Australian Education Union

Submission to the

Australian Human Rights Commission National Inquiry into Children in Immigration Detention 2014

May 2014

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The Australian Education Union has approximately 190,000 members across Australia and represents teachers and other education workers in primary, secondary and special schools, and the early childhood, TAFE and adult provision sectors.

As an organisation we have a longstanding commitment to action in support of the human rights of refugees and asylum seekers in Australia and off-shore detention centres, including access to public education as a fundamental human right.

We welcome the opportunity to contribute to the national inquiry by the President of the Australian Human Rights Commission [AHRC], Professor Gillian Triggs, into the impact of immigration detention in closed detention facilities on the health, well-being and development of children under 18 years, and the extent to which laws, policies and practices relating to children in detention meet Australia's international human rights obligations.

We note that the particular focus of this inquiry is on giving a voice to people with direct experience of immigration detention, especially those who have experience of detention as children or parents and carers of children.

We note also the huge volume of reports, including those by the AHRC, which document that Australia's mandatory detention regime breaches various aspects of Australia's human rights obligations under international law, and the particular evidence of is detrimental impact on asylum-seeking children.

Accordingly, our short submission will focus on the AEU's concerns around key issues outlined in the Inquiry's Terms of Reference and the Discussion Paper.

Introduction

The AEU considers that the need for such an inquiry is lamentable.

It is ten years since the release of the report of the AHRC (formerly Human Rights and Equal Opportunity Commission) National Inquiry into Children in Immigration Detention, *A last resort? The Report of the National Inquiry into Children in Immigration Detention* [*A last resort?*]. That Inquiry found that Australia's system of mandatory immigration detention of children was "fundamentally inconsistent with Australia's human rights obligations", as encapsulated in the key principles of the *Convention on the Rights of the Child* (CRC):

- *Every child is entitled to respect for his or her rights without discrimination and has the right to life, survival and development. [Article 2(1), 6]*
- *The best interests of the child must be a primary consideration in all actions concerning children. [Article 3(1)]*
- *Detention must be a measure of last resort and for the shortest appropriate period of time; children must not be deprived of liberty unlawfully or arbitrarily. [Article 37(b)]*
- *Children should not suffer torture or cruel, inhuman or degrading treatment or punishment; children in detention have the right to be treated with humanity and respect for the inherent dignity of the person. [Article 37(a), (c)]*

- *Children should be protected from all forms of physical or mental violence, injury or abuse while in the care of parents or legal guardians. [Article 19]*
- *Children have the right to enjoy, to the maximum extent possible, development and recovery from past trauma. (Articles 6(2), 39]*
- *Asylum-seeking and refugee children are entitled to appropriate protection and assistance. (Article 22(1)].*
- *All children have the right to education. [Article 28(1]* (*A last resort?* p93; 2014 Inquiry Discussion Paper)

The Inquiry found that the Australian Government failed to ensure that the detention of children was a measure of last resort and for the shortest appropriate period of time; that the best of interests of the child were not a consideration; that children were not treated with humanity and respect. Among its specific findings concerning the failure to ensure appropriate services and conditions in detention centres were that asylum-seeking children were not provided with the necessary assistance and support to recover from past trauma and enjoy 'maximum possible development', and that the treatment of children with mental health problems was 'cruel, inhumane and degrading'. (*A last resort?* p847)

Sufficient expert evidence was presented to establish that the mandatory detention of children is not necessary to achieve legitimate policy goals; that "the Commonwealth's failure to conceive of a means of achieving its policy objectives without the detention of children does not automatically make it a 'last resort' under the CRC":

> *The basic premise of international human rights law is the protection of the rights of each and every individual. The CRC requires an assessment of whether or not it is necessary to detain a particular child. … [T]he mandatory detention regime, by definition, denies the opportunity for any such assessment.* (*A last resort?* p176)

On the basis of its findings, it made a number of recommendations centred on the incompatibility between mandatory detention and the basic human rights of children. It recommended that Australia's immigration detention laws should be amended, as a matter of urgency, to comply with the Convention on the Rights of the Child; the need for measures such as ongoing review of the legality of continuing detention; the need for Australia's laws to codify the minimum standards of treatment of children in detention centres; the impact of immigration detention policy measures on children; and the need for the appointment of an independent guardian for unaccompanied children in detention centres. (*A last resort?* p176)

If enacted, the 2014 Inquiry would more than likely be unnecessary. It is difficult to conceive that there could be, as now, more children in closed immigration detention than at the time of the previous inquiry.

