forced them to flee alone, and their journeys seeking asylum entail varying degrees of uncertainty, fear and deprivation, this vulnerability coexists alongside capacity, agency or desire to rebuild their lives and pursue their own choices in an environment that is free from persecution and violence. See Muireann Ní Raghallaigh, 'The causes of mistrust amongst asylum seekers and refugees: Insights from research with unaccompanied asylum-seeking minors living in the Republic of Ireland' (2013) 27(1) *Journal of Refugee Studies* 82.

Unlike citizen children who are conventionally understood as members of a politically and legally defined community within territorial boundaries, unaccompanied non-citizen children are legally and politically "the other".[39] Within citizenship studies there is lively debate about the relevance and legitimacy of notions of citizenship that continue to presuppose the existence of a territorially bounded sovereign State that is impervious to transnational economic and communication exchanges and voluminous regular and irregular migration. This raises legitimate questions about States' moral right to accord differential work rights to citizens and non-citizens (many from poorer States).[40] The distinction between citizen and non-citizen is pressing for unaccompanied child asylum seekers too. They are dependent on the State for access to minimum education, health and social services. However, unlike citizen children, they may be ineligible to receive these basic services. Their precariousness is commonly compounded by their unfamiliarity with national culture, institutions or language in the country of asylum.

For unaccompanied children, the vulnerabilities generated by their unauthorised presence *and* their seeking asylum are particularly acute. Unlike unaccompanied refugee children whose claim has already been resolved, their dependence on the State to process their asylum claim and to not refoule them is absolute.[41] The heightened needs of unaccompanied child asylum seekers for special assistance in the determination of their refugee claims has been long acknowledged by international organisations with expertise in refuges and asylum seekers.[42] As far back as 1994 the United Nations High Commissioner for Refugees ('UNHCR') developed guidelines which contain safeguards for status determinations in respect

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[39] Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press, 2006) explores the exclusion of transnational migrants in liberal democratic societies, especially the United States, with a status short of full citizenship.

[40] See Rainer Bauböck, 'Stakeholder Citizenship: An Idea Whose Time Has Come?' in Bertelsmann Stiftung, European Policy Centre and Migration Policy Institute (eds), *Delivering Citizenship. The Transatlantic Council on Migration* (Gütersloh, 2008) 31.

[41] This is particularly so in States like Australia where unaccompanied children seeking asylum by boat are treated distinctly from unaccompanied refugee children whose claim has already been determined elsewhere and who are brought to Australia for settlement under its Unaccompanied Humanitarian Minor program.

[42] See for example, Conclusions on the International Protection of Refugees, adopted by the UNHCR Executive Committee, No 47 (XXXVIII), "Refugee Children", 1987; Council of the European Union, Resolution on "Unaccompanied Minors who are Nationals of Third Countries", Official Journal C 221, 19 July 1997, 23-27.

of unaccompanied child asylum seekers.[43] The circumstances leading unaccompanied children to seek asylum are likely similar to, or even identical to, those of unaccompanied refugee children who have been authorised to reside in a country. State border control policies that concentrate on the control and deterrence of unaccompanied child asylum seekers, and not their heightened vulnerability, compound the trauma they have already experienced in their country of origin and in the transit journey.[44] Yet, the practice of refugee regimes in the Global North are increasingly based on the principle of deterrence rather than human rights protection. Gammeltoft-Hansen and Tan's extensive analysis of the development of deterrence policies in the past 30 years concluded that "restrictive migration control policies are today the primary, some might say only, response of the developed world to rising numbers of asylum seekers and refugees."[45] State interventions have been increasingly justified by a political paradigm in which border control is "unquestionably related to (if not determinative of) the safety of the state."[46] The vulnerability that stems from unaccompanied children's unauthorised presence is therefore particularly dependent on the character of the State's political response to asylum seekers more generally.

In this context, space for the recognition of asylum seeker's common humanity and dignity, let alone recognition of children as "special cases", has virtually disappeared. Vulnerability theorists concede rightly that humans' instinctive response to vulnerability does not necessarily lead to acts of tolerance or generosity.[47] Instead, apprehensions of vulnerability in others can "motivate care, generosity, and retributive violence in equal measure".[48] And so,

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[43] UNHCR, *Refugee Children: Guidelines on Protection and Care* (United Nations, 1994) 101, 126; UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (United Nations, 1997) [5.7].

[44] As noted in Chapter 1, my thesis is focused on unaccompanied child asylum seekers because Australia's current Boat Turnback laws – by intercepting vessels and returning them to sea and potentially refouling unaccompanied children – exacerbate their vulnerability in breach of Australia's most basic international human rights obligation. However, I do not assert that *only* unaccompanied child asylum seekers are so vulnerable as to enliven the vulnerability informed response contended for in Chapter 4. Instead, provided the requisite "sufficient connection" can be established a vulnerability informed response ought to be able to be made out for different cohorts.

[45] Thomas Gammeltoft-Hansen and Nikolas Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) 5(1) *Journal on Migration and Human Security* 28, 28.

[46] Anthea Vogl, 'Seeking Asylum: Human Smuggling and Bureaucracy at the Border' (review) (2012) 27(1) *Canadian Journal of Law and Society* 159, 159.

[47] See Judith Butler for further discussion of the interrelationship between the relative security of some lives and the abuse of the precariousness of others' lives. Judith Butler, *Frames of War: When is life grievable?* (Verso, 2009) 2, 48.

[48] Ann V Murphy, 'Corporeal Vulnerability and the New Humanism' (2011) 26 (3) *Hypatia* 575, 583.

refugees and asylum seekers are susceptible to a wide spectrum of responses ranging from disavowal and violence to nurture and care.[49] In Australia, *refugee* children, whose presence in the State has been both authorised and invited, ordinarily receive a caring and nurturing response. They are constructed as "quintessential innocent civilians".[50] In contrast, unaccompanied children are most often exposed to violence and disavowal[51] because they are seen as legally and morally culpable for the "unauthorised" border crossing. Where domestic political and media disapprobation of asylum seekers is consistent and voluble, their arrival experience encompasses actual visceral experiences of exclusion as well as those that are imagined and feared.[52]

The vulnerability of these being/becoming children is further compounded and complicated by the fact that they must emotionally and logistically negotiate their legal precariousness as unauthorised asylum-seekers without the care, support or protection of a parent or guardian.

2.3.5 Family separation

Unaccompanied child asylum seekers share all the inherent vulnerabilities of any other child who lacks parental support. However unlike unaccompanied child refugees whose asylum claim has been determined, they also lack an adult carer to assist them and represent their interests in staking a claim for asylum or non-refoulement. Moreover, unlike children who undertake unauthorised inter-country travel with their families, unaccompanied children experience these traumas alone. This is particularly concerning for the being/becoming child because the traumatic experiences of young refugees are well outside the normal transitional experiences of childhood and adolescence and this puts "at risk their present and long-term wellbeing".[53] Further, these children commonly have enduring anxieties about the safety of the family they have left behind as well as the burden of expectation that they should be living a better life.[54] The ongoing impact of separation from their families who remain in dangerous

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[49] Ibid 578.

[50] Ibid.

[51] J. Marshall Beier (ed), *The Militarization of Childhood* (Palgrave Macmillan, 2011) 8-9.

[52] See Ċetta Mainwaring and Noelle Brigden, 'Beyond the Border: Clandestine Migration Journeys' (2016) 21(2) *Geopolitics* 243 who discuss the concept of the journey of clandestine migrations using a similar frame at 244.

[53] Elaine Chase, 'Security and subjective wellbeing: The experiences of unaccompanied young people seeking asylum in the UK' (2013) 35(6) *Sociology of Health & Illness* 858.

[54] Anonymous unaccompanied Child, Submission No 146 (n 1) 1.

environments and their sense of psychological isolation is succinctly captured in this quote from an unaccompanied child asylum seeker in Australia:

> We all spend time, a lot of time, thinking about our family – it's very important; that is part of our life… It comes automatically to our minds because our families are not safe. [Our] people are actually murdered in the shops, every second a bomb blasts and its continuous. We are continually abused, bombs blast in shopping centres, our family members are not safe.[55]
>
> I don't say anything about my rejection to my family because they already have lots of problems. If I say it to them, it will just increase their problems, their tension, so I don't say anything.[56]

It is usually a parent's role to care for and foster the development of their child. Where a child's parents die or are adjudged to be incapable of sufficient care and protection, States have long deployed the legal mechanism of guardianship. Guardianship provides for the appointment of an adult charged with protecting the child's interests and managing their property where their parents die[57] and for appointment of a statutory guardian as a measure of last resort where the State determines children to be in need of care and protection.[58] Contemporary common law recognises that guardianship encompasses the full range of rights and powers that could be exercised by an adult in respect of the welfare and upbringing of a child.[59] This includes the duty to protect the child from harm, to act for their benefit, to make decisions relating to the child's long-term welfare and to not profit from the relationship.[60] Guardians also owe a

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[55] Ilan Katz, Geraldine Doney and Effie Mitchell (2013) *Evaluation of the expansion of the community detention program: Final Report SPRC 12/13 to the Department of Immigration and Citizenship (DIAC)* 47.

[56] Ibid 48.

[57] Antonio Buti, 'The Early History of the Law of Guardianship of Children: From Rome to the Tenures Abolition Act 1660' (2003) 7(1) *University of Western Sydney Law Review* 92. The evolution of the law of guardianship from 449BC Rome up to modern times has been comprehensively chronicled. In addition to Antonio Buti's article see R H Helmholz, 'The Roman Law of Guardianship in England, 1300-1600' (1978) *52 Tulane Law Review* 223; John Seymour, 'Parens Patriae and Wardship Powers: Their Nature and Origins' (1994) 14 *Oxford Journal of Legal Studies* 159.

[58] Where a statutory guardian is appointed they are commonly the head of a government department who then delegates their functions to department officers or Not for Profit organisations accredited to provide care.

[59] Anthony Dickey, *Family Law* (Law Book Co, 2002) 341.

[60] The English common law since medieval times recognised the separate duty of the sovereign as parens patriae (parent of the country) to provide care for those who were not able to take care of themselves, protect persons deemed incapable of managing their own affairs, assume responsibility for such property or assets as they possessed and to assist those who, because of their position, were unable to obtain redress from the ordinary courts. The promulgation of *De Praerogativa Regis* in 1324 formalised the King's duty to take custody of the person and lands of infants without carers and "incompetent", "idiot" or "lunatic" adults. Accordingly, guardianship was distinct in law from the broader *parens patriae* jurisdiction of the English Courts of chancery to take custody of, and

fiduciary duty where "one person is obliged, or has undertaken, to act in relation to a particular matter in the interests of another with a 'special vulnerability' and is entrusted with a power to affect those interests in a legal and practical sense."[61]

Unaccompanied child asylum seekers have no parent to mediate their relationships with the State. Guardianship is the key legal mechanism for prescribing the legislative and functional responsibility to ensure that these children receive care and protection from harm in the present, the provision of circumstances that enable their development and access to, and realisation of, the processing of their claim for asylum. For unaccompanied child asylum seekers, the State appointed guardians become, in effect, the gatekeeper between the child and the State's legal and policy responses to them. It is here that comprehending the being/becoming child is key. From the perspective of the being/becoming child, guardians have a dual protective and anticipatory obligation to address the child's vulnerability by virtue of their family separation. They have the legislative and functional responsibility to protect the child from harm and neglect in the present and also to protect their capacity to develop into the future. This includes by advocating for the provision of emotional and psychological support to enable their recovery from past significant trauma,[62] and to ensure that they receive adequate representation to prosecute their claim for asylum.

International law and best practice State models vest the guardian with the functions of: advocating on behalf of an individual child to ensure that all decisions have their best interests as a primary consideration; ensuring that the child's views and opinions are sought and considered and that the child has suitable care, accommodation, education, language support and health care provision. They also have the functions of ensuring that the child is legally represented in procedures that will address protection claims and durable solutions and that possibilities of family tracing and reunification are explored where appropriate. In discharging these functions the guardian consults with, advises and advocates on behalf of the child. They provide a link, and ensure transparency and cooperation, between the child and the various organisations that may provide them with services.

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responsibility for, both infants (minors under 18) and adults assessed to be lacking capacity by making an order declaring them a "ward of the Court."

[61] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

[62] Ulika Wernesjö, 'Unaccompanied Asylum-seeking children: Whose perspective?' (2011) 19(4) *Childhood* 495.

As noted in section 2.2 above, the acute impact of the separation of these children from their parents and the significance of the provision of effective guardianship is acknowledged in an extensive body of international soft law including UNHCR and European States' guidelines and practice standards to address the vulnerabilities of these children generated by this separation.[63] These standards are consistent with the construction of the guardian as being in relationship with the individual child and having dual protective and anticipatory obligation to them and as gatekeeper between the child and the State. As illustrated in Table 2.1 below, analysis of the ten Separated Children in Europe Programme "Statement of Good Practice" guidelines reveals an almost even division in these two roles.

Table 2.1: Inward and outward looking responsibilities of guardians of unaccompanied child asylum seekers

Responsibilities of the guardian to develop a relationship with the individual unaccompanied child (the inward looking role)	**Responsibilities of the guardian as gatekeeper unaccompanied child and the State (the outward looking role)**
Ensure the child's views and opinions are considered in all decisions that affect them.	Ensure that all decisions have the child's best interests as a primary consideration.
Ensure that the child has suitable care, accommodation, education, language support and health care provision and that they are able to practice their religion.	Ensure the child has suitable legal representation to assist in procedures that will address protection claims and durable solutions.
Engage with the child's informal network of friends and peers	Contribute to a durable solution in the child's best interests.
Consult with and advise the child.	Provide a link, and ensure transparency and cooperation between the child and the various organisations who may provide them with services.
Explore, together with the child, the possibility of family tracing and reunification and assist the child to keep in touch with his or her family where appropriate.	Advocate on the child's behalf.

As illustrated in Table 2.1, analysis of the purpose of the responsibilities is illuminating. Five pertain to the quality of the relationship between the child and the guardian to ensure that the being/becoming child is cared for and heard (the inward-looking role). The balance of the

[63] European States in particular have developed clear practice standards to address the vulnerabilities of asylum seeking children generated by their separation from their parents. See, for example, the *Statement of Good Practice* (n 12) that endorse minimum guardianship standards at 21 - 22.

responsibilities seek to ensure that the legal interests and protection needs of the child are realisable with the guardian being the gateway between the child, the legal system and State/CSO services (the outward-looking role).

For the being/becoming child having a guardian that discharges both roles is critical. Without effective guardianship the being/becoming child's susceptibility to harm and neglect in the present is increased. They are also unlikely to access the necessary specialist assistance to recover from trauma. The chances of them receiving representation and assistance for the proper determination of their refugee claim is remote. The vulnerabilities of children separated from their parents without effective guardianship are especially evident in States like Australia where the independence of the statutory appointed guardian from the border control machinery of the State is compromised.

2.4 Conclusion

This chapter explored how, regardless of their immigration and citizenship status, unaccompanied child asylum seekers are first and foremost being/becoming children. And notwithstanding variances in their age, cultural background, prior experiences of displacement, persecution or trauma, variances in their past and present family circumstances, as well as differences in their personalities and cognitive abilities and life circumstances, these children share a compound triple burden of vulnerability. My examination of their triple burden of vulnerability generated by the convergence of their minority, alienage and family separation exposes their specific and heightened dependence on the State to respond to these vulnerabilities. In the next chapter, I evaluate the promise and limitations of human rights law in responding to these compound triple vulnerabilities.

3 THE UNFULFILLED POTENTIAL OF HUMAN RIGHTS FOR UNACCOMPANIED CHILD ASYLUM SEEKERS

3.1 Introduction

Human rights law holds out the promise of protecting unaccompanied children seeking asylum but is ultimately deficient in delivering on it. The universal human rights norms governing States' treatment of unaccompanied child asylum seekers, discussed below, are extensive but have failed to sufficiently influence Australia's domestic legislative responses to unaccompanied child asylum seekers in a way that adequately responds to their vulnerabilities. Chapter 2 set out the triple vulnerability of these children and the critical significance of guardianship systems in responding to their needs. This chapter examines the potential of human rights law's promise of universal and aspirational standards to address these compound vulnerabilities. The human rights framework is presently the only available legal mechanism to limit State responses to these children that are focused primarily on border security. By detailing the extent of that framework and correlating State human rights obligations with the triple vulnerabilities of these children, this chapter illustrates that effective implementation of these rights in domestic law and policy would amply address the acute vulnerabilities of these children. However, analysis of three key moments in the trajectory of recent Australian law (Section 3.4, below) demonstrates a legislative closing down of human rights through successive pieces of legislation. The failure of the human rights framework to prevent the awful impact of these three moments on these children provides the impetus for the supplementary vulnerability informed response proposed in this thesis (Chapter 4).

3.2 State legal obligations towards unaccompanied child asylum seekers in international human rights law

States have extensive obligations to unaccompanied child asylum seekers in international human rights and refugee law, specifically set out in treaties. It is a fundamental principle of

international treaty[1] law that "every treaty in force is binding upon the parties to it and must be performed by them in good faith"[2] with State parties held accountable for the realisation of these obligations in law, policy and practice. The international human rights system holds States to a legal standard for the treatment – either by State action or inaction – of its citizens and others within its jurisdiction under national, regional or international laws. It enables the identification of the source and nature of human rights violations. It also provides mechanisms for holding the State accountable to national or international bodies for the actions they take that cause, continue or worsen people's ability to attain minimum civil, political, economic social and cultural rights and for laws and policies that fail to address patterns of preventable human rights deprivations. The system also obliges States to continue reporting on the extent to which they are realising the totality of their international human rights obligations. State policies, legislation, and regulations ought to align, but at least must not undermine, the fundamental normative human rights standards in global human rights instruments, conventions and other internationally agreed commitments of the State. In practice however there is regular non-alignment and this is discussed further below.

Answering the research question 'How effectively does international human rights law respond to their vulnerability?' requires firstly an examination of the content of States' human rights obligations to unaccompanied child asylum seekers. This examination is not straight forward because States human rights obligations to them are generated across all of the core international human rights Treaties and the Refugee Convention rather than being contained in any single core treaty. This is because international human rights were initially broadly classified in the *Universal Declaration of Human Rights* in 1948. Subsequently, the *International Covenant on Civil and Political Rights* (ICCPR)[3] and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),[4] respectively, codified in greater detail

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[1] A treaty is "an international agreement concluded between two States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation" — article 2(1)(a) *Vienna Convention on the Laws of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('Vienna Convention').

[2] See article 26 of the Vienna Convention (ibid).

[3] *International Convention on Civil and Political Rights* opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'). Australia ratified the ICCPR on 13 August 1980.

[4] *International Convention on Economic, Social and Cultural Rights* opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) ('ICESCR'). Australia ratified the ICESCR on 10 December 1975.

the core civil and political, and economic, social and cultural rights of all persons in international law Treaties. Since 1954, thematic treaties applied and extended these core rights to specific groups of people. Six of these thematic treaties generate State obligations to unaccompanied children: the *Convention on the Rights of the Child* (CRC);[5] the *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW);[6] the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD);[7] the *Convention on the Rights of Persons with Disabilities* (CRPD);[8] and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT);[9] and the *Convention Relating to the Status of Refugees* (the Refugee Convention) and the 1967 *Protocol relating to the Status of Refugees.*[10]

To address this dispersal, Table 3.1 below, "A comprehensive synthesis of States' extensive legal obligations to unaccompanied child asylum seekers," groups State obligations arising from the provisions of each of the relevant core Treaties and the Refugee Convention.

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[5] *International Convention on the Rights of the Child* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC'). Australia ratified the Convention on 17 December 1990.

[6] *Convention on the Elimination of all forms of Discrimination Against Women* opened for signature on 18 December 1979), 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW'). Australia ratified CEDAW on 28 July 1983.

[7] *Convention on the Elimination of all forms of Racial Discrimination* opened for signature on 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('CERD'). Australia ratified CERD on 30 September 1975.

[8] *Convention on the Rights of Persons with Disabilities*, *opened for signature 13 December 2006, 2515 UNTS 3* (entered into force 30 March 2008) ('CRPD'). Australia ratified the CRPD on 17 July 2008.

[9] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* opened for signature 10 December 1984, 1465 UNTS 85, (entered into force 26 June 1987) ('CAT'). Australia ratified CAT on 8 August 1989.

The two core treaties that do not contain State obligations to unaccompanied child asylum seekers are the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* and *the International Convention for the Protection of All Persons from Enforced Disappearance.*

[10] *Convention relating to the Status of Refugees* opened for signature 28 July 1951, 189 UNTS 137, (entered into force 22 April 1954) ('Refugee Convention'). Australia acceded to the Convention on 22 January 1954.

The Refugee Convention contained both temporal and geographic limitations, referring to events before 1 January 1951 and focussing on events that had occurred in Europe. The 1967 Protocol lifted these restraints and extended the Convention protections to persons who became refugees as a result of events occurring on or after 1 January 1951. Hereafter, a reference to the Refugee Convention refers to the Refugee Convention and Protocol.

Relevantly, for the discussion about the treatment of unaccompanied child asylum seekers in Australian law that ensues in the remaining chapters, Australia has ratified all of the relevant human rights treaties and the Refugee Convention.

Table 3.1 illustrates clearly how specific State obligations are generated across multiple Treaties.[11] It identifies twenty-six core State obligations to unaccompanied child asylum seeker including obligations to all asylum seekers (column one) and additional specific obligations to them as children (column two). The twenty-six substantive State obligations identified comprise fifteen obligations to all asylum seekers and an additional eleven obligations to asylum seeking children. That eleven State obligations relate specifically to children reflects international human rights law's longstanding recognition of the need for State standards to respond to the acute needs of unaccompanied minors.[12]

Table 3.1: A comprehensive synthesis of States' extensive legal obligations to unaccompanied child asylum seekers

State obligation to all asylum seekers	Additional obligations owed only to children
	Best interests of the child must be a primary consideration CRC 3(1); CRPD 7(1)
	Provision of guardianship taking into account the best interest of the child as their basic concern CRC 18(1), 20
	Take all appropriate legislative and administrative measures to ensure child has such protection and care as is necessary for their well-being CRC 3(2)
	Right of asylum-seeking children to special protection and assistance including to fair and effective refugee status determination CRC 20, 22

[11] For example, the right to health is protected in six treaties, the right to non-refoulement is protected in four, and the obligation to not subject persons to torture, or to cruel, inhuman or degrading treatment or punishment while in immigration detention, is found in eight articles in five treaties. See Articles 7 and 10 ICCPR (n 3); Articles 18 and 37(a) CRC (n 5); Articles 2 and 16 CAT (N 9); Article 15 CRPD (n 8); Article 5(b) CERD (n 7). Assessment of relevant rights becomes even more complicated where an Unaccompanied Child Asylum Seeker is situated at the intersection of multiple treaties. For example, an unaccompanied asylum-seeking girl with a disability may have a human rights claim under both the ICCPR and ICESCR in addition to the specific themed treaties which may apply to her as well: the CRC, CEDAW, CRPD and the Refugee Convention.

[12] See *e.g.* Conclusions on the International Protection of Refugees, adopted by the UNHCR Executive Committee, No 47 (XXXVIII), "Refugee Children", 1987. The same is true of soft law instruments, see in particular, UNHCR, *Refugee Children: Guidelines on Protection and Care ('Refugee Children Guidelines')* (Office of the UNHCR, 1994) 101, 126; UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* ('*Unaccompanied Children Guidelines*') (Office of the UNHCR, 1997) [5.7]; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status ('Refugee Status Determination Handbook')* UN Doc HCR/1P/4/ENG/REV. 3 (Office of the UNHCR, 2011) [214].

	Right to development CRC 6(2)
Right to life and to not be removed to a country where life or freedom would be threatened (non-refoulement) **Refugee Convention 33; ICCPR 6, 7; CAT 3, 16**	CRC 6, 37
Right to not be penalised or discriminated against for arriving in Australia without authorization **Refugee Convention 31**	
Right to equality and respect for human rights without discrimination **ICCPR 2(1), 26; ICESCR 2(2); CERD 5; CEDAW 2; CRPD 5; 12; Refugee Convention 3.**	CRC 2
Freedom of movement **ICCPR 12; Refugee Convention 26; CERD 5(i)**	CRC 10
Freedom from arbitrary detention **ICCPR 9(1).**	CRC 37(b)
	The right of children to be detained only as a measure of last resort and for the shortest period of time. CRC 37(b)
Freedom from torture and other cruel, inhuman or degrading treatment or punishment while in detention **ICCPR 7, 10; CAT 2, 16; CRPD 15; ICERD 5(b).**	CRC 37(a)
Right to liberty and security of the person and to protection from violence **ICCPR 7, 9, 10; ICESCR 12; CAT 2, 16 CERD 5(b); CRPD 14, 16.**	**Right to protection from sexual exploitation, abduction, trafficking and other abuse and exploitation** CRC 3(3), 19, 33, 34, 35, 36, 38
Treatment with humanity and respect for dignity while in detention **ICCPR 7, 10; CAT 16; ICESCR 11, 12; CRPD 9, 14(2), 15.**	CRC 3, 37(c)
Right to privacy **ICCPR 17; CRPD 22.**	CRC 17
Right to enjoy the highest attainable standard of mental and physical health **ICESCR 12; CRPD 7, 25; CEDAW 12; CERD 5(e)(iv).**	CRC 3, 5, 6, 9, 12, 18, 19, 23(3), 24, 25, 37(c)
	Child victim's right to rehabilitation CRC 39
Right to adequate standard of living **ICESCR 11; CRPD 28; Refugee Convention 21, 23.**	CRC 6, 24, 27
Right to education **ICESCR 13, 14; CEDAW 10; CRPD 24; CERD 5(e)(v); Refugee Convention 22.**	CRC 28, 29
Right to have family protected from arbitrary or unlawful interference **ICCPR 17, 23; CRPD 23.**	CRC 8(1), 9,10(1)
	Right to rest, recreation and play CRC 31

Right to practice culture, language and religion ICCPR 27; ICESCR 15(1)(a); CRPD 30; Refugee Convention 4.	CRC 8(1), 30
	Right to a name, nationality and identity CRC 7,8
Right to freedom of speech, association, thought, conscience and religion **ICCPR 18, 19, 21 22; CRPD 21;** **CERD 5(d)(vii), (viii)**	CRC 13, 14, 15
	Right to express views and participate in decision-making CRC 12; CRPD 7(3).

It is important to identify and comprehend the scope and content of each of these State obligations because every time a State turns back an asylum-seeking child on a boat or transfers them to an offshore processing centre, that State is potentially breaching a multitude of these obligations. These breaches are largely invisible in domestic political rhetoric that demonises asylum seekers as "illegals," but in reality, each and every breach is a significant derogation of the rights of the being/becoming child who is being turned away or transferred.

3.3 Correlating States' human rights obligations with the triple burdens of vulnerability of unaccompanied child asylum seekers

States' extensive human rights obligations to unaccompanied child asylum seekers can therefore be extensively traced across multiple treaties. But cataloguing State obligations does not answer the thesis question: how effectively does international human rights law respond to the vulnerabilities of unaccompanied child asylum seekers? To illuminate the relationship between State obligations to these children in human rights law and the three sites of their vulnerability, Table 3.2 below "Correlation between State human rights obligations to unaccompanied children and their triple vulnerability" correlates the twenty six human rights obligations (section 3.2) with their vulnerabilities generated by their minority, alienage and separation from their parents. As Table 3.2 below exhibits, these can be logically characterised, for clarity, as principal (in bolded text) and ancillary (in italicised text) obligations.[13] Ancillary obligations are those necessary to achieve the principal obligation.

[13] In practice, these sites of vulnerability intersect and States' human rights obligations will arise in more than one site. For example, the duty to act in the child's best interest by conducting Best Interest Assessments that comprehensively assess that child's nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs responds to their cumulative vulnerability generated by their minority, separation from their parents (particular vulnerabilities) and their alienage (nationality, upbringing, ethnic, cultural and linguistic background, protection needs).

Table 3.2: Correlation between State human rights obligations to unaccompanied children and their triple vulnerability

Minority	Alienage	Separation from parents
Consider the best interests of the child as a primary consideration	**Not refoule the child** *Right to not be removed to a country where their life or freedom would be threatened (non-refoulement)*	**Provide unaccompanied asylum seekers with special protection and assistance including ensuring that their legal guardian considers their best interests as their basic concern**
Treat the child with humanity and respect for their human dignity *Right to a name, nationality and identity*	**Provide special protection and assistance including to fair and effective refugee status determination**	
Provide the child with care, protection and assistance *-Right to an adequate standard of living* *-Freedom from arbitrary detention* *-Detention as a last resort and for the shortest period of time* *-Freedom from torture and cruel, inhuman and degrading treatment* *-Right to liberty and security of the person* *-Right to freedom of movement unless restrictions are necessary for regularising status* *-Right to Privacy* *-Right to rehabilitation*	**Treat them without discrimination** *Right to not be penalised or discriminated against for arriving without authorisation*	
Facilitate the child's participation in decision-making		
Realise their right to development *-Right to education* *-Right to enjoy the highest attainable standard of mental and physical health* *-Right to have family protected from arbitrary or unlawful interference* *-Right to rest, recreation and play* *-Right to practise culture, language and religion* *-Right to freedom of speech, association, thought, conscience and religion*		

Having articulated a framework for comprehending how States' human rights obligations correlate with the specific vulnerabilities of unaccompanied children, this section now articulates the scope and content of those obligations to determine how effectively international human rights law does, or does not, respond to those vulnerabilities. To stipulate with precision the legal standards to which States have bound themselves, this analysis draws on relevant treaty provisions, General Comments,[14] relevant State Reports to treaty monitoring committees,[15] relevant complaints jurisprudence of applicable Treaty bodies, UNHCHR, UNHCR, and OHCHR Guidelines, and academic scholarship.

This section argues that States' full implementation of their international legal obligations would be an adequate response to the vulnerability of these children. Although rarely fully realised in practice, understanding their full scope is necessary to comprehend the extent of the disconnect between State's international legal obligations and their actual treatment of unaccompanied children pursuant to domestic border control laws and policies. As I argue below (section 3.4) there is a gaping rift in Australia between the promise of human rights protection and implementation in practice. It is the magnitude of that divide that leads me to argue in this thesis for an additional alternative normative basis for urgently attending to the vulnerabilities of unaccompanied asylum seeking children.

3.3.1 Human rights law and children's minority

As illustrated in Table 3.2 above, States have five human rights obligations that correlate with the vulnerabilities generated by the minority of unaccompanied child asylum seekers. Although the construct of the being/becoming child is a very recent one in human rights law, the provisions of human rights laws do encompass the notion that a child has both current need and future potential.[16] As discussed below, the five obligations cumulatively require States to care for, protect and fully realise the current personhood of these children while also addressing

[14] General Comments are authoritative explanations published by treaty bodies about how the provisions of the treaties overseen by that body are to be interpreted and applied in practice.

[15] For example, the Human Rights Committee, the Committee Against Torture, the Committee for the Rights of Persons with Disabilities, the Committee for the Elimination of Discrimination against Women, and the Committee on the Rights of the Child.

[16] Michael Freeman (ed), *Children's Rights: Progress and Perspectives* (Martinus Nijhoff, 2011) 15. Accepting that childhood is simultaneously a period and a state and that children are simultaneously beings and becomings necessarily alters our understanding of the role and realities of childhood, provides significant challenges to established paradigms and has significant implications for children's rights scholarship.

their need for care and protection to reach adulthood and to bring to fruition their childhood potential. These are:

- considering the child's best interests as a primary consideration
- treating children with humanity and respecting their dignity
- caring for, protecting and assisting them (which includes protecting them from violence and cruel, inhuman and degrading treatment), and
- realising their right to development and facilitating their participation in decision-making.

3.3.1.1 Consider the unaccompanied child's best interests

International human rights law firmly establishes States' obligation to consider the best interests of each child as a primary consideration in all actions concerning the child, whether by public or private social welfare institutions, courts, administrative authorities or legislative bodies.[17] This foundational "best interests" principle has existed for nearly sixty years,[18] and despite it having no enshrined definition, authoritative guidance explicitly stipulates the scope and content of States' best interest obligations to children, the necessary underlying legal framework and the necessary measures to secure proper representation of a child's best interests.[19] By requiring States to actively consider the best interests of each individual child[20] and take that interest into account as a primary consideration[21] in the operation of private or

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[17] CRC (n 5) art 3(1). See also UN Committee on the Rights of the Child, *General Comment No. 14 The right of the child to have his or her best interests taken as a primary consideration,* UN Doc CRC/C/GC/14 (29 May 2013) ('*General Comment No. 14'*) [15(a)].

[18] The Best Interest Principle was previously recognised in the 1959 Declaration on the Rights of the Child which was the precursor to the CRC.

United Nations General Assembly *Declaration of the Rights of the Child* (1959) G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354:

> The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

[19] UN Committee on the Rights of the Child, *General Comment No. 14* (n 17).

[20] The best interests will differ from child to child. Accordingly, an individualised assessment of children's best interests in their particular circumstances is required. See Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, 2002) 246.

[21] Geraldine Van Bueren, *The International Law on the Rights* of *the Child* (Brill Nijhooff, 1995) 46; *Minister* of *State* of *Immigration and Ethnic Affairs* v *Teoh* (1995) 183 CLR 273 at 289 (Mason CJ and Deane J).

public institutions and judicial and administrative proceedings that impact on children, this obligation responds in a holistic way to the being/becoming child's care and protection and development needs.[22]

Implementation of this obligation requires States to develop a best interest assessment legal framework where States document their regard to the particular needs of individual unaccompanied children wherever a decision by a State authority has a major, continuing,[23] or fundamental impact on the child's life.[24] These assessments must:

- involve a clear and comprehensive assessment of an individual child's specific circumstances;[25]
- be done in a friendly and safe atmosphere by qualified professionals who are trained in age and gender sensitive related interviewing techniques;[26]
- be determined individually, on a case-by-case basis before competing interests are taken into account;[27]
- provide reasons stating the child's factual circumstances, the relevant considerations, how they have been weighted to determine the child's best interests and whether the decision differs from the child's views;[28] and

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[22] The UN Committee on the Rights of the Child has noted that "The realisation of this obligation by State organs to is key to ensuring "both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child": UN Committee on the Rights of the Child, *General Comment No. 14* (n 17) [4].

[23] Ibid [6(c)], [14(b)], [19].

[24] 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) ('*General Comment No. 6'*) [IV c].

[25] *General Comment No. 14* (n 17) [49].

[26] Ibid [20].

[27] Ibid [1].

[28] Ibid [97]. Note that reasons for decisions must explicitly state: 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.

- provide formal mechanisms to appeal and revise the decision to address procedural or substantive decision-making errors,[29] including where best interest assessment requirements have not been complied with.[30]

In requiring best interest assessments to include a clear and comprehensive assessment of the unaccompanied child's nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs,[31] this obligation requires States to respond comprehensively to the vulnerability of the individual being/becoming child.

3.3.1.2 Treatment with humanity and respect for their dignity

As captured in Table 3.1 of this Chapter, States' duties to treat people with humanity and respect for their dignity is a distinct right recognised in nearly every international human rights convention. Dignity, like "equality" is an amorphous concept that lies at the heart of international human rights law. It is also aligned conceptually with vulnerability theory in its appeal to the recognition of core attributes that compose the common humanity of all peoples regardless of their culture, legal status, age or the character of their human embodiment. States' duty to treat children with humanity and respect for their dignity is also central to the realisation of other rights in those Treaties.[32] It encompasses: the prohibition of inhumane treatment, humiliation, or degrading treatment; facilitating the conditions for individuals' self-fulfilment, autonomy, or self-realization; the protection of group identity and culture; and the creation of the necessary conditions for an individual's essential needs to be satisfied.[33] States' obligation to treat unaccompanied child asylum seekers with humanity and respect for their dignity responds to their vulnerability by creating explicit parameters for their permissible treatment.

3.3.1.3 Care, protection and assistance

States' obligation to care for, protect and assist unaccompanied children requires States to take all appropriate legislative and administrative measures to ensure such protection and care as is

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[29] Ibid [98].
[30] Ibid [98].
[31] Ibid [20].
[32] For a comprehensive discussion of the genesis and meaning of the right to dignity see Christopher McCrudden 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *EJIL* 655.
[33] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) 545-546.

necessary for their well-being.[34] Well-being includes ensuring that the child has an adequate standard of living by meeting the child's needs for water, nutrition, shelter and clothing. But it also comprehends far more than meeting the child's basic physical and material needs. It encompasses the being/becoming child's sense of the quality of their life and includes psychological and social dimensions such as feeling secure in their care arrangements and feeling respected.

International human rights law also explicitly establishes States' extensive obligations to protect all children from all forms of physical or mental violence,[35] and from injury or abuse, neglect or negligent treatment, maltreatment or exploitation prejudicial to any aspect of their welfare.[36] The duty "leaves no leeway for the discretion of States parties… [they] are under strict obligation to undertake 'all appropriate measures' to fully implement this right for all children."[37] It prohibits States from subjecting unaccompanied child asylum seekers to torture or other cruel, inhuman or degrading treatment or punishment including during the Refugee Status Determination process.[38] States are specifically prohibited from placing them in immigration detention other than as a measure of last resort and for the shortest appropriate period of time.[39] This is so even if the detention is lawful under the domestic legislation of the State party.[40]

International human rights law responds directly, comprehensively and proportionately to the acute care and protection needs of unaccompanied children. It requires States to implement obligations to proactively prevent and explicitly prohibit laws, policies and practices that perpetrate physical or mental violence or abuse on children[41] and to protect these children from arbitrary and cruel, inhuman or degrading treatment or punishment in the present.

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[34] CRC (n 5) art 3(2).

[35] ICCPR (n 3) arts 2, 7, 9, 10, 17; CAT (n 9) arts 2, 16; ICESCR (n 4) art 12.

[36] CRC (n 5) arts 3(2), 3(3) 18(1), (2), 19, 20, 22, 19, 34, 35, 36, 37, 38 and 39.

[37] UN Committee on the Rights of the Child, *General comment No. 13 The right of the Child to Freedom from all forms of violence,* UN Doc CRC/C/GC/13 (18 April 2011) ('*General comment No. 13')* [37].

[38] CRC (n 5) art 37(a).

