

Children in Detention Submission to Australian Human Rights Commission

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Under the *Migration Act 1958 (Cth) (Migration Act)*, Australian authorities are required to detain all unlawful non-citizens who are in Australia without a valid visa. Immigration officials are authorised by law to detain persons who arrive with a visa and subsequently become unlawful due to their visa being expired or cancelled, as well as persons who arrive without a visa. This authority is by legislative effect of subsection 189(1) of the Act. Over the last ten years or so, the Act made no distinction between the detention of children and adults. As the former minister for immigration Chris Evans stated, the rationale behind immigration detention is the border protection and that as a sovereign country Australia has the right to defend the integrity of its borders and support the integrity of Australia's immigration program¹.

In the last decade especially prior to Rudd Labor government, the detention of children arriving by boat, air or those who over stayed their visa, was mandatory. In this submission we conclude that this mandatory immigration detention of children is inconsistent with Australia's obligations under Human Rights treaties, specifically the *Convention on the Rights of the Child* (CROC). So for the purpose of this submission, the most relevant and important of the treaties that Australia has ratified to be bound by the CROC, some of the articles contained in the *International Covenant on Civil and Political Rights* (ICCPR), and the 1951 *Convention relating to the Status of Refugees* (the refugee convention).

This submission will first briefly outline the background to the issue of children in immigration detention. Subsequently we will argue that Australia has not conformed to the CROC and ICCPR treaty obligations to give children special (and appropriate) treatment in all circumstances. We will then discuss how these obligations have been violated and conclude by reiterating that Australia's policies of mandatory immigration detention of children are not in line with the provisions of CROC and ICCPR.

¹ Chris Evans, 'New Directions in Detention: Restoring Integrity to Australia's Immigration System', (Speech delivered at the Centre for International and Public Law, Australian National University, Canberra, 29 July 2008)

Immigration Detention & Children

In the last decade, children seeking asylum intercepted by Australian Navy, were taken to one of the following immigration detention centres: Woomera, Curtin Immigration Reception and Processing Centre (IRPC), Port Hedland, Christmas Island, Cocos (Keeling) Islands, Baxter, Nauru and Papua New Guinea Regional Processing Centres². According to Department of Immigration and Border Protection (DIBP), as of 31 December 2013, there were 1,028 children in closed immigration detention facilities, and a further 1,637 children in community detention in Australia³.

Australia and International Human Rights Treaties

Australia as a sovereign state has recognised and ratified international treaties in order to participate in the international system of law and maintain its position among the community of nations. In so doing, Australia has agreed to be bound by the scheme of international responsibilities and rights that regulates the actions of sovereign states. Both the Department of Immigration and Border Protection and the Department of Foreign Affairs and Trade (DFAT) recognise and acknowledge Australia's international treaty obligations, as it made clear by various publications from each Department⁴.

In this regard Australia ratified the CROC in 17 Dec 1990⁵, ICCPR in 13 Aug 1980 and the refugee convention in 22 Jan 1954. The ratification of these conventions by Australia is an explicit acceptance to ensure that existing and future laws are applied in a manner that gives proper expression to its treaty obligations and comply with convention provisions in good faith and give effect to such provisions under domestic law⁶.

While Australia hasn't directly incorporated CROC, ICCPR and the Refugee Convention into Australian law in its entirety, certain provisions of those treaties are mirrored in domestic legislation. For example article 1A (2) of Refugee convention is reflected in sections 91 R

² Human Rights and Equal Opportunity Commission, 'A last resort? National Inquiry into Children in Immigration Detention' April 2004, 57

³ Department of Immigration and Border Protection, <<http://www.immi.gov.au/About/Pages/detention/about-immigration-detention.aspx>> at 24 May 2014

⁴ Department of Foreign Affairs and Trade, *Australia and International Treaty Making Information Kit* <<http://www.austlii.edu.au/au/other/dfat/infokit.html#QnA>> at 18 May 2014

⁵ *Convention on the Rights of the Child*, (entered into force in Australia on 16 January 1991)

⁶ HREOC, Above n, 58-64

and 36 of Migration Act. In addition all states of Australia have child protection legislations which in most cases reflects article 19 of CROC; the protection of children from abuse⁷. The *Human Rights and Equal Opportunity Commission Act 1986 (Cth) (HREOC Act)* is another source of human rights protection. *HREOC Act* empowers the Commission to inspect acts, practices and legislations of the Commonwealth for their consistency with human rights. Importantly, Australian common law has confirmed that legislative provisions should be interpreted by courts in a manner that ensures, as far as possible; that they are consistent with the provisions of treaties which Australia is a party⁸.

