

# **Human Rights Law and Policy Conference**

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## **"An absence of human rights: Children in Detention"**

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### **Acknowledgements**

Fellow speakers, international guests, ladies and gentlemen, all.

First of all I would like to acknowledge the traditional owners of the land on which we stand and pay my respects to their elders both past and present.

The imprisonment of children under mandatory detention policy in Australia's detention camps was one of the worst, if not the worst, human rights violations in the Australia's post World War II history. This paper examines what has happened and why our human rights protection system in place has failed the children.

### **International trends in child migration**

The globalization of the world economy, including much improved communication and transportation, has increased flows of people across borders. This includes the movement of children both with their family and unaccompanied. In fact, migration of children is a permanent feature of our contemporary world and the number of child migrants and asylum seekers goes up and down depending on circumstances.

Separated children crossing borders may be refugees, humanitarian asylum seekers, trafficked children who will be forced to work as sex workers,<sup>1</sup> or simply children lost in the aftermath of war.

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<sup>1</sup> This paper does not focus on trafficked children. The majority of trafficking victims are sent to Western Europe, the Middle East, Thailand and India - and also to the US. The majority are girls, trapped in debt bondage and forced to work as unpaid prostitutes. According to UNICEF, every year, 300,000 women and girls are trafficked into Thailand alone, to be exploited in the commercial sex trade. They come from Burma, Laos, Cambodia and southern China (reputedly a major element of Triad commerce). Every year, between 5,000 and 7,000 Nepali girls are trafficked to India. Most of them are deceived into a life as sex workers. Approximately 200,000 Nepali women, most of them girls under 18, work in Indian cities.

In fact, half of the world's refugees and displaced persons are children. They may have fled their home to escape persecutions, human rights violations, exploitation, abuse or natural disasters and many of those who survived are traumatised and confused. In some cases their relatives may have paid a people smuggler to transport them to a place where they believed the child would be safe. They can be from all corners of the globe, but in general, the flows are from South to North and from East to West.

The majority of unaccompanied refugee and humanitarian asylum seeker children who make it to the West go to Western Europe (especially the Netherlands, the Nordic countries and Switzerland), the USA and Canada.<sup>2</sup> Some of those end up in Australia and New Zealand.

Particular increase in child migration took place between 1999 and 2003 when the total of some 90,000 children sought protection in the developed countries. According to UNHCR estimates, during 1999 alone<sup>3</sup> more than 20,000 unaccompanied or separated children applied for asylum in Western Europe, North America, Canada or Australia.<sup>4</sup> They were refugees, humanitarian asylum seekers or victims of trafficking.<sup>5</sup>

The number of children seeking asylum peaked in 2000-2001 at some 22,000 among the 21 countries for which data is available. Then the annual level fell by 11% from 2001 to 2002, and an additional sharp drop of 40% was recorded from 2002 to 2003. In 2003 some 12,800 children applied for asylum. The major receiving countries were the United Kingdom (2,800), Austria (2,050), Switzerland (1,330), the Netherlands (1,220), Germany (980) and Norway (920).

Thus the arrival of 2,184 child asylum seekers into Australia, between 1 July 1999 and 30 June 2003 was not an isolated incident but it reflected the above world trends. In fact Australia received only a small proportion of children seeking protection. Countries such as UK received more asylum seeking children per year than Australia over the whole period.

The contemporary child migration made it necessary for UN and its agencies such as UNICEF or UNHCR as well as for the countries receiving child migrants to develop appropriate laws, guidelines and procedures to deal with this vulnerable group of asylum seekers. For example, UNHCR has developed the 1997 "*Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*" and the 1994 "*Refugee Children: Guidelines on Protection and Care.*" So when the wave of child migrants hit Australia, there were already well established international procedures about how to handle child asylum seekers.

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<sup>2</sup> US Department of State press release, 3 October 2002. See <http://usinfo.state.gov/topical/global/traffic/02100401.htm>

<sup>3</sup> 1999 was the year when a short term swell in asylum seekers arriving by boats to Australia started.

<sup>4</sup> UN High Commissioner for Refugees (UNHCR). See <http://www.unhcr.ch/children/>

<sup>5</sup> Council of Europe: Parliamentary Assembly, *Protection and Assistance for Separated Children Seeking Asylum*, 22 March 2005. Doc. 10477. Online. UNHCR Refworld, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4305f4224> [accessed 1 June 2008]

# **Australia and its recent asylum seekers**

## **General observations**

Before we look at child asylum seekers arriving in Australia between 1999 – 2003 allow me to make few general observations about migration to Australia.

First, immigration has been a major and continuing element in history of Australia; indeed, all Australians, except the Aborigines and Torres Strait Islanders, are immigrants or descendents of immigrants who arrived since 1788.

Second, over the years Australia's population expansion through immigration programs has been carried out in a planned and orderly fashion first by UK and then by Australian governments and Australian immigration control system was by 1999 well established and able to handle any emergencies.

Third, from time to time composition and size of migration to Australia were a subject of vigorous political debate, sometimes with racial overtones, for example Chinese migration of the 1850s, establishment and maintenance of "*White Australia*" policy or Pauline Hanson calls to limit Asian migration.

Forth, over the years, the number of undocumented settlers has been negligible, especially when compared with the situation in the USA or in many European countries, mainly due to Australia's geography.

## **The 1999 – 2003 Arrivals**

Between 1999 - 2001 a short term swell in asylum seekers arriving by boat took place when a little over 8,000 arrived. When one applies the medium term perspective, between 1989 and now, only about 14,000 have arrived by boat in that 19 year period. This equates to less than 1%, when compared with about two million new settlers who arrived in Australia over the same 19 year period. In other words, all unauthorized boat arrivals over the last 19 years would only fill about 15% of the Melbourne Cricket Ground (MCG).

Despite this relatively small number of boat arrivals in Australia's recent history, Australian response to the 1999 – 2001 swell was panicky and highly politicized. During that time, to deal with the unauthorized boat arrivals, Australia developed one of the harshest refugee control laws in the Western World – extending an Archipelago Gulag style system of detention camps.

Let us now examine the key characteristics of the Australian immigration detention regime.

## **Some Basic Facts on the Immigration Detention Regime**

### **When was the mandatory detention policy introduced?**

In 1991 to deal with the perceived influx of Cambodians and Vietnamese boat arrivals and was formalized in 1992. One of the primary purposes was to perform basic health, identity and security checks. This early version of mandatory detention was limited to 273 days after some court challenges. The mandatory detention regime was significantly extended between 1999 and 2003, among others removing any time limits on mandatory detention.

### **Who was detained?**

All persons who either arrived without a visa or whose visa expired are mandatorily detained in one of the Australia's immigration detention centres until they were issued a visa or removed from Australia. The law applied equally to adults and children. Under the recently scrapped "*Pacific Solution*", if they were intercepted outside Australia's territorial waters or arrived at an "excised off-shore place" such as Ashmore Reef, they were sent to Nauru, PNG or Christmas Island and their rights as asylum seekers were significantly reduced – assessment of refugee claims was not made under the Australian refugee law, *habeas corpus* protections did not apply and they could not appeal decisions to Australian courts, to name only a few

### **Where were the asylum seekers from?**

During 1999 to 2003 most boat arrivals were from Afghanistan, Iraq and Iran. Reasonable numbers have also come from Palestinian Territories and Sri Lanka.

### **How many children were detained (all categories)?**

The number of children in detention changed over time. A total of 976 children were in immigration detention in 1999-2000; it peaked to 1923 children in 2000-2001; and then declined to 1696 children in 2001-2002; and 703 in 2002-2003. The total number of children in immigration detention between 1999 and 2003 was 2,184. Most of these children arrived by boat.<sup>6</sup>

### **Were these boat people genuine refugees?**

Using DIMIA's figures, in 1999 - 2000 95% of Afghans and 90% of Iraqis, were found to be genuine refugees.