[39] CRC (n 5) 37(b) and ICCPR (n 3) art 9(1). The Refugee Convention Guidelines also require States to ensure that unaccompanied asylum seeking children are not detained for immigration reasons. UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12 (31 May 2001) [46].

[40] UN Human Rights Committee, *A v Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997) [9.2]; UN Human Rights Committee, *Van Alphen v. The Netherlands,* Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (23 July 1990) [5.8].

[41] UN Committee on the Rights of the Child, *General comment No. 13* (n 37) [46].

States have clear obligations to not compound the distress of any child that is already "seriously distressed as a result of past events, such as serious violations of his or her fundamental rights."[42] They are also required to promote these children's physical and psychological recovery and social reintegration where they have been victims of any form of neglect, exploitation, abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment.[43] It is especially relevant for understanding the effectiveness of international human rights law in responding to this aspect of the vulnerability of the being/becoming child that these obligations require contemporaneous, forward looking and remedial State responses.

3.3.1.4 Development

As illustrated in Table 3.1, the International human rights framework imposes extensive obligations on States to ensure that every unaccompanied child has a standard of living adequate for their physical, mental, spiritual, moral, and social development.[44] Consistently with conceiving the being/becoming child holistically to ensure the child's abilities to fulfil their human potential to the maximum during childhood and adulthood alike, States must meet the child's concrete physical needs *as well as* their psychological needs for emotional and intellectual development and their social needs.[45] States are also obliged to ensure also that all children:

- have access to compulsory primary school education and secondary schooling;[46]

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[42] UN Committee on the Rights of the Child, *Guidelines on Determining the Best Interests of the Child* (2008), 70.

[43] CRC (n 5) art 39.

[44] Ibid art 27.

[45] Traditionally, in international law, the right to development was construed as encompassing the protection of children's socio-psychological development to secure their future as adults consistent with "the human becomings" construction of childhood as discussed in Chapter 2. However, since 2013 scholars, such as Noam Peleg have advocated for a more comprehensive child's right to development framework. Peleg conducted a systematic analysis of the meaning of the child's legal right to development analysing UN Committee on the Rights of the Child's jurisprudence from 1993 and 2010 and concluded that in that period the Committee overlooked "development" itself as a human right, focusing instead on the protection of children's socio-psychological development. Peleg's conception of the child's right to development is congruent with understandings of the being/becoming child since it "accommodates a hybrid conception of childhood, a respect for children's agency, recognition of the importance of the process of maturation ('development') as well as its outcome, and a cross-disciplinary understanding of 'development'."

See Noam Peleg, *The Child's Right to Development* (Doctoral Thesis, University College, London, 2013). See also Michael Freeman 'The Human Rights of Children' (2010) 63 *Current Legal Problems*, 1.

[46] CRC (n 5) arts 28, 29; ICESCR (n 4) art 13.

- have opportunities for rest and leisure, to engage in play and recreational activities appropriate to his or her age;[47]
- can practise their culture, language and religion;[48]
- can enjoy the highest attainable standard of health; and [49]
- have their identity, including nationality, name and family relations preserved.[50]

For unaccompanied child asylum seekers, in particular, States must have regard to the "desirability of continuity in the child's upbringing and to the child's ethnic, religious, cultural and linguistic background".[51]

3.3.1.5 Realising unaccompanied child asylum seekers' right to participate in decision-making

As part of the general principle of respect for the views of the child which underpins the CRC, international human rights requires States to establish the legal and policy framework for children's views to be given due weight, in accordance with their age and maturity, in all settings, including judicial or administrative proceedings affecting them.[52] Consistent with the being/becoming child, the right to participate is not static or fixed. Instead, the expression of the right to participate expands with the increasing maturity of the child, and so States must adapt the processes enabling participation according to the child's evolving capacity.[53]

The CRC requires decision-makers to do two things in all matters affecting unaccompanied children. First, to perceive the child as possessing both the capacity and the right to agency. And, second, to put in place mechanisms or processes to facilitate participation by the child when negotiating access to the personnel and bureaucracies responsible for implementing State policies, processes and facilities responsible for the refugee determination process. In practical terms, the State's obligation to realise the right to participate requires ongoing attention to the conditions necessary for meaningful participation, including the

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[47] CRC (n 5) art 31.

[48] For children seeking asylum with their parents, States also have an obligation to protect children's families from arbitrary or unlawful interference: ibid arts 8(1), 9, 10.

[49] Ibid art 24.

[50] Ibid art 8.

[51] Ibid art 20.

[52] Ibid art 12.

[53] See Anne Graham, Jenni Whelan and Robyn Fitzgerald, 'Progressing participation: taming the space between rhetoric and reality' (2006) 16(2) *Children, Youth and Environments*, 231-247, 252.

provision of opportunities for participation and the provision of adults with expertise to hear them, particularly in relation to guardianship arrangements and legal representation.

States' have unambiguous obligations to consider these children's best interests as a primary consideration, to treat them with humanity and respect their dignity, to care for and protect them (including from violence and cruel, inhuman and degrading treatment), to realise their right to development and to facilitate their participation in decision-making. These five core obligations, if implemented in practice, would systematically care for, protect and fully realise the current personhood of these children while also addressing their need for assistance to bring to fruition their childhood potential into adulthood.

3.3.2 Human rights law and children's alienage

This section now turns to identify the scope and content of States' human rights obligations that respond to unaccompanied children's alienage and argues that States' full implementation of these obligations would adequately respond to this limb of their vulnerability. As examined in Chapter 2, unaccompanied child asylum seekers' vulnerability generated by their alienage encompasses at least two sites of legal precariousness: first, engaging in the process of seeking asylum after fleeing persecution from their country of nationality; and, second, their unauthorised presence as non-citizens in the State. As illustrated in Table 3.2 above, States have three principal human rights obligations that correlate with these vulnerabilities: non refoulement; to provide them with special protection and assistance including to a fair and effective refugee status determination and to not discriminate against them.

3.3.2.1 Non-refoulement

The duty of non-refoulement, like the child's best interests duty, is a bedrock principle of international law.[54] The Refugee Convention, CAT, ICCPR and the CRC forbid States from sending/removing a refugee or asylum seeker[55] to territories where their life or freedom would be threatened, where they have a well-founded fear of persecution on account of their race,

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[54] 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, [5]; UNHCR Executive Committee, *Conclusion No. 6 (XXVIII): Non-refoulement,* 1977, [(c)].

[55] Although the Refugee Convention explicitly refers to refugees in article 31, the UNHCR has clarified that the duty of non-refoulement applies to asylum seekers also. 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* <http://www.refworld.org/pdfid/45f17a1a4.pdf>, 3.

religion, nationality, membership of a particular social group or political opinion, or they face a real risk of significant harm either in the country to which they are removed or any other place to which that country might send them.[56] States are also prohibited from removing anyone to a country where they are in danger of death, torture, or other cruel, inhuman or degrading treatment, including arbitrary detention.[57]

There is an absolute duty upon States to 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: they cannot be overridden by other general policy considerations including, national security and/or deterring maritime migration.[58] States' non-refoulement obligations to children also include ensuring that the child's right to life, survival and development and to not be subjected to torture, cruel, inhuman or degrading treatment or punishment or arbitrary detention are not violated. The obligation applies in the country to which they will initially be removed as well as in any country to which the child may subsequently be removed.[59]

International human rights law provides adequate protection against refoulement if, whenever a State is considering moving an asylum seeker to another State's territory, the State first conducts an individualised refoulement assessment. This includes where States intercept asylum seekers on the seas. Although under the international law of the sea the distance of the boat from the State's coastline determines what actions by the State are permissible,[60]

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[56] Refugee Convention (n 10) art 33(1); CAT (n 9) arts 3, 16; CRC (n 5) arts 6, 37; ICCPR (n 3) arts 2, 6 and 7. The prohibition is express in the Refugee convention, CAT and CRC and implied in the ICCPR. See UN Human Rights Committee, *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004 (*General Comment No. 31)*, [12].

[57] 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), [6]; UN Committee on the Rights of the Child, *General Comment No. 6* (n 24) [27].

[58] The Refugee Convention contains an exception to the principle of non-refoulement in article 33(2). A refugee will not be protected against refoulement if there are reasonable grounds for regarding them as a danger to the security of the State, or if they have been convicted by a final judgment of a particularly serious crime that constitutes a danger to the community. However as Jane McAdam and Guy Goodwin-Gill have argued, State non-refoulement obligations under the ICCPR and CAT apply to all people without exception, thus imposing a stricter non-refoulement obligation on States than article 33(2) of the Refugee Convention. See Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford, 2007) 243-244.

[59] UN Committee on the Rights of the Child, *General Comment No. 6* (n 24) [26] - [27].

[60] See *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 396 (entered into force 16 November 1994); Natalie Klein, 'Assessing Australia's Push Back The Boats Policy Under International Law: Legality And Accountability For Maritime interceptions Of Irregular Migrants' [2014] 15 *Melbourne Journal of International Law* 1; Ivan Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels' (1986) 35 *International and*

international human rights law requires States to observe their non-refoulement obligations before pushing back boats containing unaccompanied children. This includes conducting a refugee status determination.[61] While in exceptional circumstances, initial screening at sea may be undertaken to proactively identify people with protection needs and expedite their access to a full refugee status determination process, State obligations of non-refoulement require appropriate pre-transfer risk and vulnerability assessment processes.[62]

3.3.2.2 Access to asylum procedures and interim care and protection until their refugee status is determined

International human rights law requires States to ensure that unaccompanied child asylum seekers receive appropriate protection and humanitarian assistance to enjoy their rights under the CRC and the other international human rights or humanitarian instruments to which the State is a party.[63] This includes the Refugee Convention. While the Refugee Convention defines who it confers protection on and establishes key principles such as non-penalisation for illegal entry and non-refoulement,[64] it does not set out procedures for Refugee Status Determination, leaving this to individual States to determine. However, there are settled guidelines regarding the minimum standards for realising a fair refugee status determination procedure that complies with the provisions of the CRC, Refugee Convention and ICCPR.[65] These guidelines require State refugee status determination processes to ensure that all asylum-seekers, however they arrive within the jurisdiction of a State:

- have access to fair, non-discriminatory and appropriate claim adjudication procedures before a competent authority, fully qualified in asylum and refugee matters;[66]

Comparative Law Quarterly 320, 330; Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, 2012) 123; Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart, 2010) 80.

[61] Natalie Klein (n 60) 6.

[62] UN High Commissioner for Refugees, *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) [55] <www.refworld.org/docid/4cd12d3a2.html>.

[63] CRC (n 5) art 22(1).

[64] Refugee Convention (n 10) arts 1, 31 and 33.

[65] UNHCR *Refugee Status Determination Handbook* (n 12); UNHCR, *Unaccompanied Children Guidelines* (n 12); UNHCR, *Refugee Children Guidelines* (n 12). See also UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)* (n 39).

[66] UNHCR, *Unaccompanied Children Guidelines* (n 12) [8.2].

- have access to legal counsel and receive guidance and advice on all stages of the procedure;
- have the opportunity to present evidence concerning their personal circumstances and conditions in the country of origin;
- receive written decisions; and
- have the opportunity for formal review of a negative refugee status determination by a fair and independent tribunal.[67]

States have a heightened obligation to give unaccompanied or separated children access to appropriate asylum procedures that recognise that "certain vulnerable asylum-seekers require particular attention, understanding and sensitivity, especially if accelerated or otherwise curtailed procedures are introduced."[68] Specifically, unaccompanied children must not be refused entry or returned at the point of entry, or be subjected, alone, to detailed interviews by immigration authorities at the point of entry.[69] Instead, as soon as a separated child is identified, "a suitably qualified guardian or adviser should be appointed to assist them at all stages" and interviews be carried out by specially trained personnel.[70]

Additionally, the CRC imposes positive obligations on States to ensure that they receive access to appropriate interim care and protection until their refugee status is determined and a strategy for their ongoing care has been settled, as discussed further below.

3.3.2.3 Equality and non-discrimination

States' duty to ensure the equal enjoyment of rights without any discrimination, to remove obstacles to equality, and to act against discrimination by public and private agencies,[71] are foundational human rights recognised in the ICCPR,[72] the ICESCR,[73] and the CRC.[74] However, the right to equality and non-discrimination does not necessitate identical treatment

[67] Ibid [8.2]. See also UN Human Rights Committee, *General Comment No. 13* (n 37) [1], [17] regarding the correct interpretation of article 14 of the ICCPR.

[68] UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)* (n 39) [44], [50].

[69] Ibid [46].

[70] Ibid [46].

[71] Human Rights Committee, *General Comment No. 18, Non-discrimination*, UN Doc CCPR/C/21/Rev.1/Add. 1 (1989), [5], [10].

[72] ICCPR (n 3) arts 2(1) and 26.

[73] ICESCR (n 4) art 2(2).

[74] CRC (n 5) art 2.

and differential treatment is not discriminatory so long as "the criteria for differentiation [are] reasonable and objective and the aim is to achieve a purpose which is legitimate under the Covenant".[75] Accordingly, it is permissible for State asylum laws and policies to treat differently asylum seekers who arrive by boat (and this treatment will not constitute discrimination under the ICCPR) only if the State can establish that such treatment is reasonable and objective and that the aim of the differential treatment is to achieve a legitimate purpose under the ICCPR.[76] Border securitisation policies that distinguish between arrivals by boat and air, for example, are impermissible if the State cannot establish that the differentiation is both reasonable and objective and achieve legitimate ICCPR purpose.

States' human rights obligations should provide unaccompanied child asylum seekers with the legal framework necessary to protect them from refoulement, give them access to asylum procedures and interim care and protection until their refugee status is determined and protect them from illegitimate discrimination (particularly that based on their mode of arrival). States that implement these three principal human rights obligations would comprehensively respond to their vulnerabilities generated by their alienage examined in Chapter 2.

3.3.3 Human rights law and unaccompanied children's separation from their parents

This section now turns to identify the scope and content of States' human rights obligations that respond to unaccompanied children's separation from their parents. As captured in Table 3.2 above, States' human rights obligation that correlates with this vulnerability is to provide them with special protection and assistance including ensuring that their legal guardian considers their best interests as their basic concern. This section illustrates that if States' implemented these human rights law obligations they would adequately respond to the vulnerabilities generated by unaccompanied children's separation from their parents examined in Chapter 2.

3.3.3.1 State obligations to provide special protection and assistance including guardianship

There is no special provision in the Refugee Convention regarding the refugee status of unaccompanied minors or the provision of guardianship. However, the Final Act of the

[75] Ibid [13].

[76] A permissible purpose would be, for example, where differential treatment is required to protect the human rights of other persons.

Conference that adopted the Refugee Convention recommended that governments take the necessary measures for “the protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.”[77] The CRC, far more unequivocally, affirms the right of asylum-seeking children to appropriate protection and assistance, including through the provision of guardianship.[78]

The CRC explicitly provides for the provision of care and protection of refugee children and children deprived of their family environment. Article 20(1)[79] recognises the special vulnerability of children temporarily or permanently deprived of their family environment and their entitlement to “special protection and assistance provided by the State”. Further, Article 22(1) relevantly requires States to take appropriate measures to ensure that every child who is seeking refugee status receives appropriate protection and humanitarian assistance in the enjoyment of the rights contained in the CRC and such other human rights instruments ratified by the State.[80]

Articles 18(1) and 20(2) CRC explicitly provide for the provision of guardianship. Article 18(1) of the CRC provides:

> States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be *their basic concern* (emphasis added).

Article 20(2) then obliges the State to “ensure alternative care for such a child” including through the appointment of a guardian. Note that for the guardian the best interests of the child are to be **their basic concern** (emphasis added), not simply to be taken into account as **a primary consideration** (emphasis added). This is significant: Article 3 CRC requires an

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[77] UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons* (“*UN Conference of Plenipotentiaries*”) UN Doc A/CONF.2/108/Rev.1, (25 July 1951), para B(2).

[78] CRC (n 5) arts 20, 22.

[79] Ibid art 21: “A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.”

[80] Ibid art 22: “States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.”

administrative authority, legislative body or court taking action regarding a child to give active consideration to that child's best interests amongst other considerations. For the child's guardian, however, Article 18(1) requires them to have the child's best interests as their basic concern. The balancing of best interest considerations permitted by the State under article 3 is not permitted by a parent or guardian under article 18(1). They are held to a higher standard.[81] UNHCR Guidelines also make manifestly clear that governments should refer unaccompanied children seeking asylum to "an independent and formally accredited organization [and] appoint a guardian or adviser as soon as the unaccompanied child is identified."[82] They also require that "unaccompanied children should have a legal guardian in any legal proceedings that is able to advocate for the child's interests or to make decisions on their behalf".[83] The United Nations Committee on the Rights of the Child has noted that "the appointment of an independent guardian for unaccompanied child asylum seekers is the key procedural safeguard to ensure the child's best interests is respected".[84]

The CRC does not define guardianship or establish specific procedural safeguards for the appointment of a guardian or for decisions on alternative care for children deprived of their family environment. Nor does the Refugee Convention.[85] Recalling the discussion in Section 2.3.5 of Chapter 2 about the significance of the provision of effective guardianship to the child's welfare, apart from the CRC provisions relating directly to the provision of

[81] Note that there are potentially additional obligations on States where an unaccompanied minor is a victim of trafficking, has a disability or where there are additional factors of vulnerability. Under article 39 of CRC, States are obliged to take all appropriate measures to promote physical and psychological recovery and social reintegration of child victims of: "any neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts". The health, self-respect and dignity of child should dictate the environment in which the recovery and reintegration takes place. Moreover, under article 23 of the CRC, mentally or physically disabled children have the right to enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate active participation in the community and Article 1 of the CRPD obliges States to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."

[82] UNHCR, *Unaccompanied Children Guidelines* (n 12) [5.7].

[83] UNHCR, *Refugee Children Guidelines* (n 12) 126.

[84] *General Comment No. 6* (n 24) [21].

[85] Although the Final Act of the Conference that adopted the Refugee Convention recommended that governments take the necessary measures for "the protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption." *UN Conference of Plenipotentiaries* (n 77) para B(2).

guardianship, an extensive body of international soft law articulates State obligations to appoint a legal guardian to unaccompanied or separated children to safeguard the child's interests.[86]

General Comment No. 6 on the *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* also provides authoritative guidance on the six requirements for States' to discharge their guardianship duties to unaccompanied children.[87] States are required to:

- create the legal framework and take necessary measures to secure proper representation of, and safeguard, an unaccompanied child asylum seeker's best interests;
- ensure the guardian has the necessary childcare expertise to ensure their legal, social, health, psychological, material and educational needs are met in a continuum of care;
- ensure agencies or individuals whose interests could potentially be in conflict with those of the child's are ineligible for guardianship;
- monitor the quality of the exercise of guardianship to ensure the best interests of the child are represented throughout the decision-making process and to prevent abuse;
- provide unaccompanied children involved in asylum procedures or administrative or judicial proceedings with legal representation in addition to the appointment of a guardian; and
- ensure unaccompanied children are informed of arrangements with respect to guardianship and legal representation and that their opinions are taken into consideration.[88]

International human rights law also acknowledges the critical importance of the guardian's dual role as gatekeeper mediating the child's relationship of proximity with the State and as an individual in relationship with the child. By requiring the guardian to be independent of any agency or individuals whose interests could potentially conflict with those of the child[89] guardians advocate for the child's best interests as their basic concern. Particularly in the context of the Refugee Status Determination process, guardians ensure that: the child has

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[86] UNHCR, *Refugee Children Guidelines* (n 12) 101, 126; UNHCR, *Unaccompanied Children Guidelines* (n 12) [5.7]; UNHCR, *Refugee Status Determination Handbook* (n 12) [214].

[87] Besides *General Comment No. 6* (n 24) the *Refugee Children Guidelines* (n 12) and *Unaccompanied Children Guidelines* (n 12) provide further direction for States discharging guardianship obligations to unaccompanied children in accordance with International legal obligations.

[88] UN Committee on the Rights of the Child, *General Comment No. 6* (n 24) [33]-[38].

[89] Ibid [33].

access to free legal assistance and representation;[90] that interviews are conducted fairly; that all relevant information is presented and considered; and there is no procedural injustice. Since they are specifically vulnerable to both inadequate custodial care and poor representation in the Refugee Status Determination process, fully compliant State practice would also implement review mechanisms. These would monitor the quality of the provision of guardianship arrangements in place from their reception in the State until the finalisation of their asylum claim to ensure their best interests are represented throughout the decision-making process and, in particular, to prevent abuse.[91]

Human rights compliant State practice requires both that the guardian be appropriately qualified and have the requisite interpersonal competencies to engage with the child and that the child's effective participation is required to discharge the best interests, development, legal representation and accountability obligations of the guardian.[92] In implementing these human rights obligations it is clear that the guardian is not only a conduit between the child and the State's border control machinery or State service providers. The guardian is required to be in relationship with the child. Effective engagement with affected children capable of expressing their views and opinions is required for guardians to be able to determine the child's capacity to perceive their own best interests. It is also necessary for the guardian to determine what is in the child's best interests in decision-making about them (for example, their care, accommodation, education, language support or health care needs) to communicate these needs to their day-to-day carers and service providers.

A State guardianship framework that implemented these human rights obligations in practice would methodically respond to the vulnerabilities of unaccompanied child asylum seekers generated by their separation from their parents examined in Chapter 2.

3.4 Australia's failure to implement human rights protections in practice

So far, this chapter has illustrated that States' extensive human rights obligations to unaccompanied child asylum seekers would, if realised in practice, amply address their acute vulnerabilities generated by their minority, alienage, and separation from their parents. In fact, these obligations ought to provide a legal and normative counterbalance to securitisation

[90] This includes representation in proceedings implementing durable solutions, including any appeals or reviews. Ibid [69].

[91] Ibid [35].

[92] Ibid [37].

rhetoric and punitive laws and policies that aggravate the vulnerability of these children. Human rights has been the dominant counter narrative to securitised responses in the last thirty years. Yet, notwithstanding the growth of the number of States ratifying human rights conventions, refugee regimes in the Global North are increasingly practically based on the principle of deterrence through restrictive migration control policies rather than human rights protection. Asserting States human rights obligations to unaccompanied children has, to date, been insufficient to change State practice towards them in a way that balances their acute needs against State border control priorities. Instead, human rights obligations are demonstrably displaced by restrictive migration control laws in practice.[93] This is particularly so in Australia, despite it having ratified all of the Treaties discussed in this chapter. Under Australian law, ratification by the executive does not automatically lead to binding domestic obligations. Instead, a treaty must be explicitly legislated to be binding[94] and there has been negligible incorporation of relevant obligations into the *Migration Act* or the *IGOC Act*. However, as identified in Table 3.1 section 3.2 above, 23 of the State obligations to unaccompanied child asylum seekers are contained in the provisions of the CRC and 11 of the State obligations are contained in the ICCPR. The CRC and the ICCPR are scheduled to *Australian Human Rights Commission Act 1986* (Cth) informing its definition of "human rights". Relevantly that brings the function of inquiring into allegations of human rights abuses by the Commonwealth, including in relation to child asylum seekers, within the scope of the Australian Human Rights Commission's (AHRC) mandate. Pursuant to s11 of the *Australian Human Rights Commission Act 1986* (Cth) the AHRC has a mandate to inquire into breaches of human rights by the Commonwealth, to make findings and recommendations and to report to parliament. Moreover, the AHRC has powers to investigate alleged violations of the ICCPR, to monitor Australia's compliance with the ICCPR, including the power to examine whether federal legislation complies with Australia's obligations under the ICCPR. See s 11(1)(e) and s

[93] This is so, despite the extensive obligations that persist even after these children have been transferred to offshore processing centres.

[94] This reflects the principle in common law legal systems that agreeing to be bound by a treaty is the responsibility of the executive in the exercise of its prerogative power, while the parliament retains responsibility for law making. Most common law countries require specific enabling legislation to be passed by the Commonwealth Parliament and/or State and Territory Parliaments to incorporate the provisions of Treaties into domestic law for the provisions of a treaty to have domestic effect. In Australia, for example, Section 51(xxix) of the Australian Constitution, gives the Commonwealth Parliament the power to enact legislation that implements the terms of those international agreements to which Australia is a party. In contrast, in monist legal systems, States' international treaty obligations are automatically incorporated into domestic law.

11(1)(f). However, the AHRC has no penalty or enforcement powers where it finds human rights violations and/or makes remedial or compensatory recommendations. There is also limited provision in Australian domestic law for the incorporation of human rights into the common law.[95]

And so, notwithstanding Australia's human rights obligations the lack of a compelling mechanism in international human rights law to close the gap between obligation and enforcement has enabled successive Australian governments, as discussed previously in Chapter 1, to progressively amend the *Migration Act* to respond to asylum seekers arriving by boat in a way that takes these children further from human rights standards, not closer. This is illustrated by three examples in particular; the persistence of mandatory onshore immigration detention and offshore immigration detention, the implementation of Boat Turnback and Takeback policies that have practically prevented boat arrivals since December 2013,[96] and contemporaneous amendments to the *IGOC Act* that subordinated the Minister's guardianship obligations to these children to border control measures. The trajectory of these legislative changes has been a turning away from Australia's human rights obligations with respect to these children.

3.4.1 The persistence of the practice of onshore mandatory immigration deterntion and offshore immigration detention, despite repeated findings about the awful harms wreaked on children by immigration detention

Australia has persisted with its practice of legislatively mandating potentially indefinite mandatory immigration detention since 1994, apart from the brief New Directions hiatus

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[95] For further explanation of Australia's implementation of its human rights obligations, see Michael Kirby 'Domestic Implementation of International Human Rights Norms' [1999] 5(2) *Australian Journal of Human Rights* 109.

[96] See Janet Phillips, 'Boat arrivals and boat 'turnbacks' in Australia since 1976: a quick guide to the statistics', *Parliamentary Library Research Paper Series 2016-2017,* 2 ('Boat arrivals since 1976'). In 2013 300 boats arrived carrying 20,587 asylum seekers. The government has reported that one boat arrived in 2014 and none in 2015 or 2016. Phillips reports that 2014 arrivals "include 2 medical transfers on 31 January and 2 February 2014 from SIEV 879 (this boat was reportedly 'turned back' and not counted as an arrival); 157 people on board a boat from India intercepted on 27 July 2014 – the passengers were subsequently transferred to Curtin Detention Centre and then to Nauru for processing (this boat was counted as an arrival, but 41 people on board another boat intercepted at the same time were returned to Sri Lankan authorities at sea); and 1 Sri Lankan national on board a boat intercepted on 15 November 2014 who was referred for refugee determination and transferred to Manus Island for processing (the 37 other passengers were transferred at sea to Sri Lankan authorities and the boat was not counted as an 'arrival')."

between 2005 and 2009.[97] The introduction of mandatory immigration detention in 1994 breached Australia's obligations under the ICCPR prohibiting arbitrary detention which Australia had ratified on 13 August 1980, and the CRC prohibiting the mandatory detention of child asylum seekers other than for the shortest possible period of time which Australia had ratified on 17 December 1990. The 1994 amendment initiated the deliberate bifurcation between Australian domestic migration law and its international human rights obligations. It set the tone for the preeminence of securitisation over care and protection as a defining features of the relationship between Australian and asylum seeking children.

The terrible impacts of Australia's policies of mandatory onshore immigration detention and offshore immigration detention on children have been thoroughly documented in reports of national inquiries conducted by Australia's National Human Rights Institution published in 2004 and 2014.[98] Both reports provided graphic evidence of the damaging impact of immigration detention on children and found that it perpetuated a multitude of human rights breaches including exposing them to arbitrary detention and inhumane and cruel treatment and punishment. They also found that mandatory immigration detention, specifically, can never be in a child's best interests and that Australia's immigration detention law and policy framework was fundamentally inconsistent with the CRC.[99] The first report captured vividly how the length, indeterminacy and inhospitable conditions of detention up to 2004, particularly in the centres that were very remote from urban centres precipitated pervasive unrest and periodic rioting. Numerous child detainees sewed their lips together, drank shampoo and attempted suicide.[100]

Human rights advocates and academics have also been highly critical of the extensive human rights abuses suffered by asylum seekers as a consequence of their prolonged detention

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[97] The *Migration Reform Act 1992* which came into effect on 1 September 1994.

[98] Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention*, (Commonwealth Government, 2004) *('A Last Resort?')*; Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (Commonwealth Government, 2014) ('*The Forgotten Children').*

[99] Human Rights and Equal Opportunity Commission, *A Last Resort?* (n 98) 5, 283-356.

Australian Human Rights Commission, *The Forgotten Children* (n 98), 29, 54, 62,151-169, 192-195.

Relevantly too, *The Forgotten Children* report found that the detention of all children who arrive without a visa as the first and only option without special considerations for unaccompanied children constituted a breach of articles 37(b) and 20(1) of the CRC, 241.

[100] Human Rights and Equal Opportunity Commission, *A Last Resort?* (n 98) 297.

in unsuitable conditions in Australia's onshore immigration centres.[101] Although many States detain unauthorised arrivals in specific circumstances, Australia mandates immigration detention for all unauthorised arrivals.[102] These reports have highlighted the repeated abject failures of successive governments to relieve these children from the damaging impact of mandatory immigration detention which, despite the *New Directions* hiatus, has been the norm in Australian law for asylum seekers arriving by boat for thirty years.

The persistence of the practice of onshore mandatory immigration detention and offshore immigration detention illustrates the abject failure of human rights to prevent the acute harms to these children as a consequence of Australian law and policy. The practice continued despite substantiated reports of the human rights abuses it generated and notwithstanding growing sociological understandings of the significance of protecting, caring for and providing for the development of children and medical evidence about the devastating long term impacts of immigration detention related trauma.

There are currently no unaccompanied child asylum seekers in onshore mandatory immigration detention or offshore detention because those that arrived prior to the reintroduction of offshore processing and the Boat TurnBack and Takeback policy have turned 18.

3.4.2 Return to offshore processing and Boat Turnbacks in 2012-2014

The return to offshore processing and Boat Turnbacks and Takebacks between 2012 and 2014 further illustrates the ultimate ineffectiveness of human rights in practice to limit the worst excesses of Australia's securitised responses to unaccompanied child asylum seekers. This return occurred against a background of longstanding condemnation of Australia's earlier flouting of its human right obligations to asylum seekers during the Howard (Coalition)

[101] See, for example, Mary Crock, 'You Have To Be Stronger than Razor Wire': Legal Issues Relating to the Detention of Refugees and Asylum Seekers' (2002) 10 *Australian Journal of Administrative Law* 33; Tania Penovic, 'Immigration Detention of Children: Arbitrary Deprivation of Liberty' (2003) 7 *Newcastle Law Review* 56; Tania Penovic and Adiva Sifris, 'Children's Rights through the Lens of Immigration Detention' (2006) 20 *Australian Journal of Family Law* 12; Tania Penovic, 'The Separation of Powers: *Lim* and the "Voluntary" Immigration Detention of Children' (2004) 29 *Alternative Law Journal* 222; Andreas Schloenhardt, 'Deterrence, Detention and Denial: Asylum Seekers in Australia' (2002) 22 *University of Queensland Law Journal* 54; Andreas Schloenhardt, 'To Deter, Detain and Deny: Protection of Onshore Asylum Seekers in Australia' (2002) 14 *International Journal of Refugee Law* 302.

[102] Janet Phillips and Harriet Spinks "Immigration detention in Australia" *Parliament of Australia Background Note* (Department of Parliamentary Services, 2013), 2.

Government's earlier Pacific Solution. The transfer of asylum seekers to third countries under the first iteration of the Pacific Solution was comprehensively condemned for the extensive human rights breaches manifested by the arrangements.[103] The impact of offshore processing on the psychological wellbeing of asylum seekers was devastating. In figures provided by the Department in response to Questions on Notice at the 2006 Senate Legal and Constitutional hearings into the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*[104] by 2005, each of the 27 asylum seekers remaining on Nauru had mental health concerns, with ten taking anti-anxiety medication, four taking anti-psychotic medication and seven taking anti-depressants. Between 2002 and 2005 the Department itself had documented eleven incidents of self-harm, an attempted suicide, a hunger strike involving 45 detainees, and incidents of adjustment disorder, acute stress reaction, anxiety, depression, reactive depression, severe depression, post traumatic stress disorder; insomnia, obsessive compulsive disorder and somatisation disorder.[105]

The utilisation of Boat Turnbacks and Takebacks was also extensively criticised for shirking Australia's international obligations to asylum seekers, including non-refoulement.[106] There were also credible reports that people lost their lives and were seriously injured as a result of these operations.[107] The reintroduction of these policies post 2012 was a flagrant

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[103] See for example, Kazimierz Bem et al, *A price too high: the cost of Australia's approach to asylum seekers*: *The Australian Government's policy of offshore processing of asylum seekers on Nauru, Manus Island and Christmas Island* (A Just Australia and Oxfam Australia, 2007) (*A price too high)* <http://pandora.nla.gov.au/pan/76526/20070910-1523/www.oxfam.org.au/media/files/APriceTooHigh.pdf >.

[104] Figures provided in response to Questions on Notice, Senate Legal and Constitutional hearings into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, 26 May 2006.

[105] Kazimierz Bem et al (n 103) 17.

[106] Jane McAdam and Kate Purcell, 'Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum' (2008) 27 *Australian Year Book of International Law* 87; Susan Kneebone, 'The Pacific Plan: The Provision of "Effective Protection"?' (2006) 18 *International Journal of Refugee Law* 696; Savitri Taylor, 'The Pacific Solution or a Pacific Nightmare?: The Difference between Burden Shifting and Responsibility Sharing' (2005) 6 *Asian-Pacific Law and Policy Journal* 1*;* Mary Crock, 'In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows' (2003) 12 *Pacific Rim Policy Journal* 49; Penelope Mathew, 'Australian Refugee Protection in the Wake of the *Tampa'* (2002) 96 *American Journal of International Law* 661*;*

[107] George Roberts, 'UNHCR interviews asylum seekers over forced return to Indonesia', *AM* (online at 18 March 2014 <http://www.abc.net.au/am/content/2014/s3965710.htm>; Michael Bachelard, 'Investigation: "Burned hands" on the high seas', *Sydney Morning Herald* (online at 7 February 2014) <http://www.smh.com.au/world/investigation-burned-hands-on-the-high-seas-20140206-hvbdl.html#ixzz2salkUX2y>; Peter Alford, 'ABC navy brutality reports unravel', *The Australian* (online at 1 February 2014) <online at: http://www.theaustralian.com.au/news/abc-navybrutality-reports-unravel/story-e6frg6n6-1226815392921>.

breach of Australia's human rights obligations to them and contemptuous of the crippling impact of offshore immigration detention on asylum seekers. Between December 2013 and October 2016 Australia turned back 29 boats carrying 740 asylum seekers.[108] The UNHCR Special Missions and Monitoring Visits to Nauru and Manus Island have reported devastating human rights abuses arising from the conditions in the offshore processing centres beyond the fact of mandatory immigration detention.[109] Once again, numerous reports from domestic human rights advocates and academics have condemned the reintroduction of these policies and their deleterious impact, especially on children.[110] Still, there have been no changes to the laws.

3.4.3 The subordination of the Minister's guardianship obligations in the IGOC Act to his border control functions in the Migration Act

The third legislative change that was determinative of Australia's closing down of its compliance with its human rights obligations to unaccompanied child asylum seekers was the subordination of the Minister's guardianship obligations in the *IGOC Act* to his border control functions in the *Migration Act* in 2012. Prior to this amendment, similarly to the two legislative changes already discussed, the inadequacy of Australia's existing arrangements to provide

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[108] Janet Phillips, 'Boat arrivals since 1976' (n 96) 5-6.

[109] See UNHCR, *Mission to the Republic of Nauru, 3 to 5 December 2012 report* ((UNHCR, 2012) and UNHCR, *Monitoring visit to the Republic of Nauru 7 to 9 October 2013* (UNHCR, 2013).

[110] Australian Human Rights Commission, *The Forgotten Children,* (n 98) Senate Legal and Constitutional Affairs Committee, *Conditions and Treatment of Asylum Seekers and Refugees at the Regional Processing Centres in the Republic of Nauru and Papua New Guinea* (Commonwealth Government, 2016); Philip Moss, *Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru Final report* (Department of Immigration and Border Protection, 2015). Amnesty International, *Nauru Offshore Processing Facility Review 2012* (Amnesty, 2012); Amnesty International, *Island of Despair: Australia's "Processing" of Refugees on Nauru* (Amnesty, 2016); Human Rights Watch and Amnesty International, *Australia: Appalling Abuse, Neglect of Refugees on Nauru: Investigation on Remote Pacific Island Finds Deliberate Abuse Hidden Behind Wall of Secrecy* (online at 2 August 2016) < https://www.hrw.org/news/2016/08/02/australia-appalling-abuse-neglect-refugees-nauru>. The Australian Churches Refugee Taskforce, *All the Lonely Children: Questions for Policy Makers Regarding Guardianship for Unaccompanied Minors* (Australian Churches, 2013) reported on existing and emerging concerns regarding the guardianship of refugee and asylum seeking children in 2012-2013. Wendy Bacon et al, *Protection denied, Abuse Condoned: Women on Nauru at Risk*, (Australian Women in Support of Women on Nauru, 2016) (online 22 July 2016) <https://www.asrc.org.au/2016/07/22/protection-denied-abuse-condoned-women-on-nauru-at-risk-report/>. Lastly, see Paul Farrell et al, 'The Nauru Files: Cache of 2,000 Leaked Reports Reveal Scale of Abuse of Children in Offshore Detention', *The Guardian (Australia)*, (online at 10 August 2016) < https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention>.

adequate guardianship for unaccompanied child asylum seekers consistent with its obligations under the CRC had been thoroughly documented.[111] In 2012, Australia was also the only State in which the government representative responsible for regulating migration was also the appointed guardian of unaccompanied children.[112] Again, notwithstanding the explicit human rights failings in the pre 2012 guardianship arrangements arising from the inherent conflict of interest, the 2012 amendments exacerbated the conflict. These amendments clearly breach Australia's obligations to provide an independent and effective guardian under the CRC. The breach had an instrumental impact in practice. There was no independent statutory guardian to represent the best interests of children subject to offshore processing by, for example, arguing that the immigration detention environment inhibits their recovery from past trauma and exposes them to ongoing stress and the threat of violence, or to contest the suitability of offshore processing because of their individual circumstances. These acutely vulnerable children were denied even a cursory response to their separation from their parents.