> *By the end of December 2013 there were 1,028 children* (around 1 in 6 asylum seekers) *being held in immigration detention facilities in Australia. This included 460 children in detention on Christmas Island. There were also a further 116 asylum seeker children who had been transferred by the Australian Government into detention on Nauru under the Government's third country processing regime.* (AHRC National Inquiry into Children in Immigration Detention 2014 Discussion Paper)

Despite the increasing levels of Government secrecy and lack of transparency, the Commission's ongoing monitoring work, and numerous other reports by concerned bodies and organisations, show the continuing great harm done to vulnerable children and adults by difficult, unsafe and inhumane living conditions, inadequate access to education and other services and facilities and lack of protections.

While there have been changes in policy and practice over the years between 2004 and 2014, the key concerns established in 2004 remain.

The Education of Children in Detention

As part of its wide-ranging investigations, the previous Inquiry undertook an extensive consideration of the education obligations of the key international conventions: the CRC, including Article 28 on the right of the child to education, the Convention Against Discrimination in Education and the Refugee Convention.

These clearly show that governments which implement policies mandating the detention of children must also implement measures to ensure their right to education on the basis of equal opportunity. Further, the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* recommend that education for detained children should be in schools external to detention facilities, through programs integrated with the education system of the country.

With specific regard to the provision of education, the Inquiry found that there were serious barriers to the provision of an adequate education inside detention centres; and a high risk of serious mental harm to children in immigration detention for long periods of time. (*A last resort*, Chapter 12)

With regard to the location of detention centres it made particular note that:

> *…in making decisions about the location in which children are detained (the remoteness of some of Australia's detention centres presenting logistical difficulties in providing an adequate level of services), a proper consideration of the best interests of the child will include an assessment as to whether their right to education can be met in that location. In the Inquiry's view, the decision to detain children in remote locations contributed to the inadequacy of their education and suggests that their best interests may not have been a primary consideration in those decisions, contrary to article 3(1).* (*A last resort?* p638)

Ten years later it remains the case that all children are detained as a first resort, for indefinite periods of time, in circumstances which are demonstrably not in their best interests. With regard to unaccompanied children in particular, the recommendation that they should receive special protection and assistance is clearly not met, as they too are subject to offshore processing without regard to their need for specific protection or assistance.

The ongoing failure to implement a key 2004 recommendation on the need for appointing an independent guardian for unaccompanied children in detention centres is highlighted by the particular nature of Australia's current detention policy and practices.

The Convention on the Rights of the Child requires the protection of the rights and wellbeing of the children of asylum-seekers and unaccompanied minors, and the Minister is responsible

for ensuring that Australia complies with its legal obligations under that convention. It is highly inappropriate that the Minister for Immigration and Border Protection remains the legal guardian for unaccompanied children in detention. There is a flagrant incompatibility between the Minister's responsibility for ensuring compliance with the CRC and the requirement to act in the best interests of the children in question, and the draconian measures the Minister is implementing.

The AEU considers that the current circumstances of large numbers of children on Christmas Island, Nauru and Manus Island, including the inadequacy of the limited education they receive, to be a direct consequence of the policies for which the Minister is responsible. Allowing one person to hold such conflicting responsibilities is totally inappropriate.

The AEU's Position

The AEU has a long history of campaigning for decent, humane policies and treatment of asylum seekers and refugees consistent with the international covenants, including that of the rights of the child, to ensure both their human rights and that they have access to the best possible education.

