



Australian  
Human Rights  
Commission

# Inquiry into Migrant Settlement Outcomes

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION  
TO THE JOINT STANDING COMMITTEE ON MIGRATION**

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## **1 Introduction**

1. The Australian Human Rights Commission (the Commission) makes this submission to the Joint Standing Committee on Migration (the Committee) inquiry into Migrant Settlement Outcomes.
2. The inquiry seeks to investigate a range of factors which affect the settlement outcomes of migrants, including settlement services, English language ability and migration processes, with particular consideration given to social engagement of young people from migrant backgrounds.
3. The Commission considers that this inquiry examines issues which engage Australia's international human rights obligations under the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC).
4. In this submission, the Commission responds to the following terms of reference:
  - the effectiveness of settlement services in promoting better settlement outcomes for migrants
  - whether current migration processes adequately assess a prospective migrant's settlement prospects
  - the adequacy of the *Migration Act 1958* character test provisions as a means to address issues arising from anti-social behaviour amongst youth migrants.

## **2 Summary**

5. The Commission welcomes the opportunity to make a submission to this inquiry.
6. Australia's international human rights obligations apply to all people under our jurisdiction or effective control, regardless of whether they are Australian citizens. In most circumstances, people from migrant and refugee backgrounds living in Australia are entitled to the full protection and enjoyment of their human rights.
7. In recent decades, immigrants to Australia have broadly reported positive experiences in migrating and in settling into their new lives in Australia. Despite this, racial discrimination continues to affect migrants and can have a significant negative impact on settlement outcomes. Efforts to combat racial discrimination can therefore play a key role in fostering positive settlement outcomes.
8. The Commission considers that processes for assessing the settlement prospects of prospective migrants may in some circumstances engage Australia's non-discrimination obligations under international human rights law.

As such, any process for assessing settlement prospects would need to be carefully considered to ensure that it is compliant with these obligations.

9. The ICESCR enshrines a number of rights which are closely related to indicators of successful settlement. The comprehensive range of settlement programs and services provided by Australia can play a significant role in ensuring that people from migrant and refugee backgrounds can participate in Australian society on an equal basis and fully enjoy their economic, social and cultural rights. Statements made by UN bodies and human rights experts suggest that these services are generally well-regarded internationally and represent good practice in settlement support.
10. The provisions of the CRC generally apply to children from migrant and refugee backgrounds on the same basis as children who are Australian citizens. The CRC also includes a number of specific obligations towards children who are seeking asylum, are refugees or have experienced trauma or ill-treatment.
11. The Commission acknowledges that children seeking asylum are temporary residents and may not settle in Australia on a permanent basis. Nonetheless, the Commission considers that their situation is relevant to this inquiry. The Commission welcomes the introduction of the Department of Immigration and Border Protection's Child Safeguarding Framework but notes that there is an ongoing need to improve care, protection and support arrangements for children seeking asylum, including through the appointment of an independent guardian for unaccompanied children.
12. The Commission considers that using s 501 of the *Migration Act 1958* (the Migration Act) to refuse or cancel the visas of young people from migrant and refugee backgrounds is not an appropriate means of addressing 'anti-social behaviour'. In the Commission's view, the use of s 501 for this purpose – particularly if the young person concerned is under the age of 18 – would place Australia at significant risk of breaching its international obligations, including obligations relating to the detention of children and the protection of the family.

### 3 Recommendations

**Recommendation 1:** That the Australian Government continue to fund and support initiatives to address racism and racial discrimination as a complementary measure to settlement services.

**Recommendation 2:** That the Committee seek input directly from people from migrant and refugee backgrounds, including young people, for this inquiry.

**Recommendation 3:** That the Committee affirm that Australia maintain a migration policy and program that do not discriminate against visa applicants on the basis of their race, colour, descent, religion or national or ethnic origin. As part of this, that the Committee emphasise the importance of any future processes for assessing the settlement prospects of prospective migrants be consistent with Australia's international human rights obligations in relation to equality before the law and non-discrimination.

