

The Nauru Dilemma

Paul Ronalds

Abstract

The scale and complexity of global forced displacement has created enormous humanitarian, social, economic and political challenges across the globe. The Australian Government responded by putting in place a range of policies designed to deter people from seeking asylum in Australia through irregular maritime migration. A core feature of these policies is the highly contentious practice of offshore or 'regional' processing of asylum seekers in Nauru and Papua New Guinea. From August 2013 to October 2015, Save the Children was contracted by the Australian Government to provide welfare, education and recreation services to asylum seekers in Nauru. This paper explores the dilemmas facing organisations engaged in refugee issues using Save the Children's experience in relation to Nauru as a case study. It argues that without a clearly articulated decision-making framework based on a realistic view about what can be achieved, and underpinned by a pragmatic, but ultimately principled, ethical position, the daunting humanitarian conundrums faced in such circumstances will overwhelm even the best intentioned humanitarian.

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Introduction

Save the Children is one of the world's oldest international non-government organisations. It was formed nearly 100 years ago in England by a visionary woman, Eglantyne Jebb.

Eglantyne Jebb was outraged by the thousands of children who were starving in Eastern Europe in the aftermath of WW1. And she was determined to do something practical about it. Despite opposition from people who objected to assisting the children of their former enemies, Eglantyne raised funds to buy life-saving food.

But she did not stop there.

Eglantyne wanted to build a worldwide movement dedicated to the protection and support of children. She penned five core principles that later formed the basis for the *Convention on the Rights of the Child*.

Since that time, Save the Children has grown and now operates in more than 120 countries. In 2015, it served more than 62 million people.

Working with people forced to flee their homes is a core part of Save the Children's mandate. Thousands of Save the Children staff currently support Syrian refugees in the Za'atari Refugee Camp in Jordan; the Domiz Refugee Camp in the Kurdistan Region of Iraq; and throughout Lebanon. In East Africa, Save the Children has been working with displaced persons and refugees across Kenya, Ethiopia and Somalia. We support refugees fleeing to Europe in Greece and Sicily. We operate a rescue boat in the Mediterranean.

Closer to home, we work with refugees in Rakhine state in Myanmar, in border camps in Thailand, and in Indonesia.

In Australia, we help to integrate humanitarian entrants into their local communities. Under a sub-contract with the Red Cross, we provide support to unaccompanied minors held in mainland 'alternative places of detention'.¹

And of course, from August 2013 to October 2015, Save the Children was contracted by the Australian Government to provide welfare, education and recreation services to asylum seekers in Nauru – asylum seekers who had arrived in Australia by boat, but who were sent to Nauru for offshore processing under a deal first entered into by the Coalition Government in 2001 and then revived under the Labor Government in 2012.

We also pioneered employment, education and other support services when the first refugees were recognised and released into the Nauru community in 2014.

As a result, we are one of the few organisations in the world that is involved in providing support to asylum seekers and refugees across multiple source, transit and destination countries.

This places us squarely in the midst of one of the most politically-charged and ethically-fraught areas of international humanitarian practice.

As the number of refugees has grown, so too has anti-immigrant sentiment.

In Australia, we have Pauline Hanson. In the US, they have Donald Trump and his wall to keep out Mexicans. Across Europe we have seen the rise of nationalist, anti-immigrant parties. Populist politicians promising simple solutions to one of the world's most difficult set of problems. The war on terror and growing fears of Muslim fundamentalism adds yet another layer of complexity.

This paper explores the dilemmas facing organisations engaged in refugee issues.

¹ Under Australian immigration laws, people who are not Australian citizens and do not have a valid visa are to be detained, regardless of circumstances, until they are granted a visa or leave the country. This policy was introduced in 1992 and has been maintained by successive governments. At times children have been detained in facilities such as hotels, hospitals and in foster care arrangements. These are known as 'alternative places of detention'. Current government policy has seen children being transferred to community housing subject to a variety of conditions and reporting obligations, often referred to as 'community detention'.

It begins by highlighting the ethical challenge at the heart of all complex humanitarian work before outlining how Save the Children sought to navigate these complexities in the case of its work with refugees and asylum seekers on Nauru.