In sum, Australian migration law and policy impacting unaccompanied child asylum seekers has not, from its inception, been developed from first principles that are human rights compliant. Instead of being driven by human rights informed responses to the acute vulnerability of unaccompanied child asylum seekers, Australian law and policy responses have been driven by political imperatives. The three key legislative moments examined in this section were instrumental in closing down Australia's domestic realisation of its human rights obligations to unaccompanied child asylum seekers. This reveals a political weakness of the human rights system in achieving justice for particularly vulnerable groups. There is no correlation between the egregiousness of breaches or the degree of vulnerability of the subject and the level of domestic accountability. Human rights norms have effectively created normative and legal change in different contexts across the globe but Australia illustrates that

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[111] See the Australian Churches Refugee Taskforce (n 110). Mary Crock and Mary-Anne Kenny, 'Rethinking the Guardianship of Refugee Children after the Malaysia Solution' (2012) 34 *Sydney Law Review* 437 and legal practitioners including Julie Taylor 'Guardianship of Child Asylum-Seekers' 34(1) (2006) *Federal Law Review* 204, and Maria O'Sullivan, 'The 'Best Interests' of Asylum-Seeker Children: Who's Guarding the Guardian?' (2013) 38 (4) *Alternative Law Journal* 228. Also, the Australian Human Rights Commission, *The Forgotten Children* (n 98) found that "the Minister for Immigration and Border Protection does not meet the criteria set out by the Committee on the Rights of the Child (in para 33 of General Comment No 6) to effectively perform the role of guardian for unaccompanied children), 171.

[112] The relevant guardianship case law in the context of unaccompanied children prior to the 2012 statutory amendments has been extensively examined by academics, notably Mary Crock and Mary-Anne Kenny (n 111) and legal practitioners including Julie Taylor (n 111), and Maria O'Sullivan (n 111).

they have not been sufficient, at this stage, to prevent human rights abuses in the context of unaccompanied children seeking asylum from Australia by sea. Australia currently lacks an effective domestic mechanism to ensure adequate protection of these children's rights. Without legislation that more comprehensively enlivens Australia's international human rights obligations to unaccompanied asylum seeking children, they remain unrealised aspirations. The chasm between Australia's obligations in international law and their realisation on the ground continues to widen as the government asserts its right to control its borders by such laws and policies as it sees fit. Unless or until Australia willingly incorporate its obligations into domestic law, or enforcement mechanisms for State human rights violations are strengthened, human rights law is evidently inadequate to counter the progressive degrading of the treatment of unaccompanied children seeking asylum by boat under Australian law.

3.5 Conclusion

This chapter has argued that although States' human rights obligations provide the existing normative response to the acute vulnerability of these children, this response has been insufficient as a check on securitisation policies to prevent real harms being perpetrated on them.

It argued that to comprehend how effectively international human rights law responds to the triple vulnerabilities of these children requires firstly identification of States' human rights obligations and secondly, the mapping of those obligations onto the three sites of vulnerability: their minority, alienage and separation from their parents. In attending to the identification of State obligations, I argued that their dispersal across the core international human rights legal instruments and the Refugee Convention obscures their extensive nature and works against an holistic conception of the obligations. I addressed this by synthesising those dispersed obligations into twenty six core obligations to these children. To illuminate the relationship between these obligations and the three sites of these children's vulnerability I then correlated the obligations with each of the three sites of vulnerability. Having then articulated the full scope and content of State obligations to respond to each site I concluded that States' full implementation would, if realised in practice, amply alleviate these sites of vulnerability of these children.

However, the acute human rights breaches consequent to Australia's harsh response to these children in successive regressive changes in law and policy illustrates how, in practice, human rights obligations have been manifestly inadequate as a limiting mechanism to curb the

exacerbation of these children's vulnerabilities in domestic securitised responses to them. This dissonance between obligations and response generates a gap where unaccompanied children are egregiously harmed. It is in this gap that I argued we must find another way to respond to the triply vulnerable unaccompanied child asylum seeker. Advocacy will, and should, continue urging legal and policy changes that give full effect to human rights obligations. However, an additional interim change to the way law and policy responds to these children that avoids exacerbating their vulnerability until States realise their human rights obligations is necessary to halt these grave breaches. This change requires a reconceptualisation of our understanding about the relationship between unaccompanied child asylum seekers and the State where they are seeking asylum and the obligations that arise because of that relationship.

In the following chapter, I argue that a vulnerability approach can step into the gap, and provide the underpinning for a State response to unaccompanied minor asylum seekers that protects them as being/becoming children in the context of their triple vulnerability, without displacing their ultimate human rights claims.

4 THE POTENTIAL OF EXPANDING VULNERABILITY THEORY TO PRIORITISE STATE RESPONSES TO UNACCOMPANIED ASYLUM SEEKING CHILDREN

4.1 Introduction

This thesis so far has laid the foundation for a reconceptualisation of the way we respond to the vulnerabilities of unaccompanied asylum seeking children. By outlining their triple vulnerability, the extent and urgency of their need for State protection is made clear. International human rights law establishes substantive and unambiguous obligations on States to protect, assist and act in unaccompanied children's best interests while their claim is processed in recognition that they are amongst the world's most vulnerable children but does not necessarily create enforceable domestic legal obligations. Australia's extensive human rights obligations to these children would, if fully realised, be sufficient to address their triple vulnerability but domestic laws and policies do not adequately require the realisation of these obligations and have, in practice, been insufficient to prevent acute harms. We need a new approach that exposes what is as stake for unaccompanied child asylum seekers when laws and policies close off the possibility of human rights protections and that prioritises responding to the sites of unaccompanied minors' most acute vulnerability.

This chapter argues that vulnerability theory provides a compelling supplementary normative ethical justification to hold States accountable domestically for the way they respond to unaccompanied asylum-seeking children. Its central utility is its alternative anchoring in vulnerability rather than human rights and therefore its suitability to argue for an immediate State response to this triply vulnerable group, without diminishing the significance of a human rights standard for all asylum seekers. But vulnerability theory as traditionally conceived excludes unaccompanied non-citizen children from its protective scope because scholars have implicitly restricted analysis of States' obligations on account of vulnerability to citizens as the

archetypal liberal subject.[1] And so, vulnerability theory, which provides a compelling normative framework for urgently holding States to account for their role in immediately ameliorating or exacerbating peoples' vulnerabilities, excludes these children *because they are non-citizen asylum seekers*. I argue that while human rights and vulnerability theory both have gaps that currently prevent them from effectively responding to the urgent and acute needs of these children, the gap in vulnerability theory can, and ought to, be closed by expanding its scope to encompass unaccompanied asylum seeking children. In this chapter I argue that, so extended, vulnerability theory provides the necessary normative justification for a supplementary framework that grounds States' domestic obligation to respond to these children's triple vulnerability without displacing the broader framework of human rights.

4.2 The conceptual foundations of vulnerability theory

The notion of vulnerability is not new in law, having ancient origins in common law equitable jurisdictions and the provision of legal guardianship mechanisms. Discussions of the specific vulnerability of certain populations and groups and the adequacy of legal responses to those groups features prominently and extensively in scholarly research on ethics, law and human rights.[2] Vulnerability theory as referenced in this thesis, was articulated as an alternative to existing identity-based equality models in law by Martha Fineman in 2008. It is a distinct theory which captures, but also necessarily extends beyond, general discussions of vulnerability.

Fineman's vulnerability theory essentially proposes a reconceptualisation of the relationship between the State and its subjects. The foundation for this reconceptualisation is recognition that actual and potential vulnerability is a universal and constant attribute of all humans. A key conceptual strength of vulnerability theory is that it highlights the normative relevance of embodied vulnerability and the ensuing inequalities deriving from distinct individual embodied experiences.[3] It exposes how all people simply by virtue of their physical embodiment require specific conditions for survival, are necessarily socially and relationally

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[1] Martha Alberston Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251, 269 ('The Responsive State').

[2] See for example, Bryan Turner, *Vulnerability and Human Rights* (Pennsylvania State University Press, 2006), David Weissbrodt and Mary Rumsey (eds), *Vulnerable and Marginalised Groups and Human Rights* (Edward Elgar Publishing, 2011).

[3] Anna Grear, 'Vulnerability, Advanced Global Capitalism and Co-Symptomatic Injustice: Locating the Vulnerable Subject' in Martha Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law And Politics* (Ashgate 2013) 44-46.

dependent on others at some parts of their lives (as babies/children and again in old age). People are also universally susceptible to dependency at other points because their embodiment makes them prone to illness and injury and susceptible to harm as a consequence of social, economic and political events. Following from this, Fineman argues that premising analysis of social institutions and socio-political structures on the traditional liberal subject instead of the vulnerable subject is inherently problematic.

By articulating our shared universal vulnerability, this theory challenges the classical liberal paradigm of the rational, free-choosing, autonomous, and able-bodied person of equal standing in society in relation to others.[4] It rejects this invulnerable, disembodied, and de-contextualised liberal subject in favor of a vulnerable subject.[5] Fineman and subsequent vulnerability theorists have resisted the restriction of the concept of vulnerability "to defined groups of fledgling or stigmatized subjects"[6] as well as associations of vulnerability with "victimhood, deprivation, dependency, or pathology."[7] Rather, they posit vulnerability as a preferable and more authentic justification to protect classes and group identities (such as race and gender) for anchoring substantive equality and distributive justice in liberal democracies.[8]

Premising analysis on the vulnerable subject rather than the traditional liberal subject disrupts the persistence of inequality that flows from analysis being normatively premised on white privileged males. It also has a profound impact on challenging assumptions underpinning the law in liberal democracies, which are equally premised on citizens as purportedly free-choosing, autonomous, and able-bodied legal subjects of equal standing. Vulnerability theory unpicks the relationships between people's vulnerability and their social, political and economic positioning in society by examining the interconnectedness of individuals' distinct experiences and their accumulation of resilience. This examination

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[4] Martha Alberston Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition', (2008) 20(1) *Yale Journal of Law and Feminism* 1 ('Anchoring Equality'); Martha Alberston Fineman, 'The Responsive State' (n 1) 25.

[5] Martha Alberston Fineman, 'Anchoring Equality' (n 4) 8.

[6] Ibid.

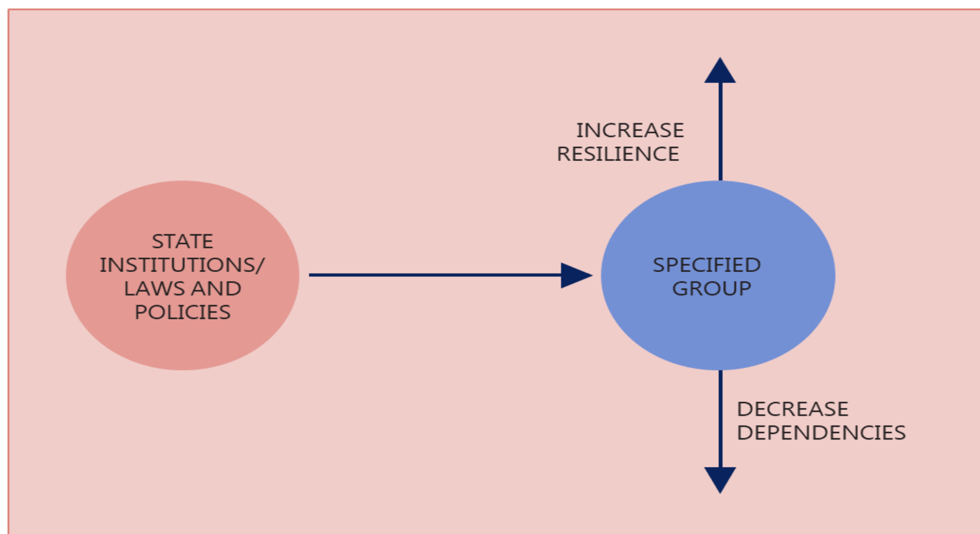
[7] Ibid.

[8] See Judith Butler, *Frames of War: When is life grievable?* (Verso, 2009) 14. Butler also argues that an inclusive and egalitarian recognition of the precariousness of all people "should take the form of concrete social policy regarding issues such as shelter, work, food, medical care, and legal status" at 13.

challenges the liberal assumption that individuals have equal opportunities to accumulate resources or to access social or institutional support.[9]

Grounded in the reality that humans are interdependent for the fulfilment of our needs, vulnerability theory highlights the ways that State action/inaction is either vulnerability-mitigating and resilience-building for these unequally positioned groups or resilience-degrading and dependency-increasing. It also reveals the structural biases and harms embedded in, and obscured by, political and legal institutions. Vulnerability theory ultimately tugs at the stitching of conventional liberal philosophy premised on limited State responsibilities to able-bodied legal subjects of equal standing and instead argues that the logical corollary of the vulnerable subject is what Fineman calls the responsive state.[10] Attending to the responsive state, as illustrated in Diagram 2, "The relationship between group vulnerability and the responsive state" enables interrogation of a causative rrelationship between State laws and policies and the resiliencies and dependencies of specified groups

Diagram 2: The relationship between group vulnerability and the responsive state



Governments are responsible for reducing, mediating and ameliorating the unequal burden on individuals whose vulnerabilities are generated by normative social, and political and institutional inequalities by programmatic, structural and institutional reform.[11]

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[9] Martha Albertson Fineman, 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics' in Martha Albertson Fineman and others (eds), V*ulnerability: Reflections on a New Ethical Foundation for Law And Politics* (Ashgate 2013) 17, 19 ('Equality, Autonomy, and the Vulnerable Subject').

[10] Martha Alberston Fineman, 'The Responsive State' (n 1) 269.

[11] Martha Albertson Fineman, 'Anchoring Equality' (n 4) 8-10.

The remedy proposed by vulnerability theory is to premise any analysis of social institutions and socio-political structures on the vulnerable subject. This disrupts the inequality that necessarily flows when analysis is premised on the traditional liberal subject, that is, on an individualistic conception of autonomy and the incorrect presumption that we are *a priori* equally positioned in society.[12] The appropriate State response is to reduce the unequal burden on individuals with vulnerabilities generated by normative social, legal and political and institutional inequalities by assisting them to accumulate resiliencies (physical, human, social, and environmental assets or resources). This will address the effects of vulnerability and gradually remedy it.

Vulnerability has been criticised for being "slippery."[13] Scholars have cautioned that vulnerability theory's perceived "conceptual fluidity" impedes its clarity as an analytical tool and inhibits its practical application for interventions in law or public policy.[14] Indeed, Terry Carney has argued that while "usages differ across disciplines, none pin down its meaning with much precision and law is no exception – vulnerability theory remains too capacious and ill-defined to provide more than false hope in substantive reform of social security law."[15]

Legal scholars have begun work on addressing this lack of specificity in exploring the application of vulnerability theory to the law. These include Jonathan Herring in children's law, family and carers law,[16] Beverley Clough in disability scholarship[17] and Terry Carney in

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[12] Susan Dodds, 'Depending on Care: Recognition of Vulnerability and the Social Contribution of Care Provision' (2007) 21 *Bioethics* 500, 507.

> "We are all vulnerable to the exigencies of our embodied, social and relational existence and, in recognising this inherent human vulnerability, we can see the ways in which a range of social institutions and structures protect us against some vulnerabilities, while others expose us to risk".

[13] Shelley Bielefeld, 'Cashless Welfare Transfers for "Vulnerable" Welfare Recipients: Law, Ethics and Vulnerability' (2018) 26 *Feminist Legal Studies* 1, 1-2.

[14] Terry Carney, 'Vulnerability: False Hope for Vulnerable Social Security Clients?' (2018) 41(3) *University of New South Wales Law Journal* 783, 786 ('Vulnerability'); Kate Brown, Kathryn Ecclestone and Nick Emmel, 'The Many Faces of Vulnerability' (2017) 16 *Social Policy and Society* 497, 498.

[15] Terry Carney, ibid 783. Carney also acknowledges criticisms of vulnerability theory by scholars for being "susceptible to abuse by powerful interests intent on increasing coercive surveillance, discipline and disentitlement for those designated as "vulnerable."'

[16] Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016).

[17] Beverley Clough, 'Disability and Vulnerability: Challenging the Capacity/Incapacity Binary' (2017) 16 *Social Policy and Society* 469. See also Mikaela Heikkilä, Hisayo Katsui and Maija Mustaniemi-Laakso, 'Disability and Vulnerability: A human rights reading of the responsive state' (2020) 24(8) *The International Journal of Human Rights* 1180 https://doi.org/10.1080/13642987.2020.1715948.

social security law.[18] There is more theoretical work to do in refining vulnerability theory as a tool for legal analysis. The distinction between scholarship that explicitly applies vulnerability theory and scholarship that discusses the relationship between the law and vulnerable populations without engaging vulnerability theory is instrumental. This is because the failure to make engagement (or not) with vulnerability theory explicit may contribute to a perception that vulnerability theory, rather than the concept of vulnerability itself, is overly capacious. In this thesis I have addressed this distinction in practice by distinguishing between the vulnerability of unaccompanied child asylum seekers in the ordinary sense in the discussion in Chapters 2 and 3 and the application of vulnerability theory in this and the following chapters.

This thesis applies vulnerability theory in the context of asylum seeker rights and border protection to flesh out what might constitute a necessary State response in practice. Despite its critics, vulnerability theorists argue that a rethinking of the traditional structure of legal regulation ought to logically follow from recognising all people's mutual vulnerability and reliance on State assistance.[19] Herring has argued that "a legal response based on a norm of vulnerable people would be a more realistic and effective one."[20] I agree. I argue that applying vulnerability theory in the particular context of State border regulation practices has two key instrumental values. Firstly, comprehending the universal dependence of unaccompanied child asylum seekers on the State *and* the particularity of their vulnerability is necessary to determine a requisite holistic response to them as being/becoming children. Secondly, it clarifies the way that the law particularly privileges and provides for the normative liberal subject and fails those that are not,[21] and identifies the sites where those failures manifest in order to better address them.

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[18] There is also Judith Butler's closely related scholarship of precariousness and Laurie Berg's scholarship on the precariousness of migrant workers Laurie Berg, *Migrant Rights at Work: Law's Precariousness at the Intersection of Immigration and Labour* (Routledge, 2016) 13.

[19] Martha Albertson Fineman, 'Grappling with Equality: One Feminist Journey' in Martha Albertson Fineman (ed), *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory* (Routledge, 2011) 58 ('Grappling with Equality').

[20] Jonathan Herring 'Forward' (2018) 41(3) *University of New South Wales Law Journal* 626.

[21] Ibid. Herring notes that Fineman spells out the significance of premising analysis of the law on the liberal subject "marked by autonomy, self-sufficiency, and self-determinacy" quoting Fineman: "When we only study the poor, the rich remain hidden and their advantages remain relatively unexamined, nestled in secure and private spaces, where there is no need for them or the state to justify or explain why they deserve the privilege of state protection. ... We need to excavate these privileged lives." See Martha Albertson Fineman, 'Grappling with Equality' (n 19) 58.

Unaccompanied child asylum seekers are vulnerable like all humans because childhood is a universal time of precariousness where children are dependent on adults to meet their care, protection and development needs.[22] Vulnerability theory resists construing an individual or group as more or less vulnerable, uniquely vulnerable, or specifically or especially vulnerable being premised as it is, on vulnerability being both universal and constant. On a surface reading, this seems to resist acknowledging that layers of interwoven vulnerabilities may underpin the universal vulnerability of particular individuals, or groups such as unaccompanied child asylum seekers. Vulnerability theory is not blind to these. Instead of comparing individuals or groups as *prima facie* more or less vulnerable, it accommodates particular vulnerabilities at the point of an individual's or group's increased dependency or increased resilience, as amplified by State practice. In this way, vulnerability theory acknowledges their universal vulnerability as normatively dependent children[23] and their dependence on State practice as a site that can either increase their dependencies or build their resilience by addressing their complex triple burden of minority, alienage and separation from their parents,[24]

The law commonly privileges and provides for the normative liberal subject and fails the vulnerable.[25] It is here that vulnerability theory chimes most clearly for the need for disruption. Herring succinctly captures the argument:

> the role of the law can shift to restricting and reducing the power of the powerful, rather than seeking to protect the vulnerable from an exercise of power. Those labelled 'vulnerable' are not some pre-existing category but better seen as having been labelled as such in order to legitimate political ends and to justify current inequalities.[26]

Disruption is especially necessary for unaccompanied child asylum seekers in States like Australia who are demonised to legitimate and justify border securitisation practices and

[22] Martha Albertson Fineman, 'Anchoring Equality' (n 4) 1, 8 and 12.

[23] See John Tobin, 'Understanding Children's Rights: A Vision beyond Vulnerability' (2015) 84 (2) *Nordic Journal of International Law* 155.

[24] Jacqueline Bhabha, 'Independent Children, Inconsistent Adults: International Child Migration and the Legal Framework' *Innocenti Discussion Paper* (UNICEF Innocenti Research Centre, 2008). Bhabha references the "triple burden" as a statement of fact but she does not theorise its content.

[25] For example, by assuming that the person before the law is, cis-gendered, able bodied or neoro-typical.

[26] Jonathan Herring 'Forward' (n 20).

rhetoric in defiance of Australia's obligations as the paradigmatic duty-holder to respond to these children upon arrival.[27]

Vulnerability theory provides a new way of looking at the relationship between the State and the non-citizen child seeking asylum *and* States' accountability for the impacts of State practice arising from that special relationship. Recognising that unaccompanied children's experience of vulnerability, like all peoples, is shaped by their social, economic and political positioning in society, vulnerability theory interrogates government choices about the quantity and quality of assistance provided to these children through State programs, institutions, laws and policies, and the way that this contributes to their accumulation, or degradation, of resilience. By illuminating their profound dependence on the State by virtue of their minority and by being unauthorised in a State and seeking asylum without parents to mediate, compensate, and lessen their vulnerability and to support and develop their resilience, vulnerability theory emphasizes the responsibility of government to mediate, compensate, and lessen their vulnerability. As discussed in Chapter 2, since the provision of legal guardians is the normal legal response by States to arrival of unaccompanied children in their jurisdiction, vulnerability theory also exposes the imperative significance of their legal guardian as gatekeeper of their access to State institutions that provide primary care, protection, development and legal services.

Vulnerability scholarship thus connects the relationship between these children's vulnerability, the impact of State practice, and State responsibilities for institutions legitimised and empowered by the State that increase, or undermine, their resiliencies.[28] But, as noted in section 4.1 above, vulnerability theory has traditionally been confined to citizens as liberal subjects and so excludes these children as depicted in Diagram 3 "Vulnerability theory as a supplementary imperative for an urgent response to non citizen children?"

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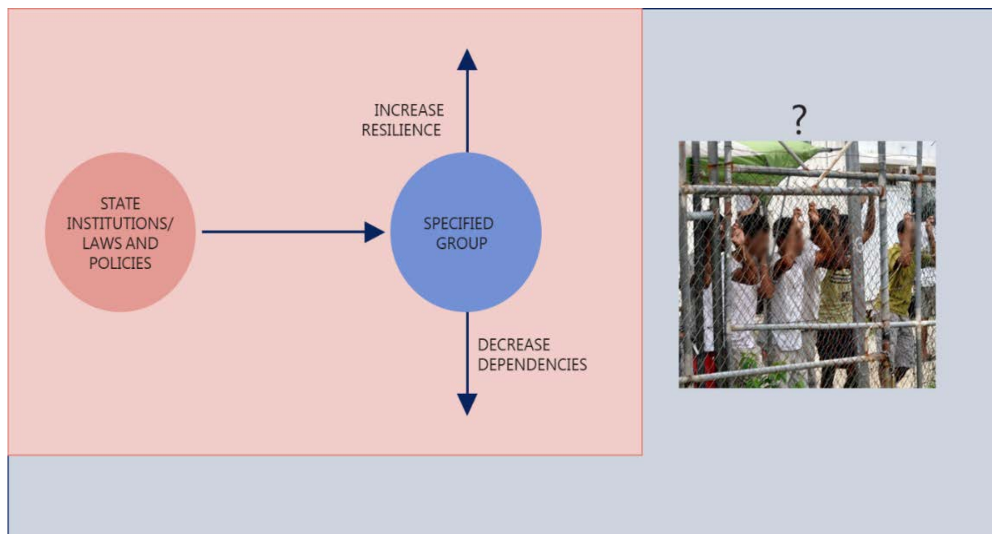
[27] In addition to being the human rights duty holder. See Bryan Turner, *Vulnerability and Human Right*s (Pennsylvania State University Press, 2006) 33.

[28] Martha Albertson Fineman, 'Equality, Autonomy, and the Vulnerable Subject' (n 9) 13, 22.

Diagram 3: Vulnerability theory as a supplementary imperative for an urgent response to non citizen children?



The next section argues that vulnerability theory should be expanded to apply to unaccompanied child asylum seekers because their vulnerability and the nature of their spatial, temporal and relational proximity to the territory of a State legitimately brings them within vulnerability theory's protective scope.

4.3 Expanding vulnerability theory beyond the citizen insider to encompass unaccompanied child asylum seekers: the Proximate Vulnerable Child

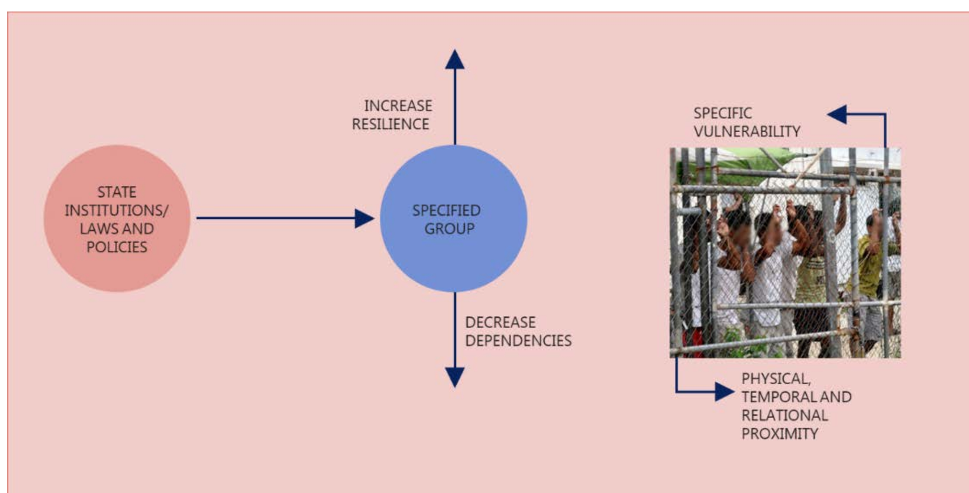
Fineman has stated in passing that non-citizens "should be afforded equality on the same terms as citizens if they are residents of the state or long term visitors or have some *other connection* that would make placing state responsibility for them and their situation appropriate" (emphasis added).[29] I argue that the highlighted reference to *other connections* is key in expanding vulnerability theory to unaccompanied child asylum seekers. Specifically, that their physical, temporal and *relational* proximity to the State provides the basis for this sufficient other connection that then obliges the responsive state to take responsibility for them.

Proximity encapsulates not just an unaccompanied child asylum seeker's physical and temporal presence, but also the relative closeness and/or distance in relationship between them and the State. Unaccompanied child asylum seekers under Australia's control are directly

[29] Martha Albertson Fineman, 'The Responsive State' (n 1) 256.

physically and temporally proximate in a way that children seeking asylum outside of Australia's jurisdiction are not. In addition, they are directly relationally proximate because the absence of their parents to act as a buffer between them and the State places them in a direct and unmediated relationship of dependence on the State. This convergence of their urgent need to have their acute triple vulnerability responded to *and* their physical, temporal and relational proximity to the State situates them in a heightened state of dependence on the State. This convergence, captured by the category of "proximate vulnerable children," generates the sufficient *other connection* that warrants extending the protective scope of Fineman's vulnerability theory to expand State responsibility for them as illustrated in Diagram 4 "Proximate vulnerable children."

Diagram 4: Proximate vulnerable children



The category of "proximate vulnerable children" brings together the elements of triple vulnerability and proximity and captures three elements:

- unaccompanied child asylum seekers' inherent exposure to harm and dependency as being/becoming asylum seeking children,
- their physical and temporal presence in the State where they are unauthorised non-citizens seeking asylum, and
- the unmediated relationship between the child and the border protection machinery of the State because they are without an adult care-giver or State of nationality willing or able to offer protection.

Without parents to care for and protect them and to provide for their development during the processing of the claim for asylum, or to stake their claim for non-refoulement or asylum, the failure of their State of nationality to provide them with protection, their dependence on the proximate State to provide this care and these protections is absolute. It is this relationship of direct physical proximity, along with the child's direct and unmediated dependence on the State, that triggers specific State obligations to respond to them. The State is singularly positioned to exacerbate or ameliorate their vulnerabilities by permitting or restricting their access to assistance and resources.

Confining vulnerability theory to 'citizens' would discriminate against other categories of 'subject', the nature of whose 'connections' generate ethically compelling claims to a State response to their vulnerability. Unaccompanied child asylum seekers' acute burden of vulnerability constitutes such a connection. Reading vulnerability theory expansively to encompass these non-citizen children delineates the impact of State practice on them and its role in increasing their resiliencies and decreasing their dependencies as well as enabling the prioritisation of law and policy reforms to redress vulnerability in a way that human rights law does not. As discussed in chapter 3, human rights law lacks a compelling domestic accountability mechanism to ultimately "close the case" for these children to have their vulnerabilities addressed by the State but, for vulnerability theory, the corollary of recognising the particular vulnerability of people is a requisite State response that eliminates and does not create sites of vulnerability. Vulnerability theory provides a supplementary normative framework for holding States to account for their role in ameliorating or exacerbating these children's vulnerabilities without displacing the broader framework of human rights.

The next section applies a vulnerability informed response to a concrete analysis of the role of the "responsive state" to these children in domestic law and policy.

4.4 Determining what constitutes a vulnerability informed response

As noted in Section 4.2, applying vulnerability theory must do more than mark when legal measures or remedies for vulnerability are required because extant ordinary usage of the term vulnerability in the law and public policy already does that. Vulnerability theory has been justifiably criticised for its limited proscriptive value as a tool for defining the appropriate role

of government.[30] Existing legal scholarship identifies both the difficulty in, and the necessity for, vulnerability theory to articulate the content of necessary interventions for its application in concrete situations.[31] Carney especially has isolated the undeveloped notion of the "responsive state" as a critical gap in applying extant vulnerability theory in legal scholarship.[32]

It is true that Fineman's vulnerability theory stops short of the specificity required to determine the content of a vulnerability informed response, how to assess the impact of State practice in increasing resiliences and decreasing dependencies in a particular context, or how to prioritise reforms to decrease dependencies.

What then is the State's required vulnerability informed response to the proximate vulnerable child? Is this *other connection* sufficient to generate obligations identical to those that the State has to its citizens or are the obligations different? What is the relevance, if any, of the fact that unless they are granted residence as refugees their connection is temporary?

This section argues that close analysis of the sites and sources of the vulnerability of proximate vulnerable children reveals that the requisite State response is necessarily context dependent. It argues that the gravity of consequences of States' failure to respond to the acute and urgent vulnerabilities of these children on arrival necessitates prioritising addressing new vulnerabilities generated by, and existing vulnerabilities that are exacerbated by, relevant laws and policies. It also argues that a universal three stage process can be applied for arriving at the appropriate vulnerability informed response in a particular context. Chapters 5, 6 and 7 then apply this process to examine the requisite vulnerability informed response to the specific context of unaccompanied child asylum seekers in Australia following the suite of legislative and policy amendments between 2012-2014.

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[30] Nina Kohn, 'Vulnerability Theory and the Role of Government' (2014) 26 (1) *Yale Journal of Law & Feminism* 2014, 11-14.

[31] Jonathan Herring (n 20). Herring acknowledges that much work is needed to articulate how to implement the theoretical principles of vulnerability theory in concrete situations

[32] Terry Carney, 'Vulnerability' (n 14) 785. Terry Carney's consideration of the utility of vulnerability theory in his analysis of recent reforms in Australian social security law acknowledges its value as a paradigm-shifting new lens for understanding the dimensions and character of social disadvantage, for analysing aspects of law and policy, and as a possibly transformative idea for rethinking the nature and role of government. But he laments the undeveloped notion of the "responsive state." Carney concludes that there is little evidence that vulnerability has either any current doctrinal purchase, or that it is a suitable criterion for incorporation into legislative reform in Australian welfare law.

4.4.1 Distinguishing between multiple vulnerabilities

4.4.1.1 Embedding a taxonomy to distinguish between vulnerabilities

Fineman's vulnerability theory does not reach to developing a taxonomy that distinguishes between types of vulnerabilities in practice. This is necessary for three reasons. Firstly, so that vulnerability theory can be utilised in practice in specific contexts to characterise interactions between an individual and the relevant social, political and legal structures as ameliorating or worsening vulnerability. Secondly, to delineate sources of vulnerabilities. Thirdly, to inform and prioritise law and policy reforms.

To address this, the vulnerability informed response that I propose embeds a vulnerability taxonomy developed in philosophy scholarship by Mackenzie, Rogers and Dodds[33] to distinguish between inherent, situational, occurrent and pathogenic vulnerabilities.[34] By distinguishing between sources and states of vulnerability generated by the operation of laws and policies in specific contexts, this response enables scrutiny of the causes and impact of intersecting sites of vulnerability and prioritisation of reforms, supplementing traditional human rights analysis.

Mackenzie, Rogers and Dodds distinguish two states of vulnerability: dispositional (individual attributes that render an individual at risk of sustaining a particular harm) and occurrent (circumstances in which individuals are acutely at risk of sustaining harm). They characterise sources of vulnerability as inherent, situational and pathogenic. Inherent vulnerability arises from "sources of vulnerability that are inherent to the human condition and that arise from our corporeality, our neediness, our dependence on others, and our affective and social natures."[35] Situational vulnerability arises in a context and is "caused or exacerbated by the personal, social, political, economic or environmental situations of a person or social group."[36] In contrast, pathogenic vulnerability is a state of being at risk of having situational

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[33] Catriona Mackenzie, Wendy Rogers and Susan Dodds, 'Introduction: What is Vulnerability and Why Does it Matter for Moral Theory?' in Catriona Mackenzie, Wendy Rogers, and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy*, (Oxford Publishing, 2014) 32 ('What is Vulnerability').

[34] Catriona Mackenzie, Wendy Rogers and Susan Dodds 'Why Bioethics Needs a Concept of Vulnerability' (2012) 5(2) *International Journal of Feminist Approaches to Bioethics* 11 at 24-25.

[35] Ibid 24.

[36] Ibid.

or inherent vulnerabilities increased or created as a result of ongoing relationships or socio-political situations that have negative or harmful effects.[37]

Occurrent and pathogenic vulnerabilities may arise inadvertently. For example, interventions designed to address inherent or situational vulnerabilities may have unforeseen new, or aggravating consequences if they are based on, for example, incorrect assumptions about existing social relationships, structural injustices or socio-political situations. However, they can also arise predictably as a consequence of law and policy interventions that are blind to the inherent or situational vulnerability of given cohorts.

4.4.1.2 Applying the taxonomy in practice

To illustrate, applying the taxonomy to consider the sources and states of vulnerability of unaccompanied child asylum seekers, they arrive in a State with the inherent sources of vulnerability that they share with all children. They also share the situational vulnerabilities of being unauthorised child asylum seekers without parents. But the quality of law and policy responses determines whether they are further exposed *by the State* to circumstances where they are acutely at risk of sustaining harm (occurrent vulnerability) or exposed to pathogenic sources of vulnerability by harmful relationships or socio-political situations that put them at risk of increasing their situational or inherent vulnerabilities or generating new ones. They are thus profoundly dependent on State law and policy responses to ameliorate their inherent, dispositional and situational vulnerabilities as far as possible and to not generate occurrent states, or pathogenic sources, of vulnerability.

Applying the types and sources of vulnerability taxonomy illuminates the context specificity of the vulnerabilities of unaccompanied children subject to laws and policies that implement offshore processing. Using the taxonomy to deconstruct the vulnerabilities of children transferred offshore to Nauru for processing also illustrates why a gravity of consequences approach that prioritises avoiding the creation of, or repealing existing, laws and policies that generate occurrent or pathogenic vulnerabilities generated by relevant is necessary. To do otherwise inflames the acute and avoidable vulnerabilities of these children.

Further, while all children are inherently predisposed to experiencing anxiety in inhospitable physical environments, placing unaccompanied child asylum seekers with pre-existing trauma in contexts that are trauma inducing generates a further occurrent vulnerability when they are detained. The social and political structures that create or perpetuate

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[37] Ibid 25.

inhospitable and trauma inducing environments produce occurrent and pathogenic sources of vulnerability for these children because of the lack of access to appropriate trauma remediation or freedom from risk of new generators of trauma in their present environment. This overlays the situational vulnerability they experience by living with pre-existing trauma in this context.

Similarly all asylum seekers are dispositionally and inherently vulnerable to experiencing illnesses and infections in a new tropical climate because of their human embodiment, but unaccompanied child asylum seekers that have arrived with illnesses or disabilities following their transit or that developed illnesses in Australian immigration detention centres prior to transfer are occurrently more vulnerable to risks of medical complications. While all asylum seekers living in shared facilities in the Offshore Processing Centre on Nauru experience situational vulnerability to violence if they do not have adequate security, child asylum seekers also face situational vulnerabilities. These are related to their susceptibility to physical and sexual violence and abuse because of their age and lack of parental protection, especially if they are not placed in secure purpose built environments.

Likewise applying the taxonomy to the 2012-2014 changes to the *Migration Act*, that limited Proximate Vulnerable children's access to onshore Refugee Status Determination processes, illustrates the context dependency of the requisite State response. Unaccompanied children's situational vulnerability arising from their seeking asylum was increased by effectively removing the possibility of them being granted asylum from Australia if they arrived by boat and by forcing them to seek asylum from a third country.[38] The legislative changes that reintroduced Boat Turnbacks in 2013 generated occurrent and pathogenic vulnerabilities by rendering them more vulnerable to the possibility of refoulement.[39] The impacts of law and policy would be different in Australia during the New Directions period[40] and different again, in another State that does not utilise offshore processing or Boat Turnbacks,

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[38] *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth), the *Maritime Powers Act 2013* (Cth), the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth) and the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

[39] Unaccompanied child asylum seekers who arrived prior to 13 July 2013 were eligible to have their claim for protection processed in Australia and were originally held in closed immigration detention but were subsequently released into community detention on the Australian mainland. Those children who arrived after 13 July 2013 were held in closed immigration detention prior to transfer to Nauru.

