

Rethinking the Guardianship of Refugee Children after the Malaysian Solution

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Abstract

The arrival of children seeking asylum in Australia without a parent or guardian continues to pose challenges for the Australian government's legislative and policy framework. The central problem is the potential for conflict between the Minister for Immigration's responsibility as guardian under the *Immigration (Guardianship of Children) (IGOC) Act 1946* (Cth) ('IGOC Act') and the Minister's roles under the *Migration Act 1958* (Cth) ('Migration Act'). The rise in the number of unaccompanied children presenting as irregular maritime arrivals has led to various attempts to challenge Ministerial interpretations of the *IGOC Act*. The authors show that successive governments have fought hard to deny much or any content to the Ministerial role of guardian. They examine a series of cases leading up to the High Court ruling which invalidated Australia's 'Arrangement' to transfer asylum seekers, including unaccompanied minors, to Malaysia. Although a clear departure from earlier jurisprudence, they argue that the ruling in *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship* should not have surprised or confounded the government as much as it did. The case provides an important object lesson in doctrinal exegesis. Rulings made at a point in time rendered fraught by war, terrorist attacks or other acute events cannot be expected again when a matter is re-litigated a decade later and in a period of relative calm. The authors argue that the current impasse in relation to offshore processing of asylum seekers presents an opportunity to reconsider Australia's approach to this vulnerable group: children seeking asylum alone.

I The Challenge of Unaccompanied and Separated Children Seeking Asylum

At the height of the national hysteria that developed around the arrival of boats carrying undocumented asylum seekers in and after 2001, the image of children and babies in

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immigration detention was a potent embodiment of the tough line embraced by the Australian government. In the wake of the terrorist attacks in North America and with the unfolding wars in Iraq and Afghanistan, border protection had become an imperative that brooked no exceptions — however young, old or vulnerable the person arriving by boat without the authority of a visa. The raft of measures known as the ‘Pacific Solution’ involved the interdiction, deflection and processing offshore of ‘irregular maritime arrivals’ (‘IMAs’) of all description.¹

The passage of time has seen Australia’s approach toward IMAs become considerably more nuanced. On the one hand, the harm caused to asylum-seeking children by long periods spent in immigration detention became a source of embarrassment and regret, with criticisms made of the punitive treatment of IMA children generally.² On the other hand, the break with the ‘past’ has been far from clean. Labor came to power in 2007 decrying the inhumanity of the conservative years, but ultimately that party was reluctant to abandon the architecture of border control constructed by predecessor governments. In part, this reflected the poisonous politics that surrounded the arrival of boats carrying asylum seekers after 2007. In opposition, conservative politicians showed no compunction in attributing the sharp rise in the number of IMAs to a ‘weakening’ in policy.³ At the same time, politicians of all persuasions have firmed in their resolve to ‘stop the boats’ as awareness has grown of the dangers inherent in the maritime people smuggling trade. In 2011, Minister for Immigration and Citizenship, Chris Bowen, used the example of the inherent dangers for children travelling alone as one rationale for advocating a new ‘regional’ solution to the problem of boat arrivals involving the transfer to Malaysia of 800 IMAs.⁴ He said:

I think the overriding obligation is to stop unaccompanied minors risking their lives on that dangerous boat journey to Australia. The overriding

¹ For a sample of the many pieces written on this subject see Mary Crock, ‘In The Wake Of The Tampa: Conflicting Visions Of International Refugee Law In The Management Of Refugee Flows’ (2003) 12 *Pacific Rim Journal of Law and Policy* 49; Savitri Taylor, ‘Sovereign Power at the Border’ (2005) 16 *Public Law Review* 55; Tania Penovic and Azadeh Dastyari, ‘Boatloads of Incongruity: The Evolution of Australia’s Offshore Processing Regime’ (2007) *Australian Journal of Human Rights* 33; Jane McAdam and Kate Purcell, ‘Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum’ (2009) 27 *Australian Yearbook of International Law* 87; and Michelle Foster and Jason Pobjoy, ‘A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia’s “Excised” Territory’ (2011) 23 *International Journal of Refugee Law* 583.

² The most comprehensive criticism of this aspect of government policy is seen in Human Rights and Equal Opportunity Commission (‘HREOC’), *A Last Resort? National Inquiry into Children in Immigration Detention* (HREOC, 2004) (‘*A Last Resort*’). See Mary Crock *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in Australia* (Themis Press, 2006).

³ See Mary Crock and Daniel Ghezalbash, ‘Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals’ (2010) 19 *Griffith Law Review* 238.

⁴ The ‘Arrangement’ with Malaysia involved sending 800 IMAs to that country in exchange for 4,000 refugees from Malaysia. See *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*, signed 25 July 2011, <http://www.minister.immi.gov.au/media/media-releases/_pdf/20110725-arrangement-malaysia-aust.pdf> (‘Arrangement’).

obligation is to say to parents, 'Do not risk the lives of your children to get the prospect of a visa in Australia'.⁵

Over the years, the discourse around asylum-seeking children has become confused, coming close on occasion to accepting the notion that cruelty to some must be accepted in order to achieve kinder global outcomes. As a result, change in the way we treat unaccompanied children has been slow and inadequate — notwithstanding the explosion of studies and literature on these children.⁶ As we explore in Part II, policy changes tend to be reactive to external events rather than driven by consistent theories or philosophies and tend to be detrimental to the interests of the children. More importantly, there has been a reluctance to acknowledge and address structural shortcomings in the legislative regime governing the care and control of unaccompanied children seeking asylum.

Having said this, the momentum for reform has begun to build. Using as a case study a series of seminal cases involving unaccompanied children, we explore the changes that have occurred in the jurisprudence governing the treatment of these children. We acknowledge the polycentric influences on the judiciary in what has been a particularly fraught area of public policy. Nevertheless, we will argue that the High Court's ruling in *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship*⁷ — the case that unravelled the government's 'Malaysian Solution' — should not have surprised or confounded the government as much as it did.⁸ Indeed, in our view the case provides an important object lesson in doctrinal exegesis. The message is that litigation rarely produces 'pure' principles that can be lifted and applied infallibly in other contexts. Rulings made at a point in time rendered fraught by war, terrorist attacks or other acute events cannot be expected again when a matter is re-litigated a decade later and in a period of relative calm.

⁵ Julia Gillard PM and Chris Bowen MP, Minister for Immigration and Citizenship, 'Samantha Stosur, Asylum Seekers, Malaysia Agreement' (Transcript of joint press conference, Canberra, 8 August 2011) <<http://www.minister.immi.gov.au/media/cb/2011/cb171739.htm>>.

⁶ See, eg, 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; Crock, above n 2; 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; Emily Benfer, 'In the Best Interests of the Child: An International Human Rights Analysis of the Treatment of Unaccompanied Minors in Australia and the United States' (2003) 14 *Indiana International and Comparative Law Review* 729; Fiona Martin and Jennifer Curran, 'Separated Children: A Comparison of the Treatment of Separated Child Refugees Entering Australia and Canada' (2007) 19 *International Journal of Refugee Law* 440; Heaven Crawley, *Child first, migrant second: ensuring that every child matters* (Immigration Law Practitioners Association, 2006); Council of Europe: Parliamentary Assembly, *Unaccompanied Children in Europe: Issues of Arrival, Stay and Return* (Doc 12539, 21 March 2011) UNHCR Refworld, <<http://www.unhcr.org/refworld/docid/4d8b1e02.html>>; United Nations High Commissioner for Refugees, *Trees Only Move in the Wind: A Study of Unaccompanied Afghan Children in Europe*, (PDES/2010/05, June 2010) UNHCR Refworld, <<http://www.unhcr.org/refworld/docid/4c21ae2a.html>>.

⁷ (2011) 244 CLR 144 ('*Plaintiffs M70 and M106*').

⁸ See, eg, Daniel Hurst, 'We thought refugee swap plan was sound: Gillard', *Brisbane Times* (online), 1 September 2011, <<http://www.brisbanetimes.com.au/national/we-thought-refugee-swap-plan-was-sound-gillard-20110901-1jni8.html>>.

This article is divided into five sections. Part II gives an overview of what has and has not changed in the way Australia treats asylum seeker children who travel without the protection of a responsible adult. In Part III, we provide a critical review of the law governing the guardianship of unaccompanied children, tracing the changes that have occurred in the judiciary's approach to cases involving these most vulnerable young people. This is followed in Part IV with an analysis of the High Court decision that scuppered the government's plans to transfer IMAs to Malaysia. The article also discusses the effect of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth), which was passed by the Australian Parliament as this article was about to be published. *Plaintiffs M70 and M106* is contrasted with earlier jurisprudence on IMA children and offshore processing that developed (mostly in the Federal Court) during the years of conservative governance. Reviewing the shortcomings that persist in the regime governing the care and control of unaccompanied children, we finish with suggestions for positive reform.

II Change and Stasis in the Treatment of Unaccompanied Children

Statistics demonstrate that unaccompanied children typically represent around five per cent of the total number of asylum seekers who come to Australia.⁹ These figures seem to be (broadly) consistent around the world.¹⁰ The first six months of 2012 saw an unprecedented rise in irregular maritime arrivals, with an alarming spike in the number of children seeking asylum alone. In 2011–12, 889 asylum seeker children were recorded as unaccompanied minors, representing 11 per cent of total arrivals.¹¹ This represents more than double the rate recorded in earlier years.¹² In spite of concerns about the rising number of children presenting as asylum seekers in Australia since 2008, it is not clear that the *percentage* of such children has increased relative to the overall cohort of asylum seekers. Sending a child to a foreign country alone in search of protection remains a desperate measure taken only by a small minority of parents.

While there have been marked improvements in the arrangements made for the care of unaccompanied refugee children over the years, these children continue to fall through the cracks at critical points in the asylum process. In our view, the situation reflects reluctance on both sides of the political divide to take

⁹ Unaccompanied children accounted for five per cent of asylum seekers in 2008–09 and 4.7 per cent in 2009–10. Statistics for the number of IMAs are available from Department of Immigration and Citizenship ('DIAC'), 'Asylum Statistics 2010-2011 (first 6 months)' <<http://www.immi.gov.au/media/publications/statistics/>>. While the statistics provide a breakdown according to age they do not provide separate statistics on the number of unaccompanied children. In percentage terms, these figures are consistent with the data gathered in Australia for the period 1999–2004: Mary Crock *Seeking Asylum Alone*, above n 2, 39.

¹⁰ United Nations High Commissioner for Refugees (UNHCR) estimates that unaccompanied and separated children constitute approximately four per cent of the number of asylum claims lodged globally in 2009 and 2010: UNHCR, *60 Years and Still Counting: Global Trends Report 2010*, <<http://www.unhcr.org/4dfa11499.html>> 27.

