



**Australian
Aid** 

**ASEAN-Australia
Counter Trafficking**

Freedom of movement for victims of trafficking

**Law, policy and practice
in the ASEAN region**

About the authors

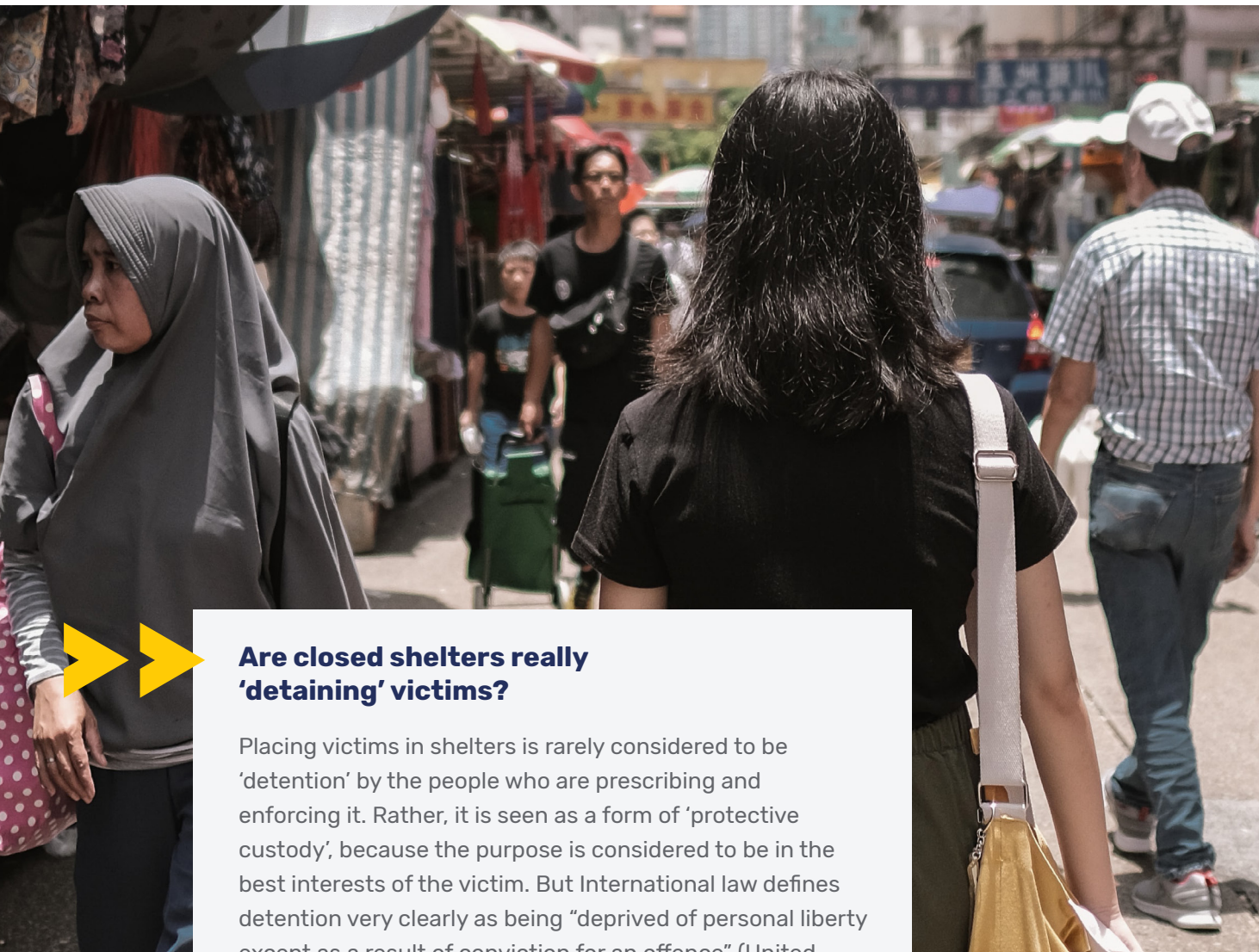
This information note was written by Dr Anne Gallagher and Dr Marika McAdam. It is based on a 2018 study of shelter practices conducted in the ASEAN region with the support of the Australian Government. That work was informed by a previous study undertaken in 2010. Thanks are due to officials and victim support workers in ASEAN countries who generously shared their experiences and insight.