**Recommendation 4:** That the Australian Government review current care, protection and support arrangements for children seeking asylum, to improve consistency in these arrangements across Australia and ensure appropriate monitoring and oversight.

**Recommendation 5:** That the Australian Government appoint an independent guardian for unaccompanied children seeking asylum in Australia.

**Recommendation 6:** That s 501 of the Migration Act not be used as a means to address ‘anti-social behaviour’ amongst young people from migrant and refugee backgrounds.

**Recommendation 7:** That s 501 of the Migration Act not be used to refuse or cancel the visas of children.

## **4 Non-discrimination**

### **4.1 International obligations**

13. Australia’s international human rights obligations apply to all people under our jurisdiction or effective control, regardless of whether they are Australian citizens. Aside from a small number of rights which may be legitimately restricted to citizens (such as the right to vote), people from migrant and refugee backgrounds living in Australia are entitled to the full protection and enjoyment of their human rights.

14. For example, the Committee on Economic, Social and Cultural Rights has affirmed in relation to ICESCR that

the ground of nationality should not bar access to Covenant rights...The Covenant rights apply to everyone including non-nationals, such as refugees, asylum seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.<sup>1</sup>

15. The ICCPR, ICESCR and CRC all include provisions obliging states parties to ensure that all people can enjoy human rights without discrimination of any kind, including discrimination on the basis of race, colour, language, religion and national origin.<sup>2</sup> Article 26 of the ICCPR further obliges states parties to prohibit discrimination and guarantee equal and effective protection against discrimination on any ground.<sup>3</sup>

16. In addition, Australia has specific obligations under CERD to prevent all forms of racial discrimination. Under this Convention, racial discrimination is defined as

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>4</sup>

17. This definition does not apply to distinctions, exclusions, restrictions or preferences between citizens and non-citizens.<sup>5</sup> However, the Committee on the Elimination of Racial Discrimination has affirmed that

Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.<sup>6</sup>

18. CERD includes obligations both to refrain from and prohibit racial discrimination, and to ensure the full and equal enjoyment of human rights and fundamental freedoms by certain racial groups.<sup>7</sup>

#### **4.2 Migration and racial discrimination in Australia**

19. Australian society is multicultural in character, reflecting the successive waves of mass immigration since the end of the Second World War. An estimated 28 per cent of the Australian population were born overseas.<sup>8</sup> This is the third highest proportion among all OECD countries.<sup>9</sup> In addition, about 46 per cent of the Australian population has at least one parent who was born overseas.<sup>10</sup> Net overseas migration reflected a gain of 168,200 people in 2014-15.<sup>11</sup> The two largest source countries of permanent settlement are China and India.<sup>12</sup>
20. Australia has been highly successful in the economic and civic integration of immigrants. This is reflected through both the economic and educational outcomes of immigrants. In 2015 the overseas-born unemployment rate was lower than the native-born rate, and was the fifth lowest in the OECD.<sup>13</sup> Moreover, the children of immigrants on average outperform the children of Australian-born parents. Australia is one of the very few OECD countries where the children of immigrants constitute a higher proportion of people in highly skilled occupations than the children of native-born parents.<sup>14</sup>
21. While many humanitarian migrants have significant 'background disadvantages' that impede a completely smooth settlement journey (such as a low level of English proficiency, disrupted education and experiences of torture or trauma), these migrants are reported to have high levels of English uptake and engagement in study and work upon settling in Australia.<sup>15</sup> Integration is a generational process, and while humanitarian migrants' disadvantages mean they may struggle with unemployment and workforce participation initially, labour force engagement rates converge towards Australia-born people over time, as residence in Australia continues.<sup>16</sup>
22. Overall, Australia's multicultural society enjoys a strong level of social cohesion. In the Scanlon Foundation's *Australians Today* survey, almost two-thirds of migrant respondents indicated a sense of belonging in Australia to a 'great' or 'moderate' extent, while only nine per cent of recent arrivals indicated no sense of belonging in Australia 'at all'.<sup>17</sup> There is also a high uptake of citizenship amongst permanent settlers, reflecting the nation-building character of Australian multiculturalism.<sup>18</sup>