¹¹ See Angus Houston, Paris Aristotle and Michael L'Estrange, *Report of the Expert Panel on Asylum Seekers*, DIAC (August 2012) 95, Table 12 ('Houston Report').

¹² See Crock, above n 2, 40–3.

responsibility for the care of unaccompanied children in a manner that truly acknowledges children as rights bearers. In many instances the ‘embodied’ child has been lost in rhetoric about deterrent measures that must be adopted in order to protect the ‘putative’ or ‘imagined’ child. Governments justify the mistreatment of unaccompanied asylum seeking children on the basis that this is necessary to deter parents sending children on dangerous journeys where many have lost their lives. The primary deterrent over many years has been immigration detention, underpinned by an institutional blindness to the harms caused by prolonged incarceration in remote locations. Inherently inefficient and exorbitantly expensive, Australia’s mandatory detention regime was (and still is) a system that exacerbates disadvantage, generates mental illness and encourages societal disharmony. It is a regime in which children are bound to suffer.

The system began under Labor in the 1990s with the establishment of mandatory detention as a first line of response to IMAs.¹³ It deteriorated rapidly with decisions to put physical distance between immigration detainees — who were almost uniformly asylum seekers — and their legal advisers. The logic was that detention is effective as a deterrent measure (for both asylum seekers and advisers intent on pursuing judicial review of adverse rulings). This led to the establishment of detention facilities in increasingly remote, inhospitable and operationally-difficult locations. These began with disused mining settlements and military bases in remote parts of Australia — at Port Hedland, Woomera, and Curtin Airbase in the Kimberley region of Western Australia. Legal advisers were excluded, or their access controlled. The detainees were taken out of sight, if not out of mind, in a regime that, over time, brutalised both detainees and their guards.¹⁴

The apotheosis of these policies was the Howard Liberal Government’s ‘Pacific Solution’, introduced in 2001 following the interdiction of the MV Tampa off Christmas Island. Between October 2001 and December 2007, children arriving at ‘excised offshore places’, such as Christmas Island or Ashmore Reef, were detained and transferred to detention facilities in other countries like Papua New Guinea and Nauru where their refugee claims were assessed. Changes made to the *Migration Act* meant that asylum seekers (including children) who arrived without documentation in an Australian territory that has been excised from the ‘migration zone’ were prohibited from applying for a protection visa in Australia.¹⁵

Unlike child asylum seekers in Australia, IMA arrivals were not able to access legal assistance or an independent appeals process if their case was rejected.

¹³ See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; see also Mary Crock and Laurie Berg, *Immigration Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press, 2011), 479–82.

¹⁴ See ABC Television, ‘The Guards’ Story’, *Four Corners*, 15 September 2008 (Quentin McDermott.) <http://www.abc.net.au/4corners/content/2008/20080915_detention/interviews.htm>.

¹⁵ The *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) excised certain territories from the ‘migration zone’ of Australia. Anyone entering Australia without a visa at one of those territories became known as an ‘offshore entry person’: *Migration Act* s 5(1). Offshore entry persons are prohibited from applying for any visas unless the Minister for Immigration personally allows them: *Migration Act* s 46A. The constitutional validity of this section was affirmed by the High Court in *Plaintiff M61/2010E v Commonwealth of Australia*, *Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 243 CLR 319 (*Plaintiff M61*). See Foster and Pobjoy, above n 1, 586–9.

Processing times were lengthy, facilities on Nauru and Manus Island were poor, and detainees suffered psychological effects from prolonged indefinite detention.¹⁶ A narrow approach to ascertaining eligibility for a visa, lack of representation, and poor interviewing techniques, combined with the harsh detention environment, had serious implications for children and in particular for unaccompanied children. Evidence suggests that these failings led to unaccompanied children being returned to their country of origin in circumstances where they should have been granted asylum in Australia.¹⁷

Although the newly-elected Rudd Labor Government closed the Nauru processing centre in December 2007, it stopped short of abolishing offshore processing altogether. The legislation excising Australia's external territories from the migration zone was not repealed. People arriving at these places are still regarded as 'off-shore entry persons', and in late 2011 continued to be detained and processed on the remote Australian territory of Christmas Island.¹⁸ The possibility of real and lasting reform under Labor was blighted by ad hoc and sometimes quite counter-productive policy shifts. The most notable of these was the decision in April 2010 to suspend the processing of refugee claims made by IMAs from Sri Lanka and Afghanistan for three and six months respectively.¹⁹

Despite a policy announcement that detention would be a last resort, and that children would not be detained in immigration detention centres,²⁰ in practice children continued to be detained — and in increasing numbers. When Labor came to power in November 2007 there were only 23 children in custody. By the end of

¹⁶ See Crock and Bhaba, above n 6, ch 13. See also Kazimierz Bem et al 'A Just Australia, 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, August 2007' (Research Project, A Just Australia and Oxfam Australia, August 2007) <<http://www.ajustaustralia.com/resource.php?act=attache&id=213>>.

¹⁷ The assessment of the researchers on the Seeking Asylum Alone project was that 32 of 55 unaccompanied children were returned to Afghanistan from Nauru in 2002–03: Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (Federation Press, 2006) 126. Figures provided in response to Questions on Notice, Senate Legal and Constitutional hearings into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (6 June 2006) stated that there were 20 children in the group who returned to Afghanistan from Nauru after being refused refugee status, including seven unaccompanied minors.

¹⁸ Even though it is an Australian Territory, Christmas Island is 360 km south of the Indonesian island of Java, approximately 2600 km from Perth and 2800 km west of Darwin. It is small in size and population, being approximately 135 square km with a local population of around 1100 people.

¹⁹ Chris Bowen, Minister for Immigration and Citizenship with Stephen Smith MP, Minister for Foreign Affairs and Brendan O'Connor MP, Minister for Home Affairs, 'Changes to Australia's Immigration Processing System' (Joint Media Release, 9 April 2010) <<http://www.minister.immi.gov.au/media/media-releases/2010/ce10029.htm>>. See also Mary Crock, 'First Term Blues: Labor, Refugees and Immigration Reform' (2010) 17 *Australian Journal of Administrative Law* 205.

²⁰ Chris Evans, Minister for Immigration and Citizenship, 'New Directions in Detention — Restoring Integrity to Australia's Immigration System' (Speech delivered at the Centre for International and Public Law Seminar, Australia National University, Canberra, 29 July 2008) <<http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>>.

January 2011 just over 1000 children were being held in immigration detention — in fact if not in name.²¹

The build-up was due to a fundamental reluctance to abandon two critical policies of the former government(s): detention and offshore processing. The underlying law had not been changed: the *Migration Act* continued to mandate incarceration as the default response to unauthorised arrivals. IMAs, including unaccompanied children, were (and still are) taken first to Christmas Island for the processing of their refugee claims. While families with children and unaccompanied children were (and still are) detained separately from the Island's main detention centre, the facilities designated as 'Alternative Places of Detention' ('APODs') have often left much to be desired. Christmas Island is a tiny location that was quickly overwhelmed when the number of IMAs surged in and after 2009. Labor's reluctance to embrace the notion of community parole for IMAs was underscored by the establishment of a series of facilities on mainland Australia, but always in remote locations. The Curtin Immigration Detention Centre near Derby was re-commissioned for adult male detainees. APODs were established or re-commissioned for unaccompanied children and families in Western Australia, Northern Territory and South Australia.

Although presented as alternatives to detention, the APODs have almost all involved severe constraints on mobility and freedoms. Unaccompanied children were held in Darwin in hotel accommodation that quickly became overcrowded, and more restrictive for the children than a regular detention centre would have been. Health and mental health services in some facilities were inadequate, with little provision made for education, activities and excursions.²² Pressures from the number of asylum seekers arriving led to increasing periods in custody. Detention under Labor has been characterised by an accountability and openness that was not seen during the years of conservative governance, however obtaining reliable data on the rate of 'incidents' in immigration detention centres from that period remains a fraught exercise.²³ The number of suicides amongst immigration detainees between 2009 and 2011 was higher than in any other period in the history of immigration detention in Australia. For the period July 2010 to June 2011 there were six deaths, 93 admissions to psychiatric hospitals, 1320 incidents of voluntary starvation and over 300 attempts at self-harm.²⁴ Given the extraordinary public

²¹ Joint Select Committee on Australia's Immigration Detention Network, Answers to questions on notice, DIAC, Question No 3, 10 August 2011 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=immigration_detention_ctte/submissions.htm>.

²² The Australian Human Rights Commission ('AHRC') regularly reports on its observations following visits to immigration detention centres. See, *Immigration Detention, Asylum Seekers and Refugees*, Australian Human Rights Commission <http://www.humanrights.gov.au/human_rights/immigration/index.html>.

²³ The plethora of articles, books and reports on immigration detention during these years are testament to the levels of unrest and human rights abuses that occurred. See, eg, *ibid* and the material cited at n 2. However, hard data on incidents in detention centres is difficult to find. The Annual Reports of the Department of Immigration are silent on the subject. Reports prepared by the HREOC and by the Commonwealth Ombudsman tend to be specialised in their focus, examining either individual cases or specific categories of detainees, such as children.

²⁴ See Joint Select Committee on Australia's Immigration Detention Network, Answers to questions on notice, Department of Immigration and Citizenship, Question No 22, 16 August 2011 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=immigration_

focus on immigration detention over the last decade, these statistics can only be described as reflective of a disappointing failure to learn from past experience.

Recognising that detention ‘can have negative impacts on [the] development and mental health of children and families’, Prime Minister Gillard and Immigration Minister Chris Bowen announced in October 2010²⁵ that all children and families would be moved into community-based accommodation by June 2011.²⁶ Strictly speaking, people under community detention orders remain in immigration detention at law but are generally able to move freely in the community. Although the policy announcement was a welcome development, the government had difficulty in meeting the target set. At the end of June 2011, only 513, or 58 per cent, of the children in immigration detention had been moved into community facilities.²⁷ By 14 March 2012, 544 children remained in community detention (including 130 unaccompanied children), with 479 held in detention facilities (including 254 unaccompanied children).²⁸ The failure to release these unaccompanied children into the community underscored the continuing potential for conflict with the Minister’s responsibility as statutory guardian.²⁹

Less than six months after the announcement that children and families would be moved into the community, the government announced in May 2011 that children would not be exempt from the agreement with Malaysia to provide a ‘regional solution’ to Australia’s IMA problem.³⁰

detention_ctte/submissions.htm>. For conditions more generally, see Janet Phillips and Harriet Spinks, ‘Background Note: Immigration Detention in Australia’ Parliamentary Library, 23 January 2012, <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/Detention>.

²⁵ Chris Bowen MP, Minister for Immigration and Citizenship with Julia Gillard PM, ‘Government to Move Children and Vulnerable Families into Community-based Accommodation’ (Joint Media Release, 18 October 2010) <<http://www.minister.immi.gov.au/media/media-releases/2010/cb10071.htm>>.