### **How many children were refugees?**

Nearly 50% of children who applied for asylum during 1999 and 2003 were from Iraq and 98% of these were successful. Approximately 35% are from Afghanistan and 95% were successful. Just fewer than 10% were from Iran and 74% were successful. So the vast majority of children in immigration detention were recognized as refugees and allowed to settle in Australia.

For comparison, in the same period only about 25% of the asylum seeker children who arrived with a visa (e.g. tourist visa) were found to be refugees; this refutes the argument that there is a correlation between being a "boat person" and a "fake refugee"; in fact boat people are much more likely to be refugees.

### **How long in detention?**

According to the migration Act 1958 all boat arrivals, including children, must stay in detention until they get a refugee visa or are sent back home. Length of detention varied greatly - depending on the individual - some children spend weeks or months, whilst others could be detained for years.

Here are some statistics. On 1 October 2003, 62 children (51%) had been in detention for more than 2 years (8 of whom had been there for more than 3 years). All of those children were in detention with one or more parents. The children who were in detention on Boxing Day in 2003 (26 December), had spent an average of one year, eight months and 11 days (619 days) in detention.

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<sup>6</sup>Numbers taken from: *National Inquiry into Children Immigration Detention "A last resort?"*, Human Rights and Equal Opportunity Commission, April 2004

The longest a child spent in an Australian immigration detention centre it was 5 years 5 months and 20 days. Then the child and his family were recognized as genuine refugees and allowed to settle in Australia.

### **What type of visa did they get?**

Since 1999, refugees who arrived undocumented on boats were given three year Temporary Protection Visas (TPV).<sup>7</sup> After three years were up they had to start refugee application process all over again. This unfavorably compares with those who arrive, say, on a tourist visa and then apply for refugee status – such refugees got permanent visas.

### **What impact do the TPVs have on their recipients?**

There is evidence suggesting that, despite their 'right to work' and access to some basic services e.g. 'special benefit' and Medicare, those on TPVs suffered from a lack of stability and had difficulty settling, not least because they were denied access to some key services and entitlement including:

- English tuition for adults;
- the full range of employment assistance and programs;
- subsidized tertiary education; and
- family reunion or 'right of return' on departure.

## **What were the official reasons for the policy?**

### **Deterrent**

Why did we lock them up for years behind razor wire? The Ministers for Immigration were telling us that they have had to face making the awful choice between locking up children and deterring people smugglers and future unauthorized asylum seekers. And, that for good of Australia they have chosen the second of these – the deterrence.

This assertion could be challenged on a number of fronts. First, there was no convincing evidence that detention deters people smugglers or asylum seekers. We have had legislated our mandatory detention since 1992. Over the past 16 years, sometimes there have been larger numbers of boat arrivals, and sometimes there have been very small numbers.

There are all sorts of factors that might encourage or deter people from coming to Australia: The facts that encourage asylum seekers to search for a new home include:

- so-called push out factors, or the conditions in countries like Afghanistan, Iran and Iraq;
- the most significant “push factors” for secondary movement are in countries of first asylum. If refugees are unable to get effective protection in their own region, they are more likely to seek assistance to travel further afield.

The key “pull factors” encouraging asylum seekers to choose Australia include:

- Australia’s economic well being and its political stability;
- Australia being a signatory to the Refugee Convention. The countries on route to Australia are not signatories to the Refugee Convention so it can be argued that asylum seekers had a legitimate belief that they could not obtain effective protection in transit countries.

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<sup>7</sup> The recent Federal Budget announced the abolition of TPV system for refugees from 1 October 2008

Harsh and long term detention could be of some deterrent value but there are also other factors that would deter which include:

- the level of coastal patrolling;
- the imposition of tough people smuggling laws; and
- international cooperation on criminal smuggling rings.

Thus, we are dealing with a complex matrix of factors and it is simplistic and not correct to say that harsh mandatory detention is the only - or even the primary – factor in influencing asylum seekers decisions where to go.

In fact, it can be argued that mandatory detention was never an effective deterrent and that the various waves of movement of asylum seekers stopped for a variety of reasons unrelated to detention. In the case of the Iraqi and Afghan movement, the wave was initially halted by interdiction. It can be argued, however, that had there not been significant changes in the source region which led to a significant drop off in the numbers leaving for every destination, Australia's measures would only have had a short term effect, if any.

### **Children as deterrent**

What was particularly wrong is that the Australian government used children to deter boat arrivals. And may I ask, what part of human rights law - or any other modern law - allows the government to use innocent children to deter criminal people smugglers? While Australia has the right to protect its borders and stop people smuggling, it also has the responsibility to uphold its human rights obligations to children. According to the *Convention on the Right of the Child* (CROC) ratified by Australia, detention of children must be a **measure of last resort** and for the **shortest appropriate period of time**; and any detention of children must be a **proportionate response** to achieving a legitimate aim.

### **Security threat**

Second we were told that boat people pose security threats. But again there is no evidence to support this proposition.

For example, in an appearance before Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade, Human Rights Subcommittee (examining aspects of Human Rights and Equal Opportunity Commission's Annual Report 2000-01 concerning immigration detention centres) on 22 August 2002, the Director-General of ASIO, Mr. Dennis Richardson had this exchange with a committee member:

**Question:** *Mrs. Judy Moylan (Liberal MP) ".....Did I understand you correctly that none of those arriving on boats (2001-02) that were checked posed a security threat?"*

**Answer:** *Mr. Richardson "I said that none of them had received an adverse security*

Finally, we must keep reminding ourselves that over 93 percent of the Iraqi, Iranian and Afghani children that we lock up between 1999 and 2003 eventually end up in the community under the care of many of you in this room.

Looking at the above facts, our mandatory detention laws and in particular mandatory detention of children just do not make any sense - legally, practically or morally.

### **Towards “A last resort?” report.**

### ***“Those who’ve come across the seas” Report***

I was appointed the Australian Human Rights Commissioner in December 2000. By that time the previous Commissioner, Chris Sidoti had already reported to Federal Parliament that “the policy of mandatory detention of most unauthorized arrivals breaches international human rights standards”<sup>8</sup>, but at this stage the impact of long term mandatory detention on detainees was largely unknown.

Soon after my appointment, between February and June 2001. I inspected the key mainland immigration detention facilities and reported to Parliament on major issues of concern to me.<sup>9</sup>

In the 2001 Report I reinforced the earlier HREOC advice to the Parliament that “*the practice of mandatory and non-reviewable detention contravenes Australia’s human rights obligations*” and focused on practical breaches of human rights of detainees that were affecting their daily life in immigration detention facilities.

### **Background to the Inquiry**

At this stage, there was something of the “honeymoon period” when one compares with what has happened later. Detainees were relieved to be finally in safety of Australia and believed that their new start in life is just around the corner and that detention is clearly coming to an end. Despite this mental stress started to emerge, processing times and length of time in detention started to be an issue, lack of or totally inadequate education, recreation, accommodation and health facilities were bitterly complained about by many detainees. My report made a range of recommendations on how to address these concerns.

I also met with the then Minister for Immigration Hon. Philip Ruddock MP who promised to implement a range of my recommendations, especially those relating to quality of accommodation and health care, improvements in education, especially for children and young people, treatment of detainees with respect by Departmental and Australasian Correctional Management (ACM) officials and speed of processing of refugee claims.

Later in 2001, following further inspections and alarming media reports I formed a view that promises made by the Minister were not kept at all and that as a result there was a significant deterioration in mental health of detainees. As a consequence I decided to conduct a formal HREOC inquiry.

The key question on my mind was what kind of inquiry to conduct in order to have stronger impact on government decision-makers than the previous HREOC report ‘*Those who’ve come across the seas. Detention of unauthorised arrivals*’ had had.