The issue

Throughout the ASEAN region, victims of trafficking often find themselves in some form of detention. For example, foreign victims may be placed in **immigration detention**, typically because they are misidentified as undocumented migrants. Immigration detention can also be the fate of identified victims of trafficking being returned home because other facilities are not available. Victims of trafficking can be detained for **committing criminal acts** that relate to their trafficking: for example, being involved in work that may be illegal such as prostitution, or illegal acts such as drug smuggling or begging.

And, in some countries, identified victims of trafficking are placed in **shelters** from which they are not permitted to leave – or are only granted very limited rights to freedom of movement (e.g. accompanied excursions) at the discretion of shelter staff. In such situations, victims are also often required to surrender their personal possessions, including money, documents and telephones and even submit to a wide range of rules governing their conduct, with punishments even imposed for non-compliance. This form of detention, which is the focus of this information note, raises serious questions around its *legality*, as well as its *necessity*.



Are closed shelters really 'detaining' victims?

Placing victims in shelters is rarely considered to be 'detention' by the people who are prescribing and enforcing it. Rather, it is seen as a form of 'protective custody', because the purpose is considered to be in the best interests of the victim. But International law defines detention very clearly as being "deprived of personal liberty except as a result of conviction for an offence" (United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by GA Res 43/173 of 9 December 1988). The term 'detention' can therefore cover a wide range of situations in which victims of trafficking are held, whether in prisons, police lock-ups, immigration detention facilities, child welfare facilities, hospitals, or shelters. Understanding whether a situation is one of 'detention' is important because national and international rules place obligations on States with regard to when detention is acceptable and what measures are required protect the rights of the detained person.



Photographer: Jo Aigner

Escape

In the context of human trafficking, the term ‘escape’ is used to refer to situations in which victims break free from their traffickers. But victims may also attempt to escape from the shelters they are subsequently placed into. Some shelters feature gates, guards, high walls and fences, locked doors and barbed wire. They may be geographically isolated and restrict contact with the outside world by restricted or monitored access to telephones, phone calls and visitors. Some victims of trafficking have gone to extreme lengths to reclaim their freedom by attempting to overpower shelter staff, setting fire to property in hopes of being cast out, harming themselves in a bid to be transferred to hospital, attempting to enlist help from passing members of the public, or even injuring themselves trying to traverse physical barriers. These examples underline the reality – and the dangers – of shelter detention.

Why do Government officials and others detain victims of trafficking in shelters?

Government officials and others offer the following reasons to justify their detention of adult victims of trafficking:

The need to protect victims

- The detention of victims of trafficking in shelters is most often justified as a measure to protect them from further harm, especially from those who have exploited them. The vulnerability of victims to intimidation and reprisals from their exploiters – as well as to re-trafficking – is real. However it is rare that decisions about shelter detention are made on the basis of an individual assessment that establishes credible risk.

The need to support victims



- Shelter detention is sometimes justified as the best way – or even the only way – to meet the urgent assistance needs of victims. Without being compelled to stay in a place where such assistance is available, it is argued that they will miss out on much needed support, from medical assistance to legal advice. Many countries have been able to provide victims with assistance and support without detaining them and it is important to inquire why this approach is considered impossible.

Because victims lack legal status

- In some countries, the law does not allow victims of trafficking who are migrants in irregular situations to receive even temporary residence permits. The fact that they are in violation of immigration laws is sometimes used as a reason to keep foreign victims within government-run or government-approved shelters. Further, closed shelters are said to facilitate the bilateral processes (including family tracing and nationality confirmation) that need to take place before a victim can be repatriated and reintegrated into their community in the country of origin.