²⁶ Amendments to the *Migration Act* in 2005 gave the Minister for Immigration the personal discretion to make a ‘residence determination’, allowing a person in immigration detention to live in the community at a specified residence: *Migration Act* s 197AB.

²⁷ Chris Bowen MP, Minister for Immigration and Citizenship, ‘Government Meets Commitment on Community Detention’ (Media Release, 29 June 2011) <<http://www.minister.immi.gov.au/media/cb/2011/cb167699.htm>>.

²⁸ DIAC, Answer to Question on Notice No 298, Joint Select Committee on Australia’s Immigration Detention Network, *Inquiry into Australia’s Immigration Detention Network* (22 March 2012), <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=immigration_n_detention_ctte/immigration_detention/submissions.htm> .

²⁹ The on-going conflict is at the heart of eight cases (including four unaccompanied minors) discussed below n 80. See *Plaintiff M168/10 v The Commonwealth*; *Plaintiff M169/10 v Minister for Immigration and Citizenship*; *Plaintiff M170/10 v The Commonwealth*; *Plaintiff M171/10 v Minister for Immigration and Citizenship*; *Plaintiff M172/10 v The Commonwealth*; *Plaintiff M173/10 v Minister for Immigration and Citizenship*; *Plaintiff M174/10 v The Commonwealth*; *Plaintiff M175/10 v Minister for Immigration and Citizenship* (2011) 279 ALR 1 (‘*Plaintiff M168 litigation*’).

³⁰ Julia Gillard PM, ‘Regional Cooperation Framework; Manus Island’ (Transcript of joint press conference, Canberra, 7 May 2011) <<http://www.pm.gov.au/press-office/transcript-joint-press-conference-canberra-4>>.

The Malaysian Solution

The plan negotiated in May 2011 is a product of the regional collaboration known as the 'Bali Process' which has been struggling for some time to find solutions to irregular migratory movements in the Asia-Pacific region.³¹ It is also reminiscent (albeit as a pale imitation) of the collaborative arrangements made after the war in Vietnam to interdict and process the asylum claims made by the IMAs — or 'boat people' — who spread out across the Asia-Pacific region after the fall of Saigon.³² The *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement* is embodied in a bilateral agreement that (problematically) is expressed to be *not* legally binding on either party.³³ Funded by Australia, the agreement involves the transfer to Malaysia of 800 asylum seekers who arrive in Australia as IMAs. In exchange, Australia has agreed to 'resettle' 4000 refugees residing in Malaysia whose status as refugees has been determined by the United Nations High Commissioner for Refugees (UNHCR). On 25 July 2011, one day before the *Arrangement* was scheduled to take effect, the Minister issued an Instrument of Declaration which purported to provide the statutory basis for the transfer of asylum seekers to Malaysia as a 'declared' country under the *Migration Act* s 198A.³⁴

Minister Bowen made it clear that unaccompanied children would be included in the group of asylum seekers to be sent to Malaysia as part of the agreement. As noted earlier, he reasoned that the inclusion was necessary as a deterrent to parents who might otherwise be encouraged to expose their children to a perilous journey to Australia. The aim was to 'break the business model' of people smugglers.³⁵

As we explore in further detail in Part IV, the announcement of the *Arrangement* met with a concerted campaign of opposition, culminating in a challenge in the High Court brought on behalf of two asylum seekers slated for removal to Malaysia. Concerns were raised about the future of any unaccompanied

³¹ See *The Bali Process* <<http://www.baliprocess.net/>>. In recent years, regional consultative processes have been established in most regions of the world. Other examples include: between Europe, North America and Australia through the 'Inter-governmental Consultations on Asylum'; in Northern and Central America through the 'Puebla Process'; in Asia through the 'Manila Process'; within Europe with the 'Budapest Process' and the Mediterranean '5 plus 5' Process'; and in Africa with the International Dialogue on Migration in West Africa and the International Dialogue on Migration in Southern Africa. See Alexander Betts, *Global Migration Governance* (Oxford University Press, 2011) 18; Mary Crock and Daniel Ghezalbash, 'Secret Immigration Business: Policy Transfers and the Tyranny of Deterrence Theory', in Savinder Singh (ed) *The Ashgate Research Companion to Migration Theory and Policy* (Ashgate, forthcoming 2012).

³² See W Courtland Robinson, 'The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck' (2004) 17 *Journal of Refugee Studies* 319; and Arthur Helton, 'Refugee Determination under the Comprehensive Plan of Action: Overview and Assessment' (1993) 5 *International Journal of Refugee Law* 544. See also Martin Tsamenyi, *The Vietnamese Boat People and International Law* (Griffith University, 1981); Judith Kumin, 'Orderly Departure from Vietnam: Cold War Anomaly or Humanitarian Innovation?' (2008) 27 *Refugee Survey Quarterly* 104.

³³ See *Arrangement*, above n 4.

³⁴ *Instrument of Declaration of Malaysia as a Declared Country under Subsection 198A(3) of the Migration Act 1958*, 25 July 2011, <<http://www.comlaw.gov.au/Details/F2011L01685>>.

³⁵ ABC Television, 'Children Part of Refugee Swap: Bowen', *Lateline*, 2 June 2011 (Tony Jones) <<http://www.abc.net.au/lateline/content/2011/s3234302.htm>>.

children sent to Malaysia.³⁶ At worst, it was feared they would be subjected to detention, ill-treatment or exploitation. At best they would remain in Malaysia for many, many years with little or no prospect of resettlement to a safe third country. To the embarrassment of the governments of both Malaysia and Australia, the Australian media highlighted reports by organisations such as Amnesty International³⁷ on the abusive treatment experienced by irregular migrants and recognised refugees in Malaysia.³⁸

The *Arrangement* provides that the government of Australia would conduct pre-screening assessments ‘in accordance with international standards’³⁹ prior to any transfer from Australia to Malaysia. According to DIAC, this process would include an assessment of Australia’s obligations under the *Convention on the Rights of the Child*,⁴⁰ with a determination of what might be the ‘best interests’ of the child.⁴¹ The document provides further that those transferred from Australia to Malaysia should be ‘treated with dignity and respect and in accordance with human rights standards’ and that ‘[s]pecial procedures will be developed and agreed to by the Participants to deal with the special needs of vulnerable cases including unaccompanied minors.’⁴² Finally, Australia agreed to meet ‘[c]osts related to the health and welfare (including education of minor children) of transferees in accordance with UNHCR’s model of assistance in Malaysia.’⁴³

From a legal standpoint, the problems with the agreement reached with Malaysia are obvious. While it has ratified the CRC, Malaysia is not a party to the *UN Convention relating to the Status of Refugees*. It was not prepared to assume any legally-binding obligations in relation to Australia’s 800 IMAs.

The *Arrangement* does not detail the guardianship arrangements for unaccompanied children in Malaysia. What is clear from the context, however, is that the Australian Minister for Immigration would cease to have any legal responsibility for these children. The previous Minister for Immigration argued that his guardianship of those unaccompanied children transported under the ‘Pacific Solution’ ceased upon their arrival at the ‘declared countries’ of Nauru and

³⁶ Adrian Edwards, *UNHCR Calls for Proper Safeguards for Children Being Returned to Malaysia by Australia* (3 June 2011) United Nations High Commissioner for Refugees <www.unhcr.org/4de8bb8d9.html>.

³⁷ Amnesty International, ‘Abused and Abandoned: Refugees Denied Rights in Malaysia’ (Research Paper No ASA 28/010/2010, Amnesty International, 16 June 2010) <<http://www.amnesty.org/en/news-and-updates/report/refugees-malaysia-arrested-abused-and-denied-right-work-2010-06-16>>.

³⁸ See, eg, ‘PM defends Malaysia’s treatment of refugees’, *ABC News* (online) <<http://www.abc.net.au/news/2011-10-27/pm-defends-malaysias-treatment-of-refugees/3604674>>; ‘Australian and Malaysia sign “Refugee” deal’, *Al Jazeera* (online) <<http://www.aljazeera.com/news/asia-pacific/2011/07/20117254439553573.html>>.

³⁹ See *Arrangement*, above n 4, cl 9(3).

⁴⁰ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990) (‘CRC’).

⁴¹ Department of Immigration and Citizenship, Submission no 31 to the Senate Legal and Constitutional References Committee, *Inquiry into Australia’s Arrangement with Malaysia in Relation to Asylum Seekers*, 11 October 2011, 13 [59].

⁴² See *Arrangement*, above n 4, cl 8.

⁴³ *Ibid* cl 9(1)(c).

Papua New Guinea ('PNG').⁴⁴ This facet of the *Arrangement* raises squarely the question of who should be charged with the care and control of asylum seeker children who travel without the protection of a responsible adult. Before examining in detail the High Court's ruling on the 'Malaysian Solution', it is to this question that we now turn. It is our argument that the legal frameworks governing the distribution of guardianship responsibilities for immigrant children in Australia continue to leave much to be desired.

III Determining the Role of the Minister: The Guardianship of Unaccompanied Children

Australia has had a long history of dealings with child migrants arriving without the protection of a responsible adult. The *IGOC Act* was created to provide a legal framework for a massive program of child migration from the United Kingdom at the end of World War II. This program saw thousands of children brought to Australia, often under misleading pretences, many to be mistreated in the institutions and foster homes where they were placed.⁴⁵ In 1994, the reach of this legislation was extended so that the Minister for Immigration is appointed guardian of every non-citizen child who arrives in Australia without the protection of a parent or other responsible adult.⁴⁶ The Minister remains the nominal guardian of all unaccompanied migrant children until they 'reach majority, leave Australia permanently or otherwise cease to fall within the provisions' of the *IGOC Act*.⁴⁷

Where children are brought to Australia as unaccompanied or separated children within the planned intake of humanitarian migrants, no particular conflicts of interest arise for the Minister who assumes the legal role of guardian as soon as they arrive in Australia. As Julie Taylor explains, the *IGOC Act* was originally intended as a mechanism to coordinate nationally the provision of services to unaccompanied migrant children brought into the country through orderly programs.⁴⁸ Although the original legislation was designed for children brought

⁴⁴ Senate Legal and Constitutional Affairs Committee, *Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002*, 56 [5.60].

⁴⁵ Between 1947 and 1953 over 3200 children migrated to Australia under approved schemes. The majority were from the United Kingdom and about 100 came from Malta: Senate Standing Committee on Community Affairs, Parliament of Australia, , *Lost Innocents: Righting the Record — Report on Child Migration* (2001) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/completed_inquiries/1999-02/child_migrat/report/index.htm> 11, ch 2. For a history of the program and its impact on the children, see Margaret Humphreys, *Empty Cradles* (Corgi, 1996). This book was revised and republished in 2011 as *Empty Cradles: Sunshine and Oranges* to coincide with the release of a film based on it.