After some deliberations I concluded that the new inquiry needed to focus on children (and not deal with all categories of asylum seekers in detention) because the language of the *Convention on the Rights of the Child* was much more specific than that of the *International Covenant on Civil and Political Rights* (ICCPR) in protecting their specific rights. For example, CROC contained the following provisions:

- the best interests of the child shall be a primary consideration. (Article 3(1));

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<sup>8</sup> *Those who’ve come across the seas. Detention of unauthorised arrivals*. Human Rights and Equal Opportunity Commission 1998

<sup>9</sup> *A report on Visits to Immigration Detention Facilities by the Human Rights Commissioner 2001*, Human Rights and Equal Opportunity Commission 2002

- detention must be as a measure of last resort and for the shortest appropriate period of time. (Article 37(b));
- children in detention have right to be treated with humanity and respect (Art.37(a), (c));
- children have the right to enjoy, to maximum extent possible, development and recovery from last trauma (Art.6(2) and (39));
- asylum-seeking and refugee children are entitled to appropriate protection and assistance (Art. 22(1)).

Second, I had hoped that focussing on children will help to focus public opinion on evils of mandatory detention of children and quarantine the Inquiry from prejudice and racial vilification that existed in some sectors of Australia society toward the predominantly Muslim asylum seekers.

Third, I also decided that for the inquiry to be successful it needed to be open to the public and involve broader civil society.<sup>10</sup>

After HREOC approved the *Terms of Reference* for the Inquiry I met with Minister Ruddock and informed him of the Commission's decision. The Minister in response expressed his utmost displeasure in no uncertain terms. The Minister simply told me that "*if you dare to conduct the Inquiry there will be no job for you as long as I sit around the Cabinet table*".

On 28 November 2001 *the National Inquiry into Children in Immigration Detention* was publicly announced.<sup>11</sup>

It took over two years to complete. In April 2004 I presented the then Attorney General Hon. Philip Ruddock MP with copy of my finalized report for tabling in Parliament under HREOC Act. The report was tabled on the Budget Day 13 May 2004 by Hon. Tony Abbott, MP, Leader of the House (and not by the Attorney General as it would be normally the case).

## **Findings and Recommendations of "A last resort?"**

By now many of you probably know what were the primary findings of "*A last resort?*" Report, but to refresh your memory I will briefly reiterate them.

### **First finding**

First - we found that the mandatory detention policy itself breached *the Convention on the Rights of the Child* because it made detention the first and only resort, not the last resort. The policy also failed to ensure that there is an individual assessment of the need to detain and there is no effective review of detention in the courts.

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<sup>10</sup> The support of civil society for the Inquiry was enormous. It was possibly the largest civil rights movement in Australia since the Vietnam War. Many established organisations became involved and new organisations focussing specifically on children in immigration detention emerged, for example Chilout or Rural Australians for Refugees.

<sup>11</sup> Full details of the Inquiry can be found at [http://www.humanrights.gov.au/human\\_rights/children\\_detention/index.html](http://www.humanrights.gov.au/human_rights/children_detention/index.html).



### **Second finding**

Second - we found that children have been in detention for long periods of time. As I have mentioned earlier the longest a child has spent in Australian detention was five years, five months and 20 days.

### **Third finding**

Third – the Inquiry established that children in detention for long periods were at high risk of serious mental illness.

In particular, the Inquiry found that the Department's failure to implement the repeated recommendations to release children suffering from mental illness amounts to cruel and inhumane treatment under article 37(a) of *the Convention on the Rights of the Child*.

This was the most serious finding that the Inquiry has made. The finding was made because there were real victims of Australia's detention system. There were perpetrators of human rights violations, too.

### **Mental health**

And allow me to stop here for a moment and focus on mental health issues.

During my visits to different immigration centres, mental health issues as presented to me by detainees and medical professionals became of major concern to me. Clearly, the mental health concerns grew in importance as I had continued my visits over time and seen the rapid acceleration of deterioration in mental health.

In fact, the face to face meetings with severely traumatized detainees and people who were mentally unwell became the most traumatizing experience of my work as Human Rights Commissioner. I have followed the most tragic cases by writing letters prior to the completion of my Inquiry to ask the Minister and the Department to intervene.

My concerns with mental health issues were verified by ample evidence given to the Inquiry by a wide range of mental health professionals.

The Inquiry has established beyond any reasonable doubt that many detainees after spending six or more months in immigration detention started to display, what I have called in my speech to the National Press Club a "*culture of despair*".

It usually manifested itself in detainee statements about hopelessness of their situation and by visibility of early signs of depression, even to an untrained eye. A good illustration of this is a statement was made by an Iranian man during the meeting with Detainee Representative Committee in Curtin IRPC.

*"I'm a father of two teenage children. My 15 year old son sleeps only with the help of sleeping pills. Both of my children are severely depressed after 5 or 6 months in the camp. My daughter is 16".*

This is one of the milder reactions that I have personally observed in the course of my many visits. Other reactions include intense trauma, self-harm and complete family disintegration. Many children have also showed symptoms like nightmares, bed-wetting, muteness and lost appetite.

After 10 months of detention or so, the mental health of many further deteriorated and many people believed that they are totally abandoned and that nothing can or will improve their situation. A good example of this is a statement made by Afghan man during an interview I conducted in Perth IDC:

*"It's about 16 months since I arrived here. I've been under a lot of pressure. My life has been taken away from me. Within these 16 months I have become mentally and also physically ill. Every day my physical well-being is getting worse.... I've become a useless person who wishes for death every day".*

At that stage, the number of detainees requiring psychological and psychiatric help was staggering. Some children, for example, have been diagnosed with clinical depression, post traumatic stress disorder, developmental delays and suicidal ideation – and the list goes on.

I will briefly tell you about two of the many tragic factual examples that I witnessed in person and are recounted in our report.

### **Case example 1**

Between April 2002 and July 2002 - a three month period - a 14 year old boy detained at Woomera:

- attempted to hang himself four times
- climbed into the razor wire four times
- slashed his arms twice
- went on hunger strike twice and
- he also once escaped from a detention centre only to be recaptured by police the next day.

This boy's mother was hospitalized due to her own mental illness during this whole period.

And I can assure you it was not “theatre” or “game playing” as suggested by some officials.

### **Case example 2**

Then there is the case of a 13 year old child who has been seriously mentally ill since May 2002. This boy has regularly self-harmed. His father has also become mentally ill.

In February 2003 a psychiatrist examining the boy wrote the following:

*'When I asked if there was anything I could do to help him, he told me that I could bring a razor or knife so that he could cut himself more effectively than with the plastic knives that are available.'*

There have been approximately 20 recommendations from mental health professionals saying that he should be released from detention with his family. Some said that removal from detention was a matter of urgency.

This child, with his family, was removed in mid-June 2004, after they won a Refugee Review Tribunal case and were declared to be refugees. I visited them in their home after their release – the boy started attending school but still was on medications. His father still locks himself out in a room and stays there for days without any contact with outside world. It will take many years before the boy and his family will fully recover from this experience, if ever.

## **Other findings**

Now coming back to inquiry findings, the Inquiry found that the conditions in detention centers:

- failed to provide sufficient protection from physical and mental violence;
- failed to provide the appropriate standard of physical and mental health;
- failed to provide adequate education until late 2002;
- failed to provide appropriate care for children with disabilities; and
- failed to give unaccompanied children the special protection that they needed. This directly relates to the fact that the Minister for Immigration is both the guardian and jailer of unaccompanied children.

## **Inquiry Recommendations**

Having found these breaches of human rights the question was: Where do we go from here? What should be done in the future to avoid ongoing breaches?

### **Recommendation 1: Release**

The Inquiry recommended that for the first step, the children who are in immigration detention centres and residential housing projects be released with their parents as soon as possible.

But the release of the children in detention following my report, only solved the immediate problem. The challenge remains to change the system in such a way that future boat people will not end up suffering as the 1999-2003 arrivals. Unless Australia's laws change, children will continue to be locked up in places like Christmas Island for indefinite periods of time, despite government assurances that this will not happen again.

That is why we went on to make a second recommendation.

