

Chapter 4

Australia's Human Rights Obligations

Contents

4.	Australia's Human Rights Obligations	89
4.1	Does international human rights law threaten Australia's sovereignty?	89
4.2	How does international law become part of Australian law?	91
4.3	What are the rights of children in immigration detention in Australia?	92
4.3.1	The best interests of the child as a primary consideration	94
4.3.2	Detention of children as a measure of last resort and for the shortest appropriate period of time	95
4.3.3	The right to be treated with humanity and respect	96
4.3.4	The right to survival, development and recovery	97
4.3.5	Special protections for asylum-seeking and refugee children	98
	(a) Who is a refugee?	98
	(b) What is non-refoulement?	99
	(c) What does the Refugee Convention say about detention of asylum seekers?	99
4.4	What tools assist in the interpretation of treaty obligations?	100
4.4.1	Treaty committees and UN principles, rules and standards	101
4.4.2	UNHCR guidelines	102
4.4.3	UNICEF Implementation Handbook	103
4.5	Summary	104
	Endnotes	105

4. Australia's Human Rights Obligations

The purpose of this chapter is to explain the relevance of international human rights law to children in Australia's immigration detention centres and to provide a quick reference point on the fundamental human rights principles that have influenced the approach of this Inquiry. This chapter also explains the role of United Nations (UN) guidelines in the Inquiry's analysis of Australia's human rights treaty obligations.

More specifically, the Inquiry addresses the following questions:

- 4.1 Does international human rights law threaten Australia's sovereignty?
- 4.2 How does international law become part of Australian law?
- 4.3 What are the rights of children in immigration detention in Australia?
- 4.4 What tools assist in the interpretation of treaty obligations?

A more detailed analysis of the human rights principles relevant to children in immigration detention can be found in the topic-specific chapters in the remainder of this report.

4.1 Does international human rights law threaten Australia's sovereignty?

Public debate in recent years has increasingly linked the concept of border protection with the arrival of asylum seekers to Australian shores. The Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) has stated on many occasions, in the context of unauthorised boat arrivals, that as a sovereign country Australia has the right to defend the integrity of its borders.¹ Australian courts have also affirmed the right of Australia to determine who does and does not enter and remain in Australia.² It is clear that Australia has the right to establish, administer and enforce its immigration policy and maintain national security. Border protection will inevitably be a part of these objectives.

The modern concept of sovereignty, however, is not absolute. Sovereignty does not mean that nations can do whatever they want, whenever they want, to whomever they want. This would inevitably lead to a breakdown in international cooperation. Australia, as a sovereign nation, has recognised the need to respect certain obligations and rights if it wants to maintain its position among the community of nations.

A last resort?

Australia has chosen to participate in the international system of law and enter into agreements – treaties – with other sovereign States. It has thereby agreed to be bound by the international scheme of rights and responsibilities that governs the way in which sovereign States act. As the Department of Immigration and Multicultural and Indigenous Affairs (the Department or DIMIA) states:

In signing up to and ratifying treaties, States may accept qualifications on the exercise of their sovereign powers. This is a sovereign act of the State itself.³

The Department of Foreign Affairs and Trade (DFAT) reiterates this point in its Information Kit on treaties:

Ratification of international treaties does not involve a handing over of sovereignty to an international body. Treaties may define the scope of a State's action, and treaties which Australia ratifies may influence the way in which Australia behaves, internationally and domestically. Implicit, however, in any Australian decision to ratify a treaty is a judgment that any limitations on the range of possible actions which may result are outweighed by the benefits which flow from the existence of a widely endorsed international agreement.⁴

For the purposes of this Inquiry the most important of the various international rules to which Australia has agreed to be bound are those contained in the *Convention on the Rights of the Child* (CRC) which imposes obligations on Australia to give all children, including asylum-seeking children, special treatment. Also relevant to the Inquiry are some of the rights contained in the *International Covenant on Civil and Political Rights* (ICCPR).

Further, the Inquiry refers to the 1951 *Convention relating to the Status of Refugees* as amended by the 1967 *Protocol relating to the Status of Refugees* (the Refugee Convention), which specifically requires Australia to apply domestic laws that establish border integrity in such a way that persons fleeing persecution for specific reasons will be protected.⁵ Article 22 of the CRC makes the Refugee Convention immediately relevant to a consideration of the human rights of children in detention because it requires that a child who is seeking refugee status receive appropriate protection and humanitarian assistance in the enjoyment of the rights contained in the CRC and in other international human rights or humanitarian instruments to which Australia is a party.

By ratifying the CRC, Refugee Convention and other treaties, Australia has explicitly agreed to ensure that new laws be enacted or existing laws be applied in a manner that gives proper expression to its treaty obligations. Such an act of national will is a positive expression of Australia's independence and an affirmative exercise of sovereignty.

As one leading commentator has stated:

Refugee law is a politically pragmatic means of reconciling the generalized commitment of states to self-interested control over immigration to the reality of coerced migration. Since the early part of this century, governments have

recognized that if they are to maintain control over immigration in general terms, they must accommodate demands for entry based on particular urgency. To fail to do so is to risk the destruction to those broader policies of control, since laws and institutional arrangements are no match for the desperate creativity of persons in flight from serious harm. By catering for a subset of those who seek freedom of international movement, refugee law legitimates and sustains the viability of the protectionist norm.⁶

Therefore, sovereignty, border protection and human rights can operate as complementary, rather than opposing, concepts. Australia, as a sovereign State, has the right to protect its borders as well as having undertaken a responsibility to achieve this in a manner that accords with human rights and humanitarian treaties. Furthermore, Australia, as a sovereign State guided by the rule of law, has committed to ensuring that those rights and responsibilities are integrated into the practices of the domestic legislature, executive and courts.

