



&

ACFID Child Rights Community of Practice

Joint Submission to Treasury on the ACNC External Conduct Standards Exposure Draft and Explanatory Materials

Endorsed by:



Save the Children



Cambodian Children's Trust



Intrepid Group



Forget Me Not



engineers
without borders
australia



Sandra Thompson- Independent Consultant

CONTENTS

| | |
|---|----|
| 1. ABOUT RETHINK ORPHANAGES AND THE CHILD RIGHTS COMMUNITY OF PRACTICE.. | 3 |
| 2. SUMMARY OF RETHINK ORPHANAGES & THE CR CoP's POSITION | 5 |
| 3. BACKGROUND TO THE ISSUE | 8 |
| The situation of children deprived of parental care living in residential care..... | 8 |
| About orphanage trafficking..... | 9 |
| Orphanage tourism as exploitation | 10 |
| Australia as a significant investor in overseas residential care | 13 |
| 4. FOCUS ON STANDARD FOUR..... | 15 |
| Provision for the External Conduct Standards in the ACNC Act 2012..... | 15 |
| Purpose of Standard 4 being applied to children in deprived of parental care & children in alternative care | 16 |
| Guiding Instruments: Basis of compliance..... | 16 |
| General principles of compliance | 18 |
| Specific principles of compliance with respect to children deprived of parental care & in alternative care..... | 18 |
| Standard 4: Compliance criteria unpacked..... | 19 |
| Assessment of compliance | 23 |
| 5. FOCUS ON STANDARD ONE..... | 25 |
| Orphanage trafficking..... | 25 |
| Orphanage tourism..... | 26 |
| 6. FINAL REMARKS | 28 |
| ANNEX..... | 28 |
| Annex 1: Joint ACFID and ACCIR Supplementary Submission into the Modern Slavery Act Inquiry | 29 |
| Annex 2: ACFID Position Paper: Residential Care and Orphanages in International Development | 53 |

1a. ABOUT RETHINK ORPHANAGES

ReThink Orphanages Network Australia is a cross-sector network with members drawn from academia, child protection, not-for profit, charity, tourism, faith-based and education sectors. The network was formed in early 2016 in order to prevent the unnecessary institutionalisation of children by shifting the way Australia engages with overseas aid and development.

The ReThink Orphanages Network has played a lead role in advocating for Australia to introduce measures to combat child exploitation in overseas orphanages, and orphanage trafficking, particularly in the context of the 2017 Parliamentary Inquiry into Establishing a Modern Slavery Act. ReThink Orphanages network members made submissions to the Joint Standing Committee on Foreign Affairs, Defence and Trade. Further testimony was given by members at public hearings, providing evidence of the occurrence of orphanage trafficking and Australia's contribution through orphanage tourism, volunteering and charity sector funding.

At the conclusion of the Inquiry, the Joint Standing Committee expressed their deep concern regarding the prevalence of the practice and the detrimental impacts it has on children. The issue was given prominence in the final report 'Hidden in Plain Sight', with a total of 11 recommendations made to the Australian Government to combat orphanage trafficking.

ReThink Orphanages has continued to work closely with government and members of Parliament to further a number of the recommendations made in the report and continue to raise awareness of this issue.

1b. ABOUT THE ACFID CHILD RIGHTS COMMUNITY OF PRACTICE (CR CoP)

The Child Rights Community of Practice (CR CoP) is an Australian Council for International Development (ACFID) member-led and run working group. The overarching goal of the Child Rights Community of Practice is to promote the rights of children and child rights-based approaches to development within the Australian international development sector.

The CR CoP currently has more than 60 members comprised of representatives from Australian international development agencies and child protection consultants. For the past three years, one of the key objectives of the CR CoP, and the focus of one of four of its sub-groups has been advocating for the rights of children in overseas residential care institutions.

The CR CoP have taken a lead role in raising awareness of the plight of children in overseas institutions and have consistently called for development programs that intersect with separated children to be underpinned by a child rights framework. This included through the development of the ACFID Position Paper: Residential Care and Orphanages in International Development and associated advocacy.

The CR CoP made a submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade during the Inquiry into whether Australia should establish a Modern Slavery Act, calling for orphanage trafficking and tourism to be captured within the scope of Australia's MSA. Furthermore, members of the CR CoP made significant contributions to the Joint Supplementary Submission written by ACFID and ACCIR, proposing funding stream reforms to curb the flow of resource to overseas orphanages operating in contravention of the Convention on the Rights of the Child and supporting Guidelines for the Alternative Care of Children.

CR CoP endorsement with the exception of Global Development Group, the Salvation Army, ISF-UTS and Dr Luke Bearup

1. SUMMARY OF RETHINK ORPHANAGES AND THE CR

CoP's POSITION

- ReThink Orphanages and the ACFID CR CoP supports the Australian Charities and Not for Profit Commission's intention to introduce a set of Minimum External Conduct Standards (herein referred to as the 'Standards'). We believe these Standards are an important means of enhancing the operational and programmatic standards of Australian charities and building public confidence.
- We commend the intention to further Australia's fulfilment of State party obligations to key international human rights treaties through the introduction of these Standards. We particularly support this with respect to enhancing alignment between charities overseas activities and key international instruments such as the UNCRC, the UN Guidelines for the Alternative Care of Children (herein referred to as the 'Guidelines') and the UNCRPD.
- We further advocate for introduction of compliance criteria and the wording of Standard 4, 'The Protection of Vulnerable Individuals', to be clearly underpinned by a rights-based approach. In practical terms we advocate for the term 'protection' to mean the protection of rights rather than a narrow focus on safety and safeguarding.
- We recognise that not all charities operate in the International Development space and not all overseas activities are for the purpose of furthering human rights. As such it is unreasonable to impose a Standard that would require charities to actively engage in the fulfilment of human rights where this is outside of their mandate. However, we believe that it is appropriate to require Australian charities with overseas activities to, at a minimum, take reasonable steps to ensure their activities do not operate in contravention of relevant international treaties. Noting the important role international treaties such as the CRC and CRPD play in providing a common framework for the protection of vulnerable persons, and the widespread ratification by countries where charities implement their overseas activities, we believe a requirement to respect international legal norms is both reasonable and in line with community expectations.
- Given the current standards' provision for factors, such as size, to influence what constitutes 'reasonable steps', we advocate for this determination to be primarily made based on the degree of risk to vulnerable persons rather than the size of the charity. This applies particularly to Standard 4. It is important to recognise the human rights of all people and to ensure the obligation to take reasonable steps to 'protect' is not disparate and based on charity-centric considerations.

- Without diminishing the importance of protecting the rights of all vulnerable populations, this submission will focus on the application of Standards 1 and 4 to charities conducting overseas activities that include the provision of alternative care services for children. We recommend that children deprived of parental care, including those in alternative care, be recognised as a particularly vulnerable population of children who face a high risk of exploitation, abuse and human rights violations in the context of alternative care services. As such, Australian charities with overseas activities that interact with this population of children should be required to demonstrate that their services operate in accordance with the CRC and supporting UN Guidelines for the Alternative Care of Children in order to meet the requirements of Standard 4, the 'Protection of Vulnerable Individuals'.

This is consistent with recommendation **39, 8:110** made in the final MSA Inquiry report, 'Hidden in Plain Sight', which states:

As a part of this review the Committee recommends that the Australian Government introduce minimum 'external conduct standards' for organisations operating overseas, including child protection safeguards and compliance with the United Nations Convention on the Rights of the Child, the United Nations Guidelines for the Alternative Care of Children and the proposed Australian Government Register.¹

Such an approach will further enhance public confidence in Australian charities with overseas activities involving alternative care amidst the growing awareness of unlawful, unregistered and/or abusive orphanages which exploit children for profit. Most importantly of all, it will represent a significant step forward to protect the rights of vulnerable children and minimise the risk of children deprived of parental care becoming victims of abuse, exploitation and serious crimes such as sexual abuse, slavery and orphanage trafficking.

- Noting the ACNC's preference for taking an educational approach to regulation, we recommend that comprehensive guidance material be developed or existing material be disseminated by the ACNC in support of these Standards. We recommend this includes resources to assist Australian charities better understand human rights and good practice with respect to working with particular vulnerable populations, including children deprived of parental care. We advocate for the inclusion of guidance material designed to raise awareness of the risks associated with institutional care and orphanage tourism, including the risk of orphanage trafficking. Overseas institutions continue to receive a significant amount of support from Australian charities despite global efforts to reform care systems for children and therefore warrant special attention. We

¹ Parliament of the Commonwealth of Australia, 'Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia', 2017, Canberra.

recommend that links be made to relevant guidance material developed to support the Modern Slavery Act and to DFAT's Smart Volunteer Campaign to promote cohesion and consistency across government.

- We note with concern the provision for exemption from these Standards where the activities are deemed incidental to the operations and pursuit of a registered entity's purposes in Australia. We strongly advocate for Basic Religious Charities to be required to comply with these Standards where they fund or operate overseas activities.
- We note the requirement for Charities to maintain reasonable internal control procedures to ensure compliance with specific laws under Standard 1. We recommend that a 'no orphanage tourism' policy stance be required as a reasonable internal control where the Australian charity's overseas activities intersect with children in residential care. This is in support of the MSA Inquiry's consideration of orphanage tourism as a form of child exploitation that constitutes modern slavery² and the inclusion of child exploitation in orphanages in the definition of exploitation in the Modern Slavery Bill.³
- We note the proposed requirement for entities to complete an Overseas Activity Statement as a part of their Annual Information Statement (AIS). We recommend that this be used as means of capturing important information about what groups of vulnerable individuals the overseas activities interact with, if any. This will allow for the ACNC to better ascertain the criteria for assessing compliance with the Standards, as well as produce useful data for the sector. We propose that this be captured through a simple list of specific groups of vulnerable people who are at heightened risk of experiencing abuse and/or exploitation. At a minimum this should include:
 - Children outside of parental care
 - Vulnerable Children
 - Persons with Disabilities
 - Persons deprived of liberty
 - Refugees and Asylum Seekers
 - Persons displaced by conflict and/or disasters (internally or cross border)

Other Related Documents:

It is suggested this paper is read in conjunction with the following supporting documents which are attached as annexes:

- Joint ACFID and ACCIR Supplementary Submission into the Modern Slavery Act Inquiry
- ACFID Position Paper: Residential Care and Orphanages in International Development

² ibid

³ The Parliament of the Commonwealth of Australia, 'Modern Slavery Bill 2018: Explanatory Memoranda', 2018, Canberra.

2. BACKGROUND TO THE ISSUE

THE SITUATION OF CHILDREN DEPRIVED OF PARENTAL CARE LIVING IN RESIDENTIAL CARE

Residential care is a type of out of parental care where children are cared for in group-living arrangements by remunerated staff or volunteers. Residential care is an umbrella term which encompasses orphanages, children's centres, children's villages, shelters, boarding houses, transit centres and other non family-based care settings.

The detrimental impacts of residential care on children's development have been widely documented, and include issues such as reactive attachment disorders, developmental delays, social skills deficits, behavioural issues and a heightened risk of abuse. Added to this, children admitted into residential care also experience rights regressions and/or violations. The loss of some rights, such as each child's right to be care for by his or her parents, is not a consequence of poor standards of care, but rather inherent to the very nature of residential care. As such, measures designed to improve standards of care within residential care institutions are insufficient to safeguard against this regression of child rights.

It is for these reasons that the only provision made for the use of residential care by the international child rights legal framework is as a temporary measure of last resort to be used for the shortest duration possible and only when alternative care is genuinely necessary and all family-based options have been exhausted.⁴ Despite these restrictive provisions, estimates suggest there are between 2 to 8 million children living in residential care institutions around the world, 80% of whom have one or both living parents.⁵ Many of these children have been placed in residential care by their families for reasons related to poverty, discrimination, disadvantage or to access primary services such as education. The UN Guidelines for the Alternative Care of Children state that poverty, or issues related to poverty, do not constitute a sufficient justification for the removal of a child from their family. Instead it is an indication that support should be provided to the family to enable them to fulfil their caregiving responsibilities.⁶

Regardless, the practice of admitting children into residential care for socio-economic reasons remains prolific. It is particularly common in contexts where residential care is over-invested and insufficient resources are being allocated towards the development of preventative and responsive services that are better placed to support families and

⁴ United Nations General Assembly, 'Convention on the Rights of the Child', 20 November 1989, UNTS 3 (entered into force Sept 1990).

⁵ Save the Children. 'A Last Resort: The growing concern about children in residential care' London.

⁶ U.N. General Assembly, sixty-fourth session, 'Guidelines for the Alternative Care of Children' A/RES/64/142 Agenda item 64 on Report of the 3rd committee A/64/434, 24 February 2010.

prevent separation. This imbalance creates a pull factor which incentivises family separation as families seek to use residential care services to alleviate socio-economic pressures in lieu of other options. It has also led to the creation of the orphanage industry, where some residential care institutions have resorted to recruiting children into care and/or preventing their reintegration in order to maintain sufficient numbers to attract or maintain financial support, particularly the support of foreign donors, NGOs and overseas volunteers. In some countries and contexts, the over-investment in residential care is driving a demand for children to be trafficked into residential care institutions.

ABOUT ORPHANAGE TRAFFICKING

Orphanage trafficking is the active recruitment of children from families into residential care institutions for the purpose of exploitation.⁷ Orphanage trafficking typically involves the false construction of a child's identity as an orphan, known as 'paper orphaning'. This is achieved through falsifying documents including parental death or abandonment certificates or through fabricated 'orphanhood' narratives, which are espoused to foreign donors in order to legitimise a child's admission into institutional care. Once a child is constructed as an orphan and placed into care, the orphan narrative and associated notion of vulnerability is used to elicit the sympathy of tourists, volunteers and overseas donors to solicit funds.

Like many forms of trafficking, one of the primary motivations driving the demand for orphanage trafficking is profit. In countries where orphanage trafficking takes place, orphanages have become a lucrative business due to the high levels of tourist, volunteer and foreign donor interest in assisting orphaned children. This has been widely termed the 'orphanage industry'.⁸ Within the orphanage industry, orphanage tourism acts as the interface between the commodification of the child as a tourist attraction and object of voluntourism; and the commodification of the good intentions of tourists/volunteers. The result is profit in the form of a fee for volunteer placement or one off or recurring donations. There have also been cases of Australian charities being established specifically to unwittingly support institutions engaging in orphanage trafficking.^{9,10}

The ongoing profitability of the orphanage industry is entirely dependent on harbouring a sufficient number of children in institutional care to meet the demands of orphanage tourism and foreign funding. With the decline in numbers of children who legitimately

⁷ van Doore, K. E. (2016). Paper Orphans: Exploring Child Trafficking for the Purpose of Orphanages. *The International Journal of Children's Rights*, 24(2), 378-407.

⁸ Cheney, K. E., & Rotabi, K. S. (2015). Addicted to Orphans: How the Global Orphan Industrial Complex Jeopardizes Local Child Protection Systems. *Conflict, Violence and Peace*, 1-19.

⁹ Winkler, T, Cambodian Children's Trust: Submission to the Inquiry into Australia establishing a Modern Slavery Act, 2017, submission 25.

https://www.apf.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Submissions

¹⁰ Pun, A, Lama, D.B, Dhakal, P, 'Submission by the Himalayan Innovative Society in partnership with Forget Me Not Nepal and Adara Development to the Inquiry into establishing a Modern Slavery Act in Australia', 2018, submission 155.

https://www.apf.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Submissions

require residential care, orphanage trafficking acts as one of the means by which the deficit between supply of children and the demand for orphanage tourism is met.

ORPHANAGE TOURISM AS EXPLOITATION

In truth, it's a case of supply and demand. Many orphanages in Cambodia are profit-driven businesses that need tourists and 'orphans' to keep their operations going. By visiting and supporting these orphanages, well-meaning Australians have inadvertently fuelled an industry that is separating children from their families and putting kids at risk of abuse and exploitation.¹¹

Orphanage tourism is the 'donation of money and goods, attending performances, or volunteering on a short-term basis at orphanages as part of one's holiday'.¹² Orphanage tourism activities often comprise 'informal English practice, and can also include formal lessons, medical or other professional services, playing sports or games, participating in art or music activities or watching dance performances'.¹³ Orphanage tourism includes a wide range of activities, from short visits to orphanages to engage with the children; to structured activities held between tourists and orphans; to long term volunteer positions where tourists may stay onsite at the orphanage for a period of months. Research notes the frequency in which orphanage tourists are given free access to vulnerable children without any background checks or the orphanage having any connection or knowledge of the person apart from the potential of a donation.¹⁴ There is often no enforcement of appropriate screening of volunteers and this can create havens for child sex offenders.¹⁵

Western tourists with good intentions 'hoping to ameliorate the circumstances of orphanhood' include both visits and volunteering in orphanages as part of their travel plans.¹⁶ The portrayal of orphans in developing nations and the encouragement to engage with them through orphanage tourism means that orphans have become a fundamental part of the tourist narrative.¹⁷ Orphanages are frequently established in locations that are popular with western travelers to increase the appeal of volunteering.¹⁸

¹¹ Mark Kavenagh, 'The uncomfortable truth: Why you should skip the orphanage tour in Cambodia' on *The Age* (27 July 2016) <<http://www.theage.com.au/comment/the-uncomfortable-truth-why-you-should-skip-the-orphanage-tour-in-cambodia-20160725-gqd35a.html>>.

¹² Tess Guiney and Mary Mostafanezhad, 'The political economy of orphanage tourism in Cambodia' (2014) 15(2) *Tourist Studies* 132. **Error! Bookmark not defined.**

¹³ Kathie Carpenter, 'Using Orphanage Spaces to Combat Envy and Stigma' (2014) 24(1) *Children, Youth and Environments* 124, 136.

¹⁴ Lumos, 'Universal Periodic Review - Republic of Haiti: Submission by Lumos concerning the Republic of Haiti for consideration during the 26th session of the Universal Periodic Review Working Group in the Human Rights Council' (Submission, Lumos, 2016) 4.

¹⁵ Afrooz Kaviani Johnson, 'Protecting Children's Rights in Asian Tourism' (2014) 22(3) *The International Journal of Children's Rights* 581, 603.

