

# Immigration Detention in South Africa and Australia: The Best Interests of the Child?

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## 1. Background

With an estimated 49 million forcibly displaced children globally and approximately 330,000 in immigration detention, child immigration detention remains one of the most contentious areas of contemporary migration governance, raising profound questions about balancing state sovereignty, border control, and the universality of children's rights.<sup>1</sup> Central to this debate is the best interests of the child principle, articulated in Article 3(1) of the United Nations (UN) Convention on the Rights of the Child (CRC), which requires that the best interests of the child be a primary consideration in *all actions* concerning children.<sup>2</sup> Article 37(b) further prohibits the unlawful or arbitrary detention of children, and mandates that detention only be used as a measure of last resort and for the shortest appropriate period.<sup>3</sup> However, despite near-universal ratification of the CRC, at least 80 countries have laws and policies allowing children to be detained; thus, child immigration detention remains a global concern.<sup>4</sup> This abstract examines the legal frameworks and practices of South Africa and Australia, two jurisdictions that have adopted markedly divergent approaches to immigration detention, evaluates their compliance with international child rights standards, and proposes reforms to align domestic policy and practice with these standards.

## 2. Conceptual and Normative International Legal Framework

The CRC establishes a comprehensive framework for the protection of migrant children, recognising their heightened vulnerability and the need for child-sensitive procedures. The Committee on the Rights of the Child has repeatedly affirmed that immigration detention is never in the best interests of the child and that alternatives to detention (ATDs) must be prioritised. General Comment No. 6 (2005) and Joint General Comment No. 4/23 (2017) emphasise that children should not be criminalised for migration-related reasons and that states must adopt rights-based, non-custodial immigration reception systems.<sup>5</sup> These standards provide the normative benchmark against which domestic practices must be assessed.

## 3. South Africa: A Rights-Based Framework Undermined by Implementation Gaps

South Africa's constitutional architecture explicitly protects children's rights. Section 28(1)(g) of the Constitution provides that children may be detained, whether for punitive or administrative reasons, only as a measure of last resort and for the shortest appropriate period. Additionally, they must be detained in child-appropriate conditions suitable to their age.<sup>6</sup> Moreover, Section 28(2) of the Constitution echoes the 'best interest of the child principle' as articulated in the CRC by stating that 'a

<sup>1</sup> United Nations Task Force on Children Deprived of Liberty, 'Advocacy Brief - End Immigration Detention of Children' (unicef.org, February 2024) <<https://www.unicef.org/media/151371/file/Advocacy%20Brief%20End%20Child%20Immigration%20Detention%20.pdf>> accessed 07 January 2026

<sup>2</sup> United Nations General Assembly (UNGA), 'Convention on the Rights of the Child' Resolution 44/25 (ohchr.org, 20 November 1989) <<https://www.ohchr.org/sites/default/files/crc.pdf>> accessed 25 July 2024

<sup>3</sup> *ibid*

<sup>4</sup> C Hunt, 'Immigration detention: no safe form for children' (sydney.edu.au, 16 April 2025) <<https://www.sydney.edu.au/news-opinion/news/2025/04/16/immigration-detention--no-safe-forms-for-children--research-show.html#:~:text=%E2%80%9COur%20findings%20are%20a%20clarion,ongoing%20global%20public%20health%20crisis>> accessed 07 January 2026

<sup>5</sup> United Nations Committee on the Rights of the Child, 'General Comment No.6 (2005) Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (refworld.org, 01 September 2005) <<https://www.refworld.org/legal/general/crc/2005/en/38046>> accessed 03 January 2026; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Committee on the Rights of the Child, 'Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return' (digitallibrary.un.org, 16 November 2017) <<https://digitallibrary.un.org/record/1323015?v=pdf>> accessed 20 June 2025

<sup>6</sup> Government of the Republic of South Africa, 'Constitution of the Republic of South Africa, Act 108 of 1996' (gov.za, 04 February 1997) <<https://www.gov.za/sites/default/files/images/a108-96.pdf>> accessed 10 September 2024

child's best interests are of paramount importance in every matter concerning the child.' The Constitutional Court has consistently affirmed the centrality of the best interests principle, most notably in *S v M* (2007) and *Centre for Child Law and Another v Minister of Home Affairs and Others* (2005), the latter addressing the detention of migrant children at Lindela Repatriation Centre and deportation of unaccompanied minors without allowing for legal representation.<sup>7</sup> While the legal framework is robust, persistent implementation failures undermine its effectiveness.<sup>8</sup> Reports from civil society organisations and oversight bodies frequently document the routine detention of undocumented minors alongside unrelated adults; inadequate age assessment procedures leading to misclassification of children as adults; limited access to legal representation and guardianship for unaccompanied minors; poor conditions at Lindela, including overcrowding, insufficient healthcare, and lack of education or psychosocial support.<sup>9</sup> These systemic shortcomings reflect broader institutional challenges within the Department of Home Affairs and other government departments, including capacity constraints, weak oversight, and a securitised administrative culture.<sup>10</sup> Although South Africa's courts have intervened to curb rights violations, judicial remedies have not fully translated into structural reform. The gap between constitutional expectation and administrative practice thus remains a central tension in the South African context.

