

Submission to the Senate Legal and Constitutional References Committee inquiry into Australia's refugee and humanitarian program

Human Rights and Equal Opportunity Commission

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Recommendations

1. Australia should replace the current system of mandatory universal detention of unauthorised arrivals with the alternative set out in detail in the Commission's May 1998 report (Attachment 1).
2. The *Migration Act 1958* (Cth) should be amended to entitle all immigration detainees to apply for release on the ground that their detention is unnecessary and/or disproportionate and should provide for judicial review of all unsuccessful applications.
3. Australia's commitments under international law require the retention of the right of appeal and judicial review for protection visa applicants and extension of these rights to non-refugee claimants for protection. Australia must ensure to every applicant claiming to be at risk of death, torture or other cruel, inhuman or degrading treatment or punishment in the country of origin the right to have his or her claim determined in a fair and public hearing by a competent, independent and impartial tribunal.
4. The refugee determination process and responsibility for immigration detention should be transferred from the immigration portfolio to those of the Attorney-General and the Minister for Justice respectively.
5. Section 36(2) of the *Migration Act 1958* (Cth) should be amended to extend the grounds on which a person can claim entitlement to Australia's protection beyond the current reliance on the Refugee Convention to include risk of extra-judicial execution, the death penalty, torture or cruel, inhuman or degrading treatment or punishment in the country of origin without more. This ground should be accorded equivalent status with the refugee ground in all respects including removal from Ministerial non-reviewable discretion and extension of full review and appeal rights.
6. The *Migration Act 1958* (Cth) should be amended to prevent the deportation of pregnant women in such circumstances, at least until after the birth of the child.
7. The Australian Government should discuss with appropriate agencies whether they would be willing and able to assist it in monitoring and, if so, fund them appropriately to undertake this task.

1. Context

Australia has long been a desirable destination for those suffering oppression in their countries of origin. Many unauthorised arrivals have been genuine refugees whose home situation has been too risky to enable them to make orderly applications for refugee status through Australia's off-shore program. Many others have faced short-term or long-term risks to their well-being although not meeting the international definition of a refugee.

In recent months, however, Australia has witnessed an influx of organised groups arriving with the expectation of enhanced economic prospects. This change in the overall demographic characteristics of the unauthorised arrivals has two implications for Australian law and practice. The first is that for the majority, who have no real basis for a claim for refugee protection, the determination and removal process can and will be expedited. The second is the risk that genuine refugees and other humanitarian claimants could be 'hidden' among a group of primarily economic would-be migrants unless each individual continues to be treated as such and not simply as a 'boat group member'. Care must be taken to ensure that unwarranted assumptions are not made about individuals on the basis of information about the majority with whom he or she arrived.

Since 1945 Australia has been an outstanding world leader in its generosity towards refugees and humanitarian migrants. Its off-shore protection program is second to none. In many respects its on-shore refugee and humanitarian programs are models of good and even best practice – including the general rights of judicial review and the right to free legal advice and assistance. However, the on-shore programs are characterised by a number of features of concern from a human rights perspective. It is these flaws which are the subjects of this submission.

2. Mandatory, universal detention of unauthorised arrivals

The requirements of international law

The Commission advised the Parliament in November 1997¹ and again in May 1998² that the law requiring detention of almost all unauthorised arrivals (*Migration Act 1958* (Cth) sections 189 and 196) contravenes international law.

The *Convention Relating to the Status of Refugees* (Refugee Convention) does not prevent the use of detention during the process of assessment. However, it only permits detention that is 'necessary' and the rights of the person under the *International Covenant on Civil and Political Rights* (ICCPR) must be fully respected at all times.

Article 9.1 of the ICCPR guarantees the right of 'everyone' to 'liberty'. There are, of course, occasions on which a state deprives a person of his or her liberty. The ICCPR does not prohibit this. However, any deprivation of liberty must be on grounds and in accordance with procedures established by law. That is, the detention must be 'lawful'. In addition, the detention must not be arbitrary. This rule recognises that countries sometimes enact laws or implement them in ways that are arbitrary. Article 9.1 provides in part

No one shall be subjected to arbitrary arrest or detention.

¹ Preliminary Report on the Detention of Boat People.

² *Those who've come across the seas: detention of unauthorised arrivals.*

This right extends to ‘all deprivations of liberty, whether in criminal cases, or in other cases such as ... immigration control’.³

The *Convention on the Rights of the Child* (CROC) similarly protects children in particular from arbitrary deprivation of liberty. Article 37(b) provides in part

No child shall be deprived of his or her liberty unlawfully or arbitrarily.

In addition, the detention of a child is to be used only as a measure of last resort and, when it is used, only for the shortest appropriate period of time (article 37(b)). In assessing what would be an appropriate period, the decision-maker must take into account the best interests of the child (article 3.1).