The need to ensure victims are able to participate in investigations and prosecutions

- Without the testimony of victims, it is difficult – and sometimes impossible – to secure successful prosecution of traffickers. But victims often have little incentive to cooperate in proceedings; many would prefer to go home, or to find better work. Accordingly, justification for detaining victims in is offered on the basis of two grounds: first, it protects them from being intimidated into not cooperating with the authorities. And second, it ensures their availability to participate as witnesses in trafficking cases. Because criminal justice processes are often very long, victim-witnesses can be detained for months, or even years, on this basis, with little to no income or contact with family and no guarantee of receiving any benefit as a result of proceedings against traffickers.

Does detention of adult victims achieve its purposes?

While each of the arguments set out above may have value in particular situations, they are not persuasive as generally applicable policies. In fact, it was found that in some cases, the opposite effect to the one intended may result. For example, rather than protecting victims, confining them in closed shelters can make them more vulnerable to harm: not least by replicating the experience of being trafficked, with the associated psychological harm. Rather than facilitating the delivery of support, placing victims in shelters against their will can operate to deny them opportunities to recover and move on. And while ‘captive victims’ may indeed be more accessible to the investigator or prosecutor, the deprivation of liberty may weaken their testimony and reduce their resolve and willingness to cooperate. Finally, it is important to note the impact on victim support workers within shelters who are required to act as de facto ‘guards’ and are held responsible for ‘escapes’.

What does the law say?

While the practice still occurs, detention of victims of trafficking in shelters and other facilities is becoming less common. This reflects a growing understanding that such an approach is not in conformity with the letter and spirit of the legal framework that has developed around trafficking in persons. For an important example, see the extract from the ASEAN Trafficking Convention below, which explicitly prohibits detention of trafficked persons.

Certainly, routine detention violates a number of international law principles (including the right to freedom of movement and the prohibition on arbitrary detention) and, without specific, individualised justification, is unlawful. See further, the box on the following page.

ASEAN Trafficking Convention

Each Party shall not unreasonably hold persons who have been identified by its competent authorities as victims of trafficking in persons in detention or in prison, prior to, during or after civil, criminal, or administrative proceedings for trafficking in persons. **Article 14(9)**



When Does Victim Detention Become a Violation of Human Rights?

The risk of detention being characterized as unlawful or arbitrary is high if it can be shown that such detention meets one or more of the following criteria:

- The detention is not specifically provided for in law or is imposed contrary to law;
- The detention is provided for – or imposed in – a discriminatory manner (e.g. only applicable to women and girls / children);
- The detention is imposed for a prolonged, unspecified or indefinite period;
- The detention is unjust, unpredictable and / or disproportionate;
- The detention is not subject to judicial or administrative review that can confirm its legality and its continued necessity in the circumstances, allowing the possibility for release where no grounds for its continuation exist.

Photographer: Ario Adityo

Source: OHCHR, Commentary to the UN Trafficking Principles and Guidelines, pp 135-136.

Gender and shelter detention

The practice of victim detention in the ASEAN region is highly gendered. The overwhelming majority of trafficked persons detained in shelters are female. This is at least partly because women and girls are considered to need the protection provided by closed shelters. Another reason is that women and girls are more likely to be identified as victims of trafficking through official channels and therefore more likely to enter both formal and informal protection systems compared to men and boys. Male victims are more likely to be misidentified as 'illegal' migrants, transferred to immigration detention facilities and eventually deported. As a result, they may not have access to the services and support they are entitled to as victims of trafficking. While some ASEAN countries have established shelter facilities for men and boys, these are much fewer, and also usually subject to different rules that permit much greater freedom of movement. International and regional law clearly prohibits sex-based discrimination. The practice of routine detention for women and girls (and the denial of adequate protection and assistance services for men and boys), is inherently discriminatory and, therefore unlawful.