4.2 How does international law become part of Australian law?

Australia, as a party to the CRC, the ICCPR and the Refugee Convention, has voluntarily committed to comply with their provisions in good faith and to take the necessary steps to give effect to those treaties under domestic law.⁷ The Department has rightly acknowledged that 'Australia has a duty to respect and apply its international human rights obligations to all individuals within its jurisdiction'.⁸

Under Australian law a treaty only becomes a 'direct source of individual rights and obligations' when it is directly incorporated by legislation.⁹ This is because under Australia's Constitution the making and ratification of treaties is a function of the Commonwealth Executive, whereas the making and alteration of Commonwealth laws is a function of the Commonwealth Parliament. The Executive would be usurping the role of Parliament if the treaties it made and ratified automatically became sources of new rights and obligations.

While the CRC, ICCPR and the Refugee Convention have not been directly incorporated into Australian law in their entirety, certain provisions of those treaties are reflected in domestic legislation. For instance, the *Migration Act 1958* (Cth) (Migration Act) makes reference to the protection obligations under the Refugee Convention in defining the criteria for a 'protection visa' under that Act.¹⁰ Other domestic legislation, much of it State legislation, can be said to mirror the intent of international conventions without referring directly to them. For instance, all States have child protection laws which reflect the obligation to protect children from abuse in article 19 of the CRC, but do not necessarily refer specifically to the CRC.¹¹ The provisions of the *Family Law Act 1975* (Cth) relating to children also mirror rights and principles established by the CRC.

The Commonwealth Parliament has also enacted the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act) which specifically empowers this Commission to examine Commonwealth legislation and the acts and practices of the Commonwealth in order to determine their consistency with 'human rights'.

A last resort?

'Human rights' is defined by the legislation to include the CRC and the ICCPR. However, this legislation falls short of direct incorporation.¹²

Nevertheless, even when treaties have not been directly incorporated by legislation, they are an indirect source of rights. In particular, treaties ratified by Australia have relevance in the common law of Australia which is enforced by courts.

The High Court of Australia's decision in 1995, in *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh*, 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:

It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute...

But the fact that the Convention [on the Rights of the Child] has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.¹³

The High Court also held that ratification of a treaty raised a legitimate expectation that an executive decision-maker will act consistently with its terms:

... ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as "a primary consideration". It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.¹⁴

4.3 What are the rights of children in immigration detention in Australia?

The CRC is a comprehensive treaty, which incorporates most of the provisions of the ICCPR and the *International Covenant on Economic Social and Cultural Rights* (ICESCR), and adapts them to the needs of children. It also protects children from non-discrimination on the basis of sex, race, disability and other grounds, thereby reflecting provisions of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) and the *Declaration on the Rights of Disabled Persons*

amongst others. The CRC also introduces specific provisions that relate only to children.

There are only two United Nations members who have not ratified the CRC – the USA and Somalia – making it the most widely ratified convention in the history of the UN.¹⁵ It is the most relevant instrument for children in immigration detention and is therefore the primary reference point for this Inquiry.

The CRC applies to all children within Australia's jurisdiction. A 'child' is defined to include any person under 18 years of age.¹⁶

Almost all of the provisions of the CRC are discussed at some point throughout the report. However, the following key principles have guided the Inquiry's examination of Australia's treatment of children in immigration detention:

1. the best interests of the child must be a primary consideration in all actions concerning children (article 3(1))
2. detention must be a measure of last resort and for the shortest appropriate period of time; children must not be deprived of liberty unlawfully or arbitrarily (article 37(b))¹⁷
3. children in detention have the right to be treated with humanity and respect for the inherent dignity of the person (article 37(a), (c))¹⁸
4. children have the right to enjoy, to the maximum extent possible, development and recovery from past trauma (articles 6(2), 39)
5. asylum-seeking and refugee children are entitled to appropriate protection and assistance (article 22(1))¹⁹

These five themes and their impact on the Inquiry's analysis are discussed below.

Other important aspects of the CRC which are considered in separate chapters in this report include the right to:

- protection from all forms of physical or mental violence (article 19)
- the highest attainable standard of physical and mental health (article 24)²⁰
- special care for children with disabilities (article 23)
- education (articles 28 and 29)²¹
- rest, recreation and play (article 31)²²
- special assistance for children who have been separated from their parents (article 20)²³
- practise culture, language and religion (article 30)²⁴

The Inquiry also addresses the issue of non-discrimination in various places throughout the report (article 2).²⁵

4.3.1 The best interests of the child as a primary consideration

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Convention on the Rights of the Child, article 3(1)

The words of article 3(1) make it very clear that the 'best interests' principle is a fundamental principle of the CRC.²⁶ The principle expressly requires Australia's Parliament, Executive (including private institutions acting on their behalf, as in the case of Australasian Correctional Management Pty Limited (ACM)) and judiciary to ensure that the best interests of the child are a primary consideration in *all actions* concerning children.