¹⁶ Kristen Cheney and Karen Rotabi, 'Addicted to Orphans: How the Orphan Industrial Complex Jeopardizes Child Protection' (2015) 11 *Geographies of Children and Young People* 1, 5.

¹⁷ P Jane Reas, "'So, Child Protection, I'll Make a Quick Point of It Now': Broadening the Notion of Child Abuse in Volunteering Vacations in Siem Reap, Cambodia' (2015) 18(4) *Tourism Review International* 295, 306.

¹⁸ Ibid.

Links between orphanage tourism, increasing use of child institutionalisation and orphanage trafficking have been reported in Liberia,¹⁹ Uganda,²⁰ Ghana,²¹ Nepal,²² Guatemala,²³ Haiti,²⁴ Cambodia,²⁵ Indonesia,²⁶ Botswana,²⁷ Kenya,²⁸ Thailand,²⁹ South Africa³⁰ and Honduras³¹ as well as many other countries.

There are both government and non-governmental organisation reports outlining the effects of orphanage tourism and how it drives the recruitment of children into orphanages. In particular, there have been major research reports focused on describing this link in Cambodia and Nepal. The UNICEF report, *With the best intentions: A study of attitudes towards residential care in Cambodia* clearly articulates a link between foreign donors and the recruitment and ongoing institutionalisation of children in orphanages.³² This study drew on both qualitative and quantitative research from 2007-2010, surveying families, government officials, orphanage directors, overseas donors, volunteers, key informants from non-governmental agencies and the tourism industry, and adult care leavers (who were former orphanage residents as children). The research was conducted across three geographical areas in Cambodia illustrating that the problem was nation-wide. The report determined that many orphanages in Cambodia were utilising orphanage tourism to attract more donors, and that almost all orphanages were funded by overseas donors.³³ The report established a strong connection between foreign donors' willingness to fund orphanages, the proliferation of orphanages and the recruitment of children into ongoing institutionalisation to fulfil that purpose.

¹⁹ Samantha Chaitkin et al, 'Towards the Right Care for Children: Orientations for reforming alternative care systems – Africa, Asia, Latin America' (Report, European Union, 2017) 19.

²⁰ Hope Among, Study on Legal Guardianship and Adoption Practices in Uganda (Ministry of Gender, Labour and Social Development and UNICEF, 2015) 42.

²¹ Kwabena Frimpong-Manso, 'Residential Care For Children in Ghana: Strengths and Challenges' (2016) *Global Perspectives* 172, 174.

²² Office of the Special Rapporteur on Trafficking in Women and Children, 'Trafficking in Persons Especially on Women and Children in Nepal: National Report 2012-2013' (Report, National Human Rights Commission, Nepal, 2014) 49.

²³ Red Latinoamericano de Acogimiento Familiar, 'Children and adolescents without parental care in Latin America: Contexts, causes and consequences of being deprived of the right to family and community life' (Report, RELAF & SOS Children's Villages International, 2010) 12.

²⁴ Georgette Mulheir and Mara Cavanagh, 'Orphanage Entrepreneurs: The Trafficking of Haiti's Invisible Children' (Report, Lumos, 2016) 5.

²⁵ UNICEF, 'With the best intentions: A study of attitudes towards residential care in Cambodia' (Report, UNICEF & Ministry of Social Affairs, Veterans and Youth Rehabilitation, Cambodia, 2011) 28.

²⁶ Florence Martin and Tata Sudrajat, 'Someone that Matters: The quality of care in childcare institutions in Indonesia' (Report, Save the Children, 2007) 19.

²⁷ Kelly Virginia Phelan, 'Elephants, orphans and HIV/AIDS: examining the voluntourist experience in Botswana' (2015) 7(2) *Worldwide Hospitality and Tourism Themes* 127, 130.

²⁸ Stephen Ucembe, 'My experience of volunteers : Growing up in an "orphanage" in Kenya' on ReThink Orphanages, (24 May 2016) <<http://www.rethinkorphanages.org/growingupinanorphanage/>>.

²⁹ Xuewei Li, 'The Harms of "Orphanage Voluntourism": Volunteering in a Thai Orphanage' on Stahili, *In Focus* (28 March 2017) <<http://www.stahili.org/volunteering-thai-orphanage/>>.

³⁰ Linda M Richter and Amy Norman, 'AIDS orphan tourism: A threat to young children in residential care' (2010) 5(3) *Vulnerable Children and Youth Studies* 217.

³¹ Jeff Ernst, 'I worked in orphanages for years. I now know there's no substitute for family' on Global Development Professionals Network, *The Guardian* (8 February 2017) <<https://www.theguardian.com/global-development-professionals-network/2017/feb/08/i-worked-in-orphanages-for-years-but-now-know-there-is-no-substitute-for-family>>.

³² UNICEF, above n 25, 28.

³³ Ibid 25.

A further strong link between orphanage tourism and the institutionalisation of children is found in Nepal where ‘all the traffickers have to do is ensure an ongoing supply of “destitute” children to attract the sympathetic tourist dollar’.³⁴ Across the 75 districts of Nepal, over 90% of registered orphanages are located in the five main tourist districts which do not ‘necessarily match the high areas of population or need’.³⁵ Research conducted in 2014 by Next Generation Nepal (a non-government organisation) describes the link between the recruitment of children into orphanages and the impact of orphanage tourism on children.³⁶ It details how foreign fee-paying voluntourists witnessed children being forced to participate in activities such as dancing, sports and games against their will to please the voluntourists. Children were also allowed to accompany orphanage tourists back to their hotel rooms, and orphanage tourists were even encouraged to bathe the children.³⁷ In these situations, the inherent vulnerability of the children was considered secondary to the desire of the orphanage tourist to interact with orphans. The report further notes that ‘children have become a lucrative commodity in Nepal, and the willingness of voluntourists and donors to provide funds ensures the ongoing demand for children to be unnecessarily displaced from their families’.³⁸

Once volunteers and visitors are present at the orphanage, children are often deliberately kept in very poor conditions to elicit concern and donations from visitors and volunteers, further maintaining the iconography of emergency.³⁹ The importance of volunteers liking them and feeling sympathetic is impressed upon the children.⁴⁰ Growing up in an orphanage in Kenya, Stephen Ucembe articulates his memory of:

*the senior staff on duty standing at the centre of a circle of volunteers pronouncing how some of us had been abandoned by their parents how others had been picked from the streets and others rejected by families. The majority of us often dropped our heads in shame and embarrassment during these introductions.*⁴¹

Child protection experts state that the constant rotation of volunteer caregivers contributes to attachment disorders in children without primary caregivers.⁴² Those participating in orphanage tourism rarely have appropriate credentials to work with vulnerable children and whether the focus on play by rotating volunteers is of any worth to the long-term development of the children has not been established.⁴³ The presence of volunteers and visitors does not ameliorate the conditions that children in

³⁴ Martin Punaks and Katie Feit, 'The Paradox of Orphanage Volunteering: Combating child trafficking through ethical voluntourism' (Report, Next Generation Nepal, 2014) 2.

³⁵ Ibid 15.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid 20.

³⁹ Guiney and Mostafanezhad, above n 12, 143.

⁴⁰ Stephen Ucembe, 'My experience of volunteers: Growing up in an “orphanage” in Kenya' on *ReThink Orphanages (online)* (24 May 2016) <<http://www.rethinkorphanages.org/growingupinanorphanage/>>.

⁴¹ Ibid.

⁴² Richter and Norman, above n 30.

⁴³ Kathie Carpenter, 'Childhood studies and orphanage tourism in Cambodia' (2015) 55 *Annals of Tourism Research* 15; *ibid*, 19.

orphanages reside in but rather causes both cognitive and material detriment to the children. Where this occurs, children become the commodity in the orphanage tourism product.⁴⁴

AUSTRALIA AS A SIGNIFICANT INVESTOR IN OVERSEAS RESIDENTIAL CARE

According to UNICEF, Australia is amongst the largest donor and volunteer sending country investing in overseas orphanages, particularly those in the South East Asian region.⁴⁵ Investment in overseas residential care institutions takes a number of forms and includes orphanage tourism, volunteerism, the provision of goods and materials, foreign funding and direct programs run by Australian charities.

Much of Australia's investment into overseas residential care institutions either directly flows through or is facilitated by Australian registered charities. This includes charities whose primary purpose is to operate overseas activities, and those with the primary purpose of advancing religion in Australia, including churches.

The ReThink Orphanages Mapping Report identified 565 Australian charities registered under the ACNC who were involved in or who operate overseas residential care institutions. 245 were identified as directly funding or sending volunteers to overseas residential care institutions.⁴⁶ 95 projects or organisations registered or under the auspices of an OAGDS approved organisations or Public Benevolent Institutions with DGR status were found to be investing in overseas residential care institutions using tax-exempt funds.⁴⁷

Due to the limited dataset available, charities identified within the ReThink Orphanages Mapping Report were primarily those operating overseas activities who declared their support of residential care as an activity in their Annual Information Statement. If charities and faith groups registered with the ACNC did not report supporting residential care in their AIS, they were not captured in the mapping. The above figures are therefore thought to exclude the vast majority of religious charities whose primary purpose is 'advancing religion' within Australia but who fund overseas residential care institutions as a peripheral activity.

To capture this data, ACC International commissioned research in 2017 as a part of the National Church Life Survey.⁴⁸ The research revealed that 36% of Christian churches across Australia and 52% of individual church attendees were found to support overseas

⁴⁴ Reas, above n 17, 306.

⁴⁵ Knaus, C. (2017) The race to rescue Cambodian children from orphanages exploiting them for profit. The Guardian. 19 August 2017, available at <https://www.theguardian.com/world/2017/aug/19/the-race-to-rescue-cambodian-children-from-orphanages-exploiting-them-for-profit> [accessed 14 November 2017].

⁴⁶ van Doore, KE, Healy L and Jones, M. (2016) Mapping Australia's Support for the Institutionalisation of Children Overseas, ReThink Orphanages, available at <http://bettercarenetwork.org/sites/default/files/Mapping%20Australia%E2%80%99s%20support%20for%20the%20institutionalisation%20of%20children%20overseas.pdf> [accessed 14 November 2017].

⁴⁷ Ibid.

⁴⁸ ACCI (2017) National Church Life Survey Commissioned Report.

residential care institutions. 28% of churches supporting overseas residential care institutions did so by sending funds through another Australian registered charity. 10% of churches indicated they did so by sending funds directly overseas. The research also revealed that 53% of churches surveyed were registered with the ACNC with the subtype 'advancing religion'. 20% indicated they were not registered with the ACNC and 27% did not know their registration status.⁴⁹

Despite the gaps in the existing data and research, these statistics suggest that the Australian charities sector as a whole is making a sizeable investment into overseas residential care institutions. To address the risk of investments unwittingly fueling the orphanage industry, driving the demand for orphanage trafficking, and resulting in exploitation and human rights abuses against children, it is imperative that measures are instituted to better regulate Australian charities' involvement in the alternative care sector overseas.

⁴⁹ Ibid .

3. FOCUS ON STANDARD FOUR

PROVISION FOR THE EXTERNAL CONDUCT STANDARDS IN THE AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION ACT 2012

The Australian Charities and Not-for-profits Commission Act 2012 makes provision for the introduction of a set of minimum external conduct standards that entities conducting or funding activities outside of Australia must meet in order to be registered as a charity.

The stated object of this division is to give the Australian public confidence that:

- a. funds sent outside of Australia by registered entities:*
 - *are reaching legitimate beneficiaries; and*
 - *are being used for legitimate purposes; and*
 - *are not contributing to terrorist, or other criminal activities; and*
- b. activities engaged in outside of Australia by registered entities are not contributing to terrorist, or other criminal, activities.*⁵⁰

There is ample evidence of Australian registered charities funding the illegitimate use of residential care overseas, defined as institutionalisation of children in contravention of the CRC and UN Guidelines on the Alternative Care of Children (herein referred to as the Guidelines). This constitutes an ‘illegitimate purpose’ due to the harm and human rights violations it causes. Evidence further shows it incentivises and drives the demand for ‘orphanage trafficking’, thus contributing to criminal activity.⁵¹

Therefore, regulating entities’ engagement with alternative care services overseas falls squarely within the external conduct standards objects and scope. Requiring charities to take reasonable steps to ensure their activities comply with the CRC and Guidelines as a means of meeting Standard 4 would reduce the likelihood of Australian charities funding or supporting alternative care services that operate unlawfully, outside of the oversight of national governments and in contravention of children’s rights. In turn, it would decrease the flow of resources into the orphanage industry, reducing one of the demand drivers of orphanage trafficking and minimising the likelihood of child exploitation and abuse taking place in the context of Australian charities’ overseas activities.

Commensurate with the overarching purpose of the Act and the object of Division 50,⁵² this would address the growing concern pertaining to Australia’s involvement in overseas

⁵⁰ Australian Charities and Not-for-profits Commission Act 2012, Division 50-1.

⁵¹ Ibid.

⁵² Ibid.

orphanages and restore public confidence in the work of Australian charities supporting vulnerable children overseas.

PURPOSE OF STANDARD 4 BEING APPLIED TO CHILDREN IN DEPRIVED OF PARENTAL CARE AND CHILDREN IN ALTERNATIVE CARE

The purpose of regulating Australian charities' engagement with overseas alternative care services as an application of Standard 4 is to:

- Prevent Australian charities, including their donors, supporters and members, from contributing to the inappropriate institutionalisation of children overseas via funding or the implementation of activities.
- Ensure Australian charities (including their donors, supporters and members) are not complicit in driving the demand for orphanage trafficking or funding criminal networks who traffic children into overseas institutions.
- Prevent the Australian government from potentially contributing to child rights violations and orphanage trafficking via contributions made to Australian charities in the form of tax concessions.
- Give the Australian public confidence in Australian charities supporting at-risk children overseas.
- Promote best practice and adherence to international child rights law by Australian charities (in general, and in response to the fragile or developing nature of child protection systems in low and middle-income countries where these issues are most prolific).
- Direct charitable donations towards activities that uphold children's rights and support overseas governments to fulfil their State party duties to the CRC. This includes initiatives designed to prevent unnecessary separation such as family strengthening programs and family preservation services.

GUIDING INSTRUMENTS: BASIS OF COMPLIANCE

In accordance with the Joint Standing Committee's Recommendation 39, 8.110, we recommend that compliance with Standard 4 of the External Conduct Standards should be linked to adherence with the CRC and Guidelines where the 'vulnerable individuals' are children deprived of parental care and children in alternative care.

The CRC is the key international treaty outlining the full scope of child rights, including the right to protection and the provision of alternative care. It acts as the binding international child rights legal framework that influences legislation, policy and practice in all 198 ratifying countries, including Australia.

The CRC clearly establishes the primacy of the family unit and importance of family preservation. In the preamble, it states:

Convinced that the family, as the fundamental group of society and natural environment for the growth and wellbeing of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.¹

It also establishes the importance of family-based care for children's optimal development; including for children who are unable to reside with their biological or extended families and require alternative care.

Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.¹

The Guidelines enhance the implementation of the CRC and of relevant provisions of other international instruments regarding children who are deprived of, or at risk of being deprived of, parental care. The Guidelines seek to ensure that:

- The importance and primacy of the family unit is upheld in decisions pertaining to children's welfare.
- Efforts are made to support and preserve families and prevent unnecessary breakdown and admission into alternative care.
- Permanent family-based care solutions are sought for children who cannot reside with their families.
- Where alternative care is necessary, the type of alternative care is appropriate taking into consideration the best interests of the individual child.
- Residential care is a last resort and temporary measure used for the shortest duration possible.
- Policies, laws, decisions and programs pertaining to children's welfare, protection and care consider children's rights.

GENERAL PRINCIPLES OF COMPLIANCE

Noting the need for the Standards to remain broad and principle based, we recommend the development of sector specific criteria against which charities are guided to self-assess in order to verify their compliance with Standard 4. Specific criteria need only be developed for known high risk areas and highly vulnerable populations and can be included in the explanatory notes and guidance materials. This approach allows for:

- The Standards to remain broad and principle based with relevance to the diverse range of charities which will be captured by the regulations.
- The application of the Standards to be specific enough to achieve their purpose of ensuring enhanced protection for vulnerable peoples.
- The criteria to be objective enough to create consistency of approach.
- The goal of using the Standards as an educational tool to be realised as it aids in raising awareness and encouraging charities to explore concepts of and approaches to protection they may not have previously been exposed to.
- Clarity with respect to what constitutes falling foul of a Standard. This is important to encourage compliance as well as enable complaints to be made where charities are intentionally contravening standards.

SPECIFIC PRINCIPLES OF COMPLIANCE WITH RESPECT TO CHILDREN DEPRIVED OF PARENTAL CARE AND IN ALTERNATIVE CARE

Where charities' overseas activities intersect with separated children and children deprived of parental care in alternative care services, we propose that compliance criteria be organised around the two principles that act as the pillars of the Guidelines; **Necessity Principle** and **Suitability Principle**, and two of the key principles of the CRC; **Best Interests of the Child** and **Child's Right to Participation**.

These two pillars and two key principles can be further distilled down into three practical criteria which are critical to protecting the rights of children deprived of parental care and safeguarding against abuse and exploitation in the context of alternative care services. These are:

1. **The Necessity Principle:** Alternative care is only used when genuinely required.
2. **The Suitability Principle:** Children access the type of alternative care best suited to their needs.
3. **The Best Interest of the Child:** All decisions are made in children's best interests and with their participation.

It is recommended that the interpretation of these three proposed criteria be based upon the guidance contained in the '*Moving Forward: Implementing the 'Guidelines for the Alternative Care of Children'*' manual developed by CELCIS. This manual represents one of three interagency initiatives developed at the global level to support the implementation of the Guidelines. It is considered a key reference document in the global care reform sector and has received widespread endorsement.⁵³

STANDARD 4: COMPLIANCE CRITERIA UNPACKED

CRITERION ONE: **NECESSITY PRINCIPLE**

Alternative care is only used when genuinely required

Purpose of this principle:

The purpose of this principle is to:

1. reduce the perceived need for alternative care in response to economic poverty, education and social issues such as discrimination, stigma and marginalisation; and
2. promote robust gatekeeping measures that ensure children are only admitted into alternative care when all means of supporting them to live with their families (including extended family) have been explored; and
3. ensure there are regular reviews of children's placement in alternative care to ascertain whether it is still required and promote reintegration as soon as it is in the best interests of the child.