Where shelter services are not tailored to individual needs, interests and aptitudes, the result may be that gender norms are imposed on people accommodated within them. In one country it was noted that teenaged girls are often given choices of activities that include sewing and praying and not provided opportunities to play sport, while adult women have been 'forbidden' to smoke cigarettes owing to expectations imposed about how women should and should not behave.

Justification

Assumptions

Factors fuelling assumptions

Strategies to challenge assumptions and reduce detention

“Traffickers will harm or threaten victims”

- Victims who are permitted to move freely will be injured, killed or dissuaded from testifying against traffickers.
- Victims, especially women and girls, need the safety of shelters.

- Incidents (real and rumoured) of traffickers harming victims outside of shelters; of sheltered victims being influenced by traffickers or their associates.

- Law enforcement and shelter staff work closely with the victim to assess, manage, mitigate credible and specific risks.
- Law enforcement and shelter staff are trained to undertake risk assessment and to participate in risk management / mitigation.

“Victims need to be protected from themselves”

- Victims who are permitted to move freely will make poor decisions: run away and return to traffickers and/or exploitative forms or conditions of work.

- Incidents (real and rumoured) of victims attempting to ‘escape’ from closed shelters.
- Disproportionate focus on female victims and sexual exploitation.
- Paternalistic and patriarchal gender norms and expectations about what is in victim’s best interest.

- Criminal justice and victim support agencies affirm and uphold the principle that victims should never be prosecuted or punished for acts committed in the course of their trafficking.
- Criminal justice and victim support agencies, including shelter staff have the knowledge and capacity to understand the trafficking dynamic and to appreciate the right of adult victims to make decisions – even bad ones – for themselves.

“Society needs to be protected from victims of trafficking”

- Victims who can move freely will disappear into the community and potentially engage in criminal and/or amoral activities.

- Subjective value judgements, particularly about gender norms and expectations.
- Conflation of migration control agenda with trafficking response.

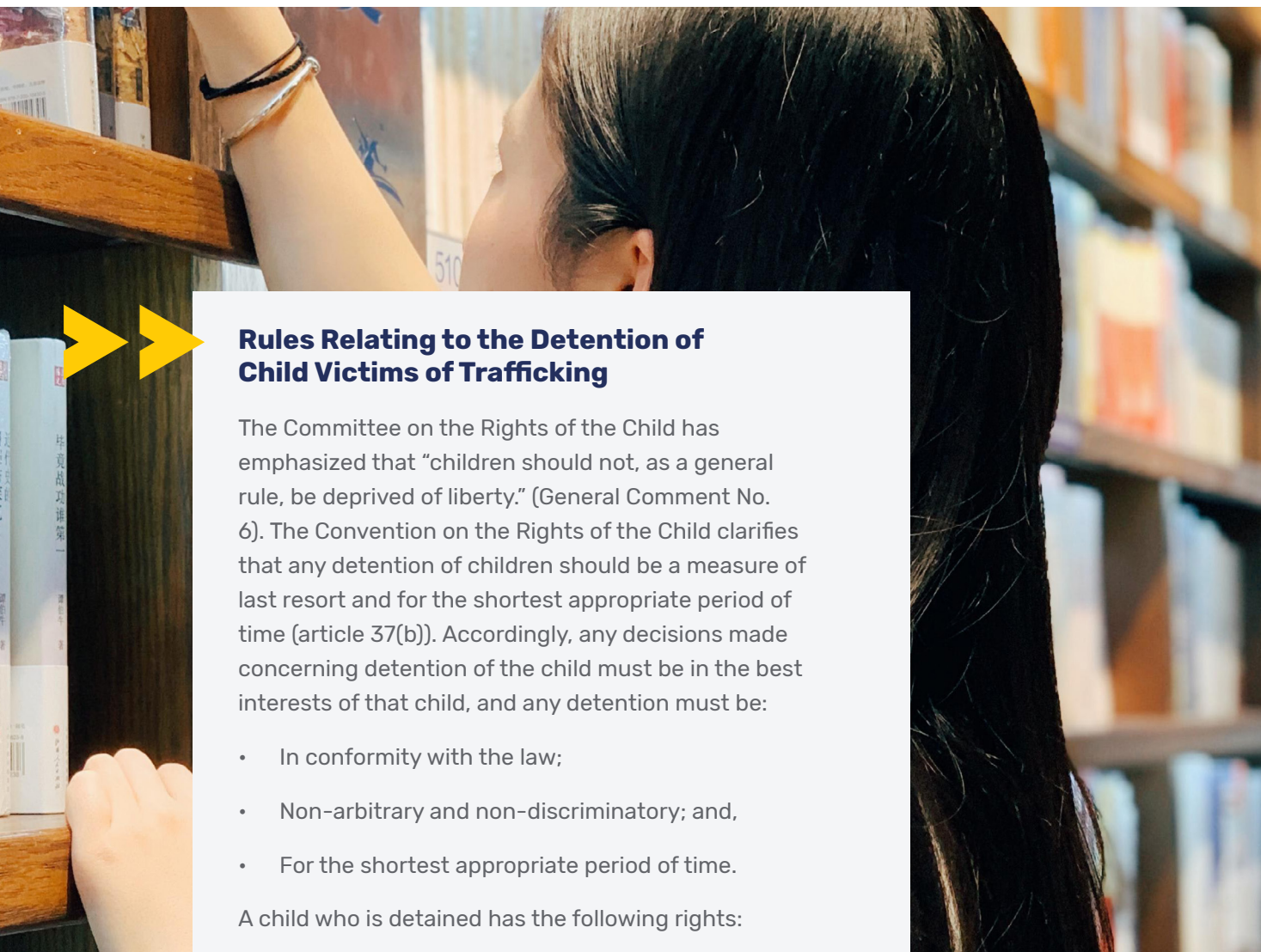
- Availability of reflection periods and other means foreign victims can stay and work legally, even for a limited time.
- Case management systems for individual victims, supported by appropriate social services with workers who are trained and incentivized to work with victims of trafficking. Strong understanding of victim-centred and gender-sensitive approaches.