Children in Immigration Detention and International Law (CROC & ICCPR)

Despite the presence of state and commonwealth legislations, Australia has repeatedly failed to meet its international law and human rights obligations arising from the CROC and ICCPR in regards to asylum seeker children in its jurisdiction. The CROC is an all-inclusive treaty which incorporates most of the provisions of ICCPR, *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, *The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* and *Committee on the Elimination of Racial Discrimination (CERD)*, and is the most widely ratified convention of the United Nations (UN) which only USA & Somalia has not ratified.

Article 22(1) of CROC provides that asylum-seeking and refugee children are entitled to appropriate protection and assistance. Article 9(1) of ICCPR and article 37 of CROC deals with arbitrary detention, while the CROC exclusively and comprehensively addresses the issue of detention of children. Article 37 of the CROC provides that the arrest, detention or imprisonment of a child shall be in conformity with the law, and detention of children must be ‘a measure of last resort’ and ‘for the shortest appropriate period of time’; that children must not be deprived of liberty unlawfully or arbitrarily and that children in detention have the right to be treated with humanity and respect for the inherent dignity of the person⁹. The provisions of Article 37 of the CROC are reiterated in several of the United Nations High

⁷ Joint Standing Committee on Migration, Parliament of the Commonwealth of Australia, *Immigration detention in Australia: A new beginning* (2008) [2.10]

⁸ *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 121 ALR 436 at 441 per Mason J

⁹ Article 37 of *Convention on the Rights of the Child*, (entered into force in Australia on 16 January 1991)

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Commissioner for Refugees (UNHCR) guidelines on refugee children and repeated throughout relevant UN standards on children¹⁰.

Australia interpreted ‘shortest appropriate period of time’ as the period of time in which the legitimate purposes of detention can be met – that is until the detainee is removed from Australia or granted a visa as per s 196 of the *Migration Act*¹¹. Section 196 of Migration Act requires children to remain in detention until they are deported or granted a visa. The government’s insistence on detaining child asylum seekers arises out of a perception that children may “disappear” into the community and will not be available for removal if they are found not to be refugees. The immigration department’s statistics reveal that approximately 90% of children arriving by boat were found to be genuine refugees¹². Proponents of detention of children argue that detention is necessary for health, identity and security checks, and is in the best interests of Australian public interest.

We submit that Australia’s immigration detention law is fundamentally inconsistent with CROC provisions. Article 37, only envisages for detention of children as ‘a measure of last resort while s 189 of Migration Act gives no alternative to the detention of unlawful non-citizen children, making it the first and only resort. The government argues that it is integral and necessary for Australia’s border protection and security¹³. However human rights proponents including the HREOC, the *NSW Commission for Children and Young People*¹⁴ and *Amnesty International* consider immigration detention of children to be arbitrary and the first resort. In addition, the indefinite period of detention adds to the argued violations CROC provisions¹⁵.

As mentioned above, the CROC requires that the detention of children should be for the ‘shortest appropriate period of time’. The HREOC reported that in 2003, ‘children in detention spent an average time of one year, eight months and 11 days behind bars. The

¹⁰ For example, the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (the JDL Rules), The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules)

¹¹ Minister for Immigration and Multicultural and Indigenous Affairs, ‘Border Protection: Children in Detention’ (29 April 2002) <www.minister.immi.gov.au/borders/detention/children_detention.htm> at 24 October 2009.

¹² Human Rights and Equal Opportunity Commission, ‘A last resort? National Inquiry into Children in Immigration Detention’ April 2004, 3

¹³ Joint Standing Committee on Migration, Parliament of the Commonwealth of Australia, *Immigration detention in Australia: A new beginning* (2008)

¹⁴ *Ibid* 176

¹⁵ Amnesty International, *Inquiry, Interview with detainees*, Baxter, December 2002

longest any one child had been held was five years'¹⁶. Extensive and indefinite periods of detention go further to discount arguments that Australia's mandatory detention of children policies are compliant with international law and human rights obligations. This also raises concern regarding violation of articles 6(2), 39, 3(1), and articles 28 and 29 of CROC which deals with the right to development, recovery from past trauma, best interest principle and the right to education respectively. While behind in detention, children were not only deprived of these rights prescribed in international law, but some children became distressed and engaged in or witnessed hunger strikes, spates of self-harm and attempted suicides. Some children stitched their lips¹⁷.