Arbitrariness in international law

The term ‘arbitrary’ includes not only actions which are unlawful *per se* but also those which are unjust or unreasonable even if lawful.⁴ In 1990, in the case of *Alphen v The Netherlands*, the Human Rights Committee stated

The drafting history of article 9, paragraph 1, confirms that ‘arbitrariness’ is not to be equated with against the law, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but *reasonable* in all the circumstances. Further, remand in custody must be *necessary* in all the circumstances, for example, to prevent flight, interference with evidence, or the recurrence of crime.⁵

The question whether a particular restriction on liberty is necessary and reasonable or arbitrary for the purposes of the ICCPR is not a matter of purely subjective judgment. The jurisprudence of the Human Rights Committee indicates that, to avoid the taint of arbitrariness, detention must be a proportionate means to achieve a legitimate aim, having regard to whether there are alternative means available which are less restrictive of rights.⁶

In a recent decision on a communication complaining of the prolonged detention of an asylum seeker by Australia, the Human Rights Committee considered whether prolonged mandatory detention pending determination of refugee status was ‘arbitrary’ within the meaning of article 9.1. Australia sought to justify the prolonged detention on the basis that the complainant entered Australia unlawfully and may have absconded if not detained. The Committee concluded, however

... detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. *Without such factors detention may be considered arbitrary, even if entry was illegal.* In the instant case, the State Party has not advanced any grounds particular to the author’s case, which would justify his continued detention ... The

³ Human Rights Committee, General Comment No. 8 (1982), paragraph 1.

⁴ Documentary references and a summary of these debates are given in M Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights*, Martinus Nijhoff, Dordrecht, 1987, page 343.

⁵ Communication No. 305/1988, Human Rights Committee Report 1990, Volume II: UN Doc. A/45/40, paragraph 5.8 (emphasis added).

⁶ In *A v Australia*, Communication No. 560/1993, the Committee stated ‘remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context’: Views of the Human Rights Committee, 30 April 1997: UN Doc. CCPR/C/59/D/560/1993.

Committee therefore concludes that the author's detention ... was arbitrary within the meaning of Article 9, paragraph 1.⁷

The average duration of detention is dropping in Australia. However, this does not resolve the human rights problem for Australia. The Human Rights Committee's comments raise questions about the validity of all but a very brief period of detention in most cases. And even though the average duration is dropping, some people are still detained for lengthy periods. One family, including two young children, has been detained at Port Hedland for over four years. There is no justification whatsoever for this.

International law requires Australia to ensure 'aliens' enjoy human rights including freedom from arbitrary detention. Whether detention is ordered by the Parliament, the executive or the courts, it will be arbitrary unless reasonable, necessary and proportionate.

Necessity and proportionality

In considering what would be a proportionate response to unauthorised arrivals, Australia must take into account its specific international obligations to them. The Refugee Convention prevents States Parties *unnecessarily* restricting the movement of asylum seekers (article 31.2). Some asylum seekers will have no choice but to flee their countries before applying through the 'proper channels', appearing in a country of asylum as illegal entrants. The Convention prohibits states from penalising people in this situation provided they present themselves directly to the authorities and show good cause why their entry was illegal (article 31.1).

Detention of unauthorised arrivals may amount to a penalty contrary to the Convention. It may also be difficult to justify as necessary as required by the Convention. If so, the detention will be arbitrary contrary to ICCPR article 9.1 and CROC article 37(b).

ExComm Conclusion 44

The Executive Committee of the High Commissioner [for Refugees] Programme issues authoritative interpretative statements, 'Conclusions', on the meaning of the Refugee Convention and Protocol. Executive Committee Conclusion No. 44, *Detention of Refugees and Asylum Seekers* (1986) (ExComm Conclusion 44⁸) elaborates the circumstances that may make it necessary to detain asylum seekers. Where the detention of asylum seekers is deemed to be necessary it should only be used

- X to verify identity
- X to determine the elements on which the claim for refugee status or asylum is based
- X to deal with cases where asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents to mislead the authorities of the State in which they intend to claim asylum or
- X to protect national security and public order.

In elaborating ExComm Conclusion 44, the UNHCR stated that the detention of asylum seekers should not be automatic or unduly prolonged. For example, in determining the elements on which a claim to refugee status is based, individuals should only be detained if necessary to undergo a preliminary interview. The detention of a person for the entire duration of a prolonged asylum procedure is not justified.

⁷ Id, page 24 (emphasis added).

⁸ UN Doc. A/AC.96/688, paragraph 128.

In relation to asylum seekers using fraudulent documents or travelling with no documents at all, the Conclusion recognises that detention is permissible only where there is an intention to mislead the authorities. Asylum seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason.⁹

The Executive Committee also

- (c) Recognised the importance of fair and expeditious procedures for determining refugee status or granting asylum in protecting refugees and asylum seekers from unjustified or unduly prolonged detention [and]
- (d) Stressed the importance for national legislation and/or administrative practice to make the necessary distinction between the situation of refugees and asylum seekers and that of other aliens.

Australia's policy of detention of asylum seekers is automatic and mandatory and applies to almost all unauthorised arrivals until their claim for protection is determined finally. It goes well beyond what ExComm Conclusion 44 deems 'necessary' for the purposes of compliance with the Refugee Convention, CROC and the ICCPR.

UNHCR Guidelines

The UNHCR has produced a set of *Guidelines on Detention of Asylum Seekers* (the Guidelines) to assist governments in developing and implementing detention policies and practices.¹⁰ The Guidelines apply to all asylum seekers who are in detention or in detention-like situations. They apply to all persons who are confined within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.¹¹ The Guidelines, therefore, are relevant to the operation of Australia's immigration detention centres.