Ways to meet the criterion:

1. Organisations seek to prevent relinquishment by facilitating families' access to family support and strengthening services and by promoting informal social support and customary coping strategies.⁵⁴
2. Organisations have in place a clear intake criteria for alternative care that is in line with national laws, policies and the Guidelines for the Alternative Care for Children.
3. Organisations have in place robust gatekeeping mechanisms, including child and family assessments carried out by competent and authorised professionals. Admissions into alternative care must be approved or mandated by the competent authorities.
4. Organisations conduct regular reviews of all alternative care placements and facilitate reunification or reintegration as soon as it is possible and in the best interests of the child.

⁵³ Cantwell, N.; Davidson, J.; Elsley, S.; Milligan, I.; Quinn, N. (2012). *Moving Forward: Implementing the 'Guidelines for the Alternative Care of Children'*.

⁵⁴ Ibid

5. Organisations prohibit the active recruitment of children for placement into alternative care.
6. Organisations ensure their funding models do not encourage unnecessary placement or retention of children in alternative care.

Means of verification:

Minimum:

- Gatekeeping policy, including:
 - process of assessment, analysis and review;
 - mechanisms for referral; and
 - criteria and process for admission into alternative care, including recognition that children can only be admitted through a competent authority.
- Signed partnership agreement detailing the means by which this standard will be met by any implementing partners (required in the event alternative care services are delivered through a third party organisation).

Recommended:

- Evidence that the organisation assists families to access non-institutional programs to prevent relinquishment and family separation. This could be through direct programs, partnerships or referral networks.

CRITERION TWO: SUITABILITY PRINCIPLE:

Children access the type of alternative care best suited to their needs

Purpose of this principle:

The purpose of this standard is to ensure that, when alternative care has been deemed necessary, appropriate care is provided. This includes:

1. Matching the care setting to each individual child's needs, taking into account their rights, the importance of maintaining family and cultural ties, and the preference for family-based care above institutional care; and
2. ensuring the care setting is operating lawfully and has adequate oversight; and
3. ensuring all care settings meet the minimum standards as determined by the State; and

4. ensuring the care setting has adequate safeguards in place to protect children against abuse and exploitation, including orphanage tourism.

Ways to meet the criterion:

1. Organisations work towards ensuring the full continuum of alternative care options are available.
2. Organisations have a means of directing children towards the type of care most appropriate to their needs based on robust assessment and with priority given to family-based care.
3. Organisations ensure that the residential care is only used as a last resort, temporary form of care for the shortest possible duration.
4. Organisations regularly review all placements for ongoing suitability and work towards long-term solutions and permanency.
5. Organisations are legally registered and hold all licenses or permissions required to provide alternative care services according to the national and state laws.
6. Organisations provide services that meet the required minimum standards and are periodically inspected by the relevant authorities against a set criteria.
7. Organisations have in place a robust child protection policy which is subject to regular review. This should aim to protect children from violence, exploitation and all forms of harm.
8. Organisations provide access to the full range of basic services required to uphold children's rights.
9. Organisations promote and facilitate contact with parents and other family members and uphold children's right to retain their cultural ties.
10. Organisations refrain from using care to further religious, political or economic goals.

Means of verification

Minimum:

- Entity registration documents
- License, Memorandum of Understanding, registration or other documentation demonstrating approval for running alternative care services.

- Child protection policy
- Visitors and volunteers policy
- Gatekeeping policy
- Signed partnership agreement detailing the means by which this standard will be met by any implementing partners (required in the event alternative care services are delivered by a third party organisation).

Recommended:

- Policy and/or documented procedures governing:
 - Family contact; and
 - Referrals.

CRITERION THREE: BEST INTEREST OF THE CHILD

All decisions are made in children's best interests and with their participation

Purpose of this principle

The purpose of this standard is to:

1. ensure all decisions made by organisations providing alternative care services are child-centric and take into account what is best for the child both immediately and long-term; and
2. prevent organisations from making organisation-centric decisions, such as prioritising ease and efficiency of service delivery over the needs and rights of the children who access services, or expose children to harm or exploitation in order to raise funds, such as through orphanage tourism; and
3. place an onus on organisations to conduct thorough investigation and consultation prior to making decisions about children's removal from families or placement into alternative care. It is also relevant to decisions pertaining to exiting care, particularly with respect to adoption as a form of permanency.

Ways to meet the criterion

1. Organisations request and/or seek adequate information about a child and his or her context, situation and perspectives before making decisions. This should include the:
 - child's own expressed wishes;
 - situation of and wishes of the child's parents and/or family;
 - level of stability or degree of risk in the child's environment;
 - potential to reduce risk and increase stability with support;
 - impact of separation, taking into account the child's age and stage of development;
 - special developmental needs of the child and the impact of care settings with respect to those needs; and

- child's religious, cultural, ethnic, linguistic background and the child's right to continuity.
2. Organisations facilitate children's involvement in all decisions pertaining to them, taking into account their stage of maturity and ability to understand the consequences of all options presented.
 3. Organisations take into account the legitimate interests of other relevant parties, particularly parents who are also rights holders under the UNCRC.
 4. Organisations make decisions pertaining to alternative care that prioritises the child's best interests over those of the organisation.
 5. Organisations take into account children's broader rights and ensure decisions pertaining to alternative care do not result in unnecessary rights regressions or violations.
 6. Organisations ensure best interests assessments and determinations are made by competent professionally trained staff and/or the relevant authorities.
 7. Organisations conduct a best interests determination during regular placement reviews.
 8. Organisations inform children of the outcome of best interests determinations and the rationale behind the decision.

Means of verification

Minimum:

- Policy or documented procedure outlining the assessment process and involvement of competent authority.
- Policy or section of child protection policy outlining the organisation's commitment to and means of facilitating child participation.
- Signed partnership agreement detailing the means by which this standard will be met by any implementing partners (required in the event alternative care services are delivered through a partner organisation).

ASSESSMENT OF COMPLIANCE

Recommendations

1. It is recommended that relevant entities (those whose overseas activities intersect with children deprived of parental care in alternative care services) be required to indicate or demonstrate compliance with the above outlined criteria at the point of seeking registration from the ACNC and as a condition of approval.

2. It is recommended that entities who have commenced involvement in with children deprived of parental care in alternative care services since the submission of their last Annual Information Statement be required to declare their involvement and indicate or demonstrate their compliance with the standards on their annual activity statement or annual information statement.
3. It is recommended that relevant entities be required to indicate ongoing compliance with these standards as a part of their Annual Information Statement.
4. It is recommended that periodic assessments and spot checks of relevant entities be conducted by the ACNC against these criteria. Such assessments should require organisations to submit verifying documentation for each criterion as listed above.
5. It is recommended that investigations be conducted by the ACNC into non-compliant organisations upon the receipt of a complaint or credible evidence to suggest non-compliance.
6. It is recommended that organisations found to be non-compliant be issued with regulatory advice in writing directing the charity to take steps to meet the external compliance standards within a prescribed period of time.
7. It is recommended that persistent non-compliance with these standards result in revocation of registration consistent with section 35-10 of the Australian Charities and Not-for-profits Commission Act 2012.

4. FOCUS ON STANDARD ONE

Standard One: 'Activities and Control of Resources', creates a requirement for entities operating activities outside of Australia to:

- (a) Take reasonable steps to ensure that its activities are consistent with its character as a not-for profit entity; and
- (b) Maintain reasonable internal controls to ensure its resources are used in a manner consistent with its character as a not-for profit; and
- (c) Comply with specific Australian laws, including laws pertaining to slavery, slavery-like conditions, trafficking, debt-bondage and sexual offences against children.

As described in detail in the background section of this submission, the inappropriate use of residential care, enabled by overinvestment and lack of appropriate regulation, fuels a number of subset issues within the 'orphanage industry', including orphanage trafficking and orphanage tourism as a form of child exploitation in institutions.

ORPHANAGE TRAFFICKING

Australia's Commonwealth Criminal Code contains divisions that criminalise trafficking in persons and constituent forms of exploitation with extraterritorial jurisdiction applicable. However, the construction of the trafficking offences are limited to trafficking in instances where there is a crossing, intent to cross or attempted crossing, of Australian borders. It also requires that the offence be perpetrated by an Australian citizen or resident or person who was a citizen or resident at the time.

Where trafficking offences take place wholly outside of Australia and have no intended nexus with Australian borders but are committed by Australian residents, citizens, or incorporated bodies, the Modern Slavery Bill has sought to encapsulate these offences through extending the definition of modern slavery to include those offences listed in the Criminal Code 1995 (Cth) as well as:

- Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; and,
- Article 3 of the International Labour Organization Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour

This ensures that trafficking in the context of Australian business supply chains, offences that typically take place wholly outside of Australia, will be included as reportable forms of modern slavery under the Act.

In a similar manner, we recommend that the provisions in the Standards requiring compliance with Australia's trafficking offences ensure that any definition of trafficking reflects Australia's State party obligations to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. This will ensure that entities must take reasonable measures to ensure that trafficking does not take place in the context of their overseas activities, not just in the context of crossing Australian borders. This safeguards against all forms of trafficking and is in line with the proposed Modern Slavery legislative framework. We believe this is appropriate given that any acts of trafficking that take place in the context of entities' 'overseas activities' are more likely to mirror those of trafficking in supply chains and therefore warrant the same approach to extend jurisdiction.

ORPHANAGE TOURISM

The exposure draft of the external conduct standards includes slavery and slavery-like offences in the list of Australian laws entities are required to comply with and maintain reasonable internal controls to ensure compliance.

Orphanage tourism has been considered, both in Australia and internationally, as a form of child exploitation associated with orphanage trafficking and a form of modern slavery. This includes in the context of:

- The Joint Standing Committee of Foreign Affairs, Defence and Trade's consideration of evidence provided in the context of the Modern Slavery Act Inquiry. This is reflected in the interim report and final report *Hidden in Plain Sight*.⁵⁵
- The 2018 US State Department's Trafficking in Persons Report which included a special interest area focusing on orphanage trafficking and child exploitation in institutions, including orphanage tourism.⁵⁶

It has further been highlighted by DFAT through the Smart Volunteering Campaign,⁵⁷ which seeks to raise awareness of the harms of orphanage tourism and discourage Australians from participating in orphanage tourism or unskilled volunteering in overseas orphanages.

Given the consideration of orphanage tourism as a form of exploitation and its prevalence in overseas institutions, we recommend that the facilitation of orphanage tourism by Australian charities or their third-party entities in the context of their overseas activities be deemed non-compliant with Standard 1. This should cover all

⁵⁵ Parliament of Australia, 'Hidden in Plain Sight'.

⁵⁶ United States of America, Department of State, "Trafficking in Persons Report", June 2018, Washington, <https://www.state.gov/documents/organization/282798.pdf>

⁵⁷ Australian Government, DFAT, 'Smart Volunteering', 2018, Canberra, <https://dfat.gov.au/people-to-people/volunteers/Pages/smart-volunteering.aspx>

forms of orphanage tourism, including visiting, attending performances, and volunteering in the context of overseas holidays or trips. We further recommend that the existence of a specific volunteers and visitors policy prohibiting orphanage tourism, similar provisions within the entity's child protection policy or an express commitment by the entity to that effect be considered a reasonable internal control to ensure compliance with this Standard.

5. FINAL REMARKS

Australia is a key country providing support to children in overseas countries and a key investor in residential care services for children overseas. Whilst the good intentions of Australian charities and the public is commendable, the scale of overseas investment flowing into residential care institutions in developing countries is undermining the development of government child welfare services required to simultaneously meet children's needs and protect their rights.

In the worst cases, the investment of overseas donors and volunteers, including Australians, acts as the incentive for the orphanage trafficking business model. At best, the concentration of resources in residential care disproportionate to need is creating situations where residential care is over extended and used to respond to child and family welfare issues that do not meet the statutory system thresholds and are more appropriately addressed through social welfare and child and family service systems. This results in children being channeled into institutional care for issues such as education, food security, disability and other issues of family vulnerability.

In order to rectify this, it is imperative that Australia introduces measures to regulate the Australian Charities Sector's engagement with children deprived of parental care, particularly those in alternative care services for children overseas. The introduction of set of criteria for complying with Standards 1 and 4 of the minimum external conduct standards, with the latter based on the key pillars and principles of the CRC and Guidelines, would be a significant step towards ensuring that efforts of Australian charities uphold child rights and support overseas governments to fulfil their State party obligations to international child rights treaties. Furthermore, it would reduce the likelihood of Australian charities fueling the orphanage industry. As the 'orphanage industry' is the site where the majority orphanage trafficking and the exploitation of children in institutions takes place, these measures would provide significant protections for vulnerable population of children in the context of Australian charities' overseas activities.

Authored by:

Rebecca Nhep

Senior Technical Advisor, Better Care Network
Convener, ACFID Child Rights Community of
Practice Sub-Group on Residential Care
Co-Chair, Rethink Orphanages
0431639015
rebecca.nhep@bettercarenetwork.org

With contributions made by:

Kate van Doore

Lecturer, Griffith Law School
Co-Founder, Forget Me Not Australia and Born
to Belong Foundation
Co-Chair, Rethink Orphanages
0411 480 149
k.vandoore@griffith.edu.au

ANNEX 1:



AUSTRALIAN
COUNCIL
FOR
INTERNATIONAL
DEVELOPMENT

**Joint ACFID & ACC International Relief
Supplementary Submission into the Joint Standing Committee on Foreign
Affairs, Defence and Trade's Inquiry into Establishing a Modern Slavery
Act**

with input from the ACFID Child Rights Community of Practice
September 2017

1. ABOUT ACFID

The Australian Council for International Development (ACFID) is the peak body for Australia's overseas development and humanitarian not-for-profit organisations. ACFID unites Australia's non-government organisations involved in international development and humanitarian action to strengthen their collective impact against poverty.

Our vision is of a world where all people are free from extreme poverty, injustice and inequality; where the earth's finite resources are managed sustainably; and Australia is compassionate and acting for a just and sustainable world. We believe that this vision can only be realised through the collective efforts of civil society, governments, business and individuals concerned for our common humanity.

Founded in 1965, ACFID currently has 126 Members and 18 Affiliates operating in more than 100 developing countries. The total revenue raised by ACFID's membership from all sources amounts to \$1.658 billion (2014–15), \$921 million of which is raised from 1.64 million Australians (2014–15). 80 per cent of funding for ACFID Members is from non-government sources. ACFID's members range between large Australian multi-sectoral organisations that are linked to international federations of NGOs, to agencies with specialised thematic expertise, and smaller community based groups, with a mix of secular and faith-based organisations. A list of ACFID Member Organisations is at **Annex A**.

ACFID's Members adhere to a Code of Conduct which is a voluntary, self-regulatory sector code of good practice that aims to improve international development outcomes and increase stakeholder trust by enhancing the transparency and accountability of signatory organisations.

The Code sets standards for practice rather than standards for results. It goes beyond the minimum standards required by government regulation and focuses on good practice. The Code is underpinned by a set of values and quality principles and speaks to the results we seek to achieve, the processes that support organisations to achieve those results, and the organisational systems that enable our Members' work.

The Code addresses areas such as fundraising, governance and financial reporting. Compliance includes triennial self-assessment, annual reporting and spot checks. All Members are subject to the independent complaints handling process governed by the Code of Conduct Committee (CCC) which is independent from the Governing Board of ACFID.

2. ABOUT THE ACFID CHILD RIGHTS COMMUNITY OF PRACTICE

The Child Rights Community of Practice (CR CoP) is an Australian Council for International Development (ACFID) member-led and run working group. *The overarching goal of the Child Rights Community of Practice is to promote the rights of children and child rights based approaches to development within the Australian international development sector.*

The CR CoP currently has more than 60 members comprised of representatives from Australian international development agencies and child protection consultants. For the past

three years, one of the key objectives of the CR CoP, and the focus of one of four of its sub-groups has been advocating for the rights of children in overseas residential care institutions. A full list of the participating agencies of the CR COP can be found at **Annex B**.

3. ABOUT ACC INTERNATIONAL RELIEF (ACCIR)

ACCIR is an Australian based International NGO which operates development and humanitarian response projects in 22 different countries. ACCIR is an ACFID member organisation and operates an Overseas Aid Fund under the Overseas Aid and Gift Deduction Scheme (OAGDS). ACCIR acts as the convenor for ACFID's Child Rights Community of Practice sub group on Residential Care and is also a co-chair of the ReThink Orphanages Network.

One of ACCIR's core thematic areas is care reform/deinstitutionalisation, which comes under ACCIR's Kinnected Program. Kinnected seeks to reduce the overuse of residential care in low and middle income countries and ensure that children's right to be raised in a family and connected to a community is respected and realised. ACCIR has Kinnected programs in 11 countries and engages in extensive donor education and advocacy work, both in Australia and globally.

ACCIR has provided technical support to 66 overseas residential care institutions undergoing transition or closure in various countries. It is through this aspect of our work that we have become aware of situations that constitute modern slavery taking place with respect to children in residential care overseas. Furthermore, it has highlighted the reality of foreign funding and orphanage volunteering, emanating from Australia and other key donor countries, acting as the primary drivers of the 'orphanage industry'.

4. TERMS OF THE INQUIRY

In this supplementary submission to the Parliamentary Inquiry into Establishing a Modern Slavery Act, ACFID & ACCIR will seek to address the third term of the inquiry as listed in the terms of reference:

- Identifying international best practice employed by governments, companies, businesses and organisations to prevent modern slavery in domestic and global supply chains, with a view to strengthening Australian legislation.

The submission will specifically look at best practice in the prevention of 'orphanage trafficking' and other related forms of exploitation, through ensuring Australian foreign aid funding, or funding from Australian charities, churches and business, does not act as a driver of demand.

5. BACKGROUND

'Orphanage trafficking' is an issue found at the nexus of foreign funding and institutional care. It is both a contributor to and consequence of the 'orphanage industry'; an industry

that profits from the prolific and inappropriate institutionalisation of children in low and middle income countries. As such, this section will give a brief overview of the links between the proliferation of residential care institutions, foreign aid funding and voluntourism and the issue of 'orphanage trafficking' and modern slavery.

