



The Hon Chris Bowen MP
Minister for Immigration and Citizenship

RECEIVED
23 NOV 2012

Mr Harry Jenkins MP
Chair, Joint Parliamentary Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Jenkins 

Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012

I refer to your letter of 22 August 2012 and thank you for the opportunity to comment on the compatibility of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (the Act) with Australia's human rights obligations.

As you note, the Government is not under an obligation to table a human rights compatibility statement in relation to the Act because the relevant Bill was originally introduced into Parliament prior to the commencement of the requirement under the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Nonetheless, I am happy to confirm the Government's clear view that the Act complies with Australia's human rights obligations.

While the Act does not breach any of Australia's human rights obligations, as you would appreciate, the absence of inconsistency alone does not guarantee compliance with human rights standards. Rather, compliance with Australia's international obligations extends to what Australia does *in toto* by way of legislation, administration and practice. The Government considers that the actions taken under the Act to date also comply with Australia's international obligations.

The Act raises human rights considerations relating to detention, use of force, non-refoulement and family and children.

The Act does not engage rights relating to freedom of movement (Article 12 of the International Covenant on Civil and Political Rights (ICCPR)) or the expulsion of aliens (Article 13 of the ICCPR), as these provisions relate to rights for persons who are lawfully in a country and to the right to enter one's own country.

The Act operates in relation to people who are not lawfully in Australia and where Australia is not identified as their own country. Further, Article 14 of the ICCPR is

not engaged as it relates to the right to a fair hearing in respect of criminal charges only.

Detention

Article 9 of the ICCPR

Australia takes its obligations in relation to people in detention very seriously.

Article 9 of the ICCPR relates to the right to security of the person and freedom from arbitrary arrest or detention. The Government's position is that the detention of asylum seekers is neither unlawful nor arbitrary *per se* under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether proper grounds for the detention continue to exist.

In the context of Article 9, 'arbitrary' means that detention must have a legitimate purpose within the framework of the ICCPR in its entirety. Detention must be predictable in the sense of the rule of law (it must not be capricious) and it must be reasonable (or proportional) in relation to the purpose to be achieved.

The Act amended subsection 189(3) of the *Migration Act 1958* to remove the discretion to detain an offshore entry person (OEP) arriving at an excised offshore place and make detention mandatory. This change brought detention of unlawful non-citizens who arrived at excised offshore places in line with the detention of unlawful non-citizens who arrived elsewhere, reflecting what generally occurs in practice. This is consistent with Government policy that, in the absence of specific reasons not to detain, all OEPs should be detained for identity, security and other relevant checks.

However, the primary purpose of the temporary detention of OEPs under this amendment is to facilitate their removal to a regional processing country.

Insofar as the Act facilitates the detention of OEPs for the purpose of identity and security checks, and for the ultimate purpose of facilitating their transfer to a regional processing country (as defined by the *Migration Act 1958*), the Act cannot be said to be arbitrary or unreasonable. Further, OEPs can challenge the lawfulness of their detention in the High Court in accordance with the requirements of Article 9(4) of the ICCPR.

Article 10 of the ICCPR

Article 10 requires that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. This article aims to ensure that persons deprived of their liberty enjoy all the rights set out in the Covenant, subject to the restrictions that are unavoidable in a closed environment.

Article 10(1) has been interpreted as requiring state parties to provide detainees with a minimum of services to satisfy their basic needs (food, clothing, medical care, sanitary facilities, communication, light, opportunity to move about, etc).

Great care is taken by the Government to ensure that people in immigration detention are treated with respect and dignity, are provided with appropriate accommodation and services in a safe and secure environment.

The Detention Services Provider maintains a presence at all immigration detention facilities and is contracted to provide security, meaningful activities, food and other living necessities to individuals accommodated there. The Detention Services Provider is supported by many other organizations such as the International Health and Medical Service, including the Psychological Support Program and Torture and Trauma Counsellors, Life Without Barriers, Translating and Interpreting Service and the Red Cross.

My Department ensures services delivered by contracted service providers are provided in a fair, reasonable and humane manner, through implementation of performance standards in each contract which are focused on service outcomes to people in detention.

Immigration detention required by Australian law is also subject to external scrutiny by the Commonwealth Ombudsman, the Australian Human Rights Commission, the United Nations High Commissioner for Refugees and the Australian Red Cross to ensure people in immigration detention are treated humanely, decently and fairly.

Use of force

The Act permits an officer to use such force as is reasonably necessary to facilitate the movement of OEPs to a designated country.

The use of force authorised by the Act does not amount to torture or cruel, inhuman or degrading treatment or punishment set out Article 7 of the ICCPR. This is because the use of force contemplated by the Act extends only to the placement, restraint or removal of an OEP for the legitimate and lawful objective of removing that person to a designated country. Moreover, the force authorised by the Act is limited to such force as is necessary and reasonable to achieve that objective.

As such, the use of force contemplated by the Act is consistent with Australia's obligations under Article 7 of the ICCPR.