The Guidelines, like ExComm Conclusion 44, state that the right to liberty is a fundamental right, recognised in all the major human rights instruments, both at global and regional levels, and that therefore 'the detention of asylum-seekers is in the view of UNHCR inherently undesirable'.¹² The Guidelines state that detention is especially undesirable for vulnerable people 'such as single women, children, unaccompanied minors and those with special medical or psychological needs'.¹³ They conclude that

Freedom from arbitrary detention is a fundamental human right, and the use of detention is in many instances, contrary to the norms and principles of international law.¹⁴

The Guidelines make it clear that asylum seekers should be detained only as a last resort on exceptional grounds. If exceptional grounds exist then detention must be clearly prescribed by

⁹ See also Note on International Protection, 15 August 1988: UN Doc. A/AC.96/713, paragraph 19.

¹⁰ The 1995 Guidelines were replaced early in 1999 and clarify the scope of application of ExComm Conclusion 44.

¹¹ Guideline 1: Scope of the Guidelines. This definition of detention is based on the Note of the Sub-Committee of the Whole on International Protection of 1986, 37th Session, UN Doc. EC/SCP/44, paragraph 25.

¹² 'Introduction', paragraph 1.

¹³ Ibid.

¹⁴ Ibid.

a national law which conforms with general norms and principles of international human rights law.¹⁵

The Guidelines affirm that the only permissible grounds for detention are the four grounds provided in ExComm Conclusion 44. Detention of asylum seekers for any other purpose, ‘for example, as part of a policy to deter future asylum seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law’.¹⁶

The Guidelines state that detention must be reasonable and proportionate to meet the standard set out by ICCPR article 9.1.

In assessing whether detention of asylum-seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved. If judged necessary it should only be imposed in a non discriminatory manner for a minimal period.¹⁷

Even so detention should be exceptional, a last resort after all possible alternatives to detention have been exhausted.

Where there are monitoring mechanisms which can be employed as viable alternatives to detention, (such as reporting obligations or guarantor requirements), these should be applied first unless there is evidence to suggest that such an alternative will not be effective in the individual case.¹⁸

Convention on the Rights of the Child

The detention of the children of asylum seekers is complicated by the apparently competing factors affecting their interests. On the one hand, detention, especially for prolonged periods, stifles their development and can cause actual harm. CROC acknowledges this by requiring that any detention of a child be a measure of last resort and for the shortest appropriate period of time (article 37(b)). In addition, CROC imposes the positive obligation upon States Parties to take appropriate measures to ensure to every child a standard of living adequate for his or her physical, mental, spiritual, moral and social development (article 27). On the other hand, children have a right to live with and enjoy the protection and assistance of their parents. The Preamble to CROC acknowledges that ‘the child, for the full and harmonious development of his or her personality, should grow up in a family environment’. CROC article 9.1 obliges States Parties to ensure that children are not separated from their parents against their will except when it is necessary in their best interests. These provisions clearly apply to children and their families seeking asylum and deprived of their liberty under the Migration Act.

Australian law provides that the Minister may grant a bridging visa to a child under the age of 18 who comes within the guidelines prescribed in Migration Regulation 2.20. The bridging visa allows the child to be released from detention pending consideration of an application to remain in Australia (Migration Act section 73). The Minister has no discretion, however, to grant a bridging visa to release the child’s parents. A child released from detention would therefore be denied the protection and assistance of his or her parents. This may lead to a breach of article 9.1 of CROC. Only two children of a possible total of 581 were released on

¹⁵ Id, Guideline 3: Exceptional Grounds of Detention.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

Bridging Visas between 1 September 1994 and May 1998.¹⁹ Australian law, therefore, purports to permit the release of children while in fact making that effectively impossible and undesirable. As a result, whether a child is detained with his or her parents or released without them, Australia is in breach of its human rights commitments.

The UNHCR's Guidelines resolve the seeming conflict by directing that minors who are asylum seekers should not be detained.²⁰ In almost all circumstances, therefore, unless there is good reason to the contrary related to the particular circumstances of the particular family, children and their parents should not be detained during the determination of a claim for refugee status. Where children are detained, however, CROC article 37(b) requires that it be a measure of last resort and for the shortest appropriate period of time. The UNHCR Guidelines direct states to take steps to ensure an appropriate environment for children who are detained. Conditions akin to a prison are to be avoided.

If children who are asylum seekers are detained in airports, immigration-holding centres or prisons, they must not be held under prison-like conditions. All efforts must be made to have them released from detention and placed in other accommodation.²¹

Conclusion

Australia's detention policy does not meet the minimum standards in the ICCPR and CROC or in ExComm Conclusion 44 or the UNHCR's Guidelines. It makes detention of unauthorised arrivals mandatory in almost all cases while international law states that detention is inherently undesirable and that as a general rule asylum seekers, especially children, should not be detained. Australia's detention regime goes well beyond what international law considers 'permissible' or 'necessary' or 'reasonable' detention. It is not proportional and would be considered arbitrary and unreasonable under the provisions of international law, including ICCPR article 9.1 and CROC article 37(b).