### **Recommendation 2: Change the law**

Change the law, as a matter of urgency, to comply with Australia's responsibilities under the *Convention on the Rights of the Child*.

We need new laws that make detention of children the last resort - not the first and only resort.

We need new laws that make detention of children for the shortest appropriate period of time - not for indefinite periods of time.

And we need new laws that make the best interests of the child a primary consideration - not laws that force a choice between family separation or indefinite detention. This is a false dichotomy.

There were also three **other Recommendations** seeking:

- appointment of an independent guardian for each child in immigration detention;
- codify minimum standards for treatment of children in legislation; and
- review impact of "Pacific solution" legislation on children in detention.

## Government response

The Howard Government did not formally respond to the Report, but the then Minister for Immigration Hon. Amanda Vanstone MP issued a press release saying that the Report was backward looking and unfair to the Department of Immigration. The Minister, however did not challenge the facts presented in the Report or its conclusions.

### Release of children

The Government's tacit response to the Report was to start a quiet release from detention of children and families that took over a year to complete. On 11 June 2004 the Prime Minister publicly declared that: *"It is the Government's intention to dwindle the number of children in immigration detention to zero"*.

On 7 July the then Minister for Immigration held a press conference in which she announced that there was only one child left (that might be reasonably classified as the subject of HREOC's report) in any immigration detention centre on mainland Australia. However, according to a media release issued ChilOut the following day *"The Minister's figure does not include children detained in Nauru, Christmas Island, Port Augusta, Maribyrnong or Villawood detention centres. It does not include children who arrived by plane. It does include children who have not sought political asylum."* Then an announcement was made by the Prime Minister Howard on 24 August 2004 that *"there are only two children in immigration detention centres"*, while in fact there were 86 children kept - 70 children kept in Australia's detention centres and 16 in Nauru.

The children release was finally secured by Petro Georgiou and his "Gang of Four" who brokered a deal with the Prime Minister that was announced on 17 June 2005.<sup>12</sup>

The children were finally were released, that is transferred into "community detention" (which now became known as a "residence determination") one year later, that is at 29 July 2005.

Since then, for about 3 years now, children have not been detained in anything other than exceptional circumstances and for very short periods of time.

### Changes to the law

The former Coalition government introduced a range of changes to the *Migration Act 1958* – changes that can be directly attributed to the "A last resort?" report.

The most significant change was the addition of Section 4AA to *the Migration Act 1958* that stated a principle that "a minor shall only be detained as a measure of last resort."<sup>13</sup>

In addition, the insertion of Sections 197AA – 197 AG gave the Minister discretion to remove any unlawful non-citizen from immigration detention centre and to request unlawful non citizens to reside in "a specified place", for example, in Community Detention or Immigration Residential Housing. Such Ministerial Determinations must specify the

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<sup>12</sup> - see ChilOut press releases for July – November 2004 at [http://www.chilout.org/information/community\\_detention.html](http://www.chilout.org/information/community_detention.html)

<sup>13</sup> 4AA Detention of minors a last resort

(1) The Parliament affirms as a principle that a minor shall only be detained as a measure of last resort.

(2) For the purposes of subsection (1), the reference to a minor being detained does not include a reference to a minor residing at a place in accordance with a residence determination.

name of beneficiary and cannot be made for a class of persons, e.g. children generally. “Residence determination” must be made personally by the Minister and the Minister has no duty to consider whether to exercise his power.

The net result of the introduction of Sections 4AA and 197AA-179AG to the *Migration Act* is that the detention of children in the future will be less likely, but it is unfortunately still possible.

The Labor government, since coming to power in late 2007, has delivered on its election promise and abolished the Pacific Solution and closed detention centres on Nauru and Manus Islands. In fact few asylum seekers remain in detention centres elsewhere as the vast majority of those who would previously have been detained are in some form of alternative arrangements – most supported by the Red Cross (with government money).<sup>14</sup> There are many more positive policy initiatives under consideration. In addition, several states have provisions for Medicare ineligible asylum seekers to access emergency hospital treatment (plus more in other states).

It is, however, important to note that the Labor government has not repealed any of the excision legislation – the 2001 excisions and the massive 2005 excisions, both involving some 4000 islands. Labor appears to have back-flipped on this on this issue<sup>15</sup> as changes were promised but the laws in question are unlikely to be repealed in the near future.

This means that all future unauthorised boat people who arrive into excised parts of Australia will be locked up at our new, ultra modern \$400 million 800 inmates detention facility on Christmas Island<sup>16</sup> and that they will not be processed under Australian law as the Christmas Island is deemed to be outside Australia with no right to appeal decisions and to have *habeas corpus* protections.

In comparison with asylum seekers arriving in the migration zone, say if their boat or plane arrives in Perth, they may be sent to Christmas Island too, but they will be processed under Australian law while sitting in indefinite mandatory detention.

So one could conclude that instead of a “*Pacific Solution*” with detention centre in Nauru, we are most likely to have an “*Indian Ocean Solution*” with detention centre on Christmas Island and with two sets of laws applying, depending upon where asylum seeker lands in Australia.

As far as detention of children is concerned there is unfortunately a distinct possibility under the current laws that we may witness again children as immigration prisoners in Australia should there be an influx of boat people similar to that in 1999-2003.

I have noted the assurances given by the current Immigration Minister Evans who has said that no children and families will be held in detention centres. But as a matter of fact, it is difficult to take his assurances at face value the fact is that a significant proportion of

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<sup>14</sup> As at 23 May 2008 the total number of detainees was 537. Out of that number 446 were held in Immigration Detention Centres and the remainder in Community Detention, Immigration Residential Housing, etc.

<sup>15</sup> On 10 June 2008 Immigration Minister Hon Chris Evans launched an inquiry into immigration detention and possible alternatives. As the inquiry will focus on examination of detention policy, procedures, practices and outcomes, it is unlikely to deal with the issue of the excision legislation.

<sup>16</sup> The Christmas Island Immigration Detention Centre is about to be commissioned and ready for operation from November 2008.

refugees travel with children. This would make the 800 bed Christmas Island detention centre rather useless if Australia would decide to place children with families elsewhere.

Another positive change was the recent Government announcement that that Temporary Protection Visas and Temporary Humanitarian Visas will be abolished by 1 October 2008. This is a most welcome change as it ends a period of uncertainty imposed by the Howard government on TPV holders. It would allow current TPV holders family reunion, access to much needed Commonwealth assistance and grant them the ability to study.

### **Further changes needed**

There are, however, a number of significant challenges associated with the past policies that require action from the current Immigration Minister Hon. Chris Evans MP. These include:

- further removal of remaining vestiges of Australia's indefinite mandatory detention system to ensure that our immigration laws and procedures comply with the international human rights law standards as ratified by Australia. If we do not change the laws we will again be creating a terrible legacy for ourselves when new boats arrive. Mandatory detention is still on the books and children can still be detained;
- abolition of the use of restricted bridging visas and the 45 Day Rule that deny basic rights and breach international obligations under the Refugee Convention, CROC and ICCPR. For example, the most often criticized Bridging Visa E<sup>17</sup> is given to asylum seekers applying for substantive visa or seeking review or Ministerial interventions. Since 1997, all asylum seekers who have not applied for a Protection Visa within 45 days of arrival in Australia are denied work rights, Medicare and Centrelink 18payments. These people can wait for years for a final decision and during that time they have no income. Some refugee workers call it "fresh air visas" because it only permits asylum seeker to breathe. The use of restricted bridging visas results in extreme poverty and destitution
- respect for the principle of family unity and repealing the ability to split families under the Migration Act 1958. Just recently a father of six who was wrongfully deported four years ago was reunited with his family in Sydney after another case of DIAC bureaucratic bungling.<sup>19</sup> There are many other cases where either parents or one parent were deported because of their regularities in immigration status and the rest of family was allowed to stay in Australia;
- facilitating family reunification for the unaccompanied minors, some as young as 8 and 12 years of age, who came to Australia between 1999-2003 and were given TPVs. Those who turned 18 years of age while still on TPV are not eligible for family reunion. Had they been processed appropriately according the Refugee Convention, they would have received their Permanent Protection Visa and been eligible to have their families join them in Australia;
- establishing a legislation and procedures to allow return to Australia of unsuccessful asylum seekers who after being returned to their countries of domicile had suffered significant treats to their life and human rights violations;

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<sup>17</sup> Restricted bridging visas, including Bridging Visa E, are used for a wide range of purposes – not just for asylum seekers. In fact, the majority of BE holders and not and never have been asylum seekers or detainees. The real issue is the limitation of entitlements to work, income support and medical care that are attached to several types of bridging visas commonly granted to asylum seekers.