The special issue of child victims

When considering the issue of shelter detention, it is important to recognize some fundamental differences between child and adult victims of trafficking. Children lack legal agency and may be much more vulnerable to harm. A consideration of the child's best interests may lead to a decision that she or he should (or should not) be confined to a shelter. Laws around child detention are very strict and it is essential that these be closely followed in cases where a decision is made that a child is to be placed in a shelter. If the obligations and rights set out below are not adhered to, the detention of the child will be unlawful.

Photographer: Remi Yuan / Unsplash





Rules Relating to the Detention of Child Victims of Trafficking

The Committee on the Rights of the Child has emphasized that “children should not, as a general rule, be deprived of liberty.” (General Comment No. 6). The Convention on the Rights of the Child clarifies that any detention of children should be a measure of last resort and for the shortest appropriate period of time (article 37(b)). Accordingly, any decisions made concerning detention of the child must be in the best interests of that child, and any detention must be:

- In conformity with the law;
- Non-arbitrary and non-discriminatory; and,
- For the shortest appropriate period of time.

A child who is detained has the following rights:

- To be separated from adults unless it is considered in the child’s best interests not to be;
- To maintain contact with his or her family through correspondence and visits (barring exceptional circumstances, such as participation of the family in the trafficking situation);
- To prompt access to legal and other appropriate assistance, including support for physical and psychological recovery, and social reintegration in an environment that fosters his or her health, self-respect and dignity;
- To challenge the legality of the deprivation of his or her liberty before a court or another competent, independent and impartial authority, and to receive a prompt decision.

Photographer: Cxxiohi / Unsplash

Eliminating shelter detention and improving the situation of victims in shelters:

The ASEAN Convention makes clear the shared commitment of ASEAN Member States to a rights-based and victim-centred response to trafficking –which includes avoiding detention of victims wherever possible. The following opportunities and strategies are offered to advance that shared commitment.