Ultimately, the operational contexts in which organisations like Save the Children work are too varied and complex to develop hard and fast rules for engagement.

However, our experience on Nauru demonstrates the importance of a clearly articulated decision-making framework based on a realistic view about what can be achieved and underpinned by a pragmatic, but ultimately principled, ethical position.

Without such a framework, the daunting humanitarian conundrums we face will overwhelm even the best intentioned humanitarian.

Consequentialist versus categorical ethics in humanitarian action

One of my favourite humanitarian thinkers is Dr Hugo Slim. His work has a particular focus on the ethics of war, the protection of civilians and the morality and practice of humanitarian action.

He seeks to bring practical ethical thinking to bear on the difficult moral and operational challenges of humanitarian action.

For a topic like refugee policy, he is a good place to start.

In 2005, Slim gave two speeches to the Australian Council for International Development's Humanitarian Forum in Canberra, one called *On Idealism*, and a second, called *On Realism*.²

The titles of these two speeches highlight the constant tension that is inherent in humanitarian work.

² Slim, H (2005) "[Idealism and Realism in Humanitarian Action](#)", Centre for Humanitarian Dialogue, Geneva and ACFID Canberra.

On the one hand, many of us believe in certain fundamental rights that should be enjoyed by all people at all times. Such thinking is at the heart of the Universal Declaration on Human Rights.

On the other, we are also deeply aware of the messiness of human relations, competing agendas, different perspectives and values, and the need for pragmatism to achieve real outcomes.

This tension mirrors the broader debate between consequentialist ethical thinking and categorical ethical thinking.

Briefly, consequentialists like Jeremy Bentham, famous for his work on utilitarianism, believe that decisions should be made on the basis of the expected outcome or consequences and the best outcomes are those that result in the best overall consequences, or the greatest happiness for the greatest number.

Categorical or duty-based ethical thinking, often associated with the German Philosopher Emmanuel Kant, however, argues that some kinds of actions are inherently right or wrong, irrespective of the consequences.

Slim suggests that humanitarians should not seek to avoid this tension but embrace it.

In *On Realism*, he says “a passion for ideals alone will never make a good humanitarian worker. She or he also needs a gritty realism to guide them as they try to bring humanitarian influence and resources to bear in very worldly situations which are usually not ideal at all”.³

This tension between idealism and pragmatism is a constant feature of humanitarian work, including in some of our sector’s founding documents.

³ Ibid, p.3

In the 1990s, a group of the largest humanitarian NGOs, including Save the Children and Red Cross, came together to develop a Code of Conduct.⁴ Although initially an attempt to “put their house in order,” following the moral quandaries of Rwanda and other humanitarian crises, the development of the Code (and the associated Humanitarian Charter and the Sphere Minimum Standards in Disaster Response) came to represent an explicit recommitment to humanitarian values at a time of increasing involvement in complex emergencies.

The first article of the Code states:

The Humanitarian imperative comes first—the right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries. As members of the international community, we recognise our obligation to provide humanitarian assistance wherever it is needed.

This emphasis on the imperative of humanitarian action was controversial from the start.

According to Slim, “Their determination to revitalize humanitarianism with a sense of ethical imperative began a moral shift toward a categorical insistence on humanitarian aid and protection that affirmed it as a supreme duty as much as a right.”⁵

Some people argued that it represented a form of humanitarian fundamentalism that was completely at odds with the operational complexity of many humanitarian crises.

⁴ Formally known as the Code of Conduct for International Red Cross and Red Crescent Movement and NGOs in Disaster Relief. A number of Save the Children entities are signatory to the Code.

⁵ Slim, H. (2006), 'Claiming a humanitarian imperative: NGOs and the cultivation of humanitarian duty', in J Mertus & J Helsing (eds), *Human rights and conflict: exploring the links between rights, law and peacebuilding*, United States Institute for Peace, Washington DC, at p.162.

Such critics point to situations like Rwanda where humanitarian assistance distributed in camps in neighbouring Democratic Republic of Congo allowed the Hutus to re-arm and resume hostilities, prolonging the conflict.⁶

Or the potential for humanitarian aid to be co-opted in the war on terror as a “force multiplier”.⁷

On the other hand, it was argued that the messiness of the operating context was exactly the reason such a humanitarian imperative was required – it was precisely in those situations that the wayward nature of human beings could not be trusted to do the right thing.