The CROC and ICCPR explicitly prohibit arbitrary and unlawful detention. To this end, many accept Universal Declaration of Human Rights (UDHR) as reflecting customary law; meaning that Australia, is bound by those customary principles. Article 9 of *UDHR* also prohibits arbitrary detention. Therefore, the jurisprudence of the UN *Human Rights Committee* is highly influential, if not authoritative, in relation to Australia's legal obligations. According to UN *Human Rights Committee* (HRC) 'detention will be 'unlawful' unless it is in accordance with established procedures in law'¹⁸. To the critics of Australian immigration law and practices, detention of children without guilt is arbitrary and unlawful. On the other hand, Australian authorities have insisted that the initial detention of children who arrive in Australia without a visa is not unlawful because it is prescribed in the Migration Act and it is "preventive" detention for reasons of public interest and national security. General Comment 8 of HRC emphasises the need for compliance with other provisions of the CROC while detaining children for preventative reasons¹⁹. The loophole in such an argument is that a child would hardly pose a risk to national security, as has never been the case in Australian immigration history²⁰. The other dimension to this point is the decision of High Court in *Kheng Lim* where the High Court found that 'mandatory detention under the Migration Act is only lawful for as long as the detention is 'reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered'. If the immigration detention goes beyond those purposes it will be

¹⁶ Human Rights and Equal Opportunity Commission, 'A last resort? National Inquiry into Children in Immigration Detention' April 2004, 57

¹⁷ *Ibid* 156-159

¹⁸ HRC, *General Comment 8: Right to liberty and security of persons (Art. 9)*, 30 June 1982, paragraph 4

¹⁹ *Ibid*

²⁰ Communication No. 1069/2002, UN Doc CCPR/C/79/D/1069/2002

considered punitive and therefore unlawful under Australia's Constitution'²¹. In this regard under international law detaining children without having considered their individual circumstances, is unlawful. The blanket application of mandatory provisions to detain children who arrive in Australia without a visa means that, as a matter of logic, detention is unlawful under CROC.

In cases of *A v Australia*²², *Baban v Australia*²³, *C v Australia*²⁴ and *Bakhtiyari v Australia*²⁵ the HRC considered whether Australia's mandatory immigration detention complies with its obligation under ICCPR and CROC. In each of the named cases HRC found that Australia had violated the provisions of ICCPR and CROC. In addition the *UN Working Group on Arbitrary Detention* in 2002 stated several concerns regarding Australia's immigration detention overall and detention of children specifically²⁶. However Australia rejected their report in 2002 stating that the report contains factual errors and misrepresents Australia's policies²⁷.

All in all, we believe that international human rights law requires that children are not detained nor deprived of liberty and development, and that the rights of each individual are protected. Current policies of mandatory detention of children asylum seekers do not conform to these requirements. The government has asserted that mandatory detention of children does not breach Article 37 of CROC because there are legitimate, proportionate and non-punitive reasons behind the mandatory detention policy.

The prevailing fact in this submission is that in order to comply with Article 3(1) of the CROC; Australia must ensure that the "best interests of the child" are of primary consideration in all decisions and actions concerning children. While we understand that refugee determination, and health and security checks are lengthy and complex processes, detention of children should not be the first and only option. In our view, Article 37 and 3(1) requires that authorities assess each child on a case-by-case basis before detention is mandated.

²¹ *Chu Kheng Lim v Minister of Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33

²² HRC, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993, 30 April 1997

²³ HRC, *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001, 18 September 2003

²⁴ HRC, *C v Australia*, Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999, 13 November 2002

²⁵ HRC, *Bakhtiyari v Australia*, Communication No 1069/2002, UN Doc CCPR/C/79/D/1069/2002, 6 November 2003

²⁶ Standing Committee of the Executive Committee of UNHCR, *Detention of Asylum-Seekers and Refugees: The Framework, The Problem and Recommended Practice*, EC/49/SC/CRP.13, 4 June 1999, paragraph 8.

²⁷ Minister for Immigration and Multicultural and Indigenous Affairs and Minister for Foreign Affairs, *Government Rejects UN Report on Arbitrary Detention*, Joint Media Release, Parliament House, Canberra, 13 December 2002.

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- *Chu Kheng Lim v Minister of Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33
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Conventions:

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- *Convention on the Rights of the Child*
- *International Covenant on Civil and Political Rights (ICCPR)*,
- *Convention relating to the Status of Refugees 1951*
- *International Covenant on Economic, Social and Cultural Rights (ICESCR)*
- *The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*
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