

JOINT STANDING COMMITTEE ON MIGRATION
INQUIRY INTO MIGRANT SETTLEMENT OUTCOMES

Witness: AUSTRALIAN HUMAN RIGHTS COMMISSION

Mr Jason Wood MP asked the following question at the hearing on 4 April 2017:

CHAIR: An idea that has been proposed and has been discussed with me is about international obligations. Once a person has attained the age of 18 years and then has their visa cancelled—for example, we have a 17-year-old who commits violent and serious crimes; they spend a period of time in youth detention; they attain the age of 18 and then, on their release, they have their visa cancelled—would that still be breaking international law or not?

Ms Morgan: It is difficult to say without knowing the circumstances of the case, because, where the international obligations would come into play is not necessarily with the cancellation of the visa but with the ramifications of that cancellation. It would depend on what the impact would be on that young person. If the crime had been committed while they were still a child, I would think that there would be a higher level of obligation, given that child would be entitled to a level of care and protection at the age when they committed that crime. It is the case that children are considered children below the age of 18 under international law. In cases where a person was a child at the time of offending, that obligation to ensure their best interests were met would still apply.

CHAIR: Even though they are over the age of 18?

Ms Morgan: Even if they were over the age of 18, it is important to consider that there would still be obligations, and these do not disappear when a person becomes an adult. Certainly you have a higher level of obligation towards a child, but—

CHAIR: Maybe you could provide more information on that on notice?

Ms Morgan: Yes.

The answer to Mr Wood's question is as follows:

Visa cancellation on the basis of a child's criminal conduct

As noted in the Commission's submission to the inquiry, the obligation to ensure that, in all actions concerning children, the best interests of the child shall be a primary consideration is one of the four 'guiding principles' of the Convention on the Rights of the Child.ⁱ The Convention also recognises that children are entitled to protection and care due to the fact that they are not fully mature and have 'evolving capacities'.ⁱⁱ

In accordance with these principles, particular care should be taken when imposing penalties for criminal conduct which occurred before a person turned 18, as their level of culpability for criminal acts is lower than would be the case for an adult. This is recognised in the criminal sentencing procedure in Australian jurisdictions, which provide different regimes for children.

In addition, the Committee on the Rights of the Child has stated that the obligation to protect the child's best interests 'means that the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders'.ⁱⁱⁱ

In light of these obligations, the Commission considers that it would in many cases be inappropriate to cancel a person's visa on character grounds, based on conduct which

occurred before they turned 18. Any such cancellations would require very careful consideration to ensure compliance with Australia's international obligations.

Obligations towards adults subject to visa cancellation

The Commission's submission to the Inquiry into Migrant Settlement Outcomes^{iv} identified several international human rights obligations relevant to the situation of adults who are subject to visa refusal or cancellation under s 501 of the *Migration Act 1958*. These include:

- the risk that Australia could breach its *non-refoulement* obligations through refusing or cancelling visas of individuals towards whom Australia has protection obligations
- the risk that people subject to visa refusal or cancellation under s 501 may be subject to arbitrary immigration detention, potentially for prolonged periods
- the deportation of long-term residents of Australia who may have little or no connection to their country of citizenship
- the separation of families resulting from the deportation of individuals who have had visas refused or cancelled on character grounds and have relatives (including children) who remain in Australia.

Further information about the human rights implications of visa refusals and cancellations under s 501 can be found in the Commission's submission to the Inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014.^v

ⁱ UNICEF, *Rights under the Convention on the Rights of the Child* (7 August 2014). At https://www.unicef.org/crc/index_30177.html (viewed 14 December 2016).

ⁱⁱ See *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) preamble, arts 5, 14.

ⁱⁱⁱ Committee on the Rights of the Child, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, UN Doc CRC/C/GC/14 (29 May 2013) [IV.A.2(b)].

^{iv} Australian Human Rights Commission, Submission No 38 to the Joint Standing Committee on Migration, Parliament of Australia, *Inquiry into Migrant Settlement Outcomes*, 31 January 2017.

^v Australian Human Rights Commission, Submission No 8 to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014*, 24 October 2014.