[40] As examined in section 1.2 of chapter 1 in this period between 2008 and 2011 the Australian government adopted a more humane approach, especially to children and families seeking asylum, included requiring justification for detention based on risk, ending the detention of children, and ensuring administrative review of the length and conditions of detention.

or that unlike Australia have independent statutory appointed guardians.

These examples illustrate how specific legal and policy responses that develop inadequate physical immigration infrastructures and environments of care potentially exacerbate the inherent and situational vulnerabilities of these children. If the legal and policy responses instead had addressed their inherent and situational vulnerabilities, occurrent and pathogenic vulnerabilities would not have been created.

Distinguishing between types and sources of vulnerability usefully discriminates between multiple vulnerabilities to facilitate analysis of the types of vulnerabilities that could and should be addressed by the State and at what point, so that responses can be targeted and appropriate. Applying this taxonomy, vulnerability theory can be utilised in specific contexts to delineate sources of vulnerabilities and to inform policy on operational priorities so that circumstances that negatively or harmfully increase individuals' inherent and situational vulnerabilities can be avoided.[41]

4.4.2 Prioritising redress

In a purist reading of vulnerability theory, the goal of the State should be to ameliorate the inherent and situational vulnerability for all vulnerable subjects and to avoid creating occurrent or pathogenic vulnerabilities by enacting laws and policies that produce specific instances, incidents or environments that are likely to induce harmful effects. Similarly, from the perspective of the being/becoming child, the amelioration of their vulnerabilities is the ideal. However, I argue that the acute vulnerability of unaccompanied children on arrival coupled with their potentially time limited proximity makes it appropriate to prioritise State responses to urgently address those vulnerabilities created or made worse by laws and policies, then those that are situational and lastly, those that are inherent for the following reasons.

Firstly, from the perspective of the being/becoming child, their vulnerability immediately upon and following arrival in a State is acute, distinct and urgent. This vulnerability, as discussed in Chapter 2, arises from pre-existing traumas generated by the persecution or harm that led them to flee their country of origin and that is compounded by their transit journey. The normative value placed on the well-being of the being/becoming

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[41] See, for example, Evelyne Durocher et al, 'Understanding and Addressing Vulnerability Following the 2010 Haiti Earthquake: Applying a Feminist Lens to Examine Perspectives of Haitian and Expatriate Health Care Providers and Decision-Makers' (2016) 8(2) *Journal of Human Rights Practice* 219. The authors illustrate how that taxonomy can, for example, inform operational priorities in the delivery of humanitarian assistance.

child is the primary imperative for avoiding occurrent and pathogenic vulnerabilities that compound their existing inherent and situational vulnerabilities.

Secondly, from the perspective of States, the approach is pragmatic given the potentially temporal nature of the child's proximity to the State. Since at the time of processing the child's claim it is unclear whether the child will ultimately be settled in the processing State or in a third country, or returned to their State of origin, that child's medium to long term care needs could ultimately become the responsibility of any of those States. For this reason each State has an interest – while the child is physically or relationally proximate to the State or under its effective control for the processing of their asylum claim – in prioritising not compounding vulnerabilities that they may be responsible for remediating once the child's refugee status is determined. Given the potential sequential impacts of maltreatment by potentially successive receiving and asylum processing States on that child's wellbeing, each State benefits from not exacerbating existing harms or generating new ones because of even the possibility of an ongoing relationship of settlement between the State and the child.

Accordingly, it is in States' interest to prioritise not exacerbating existing vulnerabilities and specifically avoiding generating new vulnerabilities for the period that the child is physically or relationally proximate to the State.[42] Once States have avoided exacerbating existing, or generating new, vulnerabilities the amelioration of the child's situational and then inherent vulnerabilities can then be prioritised. This prioritisation also accords with the reality that if the child is granted asylum by the State, attending to these vulnerabilities will fall to it in due course. And if not, the responsibility for amelioration in the longer term will fall to their State of nationality or a third State in which they are ultimately settled.

States like Australia that intend to sever the child's proximity and deny any reciprocal responsibility for them once they transfer them for offshore processing still have an interest in prioritising not compounding these children's vulnerabilities while they are under Australia's effective joint control. This is congruent with States non-delegable duty of care in both domestic and international law, to child asylum seekers sent offshore where offshore authorities act as agents implementing the sending State's policy. Using Nauru to illustrate, Australia has

[42] I draw here conceptually on Mackenzie, Rogers and Dodds' work which identifies "pathogenic vulnerability" as "a state of being at risk of having situational or inherent vulnerabilities increased or created as a result of ongoing relationships or sociopolitical situations that have negative or harmful effects": 'Why Bioethics Needs a Concept of Vulnerability' (n 34) at 24-25.

"seconded" Australian government officials and contractors to exercise public powers over those transferred and contracted private organisations to provide health and education services to asylum seekers there. Australia and Nauru exercise joint effective control. Under domestic law, a series of cases since 2016 have held the Commonwealth government owes a duty of care to refugees sent offshore to provide a reasonable and adequate standard of medical care, in an appropriate environment, that is appropriate to meet their needs, including their mental health needs particularly if the requisite care is not available offshore.[43] Australia has consequently found itself remediating and treating medically evacuated asylum seekers with serious medical complications resulting from their treatment in Nauru.

4.4.3 Determining the requisite vulnerability informed response of the State to these children

In this section and section 4.3 I have contended that an expanded application of vulnerability theory underpins State's moral obligation to respond to these children in a particular way. I have identified a taxonomy to distinguish between and characterise harms. I have also provided a gravity of consequences rationale for redress that prioritises addressing occurrent and pathogenic vulnerabilities. Just as Fineman's theory does not reach to developing a taxonomy of vulnerabilities or a method for prioritising redress, nor does it prescribe a model or process for determining an appropriate vulnerability informed response in different contexts. To answer my thesis question, 'how did amendments to Australian law and policies in 2012, 2013 and 2014 respond to the complex vulnerabilities of these children and was the response adequate?', it is necessary to identify the nature and operation of the amendments, their impact on the vulnerabilities of these children and any necessary reforms.

This section now advances a model to enable examination of these components that satisfies my criteria of gravity of consequences and that can be applied across different legal contexts to identify the content of the requisite response.

Prior to applying the vulnerability taxonomy to distinguish between and characterise harms in a given context, there must be an examination of the legal and policy context defining

[43] *Plaintiff S99/2016* v *Minister for Immigration and Border Protection* [2016] 243 FCR 17; *D7* v *Minister for Immigration and Border Protection* [2016] FCA 1331; *FRX 17 as litigation representative for FRM17* v *Minister for Immigration and Border Protection* [2018] FCA 63; *AYX18* v *Minister for Home Affairs* [2018] FCA 283. This duty of care persists despite the repeal of the *Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth) that created a framework for transfer of persons in RPCs needing urgent medical or psychiatric assessment or treatment by the *Migration Amendment (Repairing Medical Transfers Act) 2019* (Cth).

the relationship between the responsive state and the subject(s) of the inquiry. Once the operation of the laws and policies on the subject(s) of the inquiry is understood, the impact of those laws and policies can then be determined by applying the vulnerability taxonomy to distinguish between and characterise those impacts that have ameliorated inherent and situational vulnerabilities and decreased dependencies from those that have created or exacerbated pathogenic and occurrent harms. When this is understood, priorities for reform based on a gravity of consequences rationale can be identified. Accordingly, I propose the following three stage process to determine what is an appropriate vulnerability informed response in specific legal contexts:

1. Examine the operation of the relevant laws and policies governing the relationship between the designated group and the State in a specified context and time period.
2. Discern the impact of the laws and policies on the designated group by applying a vulnerability taxonomy to identify which changes have ameliorated existing inherent or situational sources of vulnerability or generated new pathogenic sources of vulnerability or exacerbated an individual's dispositional vulnerability into an occurrent one.
3. Identify those impacts that can be addressed by legislative and policy change, propose the content of those changes and the priorities for reform to first address impacts that create occurrent states of vulnerability or new pathogenic sources of vulnerabilities.

This thesis will now apply this three stage process to determine the impact of amendments to the *Migration Act* and the *IGOC Act* between 2012 and 2014 on the vulnerabilities of unaccompanied child asylum seekers in Australia generated by their minority (Chapter 5), alienage (Chapter 6) and separation from their parents (Chapter 7) and to propose priorities for law reform.

This analysis supplements a traditional human rights approach by correlating types and sources of vulnerabilities with specific laws and policies and by determining priorities for reform that alleviate the worst, avoidable harms first. This analysis will reveal that political and border securitisation imperatives have created acute occurrent vulnerabilities and generated new pathogenic vulnerabilities for these children in relation to their care, protection and development needs arising from their minority by subjecting them to physical and mental violence and foreseeable harm and neglect in the arrangements for their care. They also created critical occurrent vulnerabilities and generated new pathogenic vulnerabilities for these children in relation to their legal precariousness and unauthorised presence by failing to ensure

that they were not refouled or refused access to a Refugee Status Determination Procedure. Lastly, the amendments will be shown to have created significant occurrent vulnerabilities and generated new pathogenic vulnerabilities for these children arising from their separation from their parents by failing to appoint them with an independent guardian with the legislative and functional responsibilities to prevent them being harmed, refouled or refused access to Refugee Status Determination.

4.5 Conclusion

This chapter has argued that to engage in a constructive account of vulnerability and State responsiveness, vulnerability theory scholarship needs to articulate what a vulnerability informed response requires in particular contexts. It began by introducing the relevant conceptual foundations of vulnerability theory and arguing that this theory promises a compelling supplementary normative ethical justification to hold States accountable domestically for the way they respond to unaccompanied asylum seeking children. This is because it facilitates critical analysis of the role of government and the suitability of existing social and legal institutions to respond to individuals who are experiencing, or are at risk of experiencing, serious harm. It argued that although vulnerability theory as traditionally conceived excludes unaccompanied non-citizen children from its protective scope, it ought to encompass these proximate vulnerable children because of their vulnerability and the nature of their spatial, temporal and relational proximity to the territory of a State. So extended, vulnerability theory provides the necessary normative justification for a supplementary framework that grounds States' domestic obligation to respond to their vulnerability without displacing the broader framework of human rights. I argue that the requisite vulnerability informed response is necessarily context dependent but can be arrived at in different legal contexts by applying a three stage process. It also argued that the gravity of consequences of States' failure to respond to the acute and urgent vulnerabilities of these children on arrival necessitates prioritising reforms that address occurrent and pathogenic vulnerabilities first.

Chapter 5 begins the application of the three stage vulnerability informed response analysis that continues through to Chapter 7. It examines the operation and impact of amendments to the *Migration Act* between 2012 and 2014 on unaccompanied children seeking asylum from Australia to assess the extent to which Australian law and policy in this period responded to the distinct vulnerabilities of these children generated by their minority.

5 VULNERABILITY ANALYSIS OF AUSTRALIA'S PROVISION OF CARE TO UNACCOMPANIED ASYLUM SEEKING CHILDREN

5.1 Introduction

This chapter applies the three stage vulnerability informed response articulated in Section 4.4.3 in Chapter 4 to assess the adequacy of the environment of care provided to unaccompanied child asylum seekers pursuant to amendments to Australian law and policy between 2012 and 2014 and makes recommendations for reform. These children arrive in States with a critical and urgent need for care and protection. As examined in Chapter 2, all unaccompanied asylum seeking children bear the vulnerabilities shared by all children. They are dependent on the State to simultaneously meet their current care and protection needs by providing food, shelter and adequate healthcare as well as their development needs while their claim for asylum is processed.[1] Applying vulnerability theory, they also have additional situational vulnerabilities arising from their exposure to pre-flight traumatic events, their asylum journey as well as their separation from, or loss of, parents and other family members.[2] They present with this situational vulnerability when they arrive at the borders of destination countries[3] and remain vulnerable to its impacts on their development persisting for many years.[4] They are also occurrently vulnerable, depending on the nature of the State response to their care and protection needs, to neglect, abuse, trafficking, sex and labour exploitation whilst they are seeking to have their asylum claim determined.

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[1] For example, by ensuring they have access to age appropriate education, training and opportunities to foster their expanding abilities.

[2] Tine Jensen et al, 'Long-term mental health in unaccompanied refugee minors: pre- and post-flight predictors' (2019) 28(12) *European Child & Adolescent Psychiatry* 1671.

[3] Ilse Derluyn and Eric Broekaert, 'Different perspectives on emotional and behavioural problems in unaccompanied refugee children and adolescents' (2007) 12(2) *Ethnicity and Health* 141.

[4] See for example, Serap Keles et al, 'Resilience and acculturation among unaccompanied refugee minors' (2016) 42(1) *International Journal of Behavioural Development* 52; Tine Jensen et al, 'Development of mental health problems - a follow-up study of unaccompanied refugee minors' (2014) 8 *Child Adolescent Psychiatry and Mental Health* 29.

The following three sections of this chapter align with the three stages of the vulnerability informed response. Section 5.2 examines the operation of the changes to the *Migration Act* in 2012, 2013, and 2014 on Australia's provision of care and protection to unaccompanied child asylum seekers. It describes how the amendments resulted in a return to the onshore mandatory immigration detention of these children and then created two distinct environments of care based solely on their date of arrival in Australia: onshore community detention and offshore detention in a regional processing centre on Nauru. Section 5.3 then examines the impact of Australia's actual provision of care and protection to these children under onshore and offshore processing. It argues that mandatory immigration detention generated a new occurrent vulnerability that they would not be adequately cared for and protected whilst in detention and that detention created a pathogenic vulnerability that persisted post release as ongoing trauma. It then argues that the inherent and situational vulnerabilities of children released into community detention on the Australian mainland pursuant to a residence determination until their asylum claims were finalised were largely not exacerbated by the care arrangements provided for them. As a general rule these children were spared the very restricted access to support services that exacerbated the vulnerability of other adult and family group asylum seekers.[5] Finally, it contends that unaccompanied children subject to offshore processing were subjected to the occurrent vulnerabilities generated by their mandatory immigration detention on the mainland *compounded by* exposure to occurrent and pathogenic vulnerabilities on Nauru. These included occurrent vulnerabilities of medical complications and not having prior trauma remediated and pathogenic vulnerabilities of not having their basic needs for care and protection met, being exposed to new trauma and to physical or sexual violence and harm because of the inadequate custodial arrangements in Nauru. Section 5.4 then identifies the priorities for legislative and policy reform.

5.2 Operation of the 2012-2014 legislative amendments: environments of care based on date of arrival not care and protection needs

This section examines the legal and policy context defining the relationship between Australia, as a responsive state in vulnerability theory, and unaccompanied child asylum seekers to set out the operation of the amendments prior to the examination of the impact of those laws on their vulnerability in Section 5.3. In the years prior to 2012 statutory amendments, the Rudd

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[5] See, for example, the discussion in Australian Human Rights Commission *Lives on Hold: Refugees and asylum seekers in the 'Legacy Caseload'* (Commonwealth Government, 2019).

(Labor) and then Gillard (Labor) governments had adopted a relatively humane approach to child asylum seekers generally. With negligible new boat arrivals between 2002 and 2009, the detention centres on Nauru and Manus Island that had housed asylum seekers after the first Pacific Solution were closed and unaccompanied children that had been detained in locked immigration centres on the mainland were released into community detention while their claims were processed. But after the numbers of asylum seekers arriving in Australia by boat escalated after 2009[6] the mandatory immigration detention of asylum seekers, including unaccompanied children, resumed.

In 2012 the Gillard (Labor) government negotiated with Nauru and PNG to reopen their Regional Processing Centres. The passage of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act* 2012 (Cth) allowed for offshore processing of the protection claims of boat arrival asylum seekers. The effect of this Act in practice was that from 13 August 2012, asylum seekers who arrived in Australia by boat were subject to processing in Nauru and on Manus Island in PNG, although they could still be settled in Australia if found to be refugees. The second Rudd (Labor) government announced on 19 July 2013 that irregular boat arrivals who arrived from that date would be processed offshore and would *never* be resettled in Australia.[7] From that date only adult males were eligible for transfer to Manus Island while all other males and all women and children, including unaccompanied children, would be sent to Nauru. The approximately 1,000 male, female and child maritime arrivals who entered Australia between 13 August 2012 and 18 July 2013 who had been taken to Nauru or Manus Island were then returned to Australia for processing to free up capacity for the offshore immigration detention of the post 19 July arrivals.[8]

Unaccompanied child asylum seekers were not accommodated differently under these policy changes. The arbitrariness of the dates effecting changes in policy, the initial transfers to and fro, and the subsequent mandatory transfers illustrate the blindness of Australian border control to the relative vulnerability of individual children or the legitimacy of their claim for

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[6] Janet Phillips and Harriet Spinks, 'Boat arrivals in Australia since 1976', *Parliamentary Library Research Paper* (Commonwealth Parliamentary Library, 2017) 22.

[7] 'Asylum Seekers Arriving in Australia by Boat To Be Resettled in Papua New Guinea', *ABC News* (online at 20 July 2013) <http://www.abc.net.au/news/2013-07-19/manus-island-detention-centre-to-beexpanded-under-rudd27s-asy/4830778>.

[8] Elibritt Karlsen, 'Australia's offshore processing of asylum seekers in Nauru and PNG: a quick guide to statistics and resources' *Research paper series 2016–17* (Commonwealth Parliamentary Library, 2016) 3-4.

asylum.[9] This vulnerability blindness was compounded on 18 February 2014 by a Guideline issued by the then Minister for Immigration, Scott Morrison. It stated that asylum seekers arriving after 19 July 2013 were generally "not to be referred for my consideration [for a discretionary grant of a residence determination under s. 197AB *Migration Act*] …unless there are exceptional reasons or I have requested it."[10] Being an unaccompanied child was not an exceptional reason.

While all unaccompanied child asylum seekers in the research period were initially detained in closed immigration detention centres, these amendments created two distinct arrangements for the subsequent provision of their care that flowed solely from their date of arrival in Australia. Firstly, children who arrived prior to 13 August 2012 who had remained on the Australian mainland, or who had arrived between 13 August 2012 and 18 July 2013 and had either remained on the mainland or been sent offshore initially but then returned were eligible for release into community detention on a residence determination while their claims were assessed. Secondly, unaccompanied children who arrived after 19 July 2013 were held in closed immigration detention facilities on Christmas Island pending transfer to the Nauru Regional Processing Centre ("RPC") under the joint effective control of the Australian and Nauruan government.[11]

Having examined the effect of the operation of the amendments on the environment of care provided by Australia in response to these children's minority, the next section applies stage two of the vulnerability informed response. It applies the vulnerability taxonomy to distinguish between and characterise responses that ameliorated inherent and situational vulnerabilities and decreased dependencies from those that created or exacerbated pathogenic

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[9] These policy changes were implemented by the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth). The effect of the Act was that all "unauthorised maritime arrivals" – families, adult females, adult males and unaccompanied minors – who arrived after 19 July 2013 simply "transited" in Australia, prior to being sent offshore to Nauru or Manus Island and asylum claims were processed under the respective laws of Nauru or PNG. The impact of these laws on the vulnerabilities of unaccompanied children generated by their alienage will be interrogated in Chapter 6.

[10] For discussion of these guidelines see *Mr BF on behalf of Master BG v Cth of Australia (DIBP)* [2017] Aus HRC 114.

[11] Unless the Minister exercised his non-compellable, non-delegable intervention power under section 197AB of the *Migration Act 1958* to grant the child a residence determination enabling them to live in Community Detention if still under 18 pending resolution of their protection claim.

and occurrent harms in the provision of environments of care for unaccompanied child asylum seekers.

5.3 Impact of Australia's punitive environments of care

This section delineates and analyses evidence about the environments of care provided to unaccompanied child asylum seekers from that contained within material on the public record about asylum seekers generally. This includes the following: UNHCR Monitoring Reports of Nauru;[12] the 2014 AHRC *Forgotten Children* Inquiry Report;[13] the 2014 Moss Inquiry;[14] the 2015 Senate Select Committee Inquiry on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru ("*Taking Responsibility* Inquiry");[15] the 2016 Senate Legal and Constitutional Affairs Committee Inquiry;[16] reports by advocacy

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[12] UNHCR, *Mission to the Republic of Nauru, 3 to 5 December 2012: report* (UNHCR, 2012) and UNHCR, *Monitoring visit to the Republic of Nauru 7 to 9 October 2013* (UNHCR, 2013) < https://www.refworld.org/docid/5294a6534.html> ('*Monitoring visit to the Republic of Nauru*').

[13] Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (Commonwealth Government, 2014) 1 ('*The Forgotten Children*').

On 3 February 2014, the President of the AHRC launched an inquiry into children in enclosed immigration Detention. The inquiry received 239 submissions, conducted five public hearings and 13 visits to 11 immigration detention centres, and conducted interviews with 1,233 current and former detainees. Its report, *The Forgotten Children,* was provided to the government in November 2014, and tabled in the Senate on 11 February 2015.

[14] Philip Moss, *Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru*, Final report, (Department of Immigration and Border Protection, 2015) ('Moss Review'). The Moss Review was announced by the then Minister for Immigration on 3 October 2014 to identify and report on claims of sexual and other physical assault of asylum seekers; and conduct and behaviour of staff members employed by contracted service providers between July 2013 and October 2014. The report was provided to the Department on 9 February 2015, and a redacted version of the report was published on the department's website on 20 March 2015.

[15] On 26 March 2015, the Senate established the *Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru* to inquire into the responsibilities of the Commonwealth government in connection with the management and operation of the Nauru RPC. The Inquiry received 101 submissions, held public hearings in Canberra on 19 May, 9 June, 20 July and 20 August 2015 and tabled its final report on 31 August 2015: *Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru* (Commonwealth Government, 2015) ('*Taking Responsibility*').

[16] Senate Legal and Constitutional Affairs Committee *Conditions and Treatment of Asylum Seekers and Refugees at the Regional Processing Centres in the Republic of Nauru and Papua New Guinea*, Interim report (Commonwealth Government, 2016).

groups[17] and individuals regarding children in detention;[18] Department of Immigration Procedure Manuals;[19] Annual Reports and audits;[20] a Community Detention evaluation conducted in 2013;[21] and a 2018 report by the AHRC of its inquiry into a human rights complaint by three families transferred to Nauru in 2013.[22]

This evidence informs examination of the *impact* of Australian law and policy on unaccompanied child asylum seekers during this period that has been largely absent in existing studies, reports and evaluations that focus on child asylum seekers generally. It will be shown that initial mandatory immigration detention exacerbated the situational vulnerability of these children. In contrast, community care arrangements were not inherently exacerbating.[23] Rather, they went some way towards ameliorating existing vulnerabilities. In contrast, arrangements for the provision of care for unaccompanied children subject to onshore and offshore immigration detention both exacerbated existing inherent and situational

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[17] Amnesty International, *Nauru Offshore Processing Facility Review 2012* (Amnesty, 2012); Amnesty International, *Island of Despair: Australia's "Processing" of Refugees on Nauru*, (Amnesty, 2016) <https://www.amnesty.org/en/latest/news/2016/08/australia-abuse-neglect-of-refugees-on-nauru/>; Human Rights Watch and Amnesty International, *Australia: Appalling Abuse, Neglect of Refugees on Nauru* (HRW, Amnesty, 2016).

[18] See for example, Keith Hamburger, AM, Hamburger, Keith AM, *Nauru Review 2013: Executive Report of the Review into the 19 July 2013 Incident at the Nauru Regional Processing Centre* (Knowledge Consulting, 2014); Wendy Bacon et al, *Protection denied, Abuse Condoned: Women on Nauru at Risk* (Australian Women in Support of Women on Nauru, 2016) < https://www.asrc.org.au/2016/07/22/protection-denied-abuse-condoned-women-on-nauru-at-risk-report/>. Lastly, see Paul Farrell et al, 'The Nauru Files: Cache of 2,000 Leaked Reports Reveal Scale of Abuse of Children in Offshore Detention', *The Guardian (Australia)*, (online at 10 August 2016) < https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention>.

[19] Department of Immigration and Border Protection, *Status Resolution Support Services Policy Advice Manual* (DIBP, 2016) (online at 18 November 2018) <https://www.border.gov.au/AccessandAccountability/Documents/20161006_FA160700108_documents_released.pdf>.

[20] Department of Immigration and Border Protection, *Annual Report 2014-2015* (Australian Government, 2015), Department of Immigration and Border Protection, *Annual Report 2015-2016* (Australian Government, 2016).

[21] Ilan Katz, Geraldine Doney and Effie Mitchell (2013) *Evaluation of the expansion of the community detention program: Final Report SPRC 12/13 to the Department of Immigration and Citizenship (DIAC)* ("*Community Detention evaluation*").

[22] *Ms BK, Ms CO and Mr DE on behalf of themselves and their families* v *Commonwealth Department of Home Affairs)* [2018] *AusHRC 128* 'Report into the practice of the Australian Government of sending to Nauru families with young children who arrived in Australia seeking asylum.' ('*[2018] AusHRC 128*').

[23] Although individual children could certainly still have had exacerbating experiences while in community care, the nature of the care arrangements, unlike immigration detention in closed centres, was not inherently exacerbating.

vulnerabilities and generated occurrent and pathogenic ones by providing inadequate care and protection and failing to protect children from physical or mental violence, neglect or foreseeable harm.[24]

5.3.1 Impacts on the Legacy Caseload cohort (unaccompanied asylum seeker children on the Australian Mainland)

5.3.1.1 Mandatory Immigration Detention

The grave impacts of Australia's mandatory immigration detention system have been thoroughly documented (see Chapter 3.4). It exacerbates children's inherent and situational vulnerability in complex, unnecessary and preventable ways and prolonged detention especially generates pathogenic vulnerabilities. An institutional punitive detention environment cannot ameliorate the inherent vulnerabilities of unaccompanied child asylum seekers because it is inimical to providing the stimulation, care and protection, and personal attention to meet their immediate development needs, or to equip them with the skills and resiliencies that they need to reach future age appropriate developmental benchmarks and psychological maturity milestones.[25] Instead, it exacerbates pre-existing situational vulnerabilities and generates pathogenic new psychological and physiological vulnerabilities, as evidenced by cases of insomnia, nightmares, mutism and bed-wetting,[26] and "heightened rates of suicide, suicide attempts and self-harm, mental disorder, and developmental problems, including severe attachment disorder."[27]

Medical research clearly establishes a causal relationship between the use of mandatory immigration detention and long-term damage to children's social and emotional functioning,[28] and that the damage escalates the longer detention is prolonged. Evidence to the AHRC

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[24] The impacts flowing from the limitations associated with transfer process itself will be considered in Chapters 6 (from the perspective of the exacerbation of their vulnerabilities generated by their alienage) and 7 (from the perspective of the exacerbation of their vulnerabilities generated by their separation from their parents).

[25] Michael Dudley et al, 'Children and young people in immigration detention' (2012) 25(4) *Current Opinion in Psychiatry* 285.

[26] Carolyn Hamilton et al, *Administrative detention of children: A global report* (UNICEF, 2011) 95-96.

[27] Ibid 96.

[28] See for example, Louise Newman et al, 'Seeking asylum in Australia: immigration detention, human rights and mental health care' (2013) 21(4) *Australasian Psychiatry* 316; Nicholas Proctor et al, 'Suicide and self-harm in immigration detention' (2013) 199(11) *The Medical Journal of Australia* 730.

Forgotten Children Inquiry about the impact of prolonged detention on rates of self-harming amongst detainees stated:

> …what we know from the research in this area is that the rates of self-harming in detention are fairly low when the periods of detention are low and when the period in detention increases and particularly when it increases above 6 months the rates start to increase and then they increase at an exponential rate.[29]

For the being/becoming child, prolonged immigration detention not only threatens their present development and mental health[30] but also exerts a long-term impact on their psychological wellbeing for a substantial period after they have left detention,[31] affecting their long-term social and emotional functioning into their adult life.

Additionally, the research clearly establishes that the immigration detention environment exacerbates pre-existing trauma and inhibits recovery.[32] As discussed in Chapter 2, unaccompanied children on Nauru endured varying but universally harrowing journeys to arrive in Australia by boat. To illustrate, one unaccompanied child gave evidence to the *Forgotten Children* Inquiry about how they arrived in 2013:

> Actually the way to come here was not easy; first we came to Malaysia and then from Malaysia to Indonesia, we spent nights in the jungles there before coming to here. … This way is very very dangerous. There was space for 150 people in the boat and the boat was packed by 250 people; we were all sitting on each other, but nobody was thinking about going back … better to die. We had no food or water for five days, it was so horrible. In … the Indian Ocean the boat sank down; 110 people were rescued and many people were drowned. … Sixteen hours I swam in the water to survive when our boat sank.[33]

They also share experiences of past trauma but which are unique to their personal circumstances. The submissions made by two unaccompanied children to the *Forgotten*

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[29] Dr Peter Young, Transcript of Sydney Public Hearing to Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention*, 31 July 2014, 13. https://www.humanrights.gov.au/sites/default/files/Dr%20Young.pdf.
Dr Young was, relevantly, the psychiatrist and former director of mental health for the company contracted to provide medical care in detention centres in Australia and in offshore detention centres on Nauru and Manus Island.

[30] See Michael Dudley et al (n 25) 285-292 and Karen Zwi and Sarah Mares, 'Stories from Unaccompanied Children in Immigration Detention: A Composite Account' (2015) 51(7) *Journal of Paediatrics and Child Health* 659.

[31] Zachary Steel et al, 'Impact of immigration detention and temporary protection on the mental health of refugees' (2006) 188(1) *The British Journal of Psychiatry* 58.

[32] See Transcript of Sydney Public Hearing to Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention*, 4 April 2014, 11: "you can make the services as world class as they can be but at the end of the day they are still in detention and that is the environment really that is creating the problem in the first place."

[33] Ilan Katz, Geraldine Doney and Effie Mitchell (n 21) 43.

Children Inquiry illustrate their common experience of past trauma and physical and mental insecurity as well as their continuing distress and growing and pervasive anxiety:

> I miss freedom…know I'm 17 years old. I don't have my famil in here…I miss my famill my famil is know in Afghanistan. Afganistan is no safe for living…I don;'t know what happen for my futur. ..my famil alos have a lote of serious about me. I have a menta healt [sic].[34]
>
> I am tired of life. I cannot wait much longer. What will happen to us? What are we guilty of? What have we done to be imprisoned? …. I am alone here on Nauru. Neither my father nor my mother is with me. It is very difficult for me to live in this prison. In my country, there is war, murder and blood. I am Hazara and a Shiite Muslim. In my country, anyone who is a Hazara or a Shiite Muslim is killed and murdered. If I had stayed in my country, I would have been murdered by now.[35]

Unaccompanied child asylum seekers require specialist services and care environments to remediate the effects of past trauma. Conversely, they face an occurrent situational vulnerability when they are detained in contexts that are trauma inducing. As discussed in Chapter 4 (Section 4.1.1), child asylum seekers with pre-existing trauma are occurrently vulnerable in environments that are unsuitable for recovery from trauma or that actually compound the effects of traumatic experience by agitating intense "feelings of [helplessness] and desperation".[36] Put simply, immigration detention is inimical to the provision of conditions in which traumatised children can recover.

Further while mandatory detention is deeply harmful for all asylum-seeking children, it is particularly unsuitable for unaccompanied children, since they are without parents or guardians available to meet their emotional or support needs.[37] The AHRC *Forgotten Children* report found "causal links between detention, mental health deterioration and self-harm in unaccompanied children."[38] The vulnerability of all children recovering from past trauma in immigration detention is exacerbated for unaccompanied children because they

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[34] Unaccompanied Child, Handwritten Submission No 145, Australian Human Rights Commission, *The Forgotten Children* Inquiry (undated) <https://humanrights.gov.au/sites/default/files/Submission%20No%20145%20-%20Name%20withheld%20-%20Unaccompanied%20child%20detained%20in%20Nauru%20OPC.pdf?_ga=2.19402353.878436188.1589764716-644388670.1588671908> 1-2.

[35] Ibid 3.

[36] Dr Peter Young, Transcript of Sydney Public Hearing to Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention* (31 July 2014), 13 <https://www.humanrights.gov.au/sites/default/files/Dr%20Young.pdf>.

[37] I acknowledge that it is also difficult for adults detained with their children to meet these needs in a detention environment. There are sound reasons for not detaining families in Immigration Detention Centres but that discussion is beyond the scope of this thesis.

[38] Australian Human Rights Commission, *The Forgotten Children* (n 13) 169-170.

> are deprived of the normal reference points for the development of identity during the crucial adolescent period, which includes interactions with a peer group of their choosing, family and cultural community. Detention also restricts the availability of normal coping strategies and options for adaptive control, and as a result these young people often develop behaviours such as passivity, submission, withdrawal, excessive help-seeking, self-harm and in some instances violent protests.[39]

5.3.1.2 Community Detention[40]

After being released from Mandatory Immigration Detention, unaccompanied child asylum seekers were transferred to several possible placements: Alternative Places of Detention,[41] Immigration Residential Housing,[42] Immigration Transit Accommodation or Community Detention. While placement statistics are incomplete,[43] it is apparent that the vast majority of unaccompanied children in the Legacy Caseload cohort moved out of immigration detention

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[39] The Forum of Australian Services for Survivors of Torture and Trauma, Submission No 210, Australian Human Rights Commission, *The Forgotten Children* Inquiry (13 June 2014) 15 < https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/submissions-made-inquiry>.

[40] The Department describes Community Detention as:

> An alternative term for 'residence determination', which allows a person, who is required or permitted to be taken into immigration detention or who is in immigration detention, to reside in the community at a specified address and in accordance with certain conditions, instead of being detained at a place of immigration detention. Under the Migration Act, the Minister has a non-compellable, non-delegable power to make, vary or revoke a residence determination if it is thought to be in the public interest to do so

See DIBP Annual Report 2015-2016 (n 20) 303.

[41] APODs are low security detention facilities for families and children such as: places where medical treatment is provided; hotels, motels and apartments; home-based care using private accommodation owned or leased by relatives or persons with established close relationships with the person in detention and community-based care provided through NGOs using accommodation provided by the NGO or a community group.

[42] The most flexible housing environment for persons in immigration detention.

[43] Inconsistencies in reporting methodologies by the Department make it difficult to identify how many unaccompanied children were cared for in each custodial arrangement in the research period. The AHRC *Forgotten Children Inquiry* (n 13) provides a "point in time statistic" reporting that as at 31 March 2014 Australian detention centres held 56 children aged between 13 and 17 years who had travelled to Australia without parents or a legal guardian. In contrast, the 2014 DIBP Annual Report stated that at 30 June 2014 there were 331 unaccompanied children living in Community Detention and an undisclosed number in APODs, Immigration Residential Housing or Immigration Transit Accommodation. Subsequent DIBP Annual Reports do not distinguish between accompanied and unaccompanied children in placement statistics at all. For example, the DIBP 2014-15 Annual Report notes only that as at 30 April 2015, there were 1092 children living in Community Detention under a residence determination, 69 children in Alternative Places of Detention on the Australian mainland, 16 children in Immigration Residential Housing in Sydney and 42 children in Immigration Transit Accommodation in Adelaide, Brisbane and Melbourne.

centres from 2014 were placed into Community Detention under residence determinations.[44] They generally resided in group homes with three or four other unaccompanied child asylum seekers. The Minister remained their exclusive statutory guardian and was ultimately responsible for decisions such as residential placements, schooling and major health procedures. But day-to-day responsibility for meeting the children's social, health, psychological, material and educational needs was delegated to full-time carers (custodians) contracted by State child welfare services.[45] The discussion in this section focuses on the extent to which this delegation of the Minister's custodianship, or day-to-day care, obligations created an environment of care that responded to their situational vulnerability as children in need of care and protection and provided opportunities for development.

The children were subject to conditions including where they lived, restrictions on their behaviour, school attendance and curfews.[46] But they attended schools with local children, had access to health care through a network of community-based providers and were supported to take part in after school community activities such as soccer clubs, art or music classes and other recreational or creative activities.[47] These custodial arrangements clearly went some way towards ameliorating the children's inherent and situational vulnerabilities as child asylum seekers by providing them with appropriate medical, psychological and emotional support, and opportunities for development including age appropriate education and recreational activities.

State welfare agencies also had various criteria to ensure that custodial carers were appropriately skilled and qualified. These included that they were: at least 21 years of age; willing to provide care for the unaccompanied minor; acceptable to the child; capable of providing care for the unaccompanied minor; of good character and willing to undergo a police check; assessed as being able to provide a sustainable placement; and with no conflict of interest.[48] Custodians in group home settings were able to respond to, and ameliorate,

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[44] The impact of the legislative changes on the vulnerabilities of children detained in Immigration Residential Housing, Immigration Transit Accommodation and Alternative Places of Detention would all have been different. The impact of those alternate sites could be the subject of future research.

[45]See Department of Immigration and Border Protection, *Annual Report 2013-2014* (Commonwealth Government, 2014) 197.

[46] *Migration Act* s 197AB(2)(b).

[47] Ilan Katz, Geraldine Doney, and Effie Mitchell (n 21) 40.

[48] Ibid 19. Some concerns have been raised about the variable standard of care provided across Australia in light of the lack of consistent or compulsory qualification and training requirements of custodians employed by non-government organisations and agencies at the time. Ibid 40.

children's specific vulnerabilities by meeting their ongoing emotional and psychological needs as adolescents. As articulated by an unaccompanied child in a group house:

> [My carer] is really good because he is trying to be like kind of my family, he is always trying to make me happy and trying to forget all the worry I have about my family. Even if you can't go to sleep at 3am [he says] knock on my door and I come and sit with you and help.[49]

Although vastly preferable to mandatory immigration detention, it should not be forgotten that community detention remains a form of detention and, as such, has inevitable drawbacks. Three key concerns identified by unaccompanied children and their custodial carers about arrangements at the time were: a lack of consistency in the Department's monitoring visits of group homes;[50] difficulties in obtaining timely approval for children to participate in age appropriate activities (such as overnight stays) from Department delegates;[51] and concerns about notifications regarding incidents of potential harm regarding children.[52] While the substance of these concerns could clearly induce suffering in already vulnerable children, they could each be addressed by administrative directions without displacing the broader framework of care that generally ameliorated their situational vulnerabilities. The content and frequency of reporting by Department service provider case managers on unaccompanied children in community detention group homes should be standardised as should the framework for monitoring the implementation of recommendations for action by case managers where issues were reported. Instead of requiring custodians to obtain advance approval from the legal guardian or delegated guardian for overnight stays, this oversight should be delegated to the child's case-manager. Lastly, concerns raised by unaccompanied

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[49] Ibid 66.