Recommendation 1: Australia should replace the current system of mandatory universal detention of unauthorised arrivals with the alternative set out in detail in the Commission's May 1998 report (Attachment 1).²²

3. Discretionary release and judicial review of detention

Judicial oversight of all forms of detention is a fundamental guarantee of liberty and freedom from arbitrariness. ICCPR article 9.4 provides

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Similarly CROC article 39(d) provides

Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance as well as the right to challenge the legality of the deprivation of his or her liberty

¹⁹ The Department of Immigration and Multicultural Affairs has advised the Commission that two minors have been released from detention on bridging visas 'since May 1998'.

²⁰ Guideline 6: Detention of Persons under the Age of 18. Reference is also made to CROC articles 3, 9, 20, 22 and 37, the UN Rules for Juveniles Deprived of their Liberty and the UNHCR Guidelines on Refugee Children, 1994.

²¹ Guideline 6.

²² *Those who've come across the seas: detention of unauthorised arrivals*, Chapter 16.

before a court or other competent, independent and impartial authority and to a prompt decision on any such action.

The Human Rights Committee has emphasised that article 9.4 protects all those in detention and is not restricted to those detained as alleged or proven criminals.

[T]he important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. Furthermore, States Parties have in accordance with article 2(3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the covenant.²³

The Human Rights Committee has determined that the lack of provision for review of the detention of an alien for a period of only one week amounts to a breach of article 9.4.²⁴

In correspondence with the Commission the Department has contended that Australian law and policy satisfy the requirements of ICCPR article 9.4.²⁵ According to the Department non-citizens are able to have the 'lawfulness' of their detention tested because they have the legal right to challenge the proper application of current detention provisions to them. However, the provisions of article 9.4 require that the merits of detention in individual cases be reviewable according to the terms on which detention is permitted by international law under article 9.1 of the Covenant, that is, that it is not unlawful or arbitrary and can be shown to be a proportional means to achieve a legitimate aim. Moreover, article 13 extends the protections of the Covenant to unauthorised arrivals during the process of determining the legality of their entry or stay in Australia.²⁶ These include the guarantee of equality before the law (article 26) and the right to a fair and public hearing by a competent, independent and impartial tribunal (article 14.1).²⁷

In its examination of a complaint about Australia's immigration regime, the Human Rights Committee emphasised that judicial oversight must be able to examine the merits of detention.

In effect ... the court's control and power to order the release of an individual was limited to an assessment of whether this individual was a 'designated person' within the meaning of the *Migration Amendment Act*. If the criteria for such determination were met, the courts had no power to review the continued detention of an individual and to order his/her release. In the Committee's opinion, court review of the lawfulness of detention under Article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of Article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release 'if the detention is not lawful', Article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the Covenant. As the State Party's submissions in the instant case show that court review available to [the complainant] was, in fact, limited to a formal assessment of the self-evident fact that he was indeed a 'designated person' within the meaning of the *Migration Amendment Act*, the Committee

²³ General Comment No. 8 (1982), paragraph 1.

²⁴ *Torres v Finland*, Communication No. 291/1988. View adopted 2 April 1990, Report of the Human Rights Committee, Vol II, Supplement No.40: UN Doc. A45/40, page 96.

²⁵ Letter to HREOC from the Deputy Secretary of the Department of Immigration and Multicultural Affairs, dated 29 August 1996, page 3, in response to complaint to HREOC by Complainant PH57.

²⁶ Human Rights Committee, General Comment No. 15 (1986), paragraph 9.

²⁷ *Id.*, paragraphs 7 and 9.

concludes that the [complainant's] right, under Article 9, paragraph 4, to have his detention reviewed by a court, was violated.²⁸

The High Court has acted in one instance to read down a Migration Act provision which appeared on its face to exclude access to judicial review for persons held in immigration detention (section 183).²⁹ The present laws are an improvement on those in force at the time *Lim's Case* was decided. However, judicial review of detention in Australia remains very limited. The courts have no power to order the release of detainees of their own motion and no provision is made for periodic review by the courts of the detention of non-citizens or for the courts to consider the compatibility of the detention with the ICCPR as required by article 9.4. The Migration Act mandates the detention of all unauthorised arrivals without the possibility of release unless they satisfy the very restrictive criteria for a bridging visa or persuade a court that they have been wrongly defined as an unlawful non-citizen. For the small number eligible for a bridging visa the release decision in most instances is dependent upon the exercise of a personal and non-compellable discretion of the Minister. The Minister can be required to make this decision according to law but cannot be required to exercise the discretion in favour of any particular applicant.

Australian law does not permit the individual circumstances of detention of non-citizens to be determined or taken into consideration by courts. Neither does it permit the reasonableness and appropriateness of detaining an individual to be determined by the courts. Therefore, Australia is in breach of ICCPR article 9.4 and CROC article 37(d).

Recommendation 2: The *Migration Act 1958* (Cth) should be amended to entitle all immigration detainees to apply for release on the ground that their detention is unnecessary and/or disproportionate and should provide for judicial review of all unsuccessful applications.

4. Judicial review of other decisions

Term of reference (b) 'the adequacy of a non-compellable, non-reviewable ministerial discretion to ensure that no person is forcibly returned to a country where they face torture or death'

Term of reference (e) 'the importance of maintaining full judicial oversight of any administrative process that directly affects Australia's compliance with its international legal obligations'

Australia's obligations to people presenting in its territory claiming to be at risk of persecution are set out in four international treaties to which Australia is a party, not only the Refugee Convention.