23. Attitudes towards immigration from the existing population continue to be broadly positive. Fifty-nine per cent of Australians surveyed by the Scanlon Foundation in 2016 considered that the immigration intake was ‘about right’ or ‘too low’. Similarly, fifty-seven per cent of respondents to a 2016 Lowy Institute survey disagreed with the statement that there is ‘too much’ immigration to Australia. This stands in strong contrast to similar polls in the United States and particularly European countries where current support for immigration is much lower.<sup>19</sup>
24. Despite this, racial discrimination continues to affect migrants. Higher levels of discrimination are reported by more recent arrivals, as well as by migrants from non-English speaking backgrounds.<sup>20</sup> Particularly high levels of discrimination and racial profiling are reported by those from African countries, including Ethiopia, Kenya, Zimbabwe and South Sudan.<sup>21</sup>
25. In respect of young people, a Foundation of Young Australians report found that over eighty per cent of non-Anglo Australian background children indicated they had been subjected to some form of racism.<sup>22</sup> Young people from such backgrounds, particularly those of African descent, report concerns about encountering racism from public institutions, including police.<sup>23</sup>
26. Racial discrimination can have a significant negative impact on settlement outcomes. The Commission’s community consultations in 2015, marking the 40<sup>th</sup> anniversary of the *Racial Discrimination Act 1975*, found that experiences of racial vilification can undermine a sense of belonging to the community, alienate victims from society and feed a sense of disillusion and disempowerment.<sup>24</sup>
27. Efforts to combat racial discrimination can therefore play a key role in fostering positive settlement outcomes. Positive initiatives already in place include the National Anti-Racism Strategy, which incorporates the *Racism. It Stops with Me* campaign. The Strategy was launched in 2012 and extended for a further three years in 2015.<sup>25</sup> The Commission acknowledges the importance of anti-racism initiatives, and encourages the Australian Government to continue to fund and support them.
28. The Commission also encourages the Committee to seek testimony from people from migrant and refugee backgrounds, so that it may be informed by the lived experience of those settling in Australia. The Commission suggests that the Committee may consider devoting special attention to groups, such as young people, who may have unique experiences of settlement in Australia.

**Recommendation 1:** That the Australian Government continue to fund and support initiatives to address racism and racial discrimination as a complementary measure to settlement services.

**Recommendation 2:** That the Committee seek input directly from people from migrant and refugee backgrounds, including young people, for this inquiry.

### **4.3 Assessing settlement prospects**

29. Processes for assessing the settlement prospects of prospective migrants may in some circumstances engage Australia's non-discrimination obligations under international human rights law.
30. Not all distinctions made between visa applicants would necessarily constitute discrimination under international law, provided that such distinctions are connected to a legitimate objective, are reasonable in the circumstances and do not result in the broad exclusion of particular groups. For example, it would generally be reasonable in the case of skilled migration visas to require that applicants hold relevant qualifications, or can demonstrate a particular level of proficiency in English.
31. For other classes of visas, however, such distinctions may not be reasonable. For example, an assessment of settlement prospects based on criteria such as qualifications or English proficiency generally would not be appropriate for humanitarian visas, which have the primary objective of protecting people at risk of persecution and other forms of serious harm.
32. Policy and legislative measures which permit the broad exclusion of particular groups of people — such as assessment processes which exclude certain applicants on the basis of factors such as their country of origin, religion or political opinion, or general exemptions which permit wide-ranging discrimination against particular groups (such as the exemption of the Migration Act from the *Disability Discrimination Act 1992*) — could also place Australia at risk of breaching its international obligations. As such, any process for assessing the settlement prospects of prospective migrants would need to be carefully considered to ensure that it is compliant with Australia's human rights obligations.
33. In addition, the Commission considers that processes for assessing settlement prospects prior to a person's arrival in Australia are likely to have significant limitations. There is enormous diversity amongst the millions of migrants and refugees who have settled successfully in Australia over many decades. Australia's longstanding non-discriminatory immigration policy, which does not discriminate against visa applicants on the basis of race, colour, descent, religion or national or ethnic origin, has allowed for migration from all parts of the world. Migrants have come from many national, racial and ethnic backgrounds, have a wide variety of religious and political affiliations, arrived at many different ages and have often vastly different life experiences. This diversity suggests that it would be difficult to identify specific criteria which could reliably indicate a person's settlement prospects prior to their arrival.
34. While it may be possible to identify factors which can facilitate the settlement process for some individuals, these factors may not be accurate indicators of settlement prospects in all cases. For example, those who are proficient in English and who come from countries which have similar legal systems and institutions to Australia's may initially find it easier to navigate some aspects of life in Australia. However, a great many people from migrant and refugee backgrounds have settled very successfully in Australia despite not having