While there is no one definition of what will be in the best interests of each and every child, a child's ability to enjoy all of his or her rights in a given environment is a good indication of whether the child's best interests are being met.²⁷

Furthermore, while the CRC does not explicitly define 'best interests' it is clear that in the case of actions and decisions affecting a child, it is the best interests of that individual child which must be taken into account rather than children generally.

The Inquiry addresses two issues in the context of mandatory detention.

First, whether the best interests of the child was and is a primary consideration in the introduction and maintenance of the current mandatory detention laws. In answering this question the Inquiry considers whether the specific rights of children can be met within the terms of those laws.

Second, whether in the administration of those laws, the Department has made the best interests of the child a primary consideration in all actions affecting children. The Inquiry therefore considers the choices that the Department has made within the detention environment regarding education, health care and other issues impacting on children.

The Inquiry is mindful that the CRC does not require the best interests of the child to be the sole or paramount consideration in all decision-making. However, as the United Nations Children's Fund (UNICEF) states:

The child's interests...must be the subject of active consideration. It needs to be demonstrated that children's interests have been explored and taken into account as a primary consideration.²⁸

This approach was reflected by members of the High Court of Australia in the *Teoh* case:

A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it.²⁹

Thus for a consideration of the best interests of a child or children to be meaningful, an attempt must be made to identify the interests of children and the ways in which they are, or may be, different to those of adults. Furthermore the detention framework must permit individualised decisions and the administering authorities must address their minds to the specific circumstances of each child. It is therefore not consistent with article 3(1) to treat child detainees as simply a subset of detainees generally as this would ignore the special needs and vulnerabilities of children.

The 'best interests' principle is reiterated in article 9(1) of the CRC which states that children should never be separated from their parents against their will except when 'necessary for the best interests of the child'. The interaction between the 'best interests' principle, family unity and immigration detention is discussed specifically in Chapter 6 on Australia's Detention Policy and more generally throughout the report. However, the Preamble to the CRC provides the reference point by recognising that:

[T]he child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.

4.3.2 Detention of children as a measure of last resort and for the shortest appropriate period of time

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

Convention on the Rights of the Child, article 37(b)

The protection of individual liberty is one of the most fundamental human rights protections under international law. The CRC goes further than the general prohibition on arbitrary and unlawful detention in article 9(1) of the ICCPR, by adding that detention of children should be a 'measure of *last resort* and for the *shortest appropriate period* of time'.

While there is no set definition of the 'shortest appropriate period', when read with the 'last resort' principle it is clear that the Commonwealth must consider any less restrictive alternatives that may be available to an individual child in deciding whether and/or for how long a child is detained. Detention of children should only occur in exceptional cases.³⁰ If, after considering the available alternatives, detention is considered to be appropriate in the specific circumstances then it should be as short as possible.

This principle is clearly of primary relevance to an inquiry into immigration detention of children and Chapter 6 on Australia's Detention Policy directly examines whether Australia's detention policy and practices comply with article 37(b) (and article 9(1) of the ICCPR). The Inquiry also examines any links between a breach of article 37(b) and the enjoyment of other rights under the CRC. In particular, the Inquiry

A last resort?

examines the impact that long-term detention may have on a child's ability to enjoy other specific rights in the CRC (protection from violence, physical and mental health, education, recreation, culture and so on).

4.3.3 The right to be treated with humanity and respect

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment...

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of his or her age...

Convention on the Rights of the Child, article 37(a),(c)

The CRC applies to children the fundamental protections against torture and inhuman treatment while in detention, originally expressed in articles 7 and 10 of the ICCPR.

Generally speaking, the prohibition on torture seeks to prevent physical or mental mistreatment whereas the right to be treated with dignity imposes a positive duty to ensure a humane environment. The difference between the two protections can, however, be a matter of degree.

As this Inquiry has been more concerned with systemic issues than individual complaints, the Inquiry has not conducted an examination into whether there have been any specific acts of cruel, inhuman or degrading punishment of children under article 37(a). Any such allegations are more suited to an investigation under the Human Rights and Equal Opportunity Commission's complaints function.³¹

However, the Inquiry has considered whether the detention environment as a whole takes into account the age and development of children in a manner which succeeds in ensuring that they are treated with humanity and respect for their inherent dignity.

Since the overall conditions of detention are an accumulation of a variety of different circumstances, the individual chapters of this report generally do not come to any conclusions about whether there has been a breach of article 37(c). Rather, the summary of findings in each chapter highlights the aspects of that particular issue (for example, security, physical and mental health, education, recreation) which, when taken together with other issues, might contribute to a breach. The overall finding regarding article 37(c) is set out in Chapter 17, Major Findings and Recommendations.

4.3.4 The right to survival, development and recovery

States Parties shall ensure to the maximum extent possible the survival and development of the child.

Convention on the Rights of the Child, article 6(2)

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Convention on the Rights of the Child, article 39

The principle of survival and development is an extension of the right to be treated with dignity and respect, in that it imposes a general obligation to ensure an environment for children that fosters their positive development to 'the maximum extent possible' – whether or not children are in detention.

The right to survival and development refers not only to a child's physical survival and healthy development, but also to a child's mental and emotional development. As the Committee on the Rights of the Child has stated, what is important is:

to create an environment conducive to ensuring to the maximum extent possible the survival and development of the child, including physical, mental, spiritual, moral, psychological and social development...and to prepare the child for an individual life in a free society.³²

The obligation on Australia to promote physical and psychological recovery from past trauma in a healthy environment has special relevance to children in immigration detention in Australia since many are asylum seekers who have come from situations of armed conflict, or who have otherwise been victims of abuse, torture or cruel treatment. The principle of survival and development should therefore be read with article 39 which requires that the healing of child victims take place in an environment appropriate to their 'recovery and reintegration' into society.