#### 4. Australia: A Security-Oriented Model in Tension with International Standards

Australia, the only liberal democracy in the world without a Bill of Rights, represents one of the most securitised immigration detention regimes in the world.<sup>11</sup> The Migration Act 1958 mandates the detention of all 'unlawful non-citizens', and provides for potential indefinite detention.<sup>12</sup> This regime of mandatory detention applies equally to children, which was found to meet constitutional muster by the Australian High Court, noting the automatic detention of children as a (non-punitive) incident of immigration control.<sup>13</sup> The 'best interest of the child principle' is recognised, but only as *secondary* to immigration control.<sup>14</sup> Offshore processing arrangements on Nauru and Manus Island (Papua New Guinea) have entrenched a deterrence-based model that has drawn sustained criticism from UN treaty bodies, the United Nations High Commissioner for Refugees (UNHCR), and civil society.<sup>15</sup> Article 37(b) of the CRC prohibits arbitrary detention, yet Australia's mandatory detention framework has been repeatedly found incompatible with this obligation.<sup>16</sup> The UN Human Rights Committee and the Committee on the Rights of the Child have expressed concern over: prolonged and indefinite detention of children; exposure to violence, self-harm, and inadequate healthcare; the psychological harm caused

<sup>7</sup> *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50 (T) ([app.jutastatevolve.co.za](http://app.jutastatevolve.co.za), 18 September 2004) <[https://app.jutastatevolve.co.za/preview/1\\_y2005v6SApg50](https://app.jutastatevolve.co.za/preview/1_y2005v6SApg50)> accessed 19 May 2025; *S v M* (CCT 53/06) [2007] ZACC 18 ([saflii.org](http://www.saflii.org), 26 September 2007) <<https://www.saflii.org/za/cases/ZACC/2007/18.pdf>> accessed 07 January 2026

<sup>8</sup> MC Van Hout, J Wessels, '#Foreigners Must Go versus 'in favorem libertatis': Human rights violations and procedural irregularities in South African immigration detention law' ([tandfonline.com](http://tandfonline.com), 2023) <<https://doi.org/10.1080/14754835.2023.2170709>> accessed 23 April 2023

<sup>9</sup> ibid; W Binford and others, 'Report on Enforcing the Rights of Children in Migration' ([mdpi.com](http://mdpi.com), 19 October 2023) <<https://doi.org/10.3390/laws12050085>> accessed 07 January 2026

<sup>10</sup> Van Hout, Wessels (2023) (n8)

<sup>11</sup> Australian Human Rights Commission (AuHRC), 'Ten common questions about a human rights act for Australia', ([humanrights.gov.au](http://humanrights.gov.au), 2009) <[https://humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA\\_questions.pdf](https://humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA_questions.pdf)> accessed 27 February 2024; Global Detention Project (GDP), 'Immigration Detention in Australia: Turning Arbitrary Detention into a Global Brand' ([globaldetentionproject.org](http://globaldetentionproject.org), February 2022) <<https://www.globaldetentionproject.org/countries/asia-pacific/australia>> accessed 17 April 2023

<sup>12</sup> Commonwealth Consolidated Acts, 'Migration Act 1958 (Cth)' ([austlii.edu.au](http://austlii.edu.au), 1958) <[https://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol\\_act/ma1958118](https://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/ma1958118)> accessed 05 November 2024

<sup>13</sup> *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) HCA 49 ([cdn.hcourt.gov.au](http://cdn.hcourt.gov.au), 07 October 2004) <[https://cdn.hcourt.gov.au/assets/publications/judgments/2004/Re%20Woolley;%20Ex%20p%20Applicants%20M276-2003%20\[2004\]%20HCA%2049.pdf](https://cdn.hcourt.gov.au/assets/publications/judgments/2004/Re%20Woolley;%20Ex%20p%20Applicants%20M276-2003%20[2004]%20HCA%2049.pdf)> accessed 07 November 2024

<sup>14</sup> Australian Human Rights Commission (AuHRC), 'Ms BK, Ms CO and Mr DE on behalf of themselves and their families v Commonwealth of Australia (Department of Home Affairs)' ([humanrights.gov.au](http://humanrights.gov.au), 2018) <<https://humanrights.gov.au/resource-hub/by-resource-type/publications/ms-bk-ms-co-and-mr-de-behalf-themselves-and-their>> accessed 06 November 2025