We have called on the Federal Government on numerous occasions to comply with relevant articles and conventions on the rights of children including compliance with the article that all education/school facilities, including buildings, not be within the confines of any detention centres. Genuine compliance would require the government enabling public schools to guarantee support and education to all asylum seeker and refugee children, including the opportunity to learn English, in appropriate local educational settings.

Under such a system, all schools enrolling asylum seeker and refugee children would be provided with increased human and physical resources to meet the education, health and developmental needs of all children concerned, many of who have suffered physical and mental trauma, and overcome any educational barriers they experience. This would include the provision of appropriately qualified teachers with additional staffing to support their particular needs, including additional ESL and school counsellor time, and in servicing of staff on the special needs of traumatised asylum seeker and refugee children.

As educators, we deplore the ongoing subjection of children to mandatory detention in breach of Australia's obligations under the *Convention on the Rights of the Child*, and support the AHRC call for changes to the law to ensure that in future children will only be detained if it is truly a measure of last resort. (AHRC, November 2010)

We have been appalled by reports of education provision in detention facilities under successive governments over the last decade. In June 2011 the AEU wrote to the then Minister expressing concerns about the proposed 'Malaysian Solution' and the ongoing mistreatment of children, including unaccompanied minors. (Attachment A)

In November 2013 we wrote to the Prime Minister and Minister for Immigration and Border Protection expressing our strong concerns about the situation of asylum-seeker children detained on Christmas Island and the gross inadequacy of education provision. (Attachment B)

At the time, we also sought the support of Education International, the global union federation representing over 30 million teachers and education workers in more than 170 countries, including Australia. In its letter to the Prime Minister, the General Secretary of Education International wrote:

> *In 2010, EI published a study on the educational situation of refugee and asylum-seeking children in four countries, including Australia. The study aimed to provide insight into the inclusion of refugee and asylum-seeking children in education programmes, and to shed light on the practical actions and policy initiatives undertaken by governments to provide quality education to these children. The study concluded that the Australian situation was grim and that the educational, emotional and welfare needs of refugee and asylum-seeking children were far from being met.*
>
> *EI can only regret that the situation of refugee and asylum-seeking children remains in breach of Australia's obligations under the Convention on the Rights of the Child. All children have the right to adequate access to quality education delivered in appropriate school facilities by appropriately qualified teachers with support staff and services available. The Australian authorities and the Department of Immigration are responsible for ensuring that these rights are respected.* (Attachment C)

The AEU considers that off-shore and 'third country processing' is a means by which Australia avoids its international obligations. We share the serious concerns, arising from numerous AHRC and other significant reports including those by the Parliamentary Joint Committee on Human Rights, the UNHCR, ChilOut, the Refugee Council of Australia and Amnesty International, around:

- the differential treatment of asylum seekers based on their mode of arrival;
- the potential for breaches of Australia's non-refoulement obligations;
- the potential that asylum seekers will be subjected to arbitrary detention;
- conditions for asylum seekers on Nauru and Manus Island;
- the detention of child asylum seekers;
- the impact on families, including potential separation;
- the situation of unaccompanied children; and
- the lack of robust independent monitoring mechanisms. (AHRC, *Transfer of asylum seekers to third countries*, January 2014)

We share the AHRC's view that all who arrive seeking asylum in Australia "should have their claims assessed on the Australian mainland through the refugee status determination and complementary protection system that applies under the Migration Act. If they are found to be owed protection, they should be granted a Permanent Protection Visa and allowed to settle in Australia." (AHRC, *Transfer of asylum seekers to third countries*, January 2014)

Honouring the obligations in the Convention on the Rights of the Child and other relevant conventions, including the rights of all children to a full and appropriate education, should be central to this process.

Attachment A

Australian Education Union

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7 June 2011

The Hon. Chris Bowen MP
Minister for Immigration and Citizenship
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Parliament House
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Dear Minister

As an organisation which has a longstanding commitment to action in support of the basic human rights of refugees and asylum seekers in Australia and its off-shore detention centres, we had hoped that the appalling treatment of asylum seeker and refugee families and children in this country ended with the defeat of the Howard Government.