As with the 'best interests' principle, the Inquiry examines specific rights in light of the more general principle that children should live in a nurturing environment that fosters, to the maximum extent possible, development, recovery and social integration. The Inquiry first asks whether the policy of mandatory detention of children sufficiently allows for the provision of a nurturing environment. Second, it examines whether initiatives have been taken within the context of that detention policy to provide the appropriate environment and opportunities for development and recovery.

Many of the obligations under the CRC are relevant to these questions. For example, protection from violence, the highest attainable standard of physical and mental health, special care for children with disabilities, education, recreation and the right to a full cultural life are all factors that create a nurturing environment. In some chapters it is possible to determine whether the circumstances giving rise to the

A last resort?

breach of a specific right also cause a breach of articles 6(2) and 39. In others the Inquiry notes that specific concerns may not themselves breach articles 6 and 39 but may be factors which contribute to a breach, considering circumstances overall, of those articles.

4.3.5 Special protections for asylum-seeking and refugee children

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

Convention on the Rights of the Child, article 22(1)

This article acknowledges the special vulnerability of refugee and asylum-seeking children. Since most children in Australia's immigration detention centres are, upon entry, seeking asylum, this principle is of special importance to the Inquiry.

Article 22(1) aims to ensure that these children get the assistance they need so that they are in a position to enjoy all the rights that other children enjoy. What measures are 'appropriate' to ensure the enjoyment of the child's rights are likely to differ from, or be additional to, the measures which may be in place for other children who do not confront the disadvantages faced by children who are refugees or seeking asylum. The Inquiry therefore examines whether extra measures need to be taken by the Department in order to overcome the difficulties faced by asylum-seeking children in detention. For example, there may need to be special education, specific physical and mental health care, cultural provisions, special attention to girls' needs and so on.

Article 22(1) of the CRC requires Australia to make appropriate efforts to ensure that children enjoy their rights not just under the CRC, but also under other treaties which Australia has ratified. The most important of these in the context of this Inquiry is the Refugee Convention. The most relevant provisions of the Refugee Convention for the purposes of this Inquiry are the definition of a refugee (article 1(A)(2)), the principle of non-refoulement (article 33), the prohibition on imposing penalties on persons on account of their illegal entry and the prohibition of restricting the movement of refugees 'other than those which are necessary' (article 31). Each of these concepts is outlined below.

(a) Who is a refugee?

A refugee is defined in article 1(A)(2) of the Refugee Convention to be someone who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is

outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The process of identifying a child as a refugee is discussed in some detail in Chapter 7 on Refugee Status Determination.

(b) What is non-refoulement?

The principle of non-refoulement protects persons from being forced to go back to a country where they risk facing persecution.

Refugees, by definition, have a well-founded fear of persecution in the event they are returned to their country of nationality or habitual residence.³³ Refugees are therefore protected by the principle of non-refoulement. However, protection from return (refoulement) can also apply to persons who may not have a fear of persecution for the reasons set out under the Refugee Convention, but who do face a 'real risk' of a violation of their rights under the CRC and the ICCPR.³⁴ For example a child may be protected from being returned to a country where he or she faces a real risk of being killed.

(c) What does the Refugee Convention say about detention of asylum seekers?

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Refugee Convention, article 31

The Refugee Convention recognises that where persons are in fear for their life or freedom they may be forced to enter a country of refuge unlawfully. It therefore prohibits nations from penalising refugees 'on account of their illegal entry' where they are 'coming directly from a territory where their life or freedom was threatened'. Penalties may include prosecution and fines as well as punitive measures such as detention.³⁵

The Refugee Convention also states that detention should only occur where 'necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission to another country' (article 31(2)). The United

A last resort?

Nations High Commissioner for Refugees (UNHCR) has issued guidelines on how to interpret these provisions in the light of the CRC and has stated that:

Children seeking asylum should not be kept in detention. This is particularly important in the case of unaccompanied children.³⁶

These guidelines are discussed further in section 4.4.2 below.

While article 31 is clearly of relevance to the issue of immigration detention, in the Inquiry's view the protection of liberty in article 37(b) of the CRC provides stronger protection to children than article 31 of the Refugee Convention. On that basis, the Inquiry has focussed its analysis on article 37(b).

4.4 What tools assist in the interpretation of treaty obligations?

A treaty should be 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'.³⁷ Some of the minimum standards required by international treaties are quite clear from the words of the treaty itself and the CRC is more specific than many other instruments. However, where there is some ambiguity as to the minimum requirements for complying with an international obligation, there is a substantial body of international jurisprudence to assist in the interpretation.