<sup>18</sup> In fact, all asylum seekers are denied Centrelink, not just those caught by the 45 Day Rule.

<sup>19</sup> *The Australian*, 30 May 2008

- continuing the post-Palmer<sup>20</sup> cultural shift in the Department of Immigration and Citizenship (DIAC). At present DIAC still employs many senior officers whose professional careers directly benefited from formulation and ruthless implementation of mandatory detention policies under the previous government.

Until the relevant laws and procedures as well as DIAC culture are changed to reflect the international human rights standards better, there is no way we can be certain that the next lot of child asylum seekers will not be detained on Christmas Island and be treated in accordance with Australia's obligations under the *Convention on the Rights of the Child*.

Further, one could add one more thing to the “government should do list”. Is that the government should take active steps to publicize their change of policy in international fora as Australia did publicize its ratification of Kyoto agreement. Australia’s previous policy has had a profound impact on practices in many countries. Immigration detention, which used to be used sparingly in Europe, is now widespread and detention of children in countries such as the UK is a big issue. Also the Pacific Solution spawned the “Mediterranean Solution” with detention centres being established on Lampedusa and in Libya.

## Long term legacy

There is also the long term legacy which needs to be taken care of.

Some of the former detainees, including children, developed long term serious mental health issues and require on-going specialized psychological and psychiatric help for many years to come - help they were not getting in the detention environment and are not getting now. I am particularly concerned about the long term impact of immigration detention on mental health of those who spend considerable periods of time there.

From the evidence presented to the Inquiry we know that the longer children were kept in detention the more likely it is that they have developed serious mental health problems. We also know that out of boat children detained between 1999 – 2003 by now more than 9 out of 10 of these children call Australia home because they were eventually found to be genuine refugees.<sup>21</sup> Provision of adequate mental health services and/or payment of appropriate compensation should be considered by the government to these people.

There could be also other ex-detainees who, because of lack of duty of care shown by the Department and ACM, have suffered long term negative consequences of detention. Australia needs to consider redress for them too.

This means that the Australian community was left with the burden of not only helping these families deal with the normal challenges of settling into a new society, but also the additional issues of compensatory responses to redress the mental and other damage that our government has caused to refugees.

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<sup>20</sup> See Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau Report*, July 2005

<sup>21</sup> Out of 2,184 children in detention between 1999 and 2003, over 93% have been found to be refugees.

And here I do not propose to have a “silver bullet” solution to the problem. Perhaps the Minister could undertake some exploratory work to in order to determine both the level of liability the Government has incurred while inflicting mental health damage on detainees and the best way to deal with the problem.

Let us hope that we will be able to develop a fair compensation system, so individual victims do not need to take the path of individual civil law claims, as it was pursued by Cornelia Rau or Vivian Alvarez.<sup>22</sup>

The question of legal responsibility of those officials who while performing their official duties breached human rights of detainees or may be even have committed crimes is yet to be discussed. The key architects and implementers of the Pacific Solution and mandatory detention policies and in particular those who inflicted “*cruel and inhumane treatment*” on children in detention continue to occupy positions in the Department of Immigration and Citizenship and elsewhere. They are still in positions of power and continue to influence government policies and decisions at present.

In my view those responsible for serious human rights breaches in the early 2000s should not benefit from their unethical behavior. Perhaps an Ethics Review Committee could be established under the auspices of the Public Service Commission to examine cases of over-zealous public servants whose behavior did not conform with the APS standards and resulted in documented human rights breaches.

## **Why Australia has failed its asylum seekers?**

When one compares practices and laws of Australia with the laws and practices of other developed countries, Australia’s mandatory and long term immigration detention system for undocumented asylum seekers is clearly one of the harshest in the world. During the 1999-2003 our response was clearly over the top, bordering on hysteria and hardly justified in the context of relatively numbers of asylum seekers reaching Australia.

So why Australia has failed its asylum seekers? Is it something about our national character and prejudices we may have, or rather it is a reflection of systemic inadequacies of Australia’s human rights protection system?

In my opinion it is the later. However, below I will start with a brief examination of the social and political context that contributed to the harshness of our treatment of refugees and then concentrate on systemic inadequacies of our human rights protection system, namely on:

- political opportunism, prejudice and xenophobia;
- ineffective international human rights protection system;
- weak domestic system to protect civil liberties and individual freedoms; and
- the issue of demarcation between Federal and State laws that has played a particular role in lack of protection of children’s rights in detention.

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<sup>22</sup> There are many more cases where the Department of Immigration had to pay compensation. Recently a Nigerian man has been awarded compensation for degrading treatment suffered during a seven-hour transfer by bus from Maribyrong to Baxter Detention Centre in 2004.



## Political opportunism, prejudice and xenophobia

Australia's harsh response to the boat people arriving between 1999 and 2003 needs to be seen in the context of earlier changes in attitudes to immigration and multiculturalism, followed by the emergence of Pauline Hanson movement in the 1990s.

In March 1996 Pauline Hanson was easily elected to Federal Parliament as an independent member from the previously safe Labor seat of Oxley based in Ipswich, Queensland. A large proportion of her support appeared to have come from traditional Labor Party voters.

Her political platform warned that Australia was "*in danger of being swamped by Asians*" due to high immigration, asserting that Asian immigrants "*have their own culture and religion, form ghettos and do not assimilate.*" As a result of her views, Hanson was briefly moved to the forefront of Australian politics and founded One Nation Party. The peak of Hanson's success occurred in June 1998, when One Nation attracted nearly one-quarter of the vote in the State elections in Queensland,

During the rise of Pauline Hanson, on one hand, the reaction of the mainstream political parties was overwhelmingly negative to the One Nation. On the other, however, there was an on-going battle to capture votes of her supporters and realization that her views were shared by many Australians. When Hanson failed to be elected to Senate in 2001, she blamed Prime Minister John Howard for stealing her policies. Many commentators agreed with her assertion.

In 2001 the number of unauthorized arrivals of boat people peaked.

It was also a year when in August 2001, Norwegian ship Tampa with 439 refugees rescued in international waters arrived nearby Christmas Island. The Howard government refused Tampa entry into Australian waters and ordered the Australian Special Air Service soldiers to board the ship. The refugees from the Tampa were loaded onto a Navy vessel, HMAS *Manoora* and transported to Nauru. Changes to legislation followed creating so-called Australia's "*Pacific Solution*," that effectively meant that any asylum seekers who did not reach the Australian mainland would not be able to apply for refugee status.

The government's handling of "*Tampa*" crisis appeared to have at the time broad support of Australian population.

Finally there was the "*children overboard*" affair of October 2001. It refers to claims made during the 2001 Australian election campaign by the then Immigration Minister Ruddock that asylum seekers had thrown babies overboard from a fishing boat as a way of pressuring the Australian Navy to rescue them and take all the asylum seekers to Australia. This claim was further supported by the then Prime Minister John Howard and the then Defence Minister, Peter Reith.

The Senate Inquiry later established that that the "*children overboard*" claim was untrue and that the government knew this prior to the election,

The Howard government was returned in the 2001 mainly because of its ability to attract "*One Nation*" voters. Handling of both "*Tampa*" crisis and "*children overboard*" affair, were credited to give the government of the day electoral advantage as the issues addressed

voters' fears of terrorism, their anti-refugee sentiment and support for strong border protection.

