Soul searching is needed on child detention
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THE High Court's decision last Thursday to reject Sister Brigid Arthur's case for releasing four young Afghan asylum seekers suggests that Australia has lost its way.

These boys, who have been in detention since February 2010, are only some of the 427 unaccompanied minors still in detention. In her finding, Justice Susan Crennan concluded the continued detention of these children was lawful. She said this even as she agreed there was "strong and uncontested evidence" that they were at serious risk of psychological and other harm while in detention.

The evidence is clear. The first under-aged detainee was mentally "stable" in February 2010, but by August 26 had starved himself for four days. The second plaintiff, who also began his life in Australia in a stable condition, had by August 24 attempted suicide. Plaintiff three had starved himself and on August 30 was referred to the Royal Children's Hospital, where it was determined he was "becoming clinically depressed". The fourth boy also starved himself for five days.

Advertisement: Story continues below Much can, and should, be said about the importance of upholding the rule of law. On this matter at least the High Court has been consistent.

In 2004 the court held unanimously that the Commonwealth government had the constitutional and statutory authority to detain children mandatorily - if necessary for years. The High Court found that the Migration Act provided for mandatory detention and referred to the detention of "unlawful non-citizens". That definition made no exception for children. At that time the court also closed its eyes to the abundant evidence that the detention experience itself was compounding the traumas of children who were already damaged. In this way, detention itself is an abuse of those children.

By 2005, evidence of the injurious effect of child detention persuaded the Howard government to amend the Migration Act. Section 4AA now makes detention of a minor lawful only as the last resort.

Consequently, in 2011 Australia's incarceration of children still involves a grave assault on well-established and clear legal principles. For a society that endlessly proclaims our commitment to the rule of law, we appear to have little sense of what it actually entails.

As Sister Brigid's representation to the High Court made clear, she and others were prepared to care for the children. If that was deemed to be insufficient, Australia as a well-resourced modern nation-state has the means to care and protect children adequately outside detention centres.

The continued incarceration of these children is clearly at odds with the legal provision in the Migration Act that detaining children is only to be the last resort.

Second, the detention of vulnerable children and young people involves a significant breach of Australia's obligations under the UN Convention on the Rights of the Child. When Australia became a signatory to the UN Convention, we agreed to uphold children's rights as defined in that convention. Imprisoning children, especially when they are asylum seekers who have not been charged with any offence, is disrespectful of their humanity and contravenes international law.

Third, the detention of these children breaches Australian laws designed to protect children from abuse. Apart from the evidence of the harm done to children in detention, and the mountains of expert research documenting the adverse effect of incarceration on child health and development, the 2004 Human Rights Commission Inquiry into the Detention of Children documented horrific cases of abuse. One such case reads:
April 1, 2002: Child attempts to hang himself with a bed sheet on playground equipment.

April 12: Child's mother becomes very upset and is taken to hospital for observations and assessment … Child is recorded as saying "he wanted to kill himself because his mother doesn't eat and she cries all the time … We came for support and it seems we're being tortured."

April 19: Child attempts to hang himself from playground equipment.

The decision to not release those children, in the full knowledge their incarceration will cause them injury, renders the federal government open to the charge of child abuse. Failing to protect a child in state care breaches the jurisdictional standards government requires of parents and guardians.

Indeed, if such harm was caused by a parent they would immediately be subject to child protection intervention and possible prosecution.

While these legal questions are clearly important, the moral questions are equally important. Cruelty and compassion draw on our capacity to imagine the effect of our actions on another. Deliberately inflicting suffering indicates we are not able to put ourselves in their place, a capacity that makes us human. It requires the ability to recognise their equal dignity and in the case of children the ability to accept or reject a duty of care.

That duty of care has been breached by governments and now again by the highest court in the land. We may well conclude that our society is very sick indeed.

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