The Department has highlighted to the Inquiry that there is a 'margin of appreciation' which 'allows States to determine the best means by which to implement their international legal obligations given their particular circumstances'.³⁸ It is uncontroversial to suggest that nations must be able to determine *the manner* in which they implement their international legal obligations taking into account the circumstances of that nation. However, it is important to note that a 'margin of appreciation' concept does not permit nations to determine *the meaning* of those obligations in order to suit their particular circumstances.³⁹ This is particularly the case when dealing with fundamental rights like the right to liberty.⁴⁰

In construing the provisions of an international human rights instrument, Australian courts give weight to the views of specialist human rights bodies established to supervise implementation of treaties and international law. The High Court of Australia and the Federal Court of Australia have often referred to the international body of law to assist in their interpretation of international rights and obligations as they apply to Australia.⁴¹

In August 2000, the Minister for Foreign Affairs, the Attorney-General and the Minister for Immigration questioned the appropriateness of UN treaty committees to provide authoritative interpretations of the treaties they were designed to monitor.⁴² This reluctance to defer to the international treaty bodies regarding interpretation of international law is reiterated in the Department's submission to the Inquiry. The Department, while acknowledging that it 'has regard to [international] principles and guidelines in formulating immigration detention policy and procedures', also

states that it 'does not accept, and it does not follow, that non-binding pronouncements by international treaty bodies conclusively represent the correct interpretation of a treaty obligation'.⁴³ The Department goes on to state that it is possible to 'take a different view to legislative and policy responses' without affecting its ability to comply with international legal obligations.⁴⁴

While the instruments of the UN treaty and charter bodies do not represent the only interpretation of international obligations, they do represent the most persuasive interpretation of what should be done to ensure compliance with the CRC, the ICCPR and the Refugee Convention. They do not impose new obligations, but the guidelines and standards which are adopted by UN charter bodies, like the General Assembly, represent international consensus on what principles should govern the detention and treatment of children generally. The findings and general comments issued by treaty bodies are written by a Committee composed of experts from a wide range of countries charged with the specific purpose of interpreting and applying the provisions of the treaty and are thus highly significant.

The following sections set out the key interpretive instruments for international human rights law treaties. Together these instruments help explain the benchmarks to be applied when considering Australia's compliance with its treaty obligations. Specific provisions of these instruments are referred to throughout this report.

4.4.1 Treaty committees and UN principles, rules and standards

Treaty committees are specifically set up within the provisions of a treaty to monitor compliance. Thus, when Australia ratified the CRC and the ICCPR it agreed to be subject to the monitoring of the Committee on the Rights of the Child and Human Rights Committee respectively.

The Committee on the Rights of the Child is established by article 43 of the CRC to monitor and supervise implementation and adherence to the CRC through examining the periodic reports of States every five years and issuing Concluding Observations on State reports.⁴⁵ The Committee also issues General Comments which interpret the meaning of specific provisions of the treaty.

The Committee on the Rights of the Child has indicated, in its general guidelines for periodic reports, that parties to the CRC should utilise UN guidelines to interpret the meaning of the treaty's provisions. For example, the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (1990) (the JDL Rules) are a particularly useful tool for interpreting the meaning of article 37 of the CRC.⁴⁶

Like the Committee on the Rights of the Child, the UN Human Rights Committee reviews periodic reports submitted by States and issues findings and General Comments that interpret the provisions of the ICCPR. Both the Committee on the Rights of the Child and the Human Rights Committee have examined the detention of asylum seekers in Australia in response to those periodic reports and have expressed concern about the practice.⁴⁷

Australia has also ratified the Optional Protocol to the ICCPR thereby agreeing that the Human Rights Committee can adjudicate claims of individuals who believe

A last resort?

their rights have been violated. The findings of the Human Rights Committee in relation to these complaints are, according to courts and leading commentators, of 'considerable persuasive authority'⁴⁸ or 'highly influential, if not authoritative'⁴⁹ in relation to Australia's international legal obligations.

The Human Rights Committee has directly considered whether Australia's immigration detention system complies with the ICCPR in several cases including, *A v Australia*,⁵⁰ *Baban v Australia*,⁵¹ *C v Australia*⁵² and *Bakhtiyari v Australia*.⁵³ In each of those cases the Human Rights Committee found that Australia had breached the ICCPR. These findings are discussed further in Chapter 6 on Australia's Detention Policy.

The Human Rights Committee has also stated that the *United Nations Standard Minimum Rules for the Treatment of Prisoners* (the Standard Minimum Rules) and the *United Nations Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment* (the Body of Principles) represent minimum requirements for compliance with article 10 of the ICCPR which, like article 37(c) of the CRC, requires that persons in detention be treated humanely.⁵⁴ In other words, those principles elaborate the standards which the international community considers to be the minimum acceptable treatment of persons deprived of their liberty.⁵⁵

The UN Working Group on Arbitrary Detention, a body of the Commission on Human Rights (a UN charter body), has devoted its attention to the detention of asylum seekers since 1997.⁵⁶ It is regarded as one of the most authoritative bodies concerning arbitrary detention. The Working Group noted several concerns regarding Australia's immigration detention practices in an October 2002 report.⁵⁷ The Australian Government rejected the report in December 2002.⁵⁸

4.4.2 UNHCR guidelines

Although the Refugee Convention does not itself set up a monitoring body, the Executive Committee of the High Commissioner for Refugees, created by the UN General Assembly in 1957, issues conclusions that are regarded as persuasive interpretations of that Convention. Further, the United Nations High Commissioner for Refugees (UNHCR) is the intergovernmental body with responsibility to provide international protection to refugees and to find long-term solutions to their problems.⁵⁹ Since Australia is a party to the Refugee Convention, it is obliged under article 35 to cooperate with UNHCR.⁶⁰

UNHCR has developed several guidelines and handbooks to guide States on how to apply the Refugee Convention. According to advice received by the Inquiry from UNHCR in Australia, these are standards that are usually considered to be minimum requirements.