In countries such as Cambodia, Timor Leste, Uganda, Nepal, India and Myanmar, a significant proportion of the country's child welfare and child protection services, including alternative care, are privately funded by overseas donors. Whilst foreign aid funding is critical to the support of vulnerable populations- including children, poorly regulated and misdirected it can also contribute to significant harm and lead to child exploitation. Recipient countries are particularly vulnerable to this when there is insufficient capacity within government to oversee and coordinate private services. This lack of capacity hampers efforts to ensure comprehensive child welfare and child protection systems are developed in line with each government's duties as State parties to the UNCRC. In this environment, decisions pertaining to the development of new privately funded service are largely determined by the interests of the overseas donors. As such services often emerge to meet 'donor demand' rather than in response to local needs or in line with government agendas. This is frequently the case with the ongoing proliferation of institutional care in low and middle income countries, despite a documented reduction in numbers of children legitimately requiring such services in some countries.⁵⁸

To bridge the deficit between supply and demand and to access the foreign aid funds that have been purposed for the support of 'orphans in orphanages', various forms of unethical and exploitative practices have emerged. These include:

- the inappropriate and unnecessary placement of children in institutional care;
- the harbouring of children in institutional care long-term with no respect for their rights or best interests;
- preventing family reunification and contact to uphold the 'orphan identity,' often falsely applied to these children, and retain funding; and
- provision of substandard and inadequate care and protection for children residing within institutions.

These practices at a minimum constitute a violation of several articles of the UNCRC and therefore the rights of children. They are also contrary to the international best practice framework for alternative care as detailed in the UN Guidelines for the Alternative Care for Children (herby referred to as the 'UN Guidelines').

In more sinister cases, unscrupulous orphanage directors or recruiters resort to trafficking children into institutional care to gain access to the supply of foreign aid funds designated for 'orphans'. These funds are channelled through overseas charities, churches or through voluntourists and volunteers who visit residential care centres whilst overseas. Acts of 'orphanage trafficking' often include 'paper orphaning'⁵⁹ which is the false construction of children's identities as orphans⁶⁰, through forged documentation or fabricated narratives.

⁵⁸ MoSVY 2011, A study of Attitudes Towards Residential Care in Cambodia.

⁵⁹ van Doore, K 2016, Paper Orphans: Exploring Child Trafficking for the Purpose of Orphanages.

⁶⁰ For the purposes of accessing community services, children are often classified as 'orphans' when only one parent has deceased. However, 'false construction of identity' and fabricated narratives refers to instances where claims are made that the children have no parent/s or suitable adult caregivers, when in fact these children have living parents or relatives who could provide care.

Individual and institutional donors, including voluntourists, are in most cases unaware of the human rights breaches and exploitation their funds are fuelling. Rather, the situation presents as a perfect storm in which the combination of inconsistently applied charity sector regulations on the donor country side, insufficient government regulation and oversight on the recipient country side and the commodification of good intentions result in the exploitation of both child and donor.

Governments in numerous affected countries have taken steps as State parties to the UNCRC to reform their care systems and uphold and protect children's right to grow up in a family. Measures include the development of Alternative Care Policies, National Action Plans, Minimum Standards in Residential and Family-Based Care Policies, the revision of child protection laws and enacting moratorium ordinances on the establishment of new orphanages⁶¹. In Haiti and Nepal, 'orphanage trafficking' has been recognised under domestic law falling under anti-trafficking legislation and cases have been brought before the courts for prosecution. Whilst these important legal and policy reforms are resulting in positive changes, efforts to deinstitutionalise care systems, protect children's rights and prevent exploitation are being undermined by the sheer volume of voluntourists and foreign aid funding that continues to be directed towards residential care- despite these legal and policies measures.

As such, ACFID and ACCIR believe it is incumbent on key donor countries to participate in efforts to prevent such child rights breaches and end 'orphanage trafficking'. This can be achieved by targeting donor countries' tourism and charity sectors to ensure the regulatory environment is attentive to this issue and consistently interprets and applies relevant regulations.

6. AUSTRALIA'S OBLIGATIONS

Australia, through ratification of the UN Convention on the Rights of the Child (UNCRC), has assumed responsibility for putting into place the domestic laws and other measures necessary to protect, respect and fulfil the full scope of children's rights.

Whilst Australia's primary obligations under this convention are to children subject to Australian jurisdiction, joint responsibility exists to protect children outside of Australian jurisdiction who are subject to or at risk of human rights breaches where Australia 'aids or assists' in the breach and has 'knowledge of the circumstances of the breach'.⁶² This joint responsibility should extend to protecting children whose rights are being violated in the context of overseas residential care institutions where these human rights breaches (and trafficking acts) are being 'aided or assisted' by Australian registered charities, and/or for the purpose of accessing Australian foreign aid funding or for voluntourism.

⁶¹ Nepal, Cambodia and Myanmar are three countries who have enacted moratorium ordinances on orphanages.

⁶²http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island/Report/c07

With the links between the recruitment of children into overseas residential care institutions and Australian funding and voluntourism now well established,⁶³ appropriate action should be considered by the Australian government to prevent Australia's ongoing complicity in these human rights and legal breaches. This could be achieved by curtailing the primary drivers of 'demand'; orphanage tourism and foreign aid funding. Such action would ensure that the efforts and funds of Australian volunteers, tourists and charities are supporting rather than undermining the efforts of foreign governments to reform their care sectors in line with their obligations under the UNCRC and supporting the 'UN Guidelines'.

To achieve this, ACFID and the ACCIR seek to make the following overarching recommendations for consideration:

1. The introduction of extra-territorial legislation banning the facilitation of orphanage tourism by Australian organisations, individuals, and companies.
2. The introduction of guidelines and regulations to curb the flow of Australian foreign aid funds to overseas residential care institutions contravening the articles of the UNCRC and/or operating contrary to the 'UN Guidelines'.

The remainder of this submission will focus on a detailed breakdown of recommendation 2 above. Opportunities to introduce minor provisions to various aspects of the existing charity sector's regulatory framework will be identified with the purview of enhancing regulation and promoting higher standards of practice.

7. DISTINGUISHING BETWEEN GOOD AND POOR PRACTICE IN ALTERNATIVE CARE

Addressing Australian foreign aid funding as a driver of the 'orphanage industry' and 'orphanage trafficking' is a nuanced issue. A careful balance must be achieved between redirecting funding away from harmful practices and criminal activity without hampering countries' care reform efforts, defunding alternative care services demonstrating good practice, or creating a situation that promotes unsafe reintegration practices. It is for these reasons that **the Australian Government should not consider instituting a categorical ban on funding overseas residential care.**

Rather, for charities whose purpose includes the provision of alternative care services, steps could be taken to enhance the regulatory and reporting frameworks already in existence – including for those operating overseas activities under the Australian Charities and Not-For Profit's Commission (ACNC), those holding or seeking eligibility to the Overseas Aid Gift Deduction Scheme (OAGDS) and those holding or seeking eligibility to Public Benevolent Institutions (PBI) Deductible Gift Recipient (DGR) categories.

Most of these regulatory mechanisms already contain provisions that would enable residential care practices to be viewed as ineligible activities, however, what is lacking is a common and uniform interpretation statement to support whole-of-government application of existing guidelines to ensure residential activities are *always* identified and subject to the same considerations in determining their eligibility.

⁶³ 2013 UNICEF Funding Stream Analysis noted the connections between RCIs in Cambodia and Australian donors.

Eligible purposes/activities should be those that contribute towards the progressive realisation of children's rights as outlined in the UNCRC and work in accordance with the 'UN Guidelines' as the international guiding instrument outlining best practice in alternative care. Under this framework, eligible activities should include:

1. **Care reform efforts.** Programs and activities designed to contribute towards the deinstitutionalisation of social protection systems including child protection and care systems. This could include the scaling back of the use of residential care, the development of non-institutional services, funding stream reforms, social work force development, related capacity building and supporting the development of government policy and procedural frameworks.
2. **Transition or safe closure of existing residential care institutions.** Programs and activities designed to support existing residential care institutions through a safe transition or closure processes. This should include the advocacy efforts required to engage donors in the transition process.
3. **Reintegration.** Programs and activities designed to outwork the safe reintegration of children currently living in residential care and support to national structures to ensure continued support to families vulnerable to unnecessary separation.
4. **Best practice in alternative care services.** Programs and activities operating in accordance with the UNCRC and the 'UN Guidelines' who provide alternative care services to children. This could include any of the care options included in the continuum of care, including residential care, however must be guided by the three overarching principles: best interests of the child, suitability and necessity. Organisations operating or funding residential care should only be eligible when they can demonstrate robust gatekeeping measures, and have the technical capacity to conduct regular assessments and placement reviews to uphold the 'measure of last resort... temporary and for the shortest duration possible' clause the 'UN Guidelines' place on the use of institutional care.⁶⁴

8. POTENTIAL RESULTS

Requiring organisations to demonstrate their programmatic and policy alignment with the UNCRC and the 'UN Guidelines' would prevent the ongoing funding of inappropriate residential care services, including those:

- operating unlawfully (unregistered, inappropriately registered);
- operating without adequate gatekeeping measures in place or suitable thresholds for entry into care;
- using institutional care as a default long-term care option;
- actively recruiting children into care (including trafficking);
- without reintegration policies and procedures;
- without adequate child-safe guarding policies and procedures in place; and
- who fail to meet the minimum standards of care.

It would also result in an overall reduction of funding being directed towards residential care and encourage the redirection of funds towards other alternative care services including

⁶⁴ Principle B.14 of the UN Guidelines for the Alternative Care of Children.

family-based care. This reduction in available funding would reduce the incentive for organisations to institutionalise children and thus the incentive for ‘orphanage trafficking’. Requirements for more stringent program standards would reduce the likelihood of Australian foreign aid funds, or funds from Australian charities, churches and business fuelling the mis/over-use of residential care.

As funding and volunteering are inherently linked, particularly in the education and faith-based sectors, measures to curb the funding stream would also likely reduce the instances of Australian volunteers and voluntourists participating in orphanage tourism. This in turn would likely further reduce the risks of ‘orphanage trafficking’ and the likelihood of Australia’s ongoing complicity in this form of modern slavery.

9. OPPORTUNITIES FOR CHARITY SECTOR REFORMS

At present, Australian not-for profit organisations, including international aid agencies and charities, operate in a complex and convoluted regulatory environment. There are numerous government agencies that register and regulate not-for profits and/or the services they provide. However, with respect to those operating overseas, the main forms of assurance that charities adhere to professional practice standards on an ongoing basis and do not contribute towards unsustainable development practices or those that cause harm—include:

- Registration with the Australian Charities and Not-for-Profit Commission (ACNC);
- the Overseas Gift Deductible Scheme (OAGDS) currently administered by DFAT and;
- the Public Benevolent Institute Deductible Gift Recipient (PBI DGR) status, conferred by the ATO.

Minimal reforms targeting the ACNC’s charity regulations and the ATO DGR endorsement processes (specifically PBI DGR and OAGDS eligibility as assessed by DFAT) would likely be sufficient to prevent Australian foreign aid funding from fuelling ‘orphanage trafficking’ and related exploitation. These potential reforms will be explored below.

9.1 AUSTRALIAN CHARITIES AND NOT-FOR PROFIT COMMISSION

Not for profit organisations seeking to be registered as ‘charities’ must do so with the Australian Charities and Not-for Profit Commission (ACNC). The criteria require organisations to meet the ACNC’s ‘governance standards’ in order to be registered. This is a useful threshold for entry, however, it is important to bear in mind that they do not cover program standards or codes of conduct.

As well as identifying the organisation’s charitable purposes, charities are required to disclose if they have beneficiaries or activities overseas, or send money overseas. Such organisations are requested to provide additional information pertaining to how their funds are directed and to whom and what activities. The ACNC Overseas aid and development factsheet further states that such organisations may ‘also need to comply with a set of minimum standards called ‘external conduct standards’⁶⁵. These standards are yet to be developed and therefore whilst there is no current obligation, there is a clear opportunity to recommend specific

⁶⁵ ACNC Factsheet- overseas aid and development charities, http://www.acnc.gov.au/ACNC/FTS/Overseas_charities.aspx

inclusions to the ACNC to minimise the risk of Australian charities fuelling the ‘orphanage industry’.⁶⁶

ACNC Reform Opportunities & Recommendations

- One:** Include in the planned ‘external conduct standards’ child safeguarding standards (or policy requirements) applicable to all organisations operating or funding activities overseas.
- Two:** Include in the planned ‘external conduct standards’ programmatic standards pertaining to alternative care which require all registered charities conducting or funding alternative care activities for children to operate in accordance with the UNCRC and the ‘UN Guidelines’. The ACFID Position Paper on Residential Care in International Development could be used towards this end. Adherence should be a compliance requirement tied to registration with provisions for organisations to be subject to remedial action and deregistration for non-compliance.
- Three:** Organisations who identify (using the existing mechanism) as having overseas beneficiaries, activities or who send funding overseas could be required to further clarify if their overseas beneficiaries include children in out of home care, or activities that include alternative care services. This could then be used to identify organisations for whom the alternative care standards as included in the ‘external conduct standards’ (outlined in recommendation two) need apply.
- Four:** Institute a 2-3-year ‘grandfathering process’ for existing registered charities to ensure adequate time is given to meet and demonstrate compliance with the ‘external conduct standards’. With respect to charities supporting overseas residential care institutions, this would safeguard against increased risks to children caused by any immediate withdrawal of funds or services. It would ensure organisations have time to secure the buy-in of their overseas partners and encourage residential care programs to transition, therefore contributing towards the country’s care reform efforts.

9.2 DEDUCTIBLE GIFT RECIPIENT APPROVED ORGANISATIONS

There are two DGR categories which organisations directly operating or funding overseas activities can seek approval under. Charities registered with the ACNC with the sub type of Public Benevolent Institutions (PBI) can seek DGR endorsement from the ATO, who conducts an assessment for eligibility. Charities registered with the ACNC operating an Overseas Aid Fund can seek DGR approval under the Overseas Aid Gift Deduction Scheme (OAGDS). The OAGDS register is managed by the ATO however eligibility is assessed by DFAT with a final recommendation made to the Minister of Foreign Affairs.

⁶⁶ The not for profit overseas aid and development sector’s peak body—the Australian Council for International Development (ACFID) operates a Code of Conduct. All ACFID members must sign up to the Code of Conduct. The Code is a voluntary, self-regulatory code of good practice with a compliance regime. To learn more about ACFID’s Code of Conduct visit their website: <https://acfid.asn.au/code-of-conduct>

DGR concessions are a form of government contribution (by way of tax concessions) to approved charities. As such it is reasonable to expect DGR approved organisations to demonstrate compliance with appropriate governance and programmatic standards and, particularly, to be able to demonstrate that their work does not perpetuate harm, directly or indirectly, to children and other vulnerable groups.

Towards this stated goal, the OAGDS guidelines outline an important set of standards known as the 'eligibility criteria' comprising four criteria that must be met for organisations to be recommended for approval.⁶⁷ Criterion 1 and 4 in the 2016 OAGDS guidelines create a clear case for OAGDS ineligibility for Australian charities funding or involved in residential care services operating contrary to the 'UN Guidelines', as demonstrated below.

9.2.1 OAGDS GUIDELINES & ELIGIBILITY

Criterion 1: The organisations deliver overseas aid activities.

The explanation of this criterion states that:

*'Development activities improve the long-term well-being of individuals and communities in developing countries. Eligible development activities must demonstrate: fair distribution, be informed by local people; **and deliver sustained or lasting benefits**'⁶⁸*

Research and international child protection and child development experts agree that long-term use of residential care does not deliver sustained and lasting benefits, rather can cause detrimental long-term impacts on children, which often extend well into their adulthood⁶⁹. These include but are not limited to developmental delays, emotional and behavioural issues, attachment disorders, hyper vulnerability upon reintegration and social and life skills deficits.⁷⁰ Organisations that allow volunteers and visitors access to residential care centres that they run or partner with risk further exacerbating the attachment disorders commonly experienced by children in residential care and contribute to their ongoing vulnerability.⁷¹

Explanatory notes under Criterion 1 further outline the basis by which activities are deemed ineligible stating that:

*'Activities which do not demonstrate the principles of development activities or humanitarian activities will not satisfy this criterion. This may be because they discriminate, **do not meet locally identified needs**; create dependency; **do not lead to***

⁶⁷ DFAT 2016, Overseas Aid Gift Deduction Scheme Guidelines.

⁶⁸ DFAT 2016, Overseas Aid Gift Deduction Scheme: Guidelines p. 9, February 2016.

⁶⁹ Dunn, A, Jareg, E, Web, D n.d, A Last Resort: The Growing concern about children in residential care, Save the Children, London.

⁷⁰ Browe, K 2009, The Risk of Harm to Young Children in Institutional Care, Save the Children, London

⁷¹ Guiney, T 2012, Orphanage Tourism in Cambodia: When residential care centres become tourist attractions, Pacific News, no. 38, July/August 2012.

*lasting benefits; or do harm. Organisations undertaking such activities will not be recommended for approval under the OAGDS*⁷²

Over sixty years of global research into the effects of institutional care on children demonstrates the detrimental impacts on children's development. Furthermore, in the majority of cases, children's vulnerabilities are not overcome, rather vulnerabilities are delayed and in many cases exacerbated.⁷³ Global statistics also demonstrate that 80% of children currently in residential care are not orphans or children who lack suitable adult caregivers.⁷⁴ The vast majority of children in residential care are there for reasons such as poverty, disability or access to education.⁷⁵ Residential care is an inappropriate response to these common 'root causes' of child vulnerability and when used unnecessarily can do significantly more harm than good. Therefore, residential care used in this manner does not meet locally identified needs, does not deliver lasting benefits and can cause significant harm. As such, under Criterion 1 of the OAGDS eligibility criteria, organisations engaged in long-term residential care programs contrary to the 'UN Guidelines' should not be considered eligible for OAGDS approval.

Criterion 4: The organisation has appropriate safeguards in place and manages risks associated with child protection and terrorism.