The case of Nauru

So what is the relevance of all of this moral reasoning to the situation on Nauru?

At its heart, much of the political debate about Australia’s deterrence-based refugee policies can be viewed as a contest between categorical and consequentialist ethical arguments (although much also represents a politically convenient failure of policy imagination).

Successive Australian Governments have adopted a consequentialist approach and argued that it is ethical for a few thousand refugees to be left in limbo on Manus and Nauru if it acts as a deterrent to people traffickers and prevents people dying at sea.

⁶ In July 1994, the Rwandan Patriotic Front, formed from Tutsi refugees based in Uganda, invaded Rwanda to put a stop to the genocide committed by Hutus. The Hutus fled to Goma, in the Democratic Republic of Congo, where they received aid. This aid allowed the ex-FAR (the former Rwandan military responsible for the genocide) to rearm and resume hostilities. Eventually, after repeated warnings, in November 1996, the Rwandan Tutsi army invaded Goma and closed the camps, killing several thousand Hutus in the process. Critics, such as Fiona Terry, view this as one of the international community’s worst failures to ensure that aid does ‘no harm’. See Terry, F. (2002) *Condemned to Repeat: The Paradox of Humanitarian Action*, a book that examines the way in which NGOs provided aid to Rwandan refugee camps in Zaire and Tanzania from 1994-96.

⁷ US Secretary of State, Colin Powell, September 2001.

Others argue that whatever the consequences, it is inherently wrong to detain people fleeing persecution on Manus Island and Nauru without a future.

Or, as Kant would say, you should always treat people as ends in themselves, never as means to an end.

Interestingly, the use of these different approaches to moral reasoning is not aligned with simple political labels like progressive or conservative.

For example, some 'progressive' refugee advocates have used the same consequentialist thinking as successive Labor and Coalition Governments to argue that Save the Children should have withdrawn from Nauru once it became aware that human rights abuses were occurring.

Their argument against non-government organisations, including Save the Children, is that by ameliorating the humanitarian impact of the harsh conditions on Nauru, the system is less likely to collapse. Or, to frame it in consequentialist terms, ending off-shore detention on Nauru outweighs the increased suffering experienced by those on Nauru during the period until political change is achieved.

Aside from the question of the inherent logic of their argument, I was surprised at the selectivity of this analysis - the presence of doctors and other health workers in this setting seems to be uncontroversial while the role of educators and welfare workers was attacked.

Of course, this only highlights the dilemma we faced when then Immigration Minister Tony Burke asked Save the Children to provide welfare, recreational and education services to children on Nauru in 2013.

Resolving the Nauru dilemma

How did we resolve this dilemma?

I had been CEO for only a few weeks when we were asked to provide services on Nauru and my Chairman asked me to provide a clear recommendation to the Board on whether or not we should proceed.

For many years prior to my appointment, Save the Children had maintained a strong objection to the Australian Government's mandatory detention of asylum seekers, in particular children, which had been introduced by the Keating Government in 1992.

In our view, the policy of successive governments was a clear violation of international human rights law, particularly the Convention on the Rights of the Child.

As the Australian Human Rights Commission has concluded, the mandatory detention of children has "profound negative impacts on the mental and emotional health of children which result from prolonged detention".⁸

The Australian Human Rights Commission has expressed particular concern about the regime governing the transfer of children to Nauru, including that Australia did not give paramountcy to the best interests of the child in decisions to transfer children, in contravention of Article 3(1) of the CRC.⁹

We were also not naïve to the operational difficulty of providing services to such a highly vulnerable group in such a politically charged environment.

Nauru is located hundreds of kilometres from any other land, more than four hours flying time from Brisbane. Although for a time, the richest country in the world on a per-capita basis, it now has very basic social and economic infrastructure.

⁸ Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention*, 2014, p. 29, available at: <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children>

⁹ Ibid, pp. 192-93

The centre of the island, where the regional processing centres are located, was once a phosphate mine. Granite tors, left behind after the phosphate was removed, were simply bulldozed to create a flat stony surface that baked in the tropical sun.

Supporting a work force of hundreds of people in such an unforgiving location would not be simple.