Considering the source of its government's electoral success harsh treatment of boat people was popular with the Government.

## **Ineffective International Human Rights Protection System**

Many of us believe that the UN human rights protection system provides adequate safeguards for asylum seekers.

In fact, in the immediate aftermath of WWII it was realised, partly due to the Jewish Holocaust, that it was not sufficient to "arbitrate" in conflicts between nation states – there was a pressing need to protect individual human rights. Or in other words, human rights were no longer just the private business of individual nations, but were a matter of international concern.

Since then UN has developed a wide range of UN conventions and declarations that defined the human rights standards and protected refugees.

The first instrument, the 1948 United Nations *Universal Declaration of Human Rights*, attempted to set out the fundamental rights of all people, including:

- the right to life;
- freedom from slavery;
- freedom from torture and arbitrary arrest;
- freedom of thought, opinion and religion;
- the right to a fair trial and equality before the law;
- the right to work and education; and
- the right to participate in the social, political and cultural life of one's country.

Since then many international human rights standards have been developed and incorporated into many international laws and treaties and some of them are of direct relevance to treatment of boat people and children, for example:

- the 1966 International Covenant on Civil and Political Rights (ICCPR);
- the 1989 Convention on the Rights of the Child (CROC)
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Convention and Protocol Relating to the Status of Refugees.

But for a treaty to be explicitly binding within Australia, it must be incorporated by an enactment into domestic law and is subject of adjudication by Australian courts.

The key two international instruments of relevance to treatment of refugees and child protection, namely CROC and ICCPR, do not have specific federal enacting legislation. Both of them were only referred to HREOC.

Thus the international law has provided a range of solid standards on how to treat children in immigration detention, but Australia lacks adequate implementation procedures to enforce them.

## Weak domestic protections of civil liberties and freedoms

Then Australia has on balance a relatively weaker system of civil rights protection when compared with other developed nations.

In Australia today, the civil rights and individual freedoms are promoted and protected through a complex, evolving mosaic of institutions and laws, including:

- contemporary system of government in Australia
- the Australian Constitution and the Constitutions of the States;
- High Court
- lack of Australian bill of rights
- centuries of common law (inherited from England);
- statutory laws, especially Federal and State anti-discrimination laws;
- human rights treaties ratified by Australia and
- bodies like the Human Rights and Equal Opportunity Commission created especially to advance and protect human rights.

### Contemporary system of government in Australia

Many federal politicians believe they are the keepers of this nation's human rights flame.<sup>23</sup> But generally the attitude is that of the former NSW Premier Bob Carr who distrusted legislative protections of individual freedoms as unwelcome limitation of government powers. When welcoming a state parliamentary report that found NSW residents' rights would not be enhanced by a state-based bill of rights he said:

*“A bill of rights is an admission of the failure of parliaments, governments and the people to behave in a reasonable, responsible and respectful manner. I do not believe that we have failed.”*

Of course not everyone agrees that Parliaments do actually provide the best protections for human rights. As Lord Scarman, British Lord of Appeal in Ordinary from 1977 to 1986 said:

*“if you are going to protect people who will never have political power, at any rate in the foreseeable future - not only individuals but minority groups - if they are going to be protected, it won't be done in Parliament - they will never muster a majority. It's got to be done by the courts and the courts can only do it if they've got proper guidelines.”*

The fact of the matter is that the Westminster system of Australian government does not fully follow the principle of separation of powers, but it favours Executive Power over the Legislative Power.

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<sup>23</sup> Events in the ACT and in Victoria indicate that some of their state and territory colleagues are more open minded on that subject, by their preparedness to respectively legislate and actively formulate a bill of rights.

Furthermore, Parliament does not deal with individual cases. Decisions are made by majority to reflect the interest of majority and strict party discipline ensures that dissenting voices are rarely heard.

### **Majority rules**

Firstly, decisions regarding the need for new or amended laws may be taken by Federal parliament without due consideration of human rights principles. This, for example, may happen for populist reasons or because of the heat of the moment – the September 11 terrorist attack, the Bali bombing or the London public transport bombings.

In fact, these reactive, often potentially draconian laws, are frequently introduced by governments of the day, with the tacit support of a large segment of the population.

### **Party discipline**

Secondly, our political process, in regard to individual federal politicians, no longer provides the kind of protection and assurance that it once might have. The dominance of the major political parties and the rigidity of their discipline undermine the prospects of individual protection at the parliamentary level - Petro Georgiou and his 'gang of four' have had only a very limited impact on softening of immigration detention legislation in June 2005.

My point here is that within the major parties, organisational discipline makes it extremely difficult - not impossible - but very difficult for individuals or even groups of individuals to change laws from a human rights perspective. This is especially true if there is a broad community support for the government policies.

In countries where the Executive and Legislative powers are separated to a greater degree, protection of civil liberties benefits.

## **The Australian Federal Constitution**

The 1900 Federal Constitution as the cornerstone of the Australian legal system.

The Constitution of Australia divides spheres of legislative, judicial and executive responsibility between the Commonwealth of Australia and the States. Both Federal and State governments are responsible for human rights protection. States, for example, may also incorporate international human rights principles into state legislation to the extent that such legislation is not inconsistent with any Commonwealth legislation in the area.

On the federal level, a comprehensive statement of civil rights – or citizenship rights as they might have been known at Federation – was not included in Australia's Constitution.

In fact, very few individual rights were explicitly recognised in the Constitution. For the record they are:

- the right to vote (Section 41) - although still to be confirmed by the High Court as explicitly thus;
- the right to a trial by jury in the State where the alleged federal offence took place (Section 80);
- the denial of federal legislative power with respect to religion (Section 116); and
- the prohibition against discrimination on the basis of State of residency (Section 117).

There are also two “economic rights”:

- Section 92 guaranteeing freedom of interstate trade; and
- Section 51 mandating payment on just terms for property acquired by the Commonwealth.

The Constitution is silent in relation to numerous other rights that are well recognised in the constitutions of other Western democracies. For example, the Constitution does not guarantee:

- the fundamental freedoms such as the freedom of association, freedom of movement, freedom of peaceful assembly, freedom of thought, belief and opinion, and freedom from arbitrary arrest or detention;
- the right to a fair trial or due process;
- equality of all persons in Australia before the law.

### **Australian High Court and the Constitution**

The jurisprudence of the High Court in respect of the Constitution has made a significant contribution to the protection of human rights in Australia. I refer here to the Tasmanian Dam Case<sup>24</sup>. Here the High Court reassessed the external affairs power – that provision in the Constitution which gives the Commonwealth control of external affairs.

From this, section 51(xxix) of the Constitution, the external affairs power, provided the Commonwealth Parliament with the ability to legislate so as to incorporate provisions of international human rights conventions into Australian domestic law. So the High Court affirmed in a decision where Queensland challenged the constitutional validity of the *Racial Discrimination Act 1975*.<sup>25</sup>

A High Court interested in an expansive reading of the Constitution has also found that certain individual rights are implicit in the system of government it establishes. Thus in 1997 the individual right to communicate freely in political matters was recognised by the High Court.<sup>26</sup>

The High Court has also previously acknowledged that international human rights law is a legitimate influence on the development of the common law. However as I will develop later, the current High Court’s thinking in these matters demonstrates a change. Speaking personally I believe if a ‘*Teoh*’<sup>27</sup> situation presented itself again, the outcome from the High Court might be different from previous.<sup>28</sup>

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<sup>24</sup> Commonwealth v. Tasmania (Tasmanian Dam Case) [1986]

<sup>25</sup> Koowarta v. Bjelke-Petersen [1982] 153 CLR 168.

<sup>26</sup> Lange v. Australian Broadcasting Corporation [1997] 189 CLR 520.