⁴⁶ See *Immigration (Guardianship of Children) Amendment Act 1994* (Cth), which inserted s 4AAA and 4AAB into the *IGOC Act*. Section 4AAA defines children as 'persons under the age of 18, who enter Australia without a parent, intending adoptive parent or relative over 21 years of age, and who intend to become permanent residents of Australia'. The 1994 amendments were designed to deal with children being brought into Australia for adoption. See Julie Taylor, 'Guardianship of Child Asylum Seekers' (2006) 34 *Federal Law Review* 185.

⁴⁷ *Immigration (Guardianship of Children) Amendment Act 1994* (Cth) s 6.

⁴⁸ Taylor, above n 46, 186. The Minister's guardianship functions were delegated to state authorities and private bodies under s 5 of the *IGOC Act* — although to what effect is debatable. As Kirby J noted in *WACB* (2004) 210 ALR 190, 208, state and territory governments have not enacted

into the country as lawful migrants, recent litigation presupposes that the *IGOC Act* covers all unaccompanied children without distinction of their status at entry.⁴⁹ The only proviso is that there is an intention that the child remain permanently.

The problem with the *IGOC Act* is that the legislation never really took the issue of guardianship seriously, in the sense of spelling out the duties of guardian or the rights of the children affected. Nor did it envisage situations where the interests of the child and those of the guardian might differ or be in conflict. This arises most obviously where unaccompanied children arrive as irregular migrants — most particularly as IMAs. For undocumented asylum seeker children, conflicts inevitably arise in giving the Minister both the function of immigration control and the protection of children. The *Migration Act* requires that these children be detained until they are either granted a visa or removed from Australia.⁵⁰ As Crock noted in 2004:⁵¹

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*. This problem inheres even where the Minister delegates her or his role as *IGOC* guardian to a state welfare authority because the delegate is also perceived at law to have a conflict of interest in any conflict between the child and the state.

The conflicts inherent in this legislative regime appear to have lain dormant until relatively recent times. While unaccompanied children have featured strongly in Australia's immigration history, it was only after the instigation of a policy of mandatory detention — first for IMAs and later for all 'unlawful non-citizens'⁵² — that attitudes towards asylum seeker children appear to have hardened. The rise in the number of unaccompanied children in and after the 1990s is reflected in a string of cases challenging Ministerial interpretations of the duties implicit in the *IGOC Act*. Over the years, Ministers from both sides of the political divide have fought hard to deny much content to the Ministerial role of guardian. The consistent argument has been that the terms of the *IGOC Act* are general in nature and are subordinate to the more specific provisions of the *Migration Act*.

The response of the judiciary generally has been to acquiesce in these arguments — creating a harsh and discouraging jurisprudence for unaccompanied children. Attempts to invoke high legal and moral principle enshrined in sources such as the court's role as *parens patriae*;⁵³ the CRC⁵⁴ or the *International*

complementary legislation to allow their officials to perform duties under the *IGOC Act*. This may make the Minister's delegation ineffective.

⁴⁹ See *Odhiambo and Martizi v Minister for Immigration & Multicultural Affairs* (2002) 122 FCR 29, 47 ('*Odhiambo*'); Taylor, above n 46, 19–22.

⁵⁰ *Migration Act* ss 189, 198.

⁵¹ Mary Crock, 'Lonely Refugee: Judicial Responses to Separated Children Seeking Refugee Protection in Australia' (2005) 22 *Law in Context* 120, 129.

⁵² See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Migration Reform Act 1992* (Cth).

⁵³ *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365.

⁵⁴ See *Odhiambo* (2002) 122 FCR 29.

*Covenant on Civil and Political Rights*⁵⁵ have met with spectacular failures. Where advocates have enjoyed more success is in cases where they have eschewed high principle in favour of a careful reading of particular provisions in the legislation, reducing a child's claim to simple statutory construction.⁵⁶ However, the approach adopted has not always produced consistent outcomes.⁵⁷

The Content of the Minister's Duties as Guardian

While the *IGOC Act* s 6 provides that the Minister 'shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child', the Act does not provide any guidance as to the content of these rights, powers and duties. Before turning to how this has been interpreted by the courts in the immigration context, it is useful to consider the duties of a guardian in common law and international law.

As a matter of common law and equity⁵⁸ a guardian stands in loco parentis to the child.⁵⁹ This includes the power to make decisions for the welfare and upbringing of a child.⁶⁰ With this power come concomitant obligations such as the duty to protect the child from harm and to provide maintenance and education. It is also argued that a guardian must provide affection and emotional support.⁶¹ The overarching principle is that a guardian must always act in the best interests of the child.

This is consistent with the best interests' principle enshrined in the CRC art 3(1) and the obligation to take appropriate measures to assist asylum seekers under art 22.⁶² Article 20(2) of the CRC requires Australia to 'ensure alternative care for such a child', which may be met through the appointment of a guardian. Article 18(1) states that 'the best interests of the child will be [the legal guardian's] basic concern'. The Australian Human Rights Commission has argued that art 18(1) suggests that the best interests of an unaccompanied child must not only be a primary consideration (as suggested by art 3(1)) but *the* primary consideration

⁵⁵ *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁵⁶ See *WACB* (2004) 210 ALR 190; *Plaintiffs M70 and M106* (2011) 244 CLR 144.

⁵⁷ As counsel behind the litigation brought on behalf of Ali Reza Sadiqi, Dr John Cameron raised all and more of the arguments put forward by counsel in *Plaintiff M106* — to no avail. See *Sadiqi v The Commonwealth of Australia* [2008] FCA 1262; *Sadiqi v Commonwealth of Australia (No 2)* (2009) 181 FCR 1; *Sadiqi v Commonwealth of Australia (No 3)* [2010] FCA 596, discussed below.

⁵⁸ The relationship of trust between a ward and guardian is commonly characterised as fiduciary in nature: *Clay v Clay* (2001) 202 CLR 410, 430.

⁵⁹ John Eekelaar, 'What are Parental Rights?' (1973) 89 *Law Quarterly Review* 201, 230.

⁶⁰ 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).

⁶¹ Antonio Buti, *Separated: Aboriginal Childhood Reparations and Guardianship Law* (Sydney Institute of Criminology Series, 2004) 36–9.

⁶² Article 22(1) of the *Convention on the Rights of the Child* provides '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.'

for their guardian.⁶³ In *X v Minister for Immigration and Multicultural Affairs*, North J held that (in principle) the concept of guardianship includes the obligation to ensure the fundamental human rights set out in the CRC.⁶⁴

Perhaps the most striking feature of the cases in which attempts have been made to give content to the Minister's guardianship obligations under the *IGOC Act* is that most have failed. It is probably fair to say that a gulf has opened between notions of guardianship under the common law relative to those pertaining in the immigration context. With rare exceptions, the content of the Minister's obligations as guardian of unaccompanied children has proved nugatory.

The earliest in the recent group of cases in which the Minister's role as guardian under the *IGOC Act* was considered involved young African stowaways — from Kenya, Sudan and Rwanda respectively. In these cases, the Federal Court considered the legal capacity of minor children to make applications — both for refugee protection and for judicial review. In the normal course, the Minister, as guardian, would be expected to adopt the role of guardian *ad litem*, in effect acting as the children's representative in making or facilitating relevant applications. In reality, however, the Minister was the decision-maker on the applications — and enforcer at law.

The first case involved two young Kenyans who stowed away on a cargo ship and who had their applications for protection visas refused. The Minister's actions were challenged on the basis that he was in breach of his guardianship obligations under the *IGOC Act*.⁶⁵ North J acknowledged that Order 43 r 4(3) of the Federal Court Rules prevented the Minister from acting as guardian *ad litem* for the two boys. The role assigned to him under the *Migration Act* meant that the Minister's 'interests' conflicted with those of the applicants.⁶⁶ However, his Honour rejected the Minister's somewhat disingenuous argument in defence that if the young men were minors, they did not have the legal capacity to bring an action for judicial review. North J ruled that a child's capacity to act at law is a question of fact that must be a matter for the court to decide, taking into account the age, understanding, and capacity of the child and the nature of the litigation involved.⁶⁷

In the substantive hearing that followed this case, North J agreed that the Minister was in breach of his duty as guardian. His Honour expressed disappointment that the Minister's counsel pursued an order for costs against the individual acting as the boys' 'tutor' for the purposes of the initial litigation.⁶⁸

⁶³ HREOC, above n 2, [14.1].

⁶⁴ *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524, 537–8, [41] and [43].

⁶⁵ See *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524. The case is discussed at greater length in Mary Crock, 'Lonely Refuge: Judicial Responses to Separated Children Seeking Refugee Protection in Australia' (2004) 22 *Law in Context* 120, 129–31.

⁶⁶ *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524, 528–9 [16].

⁶⁷ *Ibid* 543 [62].

⁶⁸ This issue arose more recently in *WZAOT v Minister for Immigration (No 3)* [2011] FMCA 967. In that case, counsel for the Minister for Immigration opposed the appointment of a litigation guardian of a 3-year-old child born in Australia to Chinese parents who had been unsuccessful in applying for a protection visa. The Minister also opposed indemnifying the litigation guardian for costs. Lucev FM was critical of the Minister's seemingly hard line, commenting at [23]:

However, he found that the status of the Minister as guardian did not enliven any specific obligation to act with benevolence in such matters, given the Minister's powers under the *Migration Act*. Nor was there an enforceable obligation on the Minister to feed, house or maintain the children.⁶⁹ It is disappointing that in this and subsequent immigration cases, it has generally been accepted that the Minister's role as guardian is indeed a token or nominal one — with little practical significance for the migrant child in need of protection.

*Odhiambo*⁷⁰ involved litigation that was brought on behalf of two African street children who had stowed away on a cargo ship. Sixteen-year-old Simon Odhiambo claimed that he was a Sudanese Christian who had suffered persecution at the hands of Islamic militants in Sudan who had killed his father when he was around 11 years old. He was travelling with 16-year-old Peter Martizi who claimed to be a Hutu from Rwanda fearing persecution by the Tutsis in that country. Both were refused protection visas on grounds of credibility. While both were assisted in lodging their initial refugee claims, neither was represented at the Refugee Review Tribunal ('RRT').⁷¹

It was argued that the Minister was obliged by virtue of the *IGOC Act* to appoint a guardian *ad litem* to assist the pair at the hearing before the RRT. The factual findings made by the RRT were challenged for failing properly to take into account the age, maturity, state of development and general legal capacity of the appellants. Complaints were made also about the nature of the hearing afforded by the RRT. The hearing was conducted using video conferencing technology linked to the remote detention centre where the boys were being detained. Intervening in the case, the HREOC argued that this was so inappropriate that the children could not be said to have been afforded a hearing. The arguments were all rejected. While acknowledging the conflicting roles imposed on the Minister, the Full Court rejected the contention that the *Migration Act* should be read down in any way. The Act did not have to be interpreted so as to comply with obligations Australia has assumed as signatory to the CRC and other international instruments.⁷² The Court declined to rule on the manner in which the RRT conducted its hearing, stating simply that it had acted in accordance with its statutory obligations. No breach of the rules of procedural fairness was found either in the use of video conferencing or in the failure to provide the boys with legal or other assistance in their appearance before the RRT.