UNHCR guidelines entitled *Refugee Children: Guidelines on Protection and Care* (1994) (UNHCR Guidelines on Refugee Children), are recognised internationally as appropriate standards for the protection and assistance of refugee and asylum-

seeking children. The Committee on the Rights of the Child has reaffirmed the importance of the UNHCR Guidelines on Refugee Children, noting that they were 'fully inspired by the Convention and shaped in the light of its general principles'.⁶¹

The *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (1997) (UNHCR UAM Guidelines) and the *Statement of Good Practice of the Separated Children in Europe Programme* (2000) (which was a joint effort of UNHCR and Save the Children) are specifically directed to protecting children who have been separated from their family. They include special measures designed to address the increased vulnerability of children who do not have the support of their parents. They are also a persuasive interpretation of how the Refugee Convention applies to all children and clearly refer to the provisions of the CRC.

The *UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* (1999) (UNHCR Detention Guidelines) were first issued by UNHCR in 1995 to provide guidance to States on the limits to detention and were then revised in 1999 to reflect developments in human rights law, especially with respect to arbitrary detention. According to the Executive Committee of UNHCR, '[t]hey set out minimum standards for what might be considered acceptable state practice'.⁶² In its submission to the Inquiry the Department acknowledges the importance of these guidelines and states that its practices are consistent with them.⁶³

Similarly, the Department states that its practices are consistent with the UNHCR *ExCom Conclusion No 44* regarding detention. The UNHCR Executive Committee has stated that all persons detained should be treated in conformity with internationally accepted norms and standards including the Body of Principles, the JDL Rules, and the Standard Minimum Rules. In the Executive Committee's view:

These rules represent a consensus among states on how the basic principles should be respected. Asylum-seekers have a right, as all other individuals, to be treated in accordance with these standards.⁶⁴

Finally, UNHCR has produced a *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR Procedures Handbook), which provides a 'practical guide' for those who are required to determine whether or not a person is a refugee.⁶⁵

4.4.3 UNICEF Implementation Handbook

The CRC recognises the special competence of the United Nations Children's Fund (UNICEF) and other United Nations organs 'to provide expert advice on the implementation of the CRC in areas falling within the scope of their respective mandates' (article 45). UNICEF has produced a guide to the implementation of the various provisions of the CRC, the *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF Implementation Handbook), which helps explain the CRC's provisions. The Inquiry has made reference to this handbook extensively throughout this report.

4.5 Summary

Sovereignty brings with it rights and obligations. While Australia has the right to protect its borders, it also has the obligation to ensure that border protection occurs in a manner consistent with the human rights obligations that Australia has agreed to uphold. In the context of this Inquiry, those obligations are primarily set out in the CRC.

While the CRC has not been fully incorporated into Australian law, the Department acknowledges that Australia has a duty to respect and apply its international human rights obligations contained within the CRC and other treaties to which Australia is a party.

The key principles of the CRC discussed throughout this report include:

- ensuring that the best interests of the child are a primary consideration in all decisions concerning children
- detention as a measure of last resort and for the shortest appropriate period
- humane and respectful treatment while in detention
- survival, development and recovery from past trauma
- special protections for asylum-seeking and refugee children.

These principles influence the way the Inquiry has approached its examination of more specific rights, like the right to protection from violence (Chapter 8), the right to the highest attainable standard of mental and physical health (Chapters 9 and 10), the right to special care for children with disabilities (Chapter 11), the right to education and recreation (Chapters 12 and 13), the right to special assistance for unaccompanied children (Chapter 14) and the right to practise religion and culture (Chapter 15).

The findings and comments of UN treaty bodies, together with UN guidelines and principles, assist in interpreting what minimum standards are required to ensure compliance with all those rights.

Together, these treaties and interpretive tools create the framework within which Australia must work to maintain its status as a responsible member of the international community and ensure that children within its jurisdiction enjoy their basic human rights.