[50] Ibid 113. Unaccompanied children expressed a concern about inadequate oversight of the different service providers, with a consequent lack of transparency and accountability for some households/providers.

[51] Ibid 73. Requiring the permission of the delegated guardian for decisions such as overnight stays means that, in practice, the child often misses the opportunity:

> "If at night-time we want to go to somewhere - our friends or relatives home, the carer also are not given permission [to authorise the visit]; they are not responsible. If we want to go we have to get permission from DIAC. We should fill a form and give to carer. The carer will pass it to company. Company will pass it to case manager. Case manager will pass it to DIAC. Sometimes they say yes, sometimes they say no."

[52] Service providers are required to notify the DIBP of all reportable incidents. These include: perceived flight risks, fights/assaults, threatened/actual/or attempted self-harm, voluntary starvation, client not residing at/returning to approved address, all medical incidents requiring transport by ambulance or other relevant emergencies, emergency incidents, protest action or group disturbances and charging of a client in breach of the law.
Department of Immigration and Border Protection, Procedure Advice Manual, PAM3 – Client Placement [A 165.4], 5.3.1.

children about incident reporting subjectivity[53] and the impact of service provider reports about them on their visa decision[54] should be addressed by using best practice methods of both explaining, and confirming that the child has understood, reporting protocols and consequences during their induction into community detention.

Further, all of the children in community detention had all been previously in mandatory immigration detention. While the evidence is clear that prolonged immigration detention exacerbates existing, and generates new pathogenic, vulnerabilities more research is needed to examine the extent to which care in a group home setting has an ameliorating effect on the long term impacts of prior mandatory immigration detention. As articulated by one unaccompanied child:

> Those who been for long time in detention, they don't want to talk to anyone, even their family, because they are depressed, they only want to stay in the corner of the room because they are depressed. Before [I received a positive decision], I had the same feeling. I was not talking to people, and I was just in my home, and I wanted to do kind of harm myself, kill myself, by train or whatever.[55]

Anecdotal evidence from unaccompanied children and their carers suggests that their release into group homes with appropriate care structures provided a respite for this cohort. As explained by one unaccompanied child:

> In the last two and a half years I had really bad experience. There is 120% difference between detention centre and community detention because detention centre is like a jail, and community – it's like freedom, like relaxed.[56]

> It is always positive that people are moved into the community. For a lot of people there is visible improvement... [57]

However, anecdotally too, the respite was perhaps dependent on their status being resolved and Community Detention also not going on indefinitely:

> … it is still a very, very vulnerable group, and if they are torture and trauma survivors they are still dealing with past torture and trauma experiences. [And] many people whilst in detention … have witnessed a lot of self-harm, a lot of conflict – that does re-traumatise people. The longer people are in detention, [including] community detention, the more likely that their mental health is going to suffer….[58]

Future empirical research focusing on the impact of different types of custodial care through a

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[53] Ilan Katz, Geraldine Doney and Effie Mitchell (n 21) 51.

[54] Ibid.

[55]Ibid.

[56] Ibid 59.

[57] Ibid.

[58] Ibid.

vulnerability lens could identify whether removing unaccompanied children into a group home setting can partially or fully alleviate the exacerbating effects of prior immigration detention on their inherent and situational vulnerability.

5.3.2 Impacts on the Offshore Transferee cohort (unaccompanied asylum seeker children "cared for" on Nauru)

In contrast to the care, protection and opportunities for development in community detention settings, the situational vulnerability of children subject to offshore processing was exacerbated into occurrent and pathogenic vulnerabilities because of failures in Australian policy to adequately provide care and protection and opportunities for development for unaccompanied children on Nauru. This section considers four key failures in turn: failing to provide an adequate care environment; failing to provide adequate trauma remediation and instead compounding existing traumas; failing to respond to their occurrent vulnerability to medical complications in offshore detention; and failing to protect them from violence.

5.3.2.1 Inhospitable care environment

Nauru is a 21 km phosphate rock island that is 53 kilometers south of the Equator and 4,494 kilometers from Australia. Nauru was aggressively mined for phosphate up until the 1990s, causing permanent damage to the island's environment. It has a hot year-round climate and monsoon rains between November and February. It has no natural rivers and limited natural fresh water resources. The external environment of Nauru RPC is harsh and provides limited natural shelter from the elements. Nauru imports nearly all processed and manufactured goods, including diesel fuel necessary for power. Locals regularly lack access to adequate potable drinking water or water for basic hygiene, relying on rooftop storage tanks and desalination plants, fueled by diesel, for water. Nauru's 12,000 nationals have poor health outcomes and Nauru lacks critical national infrastructure including fully functioning hospitals.

On its face, the Memoranda of Understanding entered into by the Rudd (Labor) government with Nauru and with PNG on 3 August 2013 noted "special arrangements will be developed and agreed to by the Participants for vulnerable cases, including unaccompanied minors."[59] They also noted the respective States would "conduct all activities in respect of this

[59] *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues* signed 3 August 2013.

MOU in accordance with [their] Constitution[s] and all relevant domestic laws".[60] The *Asylum Seekers (Regional Processing Centre) Act 2012* (Nauru) ("*Asylum Seekers Act*") also acknowledged the specific needs of asylum seeking children, including unaccompanied children, and was rights-based. Section 6 imposed a general duty on the Operational Manager of the RPC "to ensure that each protected person residing at the centre is treated in a fair and humane manner consistent with the law of Nauru".[61] It also catalogued particular duties of the Operational Manager that apply to adults and children but which accord with many of the articles of the CRC. These included providing: sufficient food to maintain health and well-being;[62] clean and sufficient clothing; adequate bedding and other essential items;[63] access to appropriate washing and toilet facilities;[64] access to counselling facilities;[65] and access to medical care and treatment to the standard that they might reasonably have access to if he or she were living in the general community in Nauru.[66] Section 6 also makes specific provision for children by requiring the Operational Manager to give children access to facilities for obtaining education to the standard that they might reasonably access if living in the general community in Nauru.[67] Significantly, section 6(1)(p) also provides specifically for unaccompanied children by imposing a duty on the Operational Manager to ensure that they are provided with "anything else that the Secretary thinks ought to be provided …because he or she is… an unaccompanied child".[68]

However neither the memoranda nor the legislation delivered what was promised on a literal reading. Serious concerns regarding the provision of care for unaccompanied

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[59] *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues* signed 3 August 2013.

[60] Ibid.

[61] *Asylum Seekers (Regional Processing Centre) Act 2012* (Nauru) s 5.

[62] Ibid s 6(1)(c).

[63] Ibid s 6(1)(d).

[64] Ibid s 6(1)(e).

[65] Ibid s 6(1)(i).

[66] Ibid s 6(1)(f).

[67] Ibid s 6(1)(g). The Act requires that asylum seekers be provided with medical care and treatment and educational services 'to the standard that he or she might reasonably have access to if he or she were living in the general community in Nauru'. Legitimate concerns have been raised about the impact of Australia's offshore processing policy on asylum seekers, particularly children, because of the disparity between the quality medical care and treatment and educational services on Nauru and that provided on the Australian mainland.

[68] Ibid s 6(1)(p).

children on Nauru have been extensively documented.[69] There is an abundance of evidence in the *Forgotten Children* Inquiry,[70] reports by UNHCR,[71] the *Taking Responsibility* Inquiry Report,[72] submissions by offshore processing centre contractors, visiting Australian medical personnel and from child asylum seekers detained in Nauru[73] about the failure to deliver on expectations. The evidence reveals a lack of consistently available adequate drinking and toileting water, inadequate nutrition, overcrowded shelter that had inadequate privacy and security and which was not appropriately adapted for the climate and landscape. Further, it shows that there was inadequate access to timely and appropriate health care or educational facilities during the study period.

The Nauru RPC was a closed detention centre until October 2015, comprising three

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[69] UNHCR, *Monitoring visit to the Republic of Nauru* (n 12) 1-3.

[70] Mat Tinkler, Transcript of evidence to Australian Human Rights Commission, *The Forgotten Children* Inquiry, Sydney Public Hearing (4 April 2014), 6.
<https://www.humanrights.gov.au/sites/default/files/Mr%20Tinkler_0.pdf >.
Mat Tinkler, Director of Policy and Public Affairs at Save the Children, described the physical conditions of the Nauru RPC to the *Forgotten Children Inquiry* as follows:

> the environment is hot, it's humid, it's dusty, living conditions are very cramped. The island is very isolated the detention centres within the island are isolated. There is no shade, it's a difficult place to live…
> The centre of the island is full of fossilised coral pinnacles, they are called, with jungle and growth over them. It's not a hospitable environment and they've literally been bulldozed and had gravel poured on top and on top of that is the tents that people are living in.

[71] UNHCR, *Monitoring visit to the Republic of Nauru* (n 12).

The UNHCR noted the harsh conditions of the RPC with little natural shelter from the heat during the day, which is exacerbated by all the challenges arising from residing in a construction zone, including significant noise and dust, as well as the proximity to phosphate mining, which causes a high level of dust, 16 [89].

[72] The 2015 *Taking Responsibility Report* expressed its deep concern that "standards of living for asylum seekers in the Regional Processing Centre are unacceptably low in a range of areas, including exposure to the elements, lack of privacy, poor hygiene and insufficient access to water and sanitation". (n 15) [5.64].

[73] Unaccompanied child asylum seekers on Nauru gave evidence to the AHRC Forgotten Children Inquiry about the "very dirty tents" which often "become flooded when the rain begins [and afterwards] have leaks and holes." See, for example, Name withheld (Child detained in Nauru OPC), Submission No 95, Australian Human Rights Commission, *The Forgotten Children* Inquiry (26 May 2014) < https://humanrights.gov.au/sites/default/files/Submission%20No%2095%20-Name%20withheld%20-%20Child%20detained%20in%20Nauru%20OPC.pdf?_ga=2.24710387.878436188.1589764716-644388670.1588671908>; Name withheld (16-year old detained in Nauru OPC), Submission No 91, Australian Human Rights Commission, *The Forgotten Children* Inquiry (27 May 2014) < https://humanrights.gov.au/sites/default/files/Submission%20No%2091%20-%20Name%20withheld%20-%2016%20year%20old%20detained%20in%20Nauru%20OPC.pdf?_ga=2.216574687.878436188.1589764716-644388670.1588671908>.

compounds, OPC1, OPC 2 and OPC 3. The Director of Policy and Public Affairs at Save the Children told the AHRC *Forgotten Children* Inquiry that unaccompanied child asylum seekers, who were all transferred after October 2013, received 24-hour custodial care in a separate and secure air-conditioned compound within OPC 1.[74] Structured recreational activities occurred in one large open tent in OPC3. The totality of the care arrangements – including the common areas (eating, ablution and laundry facilities) and recreation, healthcare and education facilities – must be adequate to meet their care and development to prevent their vulnerabilities being exacerbated or pathogenised. As one of the unaccompanied children told the *Forgotten Children* Inquiry in 2014:

> Here on Nauru have nothing. The camp is too small 4 tents for 27 UAMs boys and all we can do is eating and drinking in one spot. no facilities. no internet, no mobile with other groups and I am very isolated. I have insomnia. I can't sleep.[75]

In October 2015 the government announced that the remaining 650 asylum seekers in detention would have "complete freedom of movement"[76] and that the RPC would move to an "open centre" arrangement. However, as will be discussed below, the opening of the centre occurred without sufficient consideration of unaccompanied children's lack of physical security.

5.3.2.2 Lack of adequate trauma remediation and compounding of existing traumas

As examined in Section 5.3.1 above, unaccompanied child asylum seekers require specialist services and care environments to remediate the effects of past trauma. Detaining them in contexts that are trauma inducing makes them occurrently vulnerable to not recovering from past trauma and pathogenically vulnerable to experiencing new traumas.

Medical research has confirmed since the first Pacific Solution the long term and destructive mental and physical effects of indefinite offshore detention, particularly for

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[74] Mat Tinkler, Transcript of evidence to Australian Human Rights Commission, *The Forgotten Children* Inquiry (n 70) 1.

[75] Name withheld (Unaccompanied child detained in Nauru OPC), Submission No 143 to Australian Human Rights Commission *The Forgotten Children* Inquiry (undated) 1.
<https://humanrights.gov.au/sites/default/files/Submission%20No%20143%20-%20Name%20withheld%20-%20Unaccompanied%20child%20detained%20in%20Nauru%20OPC.pdf?_ga=2.44082797.878436188.1589764716-644388670.1588671908>

[76] Tom Allard, 'Nauru's move to open its detention centre makes it 'more dangerous' for asylum seekers' *Sydney Morning Herald* (online at 9 October 2015) http://www.smh.com.au/federal-politics/political-news/naurus-move-to-open-its-detention-centre-makes-it-more-dangerous-for-asylum-seekers-20151008-gk4kbt.html.

children with pre-existing trauma arising from their, and their family members', treatment in their home country and from the transit journey.[77] It is also clear that asylum seekers with past trauma are psychologically vulnerable and at greater risk of post-traumatic stress disorder if exposed to further trauma or adverse conditions.[78]

The evidence in the research period confirms that unaccompanied children on Nauru were occurrently vulnerable to a lack of access to trauma remediation services. The Republic of Nauru lacked a multidisciplinary mental health team to provide the necessary trauma remediation inpatient care for unaccompanied children. The Department gave evidence to the *Taking Responsibility* Inquiry that all transferees were supported under the psychological support programme policy, "based on the psychological support programme in use at Australian immigration detention centres which in turn has been developed and refined over time using extensive input from clinicians".[79] However, this evidence was countered by that of clinicians working on Nauru. Dr Peter Young, former director of the provider of mental health services to Nauru, gave evidence to the *Forgotten Children* Inquiry that Nauru RPC lacked the specialised torture and trauma staff and adequate mental health facilities to respond to the complex and specific needs of unaccompanied children. This was especially so since there was no-full time child psychiatrist or psychologist on Nauru and the rotation of staff to make up a full-time equivalent left gaps in coverage.[80] Staff from the Royal Children's Hospital Melbourne who had treated children detained on Nauru testified that:

> We have seen evidence of mental health pathology in all of our patients who have been on Nauru. Symptoms include features of post-traumatic stress disorder (PTSD), depression, anxiety, learning difficulties, bedwetting in previously continent children, nightmares, behavioural regression, memory loss, separation issues, and/or somatization in the form of stomach aches and/or headaches. …Nauru RPC is an environment characterised by insecurity and fear. These children are the most traumatised cohort of patients with whom we have worked.[81]

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[77] Derrick Silove, Philippa McIntosh and Rise Becker, 'Risk of retraumatisation of asylum-seekers in Australia' (1993) 27 *Australian and New Zealand Journal of Psychiatry* 606; Rise Becker and Derrick Silove 'Psychiatric and psychosocial effects of prolonged detention on asylum-seekers' in Mary Crock (ed), *Protection or punishment: the detention of asylum seekers in Australia* (Federation Press, 1993).

[78] Zachary Steel and Derrick Silove, 'The mental health implications of detaining asylum seekers' (2001) 175 *Medical Journal of Australia* 596.

[79] *Taking Responsibility* (n 15) [3.119].

[80] Dr Peter Young (n 36) 14 < https://www.humanrights.gov.au/sites/default/files/Dr%20Young.pdf>.

[81] Royal Children's Hospital Melbourne, Submission to the *Taking Responsibility* Inquiry (2 April 2016) 2-3.
<https://www.aph.gov.au/DocumentStore.ashx?id=0de68038-5281-41ea-a567-96eb21d8e5b0&subId=412378 >.

Following its October 2013 visit to Nauru, the UNHCR reported that detainees were concerned about the deteriorating mental health of children, and the trauma associated with their detention.[82] United Nations agencies, not for profits and reporters who visited the Nauru Detention Centre, and staff who worked there, provided extensive reports about the extent of persistent self-harm of child asylum seekers on Nauru, including attempting suicide. Save the Children employees reported having observed self-harming behaviours and an increasing preoccupation with thoughts of self-harm amongst children on Nauru.[83] Further, a Nauru Detention Centre staff report leaked in 2014 detailed evidence of two suicide attempts by 17-year-old unaccompanied asylum seekers.[84] In October 2014, after the government announced its proposal to transfer detainees from Nauru to Cambodia, the media reported that ten asylum seekers, including six boys who had already been detained on Nauru for over 12 months, had their lips "crudely sewn shut" and were refusing food and water[85] as an act of protest and self-harm.

The Department conceded to the *Forgotten Children* Inquiry "it is clear …, from well-established medical evidence, that mental illness and mental health does suffer through extended periods of time in detention."[86] The failure to respond to the specific known vulnerabilities of these children in a way that ameliorated this suffering exacerbated existing and generated new and preventable pathogenic vulnerabilities. Unlike children who were released from mandatory immigration detention on the mainland into group homes with

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[82] UNHCR, *Monitoring visit to the Republic of Nauru* (n 12) 21 [115].

[83] Employees of Save the Children Australia in Nauru (names withheld), Submission No 183, Australian Human Rights Commission, *Forgotten Children* Inquiry (undated) 9, 41, 42. <https://humanrights.gov.au/sites/default/files/Submission%20No%20183%20-%20Names%20withheld%20-%20Employees%20of%20Save%20the%20Children%20Australia%20in%20Nauru_0.pdf?_ga=2.77504988.878436188.1589764716-644388670.1588671908>.

[84] Oliver Laughland and Ben Doherty, 'Nauru staff report persistent child abuse and self-harm, leaked documents show', *The Guardian* (online at 4 October 2014) <http://www.theguardian.com/australia-news/2014/oct/04/nauru-detention-centre-staff-persistent-child-abuse-self-harm>.

[85] Ben Doherty, 'Nauru asylum seekers sew lips shut in protest over Cambodia transfer', *The Guardian* (online at 2 October 2014). <http://www.theguardian.com/world/2014/oct/02/nauru-asylum-seekers-sew-lips-shut-protest-cambodia-transfer>.

[86] Department of Immigration and Border Protection, Second Public Hearing of the *National Inquiry into Children in Immigration Detention* 2014, Melbourne, 2 July 2014, 6. <http://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/national-inquiry-children-immigration-detention-2014-1 >.

qualified custodial carers and access to trauma remediation services, unaccompanied children transferred to Nauru experienced both *de novo* psychological distress and re-traumatisation. For them, the process of being transferred to Nauru and the inadequate environment of care there exacerbated the inherent and situational vulnerability they experienced by living with pre-existing trauma in this context. The Nauru RPC was thus an occurrent and pathogenic source of vulnerability because of new generators of trauma in the environment and the lack of access to appropriate trauma remediation.

5.3.2.3 Failure to respond to children's occurrent vulnerability to medical complications in transfer arrangements and in offshore detention

Unaccompanied children transferred to Nauru were also exposed to an occurrent vulnerability to medical complications evidenced by outbreaks of lice, gastroenteritis, and hand, foot and mouth diseases that were common on Nauru and difficult to contain due to the inadequate level of hygiene in the centre and detainees sharing close living quarters, common toilets, showers, and eating areas.[87] The Royal Australasian College of Physicians expressed its concern in 2013 that the 48 hour transfer procedures to Nauru meant that asylum seekers would be unlikely to receive an adequate medical assessment prior to being transferred. Additionally, they were likely to face "significant health issues" post transfer given the difficulty in appropriately assessing and caring for asylum seekers with acute or chronic illnesses in this timeframe.[88] All child asylum seekers are inherently vulnerable to experiencing illnesses and infections in a new tropical climate. Unaccompanied child asylum seekers who arrived with pre-existing disabilities, had developed illnesses during their transit, or who had developed illnesses or disabilities in Australian immigration detention centres, were occurrently more vulnerable to risks of medical complications.

Substantial evidence establishes that the physical and psychological environment of Nauru RPC exacerbated unaccompanied children's existing health problems. It is clear that primary, allied and hospital health facilities were inadequate both in terms of the breadth and depth of provision. In 2013, International Health and Medical Services ('IHMS') delivered general practitioner, nursing and mental health care clinics seven days per week for transferees

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[87] See Employees of Save the Children Australia in Nauru (names withheld) (n 85) 4-5. See also *[2018] AusHRC 128* (n 22) 39-40.

[88] Oliver Laughland 'Doctors concerned by 48-hour turnaround target for asylum seekers' *The Guardian* (online at 25 September 2013) < http://www.theguardian.com/world/2013/sep/25/doctors-concerned-asylum-seeker-health>.

and refugees settled in Nauru.[89] It supplemented these services through the provision of visiting health practitioners and a tele-health service. IHMS gave evidence to the *Taking Responsibility* Inquiry that transferees could access review by a nurse and then referral to a doctor or other health care professional during clinic hours. But initial medical care provision on Nauru was "often slow to be provided", "could involve asylum seekers queueing for long periods" and "was often inadequate."[90] For unaccompanied children with existing disabilities, there was no access to certain allied health or medical specialists. These included speech therapists, optometrists, orthodontists, or education psychologists who could diagnose learning difficulties.[91] Unaccompanied children with disabilities, in particular, are almost invisible in the research literature,[92] and should be the subject of further research, particularly regarding their relative susceptibility to the generation of new pathogenic vulnerabilities in this context.

Between 2012 and 2015 the Nauru hospital lacked the facilities needed to provide appropriate healthcare to its own citizens, let alone unaccompanied child asylum seekers. The Department gave evidence to the *Taking Responsibility* Inquiry that it was upgrading a ward and dental area of the Nauru hospital. The works included painting, insect screen replacement, refurbishment of the toilet and shower area, replacing mouldy ceilings and broken ceiling fans and doing gutter repairs. The Department also stated that it would conduct further upgrades to equipment and supplies at the hospital including to the blood bank and neonatal equipment in July 2015.[93] The failure to make these upgrades prior to arrangements for the transfer of asylum seeking children with acute needs recklessly exposed them to risk of avoidable harms.

The evidence also clearly establishes that from 2013 asylum seekers on Nauru developed acute or chronic illnesses, including potentially life-threatening illnesses such as dengue fever, tuberculosis and the Zika virus.[94] The Department's Chief Medical Officer gave evidence to the AHRC investigating a complaint of human rights abuses on Nauru that asylum seekers were diagnosed with tuberculosis in 2014 but that, despite recommendations from

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[89] Senate Select Committee, *Taking Responsibility* (n 15) [3.99].

[90] Ibid [3.108].

[91] Mat Tinkler, Transcript of evidence to Australian Human Rights Commission *The Forgotten Children* Inquiry (n 70) 3.

[92] The exceptions are research by Mary Crock et al, *Protection of Refugees with Disabilities: Forgotten and Invisible?* (Edward Elgar Publishing, 2017) and Karen Soldatic et al, 'Nowhere to be found': disabled refugees and asylum seekers within the Australian resettlement landscape (2015) 2(1) *Disability And The Global South* 501.

[93] Senate Select Committee, *Taking Responsibility* (n 15) [3.121].

[94] [2018] AusHRC 128 (n 22) 37-41.

visiting pediatricians, testing of all children for latent tuberculosis did not commence until January 2015.[95] The Chief Medical Officer gave further evidence that there had been "40 positive symptomatic cases" of Dengue Fever as at May 2014, that cases were under-reported and that a number of them required blood transfusions.[96] Lastly, the Department confirmed in 2016 that it was "aware that cases of Zika virus have been confirmed in Nauru" but did not provide details about the numbers of asylum seekers on Nauru RPC who had contracted the Zika virus during the Zika virus outbreak in the Pacific between 2013 and 2015.[97]

The lack of appropriate essential primary, allied or hospital health care combined with the risk of serious disease transmission subjected these children to serious occurrent vulnerabilities that children released into Community Detention on the mainland avoided.

5.3.2.4 Failure to protect children from physical and sexual violence

All asylum seekers living in shared facilities in the Nauru RPC experienced inherent vulnerability to violence without adequate security. Child asylum seekers also faced situational vulnerabilities related to their susceptibility to physical and sexual violence and abuse because of their age and lack of parental protection that they would not face in a secure purpose built environment. Unaccompanied children on Nauru were occurrently vulnerable to violence both within the centre and in the community after the centre moved to an open arrangement in 2015.

While detained in the closed centre environment prior to 2015, the *Taking Responsibility* Inquiry heard evidence that there was "a high level of risk in the design and provision of accommodation."[98] Transfield Services, a company contracted by the Australian government to provide services at the Nauru RPC, gave evidence that they were working with the Department to "enhance personal safety and privacy", including adding lighting in walkways, open areas, toilets, ablution areas and laundries.[99] The failure to make the necessary

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[95] Ibid 39.

[96] Ibid 40-41.

[97] Department of Immigration and Border Protection, Submission No. 18, *Senate Legal and Constitutional Affairs Committee inquiry into the Conditions of Treatment of Asylum Seekers and Refugees at the Regional Processing Centres in the Republic of Nauru and Papua New Guinea* (March 2016) 22. <https://www.aph.gov.au/DocumentStore.ashx?id=fabbe9e5-2ed3-47cd-86c2-f313a6f1b7e8&subId=411483>.

[98] Senate Select Committee, *Taking Responsibility* (n 15) [4.59].

[99] Ibid [3.43].

upgrades *prior to their transfer* from Australia to Nauru exposed these children to an avoidable occurrent vulnerability to physical and sexual violence.

The *Forgotten Children* Inquiry, UNHCR, the *Moss Review* and the *Taking Responsibility* Inquiry, all heard consistent evidence from multiple sources about the susceptibility of children in Nauru RPC to physical and sexual assault by other detainees or contracted staff. This appeared to be caused both by the conditions of detention and by the quality of legal protection and law enforcement on Nauru. The *Forgotten Children* Inquiry received a submission about unaccompanied children's "fears for their safety while being held in the family compound within the RPC".[100] The *Taking Responsibility* Inquiry reported that since 2012 Transfield Services recorded 45 allegations of child abuse and sexual assault,[101] and that then Minister for Immigration Scott Morrison had received reports in December 2013 from Save the Children child protection workers of an alleged indecent assault of a child asylum seeker by a cleaner engaged by Transfield Services at the OPC.[102] The Inquiry also heard allegations of sexual harassment of minors by staff at the RPC reported in April 2014.[103]

Additionally, the Inquiry heard evidence of the lack of existing child protection framework or functioning social services in Nauru to deal appropriately with allegations or incidents of child abuse or the complex protection and support needs of unaccompanied children.[104] There was no statutory authority to intervene or to remove a child where abuse has been substantiated.[105] Nor apparently did the Nauruan Police Force have the capacity to properly investigate and charge perpetrators of physical and sexual assaults incidents reported at the RPC.[106] These failures, combined with that of the Department to take the security needs of children seriously, left them extremely vulnerable to an ongoing risk of assault and harassment in the RPC. Nauru lacked the mandatory reporting requirements that provide some protection for children in Australia from sexual and other physical assault. Similarly to the

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[100] ChilOut, Submission No 168, Australian Human Rights Commission, *The Forgotten Children* Inquiry (May 2014) 6.
<https://humanrights.gov.au/sites/default/files/Submission%20No%20168%20-%20ChilOut.pdf?_ga=2.120120769.878436188.1589764716-644388670.1588671908>

[101] Senate Select Committee, *Taking Responsibility* (n 15) [5.29]. The figures do not differentiate between accompanied and unaccompanied children.

[102] Ibid [4.35].

[103] Ibid [4.37].

[104] Ibid [4.87].

[105] Ibid [4.88].

[106] Ibid [4.89].

exposure of unaccompanied children to avoidable occurrent vulnerabilities of re-traumatisation and medical illness, this failure to implement fundamental protection frameworks prior to the centre being opened exposed unaccompanied child asylum seekers to an avoidable occurrent vulnerability to violence.

The Immigration Minister instigated the *Moss Review* in September 2014 after extensive media reporting about sexual abuse of asylum seekers in Nauru. The Review's recommendations included that the Department review relevant policies and guidelines for reporting and responding to allegations of abuse and support the Nauruan government to enhance its legal and policy framework, and the capability of relevant authorities to investigate and respond to cases of sexual and other physical assault, and for child protection.[107] The Abbott (Coalition) government publicly accepted all of the recommendations.[108] The Department announced that it would develop a "comprehensive action plan" including "developing a child protection framework to accompany existing policies, and the provision of specialised child protection training to all staff and service providers who interact with children".[109] It is unclear whether any of these recommendations or objectives were ever implemented. The failure to have these fundamental child protection frameworks in place prior to the decision to transfer unaccompanied children to the RPC generated an avoidable occurrent vulnerability to abuse or assault.

Rather than responding to these serious public reports of profound harm being done to these children by implementing proper environments of care, the Australian government responded to this documented vulnerability with further punitive measures to silence vulnerable subjects and those advocating for them. The *Border Forces Act 2015* (Cth) prohibited anyone working with or for the Department, including workers in Offshore Processing Centres, from disclosing information obtained by them during the course of their work,[110] with offences punishable by up to two years imprisonment.[111] Although exceptions were made for disclosures made to prevent or lessen a serious threat to the life or health of an

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[107] Ibid, Recommendation 11, [5.76].

[108] Tony Abbott MP, 'Joint Press Conference, Hamilton Island' (Media Release, 21 March 2015) <http://pmtranscripts.pmc.gov.au/release/transcript-24309>.

[109] Senate Select Committee, *Taking Responsibility* (n 15) [4.42].

[110] *Australian Border Force Act 2015* (Cth) s 42(1).

[111] Ibid s 42(1).

individual,[112] the onus was on the person making the disclosure to establish that the disclosure was required for this purpose.[113]

Then, on 1st October 2014, authorities released the remaining 29 unaccompanied children into the Nauruan community. In the following weeks, a group of locals physically and verbally attacked a 17 year old Iranian boy and a 16 year old boy from Myanmar. Both required hospitalisation as a result of their injuries.[114] The *Taking Responsibility* Inquiry found that "this was a serious assault yet no action was taken in prevention or education in the community."[115] The Department continued moving such children into the community, without adequate protection, knowing that there was a culture of hostility towards them, and without taking appropriate measures to ensure their security. The *Taking Responsibility* Inquiry received evidence that:

> the Nauruan community is not a safe place for resettlement to occur, in addition to the allegation made that minors have been assaulted, it was also argued that there is a culture of resentment towards asylum seekers and refugees in the community: Children were attacked by local citizens at an alarming rate.[116]

The *Senate Select Committee Inquiry* reported growing community resentment and threats of violence against asylum seekers and refugees "as refugees were released and transitioned into the community" without any appropriate action by either the Department or the government of Nauru for the transition to succeed.[117] It recommended that the Australian government clarify incident reporting guidelines with all contracted service providers "to ensure that the safety of all asylum seekers, including children, is protected and all incidents are appropriately reported whether or not they occur within the physical boundaries of the RPC."[118] Ultimately it concluded that "children are not only denied a reasonable approximation of childhood in the [RPC], but often do not feel safe, and in fact often are not safe. Their extreme vulnerability is further exacerbated by their location in a country which lacks an adequate legal or policy framework for their protection."[119] They noted "children who

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[112] Ibid s 42(2)(a); s 48.
[113] Ibid s 42(2).
[114] Ibid.
[115] Senate Select Committee, *Taking Responsibility* (n 15) [2.163].
[116] Ibid [2.163].
[117] Ibid.
[118] Ibid Recommendation 12 [5.79].
[119] Ibid [5.74].

have been assaulted and mentally harmed from detention in Nauru remain with no remedy or relief'[120] and concluded that "the RPC Nauru is neither a safe nor an appropriate environment for children and that they should no longer be held there."[121]

5.4 Priorities for reform

This chapter has examined the effect of the operation of the amendments on the environment of care provided by Australia in response to these children's minority. It has also applied the vulnerability taxonomy to distinguish between and characterise those impacts that have ameliorated inherent and situational vulnerabilities and decreased dependencies from those that have created or exacerbated pathogenic and occurrent harms. This section now applies stage three of the vulnerability informed response and proposes priorities for reform based on a gravity of consequences rationale.

The needs of these being/becoming children for targeted care and protection immediately upon and following arrival in a State were acute, distinct and urgent. Their vulnerabilities, as discussed in Chapter 2, arose from pre-existing traumas generated by the persecution or harm that led them to flee their country of origin and that were compounded by their transit journey, usually on overcrowded and unseaworthy fishing boats for many days at sea with limited access to food and water. In this context, the vulnerability informed response model identifies the well-being of the being/becoming child as the primary imperative for prioritising amendments to laws and policies that create new pathogenic sources of vulnerability and new occurrent harms first.

The evidence clearly establishes that the fact of immigration detention itself is the key exacerbator of these children's situational vulnerability, as captured neatly by the *Forgotten Children* Inquiry:

> Despite the best efforts of the Department and its contractors to provide services and support to children in detention, it is the fact of detention itself that is causing harm. In particular the deprivation of liberty and the exposure to high numbers of mentally unwell adults are causing emotional and developmental disorders amongst children.[122]

Urgent policy changes are critical to end the devastating impacts of mandatory immigration detention in Australia and the inadequate environment of care in Nauru that generate occurrent and pathogenic harms. Mandatory immigration detention of all

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[120] Ibid [4.64].

[121] Ibid [5.75].

[122] Australian Human Rights Commission, *The Forgotten Children,* (n 13) 30.

unaccompanied children should be limited to no longer than 72 hours in purpose built child friendly reception centres prior to transferring them into foster care or a sponsorship arrangement, or as a last resort to Community Detention on the Australian mainland while their asylum claim is processed. These changes would also respond to unaccompanied children's occurrent vulnerability to medical complications and violence in offshore detention. Urgent policy changes should also address these children's existing trauma by providing them with access to trauma remediation services while their asylum claim is processed. Neither of these proposed reforms require legislative changes. The Minister can achieve the first by revoking his Guideline directing that residence applications for asylum seekers arriving after 19 July 2013 not be referred for consideration unless there are exceptional reasons, or the Minister has requested it. The second requires funding for these children to be able to access existing specialist services.

Once these occur, practice improvements in arrangements for the provision of care of unaccompanied children in Community Detention on the mainland should be implemented. These should include enabling custodians to give permission for overnight stays,[123] regularising Department case manager visits, monitoring and feedback requirements and fully informing unaccompanied children about incident reporting protocols and consequences. These can all be achieved by administrative directions. Systematic, consistent and transparent monitoring of the quality of care provided to unaccompanied children by service provider case managers is essential to ensure that they receive appropriate levels of support from their allocated service provider; are provided with accommodation that is fully functional, attend school, access health services, have their religious needs supported, and are building confidence to live independently.

Reforms must also implement consistent monitoring and reporting about frequency of visits and follow up action taken of issues reported by unaccompanied children or their case manager. The Department should ensure that, during their induction into Community Detention, unaccompanied children demonstrate a clear understanding of incident reporting protocols and potential consequences for non-compliance. Lastly, appropriate arrangements

[123] Being able to organise spontaneous overnight stays with friends enables unaccompanied children to develop regular age appropriate friendships. Custodians should still be required to obtain consent from the legal guardian or delegated guardian in relation to health care and residency decisions, travel plans, placing an unaccompanied minor in the care of another person or allowing them to leave the State in which they reside.

are critical for unaccompanied young people leaving group living arrangements to ensure that they have the necessary support and skills to transition safely and effectively to living independently. Unaccompanied children should continue to receive appropriate care and protection, opportunities for development and full social services until they turn 21.

Lastly, if governments persist with offshore processing on Nauru RPC in the future, no unaccompanied child should be transferred there, or to any other RPC, until a vulnerability informed assessment has been conducted and facilities and services are in place to effectively respond to their complex care needs.[124]

5.5 Conclusion

This chapter has examined the utility of a vulnerability analysis of the impact of the changes to the *Migration Act* in 2012, 2013, and 2014 on the environments of care provided to unaccompanied children seeking asylum from Australia. It illustrated the ways in which legal and policy responses that do not respond to the complex and specific vulnerability of these being/becoming children generate avoidable occurrent and pathogenic harms. The vulnerability analysis also clarified the Australian government's responsibility for the avoidable acute occurrent and pathogenic impacts of mandatory immigration detention and the exposure of unaccompanied children to disease, violence and traumatisation from the inadequate care arrangements in Nauru. Lastly, the vulnerability analysis clarified the sites and sources generating the most acute harms to these children and informed concrete measures and priorities for reform.

The next chapter examines Australia's response to vulnerabilities generated by the alienage of unaccompanied children. I examine the operation and impact of Australian laws and policies between 2012 and 2014 on their situational vulnerability as asylum seekers. I will argue that those changes progressively restricted access to Refugee Status Determination using pre-transfer assessments, enhanced screening and mandatory offshore processing, wound back Australia's non-refoulement obligation and ultimately restricted entry completely. I will argue that a vulnerability informed response requires the overhaul of laws which denied these children access to Refugee Status Determination and entry to the State, subjecting them to a grave risk of refoulement.

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[124] Although, as will be discussed in Chapter 6, even if the government could ensure that expert wrap around allied health care services and specialist custodians were provided, the legitimacy of offshore processing as an Australian, but not a regional solution, will still need to be justified.

6 VULNERABILITY ANALYSIS OF AUSTRALIA'S PROCESSING OF ASYLUM CLAIMS OF UNACCOMPANIED CHILDREN

6.1 Introduction

This chapter applies the vulnerability informed response to assess the operation and impact of amendments to Australian law and policy in 2012, 2013 and 2014 on the acute vulnerabilities generated by the alienage of unaccompanied asylum seeking children and to make recommendations for reform. As examined in Chapter 2, these children bear the vulnerabilities shared by all children and, additionally, three vulnerabilities arising from their alienage: their non-citizenship, their unauthorised presence and their seeking asylum after fleeing persecution in their homeland. Applying vulnerability theory, these vulnerabilities can be understood as situational, overlaying their shared inherent vulnerabilities. Depending on States' responses these inherent and situational vulnerabilities can either be ameliorated or exacerbated into occurrent or pathogenic vulnerabilities.