We have had occasion to write to you and the previous Minister, Senator Evans, several times to congratulate and support the Labor Government on changes to the cruel, inhumane and degrading mandatory detention policies of successive Howard Governments.

However recent moves by your Government regarding asylum seeker and refugee families and children, particularly the so-called Malaysian Solution, are such that we feel the need to express our outrage and serious fears.

You and your Government have made much of the fact that sending asylum seekers to Malaysia, including unaccompanied minors, is necessary to send a strong message to deter people-smugglers and “break their business model” by which they “sell the product of resettlement in Australia”.

Your argument that there would be no exemptions in order to ensure “a very robust system” of deterrence which would discourage people smugglers from “trafficking in children” was rightly condemned by the United Nations and others as shocking, hypocritical, extremely callous and lacking in compassion.

We consider your subsequent statement that the situation of these children will now be considered on a case by case basis, in the face of the outrage and concerns for the protection of vulnerable unaccompanied minors prompted by your earlier position, to be only marginally less hypocritical and deplorable. So too your insistence that somehow asylum seekers transferred from Australia to Malaysia, including unaccompanied minors, will have their human rights respected and protections guaranteed through some unspecified form of special arrangements which will ensure they are not treated under the same regime that applies to other asylum seekers in Malaysia.

Your claim that unaccompanied minors, who you say "*might* be particularly vulnerable", will be protected by "appropriate measures in place on an individual basis" is equally unacceptable.

If "appropriate measures" were in place in Australia, as laid down by conventions to which Australia is a signatory, including the Convention on the Rights of the Child, this internationally demeaning situation whereby your Government and the Opposition offer competing 'off-shore' policies of mistreating children could be avoided.

Under the Convention on the Rights of the Child, the children of asylum seekers and unaccompanied minors are entitled to have their welfare and rights protected, and you, as the Minister, are responsible for ensuring that Australia complies with its legal obligations under that convention.

Being party to the ongoing mistreatment of children in the pursuit of political gain and policy objectives is both immoral and antithetical to this responsibility.

The AEU actively campaigned for a decent, humane refugee policy, respect for human rights and an end to 'off-shore solutions' whereby Australia avoided its international obligations in breach of the United Nations Convention of the Rights of the Child and the UN Refugee Convention, during the Howard years. We had hoped that it would no longer be necessary to call for our Government to stop playing politics with vulnerable asylum seekers and innocent children's futures.

The incoming Rudd Government went some way to redressing the enormous damage done to Australia's international reputation by the Howard Government's inhumane policies. There was a degree of hope that Australia had moved beyond the politics of fear, divisiveness and the opportunistic exploitation of the plight of desperate people for political gain.

However the rising numbers of children in detention, and the politics around the 'Malaysian Solution', particularly that associated with unaccompanied minors, force us to consider the necessity of once again actively campaigning for reforms to Australia's refugee and asylum seekers policies.

The detention of children and the consequent potential for serious negative impacts on their development and mental health is not compatible with a decent and humane immigration policy consistent with the human rights standards which Australia has developed and endorsed.

Australia's policies towards asylum seekers and refugees, including unaccompanied minors, should at all times be in accord with the UN Conventions to which we are party, and advance Australia's international standing by reflecting respect, decency and traditional Australian generosity to those in need.

We call on the Government to honour its moral and legal commitments and develop policies for the treatment of asylum seeker families and children which ensure that, among other things, the education, health and developmental needs of all asylum seeker and refugee children, many of whom have suffered severe physical and mental trauma, are met.

We look forward to your positive response.