The Minister [opposed the orders] on the basis of 'instructions', which 'instructions' do not appear, on the basis of the submissions made in Court, to have been based on any serious or proper consideration of merit, precedence, or appreciation of the Minister's obligations as a model litigant. The Minister as model litigant is entitled to oppose applications made by applicants, including a minor, in judicial review proceedings, but it is hardly consistent with the obligations of a model litigant to oppose for what appears to be opposition's sake, and without any sound rationale or cogent reason.

See also *Fernando (by his tutor, John Ley) v Minister for Immigration and Citizenship (No 9)* [2009] FCA 833.

⁶⁹ *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524, 537–8 [43].

⁷⁰ *Odhiambo* (2002) 122 FCR 29

⁷¹ Taylor, above n 46, 6.

⁷² *Odhiambo* (2002) 122 FCR 29, [12].

The effect of these rulings is to create the unfortunate position at law whereby unaccompanied children are — or can be — truly alone in their attempts to navigate the complexities of Australia's legal system. In *WACA v Minister for Immigration and Multicultural Affairs*,⁷³ the Full Federal Court made it clear that unaccompanied children bear a basic onus of proof in proving that they are minors, ruling that they should not be given the benefit of the doubt in contested cases. Put another way, there is no legal obligation on the Minister to make inquiries about the age of asylum seekers or to adopt certain procedures to determine age.⁷⁴ In this and later cases, the Courts have confirmed that the *IGOC Act* will not operate to require the Minister to ensure that unaccompanied children are made aware of their legal entitlements in the absence of any obligation imposed in the *Migration Act*.

The unsatisfactory nature of this situation emerged in the litigation surrounding the refusal of a protection visa to Syed Mehdi Jaffari, a 15-year-old Afghan boy detained at the remote Curtin Detention Centre in Western Australia in 2001. Although provided with assistance for the purpose of lodging his visa, the boy was left on his own when the review of the decision by the RRT failed. The boy was either not informed or did not appreciate that he had 28 days in which he could seek judicial review. By the time he became aware of the right to seek judicial review, the deadline had passed. It was this case that moved French J to describe the situation of the unaccompanied children as a 'pressing, current issue'. His Honour continued:

The [Migration] Act provides little in the way of the kinds of protections contemplated by the UNHCR guidelines [for unaccompanied and separated children]. At the very least, there is a case for considering the provision of legal advice and assistance to unaccompanied minors up to and including the point of judicial review. It is of concern that the application for judicial review in this case was lodged by a 15 year-old non-citizen and lodged out of time, thus depriving him of such limited rights of review as he would otherwise have enjoyed.⁷⁵

At both first instance and on appeal to the Full Federal Court,⁷⁶ the argument that Jaffari had not been 'notified' of the RRT's decision was rejected. The fact that he had cried when told of the RRT's decision was held to be sufficient indication that the essence of the decision had been notified to him and as such the time limit for an application for review under s 478 of the *Migration Act* began to run from that time. Both French J and the Full Federal Court found that the validity of the notification given was affected neither by the Minister's status as statutory guardian nor by the fact that the decision involved a minor child.

⁷³ *WACA v Minister for Immigration and Multicultural Affairs* (2002) 121 FCR 463, [27]–[29].

⁷⁴ See also *Haider v Minister for Immigration and Multicultural Affairs* [2001] FCA 1515. The use of bone scans to determine age in cases involving criminal prosecutions for criminal proceedings relating to people smuggling continues to be controversial and is the subject of a recently announced inquiry by the Australian Human Rights Commission: Australian Human Rights Commission, *An Age of Uncertainty: Inquiry into the Treatment of Individuals Suspected of People Smuggling Offences Who Say that they Are Children* (July 2012) <http://www.hreoc.gov.au/ageassessment/report/an_age_of_uncertainty.pdf>.

⁷⁵ *Jaffari v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 524, 539 [44].

⁷⁶ *WACB* (2002) 122 FCR 469.

On appeal, a majority of the High Court agreed with the lower courts that the *IGOC Act* did not operate to qualify the duties imposed by the *Migration Act*.⁷⁷ Kirby J confirmed as correct the characterisation of the *IGOC Act* as a statute of general import that must be read as subservient to the specific powers vested in the Minister under the *Migration Act*. Abandoning the high legal ground represented in arguments about reading down legislation so as to accommodate the needs of unaccompanied children, Jaffari's counsel nevertheless had more success when he submitted simply that his client had not been *notified* because relevant provisions of the *Migration Act* had not been complied with. He argued that s 478 of the *Migration Act*, read together with ss 430–430B, required the physical delivery of the RRT's decision (even if the Act imposed no duty to communicate the contents of a decision). In the absence of probative evidence that a physical document *had* been placed in the boy's hands, a majority of the High Court found that he had not been properly notified. That the High Court was prepared to accept this submission may be testament to the sympathy the young Jaffari had generated in the bench. In the event, it was a narrow decision that brought relief to the litigant. The immediate response of the government was to amend the terms of the *Migration Act*.⁷⁸

The courts' rejection of arguments that the *IGOC Act* confers anything resembling rights was seen again in a case involving the discretion to release unaccompanied IMA children. The Minister for Immigration has the power, if it is in the 'public interest', to make a 'residence determination' to release an unlawful non-citizen from detention.⁷⁹ Even after the incorporation of the principle that children be detained as a last resort was incorporated into the *Migration Act* in 2005, the dominant view in the judiciary continues to be that the *IGOC Act* does not create an obligation in the Minister to exercise this discretion to release.

The *Plaintiff M168 litigation*⁸⁰ involved four unaccompanied IMA child asylum seekers from Afghanistan who had arrived at Christmas Island in February 2010.⁸¹ They were detained for approximately one month before being moved to the Melbourne Immigration Transit Accommodation ('MITA') in Victoria. In December 2010, an application was brought on behalf of the children in the High Court of Australia seeking interim orders to direct the Minister to release them into appropriate detention arrangements in the community. It was argued that a failure to transfer the children into the community amounted to a breach of the Minister's duty of care pursuant to s 6 of the *IGOC Act*. The Minister did not deny that continued detention involved 'a serious risk of psychological or other harm' to the plaintiffs and conceded that alternatives to detention were available.⁸² However, Crennan J refused interlocutory relief on the basis that no *prima facie* case had

⁷⁷ *WACB v Minister for Immigration Multicultural and Indigenous Affairs* (2004) 210 ALR 190 (Gleeson CJ, McHugh, Gummow and Heydon JJ).

⁷⁸ *Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Act 2001* (Cth). Note, however, that physical delivery of decisions can still be required: see *Minister for Immigration and Citizenship v SZKCC* (2007) 159 FCR 565; and the discussion in Crock and Berg, above n 13, ch 18, 583 [18.66].

⁷⁹ *Migration Act* s 197AB.

⁸⁰ *Plaintiff M168 litigation* (2011) 279 ALR 1.

⁸¹ At the time of the decision the plaintiffs were aged 16, 17, 17 and 18 years.

⁸² *Plaintiff M168 litigation* (2011) 279 ALR 1, 10 [40]. The Court was advised that arrangements for placement of the plaintiffs under s 197AB of the *Migration Act 1958* were 'underway'.

been established that the children's detention in the MITA was unlawful.⁸³ Her Honour reiterated the findings of Kirby J in *WACB* relating to the superior status of the *Migration Act* relative to the general guardianship obligations vested in the Minister by the *IGOC Act*. In practical terms, the policy announcement made by the Minister to move children into community detention⁸⁴ created no enforceable rights for unaccompanied children.

The one area in which some change appears to have occurred in the judiciary's approach to these cases is in Ministerial decisions made to remove unaccompanied children from Australia. Even here, however, the dominant focus for the courts has been the terms of the *Migration Act* rather than on the *IGOC Act*.

IV Legislative Constraints on the Minister's Power as Guardian of Unaccompanied Children: The Contested Space of Removals

In *Plaintiffs M70 and M106*,⁸⁵ the critical finding by the High Court was that the 'Malaysian Solution' was flawed because the Minister had failed to comply with the terms of the *Migration Act*. The case was brought on behalf of two asylum seekers from Afghanistan, one of whom (Plaintiff M106) was an unaccompanied minor. The claim made by Plaintiff M106 invoking the *IGOC Act* succeeded on grounds that were similarly narrow and legalistic. What is interesting about this landmark case (and the earlier case of *Plaintiff M61*)⁸⁶ is that the High Court was prepared to take a very vigorous approach to its review of decisions made with respect to offshore processing. As we explore here, the ruling did indeed represent a marked departure from earlier jurisprudence relied upon by the government in formulating its plans to send 800 asylum seekers to Malaysia. In fact, all of the arguments made by counsel in *Plaintiffs M70 and M106* had been advanced in earlier court actions — most without success.

A *The Sadiqi Litigation*

Interestingly, it was some time before a serious challenge was brought on behalf of a child IMA sent to Nauru as part of the Pacific solution. The delay may be explained, in part, by the failure of the challenge made by Melbourne solicitor Eric Vadarlis to the actions taken in relation to the asylum seekers rescued by the MV Tampa. In the leading judgment in the Full Federal Court in the *Tampa* case, French J came very close to finding that these matters were not justiciable.⁸⁷ The

⁸³ The case has been referred to the Federal Magistrates Court for further argument: *Plaintiff M169/10 by his litigation guardian Sister Brigid (Marie) Arthur v Minister for Immigration and Citizenship* [2011] HCA Trans 108 (Crennan J, 19 April 2011).

⁸⁴ Bowen, above n 25.

⁸⁵ *Plaintiffs M70 and M106* (2011) 244 CLR 144.

⁸⁶ *Plaintiff M61* (2010) 243 CLR 319.