Convention Relating to the Status of Refugees

Article 33 of the Refugee Convention prohibits States Parties from returning ('refouling') a refugee to the frontier of a country where his or her life or freedom would be threatened.

²⁸ *A v Australia*, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993, 30 April 1997, at page 24.

²⁹ *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1993) 110 ALR 97.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Article 3 of CAT provides ‘No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’. The right of such a person to resist expulsion is not made dependent upon him or her satisfying the Refugee Convention definition of ‘refugee’.

International Covenant on Civil and Political Rights (ICCPR)

The obligation of non-refoulement is also imposed by the ICCPR. Article 7 provides that ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. The UN Human Rights Committee has pointed out that, in relevant circumstances, placing a person at risk of torture or cruel, inhuman or degrading treatment or punishment by another country will be a breach of article 7 as much as if the first country had committed the act of torture itself. ‘States Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement’.³⁰ The protection thus afforded by article 7 is afforded both to refugees and also to others who are at risk but do not satisfy the Refugee Convention definition of ‘refugee’ (like CAT article 3). The same argument should be applicable to the ICCPR article 6 protection of the right to life and the article 9 protection of the right to security of person.

Convention on the Rights of the Child (CROC)

CROC article 22 provides comprehensive and special protection for children who are refugees or who are seeking refugee status. They are to ‘receive appropriate protection and humanitarian assistance in the enjoyment of [their CROC rights and also other human rights and humanitarian instruments to which the State Party is a party]’. Thus CROC article 22 explicitly includes Australia’s obligations to asylum seeker children under the Refugee Convention and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.³¹

Under CROC Australia must, in all its actions towards children, including asylum seeker children, make their best interests a primary consideration (article 3). An unaccompanied asylum seeker child must be afforded ‘special protection and assistance’ by the government (article 20). In the case of children in Australia, Australia must ‘take all appropriate measures to promote physical and psychological recovery’ of all those who are victims of torture or any other form of cruel, inhuman or degrading treatment or punishment or of armed conflict regardless of their nationality (article 39).

Like the ICCPR, CROC protects children from torture and other cruel, inhuman and degrading treatment and punishment (article 37) and recognises the child’s inherent right to life (article 6). Again there is an obligation not to expel, return or extradite a child to another country where he or she will be subjected to or at risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment or of death.

³⁰ General Comment 20, paragraph 9.

³¹ The import of this for Australian domestic law is that a child asylum seeker whose Refugee Convention or ICESCR rights are allegedly violated by an act or practice of the Commonwealth can complain to HREOC under CROC article 22. CROC is an international instrument which has been the subject of a declaration under HREOCA section 47; the Refugee Convention and ICESCR are not.

Positive measures required

A number of positive actions are implicitly required if Australia is to avoid breaching its obligation of non-refoulement (Refugee Convention article 33; CAT article 3; ICCPR articles 6, 7 and 9; CROC articles 6, 22 and 37). In particular, Australia must have an effective procedure to determine the validity of an asylum seeker's claim to be a refugee and of any protection visa/humanitarian category applicant's claim to be at risk of violation of his or her ICCPR article 6, 7 and/or 9 rights by a third country.³²

In this process, and while an unlawful non-citizen is within the jurisdiction, Australia must respect his or her human rights. ICCPR article 2 states

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.³³

As the Human Rights Committee has stated, 'In general the rights set forth in this Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness'.³⁴

ICCPR article 14 sets out what is required of an effective process for assessing a person's claims to be a refugee or to resist expulsion on the ground of risk to life or security of person. Everyone has the right to have the determination of his or her rights in a suit at law made 'in a fair and public hearing by a competent, independent and impartial tribunal'.

Evaluation of Australia's compliance with article 14

Only claims under the Refugee Convention are capable of judicial oversight in Australia at present. The Commission has previously advised the Committee that the proposal to eliminate such oversight (as set out in the Migration Legislation Amendment (Judicial Review) Bill 1998) will violate ICCPR article 14. The current position whereby the Minister's decision on 'humanitarian' claims is discretionary and non-compellable should be reversed.

Recommendation 3: Australia's commitments under international law require the retention of the right of appeal and judicial review for protection visa applicants and extension of these rights to non-refugee claimants for protection. Australia must ensure to every applicant claiming to be at risk of death, torture or other cruel, inhuman or degrading treatment or punishment in the country of origin the right to have his or her claim determined in a fair and public hearing by a competent, independent and impartial tribunal.

5. Refugee decision-making

Immigration policy is an expression of sovereignty of the nation state over its territory. States retain exclusive competence to regulate entry to and exit from their territory and to determine

³² Joint Standing Committee on Migration, *Asylum, Border Control and Detention*, AGPS 1994, page 55; S Goodwin-Gill, *The Refugee in International Law*, 2nd ed, Clarendon Press, 1996, page 90.

³³ See also CROC article 2 which requires that 'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind ...'