Applying the first stage of the vulnerability informed response, Section 6.2 examines how changes to the *Migration Act* in 2012, 2013, and 2014 operated to effect the inherent and situational vulnerability of unaccompanied children seeking asylum from Australia. The amendments effectively created three cohorts of unaccompanied children in Australia: a "Legacy Caseload" of unaccompanied children eligible to have their claim processed on the mainland; those whose claim for asylum from Australia was deflected and relegated to the Nauruan government to determine; and those whose claim was deflected outright by the re-introduction of Boat Turnbacks and Takebacks.

Section 6.3 then applies the second stage, examining the impact of these changes, on the relative vulnerabilities of unaccompanied child asylum seekers in each cohort. For those in the "Legacy Caseload", definitional and procedural changes to the Refugee Status Determination ("RSD") process rendered them occurrently vulnerable to incorrect determinations by the introduction of restricted "fast tracking" merits review and limiting access to judicial review. The amendments also made them pathogenically vulnerable to lethal hopelessness caused by delays in processing RSDs. Further, these changes in principle exposed unaccompanied children to an occurrent risk of refoulement by altering the criteria for refugee status and winding back recognition of Australia's non-refoulement obligations in the *Migration Act* (although the risk of refoulement was largely ameliorated in practice by the

provision of free specialist legal assistance). For the children transferred to Nauru, the legislative changes generated occurrent vulnerabilities including the risk of inaccurate age determinations leading to their detention in adult male compounds, of not being able to prosecute their claim for asylum and of being transferred offshore without a proper Best Interest pre-transfer assessment. These children were also pathogenically vulnerable to cruel, inhuman, and degrading treatment on Nauru such as to constitute refoulement. For the children subjected to Boat Takebacks and Turnbacks, critical pathogenic vulnerabilities arose through the introduction of "on sea" screening and refusing them entry to the State that both directly subject them to an unmediated risk of refoulement. Section 6.4 attends to the third stage of the vulnerability informed response by identifying the priorities for legislative and policy reform.

Framing their experiences under these amendments in terms of vulnerabilities supplements traditional human rights analysis that this State practice breached these children's rights to non-refoulement and to access to special assistance with their claim for asylum. It does so by distilling with specificity the sites where the amendments progressively exacerbated these children's inherent and situational vulnerability arising from their alienage and the exact sources of devastating occurrent and pathogenic harms. So doing, it both illuminates the imperative for States to avoid these harms by providing unaccompanied children with special assistance in processing their claim for asylum, notwithstanding their unauthorised presence, and illuminates where priorities for legislative and policy reform should be directed.

6.2 Operation of the 2012-2014 legislative amendments: downgrading unaccompanied children's ability to seek asylum in Australia

This section applies stage one of the vulnerability informed response to examine how changes to the *Migration Act* between 2012 and 2014 operated to effect the inherent and situational vulnerability of unaccompanied children generated by their seeking asylum. This examination setting out the legal and policy context defining the relationship between Australia as the responsive state, and these children, is required before we can assess the impact of the amendments in stage two, or the priorities for reform in stage three. Prior to 2012, the RSD process for assessing the protection claims of unaccompanied children who arrived by boat was essentially robust. It assessed their claim for protection against the Refugee Convention definition of refugees,[1] entitled asylum seekers to permanent protection,

[1] I note that the definition itself has been criticised as being too narrow specially to capture refugees from climate change events.

and acknowledged Australia's non-refoulement obligations in accordance with international law. Primary decisions were subject to merits and judicial review. These children also had access to government funded legal assistance and the processing of their claims were not unreasonably prolonged.

However, the passage of four key pieces of legislation between 2012 and 2014 diminished access to a robust RSD for all maritime asylum seekers *and* failed to make any special provision for unaccompanied children. These changes progressively restricted the eligibility of asylum seekers (including unaccompanied child asylum seekers) who arrive by boat in Australia to claim asylum.

The *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* authorised the removal of unauthorised maritime arrivals from Australia and the offshore processing of their protection claims.[2] As examined in Chapter 5, unaccompanied children who arrived by boat after 13 August 2012 were therefore subject to processing in Nauru or Manus Island, although they could still be settled in Australia if found to be a refugee.[3]

The *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act* 2013 implemented the Rudd (Labor) government announcement on 19 July 2013 that irregular boat arrivals who arrived from that date would be processed offshore and would never be resettled in Australia.[4] The Act enabled all "unauthorised maritime arrivals" – families, adult females, adult males and unaccompanied minors – who arrived after 19 July 2013 to be "transited" in Australia, prior to being sent offshore to Nauru or Manus Island and

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[2] The *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) received Royal assent on 18 August 2012. It inserted sections 198AB and 198AD into the *Migration Act*. In *Plaintiff S156/2013 v Minister of Immigration and Border Protection* [2014] 254 CLR 28, the High Court unanimously upheld the constitutionality of the amendments. The Court held that sections 198AB and 198AD, operating to effect the removal of a class of aliens from Australia (unauthorised maritime arrivals), were a valid exercise of the alien's power. The plaintiff argued that the sections exceeded the scope of the aliens power because they were a disproportionate response to the object of regulating the entry of aliens to, or their removal from, Australia (for reasons including they potentially exposed asylum seekers to refoulement and indefinite detention in a regional processing country). However, the Court rejected this finding that sections 198AB and 198AD merely operated to effect the removal of aliens; they did not regulate what happened post removal.

[3] *The Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) amendments, allowed for offshore processing of the protection claims of boat arrival asylum seekers and gave the government sufficient power to implement offshore processing arrangements.

[4] 'Asylum Seekers Arriving in Australia by Boat to Be Resettled in Papua New Guinea', *ABC News* (online at 20 July 2013 http://www.abc.net.au/news/2013-07-19/manus-island-detention-centre-to-beexpanded-under-rudd27s-asy/4830778).

required their asylum claims to be processed under the respective laws of Nauru or PNG. These asylum seekers could not make a valid application for a visa in Australia whilst in transit, unless the Minister personally declared it was in the public interest to do so. The Act did not make provision for adequate pre-transfer assessments or Best Interest Determinations for unaccompanied children. Nor was there any provision for them to receive independent legal advice from the time they arrived in Australia up until the time they were removed.

Prior to 19 July 2013 Australia's non-refoulement obligations under international human rights law had been partly incorporated into domestic law in sections 5(1) and 36 of the *Migration Act.* These provisions enabled unaccompanied child asylum seekers who arrived in Australia to apply for a protection visa on the basis that they were owed protection obligations under the Refugee Convention, or would face a real risk of significant harm if removed from Australia. However, amendments to the *Migration Act* in 2013 precluded asylum seekers who arrived by boat after 19 July 2013 from accessing those protections against refoulement.[5] These amendments precluded all "unauthorised maritime arrivals" and "transitory persons" from applying for a visa, including a protection visa, unless the Minister deemed it was in the "public interest" through the exercise of a non-compellable discretion.[6] The amendments effectively prevented asylum seekers who arrived by boat from accessing the visas that give effect to Australia's non-refoulement obligations.

The *Maritime Powers Act 2013* set up the statutory framework to implement *Operation Sovereign Borders*, the Abbott (Coalition) Government's policy of intercepting boats carrying asylum seekers before they reached Australian waters. It authorised Australian maritime officers to tow any person on a vessel in or outside of Australian waters back to their original destination or, if their boat was unsafe, place them in lifeboats and direct them back to Indonesia.[7]

Then, the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act*, passed in December 2014, implemented a further suite of measures which signaled Australia's explicit retreat from its international obligations. The Abbott (Coalition) Government argued these were necessary to reinforce "the government's

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[5] *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth).

[6] *Migration Act* ss 46A, 46B. The Minister may 'lift the bar' if he thinks it is in the public interest to do so.

[7] *Maritime Powers Act 2013* (Cth) s 72. See Patrick Emerton and Maria O'Sullivan, "Rethinking Asylum Seeker Detention At Sea: The Power To Detain Asylum Seekers At Sea Under *The Maritime Powers Act* 2013 (Cth)" (2015) 38(2) *UNSW Law Journal* 695, 709-712.

powers to undertake maritime turn backs and to introduce rapid processing and streamlined review arrangements"[8] in order to "stop the boats" and resolve "Labor's legacy caseload of around 30,000 cases."[9] This Act had a dramatic effect on the claim to protection of both unaccompanied children already in Australia and those still at sea or yet to arrive. For unaccompanied children seeking asylum in Australia it made extensive changes to Australia's RSD framework. These included the reintroduction of temporary protection visas without family reunion rights or a right to re-enter Australia,[10] and a new "fast track" merits review process for boat arrivals between 13 August 2012 and 1 January 2014.[11] In addition, express references to the Refugee Convention in the *Migration Act* were replaced with vaguer language which reduced protection obligations[12] and deemed Australia's non-refoulement obligations as "irrelevant" to removals carried out under s 198 of the *Migration Act*.[13]

For unaccompanied children still at sea or yet to arrive, the *Migration Act* expressly authorised the transfer of asylum seekers intercepted at sea even if this would amount to the return of people to persecution or other forms of significant harm.[14] It provided that the rules of natural justice do not apply to the exercise of these powers.[15] It also provided that exercises of power under these provisions are not invalidated even if there has been a failure to consider Australia's international obligations; there has been a "defective consideration" of those obligations; or the taking of a person to that place is inconsistent with these obligations.[16]

The effect of these legislative changes on unaccompanied children's eligibility to have their claim for asylum processed and their eligibility for re-settlement is captured in Table 6.1 "Eligibility to apply for asylum by date of arrival."

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[8] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2014, 10546 (Scott Morrison, Minister for Immigration and Border Protection) <Accessed on 10 May 2015 at http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/a526371b-b2dd-4037-ba7a-649c0c3fb696/0021/hansard_frag.pdf;fileType=application/pdf>.

[9] Ibid 10545.

[10] It also introduced a new form of TPV- the Safe Haven Enterprise Visa.

[11] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), Schedule 4.

[12] Ibid Sch 5.

[13] Ibid Sch 5, item 2.

[14] *Maritime Powers Act 2013* (Cth) s 69.

[15] Ibid s 75B.

[16] Ibid s 75A.

Table 6.1: Eligibility to apply for asylum by date of arrival

Date of arrival	Processing of asylum claim	Eligibility to settle in Australia if found to be a refugee
Pre 13 August 2012	Asylum claim processed in Australia.	Can be resettled in Australia if found to be a refugee.
Post 13 August 2012 and pre-19 July 2013	Transferred initially to a third country (Nauru or Papua New Guinea) for asylum claim processing after "transiting" in Australia (on Christmas Island). Subsequently transferred back to Australia for processing of their claim ("Legacy Caseload").	Can be resettled in Australia if found to be a refugee.
Post 19 July 2013	Transferred to a third country (Nauru or Papua New Guinea) to have their asylum claim processed after "transiting" in Australia (on Christmas Island).	Cannot be resettled in Australia if found to be a refugee.
Post September 2013	Ineligible to make a claim for asylum in Australia. Asylum seekers are subject to Turnbacks, Takebacks or transfer to a regional processing country.	No opportunity to settle in Australia.

As Table 6.1 illustrates, Australia's response to the alienage-generated vulnerabilities of unaccompanied child asylum seekers constricted steadily between 2012 and 2013. From being eligible to have their claim for asylum processed in Australia and be re-settled in Australia if found to be a refugee in 2012, unaccompanied children since 2013 have been variously subjected to boat Turnbacks, Takebacks or transfer to a regional processing country and prevented from making a claim at all. Recognition of unaccompanied children as "special cases", notwithstanding their unauthorised presence has not so much been reduced as dispensed with altogether as the trajectory of Australia's legislative reforms in this period foreground the principle of deterrence rather than human rights protection.

6.3 Impact of denying access to RSD and protections against refoulement: augmenting the protection gap for unaccompanied child asylum-seekers

As discussed in Chapter 2, unaccompanied children's vulnerability arising from their alienage is multifaceted, with indeterminate beginnings and ends. These vulnerabilities are situated in multiple and potentially overlapping sites: from the persecution experienced in their home country, from mistreatment or exploitation on their transit journey and/or at the site of border

control, from resistance to their claim for protection, or from all of the above sites. Also, unaccompanied children's vulnerability on account of their seeking asylum is acute and heightened in comparison to other unaccompanied children who have been authorised entry as refugees[17] and their vulnerability on account of their unauthorised presence is particularly dependent on the character of the State's political response to them. This section examines the impact of the legislative amendments as the second stage of the vulnerability informed response. Their inherent and situational vulnerability arising from their dependence on the State to process their asylum claim becomes an occurrent (and potentially pathogenic) vulnerability where States do not provide them with special assistance in prosecuting their refugee claim, do not process their claims in a timely fashion and do not adhere to rules of natural justice. Further, their dependence on the State to not refoule them is absolute and States' failure to ameliorate this vulnerability aggravates their situational vulnerability into a potentially pathogenic one.

6.3.1 Impacts on the Legacy Caseload cohort eligible for processing of their asylum claim on the Australian mainland

The definitional and procedural changes to the RSD process rendered unaccompanied children in the Legacy Caseload cohort occurrently vulnerable to incorrect determinations in the restricted "fast tracking" merits review and limited access to judicial review. They also became pathogenically vulnerable to lethal hopelessness caused by RSD processing delays and to a risk of refoulement by winding back recognition of Australia's non-refoulement obligations in the *Migration Act*.

Prior to the introduction of the "fast track" merits review process, asylum seekers who received a negative primary decision on their visa application could apply to the Administrative Appeals Tribunal ('AAT') for a merits review of protection visa applications. This review considered the facts, law and policy aspects of the original decision, could take into account new information that was not before the original decision-maker, and could conduct hearings to test and take new evidence. However, the new fast track merits review

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[17] As noted in Chapter 1, my thesis is focused on Unaccompanied Child Asylum Seekers because Australia's current Boat Turnback laws – by intercepting vessels and returning them to sea and potentially refouling unaccompanied children – exacerbate their vulnerability in breach of Australia's most basic international human rights obligation. However, I do not assert that *only* Unaccompanied Child Asylum Seekers are so vulnerable as to enliven the vulnerability informed response contended for in Chapter 4. Instead, provided the requisite "sufficient connection" can be established a vulnerability informed response ought to be able to be made out for different cohorts.

referred unsuccessful applicants to review before an Immigration Assessment Authority ('IAA').[18] In contrast to the AAT, the IAA, could not interview asylum seekers[19] or accept or request information that was not before the primary decision-maker to determine whether the original decision was correct except in exceptional circumstances.[20] Here, their situational vulnerability as asylum seekers became an occurrent vulnerability because they were denied an opportunity for a procedurally fair merits review of the primary decision and became a potentially pathogenic vulnerability if that denial heightened their risk of being incorrectly denied protection and returned or removed to situations in breach of Australia's non-refoulement obligations.[21] Although asylum seekers who received a negative decision on their visa application at the IAA could still apply for judicial review, this could only correct legal errors in the making of the decision (such as whether a decision-maker was biased, applied the wrong criteria in coming to their decision, or failed to take relevant information into account). Since judicial review does not assess whether the decision-maker was correct in determining that a person is or is not entitled to protection as a refugee, it does not alleviate the occurrent vulnerability of unaccompanied child asylum seekers generated by the fast track merits review process.

The amendments also made these children pathogenically vulnerable to lethal hopelessness caused by prolonged delays in processing RSDs. After third country processing was re-introduced in 2012, the processing of visa applications for people in the Legacy Caseload cohort was paused.[22] The Department's Protection Visa Processing Guidelines specify that applications from unaccompanied children should be accorded higher priority

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[18] *Migration Act* s 473CA.

Unless they were an "excluded fast track review applicant"- people who, in the opinion of the Minister: have previously had their protection claims rejected in Australia, by another country or by UNHCR; have provided a 'bogus document' in support of their application without a reasonable explanation; or make a 'manifestly unfounded' claim. See *Migration Act* s 5(1).

[19] *Migration Act* s 473DB.

[20] Ibid ss 473DC, 473DD.

[21] In *Plaintiff M147/2016 v Minister for Immigration and Border Protection* [2018] HCA 18, [95], the High Court held that the IAA engages in de novo merits review despite these limits. Notwithstanding this, the risk of refoulement increases where applications for merits review are unsuccessful due to procedural factors.

[22] Tony Burke, MP Minister for Immigration, Multicultural Affairs and Citizenship Minister for the Arts, 'Split in the Opposition's asylum seeker policy; asylum seeker policy' (Transcript of press Conference, 7 July 2013) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F3063861%22>.

than others.[23] Nevertheless, the reintroduction of temporary protection visas and suspension of visa processing until May 2015 caused such substantial delays that the Department has estimated that primary assessments for the this cohort will not be completed before December 2021.[24] Since the Legacy Caseload cohort comprises asylum seekers who arrived in Australia, and had not had their application determined before 1 January 2014, this cohort have had their claims pending for at least seven years.

These children's situational vulnerability can be exacerbated into an occurrent vulnerability where prolonged delay in finalising RSD become a stressor in and of itself.[25] This is evidenced by a growing body of research establishing that these children were subjected to a pathogenic vulnerability of "lethal hopelessness." Prolonged delays in the processing of the claims of the Legacy Caseload cohort generated "increasing reports of many people within the asylum seeker community being at advanced stages of feeling mentally trapped, figuratively boxed in, and especially hopeless and helpless".[26] While the available research does not address unaccompanied child asylum seekers specifically, it is clear that children as young as ten and 11 were expressing suicidal ideation.[27] And so, the impact of this aspect of the amendments on the vulnerabilities of unaccompanied child asylum seekers is likely to have undermined Australia's otherwise largely adequate care arrangements in Community Detention, as examined in Chapter 5.

A further key impact of these legislative changes for this cohort was to potentially exacerbate their situational vulnerability as an unauthorised entrant to a pathogenic vulnerability to refoulement. The criteria for refugee status introduced by the *Legacy Caseload Act* essentially maintained the criteria in the Refugee Convention.[28] However, by replacing most express references to the Refugee Convention in the *Migration Act* with a new

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[23] Department's Protection Visa Processing Guidelines 3.6.1.

[24] Evidence to Senate Standing Committee on Legal and Constitutional Affairs Committee, Senate Estimates, Parliament of Australia, Canberra, 25 May 2015, 66 (Michael Manthorpe, Deputy Secretary, Visa and Citizenship Management, Department of Immigration and Border Protection).

[25] Suresh Sundram and Samantha Loi, 'Long waits for refugee status lead to new mental health syndrome', *The Conversation* (online at 23 May 2012) <https://theconversation.com/long-waits-for-refugee-status-lead-to-new-mental-health-syndrome-7165>.

[26] Nicolas Procter et al, 'Lethal hopelessness: Understanding and responding to asylum seeker distress and mental deterioration' (2018) 27 *International Journal of Mental Health Nursing* 448, 451.

[27] Australian Human Rights Commission *Lives on Hold: Refugees and asylum seekers in the 'Legacy Caseload'* (Commonwealth Government, 2019) 41.

[28] For example, compare *Migration Act* s 5H with Refugee Convention, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) arts 1(A), 1(F).

statutory refugee status determination framework[29] and by including additional criteria beyond the Refugee Convention, its overall impact was to reduce Australia's compliance with its protection obligations. Specifically, the additional criteria required asylum seekers to establish that they had a "well-founded fear of persecution" in "all areas" of their country of origin,[30] not just in their home city or the place they fled from. Also, that no "effective protection measures" were available in their country of origin from their government, or non-state parties or organisations[31] and that there were no "reasonable steps" that they could take to modify their behaviour to avoid persecution.[32] For unaccompanied children, in particular, the amendment requiring their fear of persecution extend to all areas might require them to return to their country and relocate to an area where they have no family or support network. These amendments, coupled with the express stipulation that Australia's non-refoulement obligations are "irrelevant" to removals carried out under s 198 of the *Migration Act,*[33] exacerbate these children's situational vulnerability to a pathogenic vulnerability to being denied refugee status, removed from Australia, and to refoulement even if they have a well-founded fear of persecution within the meaning of the *Convention*.

It must be noted that unaccompanied children on the mainland were eligible to receive assistance with visa processing and merits review of decisions under either the government funded Immigration Advice and Application Assistance Scheme[34] or the Primary Application Information Scheme (after 31 March 2014). Although their access to legal representation was ad hoc, not automatic, the PAIS scheme funded the provision of assistance by a not-for-profit, the Refugee Advice and Casework Service ('RACS') which ran the "Legal Help for Unaccompanied Children" service in the research period. Based in Sydney, RACS sub-contracted registered migration agents in Tasmania, Victoria and the Northern Territory to assist these children with their visa applications.[35] As at 30 June 2014, RACS reported that

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[29] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) sch 5.

[30] *Migration Act* s 5J(1)(c).

[31] Ibid ss 5J(2), 5LA.

[32] Ibid s 5J(3).

[33] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) sch 5 item 2.

[34] Department of Immigration and Border Protection, *Fact Sheet 63 – Immigration Advice and Application Assistance Scheme* < https://www.immi.gov.au/media/fact-sheets/63advice.htm>.

[35] RACS, Submission No 217, Australian Human Rights Commission, *The Forgotten Children* Inquiry (30 June 2014) < https://humanrights.gov.au/sites/default/files/Submission%20No%20217-

it was assisting more than 30 unaccompanied children at imminent risk of removal to Nauru but that because of the "lack of funding and capacity of staff RACS cannot presently provide comprehensive legal assistance for all children in immigration detention".[36] Access was dependent on the ability of the child to obtain the necessary information and assistance to contact the service and the Service's capacity to cope with demand. Nevertheless, these children's occurrent vulnerability to having incorrect determinations made, or pathogenic vulnerability to a risk of refoulement, was lessened where they accessed this free specialist legal assistance.

6.3.2 Impacts on the Offshore Transferee cohort

Applying the stage two vulnerability taxonomy to distinguish between and characterise impacts of the legislative amendments on unaccompanied children in the Offshore Transferee cohort reveals four acute impacts. They were occurrently vulnerable to not being providing with adequate pre-transfer assessments for eligibility for offshore processing. They were given inadequate representation in the age determination processes. They received no special assistance to prosecute their claim for asylum. These failures exposed them to such a risk of significant or irreparable harm (including cruel, inhuman or degrading treatment) on Nauru as to constitute a pathogenic vulnerability of refoulement.

6.3.2.1 Pre-transfer assessments for offshore processing

The Government conducted "Best Interest pre-transfer assessments" of unaccompanied children subject to offshore processing. This purported to assess the possible exercise of the Minister's discretion under s 198AE (1) *Migration Act* to declare that the requisite s 198AD transfer to a regional processing country did not apply to that child. The applicable pre-transfer policy differed depending on whether an unaccompanied child arrived in the period 13 August 2012 to 19 July 2013 or post 19 July 2013.[37] However, the Government mandated that "in making the transfer decision, the best interests of such children are outweighed by other 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

%20Refugee%20Advice%20%26%20Casework%20Service.pdf?_ga=2.210690128.456257149.1589840532-1976784639.1520134709>

[36] Ibid 34 [11.10].

[37] PAM3: Refugee and Humanitarian - Regional processing - Minister's s198AE Guidelines and PAM3: Refugee and Humanitarian - Regional processing - Pretransfer assessment.

illegal boat journeys to Australia."[38] The Government explicitly conceded that "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" (emphasis added).[39]

This was in breach of both Australian domestic and international law. Australian courts have confirmed that although decision makers must not treat any other considerations as inherently more significant than the best interests of the child, other considerations (or their cumulative effect), may sometimes outweigh them.[40] But Australia law requires that the child's best interests must be identified first, before they can be weighed against other considerations, which does not occur with the Best Interest pre-transfer assessment. Under international law (as discussed previously in Chapter 3.3.1) Best Interest Assessments must involve a clear and comprehensive assessment of an individual child's specific circumstances.[41] They must be done in a friendly and safe atmosphere by qualified professionals trained in age and gender sensitive interviewing techniques.[42] They must be determined individually, on a case-by-case basis before competing interests are taken into account[43] and provide reasons stating the child's factual circumstances, the relevant considerations, how they have been weighted to determine the child's best interests and whether the decision differs from the child's views.[44] If, exceptionally, the solution chosen is not ultimately in the best interests of the child, the decision must set out grounds to show that the child's best interests were nevertheless a *primary* consideration. The assessment should also provide formal mechanisms to appeal and revise decisions to address procedural

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[38] Department of Immigration and Border Protection, Notice to produce, *Best interests Assessment for transferring minors to an RPC* (forming part of Pre-Transfer Assessment), Schedule 3, First Notice to produce Australian Human Rights Commission, *The Forgotten Children* Inquiry (31 May 2014) Document 1.2.

[39] Ibid.

[40] See *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133 [32].

[41] UN Committee on the Rights of the Child, *General Comment No. 14 The right of the child to have his or her best interests taken as a primary consideration,* UN Doc CRC/C/GC/14 (29 May 2013) (*General Comment No. 14*) [49].

[42] Ibid [20].

[43] Ibid [1].

[44] Ibid [97].

or substantive decision-making errors,[45] including where Best Interest Assessment requirements have not been complied with.[46]

An examination of the assessments conducted by the Department between 1 January 2014 and 1 March 2014 for children detained on Christmas Island revealed that they all failed to meet minimum requirements for a Best Interests Determination. All 27 unaccompanied children in immigration detention on Christmas Island were assessed for eligibility for transfer to Nauru, and all were recommended for transfer. The recommendations all adopted a set of highly generalised and almost identical reasons, stating: "Appropriate arrangements are in place in Nauru, therefore the child's transfer is appropriate." They also made no assessment of the strength of the child's claim for protection. Given that as at 31 October 2016, of the 1,195 people who had their claims for asylum assessed by the Nauruan Government, 941 (79 per cent) had been found to be refugees, it is probable that at least this percentage of unaccompanied children transferred would be found to be owed protection obligations as refugees.[47] Neither did any of the assessments included any individualised consideration of the children's educational, care, welfare and service-related needs. In particular cases where children aged 16 or 17 had had no schooling, the officers declared that the educational services were appropriate without providing any information about what services were actually available. In relation to family support, there was no indication as to whether the child had adult relatives residing in Australia who may have been able to provide support to the child. Although the form provided space for the assessing officer to record specific considerations concerning the individual child,[48] this space was left blank on every single form. In practice then, for unaccompanied child boat arrivals after 19 July 2013 subject to transfer to Nauru, there were only two possible outcomes to an assessment: officers approved the transfer or postponed it until such a time as it was reasonably practicable.

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[45] Ibid [98]

[46] Ibid [98].

[47] Elibritt Karlsen, 'Australia's offshore processing of asylum seekers in Nauru and PNG: a quick guide to statistics and resources' *Research paper series 2016–17* (Commonwealth Parliamentary Library, 2016) 10.

[48] Department of Immigration and Border Protection, 'Best Interests Assessment for transferring minors to an RPC: Guidance for Completing the Best Interests Assessment for Transferring Minors to an RPC', Version 1.4 (Best Interests Assessment for transferring minors to an RPC) (13 February 2014) 1 https://www.border.gov.au/AccessandAccountability/Documents/FOI/FA140201097.pdf> 1; Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (Commonwealth Government, 2014) 193 ('*The Forgotten Children*').

The UN High Commissioner for Refugees expressed concern in 2012 and again in 2013 about the ineffectiveness of the assessments as a mechanism for ensuring that especially vulnerable asylum seekers such as children, were not transferred to Nauru.[49] These inadequate assessments exacerbated the situational vulnerability of these children as unauthorised arrivals to an occurrent vulnerability to being transferred offshore, where their acute needs as being/becoming children could not be met, as already examined in Chapter 5.

6.3.2.2 Inadequate representation in age determination

Unaccompanied child asylum seekers without legitimate identity documentation with a clear date of birth underwent an age determination interview conducted by two Department Age Determination Officers and an interpreter.[50] The Age Determination Officers explored multiple lines of enquiry including the child's physical appearance, behaviour and demeanour, family composition and history, education and employment, and social history and independence.[51] The Department did not follow a set questionnaire during the interview process but rather reached a decision as to whether the person was likely to be a minor or an adult on the balance of probabilities.[52] Department policy stated that officers should err on the side of caution when making an assessment that the person is an adult. Also, that where there is disagreement between officers the person will be assessed as a minor.[53] The Department did not provide legal representation during age assessment interviews, unless the child had already requested or retained a lawyer.[54] Children without legal representation were incorrectly assessed as adults.[55] The process exacerbated the situational vulnerabilities of these children into an occurrent vulnerability of being detained in single male adult compounds.

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[49] Pressure from the Department of Immigration and Border Protection to complete PTAs within 48 hours reportedly affected their quality. See UNHCR, *Monitoring visit to the Republic of Nauru 7 to 9 October 2013* (UNHCR, 2013) <https://www.refworld.org/docid/5294a6534.html> ('*Monitoring visit to the Republic of Nauru*') 25-26.

[50] Department of Immigration and Border Protection *Procedures Advice Manual 3* (PAM 3) [P A345.10].

[51] Ibid [P A345.13].

[52] Ibid [P A345.10].

[53] Ibid [P A345.10].

[54] Section 256 of the *Migration Act* provided that reasonable facilities for obtaining legal advice should be afforded to a detained asylum seeker if they request legal assistance. However, there was no positive obligation on the Minister or on the Department to provide representation or legal assistance otherwise.

[55] Lenore Taylor, 'Boys kept in isolation at Manus Island detention centre', *The Guardian* (online at 4 November 2013) <http://www.theguardian.com/world/2013/nov/03/boys-kept-in-isolation-at-manus-

6.3.2.3 Prosecuting their claim for asylum

Unaccompanied children subject to offshore processing were occurrently vulnerable to having an incorrect determination of their asylum claim because of the failure to automatically provide them with consistent State sponsored legal representation to prosecute their claim for asylum from reception until their transfer.

In the research period the Department required Independent Observers to be present whenever the Department or other Government agency interviewed an unaccompanied minor.[56] But since Independent Observers were precluded from advocating on the child's behalf or from advising them, the requirement did not compensate for the absence of a legal representative to assist and represent the child during these processes, as evidenced by the following statement from a former unaccompanied child:

> People interviewing us they harass us very much; instead of listening to [us] they harass us; they take our documents and say they're fake. They ask us the same questions from different angles, so we try our best to provide documents or evidence if we can, but sometime we don't have any.[57]

Unlike unaccompanied children in the Legacy Cohort, who commonly received government funded legal assistance from RACS, the cohort on Christmas Island IDC rarely received legal representation. Access was dependent on RACS' available resources and funding and the ability of unaccompanied children to obtain the necessary information and assistance to access the service. Unaccompanied children detained on Christmas Island only received pre-transfer legal representation in their age-assessment or pre-transfer assessment interviews if the designated solicitors were already present or were able to fly there to meet with them prior to their transfer. The AHRC found that most unaccompanied children in Christmas Island IDC, as at March 2014, who had been detained from six to eight months had not "spoken to a lawyer or were aware they might have a right to do so."[58]

The lack of automatic provision of a legal representative to make a representation to the Minister to exercise his discretion to grant the child a residence determination compounded

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island-detention-centre>. See also Australian Human Rights Commission, *The Forgotten Children* (n 48) 169 which reported that an unaccompanied boy from Afghanistan, who was incorrectly assessed as being over 18 was transferred to the single adult male compound (North West Point Detention Centre) on Christmas Island after his age determination interview.

[56] Department of Immigration and Border Protection, PAM3 Chapter 2 Client placement [22].

[57] Ilan Katz, Geraldine Doney and Effie Mitchell (2013) *Evaluation of the expansion of the community detention program: Final Report SPRC 12/13 to the Department of Immigration and Citizenship (DIAC)*, 49.

[58] Australian Human Rights Commission, *The Forgotten Children* Inquiry (n 48) 155.

the inadequacy of the de-individualised pre-transfer assessment. It also further exacerbated their situational vulnerability of unaccompanied children in IDCS as unauthorised arrivals into an occurrent vulnerability of being transferred offshore where their acute needs could not be met.

6.3.2.4 Cruel, inhuman and degrading treatment on Nauru constituting refoulement

As examined in detail in Chapter 5 independent expert reports have found that the conditions of Nauru RPC exposed unaccompanied children to acute and significant harm,[59] and the Australian government was clearly aware of these acute risks. The inadequate pre-transfer assessment, age determination process and lack of specialist assistance to these children to prosecute their claim for asylum were pathogenic sources of vulnerability that made these children occurrently vulnerable to refoulement by Australia by exposing them to a real risk of significant or irreparable harm (including cruel, inhuman or degrading treatment) in Nauru.

6.3.3 Impacts on the Boat Turnbacks and Takebacks Cohort (unaccompanied asylum seeker children subject to Boat Turnbacks and Takebacks)

This section applies the stage two vulnerability taxonomy to distinguish between and characterise impacts of the legislative amendments on unaccompanied children in the Boat Turnbacks and Takebacks cohort. As discussed in section 6.2 above, from 2014 the Minister was expressly empowered to detain asylum seeking children on the high seas, immediately remove them from Australian territory, and transfer them to third countries notwithstanding Australia's non-refoulement obligations.[60] The legality of the detention of 157 Sri Lankan Tamil asylum seekers on an Australian customs boat for 29 days, after their boat was intercepted from India, was upheld by the High Court in *CPCF v Minister for Immigration and Border Protection*[61] and the legality of boat interdictions generally has not been

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[59] See UNHCR, *Mission to the Republic of Nauru, 3 to 5 December 2012: report* (UNHCR, 2012) and UNHCR, *Monitoring visit to the Republic of Nauru* (n 48).

[60] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), Schedule 5, item 2.

[61] (2015) ALJR 207, 243. The Commonwealth argued that the detention was authorised by section 72(4) of the *Maritime Powers Act 2013* (Cth) and/or the executive power under section 61 of the *Constitution*. The High Court held by a 4:3 majority in its decision, handed down on 28 January 2015, that the detention was authorised by the *Maritime Powers Act 2013.* The case attracted domestic controversy because proceedings were initiated, but before the High Court handed down its decision, Parliament passed the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum*

challenged in Australian Courts.[62] Statistics identifying the number of unaccompanied children involved in Boat Turnbacks, Takebacks and enhanced screening in the research period are unavailable.[63] The Abbott (Coalition) Government and subsequent governments have refused to release "details of 'on-water' matters" conducted by Operation Sovereign Borders.[64] However, information on the frequency and outcome of Turnbacks and Takebacks from press releases, government speeches and government answers in parliamentary scrutiny processes, such as Budget Estimates Committees, makes clear that from the commencement of Boat Turnbacks on 19 December 2013 until 5 February 2016, at least 23 vessels carrying more than 633 asylum seekers have been turned back.[65]

6.3.3.1 Enhanced screening

Unaccompanied child asylum seekers who arrived after July 13 2013 from Sri Lanka and Vietnam were subject to an "enhanced screening process" when Australian authorities first made contact with them, including on the seas, to decide whether to immediately remove them

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Legacy Caseload) Act 2014 (Cth) which significantly amended the *Maritime Powers Act 2013*, including provisions that were being contested in the High Court proceedings.

[62] Unfortunately, the Court decision did not address submissions about the extraterritorial application of Australia's non refoulement obligations and the plaintiff's risk of refoulement by India to Sri Lanka, although French CJ and Crennan J acknowledged in obiter that they may exist. There has also been a significant volume of academic commentary, in particular, on the conditions, the duration and the legality of the detention of asylum seekers interdicted at sea pursuant to Operation Sovereign Borders. See, for example, Patrick Emerton and Maria O'Sullivan 'Rethinking Asylum Seeker Detention at Sea' (2015) 38(2) *UNSW Law Journal* 695 at 697.

[63] Australian immigration officials had also been accused of paying people smugglers to reroute vessels back to Indonesia in May 2015. See Shalailah Medhora, 'Asylum seekers: 23 vessels turned back but Coalition stays silent on payments' *The Guardian* (online at 5 February 2016) < https://www.theguardian.com/australia-news/2016/feb/05/asylum-seekers-23-vessels-turned-back-but-coalition-stays-silent-on-payments>.

[64] Scott Morrison (then Minister for Immigration and Border Protection), 'Operation Sovereign Borders update' (Transcript of press conference, 8 November 2013) < https://newsroom.abf.gov.au/releases/transcript-press-conference-operation-sovereign-borders-update-8>.

[65] Senate Legal and Constitutional Affairs Legislation Committee, Immigration Portfolio, Supplementary Budget Estimates 2014–15 '*Suspected illegal entry ventures removed from Australian waters'* (20 October 2014) Tabled document 6; Harriet Spinks, 'Boat Arrivals in Australia: A Quick Guide to the Statistics since 2001' (Commonwealth Parliamentary Library, 2018) < https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1819/Quick_Guides/BoatTurnbacksSince2001>.

from Australian territory under s 198(2) of the *Migration Act*.[66] Unaccompanied children were subject to the same enhanced screening process as adults; being interviewed by two Department officers who make a determination of whether a protection claim was raised or not.[67] If not, they were "screened out" of the protection assessment process and removed from Australian territory in accordance with s 198 of the *Migration Act*.[68] If they were assessed as potentially raising a protection claim they were "screened in" and sent to Christmas Island IDC to await transit to Nauru for their asylum claim to be processed under Nauru's refugee status determination procedure.

The situational vulnerability of unaccompanied children subject to on-water enhanced screening and Boat Turnbacks and Takebacks is acute. Subjecting children to an identical screening process as adults and failing to provide them with any adult or legal representation exacerbates their situational vulnerability into an occurrent vulnerability to being turned back to an unsafe situation at sea or in the next transit country where they arrive and to a potentially pathogenic vulnerability to refoulement.

6.3.3.2 Risk of refoulement

In aid of the interception and removal powers introduced for Boat Turnbacks and Takebacks in 2014, s 197C of the *Migration Act* was introduced to make clear that, for the purposes of removing unlawful non–citizens, "it is irrelevant whether Australia has non-refoulement obligations" to them. As a result, the duty to remove them as soon as practicable "arises irrespective of whether there has been as assessment according to law of Australia's non-refoulement obligations. The failure to require this assessment exposes these children to a potentially pathogenic vulnerability to refoulement.

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[66] Section 198(2) *Migration Act* imposes a duty on the Department to remove a non-citizen who: is not the holder of a valid visa and has not made an application for a substantive visa; has not been immigration cleared; and is detained under s 189 of the Act, as soon as reasonably practicable.

[67] Australian Human Rights Commission, 'Tell me about: the 'Enhanced Screening Process' (Commonwealth Government, 2013) <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/tell-me-about-enhanced-screening-process>.