The explanation for Criterion 4 states that:

*'The organisation will have a child protection policy and procedures in place that promote child protection and child-safe practices'*⁷⁶

Child protection experts agree that neither the unnecessary and long-term use of residential care, nor allowing volunteers and tourists access to children in institutional care settings constitute practices that promote child protection and safeguarding. Children in residential care are exposed to a heightened risk of physical and sexual abuse and these risks are exacerbated by organisations who allow non-essential persons access to children in residential care centres through orphanage tourism and volunteering.⁷⁷

Child protection, as distinct from safeguarding, is concerned with protecting the full scope of children's rights. However, certain rights are automatically forfeited when a child is admitted into residential care, including their right to be raised in a family. Therefore, entry into residential care, where the suitability and necessity principles have not been met, constitute the violation of children's rights, often instituted by organisations claiming to protect them.

⁷² DFAT 2016, Overseas Aid Gift Deduction Scheme: Guidelines p. 10, February 2016.

⁷³ Myers, J 2006, *Child Protection in America: Past, present, and future*, Oxford University Press, New York, see also R Rollinson, *Residential Child Care in England 1948–1975: A history and report*, commissioned by the Irish Commission to Inquire into Child Abuse, 2009, available at: <http://www.childabusecommission.ie/rpt/pdfs/CICA-VOL5-08A.pdf>

⁷⁴ We Are Lumos, <http://wearelumos.org/the-problem>

⁷⁵ We are Lumos, <http://wearelumos.org/chart/reasons-institutionalisation-one-european-country>

⁷⁶ DFAT 2016, Overseas Aid Gift Deduction Scheme: Guidelines p. 15, February 2016.

⁷⁷ Csaky, C 2009, *Keeping Children out of Harmful Institutions*, Save the Children, London. Resande, S 2013, *No Child's Play: Respect for children's rights at tourist destinations. Examples from Thailand, Cambodia and South Africa*, Fair Trade Centre, Cambodia & Thailand.

The OAGDS Frequently Asked Questions document further states that:

*'...OAGDS seeks to ensure that organisation applying for OAGDS have good governance structures in place and a **high standard of international development practice**, based on their track record'.⁷⁸*

The long-term use of residential care is deemed an outdated and harmful practice in international development and child protection practice by major child protection organisations, sector experts, governments, academics and UNICEF. The only provision for residential care in the UNCRC and the 'UN Guidelines' is for last resort and temporary option when all other family and community-based options have been deemed as not in the individual child's best interests or have been comprehensively exhausted⁷⁹. Australian organisations involved in long-term residential care, contravening the UNCRC and not supporting the 'UN Guidelines' (as the key international guiding instruments for determining best practice in alternative care, child rights and child protection) should therefore not be eligible for OAGDS approval based upon elements of Criterion 4.

9.2.2 2015 REVIEW OF THE OAGDS GUIDELINES

In 2015 DFAT conducted a review of the OAGDS guidelines. The stated purpose of the review was to *'Make the OAGDS guidelines and processes clearer, simpler and more robust, **while reflecting current international practice and standards**'*⁸⁰

A report outlining the key findings of the review recognised *'The support of orphanages as a vexed issue'*⁸¹ and acknowledged the feedback from several approved organisations questioning the appropriateness of allowing OAGDS approved organisations to engage in residential care as an eligible activity. Despite recognising the concerns raised and the stated objective of reflecting international best practice, the revised guidelines released in February 2016 failed to articulate a clear stance on residential care and removed all former references to the support of overseas residential care institutions as an ineligible activity. No clear guidance was given apart from directing organisations involved with children in institutions to have *'additional child safe practices'* in place.⁸² By taking a child safeguarding rather than a child protection and rights perspective, the guidelines fall short of reflecting international practice and standards as they fail to consider the appropriate use of residential care or take measures to ensure children's rights and best interests are at the centre of decision making. It is these principles of suitability and necessity, rather than safeguarding, that are at the heart of best practice in alternative care and the global care reform agenda. As such it is these principles that must be demonstrated in approved OAGDS organisation's programs to ensure that Australian aid funding is not fuelling the 'orphanage industry' and 'orphanage trafficking'.

⁷⁸ DFAT 2016, Overseas Aid Deduction Scheme: Frequently asked questions, p. 2, February 2016.

⁷⁹ UN General Assembly 1998, Convention in the Rights of the Child. UN General Assembly 2009, The Guidelines for the Alternative Care of Children.

⁸⁰ DFAT 2015, Review of the Overseas Gift Deduction Scheme, p. 3, August 2015.

⁸¹ Ibid p.3

⁸² Ibid p.15.

9.2.3 ISSUES RELATED TO THE LACK OF REGULAR REVIEW

The OAGDS guidelines fulfil two important functions apart from establishing the criteria used to assess an organisation's initial eligibility. Firstly, the guidelines outline a set of benchmarks for good practice which organisations are expected to maintain with the purview of 'creating an effective and capable community of international development NGOs'.⁸³ In meeting these standards, Australian organisations operating in the international development space demonstrate they have an appropriate level of expertise to deliver sustainable development benefits to overseas communities. This safeguards against good intentions being a sufficient qualifier, which as noted by ACFID, is critical if harm, dependency and the creation of 'an industry that demands the organisation's unnecessarily protracted interventions' is to be avoided.⁸⁴ Secondly, as stated in the OAGDS review, OAGDS approval acts as a vetting and endorsement of charities, which builds public confidence by '*assuring taxpayers their donations are going to support good overseas aid charities.*'⁸⁵

These are important post-approval functions and to deliver on their promise it is essential that charities take seriously their responsibilities requiring them to regularly review their practice; identify any significant changes since being granted OAGDS status, and/or; consider whether the guidance of approved activities has shifted. Any significant changes require declaration to ensure an entity remains eligible. The Annual Statement that must be provided by all charities to the ACNC provides a regular opportunity for charities to make these considerations and seek clarification or review if in doubt.

While the principle of primary responsibility for ensuring compliance with regulation does, and should, lie with the governing entities of charitable organisations, where 'systemic issues have been identified and/or certain risk thresholds amongst categories of DGR have been surpassed'⁸⁶ it is appropriate for there to be external reviews undertaken. Reviews should be avoided being punitive and focus first on remediation with penalty or deregistration imposed only where entities are unwilling or unable to remediate their practice or have been found to be acting in flagrant breach.

Due to the considerable concern around Australian groups inadvertently perpetuating the 'orphanage industry' and 'orphanage trafficking', through donations and grants, it would be reasonable to identify this practice as constituting a sufficient risk threshold pertaining to DGRs engagement with children in out of home care overseas. Organisations who surpass the risk threshold, such as those that identify as funding or directly running residential care (via annual statements), could be flagged for periodic review with the purview of ensuring DGR entities are not complicit in or acting in a way that fuels the 'orphanage industry' and

⁸³ ibid

⁸⁴ ACFID 2017, ACFID Submission on Tax Deductible Gift Recipient Reform Opportunities Discussion Paper, July 2017.

⁸⁵ DFAT review op.cit p.

⁸⁶ ACFID 2017 op.cit.p.11

associated ‘orphanage trafficking’ and modern slavery practices. To avoid creating loopholes, this measure should apply to all charities registered with the ACNC who conduct this work, regardless of what other status they hold.

Recommended Reforms to OAGDS DGRs

- One:** Develop an Interpretation Statement on OAGDS eligibility and Residential Care in line with the ‘UN Guidelines’. ACFID’s Position Paper on Residential Care in International Development, which outlines the sector’s stance on the appropriate use of residential care could be used as the basis for this statement.
- Two:** Ensure that the primary burden of ongoing compliance with DGR lies with the governing entity while providing regular opportunities for assessments of ongoing eligibility—such as through the Annual Statement process of the ACNC.
- Three:** Consider identifying ‘alternative care’ as a risk category for organisations operating or funding activities overseas, with a threshold set at the funding or provision of residential care. Organisations who surpass this risk threshold could subsequently be flagged for periodic review against the eligibility guidelines, including the proposed OAGDS supporting Interpretation Statement on Residential Care. A review should be undertaken with the first intention to support remediation of poor practice and with penalty or deregistration imposed for those unwilling or unable to act on remedial advice, or those found to be acting in flagrant breach.
- Four:** Consider instituting a ‘grace period’ for DGRs operating overseas activities contrary to the OAGDS guidelines. With respect to DGRs supporting institutional care overseas, a grace period would provide organisations with the opportunity to improve their practices and undergo safe transition where necessary. It would safeguard against any adverse effects caused by an immediate withdrawal of funds or services. This ‘grace period’ could align with the 12-month time frame suggested in the DGR Reform Opportunities Discussion Paper with respect to DGRs requirement to meet governance standards under the ACNC⁸⁷.

9.3 PUBLIC BENEVOLENT INSTITUTIONS DGR

A Public Benevolent Institution (PBI) is a type of charitable institution whose main purpose is to relieve poverty or distress, such as sickness, disability, destitution, suffering, misfortune or helplessness.⁸⁸ Charities registering under the ACNC can select PBI as their charity sub type and apply to the ATO for PBI DGR status in order to access tax concessions including the ability to issue tax deductible receipts for all donations over \$2. The ATO is responsible for

⁸⁷ DGR discussion paper op. cit. p.5.

⁸⁸ ¹ Australian Charities and Not-for-profits Commission, *2016, Factsheet: Public benevolent institutions and the ACNC*, viewed 7/3/2016, http://www.acnc.gov.au/ACNC/FTS/Fact_PBI.aspx

assessing a given PBIs' DGR eligibility, including whether they meet the 'in Australia condition'⁸⁹.

Prior to the decision in the Hunger Project Case, the ATO held the view expressed in TR2003/5 that the 'in Australia' condition required the PBI DGR to be established and operated in Australia, with its purposes and beneficiaries also located in Australia.^{90 91} PBIs desiring to pursue relief of poverty or distress outside of Australia were required to establish an Overseas Aid Fund and seek DGR endorsement under OAGDS or partner with an already established Overseas Aid Fund DGR approved under the OAGDS guidelines. OAGDS approved DGRs however, were limited to engaging in 'development activities.'⁵ Welfare activities, including the support of residential care institutions were explicitly listed as ineligible. Therefore, the risks associated with Australian foreign aid funding contributing to the inappropriate use of institutional care overseas and incentivising 'orphanage trafficking' were limited to non-compliance amongst OAGDS approved DGRs.

The Hunger Project Case decision⁹² however, led the ATO to remove the requirement for PBI DGR purposes and beneficiaries to be located within Australia. The ATO subsequently changed their Giftpack guidance to reflect this new position.⁹³ In 2016 the ACNC released a Commissioners Interpretation Statement: Public Benevolent Institutes to further clarify the implications of the changes.⁹⁴

As a result, it is now possible for an Australian PBI DGR to use tax deductible donations to fund non-development activities in developing countries, which contradicts the established OAGDS guidelines and the objectives of the ATO framework for endorsing an Overseas Aid Fund DGR. It has also resulted in a discrepancy of standards between the two DGR types, with PBI DGR being viewed as a path of least resistance in terms of ease of approval and requirements to meet standards of practice. This is of concern with respect to the issue of Australia's involvement in the unnecessary proliferation of residential care in developing countries and 'orphanage trafficking', as organisations wishing to establish, fund or partner with long-term residential care institutions are now able to do so with relative ease under the new PBI DGR regulations. As such there is significant potential for this to result in an increase in Australian charities' involvement in the 'orphanage industry' unless provisions are put in

⁸⁹ Australian Taxation Office, *TR 2003/5 Income tax and fringe benefits tax: public benevolent institutions (This document is currently being reviewed as a consequence of the decision outlined in the Decision Impact Statement for Commissioner of Taxation v. Hunger Project Australia)*, viewed 7/3/2016, <http://law.ato.gov.au/atolaw/view.htm?docid=txr/tr20035/nat/ato/00001>, Paragraph 25 states:

"For endorsement as a deductible gift recipient so that it can receive tax deductible gifts, the public benevolent institution must be 'in Australia'. This involves a range of factors including establishment, control, maintenance and operation in Australia and the providing of public benevolence in Australia."

⁹¹ Australian Taxation Office NFP Advisory Group, *Discussion Paper: Current operation of the "in Australia" special condition for certain deductible gift recipients and income tax exempt entities*, Final August 2015

⁹² *ibid.* Paragraph 61 "The Commissioner's view on the meaning of "in Australia" for DGRs has been updated in GiftPack to remove the reference to 'purposes and beneficiaries' being in Australia. GiftPack now states: For funds, institutions and authorities to be in Australia, they must be established and operated in Australia."

⁹³ *Ibid* Paragraph 61 "The Commissioner's view on the meaning of "in Australia" for DGRs has been updated in GiftPack to remove the reference to 'purposes and beneficiaries' being in Australia. GiftPack now states: For funds, institutions and authorities to be in Australia, they must be established and operated in Australia."

⁹⁴ ACNC 2016, Commissioners Interpretation Statement: Public Benevolent Institutions, COS 2016/03.

place to increase the eligibility criteria and ongoing compliance standards for PBIs. ReThink Orphanages 2016 mapping report identified 22 organisations registered as PBIs under the ACNC contributing towards institutional care overseas⁹⁵.

This Commissioner's Interpretation Statement acknowledges the increased risks associated with charities operating overseas including a lack of experience in international development, financial misappropriation, abuse to children and other vulnerable people, and poor accountability and transparency;⁹⁶ the very risks the more rigorous OAGDS guidelines were developed to mitigate. In recognition of these increased risks, the ACNC Charities Commissioner's Interpretation Statement implied that organisations seeking to register with the ACNC as a PBI should expect the ACNC to inquire as to how they will address these risks⁹⁷. However, it falls short of providing a set of benchmarking standards to guide PBIs towards good practice.

Whilst we would welcome the inclusion of appropriate practice standards in the PBI registration and/or PBI DGR eligibility criteria, previously made recommendations pertaining to the ACNC's planned 'external conduct standards' in the ACNC section of this submission could be sufficient to address the risks inherent to PBI charities operating or funding activities overseas. However, should this recommendation be rejected, the inclusion of specific standards and compliance measures in the PBI DGR eligibility criteria should be further explored. This would ensure that PBI DGRs would be expected to adhere to appropriate professional standards proportionate to the expectations placed on OAGDS approved DGRs. PBI DGRs would also be required to verify their ongoing eligibility through the Annual Statement made in support of their ACNC registration.

Recommended Reforms to PBI registration and PBI DGR eligibility

One: Support the recommendations in the ACNC section of this report to address the risks associated with PBI organisations operating overseas and increase standards of practice and accountability.

AND/ OR

Two: Develop standards of practice applicable to organisations seeking PBI registration and PBI DGR to address the risks outlined in the ACNC's Commissioner's Interpretation Statement. This would simultaneously address the risk of PBIs fuelling the 'orphanage industry' and incentivising 'orphanage trafficking' and other forms of modern slavery in overseas institutions.

Three: Ensure that ongoing eligibility with a standard of practice (if developed) is annually reported against in the Annual Statement charities make to the ACNC as part of their ongoing registration with the regulatory. This would only be of assistance with respect to PBI DGRs should recommendation two above be adopted.

⁹⁵ ReThink Orphanages op.cit p.12

⁹⁶ ACNC Commissioner's Statement op. cit p.11

⁹⁷ ACNC Commissioner's Statement, op.cit. p.11

Four: Institute a ‘grandfathering process’ for existing PBIs to ensure adequate time is given to meet and demonstrate compliance with any ‘external conduct standards’ or new standards of practice introduced. With respect to charities supporting overseas residential care institutions, this would safeguard against increased risks to children caused by any immediate withdrawal of funds or services. It would ensure organisations have time to secure the buy-in of their overseas partners and encourage residential care programs to transition, therefore contributing towards the country’s care reform efforts.

9.4 AUSTRALIAN NGO COOPERATION PROGRAM AND DIRECT AID PROGRAM GRANTS

The Australian NGO Cooperation Program (ANCP) is an annual grants program and the primary mechanism through which DFAT partners with Australian NGOs to alleviate poverty and contribute towards sustainable development in overseas communities and countries. NGO partners must undergo a very rigorous assessment process and be accredited by DFAT to be eligible to receive ANCP funding. The ANCP funding criteria lists the support of institutions, including orphanages, in its list of ineligible activities. **As such there is no current risk associated with ANCP funding contributing towards the ‘orphanage industry’ or related trafficking and slavery like practices in institutions.**

Australia’s Direct Aid Program (DAP) is a small grants program managed by Australia’s overseas posts. It forms a part of Australia’s development program and is funded out of the Australia Aid budget. Grants are made available to local community associations, individuals and NFP organisations operating in country of each respective post.

The DAP guidelines outline a set of broad principles and a selection criteria designed to guide DAP committees at post in their consideration of applications. Eligibility is further linked to Official Development Assistance (ODA) classifications, as outlined in the OECD ‘Is It ODA 2008 Factsheet’.⁹⁸ In addition, the guidelines list in their assessment considerations, ‘Whether the project involves children and if so, does the applicant have procedures in place to protect them’.⁹⁹ There is however, no further guidance evident regarding what child safeguarding or protection standards DAP committees are expected to use in making that determination. A list of projects or project activities that are ‘as a general rule not funded’,¹⁰⁰ are included in the guidelines, however these make no mention of exclusions relating to funding residential care.

The high degree of discretion given to DAP committees at post coupled with a lack of guidance regarding the eligibility of residential care exposes the Australian Government and Aid Program to a degree of risk. As such it is recommended that the same exclusions applied to the ANCP program be similarly applied to the DAP program to create consistency and mitigate any risk of the Australian Aid Program’s involvement in the inappropriate use of residential care and related child-rights and trafficking issues.

⁹⁸ Is it ODA Factsheet 2008.

⁹⁹ <http://dfat.gov.au/people-to-people/direct-aid-program/Pages/dap-general-guidelines.aspx>.

¹⁰⁰ *ibid*.

Recommended reforms to DAP Program:

One: ANCP ineligibility criteria be applied to the DAP program.

Two: Ensure DFAT personnel at post are well informed of the issues surrounding residential care, the 'orphanage industry' and orphanage tourism. Information could be widely disseminated or target posts located in high-risk countries. National guidelines and efforts towards deinstitutionalisation and progress towards establishment of continuum of alternative care models could be documented at relevant posts to inform such funding decisions and support national, CSO and INGO efforts toward deinstitutionalisation.

