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30 May 2014

The President
Australian Human Rights Commission
National Inquiry into Children in Immigration Detention 2014
GPO Box 5218
Sydney NSW 2001

Dear President,

**National Inquiry into Children in Immigration Detention 2014**

I am writing on behalf of the Human Rights Committee of the Law Society of NSW ("Committee") which is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly.

The Committee welcomes the opportunity to provide submissions to the Australian Human Rights Commission's National Inquiry into Children in Immigration Detention 2014. In this letter the Committee considers whether the laws, policies and practices relating to children in immigration detention, including in the Republic of Nauru, meet Australia's international human rights obligations. The Committee's submissions are as follows:

1) That the Act be amended to set out minimum standards of treatment for children in immigration detention in compliance with the *Convention on the Rights of the Child* ("CRC");

2) The Act be amended to reflect that detention for a child ceases to be lawful if:
   a) those minimum standards are not met; or
   b) if cannot be appropriately justified; or
   c) It is arbitrary, lacks predictability or causes the minor harm;

3) No child (including unaccompanied minors) should be transferred to Nauru; and

4) Those children already Nauru should be transferred back to Australia.

These submissions are set out in more detail below.
1. The Commission's 2004 report on Children in Immigration Detention

The Commission's 2004 report on children in immigration detention, *A last resort? National Inquiry into Children in Immigration Detention*¹ set out the Commission's findings that:

1. Australia's immigration detention laws, as administered by the Commonwealth, and applied to unauthorised arrival children, create a detention system that is fundamentally inconsistent with the Convention on the Rights of the Child (CRC). In particular, Australia's mandatory detention system fails to ensure that:

   a. Detention is a measure of last resort, for the shortest appropriate period of time and subject to effective independent review (CRC, Article 37(b), (d))
   b. The best interests of the child are a primary consideration in all actions concerning children (CRC, Article 3(1))
   c. Children are treated with humanity and respect for their inherent dignity (CRC, Article 37(c))
   d. Children seeking asylum receive appropriate assistance (CRC, Article 22(1)) to enjoy, 'to the maximum extent possible' their right to development (CRC, Article 6(2)) and their right to live in 'an environment which fosters the health, self respect and dignity' of children in order to ensure recovery from past torture and trauma (CRC, Article 39).

2. Children in immigration detention for long periods of time are at high risk of serious mental harm. The Commonwealth's failure to implement the repeated recommendations by mental health professionals that certain children be removed from the detention environment with their parents, amounted to cruel, inhumane and degrading treatment of those children in detention.

3. At various times between 1999 and 2002, children in immigration detention were not in a position to fully enjoy the right to be protected from all forms of physical or mental violence (CRC, Article 19(1)); the right to enjoy the highest attainable standard of physical and mental health (CRC, Article 24(1)); the right of children with disabilities to 'enjoy a full and decent life, in conditions which ensure dignity, promote self reliance and facilitate the child's active participation in the community (CRC, Article 23(1)); the right to appropriate education on the basis of equal opportunity (CRC, article 28(1)) and the right of unaccompanied children to receive special protection and assistance to ensure the enjoyment of all rights under the CRC (CRC, Article 20(1)).²

The 2004 Report made recommendations that Australia's immigration detention laws be amended to comply with the CRC; that an independent guardian be appointed for unaccompanied children and that there be a minimum standard of treatment for children in immigration detention codified in legislation.³

The Committee notes that none of the recommendations made in the 2004 Report have been implemented.

¹The report is available online:

² Note 1 at pp 5-6
³ Note 1 at pp 6-7
2. Australia's law and policy on children and immigration detention

The Migration Act 1958 (Cth) (the "Act") provides for a mandatory duty to detain an unlawful non-citizen\(^4\) until such time that he or she is either removed from Australia; dealt with under the regional processing provisions; deported or granted a visa\(^5\). The High Court in \textit{Al Kateb}\(^6\) found that an asylum seeker could continue to be held in immigration detention indefinitely. In \textit{Re Woolley}\(^7\) the Court unanimously held that the same detention powers applied equally to children and in \textit{Behroz}\(^8\) held that detention remains lawful despite harsh conditions. With respect to minors there is clear tension between the mandatory detention provisions and s 4AA of the Act, which affirms the principle set out in Article 37(b) of the CRC that a minor shall only be detained as a measure of last resort.

The Department’s own policy guidelines, the \textit{Procedures Advice Manual} ("PAM3") echoes the principle towards minors under its key immigration detention values and guiding principles\(^9\) stating that a minor is to be detained only as a measure of last resort in order to progress the prompt resolution of the minor’s immigration status and that the priority for placement will be the least restrictive form of accommodation appropriate for the shortest practicable time. The PAM3 identifies that\(^10\):

- All minors will be identified for residence determination as soon as they are detained;
- The best interests of the child should be a primary consideration in the placement of the minor and the minor’s immediate family;
- The family unit must be preserved where possible and appropriate;
- Minors will have access to health, welfare and support services;
- Minors will have access to compulsory education, meaningful recreational activities and opportunities for excursions;
- Minors will have reasonable access to friends/supporters whenever practicable.

The Committee is not aware if, and to what extent, these guidelines are followed in practice but notes that as at 30 April 2014 there were 833 children in some form of enclosed immigration detention\(^11\).