Yours sincerely,

Angelo Gavrielatos
Federal President

CC: The Hon. Robert McClelland, Attorney-General
The Hon. Peter Garrett, Minister for School Education, Early Childhood and Youth
The Hon. Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs.
The Hon. Nicola Roxon, Minister for Health and Ageing

Attachment B

Australian Education Union

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18 November 2013

The Hon. Tony Abbott MP
Prime Minister
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

Email: Tony.Abbott.MP@aph.gov.au

c.c. The Hon. Scott Morrison MP, Minister for Immigration and Border Protection

Dear Prime Minister

Re: Provision of Education to Children in Immigration Detention on Christmas Island

Australia's mandatory detention policies and the treatment of asylum-seeker children and families, in particular the education of asylum-seeker children, is an ongoing concern of the Australian Education Union and has been the subject of much correspondence over the last decade. I write at this time with particular regard to reports about the situation of the growing number of asylum-seeker children indefinitely detained on Christmas Island and their access to education.

According to these reports, 2,000 asylum-seekers have been detained indefinitely on Christmas Island following then Prime Minister Kevin Rudd's July 2012 announcement that no asylum seekers arriving by boat would be settled in Australia and the new Abbott Government's determination that asylum seekers on Christmas Island would never be sent to the Australian mainland but could not be sent to Manus Island or Nauru because of "capacity issues".

Of these 2,000 asylum seekers 400 are children, almost 240 of whom are school age. These children are unable to attend the local school, which currently has 251 students enrolled and is at capacity. Enrolling the additional 230+ asylum-seeker children would effectively double its enrolment and require doubling the size of the school and bringing in an additional 10 teachers and 10 teacher aides. This in turn would exacerbate the existing housing crisis on the island.

We understand that plans are being made to contract the company Maximus Solutions to provide lessons to these children in or near their compounds using hired workers with a qualification in teaching English as a Second Language, a qualification which could take as little as four weeks to gain.

We regard this as unacceptable.

The United Nations Convention on the Rights of the Child [CRC] recognises the right of all children to education. One of its basic principles is that the best interests of the child should be a primary consideration in all decisions that affect them; specifically:

- detention of children must be a measure of last resort and only in exceptional circumstances ie. there should be a presumption against the detention of children for immigration purposes;
- detention of children must be for the shortest appropriate period of time and subject to independent and judicial review mechanisms;
- children seeking asylum have the right to appropriate protection and assistance because they are an especially vulnerable group of children;
- unaccompanied children separated from their parents have a right to special assistance;
- children in detention should be treated with respect and humanity and they have the right to healthy development and to be able to recover from past trauma;
- children seeking asylum, like all children, have rights to physical and mental health; education; culture, language and religion; rest and play; protection from violence; and to remain with their parents.

Reports by the Australian Human Rights Commission following visits to Christmas Island in 2008, 2009, 2010 and 2012, document the shameful conditions for asylum seekers detained on the island, and highlight the ongoing serious issues around the provision of education for asylum-seeker children.

Its 2009 and 2010 reports found that Christmas Island is not an appropriate place in which to hold people in immigration detention, for a range of reasons including the nature of the detention facilities, the limited infrastructure, the lack of community-based accommodation options and the restrictions on asylum seekers' access to essential services and support networks. In addition, the 2010 report found that concerns about detaining asylum seekers on Christmas Island were compounded by severe overcrowding and a consequent deterioration in many aspects of the conditions of detention.

The Commission's most recent report (*Immigration Detention on Christmas Island* October 2012) outlined the key issues around the detention of unaccompanied minors and families with children:

- The continued subjection of children to mandatory detention on Christmas Island is a fundamental breach of their human rights and of Australia's obligations under the Convention on the Rights of the Child (CRC).
- Families with children and unaccompanied minors are detained in the seriously overcrowded, closed prison-like Immigration Detention Centre, with harsh conditions in the Aqua and Lilac Compounds and the inappropriate use of the Construction Camp as a place of detention. In the Commission's view, none of these facilities provide an appropriate environment for families with children or unaccompanied minors, particularly those with a background of torture or trauma.
- The very large number of people detained in immigration detention facilities on Christmas Island has placed severe strain on access to facilities and services, including education and mental health services, the need for which continues to significantly increase.
- A mix of single adult men and families with children detained in the Aqua Compound. This co-location of different groups of people poses a risk to safety and may lead to a breach of Australia's obligations under the CRC.
- The ongoing conflict of interest in the Minister for Immigration or Departmental officers, under delegation, acting as the legal guardian of unaccompanied minors detained on Christmas Island.