[68] Department of Immigration and Border Protection, Supplementary Budget Estimates Hearing, Legal and Constitutional Affairs Committee, 19 November 2013, answer to question on notice SE13/0115 <http://www.aph.gov.au/~/media/Estimates/Live/legcon_ctte/estimates/sup_1314/DEPARTMENT/SE13-0115.ashx>.

6.4 *Priorities for reform*

This chapter has examined the effect of the operation of the amendments on the children's ability to have their claim for asylum responded to by Australia. It has also applied the vulnerability taxonomy to distinguish between and characterise those impacts that ameliorated inherent and situational vulnerabilities from those that created or exacerbated pathogenic and occurrent harms. This section now applies stage three of the vulnerability informed response and proposes priorities for reform based on a gravity of consequences rationale.

Australia should also look overseas for models that comprehensively respond to these children's vulnerability and consider how these might translate in the Australian context. For example, Italy's Law 47/2017 illuminates a vulnerability informed response to unaccompanied children's alienage. Law 47/2017 codified the prohibition on forced returns of unaccompanied children, introduced a procedure requiring an interview between the child, qualified staff at the first reception facility, and an intercultural mediator to identify the child and the essential elements of their protection claim within ten days. Besides regulating the appointment of the child's legal guardian, which will be discussed further in Chapter 7, Law 47/2017 also enabled an unaccompanied and/or separated child to be automatically granted a temporary residence permit upon their application for international protection. This protection application also entailed rights to be heard, to legal assistance and to prioritised examination of their application. It permitted them to convert that permit to an adult temporary residence permit for study, work or job seeking when they turn 18. It also provided for transitional arrangements for their continued care and protection, irrespective of legal status, and the provision of social services until the age of 21.[69]

From the perspective of ameliorating the situational vulnerabilities of unaccompanied children arising from their alienage, Italy's Law 47/2017 is an excellent starting point. It resolves their vulnerability as unauthorised entrants by granting them a residence permit and facilitates representation in, and expedited access to, resolution of their protection claim.

Australia should progressively work towards responding proportionately to these children's temporal and physical presence and their relationship of acute need in a genuine regional processing system that ensures all asylum-seekers have access to a consistent and timely Refugee Status Determination process, merits review and durable solutions. Exposure

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[69] As discussed in Chapter 5, appropriate arrangements are critical for unaccompanied young people leaving group community detention living arrangements to ensure that they have the necessary support and skills to transition safely and effectively to living independently.

to refoulement (both by Boat Turnbacks, Takebacks and by transfer to Nauru RPC) and failure to provide special assistance in the prosecution of the child's protection claim can both be addressed by legislative and policy change. This section outlines five priorities for reform to avoid exacerbating existing vulnerabilities or generating new vulnerabilities. Firstly, on-sea enhanced screening and Boat Turnbacks and Takebacks of unaccompanied children should cease, and they should be transferred to the mainland for assessment of their claim. Secondly, the Minister should make a s 198AE (1) *Migration Act* declaration that the s 198AD transfer to a regional processing country requirement does not apply to unaccompanied child asylum seekers.[70] The Minister should make such a declaration, preferably permanently, but at least until there is evidence that transferring children to Nauru does not constitute refoulement. Thirdly, parliament should re-invoke Australia's non-refoulement obligations in full by making the necessary amendments to the *Maritime Powers Act 2013* and the *Migration Act*. Fourthly, all unaccompanied children should be provided with specialist legal assistance from reception until finalisation of their protection claim by expanding funding of existing service providers. Next, to avoid pathogenising their vulnerability by extended processing delays, processing of protection claims of unaccompanied children should be expedited and custodial carers of the Legacy Caseload cohort in Community Detention group houses should urgently be trained to identify cases of "lethal hopelessness" and are provided with appropriate referral points.

In the longer term, other legislative reform should be implemented. Firstly, the reintroduction of full merits review of primary protection decisions by the Administrative Appeals Tribunal, ensuring that status determinations for unaccompanied child asylum seekers comply with international norms. Secondly, if transfers to offshore processing are resumed, ensure that the Best Interest pre-transfer assessment is a genuine and individualised assessment with a real possibility that the child not be transferred. Thirdly, in order to build a sustainable regional response, continued cooperation to build a regional processing system in Bali Process countries with consistent and timely access to Refugee Status Determination process, merits review and durable solutions. This will facilitate realistic 'third country' settlement options if government bipartisan policy continues to refuse the prospect of settlement in Australia.

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[70] This complements the recommendation in Chapter 5 that the Minister utilise his existing discretionary power to release unaccompanied children from mandatory immigration detention for processing under a residence determination. The Minister should revoke his Guideline directing that residence applications for asylum seekers arriving after 19 July 2013 not be referred for consideration unless there are exceptional reasons, or the Minister has requested it, exposed those cohorts to an unnecessary occurrent risk of continued mandatory immigration detention and offshore transfer.

6.5 Conclusion

While Australia has not "welcomed" asylum seeker boat arrivals since the 1980s, amendments to Australian migration law and policy between 2012 and 2014 effectively removed the possibility of people, including unaccompanied children, seeking asylum in Australia if they arrive by boat. The vulnerability analysis in this chapter has zeroed in on the sites at which the legislative amendments progressively exacerbated these children's inherent and situational vulnerability arising from their alienage and where devastating occurrent and pathogenic harms to these children were generated. This chapter has illustrated how a vulnerability analysis of the specific legislative amendments illuminates that Australian migration law has not properly construed or adequately responded to the actuality, complexity and specific vulnerability of unaccompanied child asylum seekers. The focus on sites of vulnerability, rather than human rights breaches, highlights the direct correlation between States' implementation of restrictive asylum practices and these harms and supplements a human rights imperative of recognising State responsibilities to provide unaccompanied children with special assistance in processing their claim for asylum as "special cases" notwithstanding their unauthorised presence. The vulnerability analysis elucidated States' accountability for legal and policy choices that disavowed these children's absolute dependence on the State – because of their temporal, relational and physical proximity – to implement robust processes for responding to their claim for asylum. The vulnerability analysis also, unlike human rights law, clarified the sites and sources of the most devastating impacts on being/becoming unaccompanied children's ability to seek asylum and informed concrete measures and priorities for reform. It illuminated where priorities for legislative and policy reform should be directed to reduce occurrent harms and pathogenic sources of vulnerability first, facilitating distinction between urgent and longer term priorities.

The next chapter examines Australia's response to vulnerabilities generated by unaccompanied children seeking asylum without an adult caregiver. I examine the operation and impact of amendments between 2012 and 2014 to the *IGOC Act* that designates the Minister responsible for the immigration portfolio as their exclusive legal guardian on unaccompanied child asylum seekers situational vulnerability generated by their separation from their parents.

7 VULNERABILITY ANALYSIS OF AUSTRALIA'S PROVISION OF GUARDIANSHIP TO

UNACCOMPANIED ASYLUM SEEKING CHILDREN

7.1 Introduction

This chapter applies the vulnerability informed response to assess the operation and impact of Australian law and policy on the acute vulnerabilities generated by unaccompanied child asylum seekers' separation from their parents following the 2012-2014 legislative amendments. It focuses on the provision of guardianship and makes recommendations for reform. Globally, States respond to the acute vulnerability of unaccompanied children by appointing a legal guardian. The guardian's role is complex but pivotal in responding to the being/becoming child. It involves overseeing both the protection of the child from present harm and the provision of opportunities to recover from past trauma and to continue development. The guardian should also provide access to, and assistance with, the State's asylum procedure. Seeking asylum without parental assistance is an additional situational vulnerability overlaying the universal inherent vulnerabilities of all children. The quality of guardianship provided determines whether that inherent and situational vulnerability is ameliorated or exacerbated, such as by exposure to acute risk of harm (occurrent vulnerabilities) and/or the addition of State-created vulnerabilities (pathogenic vulnerabilities).

Section 7.2 attends to the first stage of the vulnerability informed response. It examines the origins and subsequent transformation of the operation of the *IGOC Act* to explain the legal context of Australia's unique arrangement where the Minister responsible for immigration ('the Minister') also became legal guardian of unaccompanied children arriving in the country. It argues that this dual responsibility was allowed to arise without regard to the distinct situational vulnerability of unaccompanied child asylum seekers. The changes to the *IGOC Act* between 2012 and 2014 cemented existing failures to safeguard their best interests or secure their proper representation by explicitly subjugating the Minister's responsibilities as guardian to their border control powers under the *Migration Act,* thus giving rise to a pathogenic vulnerability to a lack of protective guardianship.

Section 7.3 then attends to the second stage of the vulnerability informed response by examining the impact of these changes on the vulnerabilities of unaccompanied child asylum seekers generated by their separation from their parents. It argues that the continuation of the Minister as their exclusive statutory guardian, particularly whilst they were in Mandatory

Immigration Detention, perpetuated the situational vulnerabilities of unaccompanied children in the Legacy Caseload cohort. By maintaining the Minister's dual role and failing to provide this cohort with an independent guardian, they became occurrently vulnerable[1] to remaining in Mandatory Immigration Detention and to a lack of representation of their best interests while detained. Further, once released into Community Detention, although their custodial care was mostly adequate (as discussed in Chapter 5) they remained occurrently vulnerable to receiving no independent representation. This section also argues that that amendments created further occurrent vulnerabilities for the cohort subject to transfer to Nauru. These children experienced the same occurrent vulnerabilities as the Legacy Caseload cohort whilst in Mandatory Immigration Detention prior to transfer. However, the subordination of the Minister's duty to consider their best interests to border protection priorities generated an additional pathogenic vulnerability that their individual best interests would not genuinely be considered, or advocated for, in the crucial pre-transfer assessment period. Finally, this section argues that the impact of the amendments was to generate a pathogenic vulnerability to refoulement and neglect for unaccompanied children subject to on-sea enhanced screening under the Boat Turnbacks policy by effectively excising them from Australia's guardianship regime.

Lastly, Section 7.4 discharges the third stage of the vulnerability informed response by identifying the priorities for legislative and policy reform.

7.2 Operation of the 2012-2014 legislative amendments: cementing the Minister responsible for border protection as the inherently conflicted guardian

This section examines the legal and policy context defining the relationship between Australia, as a responsive state in vulnerability theory, and children seeking asylum while separated from their parents, to clarify the operation of the amendments prior to the examination of the impact of those laws on their vulnerability in Section 7.3.

Different guardianship models exist globally along the migration response continuum. Yet a common factor is that guardianship is the key legal mechanism for prescribing legislative and functional responsibility to provide unaccompanied children with care and protection from harm in the present, circumstances that enable their development, and access

[1] Recalling that section 4.1.1 of Chapter 4 identifies and distinguishes inherent, situational, pathogenic and occurrent vulnerabilities.

to assistance to process their claim for asylum. Guardianship is key to satisfying unaccompanied children's human rights and it is also required to address two core sites of situational vulnerability generated by their separation from their parents. Firstly, the absence of an adult whose primary concern is caring for and protecting them and assisting them to transition to adulthood. Secondly, the absence of an adult to advocate for their claim for asylum. In Australia, even prior to the 2012-2014 legislative amendments, the appointment of the Minister as their statutory legal guardian disregarded this distinct situational vulnerability.

Recalling the historical background examination in section 1.2 in Chapter 1, the *IGOC Act* was introduced in 1946 to provide for the reception of predominantly British immigrant children whose arrival was authorised post World War Two.[2] Although in Australia's federal system, statutory child protection is the responsibility of state and territory governments, the Act was enacted under the Commonwealth's power to legislate on immigration[3] to formalise existing Commonwealth and state agreements that vested legal guardianship of every non-citizen arrival with the Commonwealth Minister for Immigration.[4] Following state child

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[2] Significant research has been conducted about the history, and impact on the lives, of former unaccompanied child migrants including: Barry Coldrey, *Good British stock: child and youth migration to Australia* (National Archives, 1999); Philip Bean and Joy Melville, *Lost Children of the Empire* (Unwin Hyman, 1989); Margaret Humphreys, *Empty Cradles* (Transworld, 2009); and Alan Gill, *Orphans of the Empire: the Shocking Story of Child Migration to Australia* (Random House, 1998). Several state government inquiries and reports have added significantly to this scholarship and the Inquiry by the Senate Community Affairs References Committee *Lost Innocents: Righting the Record* (Commonwealth Government, 2001) comprehensively investigated unaccompanied child migration to Australia under approved schemes during the twentieth century. Additionally, Julie Taylor and Jordana Silverstein provide targeted Australian scholarship regarding the history of the *IGOC Act* and the guardianship of unaccompanied children. See Julie Taylor, 'Guardianship of Child Asylum-Seekers' (2006) 34(1) *Federal Law Review* 204 and Jordana Silverstein, 'I Am Responsible: Histories of the Intersection of the Guardianship of Unaccompanied Child Refugees and the Australian Border' (2016) 22(2) *Cultural Studies Review* 65 for analysis of the history of the IGOC Act.

[3] The Act was enacted under the Commonwealth's power to legislate on immigration in s51xxvii of the Commonwealth Constitution.

[4] Or was exempted from the provisions of the Act under a discretionary right of the Minister or delegate. As initially enacted, s 6 stated that:

The Minister shall be the guardian of the person in Australia, of -

> (a) every evacuee child
> (b) every immigrant child who arrives in Australia after the commencement of this Act, to the exclusion of the father or mother and every other guardian of the child, and shall have as guardian, the same rights, powers, duties, obligations and liabilities as the natural guardian of the child would have, until the child reaches the age of twenty-one years, or leaves Australia permanently, or until the provisions of this Act cease to apply to and in relation to the child, whichever happens first.

welfare models, section 6 of the Act vested the Minister with the same rights, powers, duties, obligations and liabilities as a natural guardian. But the Minister's powers and duties as guardian were never the subject of focused consideration because shortly after the proclamation of the Act, the Minister delegated powers to state child welfare departments to oversee the custody and estate of the minors, to make home visits and to consent to marriages.[5] The Minister retained the limited power to allow their departure overseas, consistently with the separation of powers between the states and the Commonwealth. The key provisions of the Act continue into the present although the Minister's present day obligations now cease when the ward turns 18 or leaves Australia's jurisdiction.[6]

As examined in Chapter 1, in 1958 when the Australian parliament enacted the *Migration Act* to regulate "in the national interest, the coming into, and presence in, Australia of non-citizens"[7] neither the *Migration Act* nor the *IGOC Act* contained a provision expressly providing how the Acts should be read in relation to each other.[8] Parliamentary recognition that the *IGOC Act* applied to unaccompanied refugee minors first occurred in 1994[9] and the scope of the Minister's duties as guardian to children claiming asylum without pre-authorised entry were first tested in litigation in the 1990s.

It is unnecessary to repeat here the detailed analysis by Crock, and Crock and Kenny, of Australian Immigration Ministers' failure to properly discharge their guardianship

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[5] The State Premiers conference on 20 August 1946 resolved that the Commonwealth should continue to be the sole authority for migration activities overseas and that the states and territories would carry out the function of reception on arrival in Australia. See Community Affairs References Committee, Parliament of Australia Senate, *Lost Innocents: Righting the Record* (n 2) 26 [2.64] and Taylor (n 2) 185.

[6] The purpose of this provision was to protect children "from any person who would wish to entice him away from Australia for any purpose other than the good of the child". See Commonwealth, *Parliamentary Debates*, House of Representatives, 18 November 1948, Speech, 1 (Dame Edith Lyons. <http://parlinfo.aph.gov.au/parlInfo/genpdf/hansard80/hansardr80/1948-11-18/0064/hansard_frag.pdf;fileType=application%2Fpdf>.

[7] *Migration Act* s 4.

[8] The Courts subsequently acknowledged that the Minister's statutory obligations as the legal guardian of a non-citizen child may give rise to a potential "conflict of roles" in respect of the performance of functions under the *Migration Act*, see *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 29 at 47-48 [90] ('*Odhiambo*').

[9] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 March 1994, 1694 (Phillip Ruddock, Minister for Immigration and Ethnic Affairs) < https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F1994-03-03%2F0014%22>.

obligations to unaccompanied children on account of the inherent conflict of interest.[10] It suffices here to make two observations that are necessary for the discussion that follows. Australian courts have acknowledged that s 6 of the *IGOC Act* confers on the Minister all the usual responsibilities of guardianship. In common law and equity, a guardian stands in *loco parentis* to the child, provides for their maintenance and education, is empowered to make decisions for their welfare,[11] and retains a fiduciary relationship towards them,[12] including the duty to protect the child from harm. Regarding unaccompanied children, the courts have confirmed that this extends to provision of the basic needs of the child, which may include legal advice and assistance,[13] and the obligation to ensure the protection of the fundamental human rights set out in the CRC including the best interests principle.[14] As examined in Section 3.3 of Chapter 3, State obligations towards these children are extensive. However, the provisions of the *Migration Act* prevail in the event of inconsistency with obligations assumed under international human rights law, including those under the CRC.[15] Secondly, lawyers for unaccompanied child asylum seekers have had little success in persuading the courts to definitively outline the scope of the Minister's guardianship duty, or to require the Minister to discharge the duty in conformity with established expectations of the diligent discharge of guardianship of minors at common law. The courts have held, for example, that Tribunal review hearings can occur in the absence of a guardian actively representing the child's interests.[16] The Federal Court has determined that unaccompanied children bear a

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[10] Mary Crock, 'Lonely Refuge: Judicial Responses to Separated Children Seeking Refugee Protection in Australia' (2005) 22(2) *Law in Context* 128; Mary Crock, *Seeking Asylum Alone, Australia: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* (Themis Press, 2006); Mary Crock, 'Of Relative Rights and Putative Children: Rethinking the Critical Framework for the Protection of Refugee Children and Youth' (2013) 20 *Australian International Law Journal* 33; Mary Crock and Mary Anne Kenny 'Rethinking the Guardianship of Refugee Children after the Malaysian Solution' (2012) 34(3) *Sydney Law Review* 437.

[11] Provided that the child does not have the competence to make the decision: *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 235–6 (Mason CJ, Dawson, Toohey and Gaudron JJ), 278 (Brennan J), 289, 293–4 (Deane J), 315 (McHugh J).

[12] *Clay v Clay* (2001) 202 CLR 410, 430; John Eekelaar, 'What are Parental Rights?' (1973) 89 *Law Quarterly Review* 201, 230.

[13] *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524 [41] and [43]; cited with approval in *Odhiambo* (n 8) [86], [88].

[14] *X v Minister for Immigration and Multicultural Affairs,* ibid [34]-[41].

[15] Mary Crock, 'Of Relative Rights and Putative Children' (n 10) 35.

[16] In *Odhiambo* (n 8) [93-100] the Court held that responsibility for ensuring that an unaccompanied child has legal representation in tribunal or court proceedings falls to the tribunal or court, not the Minister as their guardian.

basic onus of proof in proving that they are minors and the Minister has no legal obligation to make inquiries about the age of asylum seekers or to adopt certain procedures to determine age.[17] The High Court has found that a failure to transfer children from IDCs into the community does not amounted to a breach of the Minister's duty of care pursuant to s 6 of the *IGOC Act*, even where the Court accepts that the detention is physically and psychologically harmful to the child.[18] This demonstrates the primacy of the legislative approach taken by the government of the day, and the lack of any human rights or common law based guardianship standards.

Unaccompanied child asylum seekers were spectacularly unsuccessful in any litigation against the Minister alleging a failure to diligently or fully discharge their guardianship obligations up until 2011. In that year, in *Plaintiff M70/2011*[19] solicitors for a 16 year old Afghan unaccompanied child sought an injunction restraining the Minister from removing the child to Malaysia. The High Court granted an injunction restraining the Minister from removing the child without exercising a separate statutory power as guardian and giving written consent to the removal after being satisfied that the granting of the consent would not be prejudicial to the interests of the child.[20] Although the injunction was granted, consistently with previous decisions, the Court failed to give an expansive reading to the Minister's "same rights, powers, duties, obligations and liabilities as a natural guardian" to the child under section 6. Instead, the Court applied a technical statutory construction

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[17] *WACA v Minister for Immigration and Multicultural Affairs* (2002) 121 FCR 463.

[18] *Plaintiff M168/ /10, A Minor, by his litigation guardian Sister Brigid (Marie) Arthur v The Commonwealth* [2011] HCA 25. This case was an application for interlocutory relief, seeking the release from detention of the plaintiff, who arrived in Australia as an unaccompanied minor from Afghanistan.

[19] *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 18. For further discussion of the case see Tamara Wood & Jane McAdam, 'Australian Asylum Policy All at Sea: An Analysis of Plaintiff M70/2011 v Minister for Immigration and Citizenship and the Australia-Malaysia Arrangement' (2012) 61 *International and Comparative Law Quarterly* 274 and Michelle Foster, 'The Implications of the Failed Malaysian Solution: The Australian High Court and Refugee Responsibility Sharing at International Law' (2012) 13 *Melbourne Journal of International Law* 395.

In *M70/2011*, so far as that decision related to unaccompanied children, solicitors for a 16 year old Afghan unaccompanied child sought an injunction from High Court restraining the Minister for Immigration and Citizenship (as he then was) from removing him to Malaysia without the Minister's written consent under the *IGOC Act*. That case thus involved consideration of whether and to what extent the conferral of power on an officer to take an "offshore entry person" from Australia to a declared third country (Malaysia, in this instance) under the Migration Act needed to be informed by the Minister's obligations as guardian under the *IGOC Act*.

[20] *IGOC Act* s 6A.

argument that the specific provision of the *IGOC Act* (requiring the Minister's written consent for the removal of the child) prevailed over the general unfettered provision in the *Migration Act* (enabling the removal of the child). Although the case resulted in an injunction, it still demonstrated unaccompanied child asylum seekers' vulnerability when the Minister is both the child's guardian and the enforcer of children's removals under migration laws.

The government responded to the decision with amendments to the Migration Act designed to undo its effects. In the Explanatory Memorandum to the first suite of amendments, the government noted that:

> The High Court's decision does not align with the Government's policy intention which is that the Minister's consent under section 6A of the IGOC Act is not required for a non-citizen child to be removed, taken or deported from Australia under the Migration Act.[21]

The explicit intent and effect of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act* 2012 (Cth) amendments besides allowing for offshore processing as discussed in Chapters 5 and 6, was to eliminate the requirement for the Minister's written consent upon being satisfied that removal was not prejudicial to the interests of the child.[22] Although yet to be tested by the courts, the unambiguous stated purpose of the amending Act was to clarify that the *Migration Act* "is not subject to" the *IGOC Act*[23] when the Minister exercises powers to remove non-citizens under the *Migration Act.*[24] The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum*

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[21] Explanatory Memorandum, The Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012 (Cth) [270-271] <http://www.comlaw.gov.au.ezproxy.lib.uts.edu.au/Details/C2011B00193/Explanatory%20Memorandum/Text >.

[22] The government first introduced the Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011 (Cth) which did not gain the support of the Coalition, Greens and the required number of independents in October 2011. On 13 October 2011 the government announced it would not pursue the amendments. However, it was subsequently reintroduced and passed as the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* receiving Royal assent on 18 August 2012.

[23] *IGOC Act* ss 8(1) and 8(3). However, whether any scope remains for argument that the sections in the *IGOC Act* prescribing the Minister's guardianship obligations to Unaccompanied Child Asylum Seekers still have some work to do remains untested. The Minister must still presumably consider his duties as guardian when making discretionary decisions under the *Migration Act.*

[24] These powers include removals pursuant to section 198 or 199 of the *Migration Act,* taking them to an offshore processing country pursuant to section 198AD of the *Migration Act*, deporting them pursuant to section 200 of the *Migration Act* or taking them to a place outside Australia pursuant to section 245F(9)(b) of the *Migration Act*. The amending Act also repealed the old subsection 6A(4) which had provided that section 6A did not affect the operation of any other law regulating the departure of persons from Australia.

Legacy Caseload) Act 2014 expanded the conflict inherent in the Minister's roles. It amended the *IGOC Act* to state expressly that it did not affect the performance of any function, duty or power relating to the taking of a non-citizen child to a place outside Australia under the *Migration Act* or the *Maritime Powers Act*. Lastly, the amendments effectively removed children subject to offshore processing and interception on sea from Australia's guardianship regime and abdicated Australia's obligations to them in international human rights law in circumstances where they were under Australia's joint effective control. These extensive amendments to the *IGOC Act* between 2012 and 2014, in tandem with the amendments to the *Migration Act*, progressively exacerbated the historic conflict that inheres in the Minister being the statutory guardian of unaccompanied children to the exclusion of all others. Although the provision of guardianship to unaccompanied asylum seeking children has always been problematic under the *IGOC Act*, the 2012, 2013 and 2014 amendments effectively eliminated any meaningful response to their separation from their parents through the provision of guardianship and explicitly avoided the care and protection obligations owed to them.

The effect of the amendments is captured in Table 7.1 "Eligibility for guardianship by date of arrival."

Table 7.1: Eligibility for guardianship by date of arrival

Date of arrival	Processing of asylum claim	Eligibility to settle in Australia if found to be a refugee	Provision of guardianship
Pre 13 August 2012	Asylum claim processed in Australia.	Can be resettled in Australia if found to be a refugee.	Minister of Immigration and Border Protection
Post 13 August 2012 and pre-19 July 2013	Were transferred initially to a third country (Nauru or Papua New Guinea) to have their asylum claim processed after 'transiting' in Australia (on Christmas Island) but have since been re-settled in Australia and are awaiting finalisation of their claim as part of the Legacy Caseload cohort.	Can be resettled in Australia if found to be a refugee.	Minister of Immigration and Border Protection while in Australia pre and post transfer. Subject to guardianship regimes of Manus Island or Nauru while offshore.
Post 19 July 2013	Transferred to a Regional Processing country (Nauru or Papua New Guinea) to have their asylum claim processed after 'transiting' in Australia (on Christmas Island).	Cannot be resettled in Australia if found to be a refugee.	Minister of Immigration and Border Protection while transiting in Australia. Subject to guardianship regimes of Manus Island or Nauru post transfer offshore.
Post September 2013	No access to processing of claims for asylum by Australia.	No opportunity to arrive in Australia-subject to Boat Turnbacks and Takebacks.	No provision of guardianship.

Since the amendments the Minister is the exclusive statutory guardian of all unaccompanied child asylum seekers in the Legacy Caseload cohort and those awaiting transfer for offshore processing (as Table 7.1 illustrates). Unaccompanied children sent to Australia's offshore processing centre on Nauru are legally designated to have "[left] Australia permanently" and so the Minister ceases to be their legal guardian and they become subject to the guardianship laws and policies of Nauru.[25] There is no provision for guardianship for unaccompanied child asylum seekers intercepted at sea who are subject to Australia's current Boat Turnback and Takeback policy.

[25] Accordingly, the Minister is the guardian of unaccompanied child asylum seekers awaiting transfer to a regional country for processing, but once they are transferred they are subject to the guardianship arrangements, if any, in those jurisdictions.

The *IGOC Act* arguably has ameliorated the vulnerability of some children such as those being adopted from overseas and unaccompanied refugee minors. But the *IGOC Act* was not subsequently adapted to take into account the guardianship needs of these proximate vulnerable children and has failed to similarly ameliorate their vulnerability.

Unaccompanied refugee and asylum seeking children both share the triple vulnerability of being children who have experienced trauma, being unaccompanied by an adult or guardian, and the burden of being aliens by virtue of their non-citizenship. Unaccompanied child asylum seekers have the additional burdens of an unauthorised presence and a yet to be determined asylum claim. Australian guardianship law and policy failed historically to comprehend and respond to this unique situational vulnerability. *IGOC Act* guardianship, however attenuated compared to common law expectations, was sufficient for unaccompanied refugee children in relation to migration issues, since they were not vulnerable to deportation or to conflict with migration policy considerations. However, for the unaccompanied asylum seeker children that conflict is at the very core of the matter. Appointing as statutory guardian the Minister who has obligations to prosecute the provisions of the M*igration Act* and to mandatorily detain these children exposed them to new acute vulnerabilities. This is evidenced by the rift between core expectations of guardianship of minors at common law and guardianship of these minors in the immigration context. Crock captured the problem neatly in 2005 observing that "the simple and devastating problem for the young asylum seekers is that the Minister is both legal guardian, by virtue of section 6 of the *IGOC Act*, and their prosecutor, judge and gaoler within the complicated matrix of the *Migration Act.*"[26] The 2012-2014 statutory amendments to the *IGOC Act* that occurred in tandem with the hardening of Australian migration laws and policy rendered guardianship nugatory in practice for all unaccompanied child asylum seekers other than the Legacy Caseload cohort. Crock's 2005 observation is even more pertinent after the 2012 and 2014 amendments. The next section examines the impact of these legislative changes on the inherent and situational vulnerability of asylum seeking children separated from their parents.

7.3 Impact of the changes: the guardian gatekeeper vacated the space

Having examined the effect of the operation of the amendments on the provision of guardianship by Australia in response to these children's separation from their parents, this

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[26] Mary Crock, 'Lonely Refuge: Judicial Responses' (n 10) 129.

section applies stage two of the vulnerability informed response to the different contexts of children in the Legacy Caseload, Offshore Transferee and Boat Turnbacks and Takebacks cohorts. It applies the vulnerability taxonomy to distinguish between and characterise responses that ameliorated inherent and situational vulnerabilities and decreased dependencies from those that created or exacerbated pathogenic and occurrent harms in the provision of guardianship.

Asylum seeking children, without parents, are especially dependent on the receiving State appointing them a legal guardian to oversee their protection from harm. The Legacy Caseload cohort experienced an occurrent vulnerability of being without an independent guardian to advocate for their release from Mandatory Immigration Detention or to provide them with independent representation of their interests while they were in immigration detention. Further, once released into Community Detention, although their custodial care was mostly adequate (as discussed in Chapter 5) their occurrent vulnerability was not ameliorated because the amendments maintained the Minister's dual role. The amendments generated an additional occurrent vulnerability for the cohort subject to transfer to Nauru that no guardian would advocate for their individual best interests in the crucial pre-transfer assessment period.

7.3.1 Guardianship of unaccompanied asylum seeker children in the Legacy Caseload cohort on the Australian mainland

As discussed in Chapter 5, unaccompanied asylum seeking children in the Legacy Caseload cohort were all subject to mandatory immigration detention. The failure to provide them with an independent and appropriately qualified guardian to represent their interests whilst in mandatory immigration detention exposed them to occurrent vulnerabilities of not having their best interests considered or met, or of ensuring the provision of access to legal representation in processes for prosecuting their claim for asylum. These occurrent vulnerabilities persisted after their release into Community Detention.

The failure to provide unaccompanied children with an independent and appropriately qualified guardian whilst in mandatory immigration detention compounded their exposure to the occurrent and the pathogenic vulnerabilities generated by the detention centre environment examined in Section 5.3.1 in Chapter 5. In 2013, the Commonwealth and Immigration Ombudsman highlighted the "particular vulnerability" of children in immigration detention. This was "their dependence on the department and its service providers to supply an environment and care conducive to their developmental, health, educational and welfare needs"

and the corresponding responsibility on the Department to "avoid acting in ways that directly cause harm to children, but to also take action to prevent harm from occurring."[27]

In fact, these matters continued to be the responsibility of the Minister as their legal guardian. In the research period, the Minister delegated his guardianship responsibilities to unaccompanied children in IDCs to nominated Department officers. These delegates were either Detention Centre or Regional Managers or held Executive Level 2, or higher, positions within the Department.[28] The delegates were not required to have specific child centred qualifications or experience related to childcare.[29]

The Department sought to justify guardianship delegations to Detention Centre or Regional Detention Managers and Department Executive Level 2 personnel, based on their seniority rather than expertise with young people, on the basis that "the delegated guardian is required to make important decisions which relate to the care and welfare of children, such as decisions about medical treatment or education."[30] Unaccompanied children in IDCs have undergone separation from their family members and have also, to varying degrees, experienced loss, trauma, disruption and/or violence. It is the very gravity of the decisions being made which necessitates that the decision-maker has expertise in assessing the impact of that decision on the needs of the child and expertise in ascertaining the unaccompanied child's own assessment of what they need. In the *Forgotten Children* Report the AHRC found that:

> …the Minister for Immigration and Border Protection does not meet the criteria set out by the Committee on the Rights of the Child (in para 33 of General Comment No 6) to effectively perform the role of guardian for unaccompanied children.… the lack of expertise in the field of childcare on the part of the Minister or those within the Department to whom he delegates his guardianship responsibilities, render the Minister an inappropriate and ineffective guardian.[31]

I agree with that observation. But the failure to provide an independent and appropriately qualified guardian charged with acting solely in their best interests also spawned an occurrent vulnerability. Namely that no adult would advocate for their prompt release as soon as their health and identity checks were completed; instead they would remain in an environment

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[27] Commonwealth and Immigration Ombudsman, *Suicide and Self-harm in the Immigration Detention Network Report 02/2013* (Commonwealth Government, 2013) [7.20] - [7.21].

[28] Immigration (Guardianship of Children) Delegation 2013 (Cth), Sch 2.

[29] Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (Commonwealth Government, 2014) 169 ('*The Forgotten Children*').

[30] Department of Immigration and Border Protection, Submission to the *Forgotten Children Inquiry* (30 May 2014) < https://www.humanrights.gov.au/sites/default/files/Submission%20No%2045%20-%20 Department%20of%20Immigration%20and%20Border%20Protection.pdf>.

[31] Australian Human Rights Commission, *The Forgotten Children* (n 29) 171.

inhibiting recovery from past trauma and exposing them to the risk of physical and/or psychological harm impacting their ongoing development.[32]

As will be discussed below, the failure to provide meaningful guardianship for children in immigration detention on Christmas Island who were subject to transfer to Nauru generated occurrent and pathogenic vulnerabilities for that cohort. But both cohorts share the common key shortcoming: the failure to create a guardianship framework to secure their proper representation and safeguard their best interests through two primary means. First, by ensuring that agencies or individuals were ineligible for guardianship if their interests could potentially be in conflict with those of the child's and, second, by the provision of a legal representative in addition to the guardian.

7.3.2 Guardianship of unaccompanied asylum seekers in the Offshore Transferee cohort

Unaccompanied children subject to transfer to Nauru experienced the same occurrent vulnerabilities as the Legacy Caseload cohort of not having their best interests represented by an independent and appropriately qualified guardian.[33] But the impact of the subordination of the Minister's duty to consider their best interests as their guardian to border protection priorities combined with the failure to provide them with independent legal representation in the pre-transfer period generated a new pathogenic vulnerability to their being transferred offshore with no guardian advocating for a genuine assessment of their individual best interests. These failures further exposed them to pathogenic vulnerability of refoulement, including, as examined in Section 6.3.2.4 in Chapter 6, exposure to cruel, inhuman or degrading treatment on Nauru.

The examination of the inadequacies of the pre-transfer Best Interest Determinations for unaccompanied children in Chapter 6 (Section 6.3.2.1) evidences the patent conflict generated by the Minister being both guardian and enforcer of Department law and policy. The Best Interests pre-transfer assessment acknowledged the best interests of the child as a primary consideration, but not the only primary consideration. It explicitly mandated that the best interests of the individual child "are outweighed by other primary considerations" which

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[32] Commonwealth and Immigration Ombudsman, *Suicide and Self-harm in the Immigration Detention Network Report 02/2013* (2013), [7.20].

[33] This was in addition to not having automatically appointed legal representation as discussed in Sections 6.3.2.2 and 6.3.2.3 in Chapter 6.

include 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. As noted in Chapter 3, this is a permissible application of the best interest principle under international law so far as it relates to the State's general obligation to consider a child's best interests. However, it is not a permissible application of the principle so far as a guardian is concerned: the best interest of the unaccompanied child is to be their basic concern.[34] The insertion of s 8 into the *IGOC Act,* discussed in section 7.2 above, has however effectively completely removed any best interests consideration which conflicts with the exercise of Minister's powers under the *Migration Act* – the Minister's obligations under migration law and policies outweigh his obligations to give primacy to the unaccompanied child's best interests. The amendments made the Minister responsible for overseeing the conduct of these pre-transfer Best Interests Determinations in accordance with Australian migration policy. The impossibility of the Minister discharging this obligation *and* advocating these children's individual best interests as their sole guardian clearly exposed them to an occurrent risk of not having their best interests properly contended for. This in turn exposed them to the pathogenic risks arising from transfer to Nauru RPC as examined in Chapter 5.

Providing legal representation is a core duty of guardians of unaccompanied children.[35] As examined in Section 6.3.2.3 in Chapter 6 the Minister as guardian did not appoint a legal representative for unaccompanied children either on arrival or prior to their transfer offshore. Instead, whether they received legal assistance was dependent on the resources and funding of the RACS and the child's ability to access the service. Unaccompanied children on Christmas Island only received pre-transfer legal assistance if the designated solicitors were already present or were able to fly there to meet with them prior to their transfer. The majority of unaccompanied children there, as at March 2014, had been

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[34] Note that there are potentially additional obligations on States where an unaccompanied minor is a victim of trafficking, has a disability or where there are additional factors of vulnerability. Under article 39 of CRC, States are obliged to take all appropriate measures to promote physical and psychological recovery and social reintegration of child victims of: "any neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts". The health, self-respect and dignity of child should dictate the environment in which the recovery and reintegration takes place. Moreover, under article 23 of the CRC, mentally or physically disabled children have the right to enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate active participation in the community and Article 1 of the CRPD obliges States to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."

[35] See the discussion in Chapter 3 in Sections 3.3.2.2 and 3.3.3.1.

detained from six to eight months and had not "spoken to a lawyer or were aware they might have a right to do so."[36] The Minister's failure as guardian to provide them with a legal representative generated an occurrent vulnerability that any claim they had to remain in Australia would not be prosecuted.

7.3.3 Guardianship of unaccompanied asylum seeker children in the Boat Turnbacks and Takebacks cohort

The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* amendments essentially refused entry to unaccompanied child asylum seekers when intercepted at sea under the Boat Turnbacks and Takebacks policy, voiding their entitlement to the appointment of a guardian or someone charged with ensuring they have legal representation at the point of interception. This generated a pathogenic vulnerability to refoulement and exposed these children to the risk of new human rights abuses perpetrated by Australia that were utterly avoidable. Regard to the acute and specific vulnerability of these children renders these legislative and policy changes that generate new human rights abuses unconscionable.