Non-refoulement

In addition to the *non-refoulement* (non-return) obligation under the Refugees Convention (which is not one of the treaties specified in the definition of 'human rights' in the *Human Rights (Parliamentary Scrutiny) Act 2011*), Australia has an obligation to not send a person:

- To a country where they are at a real risk of the death penalty, arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment (Articles 6 and 7 of the ICCPR, Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)); or
- to a country which would send the person to another country where they would face such a risk.

As noted above, any legislative scheme – including that which provides for the taking of persons from Australia – is not expected to expressly guarantee compliance with these obligations so long as the combination of legislation, policies, procedures and practices enables Australia to so comply.

Subsection 198AB(1) of the *Migration Act 1958*, as inserted by the Act, provides that the Minister may designate, by legislative instrument, that a country is a regional processing country. The only condition for the exercise of the power under subsection 198AB(1) is that the Minister thinks it is in the national interest to so designate a country (s198AB(2)).

In considering the national interest, the Minister must have regard to whether or not the country has given Australia any assurances to the effect that the country will not expel or return a person taken to the country to another country where their life or freedom would be threatened for a Refugees Convention reason, and whether the country will make a refugee status assessment in respect of a transferee, or permit such an assessment to be made.

Moreover, new paragraph 198AB(3)(b) of the *Migration Act 1958* provides that the Minister, in considering the national interest for the purposes of s198AB(2), may have regard to any other matter which, in the opinion of the Minister, relates to the national interest. This confers on the Minister a discretion to take into account other matters. These matters could include, for example, whether or not the country has given Australia any assurances that the country will not send a transferred person to another country where there is real risk that the person will be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life, or the imposition of the death penalty.

The Act further provides a mechanism for the Minister to determine that new section 198AD of the *Migration Act 1958* (which provides for the taking of offshore entry persons to a regional processing country) does not apply to an OEP, if the Minister thinks it is in the public interest to do so. This is a personal, non-compellable power that allows the Minister to exempt persons from the operation of section 198AD should, for example, issues arise in relation to obligations under the CAT or ICCPR.

Rights relating to families and children

Under Article 3 of the Convention on the Rights of the Child (CROC), Australia also has an obligation to treat the best interests of the child as a primary consideration in all actions concerning children.

This does not mean these interests must be the overriding or only consideration. Rather, the best interests of the child must be a “primary” consideration, which must be considered with other primary considerations, including those outlined in the *Migration Act 1958* and the *Migration Regulations 1994*.

Article 3 of the CROC does not create any specific rights in respect of immigration. Consideration of the best interests of a child does not necessarily require a decision

to allow the child or the child's family to remain in Australia and may be outweighed by other primary considerations.

An important competing consideration is one of the central objectives underlying the Act, which is to prevent children from taking the dangerous boat journey to Australia. Further, national interest considerations, including the integrity of Australia's migration system, are primary considerations which in this context will generally outweigh the preference and interests of the child to remain in Australia.

In addition to its obligations under CROC, Australia has obligations in relation to families under the ICCPR.

Article 17 of the ICCPR states that no-one shall be subjected to arbitrary or unlawful interference with his family and that everyone has the right to protection of the law against such interference. Article 23 states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

The protection of the family unit under Articles 17 and 23 does not amount to a right to enter Australia where there is no other right to do so. Avoiding interference with the family or protecting the family can be weighed against other countervailing considerations including the integrity of the migration system and the national interest more generally.

In this context, "arbitrary" interference involves elements of injustice, unpredictability and unreasonableness. "Unlawful" interference means interference that is contrary to domestic law. Accordingly, interference with family is permissible where it is not arbitrary and where it is lawful at domestic law. Australia does not consider that the measures outlined in the Act amount to separation of family, noting that persons who travel to Australia together will not ordinarily be separated when taken to a regional processing country.

Further, to the extent that these measures may be perceived as interference with family, the Government maintains that these measures seek to achieve a legitimate purpose of preventing unlawful non-citizens from travelling to Australia by irregular means and are not arbitrary or unlawful and thus are consistent with Australia's obligations under Articles 17 and 23 of the ICCPR.

Article 24(1) of the ICCPR provides for the protection of children by the State, without discrimination, as required by their status as children. It is the Government's view that Article 24 does not give rise to an automatic right to remain in Australia. While in Australia's jurisdiction, however, the needs of children will be met according to their environment.

I have consistently worked to ensure that children are placed with their family in the least restrictive form of immigration detention possible and have access to the services discussed in relation to Article 10 of the ICCPR, above. If a child is an unaccompanied minor and falls under my responsibilities under the *Immigration (Guardianship of Children) Act 1946*, their needs are met through contracted service providers.

It is also relevant to note that subsection 199(4) of the *Migration Act 1958*, inserted by the Act, also provides a mechanism for the spouse or de facto partner of an OEP who is being taken, or about to be taken, to a regional processing country, to request that they also be taken or for an OEP to request that a dependent child or children be taken to a regional processing country with them.

I hope this information is of assistance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Chris Bowen', with a horizontal line extending to the right.

CHRIS BOWEN

15 NOV 2012