<sup>27</sup> Minister for Immigration and Ethnic Affairs v. Teoh [1995] 183 CLR 273. The High Court’s decision confirmed that legislative provisions should be interpreted by courts in a manner that ensures, as far as possible, that they are consistent with the provisions of Australia’s international obligations.

<sup>28</sup> Recent comments by members of the High Court, the most recent being McHugh J’s observations in the majority decision of *Al-Kateb*, where he declared Justice Kirby’s view that the Australian Constitution should be read consistently with international law was ‘heretical’, have suggested that the ‘legitimate expectation’ principle outlined in *Teoh* may be the subject of reconsideration by the High Court in future (*Re Minister for Immigration and Multicultural Affairs: Ex parte Lam* [2003] HCA 6). There have been three previous attempts to introduce Federal legislation that overrules the ‘legitimate expectation’ principle, but for a variety of different reasons on each occasion the Bill has failed to become law. In a joint press release by the Attorney-General and the Foreign Affairs Minister, dated 10 May 1995, it was asserted: ‘that entering into an international treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty...’

## **No Australian Bill of Rights**

The expanding reading of the Constitution to protect human rights does not however take away the fact that Australia has no either constitutional or statutory Bill of Rights.

Our founding fathers, in putting the Constitution together, looked at a number of different constitutions. They looked at the French and American, amongst others, and decided that there was no need to include a Bill of Rights into our Constitution.

In fact, today Australia the only developed common law country without a Bill of Rights. And it is curious in a way, that in the time of sweeping globalisation, Australia swims against the tide in terms of protection of individual rights.

The USA. system is characterised by strong protections of civil liberties. It has a constitutional Bill of Rights, one of the strongest in the world, which invalidates all legislation that is inconsistent with it. For example, a recent US Supreme court ruling reinstated the principle of *habeas corpus* for detainees at the prison for terrorism suspects in Guantanamo Bay US naval base in Cuba. The Australian Constitution was unable to offer “habeas corpus” protection to people being subject of the “Pacific solution”.

The European Union is another world leader in human rights. As you would be aware, all States belonging to the EEU surrender part of their sovereignty to the human rights court in Strasbourg. Look at Canada, it legislated for a Charter of Rights and Freedoms in 1982; New Zealand and the United Kingdom, even our friends the Kiwis and Mother England have adopted human rights legislation.

So what conclusions can we draw from the international scene? First I would say that where individual rights are enshrined in legislation there's certainly a much better level of protection for individuals, including asylum seekers from government action.

Such a charter would provide our courts with Parliament-determined standards and, as the distinguished British jurist, Lord Scarman said:

*"If you are going to protect people who will never have political power, at any rate in the foreseeable future, not only individuals but minority groups, it won't be done in Parliament. They will never amass a majority. It's got to be done by courts and the courts can only do it if they've got proper guidelines."*

## **Diminishing role of the common law in protecting rights**

In recent years we observe the decline in the role of common law as shield for Australia's residents when their civil liberties are under pressure.

In fact where federal parliament passes a law that is unambiguously linked to a ‘head of power’ within the Constitution, the potential reach of that law is quite startling.

When the *Hindmarsh Island Bridge Case (Kartinyeri – 1998)* was being argued before the High Court, the Commonwealth Solicitor-General agreed with Justice Kirby's (incredulous) question, whether: “Under the “race” power of our Constitution, Nuremberg-style race laws or South African apartheid laws, if enacted by our federal parliament, would be binding?”

The Solicitor-General confirmed such laws would be binding.

In other words, Federal parliament is free to legislate in a morally ambiguous way, so long as it stays within the Constitution's heads of power.

I think Her Honour Felicity Hampel captured the essence of this issue when, in a 2001 presentation to the Australian Legal Convention, she said:

*“Whilst human rights instruments declare rights, the common law is a developed system of judge declared or judge made law, based on single instances from which, eventually, a principle is extracted, then refined, or adapted to the circumstances of another, different, single instance. It is not based on, and does not start by referring to fundamental rights.*

*The common law reasons up not down. It does not apply a declared right to the facts of a particular case, but asks how do the facts of this case conform with the ‘standard’ or ‘existing common law’. Occasionally, it may ask what should the common law be?*

*Whilst in some instances the common law may reflect fundamental human rights, it does not do so systematically, it is not bound to, and at times it is not able to. There is no obligation on courts in defining the common law to do so by reference to fundamental human rights, whether by reference to international instruments or implied rights and freedoms.”*

I agree completely with those remarks, as to why the common law tradition alone, provides insufficient HR protection.

Her Honour's point is reinforced by the comments of Justice McHugh in the recent case of *Al Kateb*, where his Honour said this in relation to detention under the Migration Act:

*“As long as the detention is for the purpose of deportation or preventing aliens from entering Australia or the Australian community, the justice or wisdom of the course taken by the Parliament is not examinable in this or any other domestic court. It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights”.*

Justice McHugh did go on and lament the practical effect of his legal reasoning. He acknowledged that the future prospects of the unfortunate Mr. Al-Kateb had shades of the fate of French prisoners on Devil's Island: the Australian law acknowledges a legal possibility of release from immigration detention only by way of the grave.

His Honour further concluded that change to this state of affairs, from the legal perspective could only be achieved by adopting a federal bill of rights in Australia.

And I agree with this conclusion.

We have also seen recently indications from the High Court that it may reconsider the 'legitimate expectation' principle outlined in the *Teoh* decision.

In *Teoh*, the Court held that the ratification of a convention "is a positive statement by the executive government... that the executive government and its agencies will act in accordance with the convention".

Accordingly, there is a legitimate expectation, in the absence of any indication to the contrary, that administrative decision-makers will act in conformity with the convention. It should be noted that this expectation forms a part of procedural fairness and does not give rise to a right to any particular outcome.

Nevertheless, the principle acknowledged at least a limited role for human rights in the operations of executive government.

The decision in *Teoh* has, however, caused significant controversy and in High Court's decision in *Ex parte Lam* there were strong indications from members of the Court that they may be prepared to reconsider the legitimate expectations principle.

Such a move by the High Court (to reconsider *Teoh*) would undoubtedly be strongly supported by federal parliament.

In a joint press release by the Attorney-General and the Foreign Affairs Minister, dated 10 May 1995, it was asserted:

*'that entering into an international treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty...'*

In fact there have been three previous attempts to introduce federal legislation that overrules the '*legitimate expectation*' principle. For a variety of different reasons on each occasion the Bill has failed to become law. Whether or not the recent changes in the Senate will mean that this issue is revisited by Parliament is not known.

What this demonstrates, however, is the limited and potentially fragile nature of the protection of human rights under the common law and reinforces, in my view, the case for a bill of rights.

### **Federal legislation**

The history of Australian domestic legislation from the point of compliance with human rights standards is uneven, especially when we deal with the protection of civil liberties.

The first act of the new federal Parliament in 1901 was to pass the *Immigration Restriction Act* and the *Pacific Island Labourers Act* giving effect to the White Australia Policy.

On the other hand, Australia did reasonably well by contemporary standards in creating a democratic system of government. For example, as early as in 1902 the federal franchise - the vote - was extended to women. (This voting equality was however not extended to other spheres of importance to women until the early seventies.)

Australia's particular achievement, in the early years, was the development of a comprehensive system of protection of economic and social rights, which was put in place well before the Bolshevik Revolution in Russia. In fact Australia has been an international leader in this field. The concept of the basic wage and development of labour relations around a framework of conciliation and arbitration, are but two of the more high profile examples of those achievements. So, many social and economic human rights in Australia were protected by domestic legislation, well in advance of the emergence of international human rights treaties.



## **And what's about the Human Rights Commission?**

The Human Rights and Equal Opportunity Commission (HREOC) is an important element in the human rights protection system in Australia. HREOC was established by an act of federal Parliament in 1986 as a national independent statutory authority. It replaced the previous Human Rights Commission, which was set up in 1981. The Commission administers federal legislation in the area of human rights, anti-discrimination and social justice. It reports to the federal Parliament through the Attorney-General.