10. SUMMARY OF POTENTIAL IMPACT

The various recommendations outlined in this report could have a significant impact on curbing Australia's involvement in fuelling the 'orphanage industry' and in reducing the demand for children to be trafficked into institutional care. As a key donor and volunteer sending country, Australia can substantially affect a reduction in the over/misuse of residential care particularly in countries in the Pacific and South-East Asian region. Reducing the over/misuse of residential care will have a positive impact on this form of trafficking and modern slavery.

Using the current regulatory environment to work with Australian charities to ensure that they are not contributing to or exacerbating the 'orphanage industry' would likely capture the bulk of Australian foreign aid funding flowing to overseas residential care institutions. This would include funds emanating from sectors such as the Christian faith-based sector, which is anecdotally accepted as one of the largest sectors financially supporting overseas residential care institutions.

ACCI commissioned a set of research questions in the 2016 National Church Life Survey (NCLS) with the goal of quantifying the Christian faith-based sector's involvement in both financially supporting and volunteering within overseas residential care institutions. The commissioned questions were spread across two surveys: the NCLS Church Attenders Survey and the NCLS Operations Survey. The findings of the Church Attenders Survey revealed that 51% of church attendees in Australia financially support an overseas residential care institution. Of this 51%, 21% channel their support through their local church. A further 34% channelled their support through an Australian charity and only 5% sent direct remittances to an overseas organisation.¹⁰¹ The Operations survey findings indicated that 36% of churches support overseas residential care institutions, 90% of which constitutes financial support. The disaggregated data further revealed that 28% out of the 36% channelled funds collected for the support of an overseas residential care institution through an Australian charity. Only

¹⁰¹ ACCI, 2017 National Church Life Survey Commissioned Report - church attendees gave to multiple RCIs and/or through multiple means accounting for the total disaggregated figures exceeding the sum-total percentage.

10% indicated they sent direct remittances to an overseas organisation. This reveals that the Australian charities sector acts as the major conduit for funds emanating from the Christian faith based sector and therefore strengthens the argument for focused work with the charity sector to reform its practices. It is highly probable that a similar, conduit relationships exist between charities and schools/businesses raising funds purposed for overseas residential care institutions.

11. FINAL REMARKS

The Australian Parliament has demonstrated a commendable degree of global leadership with respect to combatting orphanage tourism and trafficking. Efforts to date have rightfully gained the attention of other key donor countries and led to an increased public awareness and consideration of the issue. By introducing further measures including world-first legislation banning the facilitation of orphanage tourism and charity sector reforms to address foreign funding as the primary driver, the Australian Government will successfully end Australia's ongoing complicity in this aspect of modern slavery. Furthermore, the Australian Government's bold measures will both encourage and provide a road map for other countries to consider and adopt similar reforms. This, if achieved amongst several donor countries, could signal the end of the 'orphanage industry' and the total eradication of 'orphanage trafficking'.

Rebecca Nhep*

CEO of International Programs, ACC International Relief

Convener, ACFID Child Rights Community of Practice Sub-Group on Residential Care

Co-Chair Rethink Orphanages

(03) 8516 9600

rebecca@accir.org.au

Joanna Pradela*

Director of Policy and Advocacy, Australian Council for International Development (ACFID)

(02) 6285 1816

jpradela@acfid.asn.au

**With thanks to the ACFID Child Rights Community of Practice for their substantial input.*

ANNEXES

ANNEX A. LIST OF ACFID

Full Members:

- ACC International Relief
- Act for Peace - NCCA
- ActionAid Australia
- Action on Poverty
- Adara Development Australia
- ADRA Australia
- Afghan Australian Development Organisation
- Anglican Aid
- Anglican Board of Mission - Australia Limited
- Anglican Overseas Aid
- Anglican Relief and Development Fund Australia
- Asia Pacific Journalism Centre
- Asian Aid Organisation
- Assisi Aid Projects
- Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine
- Australia for UNHCR
- Australia Hope International Inc.
- Australian Business Volunteers
- Australian Doctors for Africa
- Australian Doctors International
- Australian Himalayan Foundation
- Australian Lutheran World Service
- Australian Marist Solidarity Ltd
- Australian Medical Aid Foundation
- Australian Mercy
- Australian Red Cross
- Australian Respiratory Council
- AVI
- Beyond the Orphanage
- Birthing Kit Foundation (Australia)
- Brien Holden Vision Institute Foundation
- Bright Futures Child Aid and Development Fund (Australia)
- Burnet Institute
- Business for Millennium Development
- CARE Australia
- Caritas Australia
- CBM Australia
- ChildFund Australia
- CLAN (Caring and Living as Neighbours)
- Credit Union Foundation Australia
- Daughters of Our Lady of the Sacred Heart Overseas Aid Fund
- Diaspora Action Australia
- Diplomacy Training Program
- Door of Hope Australia Inc.
- Edmund Rice Foundation (Australia)
- EDO NSW
- Engineers without Borders
- Every Home Global Concern
- Family Planning New South Wales
- Fairtrade Australia New Zealand
- Food Water Shelter
- Foresight (Overseas Aid and Prevention of Blindness)
- Fred Hollows Foundation, The
- Global Development Group
- Global Mission Partners
- Good Shepherd Services
- Good Return
- Grameen Foundation Australia
- Habitat for Humanity Australia
- Hagar Australia
- HealthServe Australia
- Heilala*
- Hope Global
- Hunger Project Australia, The
- International Children's Care (Australia)
- International Needs Australia
- International Nepal Fellowship (Aust) Ltd
- International River Foundation
- International Women's Development Agency
- Interplast Australia & New Zealand
- Islamic Relief Australia
- KTF (Kokoda Track Foundation)
- Kyeema Foundation
- Lasallian Foundation
- Leprosy Mission Australia, The
- Live & Learn Environmental Education

- Love Mercy Foundation
- Mahboba's Promise Australia
- Marie Stopes International Australia
- Marist Mission Centre
- Mary MacKillop International
- Mary Ward International Australia
- Mercy Works Ltd.
- Mission World Aid Inc.
- MIT Group Foundation
- Motivation Australia
- Murdoch Children's Research Institute
- MAA (Muslim Aid Australia)
- Nusa Tenggara Association Inc.
- Oaktree Foundation
- Opportunity International Australia
- Our Rainbow House*
- Oxfam Australia
- Palmera Projects
- Partner Housing Australasia*
- Partners in Aid
- Partners Relief and Development Australia
- People with Disability Australia
- PLAN International Australia
- Quaker Service Australia
- RedR Australia
- Reledev Australia
- RESULTS International (Australia)
- Royal Australian and New Zealand College of Ophthalmologists
- Royal Australasian College of Surgeons
- Salesian Missions
- Salvation Army (NSW Property Trust)
- Save the Children Australia
- Service Fellowship International Inc.
- School for Life Foundation
- SeeBeyondBorders
- Sight For All
- So They Can
- Sport Matters
- Surf Aid International
- Tamils Rehabilitation Organisation Australia
- TEAR Australia
- Transform Aid International (incorporating Baptist World Aid)
- UNICEF Australia
- Union Aid Abroad-APHEDA
- UnitingWorld

- WaterAid Australia
- World Vision Australia
- WWF-Australia
- YWAM Medical Ships

Affiliate Members:

- Australian Federation of AIDS Organisations
- Australian National University – School of Archaeology and Anthropology, College of Arts and Social Sciences
- Charles Darwin University – Menzies School of Health Research
- Deakin University – Alfred Deakin Research Institute
- James Cook University – The Cairns Institute
- La Trobe University – Institute of Human Security and Social Change
- Murdoch University – School of Management and Governance
- Queensland University of Technology – School of Public Health and Social Work
- Refugee Council of Australia
- RMIT – Centre for Global Research
- Swinburne University of Technology Centre for Design Innovation
- Transparency International Australia
- University of Melbourne – School of Social and Political Sciences
- University of New South Wales-International
- University of Queensland – Institute for Social Science Research
- University of Sydney – Office of Global Engagement
- University of the Sunshine Coast – International Projects Group
- University of Technology, Sydney – Institute for Sustainable Futures
- University of Western Australia – School of Social Sciences
- Vision 2020
- Western Sydney University- School of Social Sciences and Psychology

* Denotes Interim Full Member

** Denotes Interim Affiliate Member

ANNEX B. LIST OF CHILD RIGHTS COMMUNITY OF PRACTICE MEMBERS

| Full Name | Position | Organization |
|-----------------------------------|------------|---|
| Ragna Gilmour | COP Member | Quaker Service Australia |
| Claire Birks | COP Member | ChildFund Australia |
| Ms Sophie Gulliver | COP Member | CARE Australia |
| Anna Noonan | COP Member | Consultant |
| Esther Obdam | COP Member | The Fred Hollows Foundation |
| Clinton Tedja | COP Member | The Salvation Army NSW Property Trust |
| Bethany Hender | COP Member | Australian Council for International Development |
| Claire Achmad | COP Member | World Vision Australia |
| Emma Braithwaite | COP Member | Australian Red Cross |
| Mr Clinton Tedja | COP Member | The Salvation Army NSW Property Trust |
| Jackson Heilberg | COP Member | Australian Council for International Development Child Rights CoP |
| Ms Louise Villanti | COP Member | Save the Children Australia |
| Rebekah Kofoed | COP Member | ChildFund Australia |
| Ms Lee Sayer | COP Member | Habitat for Humanity Australia |
| Sophie Seck | COP Member | Australian Council for International Development |
| Meg Laufer | COP Member | Act for Peace |
| Melanie Sleep | COP Member | Plan International Australia |
| Mrs Mwiyeria Munyeki | COP Member | World Vision Australia |
| Ms Annie Douglas | COP Member | The Oaktree Foundation |
| Ms Ruth Dearnley | COP Member | Influence Global |
| Ms Julia Kendall | COP Member | The Fred Hollows Foundation |
| Ms Katherine Lim | COP Member | The Fred Hollows Foundation |
| Dr Nanditha Janajeevi Hettitantri | COP Member | ADARA Development Australia |
| Emily Ellis | COP Member | International Women's Development Agency |
| Ms Jo Thomson | COP Member | ChildFund Australia Learning4Development |
| Lisa Schultz | COP Member | Consultant |
| Ms Julie Wiltshire | COP Member | Consultant |
| Mr Philip Morris | COP Member | International Nepal Fellowship (Aust) Ltd |
| Ms Joanna Pradela | COP Member | Australian Council for International Development |
| Ms Karen Rasmussen | COP Member | Act for Peace |
| Ms Fiona Williams | COP Member | Save the Children Australia |
| Ms Katie Blok | COP Member | ACC International Relief |
| Rebecca Hunter | COP Member | Asian Aid Organisation |
| Ms Karen Flanagan, AM | COP Member | Save the Children Australia |

| | | |
|---------------------------|------------|--|
| Ms Anne Fitzpatrick | COP Member | Australian Lutheran World Service |
| Ms Tamara Domicelj | COP Member | Act for Peace |
| Victoria Mcdonough | COP Member | Australian Red Cross |
| Mrs Alana Goodwin | COP Member | The Salvation Army NSW Property Trust |
| Ms Siobhan Mccann | COP Member | Plan International Australia |
| Ms Uma Komalan, MA | COP Member | Oxfam Australia |
| Ms Uma Komalan, MA | COP Member | Oxfam Australia |
| Katie Blok | COP Member | ACC International Relief |
| Ms Belinda Lucas | COP Member | Learning4Development |
| Mrs Jan Bayliss | COP Member | Global Mission Partners |
| Jessica Waite | COP Member | International Women's Development Agency |
| Laura Healy | Convenor | The Fred Hollows Foundation |
| Manasi Kogekar | COP Member | ChildFund Australia |
| Mr Dan Skehan | COP Member | Transform Aid International |
| Ms Mel Harwin | COP Member | Transform Aid International |
| Ms Veronica Joseph | COP Member | Habitat for Humanity Australia |
| Ms Keri Chittenden | COP Member | So They Can |
| Ms Rebekah Kofoed | COP Member | UNICEF Australia |
| Mrs Rebecca Nhep | COP Member | ACC International Relief |
| Ms Mary-Ann Nicholas | COP Member | Burnet Institute |
| Ms Peta Thomas | COP Member | Global Development Group |
| Mrs Jessica Hill | COP Member | Interplast Australia & New Zealand |
| Ms Karla Pardo | COP Member | World Wide Fund for Nature Australia |
| Sophie Levins | COP Member | Habitat for Humanity Australia |
| Amy Lamoin | COP Member | UNICEF Australia |
| Sophie Shugg | COP Member | Plan International Australia |
| Ms Gaye Wealthy | COP Member | Plan International Australia |
| Ms Caitlin Barrett | COP Member | Love Mercy Foundation |
| Ms Cassi Jenkins | COP Member | Love Mercy Foundation |
| Mark Kavenagh | Convenor | ChildFund Australia |
| Ms Justine Aenishaenslin | COP Member | Transform Aid International |
| Catherine Middleton | COP Member | International Needs Australia |
| Mrs Jackie Robertson | COP Member | Transform Aid International |
| Noreen McGrath | COP Member | Interplast Australia & New Zealand |
| Keren Winterford | COP Member | Institute for Sustainable Futures |
| Melissa Stewart | COP Member | World Vision Australia |
| Kate Eversteyn | COP Member | Consultant |
| Ms Sandra Louise Thompson | COP Member | Consultant |
| Meg Northrope | COP Member | DFAT |
| Nick Brodie | COP Member | DFAT |
| Toni Hunt | COP Member | DFAT |
| Dilani Edirisuriya | COP Member | DFAT |
| Julia Hartelius | COP Member | Australian Red Cross |
| Ms Fadia Tasneem | COP Member | MAA International Inc. |

| | | |
|----------------------------|------------|------------------------------|
| Cath Napier | COP Member | Save the Children Australia |
| Geordie Fung | COP Member | The Oaktree Foundation |
| Ms Paula Fitzgerald | COP Member | RedR Australia |
| Ms Chrissy Galerakis | COP Member | Plan International Australia |
| Emily Dwyer, Youth Advisor | COP Member | Oxfam Australia |
| Robert Madsen | COP Member | AVI |
| Mrs Sarineh Manoukian | COP Member | The Fred Hollows Foundation |
| Alana George | COP Member | The Fred Hollows Foundation |

- *Denotes non-ACFID member*



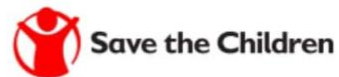
AUSTRALIAN
COUNCIL
FOR
INTERNATIONAL
DEVELOPMENT

POSITION PAPER

Residential Care and Orphanages in International Development

Prepared by the Child Rights Community of Practice

December 2016



About ACFID

The Australian Council for International Development (ACFID) is the peak body for Australian non-government organisations (NGOs) involved in international development and humanitarian action. Our vision is of a world where all people are free from extreme poverty, injustice and inequality and where the earth's finite resources are managed sustainably. Our purpose is to lead and unite our members in action for a just, equitable and sustainable world.

Founded in 1965, ACFID currently has 128 members and 18 affiliates operating in more than 100 developing countries. The total revenue raised by ACFID's membership from all sources amounts to \$1.525 billion (2013-14), \$838 million of which is raised from over 1.5 million Australians (2013-14). ACFID's members range between large Australian multi-sectoral organisations that are linked to international federations of NGOs, to agencies with specialised thematic expertise, and smaller community based groups, with a mix of secular and faith based organisations.

ACFID members must comply with the ACFID Code of Conduct, a voluntary, self-regulatory sector code of good practice that aims to improve international development outcomes and increase stakeholder trust by enhancing the transparency and accountability of signatory organisations. Covering over 50 principles and 150 obligations, the Code sets good standards for program effectiveness, fundraising, governance and financial reporting. Compliance includes annual reporting and checks. The Code has an independent complaints handling process.

About the Child Rights Community of Practice (COP)

ACFID COPs provide a means for ACFID Members to come together to share, learn, collaborate and advocate around a particular subject area. Communities of Practice are member led and run, with the support of two co-convenors and the energy and commitment of interested members. They interact through ACFID's online space for collaboration, planning and information sharing. The overarching goal of the Child Rights Community of Practice is to promote the rights of children and child rights based approaches to development within the Australian international development sector. This is achieved through collaboration, advocacy, and learning.

The Child Rights Community of Practice aims to: strengthen collaboration and coordination on child rights based approaches to development within the Australian NGO community and with DFAT; influence Australian aid to adopt and improve child rights based approaches through advocacy; and contribute to the evidence base for child rights based aid and development through publications, forums, and training.

Table of Contents

| | |
|--|-----------|
| About ACFID..... | 1 |
| About the Child Rights Community of Practice (COP) | 1 |
| Introduction..... | 3 |
| Key Terms | 5 |
| Section One: The use of residential care in international development..... | 7 |
| 1. Overview of the situation of residential care | 7 |
| 2. Residential care poses significant risks to children | 8 |
| Section Two: Residential care is a children's rights issue | 10 |
| 1. Using a child rights framework..... | 10 |
| 2. The UN Convention on the Rights of the Child | 10 |
| 3. Preventing child rights regressions | 11 |
| 4. The 'necessity' and 'suitability' principles in the UN Guidelines for the Alternative Care of Children | 12 |
| 5. Continuum of alternative care | 13 |
| 6. Redirecting resources..... | 14 |
| Section Three: Good practice in alternative care and development | 15 |
| 1. Prevent family separation..... | 15 |
| a) Address the root cause (not the symptoms)..... | 15 |
| b) Strengthen (not separate) families and communities..... | 15 |
| c) Develop family preservation programs | 15 |
| d) Engage in child-centred programming..... | 16 |
| 2. Good practice in residential care..... | 16 |
| a) Limit the use of residential care to last resort and temporary..... | 16 |
| b) Adhere to the relevant laws and minimum standards of care..... | 16 |
| c) Maintain family connections..... | 17 |
| d) Utilise therapeutic care models..... | 17 |
| e) Redirect volunteers to engage in non-residential programs | 17 |
| 3. Develop family-based care | 17 |
| a) Develop non-institutional services and promote reintegration | 17 |
| b) Strengthen family-based alternative care | 18 |
| c) Utilise domestic adoption and permanency planning..... | 18 |
| 4. Good organisational practices..... | 19 |
| a) Consider the risks and negative impacts of programs | 19 |
| b) Enforce robust child protection and safeguarding mechanisms in programs..... | 19 |
| Resources | 20 |

Introduction

Overview

The paper introduces the Australian Council for International Development's (ACFID) position on the appropriate use of residential care within international development programs. This position is informed by the UN Convention on the Rights of the Child (CRC), the UN Guidelines on the Alternative Care of Children and over 60 years of global research into the effects of institutionalisation on children and care leavers.