<sup>15</sup> J Barnes, 'Suffering to Save Lives: Torture, Cruelty, and Moral Disengagement in Australia's Offshore Detention Centres' ([academic.oup.com](http://academic.oup.com), December 2022) <<https://doi.org/10.1093/jrs/feac041>> accessed 15 August 2025

<sup>16</sup> Binford (2023) (n9); United Nations Committee on the Rights of the Child, 'Concluding observations on the combined fifth and sixth periodic reports of Australia' ([docs.un.org](http://docs.un.org), 01 November 2019) <<https://docs.un.org/en/CRC/C/AUS/CO/5-6>> accessed 07 January 2026

by detention environments; and the absence of a statutory best interests test in migration decision-making.<sup>17</sup> The High Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) briefly unsettled the legal foundations of indefinite detention by holding that detention without a realistic prospect of removal was unconstitutional.<sup>18</sup> However, subsequent jurisprudence has reaffirmed the constitutional validity of prolonged detention when removal remains legally possible, even if it is practically remote.<sup>19</sup> This judicial trajectory reinforces the dominance of executive power in migration control and limits the scope for rights-based challenges.

### 5. Recommendations Towards Rights-Centred Reform

Addressing the systemic failures in both countries requires a reorientation of policy, practice, and political will towards a genuinely child-centred approach to minors on the move. While South Africa's legal framework is normatively aligned with the CRC, implementation deficits undermine the effectiveness of legislative protection. The country should focus on further strengthening procedural safeguards and ensuring that existing legal standards are meaningfully implemented. This includes the development of interdepartmental coordination mechanisms that bring together immigration authorities, social services and the judiciary to ensure that best-interest determinations are conducted in every case. In line with international best practices, the country should invest in ATDs, supported by adequate funding and oversight, including the integration of migrant children into national child protection systems, family-based care options such as foster care, community-based care arrangements, supervised independent living, and group homes.<sup>20</sup> Conversely, although Australia has provided for community detention and bridging visa arrangements in its legislation, these mechanisms remain discretionary and are not grounded in a statutory presumption against the detention of children, therefore structurally incompatible with the CRC's prohibition on arbitrary detention.<sup>21</sup> The repeal of the Migration Act's mandatory detention provisions would represent a critical first step toward compliance with international law. In the interim, the country should introduce statutory time limits on detention and establish independent judicial oversight for all detention decisions involving children. At a broader level, both states must embrace a shift from securitised control to protection. This involves institutionalising child impact assessments at every stage of immigration detention decision-making, ensuring the potential consequences for children are systematically evaluated. Both should also move toward ratifying and implementing the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (2014), thereby strengthening accountability and enabling individual complaints to be considered by the UN Committee on the Rights of the Child.<sup>22</sup>

### 6. Conclusion

The principles articulated in Articles 3(1) and 37(b) of the CRC are unambiguous. Both South Africa and Australia illustrate how political priorities and securitised narratives often overshadow these legal commitments. Realising the best interests of the child in the context of migration requires states to view child protection not as a secondary consideration but as a fundamental obligation. Until this transformation occurs, the detention of children for immigration purposes will remain one of the most persistent and troubling contradictions in international human rights law.

<sup>17</sup> UNCRC (2019) (n14); United Nations (UN) Human Rights Committee (HRC), 'Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2749/2016' (ohchr.org, 23 January 2025) <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F142%2FD%2F2749%2F2016&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F142%2FD%2F2749%2F2016&Lang=en)> accessed 17 June 2025

<sup>18</sup> *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) HCA 37 (jade.io, 28 November 2023) <<https://jade.io/article/1055542?at.h1=%25EF%2582%25A7%2509NZYQ+v+Minister+for+Immigration%25C+Citizenship+and+Multicultural+Affairs+%255B2023%255D+HCA+37>> accessed 7 November 2024

<sup>19</sup> *CZA19 v Commonwealth of Australia; DBD24 v Minister for Immigration and Multicultural Affairs* [2025] HCA 8 (jade.io, 02 April 2025) <<https://jade.io/article/1126917>> accessed 30 May 2025

<sup>20</sup> United Nations General Assembly, 'Ending immigration detention of children and providing adequate care and reception for them' (docs.un.org, 20 July 2020) <<https://docs.un.org/en/a/75/183>> accessed 07 January 2026

<sup>21</sup> Refugee Council of Australia, 'Australia's detention policies' (refugeecouncil.org.au, 20 May 2020) <<https://www.refugeecouncil.org.au/detention-policies/5/>> accessed 07 January 2026

<sup>22</sup> United Nations General Assembly, 'Optional Protocol to the Convention on the Rights of the Child on a communications procedure' (ohchr.org, 19 December 2011) <[https://www.ohchr.org/sites/default/files/CTC\\_4-11d.pdf](https://www.ohchr.org/sites/default/files/CTC_4-11d.pdf)> accessed 07 January 2026