It is, however important to note that HREOC does not have constitutional standing; nor does it has a 'court like' mandate. The Commission's responsibility is to foster greater understanding, respect and protection of human rights in Australia, with a particular focus on sex, race, disability and most recently age discrimination, as well as the rights of indigenous Australians.

The Commission does this through:

Holding inquiries into issues of national importance:

- such as the forced removal of Aboriginal children from their families<sup>29</sup>
- paid maternity leave<sup>30</sup>;
- and the rights of children in immigration detention centres.

Acting as *Amicus Curie* to assist courts in cases that involve human rights principles such as:

- International law and the extent to which administrative decision makers are obliged to take into account international human rights instruments in making decisions (the *Teoh* case);
- Inconsistency between state and federal legislation in relation to the criminalisation of homosexuality (the *Croome & Toonen* case<sup>31</sup>);
- Freedom of political speech (the *Langer* case).

The Commission also provides advice to parliaments and governments to develop laws, programs and policies such as the new *Federal Age Discrimination Act* (2004); it also raises public awareness of human rights by fostering public discussion and developing educational programs and resources for schools, workplaces and the community

Under the Complaint Handling Section of HREOC it also investigates and conciliates, where appropriate, complaints about alleged infringements of the Commonwealth Race, Sex, Disability and now (recently) Age Discrimination Acts and alleged infringements of human rights under the *HREOC Act*.

As most of you would be aware there is a vital difference between complaints brought under Sex, Race, Disability and Age equality protection laws. Where, if the parties cannot come to a negotiated settlement of such a complaint, in most of those cases the complainant is entitled to take the matter to court for a decision and a remedy, including compensation where appropriate.

But complaints regarding 'human rights' or civil liberties, brought to HREOC, pursuant to say, ICCPR, can at best, only lead to a report to Federal parliament, via the Attorney-

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<sup>29</sup> "Bringing them home: The 'Stolen Children' Report" (1997).

<sup>30</sup> "A time to value – proposal for a national paid maternity leave scheme" (2002).

<sup>31</sup> *Croome v. Tasmania* [1997] 191 CLR 119.

General. No court imposed remedy, no requirement to pay compensation – even where the Commission ‘finds’ a breach.

So arguably the Australian contemporary human rights culture is strong in terms of protection of equality rights and political rights; but considerably weaker on civil liberties.

### **Demarcation problems between Federal and State laws**

In addition, the Inquiry has highlighted that there were clear demarcation problems between the agencies of Commonwealth and State governments that were directly impacting on well-being and care of children in immigration detention.

Immigration detention facilities were located on Commonwealth property and according to the Department of Immigration officials children in immigration detention were the primary responsibility of the Commonwealth.

However, under the Constitutional arrangements, State child welfare authorities have a legislative responsibility to ensure the safety and well-being of children is protected and, as required, provide expert advice and assistance.

The inquiry has established that while the Department has sought to rely on State authorities for the provision of some services to children in immigration detention, the relationship between the Department and State authorities has been somewhat haphazard. The Department appears to have been extremely slow to enter into memoranda of understanding that would have facilitated the provision of State-based services to children in immigration detention and often disregarded the advice of State authorities when it was given, because it was of the view that State agencies act in an advisory capacity only and that the Immigration Department has the discretion to disregard the advice when given.

## **Conclusion**

Today there are no more long term child detainees in the Australian immigration Gulag Archipelago.<sup>32</sup> Many of the existing detention centers have been closed down.

Some changes have been made to Australian immigration laws. In particular I welcome the insertion into the *Migration Act* of a principle saying that “*a minor shall only be detained as a measure of last resort*” and the recent decision to abolish from 1 October 2008 Temporary Protection and Temporary Humanitarian Visas.

But I regret to say, that there is still many unresolved issues. It is certainly true that the Rudd government has yet to dismantle the key vestiges of mandatory detention systems and that despite some marginal improvements “detention culture” remains firmly in place in the Department of Immigration. So, should Australia experience another rapid increase in boat people arrivals, most likely we will be back to square one and major human rights violations will reoccur.

Further, the Labor government has yet not repealed any of the excision legislation of 2001 and 2005 that involves some 4000 islands. In Ministerial statements promising us early opening new massive Christmas Island Immigration Detention Centre seems to suggest that the “*Indian Ocean*” solution is here to stay.

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<sup>32</sup> As at 23 May 2008 there were 2 children held in Sydney immigration Residential Housing and 13 children in Community Detention. The total number of people held in detention was 537.

So what can be done to fix the system so it is compliant with international human rights obligations; or at least so that it provides a better balance between, on one hand, our massive expenditure on protection of Australia's border security and the human rights of asylum seekers on the other?

To start with a further legislative change is needed to immigration laws to ensure Australia's full compliance with international human rights standards. The Convention on the Rights of the Child needs to be incorporated fully into the domestic legislation and in particular into the *Migration Act 1958*.

In this context, the establishment of a statutory office of the Federal Children's Rights Commissioner with a responsibility of monitoring the implementation of the Convention would be a welcome step in the right direction.

Second, Australia needs a much better overall human rights protection system. The present jurisdiction of the Human Rights and Equal Opportunity Commission is inadequate. At best, it can report to Federal Parliament on the human rights breaches under CROC and ICCPR it has investigated.

Establishment of a statutory Australian charter of rights to implement the International Covenant on Civil and Political Rights is long overdue. In fact, Australia is now the only developed common law country without a bill of rights. Even mother-England has one.

It would also assist if Australia would avail herself to a higher level of external scrutiny of its human rights practices. This could be achieved through increased participation in the UN system<sup>33</sup>, but my personal preference would be for Australia to actively explore the possibility of becoming a signatory to the European Convention on Human Rights and to accept adjudication of the European Court on Human Rights in Strasbourg.

*"Bring the Rights Back Home"* campaign is needed to educate Australians about their rights and to tackle existing pockets of prejudice, homophobia and racism. An Australian charter of rights would be certainly a good starting point in educating Australians about human rights standards (many of which are taken for granted).

The development and implementation by the Commonwealth government of a national human rights curriculum for high schools across Australia would be another significant step in the right direction.

Human rights education needs to involve the Australian Public Service as it would benefit from change in its culture. Better awareness of human rights would certainly benefit development of public policy and decision making as well as benefit its client interface. The changes achieved in the UK public service following the implementation of British Human Rights Act provide a good example to follow.

Despite that it has been said that a leopard cannot change its spots, serious attempt need to be made to embed human rights culture in the Department of Immigration and Citizenship.

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<sup>33</sup> In fact attorney General, Hon Robert McClelland MP promised greater engagement with the UN and in particular that Australia will become party to the Optional Protocol to the Convention Against Torture.

The issue of immigration officials who are responsible for serious human right breaches or personally benefited from human rights breaches need to be addressed. The proposed establishment of an Ethics Review Committee under the auspices of the Public Service Commission could provide a way forward.

Last but not least - compensate the victims. And there are many real victims of our “*Pacific Solution*” and mandatory detention regime who are waiting to be compensated. People who lost their health, families that were broken, children which were denied the future opportunities that many Australian children take for granted. It is only in the best tradition of Australia's "fair go", to compensate those who were wronged by the government's ill-advised action.

Finally, let me leave you with the opening lines of Mick Palmer's report:

*‘Protection of individual liberty is at the heart of Australian democracy. When there exist powers that have the capacity to interfere with individual liberty they should be accompanied by checks and balances sufficient to engender public confidence that those powers are being exercised with integrity.’*

Coming from a former federal Commissioner of Police, I think this elegant summation says it all.

So there is much yet to be done to advance human rights in Australia and to protect our asylum seekers.

And I ask everyone here to do his or her share to support that advancement.

Thank you.

Sydney, 17 June 2008