⁸⁷ *Ruddock v Vadarlis* (2001) 110 FCR 491. French J ruled that the government did not require the authority of legislation for its actions but could rely on the Executive power vested in it by the Constitution: at 545 [193]. For a discussion of this case, see Crock and Berg, above n 13.

majority's findings on this point were not disturbed by the High Court.⁸⁸ Ironically, it was French J who would later highlight the injustice (if not abuse) inherent in the decision to remove unaccompanied child IMAs to Nauru in 2001 in circumstances that were plainly against the children's best interests.⁸⁹ Although his Honour noted that these were children of whom the Minister was legal guardian by virtue of s 6 of the *IGOC Act*, French J consistently rejected arguments that would give content to the Minister's status.⁹⁰

*WAJC v MIMIA*⁹¹ was the first in a series of cases that stand as precursors to the actions brought by *Plaintiffs M70 and M106*. The case involved a 16-year-old Afghan asylum seeker, Ali Reza Sadiqi, who was sent from Christmas Island to Nauru in late 2001. The boy was brought to Australia one year later as a 'transitory person'⁹² to testify in a coronial inquest into the drowning death of two women. He had tried to save one of the women when the boat on which they were travelling sank near Ashmore Reef. Sadiqi was unsuccessful before French J in his attempt to challenge the decision to return him to Nauru on the simple basis that the Federal Court was precluded from hearing the case. His Honour pointed to provisions in the *Migration Act* excluding the Federal Court from judicial review of decisions made in respect of 'offshore entry persons'.⁹³ However, in one of the last decisions made before her retirement from the High Court, Gaudron J issued an injunction on 13 January 2003 restraining the Minister from removing Sadiqi from Australia pending the hearing of his case or his attaining the age of 18, whichever occurred first.⁹⁴

The substance of Sadiqi's claim was complex and multi-faceted. At the centre were allegations that the Minister's decision to remove him to Nauru in November 2001 was unlawful and would again be unlawful should he be returned there. Leaving to one side the argument that was developed (and dismissed) around the constitutionality of the *Migration Act* s 298A, Sadiqi's case turned on two, critical, allegations. The first was that the Minister had not acted lawfully in declaring Nauru to be a country to which IMAs could be sent for the processing of their refugee claims. The second was that the Minister had acted in breach of his obligations under the *IGOC Act* s 6A in sending Sadiqi to Nauru. A series of other

⁸⁸ Leave to appeal was denied on the basis that the Tampa 'rescues' had been removed from the jurisdiction of the Australian courts when taken to Nauru, rendering moot the challenge made by Vadarlis and others. See *Vadarlis v Minister for Immigration and Multicultural Affairs* [2001] HCATrans 625.

⁸⁹ Unlike the children transferred to mainland Australia, those sent to Nauru were given no assistance in making refugee claims and no special arrangements were made with respect to how they were treated while in detention. The effect of the neglect was devastating. While virtually all of the unaccompanied children whose claims were processed on the mainland gained protection in Australia, 32 of the 55 unaccompanied children on Nauru were returned to an uncertain future in Afghanistan: see Crock, above n 2, 41.

⁹⁰ An Operational Planning Minute to the Immigration Minister suggests that the removal decision was made in November 2001 in a deliberate attempt to exclude the 30 children in question from the HREOC inquiry into children in detention: see *WAJC v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1631, [4].

⁹¹ *Ibid.*

⁹² Such persons are barred from making visa applications in Australia: *Migration Act* s 5(1).

⁹³ See *Migration Act* ss 494AA and 494AB. The effect of these provisions is to withdraw from the Federal Court jurisdiction that would otherwise be available under the *Judiciary Act 1903* (Cth) s 39B.

⁹⁴ See *P1/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1029.

claims were made about the lawfulness of Sadiqi's detention, misfeasance of the Minister's public office; and about Sadiqi's entitlement to damages.

While the claims formulated by counsel, Dr Cameron, were strategically beneficial to his young client,⁹⁵ Sadiqi was unsuccessful at virtually every stage of what became a protracted string of complicated cases.⁹⁶ The matters were only settled when it emerged that McHugh J probably committed a fundamental error of law in remitting the various claims that were made before Gaudron J in the High Court back for determination in the Federal Court.⁹⁷ As noted earlier, it was the consistent defeat of the arguments raised in the *Sadiqi* litigation that appears to have founded the confident advice by the Solicitor General to Minister Bowen and Prime Minister Gillard that their proposed 'Malaysian Solution' would withstand judicial scrutiny.⁹⁸ It is to the substance of these claims that we now turn.

B The Legislation

The legislative provisions underpinning both the 'Pacific Solution' and the proposed arrangements with Malaysia were introduced by the Coalition government in 2001. They are described in detail in both the Sadiqi litigation⁹⁹ and the more recent ruling by the High Court.¹⁰⁰ At the centre of all the cases were ss 198(2) and 198A(1) of the *Migration Act*. The first of these provisions imposes on an officer a duty to remove from Australia as soon as reasonably possible an unlawful non-citizen who is in detention under s 189(3). The issue for determination was whether this duty to remove was conditioned in any way; for example by a requirement that consideration be given

⁹⁵ Sadiqi was brought to Australia as a 'transitory person'. Although this initially stripped him of any legal ability to apply for a visa in Australia, after six months he acquired an entitlement to request an assessment of his case by the Refugee Review Tribunal. See *Migration Act* s 198C; and *Plaintiff P1/2003 v Ruddock* (2007) 157 FCR 518, 524[8]. Sadiqi was successful in his appeal. He was released on a 3-year Temporary Protection Visa in February 2004, having spent almost two-and-a-half years in detention.

⁹⁶ This most interesting line of cases developed in complexity as applications were made to amend the original statement of claim. See especially the ruling of Nicholson J in *Plaintiff P1/2003 v Ruddock* (2007) 157 FCR 518; and the decisions of McKerracher J in *Sadiqi v Commonwealth of Australia* [2008] FCA 1262; *Sadiqi v Commonwealth of Australia (No 2)* (2009) 181 FCR 1; and *Sadiqi v Commonwealth of Australia (No 3)* [2010] FCA 596. The two earlier rulings were *P1/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1029; and *P1/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1370, both decisions of French J.

⁹⁷ This is as a result of the decision in *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601. In that case, the High Court ruled that the remittal of matters to the Federal Court from the High Court could not operate to expand the jurisdiction of the Federal Court if this had otherwise been confined by statute. In Sadiqi's case, this ruling undermined all the findings made by the Federal Court after the remittal order made by McHugh J.

⁹⁸ On 8 August 2011 the Minister stated: '[s]uffice it to say that our legal advice remains the same as it has been all the way through. The Commonwealth Government is on very strong legal grounds. Very strong legal grounds in this case.' Chris Bowen MP, Minister for Immigration and Citizenship, 'Malaysia Transfer Arrangement, High Court Case', (Transcript of press conference, 8 August 2011) <<http://www.minister.immi.gov.au/media/cb/2011/cb169899.htm>>.

⁹⁹ *Sadiqi v Commonwealth of Australia* [2008] FCA 1262; *Sadiqi v Commonwealth of Australia (No 2)* (2009) 181 FCR 1; *Sadiqi v Commonwealth of Australia (No 3)* [2010] FCA 596.

¹⁰⁰ *Plaintiffs M70 and M106* (2011) 244 CLR 144.

to allowing a non-citizen to make an application for a visa.¹⁰¹ For ‘offshore entry persons’ such as Sadiqi and Plaintiffs M70 and M106, the question was whether this included consideration of whether or not the Minister should exercise his personal discretion to allow them to apply for protection visas under s 46A of the *Migration Act*.

In 2003, French J accepted the Minister’s submission that the mandatory terms of the *Migration Act* directing the removal of unlawful non-citizens as soon as reasonably practicable precluded any qualification being placed on s 198(2). He ruled that the Act left ‘no room for transitory persons (such as Sadiqi) ... to remain in Australia merely for the purpose of pursuing legal proceedings in the country.’¹⁰²

The other key provision in the cases is s 198A of the *Migration Act*. Sub-section 198A(1) provides:

An officer may take an offshore entry person from Australia to a country in respect of which a declaration is in force under subsection (3).

The power to ‘take’ people from Australia is clarified in s 198A(2) to include the power, exercisable within or outside Australia, to place and restrain a person on a vehicle or vessel; to remove a person from a vehicle or vessel and to use such force as is necessary and reasonable. This is followed by sub-s 198A(3)(a) which empowers the Minister to declare in writing that a specified country:

- (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
 - (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and
 - (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
 - (iv) meets relevant human rights standards in providing that protection;
- ...

In the *Sadiqi* litigation, Dr Cameron argued for his young client that the terms of s 198A(3)(a) constituted jurisdictional facts such that a declaration would be invalid if made in respect of a country that did not meet the criteria enumerated in the provision. The challenge was premised on the fact that in 2001 Nauru was not a party to the *Refugee Convention* and could not meet any of the requirements in sub-s 198A(3). Exactly the same argument underpinned the plaintiffs’ claims in *Plaintiffs M70 and M106*, only, on this occasion, it was Malaysia that it was asserted failed to meet the statutory criteria. In 2003, French J dismissed Sadiqi’s application for an injunction on the basis that s 198A(3):

does not in terms condition the power to make a declaration upon satisfaction of the standards which are its subject matter. The form of the

¹⁰¹ *Plaintiff M61* (2010) 243 CLR 319.

¹⁰² *P1/2003 v Minister for Multicultural and Indigenous Affairs* [2003] FCA 1029, [51]; see also *Sadiqi v Commonwealth of Australia (No 2)* (2009) 181 FCR 1 50–2[236]– [245] (McKerracher J).

section suggests a legislative intention that the subject matter of the declaration is for ministerial judgment. It does not appear to provide a basis upon which a court could determine whether the standards to which it refers are met. Their very character is evaluative and polycentric and not readily amenable to judicial review. That is not to say that such a declaration might not be invalid if a case of bad faith or jurisdictional error could be made out. In my opinion, however, the argument against the validity of the declaration faces a significant threshold difficulty. It does not support the view that there is a seriously arguable case.¹⁰³

This view was accepted by the other Federal Court justices throughout the *Sadiqi* litigation.¹⁰⁴

French CJ's findings in *Plaintiffs M70 and M106* could not be more different. Without making any reference to his rulings as a Federal Court judge in *P1/2003*, the Chief Justice fell into line with the majority in the High Court. One decade on, he found that s 198(2) of the *Migration Act* could not be read as conferring an unqualified power to remove the plaintiffs (or other offshore entry persons) from Australia. He ruled that it should be read as a provision that permits the detention of non-citizens while a decision is made on whether to lift the s 46A bar so as to allow the person to lodge a refugee claim.¹⁰⁵ Gummow, Hayne, Crennan and Bell JJ explained that reading s 198(2) as an unqualified power would allow the Minister to remove a person with potential protection claims, but whose claims have not been assessed, to *any* country willing to receive that person. This would give s 198A(1) no separate work to do.¹⁰⁶ The majority stressed the legislative intention evident from the *Migration Act* as a whole, ruling that its provisions are intended to facilitate Australia's compliance with its international obligations.¹⁰⁷ French CJ commented:

As this Court observed in *Plaintiff M61*, the changes to the Migration Act effected by the enactment of ss 46A and 198A reflect "a legislative intention to adhere to that understanding of Australia's obligations under the Refugees Convention and the Refugees Protocol that informed other provisions made by the Act."¹⁰⁸

On the interpretation of s 198A of the *Migration Act*, the Chief Justice ruled that, absent clear words of statutory intent, subsection 198A(3) should not be construed as conferring upon courts the power to substitute their judgment for that of the Minister by characterising the matters in sub-paragraphs (i) to (iv) as jurisdictional facts.¹⁰⁹ He preferred to view these placita as listing 'jurisdictional tasks'. He ruled that the Minister is required to form an evaluative judgment, in good faith, based on the matters set out in s 198A(3)(a). On the evidence, his Honour found that the Minister did not look to, and did not find, any factual basis

¹⁰³ *P1/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1029, [49] ('*P1/2003*').