spoken English when they arrived, and having come from countries with very different legal systems and institutions.

35. For example, as noted above, many humanitarian migrants face significant disadvantages upon arrival in Australia, yet nonetheless are reported to have high levels of English uptake and engagement in study and work. Evidently, such disadvantages do not present insurmountable barriers to successful settlement, particularly over the long term.
36. The Commission therefore cautions against an overreliance on processes for assessing settlement prospects prior to a person's arrival in Australia, as a means of ensuring positive settlement outcomes after arrival. The Commission considers that it may be more effective to strengthen measures in Australia which create an environment conducive to positive settlement outcomes – including services and programs which already play a role in supporting positive settlement outcomes and enhancing the enjoyment of human rights in Australia.

**Recommendation 3:** That the Committee affirm that Australia maintain a migration policy and program that do not discriminate against visa applicants on the basis of their race, colour, descent, religion or national or ethnic origin. As part of this, that the Committee emphasise the importance of any future processes for assessing the settlement prospects of prospective migrants be consistent with Australia's international human rights obligations in relation to equality before the law and non-discrimination.

## **5 Settlement outcomes and economic, social and cultural rights**

### **5.1 International obligations**

37. The ICESCR enshrines a number of rights which are closely related to indicators of successful settlement, such as: the right to work and to just and favourable conditions of work; the right to an adequate standard of living (including adequate food, clothing and housing) and the continuous improvement of living conditions; the right to the highest attainable standard of physical and mental health; the right to education; and the right to take part in cultural life.<sup>26</sup>
38. As noted by the Parliamentary Joint Committee on Human Rights, Australia has obligations not only to respect and protect the rights enshrined in the treaties to which it is a party (that is, to refrain from interfering with the enjoyment of these rights and prevent others from doing so) but also to *fulfil* these rights through adopting measures to ensure their full realisation.<sup>27</sup>
39. This principle has been repeatedly affirmed by the Committee on Economic, Social and Cultural Rights in its general comments on the ICESCR.<sup>28</sup> The Committee has emphasised the obligation to fulfil may require the adoption of specific measures to ensure the enjoyment of economic, social and cultural rights by vulnerable, disadvantaged and marginalised groups and those who face difficulties in exercising their rights under the ICESCR.<sup>29</sup> This may include

refugees, people seeking asylum, migrant workers and members of cultural and linguistic minority groups.<sup>30</sup>

40. In some circumstances, these obligations under the ICESCR may have implications for programs and services designed to support the settlement of migrants and refugees. Fulfilment of these obligations may require the adoption of proactive measures to promote the participation of migrants and refugees in Australia's economic, social and cultural life, including through the provision of targeted assistance to groups who may be particularly disadvantaged or vulnerable.