³⁴ General Comment 15, paragraph 1. This is not to say that the ICCPR requires States Parties to accept all applicants for protection or that people unlawfully in the State's territory have identical rights with people lawfully present. The freedom of movement and residence does not apply to people not lawfully present in the territory, for example (article 12).

which non-citizens may remain in their territory. Refugee policy, however, derives from obligations under international refugee law which have been incorporated into Australian domestic law. It recognises that external factors beyond the control of the state will determine whether certain individuals can enter or remain in the territory of the state.

Accommodating the refugee determination process within the immigration portfolio blurs this distinction. Refugee policy comes to be perceived as a sub-set of immigration policy. The two have distinct legal bases, however, with distinct and divergent consequences.

The difference between refugee and immigration policy is reflected in the fact that an international organisation, the United Nations High Commissioner for Refugees, has a mandate for the international protection of refugees. There is a tension, however. Actual responsibility for protection lies with individual states which have the power to control the integrity of their borders and therefore entry and continued residence.

The convergence of border control on the one hand and protection obligations under the Refugee Convention and Protocol on the other gives rise to policies of mandatory detention as a deterrent. The impact of this convergence is disproportionately felt by asylum seekers who arrive by boat and claim refugee status on-shore. Some may be illegal immigrants and some refugees. On the surface, however, they are often indistinguishable and are treated as such.

Yet refugees, whether or not determined to be refugees, have rights to other, better treatment. Article 31 of the Refugee Convention states that refugees should not be subjected to any penalties on account of their illegal entry. The argument that an unauthorised arrival is an illegal entrant until proven otherwise cannot be sustained in law. Asylum seekers who arrive by boat have in numerous cases been determined to be refugees. They became refugees not when their claims were accepted but when they developed a well-founded fear of persecution on one of the grounds prescribed by the Refugee Convention and for that reason could not remain in or return to their country of origin.

There is a fundamental difference between immigration decisions and determinations of refugee status. Immigration is properly a matter of government policy. Subject to human rights considerations, including the principle of non-discrimination, each state is entitled to decide its own approach to immigration and each government to set its own policy and expect it to be implemented.

Determination of refugee status, however, is a matter of law, not policy. Whether or not someone is a refugee depends on whether the person meets the definition of refugee set out in the Refugee Convention, which is incorporated in Australian law. This is not a matter on which a Minister should be able to issue policy directions. The task of deciding a claim for refugee status is a difficult one. Courts and tribunals are often divided on whether an applicant meets the legal definition. Individual asylum seekers then cannot be criticised if they seek determination of their status by a competent court or tribunal.

The essential difference between immigration and refugee law, policy, practice and decisions leads the Commission to conclude that deciding a refugee application is not properly an immigration matter at all. Refugee determinations, therefore, should be transferred to the Attorney-General's Department which is better placed to manage a legal process that is subject to international human rights and refugee law and should not be constrained by immigration policy.

The federal justice portfolio within the Attorney-General's Department deals with the administration of the courts, the police and related matters. Justice ministries at State and Territory levels are generally responsible for the administration of correctional facilities. Immigration detention centres would be more appropriately administered with the justice portfolio.

Recommendation 4: The refugee determination process and responsibility for immigration detention should be transferred from the immigration portfolio to those of the Attorney-General and the Minister for Justice respectively.

6. Incorporation of CAT obligations

Term of reference (c) 'whether Australia's treaty commitments to, and obligations under, the 1951 Convention relating to the Status of Refugees, the 1984 United Nations (UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the 1966 International Covenant on Civil and Political Rights are capable of being met given that the fundamental principle of non-return to face torture or death is not present in domestic law nor subject to the rule of law'

CAT and the ICCPR have not been incorporated into Australian domestic law. Incorporation of these international obligations would significantly strengthen their protection in Australia. A critical issue is the need to extend full and adequate protection to people at risk who cannot satisfy the Refugee Convention definition. Another is the ICCPR article 14 right to independent, open and competent determination of claims and rights by an impartial tribunal obliged and empowered to review both 'refugee' and 'human rights' based claims.

Recommendation 5: Section 36(2) of the *Migration Act 1958* (Cth) should be amended to extend the grounds on which a person can claim entitlement to Australia's protection beyond the current reliance on the Refugee Convention to include risk of extra-judicial execution, the death penalty, torture or cruel, inhuman or degrading treatment or punishment in the country of origin without more.³⁵ This ground should be accorded equivalent status with the refugee ground in all respects including removal from Ministerial non-reviewable discretion and extension of full review and appeal rights.

7. Risk of enforced abortion

Term of reference (h) 'the responsibility of Australia under international law for the very serious human rights violation of forced abortion which is claimed in this case'

Enforced abortion is a serious human rights violation. It violates the security of the person contrary to ICCPR article 9 and the prohibition on sex discrimination in the enjoyment of human rights in ICCPR article 2 and is certainly inhuman treatment contrary to ICCPR article 7 and CAT. The Human Rights Committee has advised

The aim [of article 7] is to protect both the dignity and the physical and mental integrity of the individual.³⁶

³⁵ As discussed below, the category of inhuman treatment will include an enforced abortion.

³⁶ HRC, General Comment No. 20 (1992), paragraph 2.

The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim ... article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.³⁷

An enforced abortion performed at a date when the foetus would normally be able to survive outside the womb is also arguably a violation of the 'child's' right to life contrary to ICCPR article 6 and CROC article 6.³⁸

As noted above, ICCPR article 7 imposes on States Parties the obligation not only to refrain from perpetrating inhuman treatment but also to refrain from placing a person at risk of such treatment in another country, including the country of origin.

States Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.³⁹

Conclusion

Australia has undertaken an obligation to refrain from returning women to countries where they are known to risk enforced abortion.

Recommendation 6: The *Migration Act 1958* (Cth) should be amended to prevent the deportation of pregnant women in such circumstances, at least until after the birth of the child.

8. Monitoring deportees

Term of reference (m) 'the processes which are in place for monitoring deportation cases once they have been returned to their country of origin'

The Commission understands that, at present, Australia does not have standard processes in place for monitoring deportation cases. While there is no direct international legal obligation upon Australia to monitor the fate of deportees, the direct obligation to refrain from returning people to areas of risk indirectly imposes such an obligation. Australia must be confident that its processes are effective and its determinations accurate. The only way to be sure of this is to follow up those returned to document whether their claims to be at risk prove unfounded as predicted.

Monitoring in itself, however, can place a person at risk if undertaken blatantly or insensitively. Australian missions should be capable of devising confidential processes which do not expose returned persons to suspicion in their countries of origin. Local or international

³⁷ Id, paragraph 5.

³⁸ Both the ICCPR and CROC refer to 'human being' without specifying a minimum age, thus leaving the matter to be decided in accordance with each State Party's particular cultural, religious and legal standards. The CROC drafters debated this issues at great length on several occasions and explicitly decided to omit the phrase 'from the moment of his birth' from the definition of 'child' in article 1 in deference to the variety of views among States Parties: see Sharon Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the 'Travaux Preparatoires'*, 1992, page 115 paragraphs 29 and 30 and page 118 paragraph 77. Note, however, preambular paragraph 9 to CROC which states

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'.

³⁹ General Comment 20, paragraph 9.

non-government organisations or the UNHCR may offer effective sources of information to inform the monitoring process.

Recommendation 7: The Australian Government should discuss with appropriate agencies whether they would be willing and able to assist it in monitoring and, if so, fund them appropriately to undertake this task.

Attachment 1

Alternative Model Stage I - Arrival, reception and consideration for release

All ‘unlawful non-citizens’ who have not been immigration cleared may be held initially in closed detention. During this initial period of detention a decision is made about the form of release most appropriate to the applicant’s circumstances.

Grounds for denial of release

Asylum seekers are to be released from detention within 30 days after arrival, although this may be extended by a further 30 days on no more than two occasions if additional time is needed to consider grounds for possible denial of release. Accordingly, the maximum period which can precede release from detention is 90 days.

Release from detention may only be denied where

- X the identity of the applicant cannot be verified
- X an application for a Protection Visa has not been lodged for processing
- X the applicant is considered on reasonable grounds to pose a threat to national security or public order or public health or safety
- X there is a strong likelihood that the applicant will abscond or
- X the applicant refuses to undertake or fails the health screening.

Priority processing

Priority is to be given to processing for release from detention any applicant who

- X is less than 18 years of age or is a close relative of another detainee who is less than 18 years of age
- X is older than 75 years of age
- X is an unaccompanied minor
- X is a single woman
- X requires specialist medical attention that cannot be provided in detention
- X requires specialist medical attention due to previous experience of torture or trauma and which cannot be provided in detention.

Alternative Model Stage II - Release from detention

An applicant who is not denied release on one or more of the prescribed grounds must be released within 90 days of arrival in Australia. Applicants who qualify for release from detention are to be granted a bridging visa which matches the appropriate form of release. The form of bridging visa granted is determined by the case officer.

Statement of reasons and review

An applicant who is not released is to be provided with a statement of the reasons for his or her detention. Where the applicant remains in detention, the case officer must review the applicant's detention every 30 days with independent review at the end of 90 days. Stage IV sets out provisions for review.

Priority processing of asylum claims

An applicant who is not released is to be given priority in processing of his or her application for a Protection Visa.

Forms of bridging visa

Two forms of bridging visa are available for applicants who meet the requirements for release from detention.

- X Open detention bridging visa.
- X Community release bridging visa, which allows
 - family release
 - community organisation release or
 - release upon own recognisance.

The elements of the open detention bridging visa are

- X accommodation and daily requirements are provided by the Department
- X the visa holder can leave the centre between the hours (for example) 7.00 am and 7.00 pm
- X the visa holder must sign out and in to the hostel when departing and returning
- X eligibility for permission to work is available on the terms contained in Bridging Visa E
- X a visa holder who obtains employment must pay a fee for accommodation and board
- X eligibility for Asylum Seekers' Assistance⁴⁰ is on the terms currently available to other asylum seekers and if granted a fee for accommodation is deducted prior to payment to the visa holder.