On the other hand, our refugee work in source countries provides us with first-hand knowledge of the situation of many asylum seekers; we had the capacity to scale up quickly in a difficult operating environment; and we believed that the Government would be open to our advice on ways to ameliorate the impact of their policies on Nauru.

Given the restrictions placed on accessing Nauru and the regional processing centre, we also believed it unlikely that we could access asylum seekers on Nauru any other way.

Consequently, management recommended Save the Children accept the Government's invitation to provide services on the basis that:

- a. In the lead up to a Federal election, Save the Children's decision whether or not to provide services would not influence the Federal Government's policy or public support for it. We could not therefore be complicit in the Federal Government's breach of international law, consistent with the 'do no harm principle';
- b. We were confident that we could provide high quality services to very vulnerable children, consistent with the Red Cross Code of Conduct's humanitarian imperative;
- c. By participating we may be able to influence operational procedures on Nauru to ameliorate the impact of the Federal Government's policies on children. We therefore believed that accepting the contract was in the 'best interests of children', as required by the Convention on the Rights of the Child.

This decision was made on condition that Save the Children clearly retained our right to publically advocate on a policy that we viewed as a direct breach of the Convention on the Rights of the Child.¹⁰

I personally communicated this condition to the Secretary of the Department, Martin Bowles, Minister Burke and subsequently to Minister Morrison's Chief of Staff when some months later, the Coalition Government took power.

Of course, the right to advocate is also enshrined in Federal Law, pursuant to the *Freedom to Advocate Act*.

As you can see, we adopted a mix of consequentialist and categorical moral reasoning, or, in Hugo Slim's language, idealism and realism.

So how did it play out?

Throughout 2013 and into 2014, we maintained a constructive relationship with the Department of Immigration. Many recommendations to improve conditions or outcomes for asylum seekers were accepted and, over time, implemented.

Perhaps the most significant success was in relation to education facilities. Initially, teaching was conducted in large non-air-conditioned tents in the regional processing centre where temperatures were recorded at up to 50 degrees Celsius.

Over time, we worked with the Department and other service providers to secure hard-walled, air-conditioned structures in the administrative compound to house the 'school'.

Each morning, a bus would pick up the children from the processing centre and transport them to 'school' in the administrative compound. The improved physical conditions and high quality teachers resulted in significantly improved attendance levels and education outcomes.

¹⁰ Save the Children Australia Board discussion on 25 July 2013

By 2015, the 'school' was enjoying attendance rates in excess of 90%, reflecting the desire of parents to see their children's education continue.

Towards the end of Save the Children's contract in 2015, the Department decided to integrate all refugee and asylum seeker children into Nauruan schools. While such a policy had some merit, it was executed without the support required to make it a success.

The result has been plummeting school attendance, to around 15%.

During this time, we purposely limited our public advocacy, using the media sparingly, to make our opposition to the Government's policy known, but otherwise giving preference to private advocacy.

Despite this, our relationship with the Department and the Minister deteriorated in the second half of 2014. There were a number of reasons for this deterioration.

Despite pressure from the Department of Immigration not to, Save the Children made a submission and provided testimony to The Forgotten Children: National Inquiry into Children in Immigration Detention, conducted by the Australian Human Rights Commission in June 2014.¹¹

Submissions to the Commission's Inquiry were also made by a number of current and former Save the Children personnel. One anonymous submission was allegedly made by a number of "current and former" Save the Children personnel. This anonymous submission disclosed confidential information.

The Australian press also began reporting allegations of sexual abuse of refugees on Nauru around this time.

¹¹ Save the Children Australia, Submission to The Forgotten Children: National Inquiry into Children in Immigration Detention, June 2014, available at: https://www.savethechildren.org.au/_data/assets/pdf_file/0013/34240/Submission-to-AHRC-NationalInquiry-Children-in-Immigration-Detention.pdf

During this time, we were involved in drawn out negotiations with the Department of Immigration over longer-term contracts for the provision of services to both asylum seekers in the processing centre, as well as refugees in the Nauruan community.

These negotiations included extensive discussions over a 'communication protocol' whereby the Department would coordinate any service provider responses to media requests and, effectively, the Minister would be the 'sole voice' on such issues.