## **5.2 Settlement services in Australia**

41. Australia provides a comprehensive range of programs and services designed to support the successful settlement of migrants and refugees. In the Commission's view, these services play a significant role in ensuring that Australia meets its obligations under international human rights law. The provision of settlement services can help to ensure that people from migrant and refugee backgrounds can participate in Australian society on an equal basis and fully enjoy their economic, social and cultural rights. Settlement services also play a key role in providing targeted assistance to groups and individuals who may be particularly vulnerable, disadvantaged or marginalised.
42. The provision of dedicated settlement services has been integral to the success of multicultural Australia. It has, in part, distinguished the Australian experience of multiculturalism from that of other liberal democratic societies that have been characterised as 'multicultural'.
43. Statements made by UN bodies and human rights experts suggest that Australia's settlement services are generally well-regarded internationally and represent good practice. During a visit to Australia in 2012, then High Commissioner for Refugees António Guterres applauded Australia's success in achieving positive settlement outcomes for refugees:

Beyond the mere numbers, one of the notable features of Australia's resettlement programme is the excellent standard of settlement services provided to new arrivals, something by which I was deeply impressed already during my first visit in 2009 and again this week. NGOs, community and faith-based groups, as well as central and local authorities, undertake essential and meaningful work toward helping new arrivals to integrate and settle into Australian society so that they can begin productive lives in this country. They provide housing, training, and education, giving refugees optimum opportunities to fully establish themselves and their families in Australia. Integration is the most challenging aspect of creating a truly durable solution, and Australian society achieves impressive results in this regard.<sup>31</sup>

44. Following their more recent visits to Australia, two Special Rapporteurs have separately commended Australia's support services for migrants and refugees. In his end-of-mission statement, the Special Rapporteur on the human rights of migrants, François Crépeau, acknowledged the 'energy, imagination, dedication and commitment of civil society organisations working

with migrants’, including those which are contracted by the Australian Government to deliver settlement services.<sup>32</sup>

45. The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mr Mutuma Ruteere, opened his end-of-mission statement by praising Australia’s policy of multiculturalism, specifically noting that Australia ‘offers commendable resources and programmes at various levels for their integration so that they can settle into their new communities as smoothly as possible.’<sup>33</sup> He went on to relate that

I have noticed the relatively good integration of migrants into the Australian society, where numerous social programmes have been put in place at the various levels of Government particularly in areas such as housing, education, health, employment and welfare services. This is complemented by a vibrant civil society and numerous multicultural and ethnic organisations which help migrants and refugees settle in Australia and who provide a wide-range of programmes and initiatives of their own.<sup>34</sup>

46. During the most recent Universal Periodic Review of Australia in 2015, several members of the UN Human Rights Council similarly praised Australia’s policy of multiculturalism, including efforts to combat racism and discrimination.<sup>35</sup>
47. It is evident that many of Australia’s current settlement policies and programs are already achieving their goal of promoting successful settlement, including through furthering the enjoyment of economic, social and cultural rights. These services could potentially be built upon, strengthened or refined to further improve settlement outcomes. In particular, the Commission suggests (in line with Recommendation 2) that input and collaboration be sought from migrants and refugees themselves, to ensure that settlement services continue to effectively meet their needs.

## **6 Rights of children**

### **6.1 International obligations**

48. In a similar manner to the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child has affirmed that the enjoyment of the rights enumerated in the CRC

is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children – including asylum-seeking, refugee and migrant children – irrespective of their nationality, immigration status or statelessness.<sup>36</sup>

49. The provisions of the CRC should therefore generally apply to children from migrant and refugee backgrounds on the same basis as children who are Australian citizens. This includes the four ‘guiding principles’ of the CRC<sup>37</sup> – the right of children to enjoy human rights without discrimination; the obligation to ensure that, in all actions concerning children, the best interests of the child shall be a primary consideration; the right of children to life, and the obligation to ensure the survival and development of the child to the maximum extent

possible; and the right of children to express their views in matters which affect them.<sup>38</sup>