The elements of the community release bridging visa are

- X in the case of family release, the visa holder resides at a designated address with a nominated close family member or member of the community offering family-like support; or, in the case of community organisation release, the visa holder resides at a designated address nominated by a recognised community organisation; or, in the case of release on own recognisance, the visa holder resides at a designated address
- X the visa holder must notify the Department of any change of address within 48 hours
- X the visa holder must report to the Department at regular intervals specified by the case officer
- X the visa holder or the nominated close family may be required to pay a bond to the Department or sign a recognisance with the Department
- X if called upon to do so, the visa holder shall present to the case officer within 24 hours
- X the visa holder is required to sign an undertaking in writing that he or she shall comply with the conditions of the visa and, in the event that a condition of the visa is breached, may be returned to detention

⁴⁰ The Asylum Seekers= Assistance Scheme was established in 1992 for the purpose of providing basic financial assistance and limited health care for needy applicants awaiting a decision on their primary applications for Protection Visas. The scheme is funded by the Federal Government and administered by the Red Cross on behalf of the Department. The Minister=s consent is required to continue the scheme each year.

- X eligibility for permission to work is available on the terms contained in Bridging Visa E
- X eligibility for Asylum Seekers' Assistance is on the terms currently available to other asylum seekers.

Reporting requirements are an important element of bridging visas. In this regard, it is noteworthy that in the financial years 1996-97 and 1997-98 (year to date) there have been no unauthorised arrivals released on bridging visas who have failed to meet their reporting obligations to the Department.⁴¹

In making decisions regarding release from detention, no special distinction is to be made between initial applicants and applicants for review of refugee status. The Commission does not favour a less sympathetic release method for review applicants. The risk with such a system is that genuine refugees may be penalised because the initial determination was incorrect. In 1996-97 twelve per cent of applicants at the review stage were determined to be refugees.⁴²

If an applicant is assessed as having some risk of absconding, this should not automatically preclude release from detention. The risk may instead be adequately addressed through additional conditions being applied to their release such as more rigorous reporting and residential requirements.

The Commission does not accept that release of the applicant into the community, in accordance with the proposed procedures, is unworkable in terms of ensuring adequate support for the applicant and monitoring his or her whereabouts. A central tenet of the community release scheme is determining the most appropriate form of release (open detention, family release, community organisation release or release upon own recognisance) based on the viability of the proposed support. In addition, a bond may be required if additional security is deemed appropriate. This is similar in many respects to the system which operates with significant success in Australia's criminal justice system. Nonetheless a degree of Government commitment will be needed to make community release viable. To ensure a feasible alternative to mandatory detention, consideration will need to be given to access to health care, employment registration, work permits, education and basic support such as that provided by the Asylum Seekers' Assistance Scheme. It will also require adequate funding of the community sector so that it can meet the additional demands placed on it by a comprehensive community release scheme. In particular, community organisations should not be required to pay a bond or sign a recognisance with the Department as these organisations are likely to support the greatest proportion of applicants and many would not have the funds to meet this requirement.

Alternative Model Stage III - Return to detention

Breach of conditions

If the applicant breaches any of the conditions set for his or her release, and fails to show good reason for the breach to the case officer, he or she may be returned to detention and should not be eligible to re-apply for release for a period of 30 days from the time of return to detention.

⁴¹ Information provided by the office of the Minister for Immigration and Multicultural Affairs in response to a question on notice by Senator Stott Despoja on 1 September 1997 - Question No.803.

⁴² Refugee Review Tribunal *Annual Report 1996-97*.

Where the applicant remains in detention, the case officer must review the applicant's detention at the completion of the 30 day period. Release can only be granted where the applicant complies with all the requirements set out in Stage I. Stage IV sets out further provisions for review.

Change in circumstances

If any of the grounds for detention set out in Stage I become relevant to the circumstances of a bridging visa holder, the applicant may be returned to detention and should not be eligible to re-apply for release for a period of 30 days from the time of return to detention.

Where the applicant remains in detention, the case officer must review the applicant's detention at the completion of the 30 day period. Release can only be granted where the applicant complies with all the requirements set out in Stage I. Stage IV sets out further provisions for review.

Alternative Model Stage IV - Review

By case officer

- X The case officer may review the applicant's detention at any time.
- X Where the applicant remains in detention, the case officer must review the applicant's detention at the end of every 30 days.
- X The case officer must review the detention and/or release status of the applicant upon request by the applicant, except that the case officer is not required to consider any such request more than once every 30 days.
- X In determining whether there should be a change in the detention and/or release status of the applicant, the case officer must take into account any change in circumstances since such status was last set.
- X The case officer has a non-enforceable discretion to review the detention and/or release status of an applicant at any time should there be a change in the circumstances of the applicant.
- X If the detention status of the applicant is to be changed, the case officer must provide a statement of reasons for the decision.

By an independent review tribunal

- X Upon request by the applicant the independent review tribunal may review a decision of a case officer with respect to
 - the detention status of an applicant
 - the conditions of release imposed on the applicant
 - an alleged breach of any condition of release imposed on the applicant.
- X The independent review tribunal is not required to consider any such application more than once every 90 days.
- X If no decision is made by the case officer as to the detention status of an applicant within 90 days of the applicant's arrival in Australia, the independent review tribunal must review the detention status of that applicant as a matter of priority.
- X Any review by the independent review tribunal under this provision is a review *de novo* on the merits of the application. The independent review tribunal may in its discretion grant any of the available bridging visas to the applicant, regardless of the status of the

applicant at the time of application or of the type of bridging visa originally sought by the applicant.

By the Federal Court of Australia

The Federal Court of Australia may review decisions on points of law relating to the detention status of an asylum seeker. The review should be able to consider the reasonableness of the original decision.