¹⁰⁴ *Sadiqi v Commonwealth of Australia (No 2)* (2009) 181 FCR 1 [221] (McKerracher J).

¹⁰⁵ *Plaintiffs M70 and M106* (2011) 244 CLR 144, 178 [54].

¹⁰⁶ *Ibid* 192 [97] (Gummow, Hayne, Crennan and Bell JJ). French CJ and Kiefel J made similar rulings: at 178 [54] (French CJ) and 227 [224] (Kiefel J).

¹⁰⁷ *Ibid* 192 [98] (Gummow, Hayne, Crennan and Bell JJ).

¹⁰⁸ *Plaintiff M61* (2010) 243 CLR 319.

¹⁰⁹ *Plaintiffs M70 and M106* (2011) 244 CLR 144, 180 [58].

for his declaration — either in Malaysia’s international obligations or in relevant domestic laws of that country.¹¹⁰

Gummow, Hayne, Crennan and Bell JJ were more direct, ruling that the criteria enumerated in s 198A(3)(a) were jurisdictional facts.¹¹¹ To comply with the terms of the legislation, their Honours ruled that the Minister was required to identify positively the content of the criteria. This could be done by ensuring that Malaysian law dealt expressly with the classes of persons mentioned in those sub-paragraphs; or by ascertaining that Malaysia is obliged under international law to provide the particular protections.¹¹² The procedures and protection that a country must offer ‘must be provided as a matter of legal obligation’ and could not be established by an examination of what happened in the past or might happen in the future.¹¹³

Of the majority judges, Kiefel J was the only judge who expressly placed the interpretation of s 198A(3) within the context of Australia’s obligations under the *Refugee Convention*. The Minister had argued Australia’s obligations under the Convention were limited to *non refoulement*, arguing that in this respect asylum seekers sent to Malaysia would not be at risk of persecution or harm.¹¹⁴ Kiefel J rejected this contention, noting that another obligation arising under the Convention is the duty to determine whether an asylum seeker is a refugee.¹¹⁵ She said:

Section 198A(3)(a) has the effect of shifting some of the responsibilities undertaken by Australia under the Convention to another country. Its evident concern is that Australia’s obligations under the Convention are not breached in that process. Its terms contemplate that a country specified in the declaration will provide some of that which Australia would have provided had the asylum-seeker remained in its territory.¹¹⁶

Read in this light, Kiefel J found that s 198A(3)(a) requires that a ‘declared’ country must have a refugee status determination procedure in place and it must provide for protection during and after that process if a person is found to be a refugee. The question of whether a country does meet these preconditions requires an assessment of not only their laws but actual practice.¹¹⁷ In this case, while the *Arrangement* tried to put into place certain protections for the asylum seekers in Malaysia, it could not alter the fact that *Malaysia* did not have laws which recognise and protect refugees from *refoulement* and persecution.¹¹⁸ Although the *Arrangement* attempted to address some of the problems which face asylum seekers in that country, it could not alter that state of affairs. The government’s arguments in this respect were not assisted by the specification that the *Arrangement* created no legally binding obligations on the Malaysian government.

¹¹⁰ Ibid [58]–[59].

¹¹¹ Ibid 194 [109].

¹¹² Ibid 199 [126].

¹¹³ Ibid 195 [116].

¹¹⁴ Ibid 226 [220].

¹¹⁵ Ibid 226 [221], citing *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290.

¹¹⁶ Ibid 232 [240].

¹¹⁷ Ibid 233 [244]–[245].

¹¹⁸ Ibid 236 [254].

There was no such reference to international principles when any of the majority judges considered the operation of the *IGOC Act*. As noted earlier, their ruling on the arguments made about the *IGOC Act* was simple and restricted to a technical argument. The majority held that s 6A(1) of the *IGOC Act* requires the Minister to consent in writing before a non-citizen child can be removed from Australia. The Court found that a declaration, in the form of Memorandum of Understanding comprising an ‘Arrangement’ with Malaysia was not sufficient to constitute the written consent required by the *IGOC Act*. Accordingly, removal of Plaintiff M106 would be unlawful.¹¹⁹ Importantly, the court added that the decision to grant consent of that kind would be a decision under an enactment and would therefore engage the provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). This meant that the Minister would be required to provide reasons for a decision and that the decision would be reviewable on any of the grounds stated in that Act.¹²⁰

In dissent, Heydon J was the only member of the High Court who came close to following the discredited reasoning of the lower courts in the *Sadiqi* litigation. In relation to Plaintiff M106, his Honour overlooked the technical error in the Minister’s failure to provide written consent. He noted that s 6A(4) provides that the section does not affect the operation of any other law ‘regulating the departure of persons from Australia’.¹²¹ (On this point the majority distinguished ‘regulating departure’ from a power to remove’).¹²² Heydon J was not willing to find that the Minister had failed in his fiduciary duty as a guardian under s 6 of the *IGOC Act* by considering an exercise of his powers under ss 46A and 195A of the *Migration Act*. His Honour relied on the very clear terms of ss 46A(7) and 195A(4) which show that the Minister is not obliged to give consideration to an exercise of those powers. He followed the reasoning of earlier judgments in the *Sadiqi* litigation in finding that the general powers conferred by s 6 of the *IGOC Act* do not extend to interference with the Minister in carrying out very specific statutory functions under the *Migration Act*.¹²³

In practical terms, the majority’s decision in *Plaintiff M106* means that no unaccompanied child who comes to Australia seeking asylum can be removed or taken from Australia unless the Minister as guardian gives written consent to that removal. The Minister is not able to give valid consent unless satisfied that the removal would not be prejudicial to the interests of the child. How the Court should assess the exercise of the power remains untested. However, it is difficult to conceive of many situations in which it is in the best interests of a child to be removed to a third country for the assessment of their claims to protection under the *Refugee Convention*.¹²⁴

¹¹⁹ Ibid 203 [143] (Gummow, Hayne, Crennan and Bell JJ).

¹²⁰ Ibid 203, 204 [143] and [146] (Gummow, Hayne, Crennan and Bell JJ).

¹²¹ Ibid 219 [198].

¹²² Ibid 203 [144].

¹²³ Ibid 219 [193]–[195].

¹²⁴ One example might be where a natural parent or other adult relative of the child is living in that third country.

The Government's reaction to the High Court's decision was immediate and negative. Minister Bowen declared that it was important that he retain an unfettered power to remove unaccompanied children under the *Migration Act* in order to meet broader public policy objectives of attempting to deter boat arrivals.¹²⁵ In pursuit of this policy objective the government introduced the Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011. The Bill proposed the addition of s 8(3) to the *IGOC Act* which would provide that nothing in that Act would affect the Minister when exercising the power under the *Migration Act* to remove a non-citizen child from Australia to an offshore processing country.¹²⁶ The purpose was to override the Minister's obligation to give written consent to such a removal bearing in mind the interests of the child.¹²⁷ In his second reading speech Minister Bowen again stressed the public policy imperative for the Malaysia Solution and said that the High Court's interpretation of the Minister's responsibilities under the *IGOC Act* made the removal of unaccompanied children 'practically extremely difficult, if not impossible'.¹²⁸ He agreed that it was appropriate for the Minister to determine in individual cases that a person should not be removed to a third country for processing in appropriate circumstances. However, a:

blanket inability of the government of the day to transfer unaccompanied minors to a designated country provides an invitation to people smugglers to send boatloads of children to Australia. No government can stand for the gaming of the system and risking of children's lives in this way.¹²⁹

The Bill failed to gain support of the Coalition, Greens and the required number of independents. On 13 October 2011 the Government announced it would not pursue the attempts to amend the *Migration Act* and the *IGOC Act*.¹³⁰ Overcrowding in the detention facilities was addressed by the announcement that asylum seekers would be released progressively into the community following basic health and character checks.

The situation in default of agreement between Labor and the Coalition was, briefly, beneficial to unaccompanied children. With the children released into community settings, the ability to put meaningful guardianship arrangements in place increased exponentially. The enduring problems are that changes have been made at the level of policy only, making reversion to a much harsher regime extremely easy.

The impasse generated by the failure of the government's 'Malaysian Solution' did not pass unnoticed by the people smugglers. As noted above in Part III, the first months of 2012 saw an unprecedented rise in irregular maritime arrivals and

¹²⁵ Bowen, above n 98.

¹²⁶ Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011, sch 2, item 8.

¹²⁷ Explanatory Memorandum, Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011.

¹²⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 September 2011, 10948, (Chris Bowen, Minister for Immigration and Citizenship).

¹²⁹ *Ibid.*

¹³⁰ Julia Gillard, Prime Minister, 'Asylum Seekers; Malaysia Agreement; Commonwealth Ombudsman' (Transcript of joint press conference, 13 October 2011) <<http://www.pm.gov.au/press-office/transcript-joint-press-conference-canberra-17>>.

in 2011–12, asylum seeker children represented more than double the proportion of total arrivals recorded in earlier years.¹³¹ In search of a circuit breaker — to neutralise the issue politically as much as to actually stop the boats — the government appointed a ‘Panel of Experts’ to recommend a solution.¹³² The release of the *Houston Report* was followed immediately by the re-introduction and successful passage of legislation to amend the *Migration Act* — and the *IGOC Act*.¹³³

This Act replaces the troublesome *Migration Act* s 198 with provisions that empower the Minister to make a legislative instrument designating a country as a ‘regional processing country’ if the Minister ‘thinks that it is in the national interest’ to make the designation. Previous requirements concerning the country’s human rights record and capacity have been replaced with a stipulation that the Minister must have regard to whether the country has provided assurances relating to *non-refoulement* and the willingness to assess, or allow the assessment, of refugee claims. The assurances need not be legally binding.¹³⁴

Problematically, the amending Act also pursued the government’s agenda to remove the Minister’s written consent during the removal or deportation process. In discussing this issue during debates on the proposed law in the Senate the government’s view of the purpose of the amendment was clear

In effect, the bill before us re-asserts the primacy of the *Migration Act* with regard to unaccompanied minors and the amendments to the *Guardianship Act* will also put beyond doubt that the Minister’s guardianship ceases when a child is removed from Australia or taken from Australia without a visa or right to return.¹³⁵

At time of writing, it was not clear whether anyone was to be designated to assume a guardianship role with respect to these children if they are removed from Australia.¹³⁶ In removing asylum seekers to a regional processing centre, the *Houston Report*’s recommendation was that asylum seekers who seek to enter Australia by boat should obtain ‘no advantage...through circumventing regular migration arrangements’.¹³⁷ Accordingly, asylum seekers will remain in Nauru or PNG for the same period of time they would have waited for resettlement from overseas. Just how such a period would (or could) be determined is very unclear. The report also recommended that there be provision for ‘particularly vulnerable’ people to be brought back to Australia whilst awaiting a resettlement outcome.¹³⁸

¹³¹ See Angus Houston, Paris Aristotle and Michael L’Estrange *Report of the Expert Panel on Asylum Seekers*, DIAC, August 2012 at 95, table 12 (‘*Houston Report*’); Crock, above n 2, 40–3.