The paper looks in brief at the risks to children associated with residential care, and outlines the global situation in which an estimated eight million children are living in residential care centres worldwide, 80% of whom have one or both parents living. The paper explores statistics and the associated research which demonstrates that the current use of residential care is not limited to children who lack appropriate adult caregivers; rather, it is being used to address a complex set of issues affecting families, largely related to poverty and access to primary services. It highlights the responsibility of the international aid sector to look more critically at the disparity between the needs and rights of children, and calls for a review of the current allocation of resources and provision of services in light of the risks of harm associated with residential care.

The structure

The paper is divided into three key sections, the first of which gives an overview of the situation of children in residential care and the potential detriments associated with its long-term use. The second looks at residential care through a child rights lens, and highlights the key principles within the UN Convention on the Rights of the Child and the UN Guidelines for the Alternative Care for Children that inform rights-based practice within the care sector. Section Two also introduces the 'continuum of care' and lists the various care options contained within its scope under the three main categories of family-based, community-based and residential-based care. The third and last section of the paper outlines good practice principles relevant to the care sector and the global care reform agenda. These recommendations are designed to assist organisations to consider the practical implications of aligning with the UN Guidelines for the Alternative Care for Children and the continuum of alternative care, which prioritises family-based care and locates residential care as a last resort and a temporary solution.

The process

The Position Paper on Residential Care and Orphanages in International Development was initiated by the ACFID Child Rights Community of Practice and written by a sub-group comprised of ChildFund Australia, ACC International Relief, AVI and UNICEF Australia. An extensive consultation process was

undertaken within the ACFID membership over a 12-month period to ensure that agencies involved in residential care were given an opportunity to provide feedback and input. A draft version was subsequently reviewed by the ACFID Development Practice Committee, the ACFID Code of Conduct Committee, and finally the ACFID board, and feedback was incorporated into the final draft. The final draft version of the paper was further endorsed by the CEOs of numerous ACFID member agencies including UNICEF Australia, ChildFund Australia, Save the Children Australia, ACC International Relief, Australian Volunteers International, Plan International Australia and TEAR Australia and logos of the Child Rights COP members who have endorsed the paper are included on this document.

The purpose

The paper is designed to put forward a clear position on the use of residential care in international development programs that is aligned with the key international treaties and guiding instruments pertaining to child rights and children out of parental care. It seeks to inform the practice of both ACFID member organisations and Australian-based non-member organisations, as well as to underpin advocacy undertaken by ACFID and its member agencies.

On a practical level, this paper hopes to stimulate action and contribute towards three key outcomes:

1. To engage the Australian aid and development sector in a transparent appraisal of current programs designed to assist at-risk children in international development programs. This should be done with the view to support the global care reform agenda's goal of reducing the number of children residing unnecessarily in residential care.
2. To encourage the Australian-based organisations engaging with at-risk children overseas to begin to redirect efforts and resources towards the prevention of family separation, the development of family-based care and addressing the root causes of poverty, rather than maintaining the current overemphasis on addressing the symptoms.
3. To promote better practice in volunteering and voluntourism and discourage orphanage tourism and volunteering, a practice which is a known driver of the ongoing and unnecessary institutionalisation of children and which simultaneously places children at a heightened risk of harm within care settings.

This paper presents a mere summary of issues in relation to residential care in aid and development. However, it is not comprehensive in scope or depth. Much research has been written and is available for practitioners and policy makers who wish to develop a deeper understanding of the issues and the complexities involved. A selection of this work appears at the end of the document.

Key Terms

Residential care

Group-living arrangements in which children are cared for by paid employees or volunteers, whether on a temporary, mid-term or permanent basis. This can include orphanages, children's centres, shelters, boarding facilities, transit homes, children's villages (compound foster care) and other such non-family-based settings.

Alternative care

Alternative care is the care provided for children by caregivers who are not their biological parents. This care may take the form of informal or formal care. Alternative care may include supervised independent living arrangements for children.¹

De-institutionalisation

De-institutionalisation is the process of closing residential care centres and providing alternative family-based care within the community.² De-institutionalisation is a broad program working at any level, to 'change attitudes, develop different ways of working with children, improve children's and families' access to services, and ensure that every decision taken for children is made in their best interest'.³

Family-based care

Family-based care includes all forms of parental child care or alternative care in which a child is raised by a family, rather than in an institution. Family-based care includes parental care, kinship care, foster care and adoption.⁴

Gatekeeping

Gatekeeping is a process which prevents children from being placed in a residential care facility when it is not in their best interest. Gatekeeping involves a systematic, recognised process: firstly, to determine whether a child needs to be placed in an alternative care setting; secondly, to refer the child and her/his family to appropriate forms of family support and other services; finally, to decide from

¹ Fulford LM & Smith R, 2013, *Alternative Care in Emergencies Toolkit*, London: Save the Children.

² Better Care Network Toolkit, www.bettercarenetwork.org/toolkit accessed 8 December 2016

³ Lumos, 2015, *Ten Elements Of Deinstitutionalisation*, <http://wearelumos.org/stories/ten-elements-deinstitutionalisation> accessed 12 December 2016

⁴ Lovera J & Punaks M, 2015, *NGN, Reintegration Guidelines for Trafficked and Displaced Children Living in Institutions*. USA: Next Generation Nepal http://www.nextgenerationnepal.org/File/2015_01_28_NGN-THIS-Reintegration-Guidelines.pdf accessed 8 November 2016

the available range which is the alternative care arrangement that best corresponds to the child's situation.⁵

Permanency planning

Permanency planning involves a process of long-term planning to reconnect children in alternative care with their own families or to place children with adoptive families (or *kafala* in Muslim communities). This implies the need for a case plan for each child upon admission into care, subject to periodic review.⁶

Orphanage voluntourism

Orphanage voluntourism is a term used to define a spectrum of activities related to the support of orphanages and children's homes by individuals who are primarily, or were initially, tourists on vacation. In most cases, orphanage voluntourism involves a tourist who wishes to include an element of volunteering in their travels and who chooses to do this by giving their time – sometimes coupled with financial or material support – to a residential care facility (orphanage).⁷

Best interests determination (BID)

Best Interests Determination (BID)⁸ is a formal process with specific procedural safeguards and documentation requirements that is conducted for certain children of concern. In the BID process a decision-maker is required to weigh up and balance all the relevant factors of a particular case, giving appropriate weight to the rights and obligations recognised in the CRC and other human rights instruments, so that a comprehensive decision can be made that best protects the rights of children.⁹ When a child is deprived of parental care, or is at risk of being so, BID determination should be designed to identify the best suited course of action which satisfies the needs and rights of the child. It must also take into account the full and personal development of their rights in their family, their social and cultural environment and their status as subjects of rights, both at the time of determination and in the long term. The BID process should also take into account the right of a child to have his/her views taken into account in determining the best course of action and have their voice heard on matters affecting their future in accordance with his/her age, maturity and capacity.¹⁰

⁵ Cantwell N, Davidson J, Elsley S, Milligan I, Quinn N, 2012, *Moving Forward: Implementing the 'Guidelines for the Alternative Care of Children'*, UK: Centre for Excellence for Looked After Children in Scotland. <http://www.alternativecareguidelines.org/Portals/46/Moving-forward/Moving-Forward-implementing-the-guidelines-for-web1.pdf> accessed 8 December 2016

⁶ UNICEF, 2006, *Alternative Care for Children Indonesia, Malaysia, Myanmar and Thailand Without Primary Caregivers in Tsunami-Affected Countries*, Bangkok, Thailand: UNICEF East Asia and Pacific.

⁷ Lovera J & Punaks M, 2015, *NGN, Reintegration Guidelines for Trafficked and Displaced Children Living in Institutions*. USA: Next Generation Nepal http://www.nextgenerationnepal.org/File/2015_01_28_NGN-THIS-Reintegration-Guidelines.pdf accessed 8 November 2016

⁸ United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, UNTS 3 (entered into force September 1990) <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf> accessed 8 December 2016.

⁹ UNHCR, 2008, *Guidelines on the Formal Determination of the Best Interests of the Child* <http://www.unhcr.org/4566b16b2.pdf> accessed 8 December 2016

¹⁰ U.N. General Assembly, sixty-fourth session, *Guidelines for the Alternative Care of Children* A/RES/64/142 Agenda item 64 on Report of the 3rd committee A/64/434, 24 February 2010

Section One

The use of residential care in international development

1. Overview of the situation of residential care

The term 'residential care' can be applied to a range of different facilities that are distinct in terms of size and structure, but they are alike in that they provide a group-living arrangement for children out of parental care.

In 2007 over eight million children worldwide were documented as living in residential care.¹¹ There is a perception that children living in residential care do not have parents, guardians or other suitable adult caregivers; however, studies have shown that many children in residential care are not orphaned, but in fact have families¹². For example, the Ministry of Social Affairs Veterans and Youth Rehabilitation, 2005-2009, 'Alternative Care Database' in Cambodia demonstrates that as many as 77% of children in residential care have at least one living parent.

Children are placed into residential care as a result of numerous issues that challenge families' ability to look after them. These include socioeconomic reasons such as poverty, lack of access to education, inability to provide children with disabilities with specialised care, and perceptions that children will be able to access greater opportunities in orphanages located in urban areas than in rural communities. Other factors that result in children being admitted into care are those which affect family functioning, include migration, displacement through armed conflict and disasters, death of a parent, and remarriage.

In many developing contexts social protection systems and non-institutional child welfare systems are underdeveloped and therefore fail to identify and provide appropriate support to vulnerable children and their families in their communities.

At the same time vast amounts of resources are being directed towards residential care which results in residential care being used as a development strategy to meet children's basic needs, rather than being reserved for cases where all other forms of alternative care are unavailable. Despite being considered outdated in 'developed' countries, residential care continues to receive widespread support from donors, NGOs and volunteers from Western countries. This support comprises a significant proportion of the overall resources being used to sustain residential care.

¹¹ Save the Children, *A Last Resort: The growing concern about children in residential care*, London; Browne K, 2009, 'The Risk of Harm to Young Children in Institutional Care'.
[http://www.savethechildren.org.uk/sites/default/files/docs/A last resort 1.pdf](http://www.savethechildren.org.uk/sites/default/files/docs/A%20last%20resort%201.pdf) accessed 8 December 2016.

¹² UNICEF, *Residential Care in Cambodia, Fact Sheet* [https://www.unicef.org/cambodia/Fact_sheet - residential care Cambodia.pdf](https://www.unicef.org/cambodia/Fact_sheet_-_residential_care_Cambodia.pdf) accessed 13 December 2016

The continued support of residential care as a means of meeting children's needs has effectively led to the incentivisation of family separation. In families with one or both parents alive, the decision may be made to place children in residential care centres in order to access educational and other services, thus increasing the demand for such services. It is critical to note that a family's decision to place their children in residential care should not automatically be equated with abandonment. It is overwhelmingly more likely that this situation is driven by the parents' desire to give their children better opportunities than those which exist in their community, such as better education and health care.

The widespread support of residential care has also led to the exploitation of this model by some for financial gain. This includes the targeted 'recruitment' of children from poor families, on the promise of a better lifestyle and opportunities, in order to solicit donor funds for so-called 'orphans'. In extreme circumstances, there is evidence of children being trafficked into orphanages for exploitation for profit,¹³ Living conditions may even be kept deliberately bad in order to solicit larger donations from donors, visitors or tourists. Lax regulations and limited accountability and transparency regarding the quality and legitimacy of residential care homes are characteristic in many developing contexts and enable such practices to thrive.¹⁴

2. Residential care poses significant risks to children

Much has also been published on the potentially detrimental impacts of growing up in residential care on a child's development and overall well-being.¹⁵ These impacts include the risk of developing reactive attachment disorders, developmental delays, behavioural issues, and the risk of abuse.

One of the most well documented issues is that of attachment disorders. Attachment disorders can occur in instances where a child has been unable to form and sustain an attachment or bond with a primary caregiver. They are common amongst children in residential care due to being separated from their parents, and the frequently high staff turnover and use of volunteers as caregivers. This results in children forming numerous brief attachments with staff or volunteers in residential care centres, which exposes children to a constant cycle of attachment and rejection. This has multiple detrimental impacts that can extend well into adulthood.

Evidence has also shown that young children who grow up in institutional care are more likely to experience delays in their cognitive and social development and experience behavioural problems when compared to children of an equivalent age that grow up in a family unit.¹⁶ This is often the result of the impact of attachment disorders on children's brain development, limited stimulation, and fewer opportunities for engagement in normal social settings in the community.

¹³ Punaks M & Feit K, 2014, *The Paradox of Orphanage Volunteering*, Oregon, USA: Next Generation Nepal

¹⁴ Wulczyn F, Daro D, Fluke F, Feldman S, Glodek C, Lifanda K, 2010, *Adapting a Systems Approach to Child Protection: Key Concepts and Considerations*, New York: UNICEF.

¹⁵ Save the Children, 'A Last Resort: The growing concern about children in residential care', London; Browne K, 2009, 'The Risk of Harm to Young Children in Institutional Care'.

[http://www.savethechildren.org.uk/sites/default/files/docs/A last_resort_1.pdf](http://www.savethechildren.org.uk/sites/default/files/docs/A%20last%20resort%201.pdf) accessed 8 December 2016.

¹⁶ Browne K, 2009, *The Risk of Harm to Young Children in Institutional Care*, London: Save the Children.

Apart from the impact that residential care can have on children's development, children in care are also at risk of experiencing various types of abuse. A significant proportion of services in the residential care sector in developing contexts remain unregistered, under-regulated and staffed by unqualified workers. As such there are often few mechanisms in place to protect children in care, and little formal monitoring of centres taking place. As a result, abuse in residential care remains widespread. Whilst there are numerous instances of adults who seek opportunities to abuse children taking advantage of the lack of protective measures in place, caregivers or adults are not the sole perpetrators of abuse in residential care. There are also widespread reports of children abusing other children in residential care settings. The risk of abuse is further heightened in residential care centres where volunteers, tourists and visitors are permitted to work directly with children and as a result, key child protection agencies and child rights advocacy groups are calling for a halt to the practice of orphanage voluntourism.¹⁷

¹⁷ Better Care, Better Volunteering, <http://www.bettercarenetwork.org/bcn-in-action/better-volunteering-better-care> accessed 8 December 2016

Section Two

Residential care is a children's rights issue

1. Using a child rights framework

Despite the best of intentions in public and organisational support for residential care, children growing up in these settings are not only exposed to a greater risk of abuse and the detrimental effects of institutionalisation, they are also subject to rights violations and/or regressions. Furthermore, some of these violations are a direct by-product of the very nature of residential care rather than a result of poor standards.¹⁸ This means that improving the standards of care within residential care centres alone is insufficient to protect and uphold the full spectrum of children's rights and demonstrates why it is so important that we limit its use to cases where residential care is legitimately required.

As a sector committed to advocating for the rights of children, it is vital that we engage in deep critical reflection regarding what constitutes the appropriate use of residential care, and frame this discourse from a holistic child rights perspective.

2. The UN Convention on the Rights of the Child

The UN Convention on the Rights of the Child (CRC) is a comprehensive framework for protecting child rights, and outlines the premises for achieving optimal child development and wellbeing. The CRC is a legally binding international instrument, which to date has been ratified by 194 countries. State Parties to the convention are obliged to develop policies and undertake action on behalf of children in light of the articles contained within the CRC and with children's best interests in mind. All rights enshrined under the CRC are inalienable, indivisible and universal.

The broad spectrum of children's rights is outlined in the UN Convention on the Rights of the Child, which declares that all children who are deprived of living with their family must be provided with environments to a standard of living adequate for the physical, mental, spiritual, moral and social development of the child

Various articles emphasise the important role that family and family environments play. To this effect the CRC preamble states that:

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community ...¹⁹

¹⁸ Save the Children, 'A Last Resort: The growing concern about children in residential care', London; Browne K, 2009, 'The Risk of Harm to Young Children in Institutional Care'.

http://www.savethechildren.org.uk/sites/default/files/docs/A_last_resort_1.pdf accessed 8 December 2016.

¹⁹ United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, UNTS 3 (entered into force September 1990)

Numerous other articles of the CRC also recognise the role of the family as the primary duty bearers for the care of children and the right of the child to be raised by their parents or family, except in very limited instances where it has been deemed as not in the child's best interests by the competent authorities. The CRC further recognises the importance of protecting and assisting the family to fulfil their role as primary caregivers of children, and directs State Parties to ensure that there are sufficient services and facilities available to families for this purpose.

Whilst it is the responsibility of State Parties to develop the legislation, policies and services required to meet their obligations under the CRC, in countries with highly institutionalised care sectors, governments often require significant support from the international community to undergo care reform. As child rights advocates and members of the international community, we should be actively involved in advocating for such care reforms and supporting local governments to develop the policies and non-institutional services required to uphold the full spectrum of children's rights, including their right to a family.

3. Preventing child rights regressions

Despite the CRC clearly emphasising the importance of families and the onus on States to provide services that strengthen the capacity of families, many child welfare systems and individual services provided by governments and NGOs in effect supplant the responsibilities of families rather than support them to fulfil their role. When residential care is used as a solution to education, poverty and disability-based issues, it becomes a 'pull factor' which incentivises family separation, encourages the relinquishment of parental responsibilities and causes children to experience numerous rights regressions including their right to be raised by their parents.

Whilst it is undoubtedly important that children's educational, physical and material needs are met, it is critical that as a sector we evaluate **how** we best meet these needs and approach decisions regarding the welfare of children with their best interests and the full scope of their rights in mind. To this end, child welfare systems and individual programs should be designed to assist children to progressively realise their rights and avoid creating environments where children must forfeit certain rights in order to access others.

Children's circumstances need to be carefully assessed and interventions need to be vetted for necessity and suitability in order to prioritise services that do not have a negative impact on other areas of the child's rights.

