



## Australia's Immigration Law, Policy and Practice

### ***Mandatory Detention of Asylum Seekers***

Despite previous recommendations from the Committee Against Torture and repeated calls by the Australian Human Rights and Equal Opportunity Commission<sup>1</sup> and other human rights bodies,<sup>2</sup> the Australian Government maintains a policy of indefinite mandatory detention of asylum-seekers. The *Migration Act 1958 (Cth)* provides that a stateless person who has committed no crime, and who has requested removal from Australia and is cooperating with the authorities, may be kept in immigration detention for the rest of their life if unable to be deported or removed.<sup>3</sup> Between 1999 and 2003, 2184 children were held in immigration detention, of whom 92% were subsequently found to be refugees.<sup>4</sup> While amendments to the *Migration Act* in 2005 require that the detention of children be a 'measure of last resort',<sup>5</sup> unaccompanied minors continue to be detained.<sup>6</sup>

### ***Non-refoulement***

The fundamental principle of non-return to face torture or death is not entrenched in Australian domestic law, despite a Senate Committee recommendation that Australia 'explicitly incorporate' the *non-refoulement* obligations of the CAT and ICCPR into domestic law'.<sup>7</sup> The UN Special Rapporteur on Human Rights and Counter-Terrorism has similarly noted 'with grave concern that the *Migration Act 1958* does not prohibit the return of an alien to a place where they would be at risk of torture or ill-treatment'.<sup>8</sup>

There is substantial evidence that asylum-seekers who have been returned by Australia to their country of origin have been tortured and even killed.<sup>9</sup> Australia regularly deports asylum-seekers to countries which are not signatories to the *Refugee Convention* (such as Malaysia and Thailand) and to so called 'safe third countries' (such as China) in which the use of torture and other cruel or degrading treatment remains widespread. The Australian Government has repeatedly disclaimed any responsibility for monitoring or following up on cases of asylum-seekers who do not receive protection in Australia and are consequently deported.

### ***Conditions of Immigration Detention***

In 2002, the UN Working Group on Arbitrary Detention reported that 'the conditions of [immigration] detention are in many respects similar to prison conditions'.<sup>10</sup> The Working Group was also critical of a number of practices which create stressful conditions for detainees, including constant video surveillance, routinely handcuffing detainees outside the centres and isolation practices. The Australian Human Rights and Equal Opportunity Commission has expressed significant concern about the incidence and impact of 'prolonged and indeterminate detention', detainees' lack of access to legal advice and information, lack of educational and recreational opportunities in detention, over-crowding and separation of families.<sup>11</sup>

### ***Mental Health Care in Immigration Detention Facilities***

The mental health care provided to people in immigration detention is severely inadequate. Detention is often the first response when a person is identified as suffering from a mental illness. In addition, immigration officials often fail to recognise that mentally ill people may lack the capacity to consent to actions or sign documentation, and there is inadequate documentation of medical treatment provided to people in immigration detention, which often leads to issues with assessment, management and review of a person's condition. The effects of arbitrary, indefinite and prolonged immigration detention raise serious concerns in relation to the *Convention Against Torture*, with the Australian Human Rights Commissioner reporting a very

high prevalence of 'mental distress' among detainees, especially long-term detainees.<sup>12</sup> The UN Human Rights Committee has expressed concern about the detention of the mentally ill; in one case finding that it amounted to cruel, inhuman or degrading treatment and, in another case, finding it was inhumane.<sup>13</sup>

### **Education and Training**

Recent reports have revealed that the Department of Immigration has 'deep-seated cultural and attitudinal problems' and 'serious administrative deficiencies' within its immigration compliance and detention areas.<sup>14</sup> The main areas of concern were 'poor understanding of law and policy relating to immigration and citizenship, inadequate staff training, deficient record keeping, wrongful exercise of the power to detain, failure of internal monitoring and review, and delay in resolving the immigration status of those in detention'.<sup>15</sup> It is unclear whether airport liaison officers and naval and coastguard officers, all of whom are involved in the interdiction of asylum-seekers, receive any training in relation to the *Convention*. There is also little evidence that persons involved in the assessment or adjudication of asylum claims have any training in relation to the *Istanbul Protocol on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,<sup>16</sup> with delayed disclosure of allegations of torture in protection applications often resulting in adverse findings as to credibility. It is a matter of significant concern that some of Australia's immigration detention centres are operated by private entities that also operate Australian prisons, with guards regularly rotated between prisons and immigration detention centres.