¹³² Houston, Aristotle and L’Estrange, above n 131.

¹³³ *Migration Legislation Amendment (Regional Processing and Other Measures) Act* 2012 (Cth).

¹³⁴ See *Migration Act* s 198AB.

¹³⁵ Commonwealth, *Parliamentary Debates*, Senate, 16 August 2012, 113 (Kate Lundy).

¹³⁶ See *IGOC Act*, s 6(1), read with s 6(2)(b). See also s 8(3)(b).

¹³⁷ Houston, Aristotle and L’Estrange, above n 131, [3.41].

¹³⁸ *Ibid* [3.48].

V The Way Forward: The Case for Appointing an Independent Guardian for Unaccompanied Children

At the end of the day, the *IGOC Act* remains a profoundly flawed enactment in its application to unaccompanied non-citizen children. As Julie Taylor documents in her review of the guardianship cases brought before 2006,¹³⁹ all sorts of problems and anomalies arise when asylum seeker children are left to fend for themselves without an effective guardian *ad litem*. In the absence of statutory guidance, adjudicators can be left making unsatisfactory decisions about who should act for a child.¹⁴⁰ The challenges for adjudicators in conducting a process with an unrepresented child are also manifest, even if the case law on this subject generally favours the tribunals over the children.

Even where unaccompanied immigrant children are released into the community, there continues to be a lack of clarity about the responsibility role of the state and federal authorities in relation to their care and protection. This was an issue noted in the *Seeking Asylum Alone* report¹⁴¹ and by the Australian Human Rights Commission in its 2004 Report, *A Last Resort*.¹⁴² In releasing these children into the community, the government has worked in recent years with the Australian Red Cross and the non-government organisation 'Life Without Barriers'.¹⁴³ Child protection is presumed to fall to relevant state or territory child welfare authorities, although at time of writing the Department of Immigration had no formal agreement had been reached for delegating care to these authorities. The issue has reportedly been under active consideration for some time.¹⁴⁴

In sum, the conflicts of interest generated by the *IGOC Act* have been widely acknowledged.¹⁴⁵ The Department of Immigration has described the matter as a 'work in progress' since at least 2009. The problem is that both this Department and the government appear to be trapped in what might be described

¹³⁹ See Taylor, above n 46, pt 3.

¹⁴⁰ For a recent example, see *WZAOT v Minister for Immigration and Citizenship and the Refugee Review Tribunal* [2011] FMCA 786 (Raphael FM).

¹⁴¹ Crock, above n 2, 107.

¹⁴² HREOC, above n 2, 128–9.

¹⁴³ Chris Bowen MP, Minister for Immigration and Citizenship, 'Moving asylum seeker children into the community' (Statement, 1 March 2011) <<http://www.minister.immi.gov.au/media/cb/2011/cb159599.htm>>.

¹⁴⁴ DIAC, *Response to the Australian Human Rights Commission's 2010 Immigration Detention on Christmas Island Report* (Australian Human Rights Commission, 2010) 8 <http://www.hreoc.gov.au/human_rights/immigration/idc2010_christmas_island_response.pdf>; Department of Immigration and Citizenship, *Response to the Australian Human Rights Commission's 2009 Immigration Detention and Offshore Processing on Christmas Island Report*, (Australian Human Rights Commission, 2009) 12 <http://www.hreoc.gov.au/human_rights/immigration/idc2009_xmas_island_response.html>.

¹⁴⁵ See HREOC, above n 2; Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009*, August 2009, 19 [2.65]; United Nations High Commissioner for Refugees, Submission No 61 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Commonwealth Commissioner for Children and Young People Bill 2010*, 16 December 2010, 2–3; Law Council of Australia, Submission No 78, to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Commonwealth Commissioner for Children and Young People Bill 2010*, 6 January 2011, 17; Joint Select Committee on Australia's Immigration Detention Network, Parliament of Australia, *Final Report* (March 2012) Recommendation 19, 126 [5.96].

as a 'reactive' mindset — dealing *seriatim* with crises as they arise, but failing to address the central problems.¹⁴⁶ In partial response, in 2010 the Department created a new senior position of Principal Advisor, Citizenship, Settlement and Multicultural Affairs Division. The appointee is charged with providing support and advice on a range of critical and cross-cutting issues relating to children and refugee youth. This includes the issue of guardianship of children and the release of children and young people from detention.

One proposal that has emerged from consultations outside of the Department is that the role of guardian be given to a proposed national Commissioner for Children and Young People. The need for such an office has been promoted and recommended by a number of key agencies and bodies and was an endorsed action of the Council of Australian Governments ('COAG') in their 2009 National Framework for Protecting Australia's Children.¹⁴⁷ The issue has been the subject of a Private Members Bill,¹⁴⁸ a Senate Inquiry¹⁴⁹ and a government discussion paper.¹⁵⁰ There is broad support for a federal Children's Commissioner to provide specific protection and advocacy for the rights of children involved in immigration processes and being held in immigration detention centres.¹⁵¹

Whether it is appropriate that such a Commissioner take the formal role of guardian to unaccompanied immigrant children is more fraught. In particular, there is a concern that there may be a conflict in acting as legal guardian in individual cases given the broader oversight duties the Commissioner would be expected to assume. These would include a duty to act independently; to monitor the appropriateness of guardianship arrangements for children; and to investigate complaints by children and young people.¹⁵² There is also concern that a (generalist) Commissioner would

¹⁴⁶ See, eg, Department of Immigration and Citizenship, Submission No 89 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Commonwealth Commissioner for Children and Young People Bill 2010*, 4 February 2011, 3 [19]; DIAC, *Response to the 2010 Australian Human Rights Commission Report on Immigration Detention on Christmas Island*, (Australian Human Rights Commission, 2010) <http://www.hreoc.gov.au/human_rights/immigration/idc2010_christmas_island_response.pdf> 9; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009*, August 2009, 18 [2.63].

¹⁴⁷ Council of Australian Governments, *Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009–2020* (April 2009) Department of Families, Housing, Community Services and Indigenous Affairs <<http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/protecting-children-is-everyones-business>>. The plan includes the establishment of a national Commissioner for Children and Young People. It is noted that such commissioners already exist at state and territory level.

¹⁴⁸ Greens Senator Sarah Hanson-Young introduced the Commonwealth Commissioner for Children and Young People Bill 2010 into the Senate on 29 September 2010.

¹⁴⁹ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Commonwealth Commissioner for Children and Young People Bill 2010*, (2011).

¹⁵⁰ Children's Policy Branch Department of Families, Housing, Community Services and Indigenous Affairs, The Department of Families, Housing, Community Services and Indigenous Affairs and Attorney Generals Department, *A National Children's Commissioner*, Discussion Paper (2011)

¹⁵¹ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Commonwealth Commissioner for Children and Young People Bill 2010*, (2011) 51 [4.45].

¹⁵² See for example ChilOut, Submission No 63 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Commonwealth Commissioner for Children and Young People Bill 2010*, 6 December 2010, 5; Law Council of Australia, Submission No 78 to Senate Legal and

not have the resources or specialist technical expertise to carry out such a function in individual cases.¹⁵³ A more appropriate role for a Commissioner, in our view, would be to assist the various government agencies to develop an improved systemic response to unaccompanied immigrant children.

Another alternative which has been proposed is to transfer statutory guardianship formally from the Minister for Immigration to the Minister for Families, Housing, Community Services and Indigenous Affairs. Detailed functions could then be delegated to a panel of advisers staffed by experts, representatives from community organisations and/or state government agencies. All members would be required to possess relevant specialist and technical knowledge.¹⁵⁴ This could address the issues of conflict of interest and place prime responsibility for vulnerable non-citizen children in the portfolio of a Minister whose mandate is to ensure the protection of children. The guardian would be required, directly or through a representative, to ensure that the child's interests are safeguarded and their various needs met until a durable solution is identified and implemented. The guardians would also act as a link between the child and other agencies or individuals providing legal and welfare services.¹⁵⁵

Whichever of these options are adopted, it is our view that the current situation would be greatly improved. Unaccompanied migrant children have languished for too long in a legal no-man's land, passed from pillar to post with no real advocate place to give voice to their legal entitlements.

In Australia, as in many other parts of the world, irregular migration will continue to challenge governments of all political persuasions. The High Court's ruling in *Plaintiffs M70 and M106* forced everyone back to the drawing board. With the reversion to offshore processing announced in August 2012, there will never be a better time to reconsider the legislative and policy framework governing the care and control of unaccompanied asylum seeking children. The *IGOC Act* stands as an anachronism — and as legislation that never functioned as intended anyway. Its amendment to remove the Minister as guardian of children removed to regional processing centres begs the question who is to care for these most lonely and vulnerable of asylum seekers. The plain truth is that unaccompanied children need help and guidance if they are to navigate immigration and asylum processes. Deterrent measures should not be allowed to deny the vulnerability or to override the needs of the embodied child. This is most particularly so where the child has been sent out alone in search of safe haven.

Constitutional Affairs Legislation Committee, Parliament of Australia, *Commonwealth Commissioner for Children and Young People Bill 2010*, 6 January 2011, 17.

¹⁵³ Australian Children's Commissioners and Guardians, Submission No 20 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Commonwealth Commissioner for Children and Young People Bill 2010* (2010) 2–3.

¹⁵⁴ ChilOut, above n 152. See also Refugee Council of Australia, Submission No 107 to Australian Human Rights and Equal Opportunity Commission, *National Inquiry into Children in Immigration Detention*, 9 January 2003 <http://www.hreoc.gov.au/Human_RightS/children_detention/submissions/refugee_council.html#som> [7].

¹⁵⁵ As recommended by the UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (February 1997) UNHCR Refworld <<http://www.unhcr.org/refworld/docid/3ae6b3360.html>> [5.7].