The Government also sought a performance bond from Save the Children worth millions of dollars, which they would seek to retain in the event of a breach of contract.¹²

Together, we saw these clauses as effectively constituting a gag clause and refused.

There were also intense negotiations over contract price and a number of clauses that sought to give the Government the right to act unilaterally - to terminate without breach, to withhold or offset payments or to extend for multiple periods – that we believed would reduce our independence.¹³

¹² See <http://www.smh.com.au/federal-politics/political-news/buying-silence-immigration-asked-charities-for-multimilliondollar-bond-20151030-gkmspv.html>

¹³ As documented by the Australian National Audit Office in its Audit Report on *Offshore Processing Centres in Nauru and Papua New Guinea Procurement of Garrison Support and Welfare Services*, Save the Children submitted four pricing revisions in response to requests from the Department. However, in May 2014, "Save the Children wrote to DIBP declining an invitation to submit a further contract change proposal in the terms the department had requested. Save the Children advised that the reductions proposed by the department (which were in the order of 20 to 50 per cent) would change the service offering fundamentally and expose the department, Save the Children, asylum seekers and employees to an unacceptable level of risk". Save the Children correspondence to the Department dated 30 May 2014 stated:

"As an organisation whose mission is to protect and promote the rights and safety of children and their families, and for the reasons outlined above, SCA [Save the Children] cannot in good conscience submit a revised contract change proposal as requested. SCA remains committed to working with the Department to ensure the best possible conditions and services for asylum seeker children and families in Nauru. We would welcome the opportunity to further discuss our contract change proposal and identify additional cost reductions which do not compromise our ability to safeguard the physical, mental and emotional wellbeing of the people in our care."

According to the Government, other service providers, including the Red Cross and Connect Settlement Services agreed to such clauses.¹⁴

Furthermore, the *Australian Border Force Act* was introduced by the Government in February 2015, and passed by the Senate with the support of the Labor opposition, in May 2015. This legislation contained secrecy provisions which restricted the recording or disclosure of protected information, defined broadly. A breach of the Act may be subject to criminal prosecution, including 2 years in jail.¹⁵

Then, late on **2 October 2014**, the Department of Immigration and Border Protection issued Save the Children Australia with a notice pursuant to our contract requiring us to remove ten Save the Children personnel from the provision of services on Nauru.

Later that evening, Save the Children's Director of Public Affairs rang me to say that a journalist from Sydney's *The Daily Telegraph* had just called seeking a comment on a story to run on the front page of the next day's newspaper about the removal of staff. While not known to us at that time, the following day the *Telegraph* would lead with a story under the headline 'Truth Overboard' and carry allegations that Save the Children staff had fabricated stories of abuse on Nauru, and even coached asylum seekers to self-harm.

The journalist responsible had a reputation as being 'on the drip' from the Government and had a habit of being in receipt of intentional 'leaks'. In this case it appeared that he had not only been briefed on the allegations, but had received a leaked copy of a so called intelligence report into Save the Children prepared for the Government by Wilson Security. We did not have knowledge of the report at this point (and despite our requests, we wouldn't see this document until it was read into Hansard by the

¹⁴ The Red Cross has denied ever making such a payment: <http://www.theage.com.au/federal-politics/political-news/not-muzzled-red-cross-denies-it-paid-immigration-multimilliondollar-bond-20151104-gkql4f.html>

¹⁵ Various operational issues also caused friction. There were a number of data breaches, a result of the lack of IT infrastructure on the Island. There were also increasing friction, over time, between our employees and DIBP/other service providers in relation to client welfare issues.

Australian Greens' Senator Hanson-Young months later under the cover of parliamentary privilege).

The next day, then Minister for Immigration, Scott Morrison, convened a press conference regarding allegations relating to the conduct and behaviour of staff employed by contracted service providers. At the same press conference, he announced that ten Save the Children staff had been required to leave Nauru.

Minister Morrison also announced an inquiry into the allegations of abuse in the regional processing centre, and of the conduct of service providers.¹⁶ The inquiry would be headed by Mr Philip Moss.

The implications were clear.

Until that time, we had prioritised private over public advocacy. However, we could not allow our public reputation to be denigrated in this way. We responded with a press conference of our own, strongly rebutting the implicit and explicit allegations made by the Minister.