7.4 Priorities for reform

The vulnerability analysis in this chapter has foregrounded where the legislative amendments to the *IGOC Act* failed to ameliorate these children's existing situational vulnerability arising from their separation from their parents and the sites where they generated new and acute harms to them. The focus on the impact of the amendments as generators of avoidable situational and pathogenic sources of vulnerabilities and occurrent harms, rather than on human rights breaches, highlights the direct correlation between Australia's deliberate winding back of the provision of guardianship to these children and the inevitable harms. The vulnerability analysis also resounds the imperative of recognising State responsibilities to provide unaccompanied children with an independent and effective guardian, notwithstanding their unauthorised presence, because of their unmediated dependence on the State to provide them with an adult charged with protecting their interests. It also, unlike human rights law, illuminates where priorities for legislative and policy reform should be directed to reduce occurrent harms and

[36] Australian Human Rights Commission, *The Forgotten Children* (n 29) 155.

pathogenic sources of vulnerability first, facilitating distinction between urgent and longer term priorities.

Having identified the impact of the relevant laws and policies that exacerbated, or generated new vulnerabilities, two issues remain. Firstly, which of these vulnerabilities can be addressed by legislative and policy change and what should those changes entail? Secondly, what should be the priorities for reform?

The vulnerabilities identified in section 7.3 are all attributable to the absence of an independent and appropriately qualified legal guardian who can advocate for the best interests of unaccompanied child asylum seekers in Australia. Australia should establish an independent statutory guardian for these children to cease the pathogenisation of their vulnerability under existing arrangements. An independent guardian is necessary to oversee key reform priorities identified in Chapters 5 and 6. In fulfilling guardian's ordinary core functions, for example, they would be responsible for overseeing that children are not detained for longer than 72 hours in child friendly reception centres prior to transfer to foster care or a sponsorship arrangement, or to Community Detention as a last resort, and would ensure they have access to trauma remediation services while their asylum claim is processed. Similarly, they would ensure they have access to automatic legal representation from reception to finalisation of their claim or transfer from the jurisdiction and would advocate for genuine and individualised Best Interests assessments for the child. Crucially, the guardian would have the legislative function of protecting unaccompanied children from torture or inhumane treatment and refoulement. The interplay between all of these priorities reinforces the critical role of the guardian as the "rights gatekeeper" between the child and the border control machinery of the State.

Since the re-introduction of offshore processing Australia's legal framework has failed to provide unaccompanied child asylum seekers with an adult to respond to their vulnerability caused by separation from their parents. They lack someone to care for them, provide them with opportunities to grow into adulthood or help claim asylum. The Minister as their "guardian" has not advocated on their behalf for an appropriate environment of care, has not provided them with automatic and free legal representation, or advocated on their behalf for the proper conduct of Best Interests assessments. Instead, their guardian has enforced the full force of the border control machinery of the State against them, *knowingly* exposing them to occurrent and pathogenic vulnerabilities.

Repeated calls for legislative change to address the failures in Australia's current law to appoint an independent guardian for unaccompanied children and concerns about the

unsuitability of the Minister as their guardian have been raised since the AHRC *National Inquiry into Children in Detention* in 2004 by not for profits, academics and parliamentary inquiries.[37] In February 2015, the Australian Human Rights Commission, in *The Forgotten Children Report,* again recommended that an independent guardian be appointed for child asylum seekers who arrive in Australia without a parent or guardian.[38] The current law breaches Australia's international obligations, particularly under the CRC, ICCPR and ICESCR.[39]

In the last decade, proposed laws have been tabled calling for the creation of a statutory independent guardian of unaccompanied children.[40] The last of these was Senator Hanson-Young's introduction of a *Bill for the Guardian for Unaccompanied Children Act 2014* ('The Greens' Bill'). It attracted submissions from multiple stakeholders most of whom agreed with the Bill and a small number proposing amendments. The Greens' Bill proposed to establish a new office of the Guardian for Unaccompanied Non-citizen Children as the guardian of every unaccompanied non-citizen child who arrives in Australia after the commencement of this Act or who is in Australia at the time of the commencement of this Act. The Bill incorporated Australia's key obligations under the CRC and is compliant with the best practice requirements for guardianship in *General Comment 6* of the UN Committee on the Rights of the Child.

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[37] See, for example, Australian Churches Refugee Taskforce, *All the Lonely Children: Questions for Policy makers regarding guardianship for unaccompanied minors* (Australian Churches, 2013); Mary Crock and Mary Anne Kenny 'Rethinking the Guardianship of Refugee Children after the Malaysian Solution' (2012) 34(3) *Sydney Law Review* 437. In 2012, the Parliamentary Joint Select Committee on Australia's Immigration Detention Network recommended that the Minister for Immigration should not be the legal guardian of unaccompanied minors in immigration detention. See Parliamentary Joint Select Committee on Australia's Immigration Detention Network*, Final Report* (Commonwealth Government, 2012) [5.95-5.96].

[38] The AHRC found that:

> In the event of any conflict between guardianship obligations and migration policies, the Minister and the delegated guardians are required to give priority to their roles under the Migration Act. In August 2012 the *Immigration (Guardianship of Children) Act 1946* (Cth) was amended to make clear that the Minister or his delegated guardians can only exercise 'the same rights, powers, duties, obligations and liabilities as a natural guardian' of an unaccompanied child in immigration detention to the extent that those duties do not affect the performance or exercise of any function, duty or power under the migration law. In some instances, the law or the policies relating to immigration detention are in direct conflict with the best interests of the child.

See Australian Human Rights Commission, *The Forgotten Children* (n 29) 167-167.

[39] Ibid 171.

[40] Commissioner for Children and Young People Bill 2010 (Cth); Guardian for Unaccompanied Children Bill 2013 (Cth).

However, in using the terminology "unaccompanied non-citizen child" the Bill did not sufficiently acknowledge that unaccompanied child asylum seekers have an additional and separate vulnerability to Unaccompanied Humanitarian Minors because their claim for asylum is not resolved.

The appointment of an independent guardian is necessary if Australia is to even minimally discharge its guardianship obligations to unaccompanied children. As illustrated throughout this chapter, the current conflict is actual, not perceived, and the ramifications for children whose interests are not represented or protected are grievous. I propose the development of a Guardianship Act that complies with Australia's core obligations to respond to the complex vulnerabilities of these children through the provision of an effective guardianship framework.[41]

Recalling the six requirements for States' to discharge their guardianship duties to unaccompanied children, I propose that the Bill create the legal framework to secure the proper representation and safeguarding of the child's best interests. It would ensure the guardian has the necessary childcare expertise to ensure their legal, social, health, psychological, material and educational needs are met in a continuum of care. The Bill could achieve both of these objectives by requiring a court[42] or independent body[43] to oversee the appointment process. The Bill would also preclude agencies or individuals whose interests could potentially be in conflict with those of the child's. Other jurisdictions maintain a clear distinction between the immigration and guardianship authorities by utilising child protection or youth services government agencies,[44] non-government bodies,[45] or hybrid models,[46] or appointing citizens of good standing, such as in Sweden.[47] The Bill would also provide unaccompanied children involved in asylum procedures or administrative or judicial proceedings with legal

[41] See the discussion of Australia's international obligations examined in Section 3.3.3 in Chapter 3.

[42] See for example, the Netherlands, Austria, Germany, and Italy.

[43] See for example, Belgium – the Guardianship Service; and Sweden – the Chief Guardian.

[44] See for example, Austria, Germany, Lithuania and Spain.

[45] See for example France, Netherlands and Poland.

[46] See for example Belgium (professional non-government employees, and volunteers) and the Czech Republic (child protection departments and NGOs).

[47] European Migration Network, 'Policies on Reception, Return and Integration arrangements for, and numbers of, Unaccompanied Minors – an EU comparative study' (EMN, 2010) <http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/unaccompanied-minors/0._emn_synthesis_report_unaccompanied_minors_publication_sept10_en.pdf>.

representation in addition to the appointment of a guardian. It could do this in Australia by comprehensively funding the provision of existing legal services to these children. The Bill would also make provision to monitor the quality of the exercise of guardianship to ensure the best interests of the child are represented and to prevent abuse. This could utilise the state and territory Offices of the Children's Guardian in monitoring functions or establish a bespoke Official Community Visitors program. Lastly, it would establish mechanisms to ensure unaccompanied children are informed of arrangements with respect to guardianship and legal representation and that their opinions are taken into consideration.[48]

To ameliorate the situational vulnerability generated by these children's separation from their parents the Bill would acknowledge the critical importance of the guardian's dual role as gatekeeper mediating the child's relationship of proximity with the State *and* as an individual in relationship with the child. As discussed in Chapter 6, Italy's Law 47/2017 illuminates a vulnerability informed response to these children's alienage. Italy also presents as a lighthouse model for Australia to draw on in developing a human rights compliant and vulnerability informed Guardianship Bill.[49]

Law 47/2017[50] which came into force in May 2017 regulates the appointment of the child's legal guardian, the scope of their legal responsibilities (including safeguarding their best interests and ensuring legal representation) and the permissible ratio of three wards per guardian. The law makes provision for genuine assessment of the child's best interests by requiring qualified staff at the first reception facility to compile a *cartella sociale* (social file) for the child. It provides for three types of normative guardianship models: public-institutional, voluntary, and pro tempore with volunteer guardians (being the preferred appointment in practice). Volunteer guardians' selection and training is overseen by the children's Ombudsman and/or the Italian Independent Authority for Children and Adolescents. The volunteer guardian model, appointed by youth courts from lists of approved guardians, have

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[48] 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, [33]-[38].

[49] See Paul Rigby et al, *Responding to Unaccompanied Minors in Scotland: Policy and Local Authority Perspectives* (University of Stirling, October 2018) < https://www.scottishinsight.ac.uk/Portals/80/SUIIProgrammes/Asylum%20Seeking%20Children/Responding%20to%20Unaccompanied%20Minors%20-%20Policy%20and%20LA.pdf>. See also ISMU *At a crossroads. Unaccompanied and Separated Children in their Transition to Adulthood in Italy* (IOM, November 2019) 22.

[50] *Law No. 47 /2017 on Provisions on protective measures for unaccompanied children in Italy* [*Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati*].

been particularly lauded because, in the immediate term it enables the timely appointment of an appropriately qualified guardian. In the medium and longer term, the Italian volunteer guardian model discharges each of the six best practice requirements in international law. It also ensures the child is inter-connected with all relevant actors including social services, reception centres and regional education offices, and plays a fundamental role to support the integration and the forging of positive relationships between the child and their surrounding social context in Italy.[51]

7.5 Conclusion

This chapter has illustrated how a vulnerability analysis of the specific legislative amendments to the *IGOC Act* in 2012, 2013, and 2014 illuminates that amendments directed at this group of children explicitly avoided, rather than enhanced, the care and protection obligations owed by the Minister as their statutory guardian. It has argued that guardians' have a critical role in achieving a vulnerability informed response that addresses the exacerbation of existing vulnerabilities at the sites where these children's minority, alienage and separation from their parents intersect. It argued too that Australian law has failed to properly construe or adequately respond to their specific vulnerability because of their separation from their parents.

The vulnerability analysis exposed how all cohorts of children were occurrently vulnerability to not having their best interests represented because of the pre-existing conflict of interest inherent in the Minister being both their sole legal statutory guardian and responsible for enforcing Australia's migration laws. The *IGOC Act* was not originally designed to apply to asylum seeking children at all since Australian laws and policies regulating the guardianship of unaccompanied children were developed to respond to authorised immigrant children. Subsequent amendments failed to make special provision to accommodate their different needs, vulnerabilities and arrival circumstances; or even simply acknowledge that they are differently vulnerable to all other categories of ward under the Act since their legal status to remain in Australia is yet to be determined.

The 2012, 2013, and 2014 amendments directed at this group of children explicitly avoided, rather than enhanced, the care and protection obligations owed by the Minister as their statutory guardian, by constraining guardianship obligations to the increasingly vanishing

[51] European Union Agency for Fundamental Rights and AGIA *Guardianship for Unaccompanied Children in Italy.* (EUAFR, 2018) https://fra.europa.eu/en/news/2018/innovative-italian-legislation-updates-approach-guardianship.>

space not occupied by the Minister's border protection powers under the *Migration Act* or *Maritime Powers Act*. The impact of failing to provide the Legacy Caseload cohort with a guardian independent from the Minister responsible for border protection perpetuated the situational vulnerabilities of unaccompanied children in Mandatory Immigration Detention by making them occurrently vulnerable to remaining in detention and to a lack of independent representation of their interests while detained. The impact of maintaining the Minister's dual role for children released into Community Detention failed to ameliorate their situational vulnerability as wards.

The impact of the amendments also significantly exacerbated the situational vulnerability for the cohort subject to transfer to Nauru. These children experienced the same exacerbating factors as the Legacy Caseload cohort whilst in Mandatory Immigration Detention. However, the subordination of the Minister's duty to consider their best interests to border protection priorities generated two pathogenic vulnerabilities. Firstly, that no adult would consider or represent their individual best interests in the crucial pre-transfer assessment period. Secondly, that they could potentially be refouled by being subjected to cruel and inhumane treatment on Nauru.

The impact of the amendments rendered unaccompanied children subject to Boat Turnbacks and Takebacks occurrently vulnerable to neglect and inhumane treatment and pathogenically vulnerable to refoulement by denying them access to any of the core protections guardians are mandated to extend to them or legal advice at the point of interception and prior to removal back into International waters.

The vulnerability analysis has exposed guardians' critical role in acting as gatekeeper between the child and the State at the sites where these children's minority, alienage and separation from their parents intersect. It has also clarified the sites and sources of the most devastating impacts on being/becoming unaccompanied children's separation from their parents and informed the concrete measures and priorities for reform that were proposed.

The next chapter concludes the thesis.

8 CONCLUSION

When people arrive with nothing but the sweat on their backs and a crying need for refuge, we're terrified. Especially if they arrive by boat. It seems the boat makes all the difference. So great and so wild is our fear of maritime arrivals, we can no longer see victims of war and persecution of fellow humans. This fear has deranged us. It overturns all our civic standards, our pity, our tradition of decency, to the extent that we do everything in our power to deny these people their legal rights to seek asylum. They're vilified as 'illegals' and their suffering is scoffed at or obscured. Our moral and legal obligations to help them are minimised, contested, or traduced entirely.[1]

8.1 Prising open space to respond to unaccompanied child asylum seekers

There has been longstanding and vigorous debate in Australia between academics, political commentators, politicians and refugee advocates about the appropriate balance between national security based on tight border protection and the humane treatment of asylum seekers. This often fraught debate is framed between two polarities. One side has expressed strong and longstanding condemnation, sometimes anguished like Winton's in the quote above, about the treatment of asylum seekers and the disconnect between this treatment and Australia's human rights obligations.[2] On the other side, successive governments have asserted that Australia's national security interests can only be met by the retention of punitive border control policies. In the middle, political "pragmatists" contend that Australia has a moral responsibility to settle asylum seekers marooned on Nauru. However, they argue that "it is inconceivable that in the next few years any Australian government – either Coalition or Labor – will be willing to …cease offshore processing of asylum claims and to abandon the policy of naval interception and turn-back to the point of departure".[3] They call on opponents of the governments "ring of

[1] Tim Winton 'Stones for Bread' in *The Boy Behind the Iron Curtain* (Penguin, 2016) 254-255.

[2] These advocates argue that Australia has voluntarily undertaken legal obligations in international law by ratifying the Refugee Convention and that Australia is prohibited from: refouling, imposing penalties based on a refugee's mode of arrival; and from expelling a refugee who is lawfully in Australia except on the grounds of national security or public order. See for example, Anne Mcnevin et al, 'Beyond deterrence: reframing the asylum seeker debate' *Inside Story* (online at 13 October 2014) < https://insidestory.org.au/beyond-deterrence-reframing-the-asylum-seeker-debate/ >

[3] For example, Robert Manne, Frank Brennan, Tim Costello and John Menadue, 'A Solution to Our Refugee Crisis' *Pearls and Irritations* (online at 13 August 2016) < https://johnmenadue.com/robert-manne-frank-brennan-tim-costello-john-menadue-a-solution-to-our-refugee-crisis/>; Frank Brennan et al, 'Boat Turnbacks and Medical Transfers' *Pearls and Irritations* (online at 15 February 2019) <

naval steel" policy to accept that "the only realistic position from the political point of view is one involving the retention of turn-back"[4] arguing that the "political unrealism and unwillingness to compromise" of countervailing view holders has contributed to the current impasse.[5] Robert Manne colourfully argued in 2017 that "it is as certain as anything in politics can ever be that no government that has a chance of being elected in Australia in the next few years will return to the position…where offshore processing and turn-backs were both abandoned."[6]

I disagree.

History has shown that, on the contrary, Australians do respond to principled and informed leadership on this issue.[7] In relation to unaccompanied children seeking asylum, the bipartisan commitment to a border-driven rhetoric has obscured our capacity to respond to their triple vulnerabilities and permitted egregious harms. Principled leadership could focus on a broader context than the border: the key driver of flight by sea towards Australia: the lack of effective protection for refugees and people seeking asylum in the Asia-Pacific region. It could also lead debate about obvious priorities for reform. Firstly, expanding opportunities for the safe entry of unaccompanied child asylum seekers by increasing the size of Australia's resettlement program and improving access to alternative migration pathways. Secondly, developing alternative regional responses that focus on their protection rather than deterrence strategies. Both would enhance recognition of the common humanity and dignity of these children, enhance protection for unaccompanied children fleeing persecution in accordance with our international human rights obligations and be an effective and sustainable means of preventing flight by sea. Current Australian policy only achieves the third objective.

This principled leadership could also expand the political debate that has contracted to whether governments are unelectable with policies which can be portrayed as opening

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https://johnmenadue.com/frank-brennan-tim-costello-robert-manne-john-menadue-boat-turnbacks-and-medical-transfers/>.

[4] Robert Manne, *Seeking a workable solution for asylum The Monthly* (24 August 2017) 3.

Subject to the proviso that the tunbacks are "lawful, transparent and conducted in such a way that the asylum seekers lives are not put in peril." 5.

[5] Ibid 3.

[6] Ibid 8.

[7] See Claire Higgins' discussion of the policy debates in the 1970s which considered but rejected implementing boat Turnbacks and mandatory detention of asylum seekers arriving by boat. Claire Higgins, *Asylum by Boat: origins of Australia's refugee policy* (University of New South Wales Press, 2017).

Australia to unauthorised boat arrivals and that loosen its iron clad maritime borders, to instead lead discussion about Australia's responsibility for unaccompanied children as a "special case." It could point to the clear and unequivocal publicly available evidence examined in Chapters 5 to 7 about the damage wrought on these children, especially those held in mandatory immigration detention on the mainland and those sent to Nauru. Their triple burden of vulnerability as children who have experienced persecution or serious harm in their State of nationality, seeking protection in a State where their entry is unauthorised, while separated from their parents or guardians has not only been obscured. Instead, the hardening of laws and policies prioritising border securitisation over humanitarian obligations have further exacerbated their acute vulnerabilities.

There are very real complexities in Australian migration law and policy. They do not justify Australia further harming these children. Genuine guardianship and care and protection could easily be extended to them without seriously threatening Australia's borders. It is one of the more remarkable paradoxes in Australian law that the functions of the Minister who is the statutory legal guardian of unaccompanied children – to the exclusion of any others who might effectively perform that role – are subject to the exercise of that Minister's functions under the *Migration Act*. Guardians stand in the parents' shoes for an unaccompanied child with no adult carer. Guardians and parents have an overriding obligation to act in the best interests of the child while discharging their duties for that child to survive and thrive. It should be a requirement under State law and policy for a statutory guardian to do so. After the amendments to the *IGOC Act* in 2012-2014, not only is acting in the best interests of these children – who are subject to transfer to Nauru and to Boat Turnbacks and Takebacks – not a requirement; it is no longer possible. This State response proactively pathogenises the triple vulnerability of these children. Australia's treatment of these children is a deliberate policy choice. As Italy's example shows, the damage inflicted on unaccompanied children by Australian law and policy is neither necessary nor inevitable. Italy's *Law 47/2017* demonstrates that it is possible to not generate occurrent harms and pathogenic sources of vulnerability by granting unaccompanied children a residence permit, facilitating their representation in, and expedited access to, resolution of their protection claim and appointing an independent guardian. In fact, as Italy's *Law 47/2017* has shown, it is possible to also ameliorate their situational vulnerabilities.

Principled leadership can address the complexity of the security *and* the human impact of Australia's policies without diminution of the protection extended to these children. The

momentum in Australia connecting increasing border control and diminishing protection of unaccompanied children must be halted if Australia is to comply with either its moral obligations to stop harming proximate vulnerable children or its international human rights obligations.

By interrogating the vulnerabilities of unaccompanied child asylum seekers, and the impact of a series of Australian legislative amendments between 2012 and 2014 on those vulnerabilities, this thesis is positioned as an "interrupter" to the current political trajectory. It does not only critique the disconnect between human rights and State practice but proposes a reconceptualization of States' responsibilities to respond to that vulnerability and provides a new imperative for prioritising and formulating new law and policy responses. To this end, this thesis has asked and answered five questions. Are unaccompanied children vulnerable in a way that generates a moral obligation for the State to respond to, not exacerbate, their vulnerability, an obligation that supplements international law obligations? How effectively does international human rights law respond to their acute vulnerability? How did amendments to Australian laws and policies in 2012, 2013 and 2014 respond to the vulnerabilities of these children? In what ways was this response inadequate? How should Australian law and policy be reformed to respond to their vulnerability?

In answering these questions this thesis has argued that this reconceptualisation is urgently required for two reasons: the acute and specific vulnerability of unaccompanied child asylum seekers and the as-yet unfulfilled potential of human rights law, particularly in Australia. It also argued that vulnerability theory should be expanded to extend to these proximate vulnerable children and that it provides the ethical imperative for reframing legal and policy responses to ensure States *do not further harm* children seeking their protection. Connecting theory and practice, this thesis proposed a three stage process to identify a vulnerability informed response in different contexts. It applied that method to evaluate the impact of amendments between 2012 and 2014 to the *Migration Act* and the *IGOC Act* on these children.

8.2 The acute vulnerability of unaccompanied child asylum seekers

This thesis has argued that unaccompanied children are vulnerable in a way that generates a moral obligation that supplements international law obligations to respond to, not exacerbate, their vulnerability. Unaccompanied child asylum seekers experience an intersecting and

intertwined “triple burden” of vulnerability that characterises their specific dependence on the State: their minority; alienage (asylum seeking and unauthorised presence in the territory); and separation from their parents. They have distinct needs arising from their minority; to be cared for and given opportunities to develop and to be protected from physical or mental violence and foreseeable harm and neglect. Their legal precariousness and unauthorised presence likewise generates a distinct need to not be refouled or refused access to a Refugee Status Determination Procedure. Similarly, their separation from their parents gives rise to a specific need for a legal guardian with legislative and functional responsibilities to act in the child’s best interests.

Understanding that “childhood” is simultaneously a period and a state, and that a “child” is simultaneously a becoming person and an extant being, has been shown in this thesis to be central to properly comprehending the rationale for, and to determining the proper extent of, States’ obligation to respond to unaccompanied children. As Chapter 2 argued, viewing childhood holistically brings into sharp focus that children need care and protection both as their current selves to be psychologically well in the present and simultaneously to develop age age appropriate developmental benchmarks and psychological maturity milestones in their futures. Unaccompanied children arrive in States at their specific stage of development, with their specific care and protection needs and the embodiment of all the potential for growth and development they possess. Whether or not their care, protection and development needs are adequately responded to, for example, through the provision of appropriate custodial care, appropriate psychological care to enable recovery from past trauma, or additional educational services to remediate disruptions to education is crucially important. Comprehending children and childhood in this way is critical to understanding the real impact of the amendments between 2012 and 2014 to the *Migration Act* and the *IGOC Act* examined in Chapters 5 – 7.

8.3 Human rights compliance as the long game

This thesis has argued that international human rights law has ultimately been ineffective, to date, at compelling an adequate Australian State response to the acute vulnerability of these children. The existing normative response to the acute vulnerability of unaccompanied child asylum seekers is grounded in States’ extensive human rights obligations. These obligations *ought* to provide an effective counterbalance to securitisation rhetoric and punitive laws and policies. However, the dispersal of these obligations across the core international human rights legal instruments and the Refugee Convention obscures both their extensive nature and an

holistic conception of how the obligations pertain to unaccompanied child asylum seekers. I addressed this by correlating States' dispersed human rights obligations to these children with each of the three sites of vulnerability identified in Chapter 2 (their minority, alienage and separation from their parents). I then examined the scope and content of these human rights obligations to demonstrate that if States so conceptualised and then fully realised them, unaccompanied asylum seeking being/becoming children would be adequately protected.

Chapter 3 went on to argue that, despite the adequacy of human rights in principle, they have been an inadequate protection against "securitised" policies in Australia in practice. They have proven incapable of preventing real harms being perpetrated on these acutely vulnerable children. This chapter detailed how especially in legal systems such as Australia where treaty ratification does not create domestic legal obligations unless the provisions are incorporated into domestic law, State practice routinely falls far short of human rights legal standards. I argued that the unfulfilled potential of human rights law is particularly evidenced by the progressive degrading of treatment of unaccompanied children seeking asylum by boat under Australian law in the last two decades. Australia is responsible in international law for fully discharging the duties it has undertaken having ratified all core human rights treaties and the Refugee Convention. And yet, over the last 20 years, apart from brief periods where child asylum seekers have been released into the community whilst their claims have been processed, laws and policies implemented by both of Australia's dominant political parties have increasingly hidden child asylum seekers from view and repudiated their need for special assistance. They were initially detained in remote and inhospitable places on the Australian mainland, before being further consigned to the background on remote Australian island outposts. This was followed by their individual treatment and any corresponding harms being completely obscured when sent to other States to process their claims for asylum. Lastly, in the most emphatic disavowal, Australia has refused to receive them at all, by turning back the boats taking them to seek asylum. These successive responses to asylum seekers each represent watershed moments where lines of fundamental human rights standards were crossed. Australian contemporary law and policy deliberately disowns the abject vulnerability of these children. Analysis of the extensive, egregious human rights breaches caused by Australia's harsh, punitive and rejecting response to these children in successive regressive changes in law and policy illustrates how human rights law has not provided the necessary brake for these children on the excesses of securitised responses.

Australia should continue to strive to realise the totality of its international human rights obligations. Its policies, legislation, and regulations ought not to undermine the fundamental normative human rights standards in global human rights instruments, conventions and other internationally-agreed commitments that Australia has ratified. While advocacy will, and should, continue, urging legal and policy changes that balance border control priorities with human rights obligations, urgent interim changes to law and policy are required that respond to the particular vulnerability of unaccompanied asylum seeking children and the substantive evidence of the considerable and lasting harm that Australian laws and policies are causing them. Behind the catalogues of breaches of Australia's human rights obligations are children whose lives have been indelibly marked because of Australian laws and policy together with the actions of, and failure to act by, their legal guardian. Further inaction until Australia makes sufficient progress in realising its human rights obligations will inflict further harm and cannot be justified.

8.4 The novelty of an expanded vulnerability theory in identifying the content of, and prioritising the rollout of, an acute response

As a basis for a supplementary approach to human rights, this thesis has argued that vulnerability theory offers a new way of delineating the precise nature of the vulnerabilities of particular groups, the significance of the role of the State in ameliorating those vulnerabilities, the impact of State practice and the changes required to laws and policies to redress vulnerability. Since Fineman's work to date, along with other mainstream vulnerability scholarship on domestic themes, implicitly restricts the scope of States' obligations on account of vulnerability to citizens as liberal subjects, vulnerability theory, as traditionally conceived, falls short of providing a normative theory that includes unaccompanied non-citizen children within its protective scope. Unaccompanied child asylum seekers fall between the gaps of human rights and vulnerability theory. They miss out on the protections of an international human rights system that does recognise extensive State obligations owed to them *because they are non-citizen asylum seeking children* but that does not guarantee creation of equivalent domestic legal obligations. They are then overlooked by vulnerability theory, that provides a normative framework for holding States to account for their role in ameliorating or exacerbating people's vulnerabilities, but excludes these children *because they are non-citizen asylum seeking children*.

This thesis argued in Chapter 4 for the radical application of vulnerability theory outside of the traditional context of nation State obligations to citizens. Developing Fineman's neglected acknowledgement that non-citizens "should be afforded equality on the same terms as citizens if they …have *some other connection* that would make placing state responsibility for them and their situation appropriate"[8] it argued that unaccompanied child asylum seekers have this requisite *other connection* as "proximate vulnerable children." This is because of the convergence of their urgent need to have their acute "triple burden" of vulnerability responded to *and* their spatial, temporal and relational proximity to the State.

The chapter contended further that a State's obligations to these children while they are seeking asylum are not to fully ameliorate their vulnerabilities; that responsibility will fall on the State in which they are ultimately settled. Yet, the urgency and acuteness of their vulnerability and the potential sequential impacts of maltreatment by potentially successive receiving and asylum processing States necessitates a response by *each* State that does not exacerbate their vulnerabilities and that specifically avoids generating new vulnerabilities for the period that the child is physically or relationally proximate to the State.

Fineman's vulnerability theory does not reach to determining what constitutes a response that neither exacerbates nor generates new vulnerabilities in practice. This thesis therefore drew on the conceptual work by Mackenzie, Rogers and Dodds to distinguish between inherent, situational, occurrent and pathogenic vulnerabilities.[9] It then articulated a three stage process to identify the requisite response to avoid exacerbating existing inherent or situational vulnerabilities or generating new occurrent or pathogenic ones in specific contexts. Firstly, examining the operation of laws and policies governing the relationship between the proximate vulnerable child and the State in a specified context and time period to understand the legal context resulting from government choices about laws and policies in practice. Secondly, discerning the impact of those laws and policies on unaccompanied children's minority, alienage and separation from their parents to identify which changes have ameliorated vulnerabilities, or generated occurrent or new pathogenic vulnerabilities. Thirdly, identifying the impacts that can be addressed by legislative and policy change and proposing the content of those changes and priorities for reform to first address impacts that create

[8] Martha Fineman, 'The Vulnerable Subject and the Responsive State', (2010) 60(2) *Emory Law Journal* 251, 256.

[9] Catriona Mackenzie, Wendy Rogers, and Susan Dodds 'Why Bioethics Needs a Concept of Vulnerability' (2012) 5(2) *International Journal of Feminist Approaches to Bioethics* 11, 24-25.

occurrent or new pathogenic vulnerabilities.

8.5 Roadmap for reform

This thesis argues for two immediate reform priorities to create an environment of care for unaccompanied children that does not generate occurrent or pathogenic vulnerabilities. Firstly, limiting mandatory immigration detention of all unaccompanied children to no longer than 72 hours in purpose built child friendly reception centres prior to transferring them into foster care or a sponsorship arrangement, or as a last resort to Community Detention, on the Australian mainland while their asylum claim is processed. Secondly, providing them with access to trauma remediation services while their asylum claim is processed. Neither of these proposed reforms require legislative changes.[10] It also proposed progressive practice improvements in Community Detention arrangements. Finally, it recommended that *if* the government persists with offshore processing on Nauru RPC in the future, no unaccompanied child should be transferred there until a vulnerability informed assessment has been conducted and facilities and services are in place to effectively respond to their complex care needs.[11]

This thesis argues for five urgent priorities for reform to avoid existing occurrent and pathogenic vulnerabilities generated by Australia's response to these children's alienage. Three can be implemented immediately. First, that the Minister make a s 198AE (1) *Migration Act* declaration that the s 198AD transfer to a regional processing country requirement does not apply to unaccompanied child asylum seekers,[12] preferably permanently but at least until such time as the UN declares that transferring children to Nauru does not constitute refoulement. Second, to provide all unaccompanied children with specialist legal assistance from reception until finalisation of their protection claim by expanding the funding of existing service providers. Third, to expedite processing of protection claims of unaccompanied children and ensure that custodial carers of the Legacy Caseload cohort in Community

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[10] As noted in Section 5.4 in Chapter 5, the Minister can achieve the first by revoking his Guideline directing that residence applications for asylum seekers arriving after 19 July 2013 not be referred for consideration unless there are exceptional reasons, or the Minister has requested it. The second requires funding for these children to be able to access existing specialist services.

[11] Although, as shown in Chapter 6, even if the government could ensure that expert wrap around allied health care services and specialist custodians were provided, the legitimacy of offshore processing, as an Australian but not a regional solution, still needs to be justified.

[12] This complements the recommendation in Chapter 5 that the Minister utilise his existing discretionary power to release unaccompanied children from mandatory immigration detention for processing under a residence determination.

Detention group houses are urgently trained to identify cases of "lethal hopelessness" and are provided with appropriate referral points.

The fourth and fifth reforms proposed in the thesis entail amending the *Maritime Powers Act 2013* and the *Migration Act* to reverse the changes made by the *Resolving the Asylum Legacy Caseload) Act 2014* to re-invoke Australia's non-refoulement obligations in full and to exempt unaccompanied children from on-sea enhanced screening and Boat Turnbacks and Takebacks. Unaccompanied children should instead be transferred to the mainland for assessment of their claim.

The thesis also proposes longer-term priorities for legislative reform:

- The reintroduction of full merits review of primary protection decisions by the Migrant and Refugee Division of the Administrative Appeals Tribunal, ensuring that status determinations for unaccompanied child asylum seekers comply with international norms.
- Should transfers to offshore processing resume, ensure that the Best Interest pre-transfer assessment is a genuine and individualised assessment with the possibility that the child not be transferred, and
- Continue cooperation to build a regional processing system in Bali Process countries with consistent and timely access to Refugee Status Determination process, merits review and durable solutions and, if government bipartisan policy continues to refuse the prospect of settlement in Australia, ensure that there are realistic 'third country' settlement options.

Lastly, the thesis recommends the appointment of an independent guardian. This is crucial if Australia is to even minimally discharge its guardianship obligations to unaccompanied children. The roadmap for reform proposed the development of a Guardianship Bill. This Bill would comply with Australia's six core obligations to respond to the complex vulnerabilities of these children through the provision of an effective guardianship framework. The Bill would also acknowledge the critical importance of the guardian's dual role as gatekeeper, both being in relationship with the child *and* mediating the child's relationship of proximity with the State.

The roadmap for reform recommended that Australia should also look overseas for models that comprehensively respond to these children's vulnerability. For example, on its terms, Italy's *Law 47/2017* presents as a lighthouse model for Australia to draw on in

developing a human rights compliant and vulnerability informed Guardianship Bill.[13] *Law 47/2017* codified the prohibition on forced returns of unaccompanied children, introduced child-friendly assessment and determination procedures, enabled their simultaneous application for international protection (with rights to be heard, to legal assistance and to prioritised examination of their application) and the automatic granting of a residence permit for unaccompanied and/or separated children. It permits them to convert that permit to a residence permit for study, work or job seeking when they turn 18. It also provides for transitional arrangements for their continued care and protection, irrespective of legal status, and the provision of social services until the age of 21.[14] Finally, it regulates appointment of the child's legal guardian under three normative guardianship models and the scope of their legal responsibilities (including safeguarding their best interests and ensuring legal representation). As examined in Section 7.4.2, in the medium and longer term, the Italian volunteer guardian model discharges each of the six best practice requirements for guardians in international law.

8.6 The utility of the vulnerability informed response

This thesis has demonstrated the three pronged utility of an expanded and modified vulnerability theory. It enables comprehension of the complex vulnerability of unaccompanied asylum seeking children to identify sites of State responsibility that expose them to a probability of having their dependencies manifested. It provides a normative framework for action by precisely articulating the impact of consequences of laws and policies when States fail to respond to that vulnerability. And it clarifies the imperative for, and the components of, necessary response adjustments.

Against the premise that State intervention can either exacerbate vulnerabilities or support resilience, this thesis examined the effect and impact of legislative amendments to the

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[13] See Paul Rigby, Maria Fotopoulou, Ashley Rogers and Andriana Manta, *Responding to Unaccompanied Minors in Scotland: Policy and Local Authority Perspectives* (University of Stirling, October 2018). Accessed on 23 October 2019 at https://www.scottishinsight.ac.uk/Portals/80/SUIIProgrammes/Asylum%20Seeking%20Children/Responding%20to%20Unaccompanied%20Minors%20-%20Policy%20and%20LA.pdf

See also ISMU, *At a crossroads. Unaccompanied and Separated Children in their Transition to Adulthood in Italy* (IOM, November 2019) 22.

[14] As discussed in Chapter 5, appropriate arrangements are critical for unaccompanied young people leaving group community detention living arrangements to ensure that they have the necessary support and skills to transition safely and effectively to living independently.

Migration Act and the *IGOC* Act between 2012 and 2014. This thesis has argued that these amendments, in the main, failed to respond to the vulnerabilities of these children. The respective analysis of the impacts of the legislative amendments on the vulnerabilities generated by these children's minority (examined in Chapter 5), alienage (examined in Chapter 6), and their separation from their parents (examined in Chapter 7) identified the specific sites where the amendments generated new occurrent and pathogenic vulnerabilities or exacerbated them. The analysis of the profound impacts on these different sites of unaccompanied children's vulnerability illustrates exactly what is at stake when States fail to respond to the situational vulnerabilities of children, or generate occurrent or pathogenic vulnerabilities. The vulnerability informed response spotlights the correlation between the egregiousness of harm caused by State laws and policies and the relative degree of vulnerability of these children, and the complex and interconnected ways that political and border securitisation imperatives have radically exacerbated and pathogenised their vulnerability, in a way that human rights law does not.

Finally, by focusing on reforms that can end these children's exposure to occurrent and pathogenic vulnerabilities, the vulnerability informed response identifies a reform roadmap identifying the specific law and policy sites requiring urgent responsive action by the Australian government to respond appropriately to these children. Implementing this reform roadmap will prevent these children being subjected to further harm as a consequence of Australian law, until such time as Australia fully realises the human rights obligations it has voluntarily assumed at international law. In the meantime, these reforms would move Australia closer to compliance with those obligations.

This thesis ultimately offers both hope and pragmatism regarding the promise and limits of human rights law to deliver to those who need its protection the most. Children are resilient but government policy can and does create wounds that are long and deep and potentially indelible. Our urgent goal must be to put an immediate stop to foreseeable ineffaceable harm. Implementing the vulnerability informed response, set out in this thesis, can achieve this end.

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