50. In its most recent concluding observations on Australia, the Committee on the Rights of the Child recommended that Australia take measures to ensure that the Migration Act 'guarantees respect for the views of the child at all stages of the migration process, including in situations of irregular migration'.<sup>39</sup>
51. The CRC also includes a number of specific obligations towards children who are seeking asylum, are refugees or have experienced trauma or ill-treatment:
  - Article 22(1) of the CRC requires states parties to ensure that children who are seeking asylum or have been recognised as refugees receive appropriate protection and humanitarian assistance<sup>40</sup>
  - Article 39 requires states parties to take measures to promote the physical and psychological recovery and social reintegration of a child victim of neglect, exploitation, abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment. This recovery should 'take place in an environment which fosters the health, self-respect and dignity of the child'.<sup>41</sup>
52. These obligations may necessitate the adoption of specific measures to support the settlement of children from refugee backgrounds, particularly those who have experienced trauma. This includes unaccompanied children, who have been recognised by the Committee on the Rights of the Child as being a particularly vulnerable group of children.<sup>42</sup>

## **6.2 Settlement outcomes of children seeking asylum**

53. As noted above, children seeking asylum are recognised under the CRC as a particularly vulnerable group of children who are entitled to protection and assistance. The Commission acknowledges that children seeking asylum are temporary residents and may not settle in Australia on a permanent basis. Nonetheless, the Commission considers that their situation is relevant to this inquiry, given that many children spend a considerable amount of time in Australia (including formative years of development) while waiting for their applications for refugee status to be assessed.
54. The Commission welcomes the introduction of the Department of Immigration and Border Protection's Child Safeguarding Framework,<sup>43</sup> which implements recommendations from the Department's report: *Making Children Safer: The wellbeing and protection of children in immigration detention and regional processing centres*.<sup>44</sup> The Framework is designed to ensure that the Department meets its child protection and wellbeing obligations and responsibilities, and is an important step towards ensuring compliance with Australia's obligations towards asylum seeker children. The Commission looks forward to further engagement with the Department for Immigration and Border Protection on the implementation of this framework.
55. However, the Commission considers that there is a need to improve processes for monitoring the wellbeing and settlement outcomes of children seeking asylum who are in community detention or are living in the Australian

community on Bridging Visas. The Commission therefore encourages the Australian Government to conduct a review of current care, protection and support arrangements for children seeking asylum, to improve consistency in these arrangements across Australia and ensure appropriate monitoring and oversight. Following the recommendation noted above from the Committee on the Rights of the Child, the Commission suggests that the Government seek the views of young people seeking asylum as part of this review process.

56. The Commission remains concerned that the Minister for Immigration and Border Protection cannot be an effective guardian for unaccompanied children seeking asylum and act in their best interests, as the Minister is also responsible for administering the immigration detention system and making decisions about visas, removals and transfers to Regional Processing Centres. The Commission considers that the appointment of an independent guardian for unaccompanied children seeking asylum would be an important step towards improving care and protection arrangements for these especially vulnerable children.

**Recommendation 4:** That the Australian Government review current care, protection and support arrangements for children seeking asylum, to improve consistency in these arrangements across Australia and ensure appropriate monitoring and oversight.

**Recommendation 5:** That the Australian Government appoint an independent guardian for unaccompanied children seeking asylum in Australia.

### **6.3    *The character test***

57. For a number of years, the Commission has raised concerns that decisions to refuse or cancel visas under s 501 of the Migration Act may lead to breaches of Australia's international human rights obligations.<sup>45</sup> These concerns have included:
- 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
58. The extent to which s 501 has been used to date to cancel the visas of children and young people is unclear. However, on the basis of the concerns outlined above, the Commission considers that using s 501 in its current form to refuse or cancel the visas of young people from migrant and refugee backgrounds would not be an appropriate means of addressing 'anti-social

behaviour'. In the Commission's view, the use of s 501 for this purpose – particularly if the young person concerned is under the age of 18 – would place Australia at significant risk of breaching its international obligations.