### **TABLE OF CROSS-REFERENCES**

| <b>Issue</b>                                | <b>Relevant Articles of <i>Convention Against Torture</i></b> | <b>References to Issue in NGO Submissions</b>   |
|---|---|---|
| Mandatory detention of asylum seekers       | 2, 11, 16   | NACLC/HRLRC Submission of 6 July 2007, Part 2(a)<br>NSWCCL Shadow Report (27 July 2007) Parts 5.1, 5.1.4    |
| Non-refoulement                             | 3   | NACLC/HRLRC Submission of 6 July 2007, Part 2(c)<br>NSWCCL Shadow Report (27 July 2007) Parts 4.1 and 4.2.4 |
| Conditions of immigration detention         | 2, 11, 16   | NACLC/HRLRC Submission of 6 July 2007, Part 2(b)<br>NSWCCL Shadow Report (27 July 2007) Part 5.1.2          |
| Mental health care in immigration detention | 2, 11, 16   | NACLC/HRLRC Submission of 6 July 2007, Part 2(b)<br>NSWCCL Shadow Report (27 July 2007) Part 5.1.3          |
| Education and training                      | 10, 11  | NACLC/HRLRC Submission of 6 July 2007, Part 4<br>NSWCCL Shadow Report (27 July 2007) Part 5.1.6             |

### **Endnotes**

<sup>1</sup> See, eg, Human Rights and Equal Opportunity Commission, [Summary of Observations following the Inspection of Mainland Immigration Detention Facilities](#) (January 2007).

<sup>2</sup> Including the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination Against Women.

<sup>3</sup> [Al-Kateb v Godwin](#) [2004] HCA 37.

<sup>4</sup> Human Rights and Equal Opportunity Commission, [A Last Resort? A Summary Guide to the National Inquiry into Children in Immigration Detention](#) (2004) 15.

- 
- 5 *Migration Amendment (Detention Arrangements) Act 2005* (Cth).
- 6 See, eg, Human Rights and Equal Opportunity Commission, [Summary of Observations following the Inspection of Mainland Immigration Detention Facilities](#) (January 2007) Part 6.1.
- 7 Senate Legal and Constitutional References Committee, [A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes](#) (June 2000), [60].
- 8 Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, [Australia: Study on Human Rights Compliance while Countering Terrorism](#), UN Doc A/HRC/4/26/Add.3 (2006), [62], [72].
- 9 See, eg, [Deportations to China: Australian RSD Processes that Return People to Persecution](#) (2007); Edmund Rice Centre for Justice and Community Education, [Deported to Danger II](#) (2006); and Refugee Health Research Centre, [Removing Seriously Ill Asylum Seekers from Australia](#) (2007).
- 10 Working Group on Arbitrary Detention, [Report of the Working Group on Arbitrary Detention: Visit to Australia](#) (24 October 2002) UN Doc. E/CN.4/2003/8/Add.2, [14].
- 11 Human Rights and Equal Opportunity Commission, [A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner](#) (2001).
- 12 Human Rights and Equal Opportunity Commission, [A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner](#) (2001), [3.9].
- 13 [C v Australia](#) (2002) UN Doc CCPR/C/76/D/900/1999; [Madafferi v Australia](#) (2004) UN Doc CCPR/C/81/D/1011/2001.
- 14 Commonwealth Ombudsman, [Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau](#) (July 2005); [Mr G](#) (Report No 06–2006), [Mental Health and Incapacity](#) (Report No 07–2006) and [Children in Detention](#) (Report No 08–2006).
- 15 Commonwealth Ombudsman, [‘Ombudsman Releases Three Reports on Immigration Detention’](#), Media release, 6 December 2006.
- 16 Office of the United Nations High Commissioner for Human Rights, [Istanbul Protocol on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#) (2004).