UNHCR guidelines also provide that unaccompanied minors should not be detained, particularly in isolated areas. The Commission's visit found that there were 101

unaccompanied minors detained in Lilac Compound, which it considered inappropriate for immigration detention purposes, and especially inappropriate for the detention of children. Additionally, they did not have dedicated carers, but were under the supervision of Serco officers, the company contracted by the Australian Government to run offshore immigration detention facilities.

One of the Commission's most serious concerns arising from their visit was the lack of access to education. While the failure to provide education which meets the requirements of the CRC is deemed to be justified because logistical difficulties associated with the large number of school age children in detention make it impossible, this is an unacceptable response.

The AEU concurs with the AHRC that:

> *Children of compulsory school age should be provided with access to education of a standard equivalent to that in Australian schools. Children older than compulsory school age should also be provided with opportunities to continue their education. Wherever possible, the education of children should take place outside the detention facility, in the general school system.*

It is the responsibility of the Australian Government and Department of Immigration to ensure adequate access to education delivered in appropriate school facilities by appropriately qualified teachers with support staff and services available. If this is not possible, they and their families should be transferred to a location where they can be, preferably in the school system on the Australian mainland.

The AEU will continue to advocate and campaign for the human rights of asylum-seeker children and their families, and, in particular, for their full rights to education, and we urge that you honour Australia's commitments under the CRC and other relevant UN conventions.

Yours sincerely

Angelo Gavrielatos
Federal President

Attachment C

Education International
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The Hon. Tony Abbott
Prime Minister of Australia
PO Box 6022
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AUSTRALIA

20 November 2013

Re: Provision of Education in Immigration Detention on Christmas Island

Dear Prime Minister,

I am writing to express concern about the situation of asylum-seeker children detained on Christmas Island and their access to education. Education International (EI) is the global union federation representing over 30 million teachers and education workers in more than 170 countries, including Australia.

The Australian Education Union, supported by the National Tertiary Education Union and the Independent Education Union, has drawn to our attention issues around the provision of education for asylum-seeker children on Christmas Island. These issues have been documented by the Australian Human Rights Commission (AHRC) since 2008. According to a recent AHRC report, one fifth of the asylum-seekers detained on Christmas Island are children, a substantial number of whom are unaccompanied minors.

The number of school-age detainees is now such that they are unable to attend the local school, which is at capacity. Rather than increase the capacity of the school, EI understands that, to resolve this situation, your Government is planning to contract a private company to provide lessons to these children in or near their compounds, using underqualified workers to act as "teachers".

In 2010, EI published a study on the educational situation of refugee and asylum-seeking children in four countries, including Australia. The study aimed to provide insight into the inclusion of refugee and asylum-seeking children in education programmes, and to shed light on the practical actions and policy initiatives undertaken by governments to provide quality education to these children. The study concluded that the Australian situation was grim and that the educational, emotional and welfare needs of refugee and asylum-seeking children were far from being met.

EI can only regret that the situation of refugee and asylum-seeking children remains in breach of Australia's obligations under the Convention on the Rights of the Child. All children have the right to adequate access to quality education delivered in appropriate school facilities by appropriately qualified teachers with support staff and services available. The Australian authorities and Department of Immigration are responsible for ensuring that these rights are respected.

EI urges the Australian Government to ensure the right to education of these children. If this is not possible on Christmas Island, they and their families should be transferred to the mainland where children could join the existing school system.

Yours sincerely,

Fred van Leeuwen
General Secretary

c.c.: the Hon. Scott Morrison, Minister for Immigration and Border Protection