4. The ‘necessity’ and ‘suitability’ principles in the UN Guidelines for the Alternative Care of Children

The United Nations Guidelines for the Alternative Care of Children were adopted by the United Nations General Assembly in 2010. The purpose of the guidelines is to support the implementation of the Convention on the Rights of the Child and other key instruments regarding the protection and wellbeing of children deprived or at risk of deprivation of parental care. As background to these documents, they were designed to support the formation of policy and practice on alternative care for children from a rights-based perspective.²⁰ The Guidelines outline two important principles which aim to ensure that alternative care is only used when necessary and that the right type of alternative care is identified in instances where it is genuinely needed. These are the **necessity** and **suitability** principles.²¹

The purpose of the **necessity principle** is to ascertain if alternative care is genuinely required, or if the family and child require family preservation, family strengthening or other social services to assist the family and prevent family separation. This principle discourages the use of alternative care to address issues that do not relate to the availability or suitability of parents or adult caregivers, such as poverty, educational and disability related issues. It ensures that the interventions and support provided are appropriate and proportionate to the issues.

If thorough assessment and investigation conducted by the competent authorities leads to a determination that alternative care is genuinely required, the **suitability principle** is designed to ensure that the right type of care and the most suitable care provider is selected. The suitability principle takes into account the best interests of the child based on their individual needs and circumstances and what is most conducive to achieving permanency for that child. It is here that the different types of care as outlined in the continuum of alternative care (see next section) are assessed for suitability starting with the least disruptive options, i.e. kinship care through to residential care which is considered a last resort option within the continuum.

The necessity and suitability principles are important components of gatekeeping, preventing children from being placed in residential care when it is not in their best interests. These are important principles for child rights advocates to embed in their development programs and practices when interfacing with vulnerable children and their families.

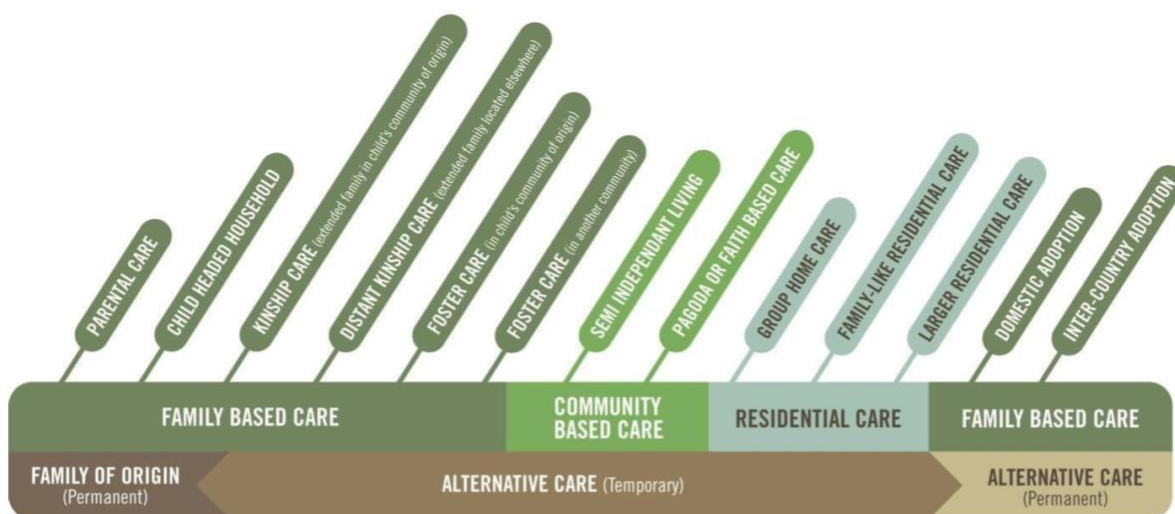
²⁰ U.N. General Assembly, sixty-fourth session, *Guidelines for the Alternative Care of Children* A/RES/64/142 Agenda item 64 on Report of the 3rd committee A/64/434, 24 February 2010

²¹ Cantwell N, Davidson J, Elsley S, Milligan I, Quinn N, 2012, *Moving Forward: Implementing the ‘Guidelines for the Alternative Care of Children’*, UK: Centre for Excellence for Looked After Children in Scotland. <http://www.alternativecareguidelines.org/Portals/46/Moving-forward/Moving-Forward-implementing-the-guidelines-for-web1.pdf>. accessed on 8 December 2018

5. Continuum of alternative care

In cases where a child does not have parents or where parents are temporarily or permanently unable to care for a child, despite assistance, the CRC and associated UN Guidelines for the Alternative Care of Children outline a preferential ordering of alternative care placements. Alternative care placements available to children on a continuum of alternative care are outlined in three main groupings and are to be utilised based on a determination of the best interest of the child. These three groupings are family-based care, community-based care and residential care, comprising multiple care options. Each of these groupings also offers permanent and temporary solutions for children (called the Continuum of Alternative Care, see diagram below). The aim of a best-interest determination in the consideration of alternative care is to provide the most stable, safe and least intrusive solution to the child's specific circumstances. This ordering prioritises family-based care and emphasises the importance of retaining the child's family, community and cultural ties wherever possible. It considers the impact of different placements on achieving reunification or permanency within a family in the shortest possible timeframe. This effectively positions the legitimate use of residential care as a last resort and/or temporary emergency option in the range of alternative care options.²²

CONTINUUM OF ALTERNATIVE CARE



Note: This diagram is a graphical representation of the standard internationally accepted continuum of care

²² U.N. General Assembly, sixty-fourth session, *Guidelines for the Alternative Care of Children* A/RES/64/142 Agenda item 64 on Report of the 3rd committee A/64/434, 24 February 2010

6. Redirecting resources

One of the current obstacles that governments and the international development sector are facing is the sheer amount of resources and energy being directed towards residential care in disproportion to actual need. This concentration of resources within residential care centres stifles the sector's ability to develop and provide a holistic scope of community services and family-based care options that can improve children's wellbeing whilst upholding the full spectrum of their rights. Access to such a full scope of services would enable families, communities and the authorised child protection bodies to direct vulnerable children and their families to the most suitable services that will meet their specific needs rather than defaulting to an overdependence on residential care due to a lack of options.

As advocates of child rights it is therefore essential that we begin to intentionally redirect resources towards diversifying programs and work towards ensuring that the full scope of non-institutional services required to respect, protect and uphold children's rights are available to children and their families at the community level.

Section Three

Good practice in alternative care and development

1. Prevent family separation

a) Address the root cause (not the symptoms)

It is important that residential care is not used as a mechanism to address the symptoms of material poverty. Where poverty is adversely affecting children, we should seek to identify and address the root cause and work to eradicate poverty from whole communities rather than respond to poverty by removing children. Removing a child from their family solely due to poverty is rarely a legitimate protective act and nor can it be deemed to be in the best interests of the child. Similarly, children in residential care should not be denied the opportunity to be reunified with their families solely due to poverty. This does not however mean that children should be relinquished to situations of abject poverty that will adversely affect them. Rather, families should be supported to escape the poverty cycle, for example through measures such as micro enterprise, micro loans and savings schemes, community development, cash and in-kind transfers and psychosocial support.

b) Strengthen (not separate) families and communities

The primary aim of interventions with children, families and communities, should be to strengthen the capacity of all actors charged with a duty to provide care for the child or uphold aspects of their rights. This includes, for example, parents, teachers, health practitioners and local governments. Lack of essential services such as access to health care services or education alone should not be viewed as a legitimate reason for separating a child from their family and placing them in residential care. It is rather an indication of the need to increase availability and direct resources and efforts towards finding local community-based solutions that will enable children to access education and other primary services without forfeiting their right to be raised by their family and in their community. Such solutions may include training local teachers, refurbishing or building local schools or clinics or providing transportation so that children can access education in nearby communities or towns. In most cases, long-term separation of a child from their parents in order to access essential services cannot be justified as a protective act.

c) Develop family preservation programs

Family preservation programs aim to identify vulnerable families at risk of imminent breakdown and provide intense support with the goal of preserving the family unit. Support may be in regard to basic services such as health, financial, housing, and often includes other support to assist families solve individual problems which may leave the child and family vulnerable.

d) Engage in child-centred programming

A child-centred approach to development is one that primarily seeks to improve outcomes for children, but realises that a child cannot be viewed in isolation from a family, community, culture and nation. Since there are numerous actors who are charged with the care and wellbeing of the child, a child-centred approach to programming seeks to strengthen and build the capacity of families, communities and governments to adequately meet the holistic needs of children.

Child-centred programming above all aims to break existing intergenerational cycles of poverty, harm and separation, allowing children, families and communities to not only survive but to thrive.

2. Good practice in residential care

a) Limit the use of residential care to last resort and temporary

Residential care should not be considered a long-term living arrangement for children. Within the continuum of alternative care, it should only be utilised as a last resort, a temporary care option used for therapeutic reasons, or as emergency care whilst other family-based alternative care options are being explored.

Robust gatekeeping systems and comprehensive child and family assessments prior to admission must be in place and utilised to ensure that residential care is only used when it is both necessary and suitable for the individual child.

Active reintegration planning to facilitate reunification with the family or integration into a permanent family/community-based solution should commence from the day of the child's arrival in residential care. Good practice guidelines show that children in residential care should have their placements reviewed at a minimum of six-month intervals to ensure that the arrangement does not default to becoming permanent.

b) Adhere to the relevant laws and minimum standards of care

All residential care services need to abide by the legal framework of the country in which care is being provided. This includes ensuring that the centres are properly registered and licensed, meet the minimum standards of care, and that staff follow the proper admission and reintegration procedures and avoid actively recruiting children.

Where there is an absence of clear process, it is the responsibility of the care provider to seek advice from the competent authorities and ensure that they are operating in a lawful manner and complying with local laws. Where no minimum standards are in place, the UN Guidelines for the Alternative Care of Children should be used as a benchmark.

c) Maintain family connections

During periods where a child is living in residential care and separated from their family, consistent and meaningful contact and interaction should be maintained between the child and their family or other significant relationships. This can be costly and require exceptional measures on the part of the service provider; however, it is an important aspect of upholding children's rights whilst in care and it is critical to facilitating children's healthy development. In circumstances where the immediate safety of a child may be in question, safe forms of interaction between the child, family and community should be facilitated. Residential care providers do not have the right to restrict or sever a child's contact with their family and other significant community relationships unless directed to do so by the statutory mandated child protection authorities where it has been deemed that it is in the best interest of the child to restrict access.

d) Utilise therapeutic care models

In exceptional cases where it has been deemed that it is unsafe or not possible for a child to live with their family or in family-based care, therapeutic residential care may be the most suitable option. In these cases, care should be provided in small, family-like settings where the caregiver-to-child ratios are appropriate to the special circumstances and needs of the child and that caregivers are both long term and consistent.

e) Redirect volunteers to engage in non-residential programs

The fundamental motivation of volunteers who seek to work with vulnerable children to 'do some good' is admirable. However, as development practitioners and organisations we need to steer those good intentions in the right direction and put ethical boundaries around volunteer interaction with vulnerable children. Volunteering with children in residential care should be discouraged due to the numerous risks it poses for the children and the fact that it contributes to the ongoing proliferation of residential care globally.

There are numerous other more ethical ways that volunteers can support the work of NGOs and community organisations, and contribute to programs that strengthen families and communities. Consider what would be appropriate and allowed in terms of interaction with vulnerable children in Australia, and consider using this as a benchmark for ethical engagement with children overseas.

3. Develop family-based care

a) Develop non-institutional services and promote reintegration

In order to scale back the use of residential care, non-institutional child welfare and child protection systems need to be developed and implemented. This encompasses numerous steps including developing community services, family and kinship-based care as a positive alternative to residential care, and assisting children currently in residential care with reintegration and reunification. To

achieve this, a significant proportion of the resources currently flowing into residential care need to be redirected towards family and community-based services in order to prevent the separation of families and sustain family-based alternative care options for children. Building such viable alternative services is an essential part of any country transitioning from residential care to family-based care.

b) Strengthen family-based alternative care

It is important to invest in true family-based alternative care models as a part of the deinstitutionalisation process, in order to prevent the ongoing institutionalisation of children who legitimately require alternative care.

Kinship care is often overlooked, but commonly employed in developing world communities when children who cannot be with their immediate families are frequently cared for by their extended family or with close friends known to the child. Supporting this organic model of family-based care can be an expedient option. However, care needs to be taken to ensure that the children's rights are maintained in these placements.

Family-based alternative care models include:

| Type of family-based care | Explanation |
|---------------------------------------|---|
| Kinship | Care provided by a member of the child's extended family. |
| Foster care (single or sibling group) | <u>Known</u> – care provided by a member of the child's community of origin <u>Stranger</u> – care provided by a person outside of the child's community of origin |
| Foster care (non-sibling group) | Care provided to two or more unrelated children in the foster parent's home environment. |
| Kafala | Care provided by a person who voluntarily commits to care for an orphaned or vulnerable child |
| Semi-independent living | Youth supported (by a staff person or community member) to live alone or with a group of peers in the community. |

c) Utilise domestic adoption and permanency planning

In many countries where there is a proliferation of residential care centres, national permanency plans and processes remain underdeveloped. It has been indicated that in some countries the legal avenues for domestic adoption remain unclear or, in some cases, non-existent.

In many settings, traditional domestic adoption is organised through informal community structures where kin or a neighbour would assume care of a child in their community with no legal transfer of guardianship. In other cases, guardianship is transferred at the local government level affording the child a reasonable degree of legal protection. However, these arrangements may not be formally

ACFID MEMBERS LIST – December 2016

Full Members:

- ACC International Relief
- Act for Peace - NCCA
- ActionAid Australia
- Action on Poverty
- Adara Development Australia*
- ADRA Australia
- Afghan Australian Development Organisation
- Anglican Aid
- Anglican Board of Mission - Australia Limited
- Anglican Overseas Aid
- Anglican Relief and Development Fund Australia
- Asia Pacific Journalism Centre
- Asian Aid Organisation
- Assisi Aid Projects
- Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine
- Australia for UNHCR
- Australia Hope International Inc.
- Australian Business Volunteers
- Australian Doctors for Africa
- Australian Doctors International
- Australian Himalayan Foundation
- Australian Lutheran World Service
- Australian Marist Solidarity Ltd
- Australian Medical Aid Foundation
- Australian Mercy
- Australian Red Cross
- Australian Respiratory Council
- AVI
- Beyond the Orphanage
- Birthing Kit Foundation (Australia)
- Brien Holden Vision Institute Foundation
- Bright Futures Child Aid and Development Fund (Australia)
- Burnet Institute
- Business for Millennium Development
- CARE Australia
- Caritas Australia
- CBM Australia
- ChildFund Australia
- CLAN (Caring and Living as Neighbours)
- Credit Union Foundation Australia
- Daughters of Our Lady of the Sacred Heart Overseas Aid Fund
- Diaspora Action Australia
- Diplomacy Training Program
- Door of Hope Australia Inc.
- Edmund Rice Foundation (Australia)
- EDO NSW
- Engineers without Borders
- Every Home Global Concern
- Fairtrade Australia New Zealand
- Family Planning New South Wales
- Food Water Shelter
- Foresight (Overseas Aid and Prevention of Blindness)
- Fred Hollows Foundation, The
- Global Development Group
- Global Mission Partners
- Good Shepherd Services
- Grameen Foundation Australia
- Habitat for Humanity Australia
- Hagar Australia
- HealthServe Australia
- Hope Global
- Hunger Project Australia, The
- International Children's Care (Australia)
- International Christian Aid and Relief Enterprises

- International Needs Australia
- International Nepal Fellowship (Aust) Ltd
- International RiverFoundation
- International Women's Development Agency
- Interplast Australia & New Zealand
- Islamic Relief Australia
- KTF (Kokoda Track Foundation)
- Kyeema Foundation
- Lasallian Foundation
- Leprosy Mission Australia, The
- Live & Learn Environmental Education
- Love Mercy Foundation
- Mahboba's Promise Australia
- Marie Stopes International Australia
- Marist Mission Centre
- Mary MacKillop International
- Mary Ward International Australia
- Mercy Works Ltd.
- Mission World Aid Inc.
- MIT Group Foundation*
- Motivation Australia
- MSC Mission Office
- Murdoch Children's Research Institute*
- Muslim Aid Australia*
- Nusa Tenggara Association Inc.
- Oaktree Foundation
- Opportunity International Australia
- Oro Community Development Project Inc.
- Oxfam Australia
- Palmera Projects
- Partners in Aid
- Partners Relief and Development Australia
- People with Disability Australia
- PLAN International Australia
- Quaker Service Australia
- RedR Australia
- Reledev Australia
- RESULTS International (Australia)
- Royal Australian and New Zealand College of Ophthalmologists
- Royal Australasian College of Surgeons
- Salesian Missions
- Salvation Army (NSW Property Trust)
- Save the Children Australia
- Service Fellowship International Inc.
- School for Life Foundation
- SeeBeyondBorders
- Sight For All
- So They Can
- Sport Matters
- Surf Aid International
- Tamils Rehabilitation Organisation Australia
- TEAR Australia
- Transform Aid International (incorporating Baptist World Aid)
- UNICEF Australia
- Union Aid Abroad-APHEDA
- UnitingWorld
- University of Cape Town Australian Trust
- Volunteers in Community Engagement (VOICE)
- WaterAid Australia
- World Education Australia
- World Vision Australia
- WWF-Australia
- YWAM Medical Ships*

Affiliate Members:

- Australian Federation of AIDS Organisations**
- Australian National University – School of Archaeology and Anthropology, College of Arts and Social Sciences
- Deakin University – Alfred Deakin Research Institute
- La Trobe University – Institute of Human Security and Social Change
- Murdoch University – School of Management and Governance
- Refugee Council of Australia
- RMIT – Global Cities Research Institute
- Royal Institute for Deaf and Blind Children
- Transparency International Australia**
- University of Melbourne – School of Social and Political Sciences
- University of New South Wales- International**
- University of Queensland – Institute for Social Science Research
- University of Sydney – Office of Global Engagement
- University of the Sunshine Coast – International Projects Group
- University of Technology, Sydney – Institute for Sustainable Futures
- Vision 2020
- University of Western Australia – School of Social Sciences
- Western Sydney University – School of Social Sciences and Psychology**

* Denotes Interim Full Member

** Denotes Interim Affiliate Member