Obtain written consent of victims upon entry to a shelter and at regular intervals thereafter:

- All adult victims should explicitly give consent to entering a shelter. That consent should be based on full information about why they need to be there; how long they can expect to stay; and the conditions under which they will be sheltered. 'Full' information means that relevant information should not be withheld from victims, including about their rights. Information should be conveyed in a way that victims understand, taking into consideration the individual's language, age and any disabilities that he or she may have. Victims may withdraw their consent at any time and shelter authorities must regularly check whether a victim continues to consent to remain in the shelter.

Keep accurate and detailed records for each individual victim in a shelter:

- Written records should be kept to accurately record the initial consent of victims to enter a shelter; what possessions have been held for safekeeping or confiscated; when and why; any retraction of the victim's consent to remain in the shelter; the reasons why he or she continues to be kept in the shelter; how and when those reasons were decided and by whom; and how, when and how often those decisions were explained to the victims and by whom. Such records should be kept securely in accordance with national data protection laws and requirements.

Give victims time to decide what they want to do:

- An increasing number of countries are granting victims a reflection and recovery period, during which time they are provided with accommodation and assistance that will help them decide on their options, including whether they will cooperate with criminal justice agencies in the prosecution of their exploiters. As the purpose of this reflection and recovery period is to make victims feel safe and supported, detention has no place in such initiatives.

Strictly apply due process for shelter-related decisions:

- All decisions to detain a victim of trafficking must be made on the basis of law, in a manner that is not discriminatory on any ground. Determinations must be made for each individual, not applied on a routine or group basis. Where no such due process procedures exist they should be introduced, and relevant decision-makers made aware of them.

Unlink criminal justice objectives from decisions concerning victim shelter:

- Consider ways of achieving evidentiary statements and testimonies from victims without detaining them for prolonged periods in shelter facilities. Criminal justice practitioners should be made aware of opportunities that exist in criminal procedure law, including use of pre-trial testimonies, video recordings of testimonies, or testimony via video-link. Legislators should consider legislating for such options if they do not already exist. Mechanisms should be introduced to ensure that victims are kept informed about the progress of any case they are involved in, and can request information any time.

Expedite trafficking cases to reduce burden on sheltered victims:

- Some countries have made efforts reduce the duration of victims' stay in closed shelters by using special courts and specially trained judges and prosecutors to expedite trafficking cases. Lessons can be learned from these efforts and by sensitising investigators, prosecutors and judges about the detrimental impact that delays have on sheltered victims.

Introduce shelter management policies that reduce burdens on shelter staff:

- The primary role of shelter staff – who are very often social workers – is to provide support to victims. The trust and rapport that staff must build with victims is impeded when they are required to enforce restrictions on movement. Further, this de facto ‘policing’ role places undue burdens on staff and potentially exposes them to risk of harm. Shelter policies should be reviewed and revised to protect shelter social workers from having to act against the interests of victims and to clarify that their role is to provide them with support.

Explore alternatives to shelter through community-based care:

- Where possible, victims should be given opportunities to receive care outside the shelter system. Service providers should explore ways of accommodating them in safe and appropriate accommodation including rented houses or apartments. Barriers victims may face in accessing assistance services within the community should be identified and addressed.

Appoint a guardian for all child victims:

- All child victims of trafficking (or presumed victims) should immediately be appointed a competent and well-trained guardian who is responsible for protecting that child’s best interests. If the child is detained in a shelter, it is the responsibility of the guardian (who should be an independent and impartial person appointed by the competent national authority) to ensure that this is (and continues to be) in the child’s best interests, and that the relevant procedural and other rights are fully respected.

Separate migration management objectives from shelter-related decisions:

- To ensure that foreign victims of trafficking are not subject to immigration-related detention, temporary residence permits should be available and issued to eligible victims without delay or undue bureaucracy.

Invest in victim support services that promote alternatives to shelter detention:

- State, non-state and other stakeholders who partner with and / or provide funding to shelters, should give priority to those service providers who promote community-based and open shelter models of victim care. Donors and others are responsible for ensuring that their actions do not incentivise shelter detention in any way.