Endnotes

- 1 DIMIA, Fact Sheet 70, Border Control, at <http://www.immi.gov.au/facts/70border.htm>, viewed 23 November 2003; Minister for Immigration and Multicultural and Indigenous Affairs and Minister for Foreign Affairs, *Government Rejects UN Report on Arbitrary Detention*, Joint Media Release, Parliament House, Canberra, 13 December 2002, at http://www.minister.immi.gov.au/media_releases/ruddock_media02/r02107.htm, viewed 2 December 2003.
- 2 See for example *Chu Kheng Lim v Minister of Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 29; *Ruddock v Vadarlis* (2001) FCA 1328 at [193].
- 3 DIMIA, Response to Draft Report, 4 July 2003.
- 4 Department of Foreign Affairs and Trade, *Australia and International Treaty Making Information Kit*, at <http://www.austlii.edu.au/au/other/dfat/infokit.html#QnA>, viewed 23 November 2003.
- 5 See generally J Hathaway, *The Law of Refugee Status*, Butterworths, Toronto, 1991, pp1-2, 31-32, 231-233.
- 6 Hathaway, p231.
- 7 *Vienna Convention on the Law of Treaties*, article 26.
- 8 DIMIA, Submission 185, p15. See also DIMIA, Submission 185, p2 and DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p23.
- 9 *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J.
- 10 Migration Act, s36(2)(a).
- 11 See Chapter 8 on Safety for further discussion of article 19 of the CRC.
- 12 HREOC Act, s3. In its comments on the report of the United Nations Working Group on Arbitrary Detention, the Australian Government has pointed out that the scheduling of the ICCPR to the HREOC Act does not mean that it has general effect in Australian law. However, it states that 'as a signatory to all of the UN's core human rights instruments, the Government takes its international obligations, including its human rights obligations, very seriously'. See Minister for Immigration and Multicultural and Indigenous Affairs and Minister for Foreign Affairs, *Government rejects UN Report on Arbitrary Detention*, Joint Media Release, Parliament House, Canberra, 13 December 2002.
- 13 (1995) 183 CLR 273 at 287 (footnotes omitted).
- 14 (1995) 183 CLR 273 at 291 (footnotes omitted). Recent comments by members of the High Court 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). However, the principle is still binding law in Australia. Note, in particular, that there have been three attempts to introduce legislation that overrules the 'legitimate expectation' principle – *Administrative Decisions (Effect of International Instruments) Bill 1995*, *Administrative Decisions (Effect of International Instruments) Bill 1997*, *Administrative Decisions (Effect of International Instruments) Bill 1999*. However, none of those bills were passed. The Executive also attempted to overturn this principle in 1995 by issuing a statement which 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...'; Minister for Foreign Affairs and Attorney-General, *International Treaties and the High Court Decision in Teoh*, Joint Statement, 10 May 1995. A statement in similar terms was released by the Attorney-General of South Australia on 8 June 1995. See generally S Roberts, 'Minister for Immigration and Ethnic Affairs v Ah Hin Teoh: The High Court Decision and the Government's Reaction to it', *Australian Journal of Human Rights*, vol 2, 1995, p135. These statements have been found to be of no effect by the courts; see, for example, *Department of Immigration and Ethnic Affairs v Ram* (1996) 69 FCR 431; *Browne v Minister for Immigration and Multicultural Affairs* (1998) 566 FCA; *Tien v Minister for Immigration and Multicultural Affairs* (1998) 89 FCR 80.
- 15 192 countries have ratified the treaty. The USA and Somalia have signed but not ratified the CRC. See UNICEF, 'Convention on the Rights of the Child', at <http://www.unicef.org/crc/crc.htm>, viewed 26 November 2003.
- 16 CRC, article 1.
- 17 See also ICCPR, article 9.
- 18 See also ICCPR, articles 7 and 10.
- 19 See also Refugee Convention, articles 1A, 31 and 33.
- 20 See also ICESCR, article 12; CEDAW, article 12.

A last resort?

- 21 See also ICESCR, article 13.
- 22 See also ICESCR, article 7.
- 23 See also ICESCR, article 10.
- 24 See also ICESCR, article 15; ICCPR, article 18.
- 25 See also CEDAW, CERD, the *Declaration on Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, the *Declaration on the Rights of Disabled Persons* and the *UN Declaration on the Rights of Mentally Retarded Persons*.
- 26 As UNICEF notes, the concept of 'best interests' of children has been the subject of more academic analysis than any other provision of the Convention; see UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF Implementation Handbook), United Nations Publications, Geneva, 2002, p41.
- 27 UNICEF Implementation Handbook, 2002, p246.
- 28 UNICEF Implementation Handbook, 2002, p43. See also *Family Law Act 1975* (Cth), s65E, which requires courts to 'regard the best interests of the child as the paramount consideration' when making parenting orders.
- 29 *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 292 per Mason CJ and Deane J.
- 30 UNICEF Implementation Handbook, 2002, p550; UNHCR, *UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 1999, guideline 3.
- 31 Note, however, that Chapter 9 on Mental Health discusses this article in a more general sense.
- 32 Committee on the Rights of the Child, *General guidelines regarding the form and contents of periodic reports to be submitted by States Parties under article 44, paragraph 1(b) of the Convention* (Guidelines for Periodic Reports), 11 October 1996, cited in UNICEF Implementation Handbook, 2002, p677.
- 33 Note, however, that a refugee may be excluded from the protection of non-refoulement in the limited circumstances set out in article 33(2) of the Refugee Convention.
- 34 See further, HREOC, Submission to the Senate Select Committee on Ministerial Discretion in Migration Matters, 7 August 2003, available at http://www.hreoc.gov.au/human_rights/migration_matters.html. See *Kindler v Canada* (470/91); *Ng v Canada* (469/91); *Cox v Canada* (539/93); *T.T. v Australia*, Communication No. 706/96, UN Doc CCPR/C/61/D/706/1996, in the jurisprudence of the Human Rights Committee (HRC). See also HRC, *General Comment 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment* (Article 7), para 9. Note that in the case of *T.T. v Australia*, the submission made by the Australian Government was that the obligation of a State party in relation to future violations of human rights by another State arises only in cases involving a potential violation of the 'most fundamental human rights'.
- 35 DIMIA, 'Article 31: Refugees Unlawfully in the Country of Refuge', UNHCR Global Consultations on International Protection of Refugees, at <http://www.immi.gov.au/refugee/publications/convention2002/index.htm>, viewed 26 November 2003.
- 36 UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, Geneva, 1997, para 7.6.
- 37 *Vienna Convention on the Law of Treaties*, article 31(1).
- 38 DIMIA, Response to Draft Report, 4 July 2003. See also, DIMIA, Submission 185, p15.
- 39 In the context of the ICCPR, for example, Joseph et al note that such a doctrine 'dilutes human rights protection' and argue that it would be 'unwise to apply such a doctrine under the ICCPR': see S Joseph et al, *The International Covenant on Civil and Political Rights*, Clarendon Press, Oxford, 2000, p394 for a full discussion. See also E Evatt, 'The Impact of International Human Rights on Domestic Law' in G Huscroft and R Rishworth, (eds) *Litigating Rights: Perspectives from Domestic and International Law*, Hart Publishing, Oxford, 2002, pp281-303 at 295.
- 40 See, for example, jurisprudence in the United Kingdom dealing with this issue: *Amirthanathan, R (on the application of) v Secretary of State for the Home Department* [2003] EWHC 1107 (Admin) at [54]; *The Queen v Secretary of State for the Home Department ex parte Khawaja* [1984] AC 74 per Lord Scarman at 108-111.
- 41 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 per Brennan J at 42; *Dietrich v The Queen* (1992) 177 CLR 292 per Mason CJ and McHugh J at 305-307; *Johnson v Johnson* (2000) 201 CLR 488 per Kirby J at [38]; *Commonwealth v Bradley* (1999) 95 FCR 218 per Black CJ at [35]; *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 174 ALR 585 per Gleeson CJ at [5]. See also H Burmester, 'National Sovereignty, Independence and the Impact of Treaties and International Standards', *Sydney Law Review*, vol 17, 1995, p145.