The Committee submits, consistent with the recommendations in the 2004 Report, that:

1) Australia's immigration detention laws be amended to ensure compliance with the CRC by setting out minimum standards of treatment for children in immigration detention;

\(^4\) Section 189 of the Act
\(^5\) Section 196 of the Act
\(^6\) \textit{Al Kateb} v \textit{Godwin} (2004) 208 ALR 124
\(^7\) \textit{Re Woolley; Ex parte Applicants M276/2003 by their next friend GS} [2004] HCA 49
\(^8\) \textit{Behroz} v \textit{Secretary of the Department of Immigration and Multicultural and Indigenous Affairs} (2004) 208 ALR 271
\(^9\) See PAM3 Detention Service Manual
\(^10\) Note 9
2) it is also appropriate, in the Committees' view, that the Act be amended to reflect that detention for a child, including in an "Alternative Place of Detention", ceases to be lawful if:

   a) minimum standards are not met; or
   
   b) it is for a period that cannot be appropriately justified; or
   
   c) it is arbitrary; inappropriate; lacks predictability or causes the minor significant harm (including mental or developmental).

3. Transfer of minors to regional processing countries and best interest of child

The Regional Processing provisions in the Act provide for a mandatory requirement to take a detainee\(^ {12} \) who meets the definition of an unauthorised maritime arrival\(^ {13} \), as soon as reasonably practicable, to a regional processing country\(^ {14} \). The only condition in designating a country as a regional processing country is that the Minister thinks that it is in the national interest, having regard to whether or not the country has given Australia any assurances to the effect that it will not return a person to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; that the country will make an assessment, or permit an assessment to be made, of whether the person is a refugee and other matters which, in the opinion of the Minister, relates to the national interest\(^ {15} \).

Notably, children are not excluded from regional processing and neither the CRC nor the ICCPR are mandatory considerations under the Act, for either the purpose of designation or taking an unauthorised maritime arrival to a regional processing country. Section 6 of the Immigration (Guardianship of Children) Act 1946 (Cth) ("IGOC Act"), however, appoints the Minister as the guardian of unaccompanied minors. It follows that in his/her capacity as guardian the Minister stands in loco parentis to the child and has a duty to protect the child from harm and to provide maintenance and education and always act in the best interest of the child\(^ {16} \). As North J observed in X v Minister for Immigration and Multicultural Affairs:

The responsibilities of a guardian under s 6 of the Act include the responsibilities which are the subject of the Convention [CRC]. They are responsibilities concerned with according fundamental human rights to children.\(^ {17} \)

The Committee nevertheless understands that a "Best Interest Assessment" is conducted before any child (either accompanied or unaccompanied) is transferred to a regional processing country. The Committee further understands that while the assessment recognises that Australia has an obligation under Article 3 of the CRC to treat the best interest of the child as a primary consideration, it notes the Australian Government's view is that in making the transfer decision, the best interest of children are outweighed by other primary considerations, including the need to

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\(^ {12} \) Section 198AD(1) of the Act
\(^ {13} \) See section 5AA of the Act
\(^ {14} \) See section 198AD(2) of the Act
\(^ {15} \) See section 198AB
\(^ {16} \) Crock and Kenny, 'Rethinking the Guardianship of Refugee Children after the Malaysian Solution' [2012] SydnLawRw 21 at [447]
\(^ {17} \) [1999] FCA 995 at [43]
preserve the integrity of Australia’s migration system and discouraging children from attempting to arrive in Australia by boat.

The Committee appreciates the need to preserve the integrity of the migration system; however, does not consider it appropriate that this end should be achieved through breaches of the CRC and other international obligations. The UN High Commissioner for Refugees (“UNHCR”) monitoring visit to the Republic of Nauru in October 2013\(^\text{18}\) identified that the current policies, conditions and operational approaches at the regional processing centre do not comply with international standards. In particular the UNHCR found the conditions:

a) Constitute arbitrary and mandatory detention under international law;
b) Do not provide a fair, efficient and expeditious system for assessing refugee claims;
c) Do not provide safe and humane conditions of treatment in detention; and
d) Do not provide for adequate and timely solutions for refugees.\(^\text{19}\)

With respect to children the UNHCR found that the harsh and unsuitable environment at the closed centre is particularly inappropriate for the care and support of child asylum seekers. Concern was also raised that children did not have access to adequate education and recreational facilities. The UNHCR ultimately expressed the view that “no child” should be transferred from Australia to Nauru.

In light of the findings by the UNHCR the Committee submits that the transfer of children to Nauru is in breach of the CRC in that:

- It fails to ensure the child such protection and care as is necessary for his or her well-being (Article 3(2));
- It fails to ensure to the maximum extent possible the survival and development of the child (Article 6(2));
- It fails to provide appropriate protection and humanitarian assistance (Article 22(1));
- It fails to ensure that no child is deprived of his or her liberty arbitrarily (Article 37).

It follows, in the Committee’s view, that children should not be sent to Nauru and those children currently detained in the Regional Processing Centre should be transferred back to Australia.

Thank you for the opportunity to provide comments. Any questions can be directed to Vicky Kuek, policy lawyer for the Committee, at victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,

Ros Everett
President


\(^{19}\) Note 18 at p 1