59. The Commission considers that there would be few circumstances in which a decision to refuse or cancel a child's visa on character grounds would be compliant with the obligation to consider the best interests of the child. If the child concerned is from a refugee background, has experienced trauma or arrived in Australia unaccompanied, there is a risk that a decision to refuse or cancel their visa on character grounds would breach Australia's obligations to provide special assistance to these groups of especially vulnerable children.
60. The Commission is particularly concerned that refusing or cancelling the visas of young people on character grounds could lead to an increase in the number of children in immigration detention. Australia has an obligation under article 37(b) of the CRC to ensure that children are detained as a last resort and for the shortest appropriate period of time.<sup>46</sup> The United Nations Committee on the Rights of the Child has affirmed that 'the detention of a child because of their or their parent's migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child', calling on states to 'expeditiously and completely cease the detention of children on the basis of their immigration status'.<sup>47</sup>
61. Since the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) was passed in December 2014, there has been a significant increase in the number of people in detention as a result of visa cancellation. At the end of 2014, there were 140 people in immigration detention for this reason.<sup>48</sup> By the end of October 2016, this had increased to 615 people, the majority of whom (471) had their visas cancelled under s 501.<sup>49</sup>
62. The Commission wishes to acknowledge the Australian Government's efforts in dramatically reducing the number of children in immigration detention. Were the character test to be employed to refuse or cancel the visas of children, however, there is a significant risk that the number of children in immigration detention could again increase.
63. The Commission is also concerned that visa refusal or cancellation could result in children and young people facing indefinite or permanent separation from family members (as a consequence of their detention and/or deportation from Australia). This may engage Australia's obligations under the ICCPR and ICESCR to afford protection and assistance to the family,<sup>50</sup> as well as the obligation under the CRC to facilitate family reunification.<sup>51</sup>
64. Finally, the Commission considers that refusing or cancelling visas is likely to be an ineffective means of addressing 'anti-social behaviour'. Studies of brain maturation show that children and young people are still developing the ability to make careful judgments, delay gratification, restrain impulsive behaviour and consider consequences. Positive interventions and rehabilitative programs are therefore needed to support young people demonstrating 'anti-social behaviour'. Refusing or cancelling visas isolates young people from support networks and services which could otherwise assist in addressing this behaviour.

65. A more constructive approach, in the Commission's view, would be to pursue measures aimed at promoting the education, inclusion and participation of all young people in Australian society (including targeted, youth-specific settlement services). This approach would also assist in promoting positive settlement outcomes for young people from migrant and refugee backgrounds more generally.
66. The Commission notes that s 501 currently provides for discretion in most decisions to refuse or cancel a visa, and for decision-makers to consider revocation of mandatory visa cancellations. The Commission considers that these provisions should be employed in cases involving children, to ensure that their visas are not refused or cancelled on character grounds. In addition, the Commission cautions against legislative amendments to further extend the application of s 501 without additional safeguards, particularly if such amendments would place children and young people at higher risk of visa refusal or cancellation.

**Recommendation 6:** That s 501 of the Migration Act not be used as a means to address 'anti-social behaviour' amongst young people from migrant and refugee backgrounds.

**Recommendation 7:** That s 501 of the Migration Act not be used to refuse or cancel the visas of children.

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<sup>1</sup> Committee on Economic, Social and Cultural Rights, *General comment no. 20 on non-discrimination in economic, social and cultural rights*, ECOSOC, 42<sup>nd</sup> sess, Agenda Item 3, UN Doc E/C.12/GC/20 (2 July 2009) [30].

<sup>2</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2(1); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 2(2); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 2(1).

<sup>3</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26.

<sup>4</sup> *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 1(1).

<sup>5</sup> *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 1(2).

<sup>6</sup> Committee on the Elimination of Racism Discrimination, *General recommendation no. 30 on discrimination against non-citizens*, 64<sup>th</sup> sess, UN Doc CERD/C/64/Misc.11/rev.3 (2004) [4].

<sup>7</sup> *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 2.

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