- 42 Minister for Foreign Affairs, Attorney-General and Minister for Immigration and Multicultural Affairs, *Improving the Effectiveness of United Nations Committees*, Joint Media Release, Parliament House, Canberra, 29 August 2000, at http://www.dfat.gov.au/media/releases/foreign/2000/fa097_2000.html, viewed 26 November 2003.
- 43 DIMIA, Submission 185, p18.
- 44 DIMIA, Submission 185, p19; DIMIA, Response to Draft Report, 4 July 2003.
- 45 Office of the High Commissioner for Human Rights, Fact Sheet No.10 (Rev.1), *The Rights of the Child*, at <http://www.unhcr.ch/html/menu6/2/fs10.htm>, viewed 26 November 2003.
- 46 Committee on the Rights of the Child, *Guidelines for Periodic Reports*, 1996, para 138. See also HRC, *General Comment 8: Right to liberty and security of persons (Art. 9)*, 30 July 1982; UNICEF Implementation Handbook, 2002, p543.
- 47 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, UN Doc CRC/C/15/Add.79, 10 Oct 1997, para 20; HRC, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc A55/40, paras 498-528, 24 July 2000.
- 48 *Nicholls v Registrar Court of Appeal* [1998] 2 NZLR 385 at 404 per Eichelbaum CJ. Examples of references to the jurisprudence of human rights treaty bodies by Australian courts include: *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42 per Brennan J (with whom Mason CJ and McHugh J agreed); *Dietrich v The Queen* (1992) 177 CLR 292 at 305-307 per Mason CJ and McHugh J and *Johnson v Johnson* (2000) 201 CLR 488 per Kirby J at [38]. See also R Rishworth, 'The Rule of International Law' in Huscroft and Rishworth, 2002, p275.
- 49 Evatt, p295. See also Joseph, p14.
- 50 HRC, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993, 30 April 1997.
- 51 HRC, *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001, 18 September 2003.
- 52 HRC, *C v Australia*, Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999, 13 November 2002.
- 53 HRC, *Bakhtiyari v Australia*, Communication No 1069/2002, UN Doc CCPR/C/79/D/1069/2002, 6 November 2003.
- 54 HRC, *General Comment 21: Replaces general comment 9 concerning humane treatment of persons deprived of liberty (Article 10)*, 10 April 1992, para 5.
- 55 The Department does not accept this interpretation by the HRC. See DIMIA, Response to Draft Report, 4 July 2003.
- 56 Standing Committee of the Executive Committee of UNHCR, *Detention of Asylum-Seekers and Refugees: The Framework, The Problem and Recommended Practice*, EC/49/SC/CRP.13, 4 June 1999, para 8.
- 57 UN Economic and Social Council, *Civil and Political Rights, including the question of torture and detention: Report of the Working Group on Arbitrary Detention: Visit to Australia*, E/CN.4/2003/8/Add.2, 24 October 2002.
- 58 Minister for Immigration and Multicultural and Indigenous Affairs and Minister for Foreign Affairs, *Government Rejects UN Report on Arbitrary Detention*, Joint Media Release, Parliament House, Canberra, 13 December 2002.
- 59 Statute of the Office of UNHCR, article 1.
- 60 See also article 11 of the 1967 Protocol to the Convention. Both Resolution 428 (V) of the UN General Assembly and the Statute of UNHCR, which was annexed thereto, called for cooperation between governments and the High Commissioner's Office in the performance of the High Commissioner's functions.
- 61 Committee on the Rights of the Child, *Report on the seventh session*, UN Doc CRC/C/34, (1994) p61. See also UNICEF Implementation Handbook, 2002, p282.
- 62 Standing Committee of the Executive Committee of UNHCR of 4 June 1999, *Detention of Asylum-Seekers and Refugees: The Framework, The Problem and Recommended Practice*, EC/49/SC/CRP.13, para 12.
- 63 DIMIA, Submission 185, p16.
- 64 Standing Committee of the Executive Committee of UNHCR of 4 June 1999, *Detention of Asylum-Seekers and Refugees: The Framework, The Problem and recommended Practice*, EC/49/SC/CRP.13, para 11.
- 65 *Chan v Minister for Immigration* (1989) 169 CLR 392.