Shortly afterwards, we received notice that the government had “changed its mind” and one of our two contracts relating to Nauru would be immediately put out to tender.

The second contract, to provide services in the regional processing centre, would continue until the Government handed over our responsibilities to Transfield/Broadspectrum in October 2015.

The findings of the Moss Review that Minister Morrison announced on 3 October 2014 were finally made public on 20 March 2015. You may recall it was released suddenly, on a Friday afternoon and on the same day as Malcolm Fraser died. The Government was heavily criticised for the timing of its release.

¹⁶ Terms of Reference for the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, October 2014, available at: <http://www.border.gov.au/about/reportspublications/reviews-inquiries/offshore-regional-processing/nauru-centre/allegations-conditions/circumstances>

It found “no evidence that Save the Children staff on Nauru encouraged self-harm, fabricated abuse allegations or orchestrated protests”.

Recommendation 9 of the Moss Review required the Department to review its decision to remove Save the Children staff from Nauru. This led to the Department commissioning Professor Christopher Doogan AM to undertake an independent review of its decision.

The ‘Doogan Review’, as it became known, was released by the government late on Friday 15 January 2016. Again the Government was heavily criticised for the timing of the release of the report. Professor Doogan found that the decision to issue the notice to remove staff was not justified and recommended compensation be paid to Save the Children and its staff.

Justice in the end for Save the Children but sadly little has changed for the children and their families we worked with on Nauru.¹⁷

Instances of actual or attempted self-harm, deteriorating mental health and allegations of abuse continue to be made public.

Conclusion: learning the lessons of the Nauru dilemma

So what did we learn?

There is no doubt that the overarching policy of mandatory offshore immigration detention and inherent limitations of the context reduced our ability to fully realise Save the Children’s mission to mitigate the impacts of offshore processing.

But this is the case in most humanitarian situations.

Almost always, the power of political actors is much stronger than the interests of humanitarian agencies. Agencies are never “as independent as they would like” and to get things done you have to make hard choices and form relationships which you would

¹⁷ At the time of writing this discussion paper, the claim by former Save the Children staff is unresolved and they remain prohibited from travelling to Nauru.

rather avoid". You will almost always be seen "as taking sides" because of who you work with and where the money comes from – what Slim describes as the "Code of Reality for humanitarian agencies".¹⁸

To navigate such situations, a clear decision making framework and underlying philosophical position must be adopted at the outset to guide your work, assisting all those involved to respond to the numerous day to day decisions that have to be made.

Having my Board and staff clear on what we were trying to achieve on Nauru was critical. Unwavering Board support during the Nauru crisis gave me enormous confidence as Chief Executive Officer. I have no doubt that this Board support was founded on a common understanding of why we were on Nauru, and what we were seeking to achieve.

Our position was also clearly communicated to our staff, stakeholders and to the Australian Government.

Understanding what we were seeking to achieve on Nauru and approaching our work in a principled way gave us the high moral ground when we were attacked in the media.

I think our mix of private and public advocacy resulted in some important wins.

We achieved significant improvements for the benefits of children and their families while we adopted a strategy that relied predominantly on private advocacy.

Later, our first-hand experience working in the processing centre gave us real legitimacy and added weight to our public advocacy.

This public advocacy, combined with private discussions, continued once we exited Nauru, most recently in the lead up to the Obama Summit on refugees in the margins of the UN General Assembly in New York in September 2016.

¹⁸ Slim (2005, p.15). The conflict in South Sudan is a good example of this – only a political settlement can resolve the situation but in the meantime aid agencies navigate a range of difficult ethical challenges to deliver food aid and prevent people from starving.

I am confident that our work played a part in the recently announced re-settlement deal with the United States which may finally provide refugees on Nauru with a pathway towards a safe and prosperous future.

Our work on Nauru has also been good for brand awareness and our reputation.

While we lost some donors, for both deciding to work on Nauru and for criticising the Government's policy, donor support has been overwhelmingly positive.

However, the ultimate test for us is whether we believe we have 'acted in the best interests of children', in accordance with clause 3 of the Convention on the Rights of the Child.

In making the decision to work on Nauru, the answer to this question is an overwhelming yes.