13 June 2014

Ms Gillian Triggs
President
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001
Australia

By Post and Email:

Our ref 337.23

Dear President

National Inquiry into Children in Immigration Detention 2014

The Inquiry initiated by the Australian Human Rights Commission into children in immigration detention 2014 is to investigate the ways in which life in immigration detention affects the health, well-being and development of children. The Inquiry is to focus on the changes that have been made in the 10 years since the Commission released, 'A last resort? The report of the National Inquiry into Children in Immigration Detention' in 2004.

The width of the scope of the Inquiry as identified from the terms of reference, is quite significant.

- The appropriateness of facilities in which children are detained;
- The impact of the length of detention on children
- 'measures to ensure the safety of children;
- Provision of education, recreation, maternal and infant health services;
- The separation of families across detention facilities in Australia;
- The guardianship of unaccompanied children in detention in Australia;
- Assessments conducted prior to transferring children to be detained in ‘regional processing countries’; and
- Progress that has been made during the 10 years since the Commission's 2004 report: A last resort? National Inquiry into Children in Immigration Detention.

Thus in broad terms, the Inquiry is designed to investigate the way life in immigration detention affects the health, well-being and development of children.
We make this submission in our capacity as a professional body, wishing to express concern over the impact of immigration detention on children and the need for the Commonwealth of Australia to be compliant with its international obligations – more particularly under the Convention on the Rights of the Child.

Article 37(b) of the Convention on the Rights of the Child provides that:

“No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”

In our view, we believe that the Federal Government should consider Australia’s obligations under international treaty law and customary international law and assess the consistency of Australian law and policy with these obligations.

In our view, the ‘principle of last resort’ enunciated in section 4AA of the Migration Act 1958 needs to be implemented more effectively. While the principle may have found recognition repeatedly at a conceptual level, this means nothing without the requisite machinery for its implementation. It is our respectful submission that the minister be given the requisite machinery to implement the principle.

Australia has a system of mandatory immigration detention. This requires that all non-citizens who are in Australia without a valid visa must be detained. This includes children. The majority of children in immigration detention are asylum seekers who arrived on boats – some with family others by themselves. Whether accompanied by parents or not, these children are vulnerable at many levels – psychologically, emotionally and physically. While children unaccompanied by parents are perhaps exposed to a higher degree of insecurity, it is also true that even when accompanied by parents – some of who may lack familiarity with the legal process and the wherewithal to provide a sense of security to their children - the same concerns would prevail. A further concern is the vulnerability of detainees and children in particular, in the legal process. The denial and or unavailability of legal assistance to children is a serious drawback.

The policy of mandatory detention of immigrant children is fundamentally at odds with Australia’s Human Rights obligations. Detention profoundly impacts on children, most notably in a psychological context. Whilst it has to be noted that lengthy detention of children is rare, the major concern in relation to children in detention relates to processing times rather than the conditions in the different on shore detention centres. The movement of children between different centres has drawn concerns as detainees from certain centres and in particular Nauru, are known for the adverse psychological impact they are subjected to. The detention Centre in Nauru is known for its unsatisfactory conditions and transferees demonstrably suffer from psychological issues. The offshore detention policy does not accord with the provisions in the Migration Act 1958. Particularly in relation to children, we submit that community detention be given preference where detention is unavoidable.

The safeguards desired for children in detention must also apply to children born in detention.
Under section 197AB of the *Migration Act 1958*, the minister has the power to make a residence determination which is non-compellable. In exercising the discretion under Section 197AB of the Act, the minister should, in our submission, be guided by the principle of last resort in section 4AA which should be regarded as an entrenched provision in the *Migration Act 1958*. Thus it would be our urgent recommendation that the exercise of ministerial discretion under section 197AB be subject to an Inquiry process to certify that the foreshadowed detention is as a last resort in keeping with the principle enshrined in section 4AA.

We also wish to refer to the powers of the Immigration Ombudsman under the Migration Act. Under part 8 of the *Migration Act 1958*, the Ombudsman has the power to make a recommendation to review the detention of a person who has been in detention for two years. We submit that a new section be introduced under part 8 of the *Migration Act 1958*, requiring in the case of child immigrants that this period of review be six months.

We submit that an affirmative obligation be imposed by legislation upon the minister prior to the exercise of ministerial authority sanctioning the removal of unauthorised Maritime arrivals to a regional processing country, to prevent the transfer of children to locations where they are likely to be detained for more than six months.

Every day spent in detention by a child, is a day in regression. The principle of last resort at present is a mere legislative policy, without an enforcement mechanism that could lend it utility.

Yours faithfully

[Signature]

Michael Fitzgerald
Deputy President