



QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

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The Committee Secretary
Joint Select Committee on Australia's
Immigration and Detention Network

By Email: immigration.detention@aph.gov.au

Dear Sir

Submission to the Joint Select Committee on Australia's Immigration and Detention Network

Thank you for the opportunity to make a submission to this Committee.

About the QCCL

The Queensland Council for Civil Liberties was established in 1967. It has as its objective the implementation in Queensland and Australia of the Universal Declaration of Human Rights.

In the Council's view the following articles of the Universal Declaration are engaged by the detention of asylum seekers:-

1. Everyone has the right to life, liberty and security of person (article 3);
2. No one should be subject to torture or to cruel, inhumane or degrading treatment or punishment (article 5);
3. Everyone has the right to recognition everywhere as a person before the law (article 6);
4. Everyone has the right to an effective remedy by the competent national tribunals for acts of violating the fundamental rights granted to him by the constitution or by law (article 8);
5. No one shall be subjected to arbitrary arrest, detention or exile (article 9);
6. Everyone has the right to seek and to enjoy another country's asylum from persecution (article 14(1)).

A Basic lack of Humanity

It is trite to say that Australia is obliged by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the Protocol to the Refugee Convention to protect asylum seekers whilst they are being detained.

Watching them while they are watching you!

However, the system of mandatory detention does not protect asylum seekers. Quite the opposite. The policy that we have chosen of mandatory detention has been well established as being extremely detrimental to the mental health of those who have detained:-

1. The rates of suicidal behaviours amongst men and women at Australia's detention centres are 41 and 26 times the national average;
2. Male refugee claimants in detention have rates of suicidal behaviour at 1.8 times higher than the male prison rate;
3. Individuals detained for approximately 2 years meet the diagnostic criteria for at least one current psychiatric disorder;
4. Holding children and young people in detention can be harmful – there is accentuation to developmental risks, threatens the bonds with significant caregivers, limits educational opportunities, has destructive psychological impacts and exacerbates the impacts of other traumas¹

The arbitrariness of the system is reinforced by the facts. It is estimated that as at 30 June, 2010 that there were some 53,900 visa overstayers residing in Australia².

Historically boat arrivals only made up a small proportion of a asylum applicants. Historically between 96-99% of asylum applicants arrive by air³.

But even now boat arrivals still comprise less than half of Australia's onshore asylum seekers⁴.

Historically only between 1/3 and a ¼ of the people who seek asylum are put into detention. The main determinant of whether you get put into detention being whether or not you have arrived by boat.

It is even more important to be reminded that the figures show between 70-90% of asylum seekers arriving by boat have been found to be refugees.

By contrast those who arrive by air are far less successful in being found to be refugees. The majority are not found to be refugees.

Clearly then people who get in boats and take the risk to enter into this country are far more often than not found to be genuine refugees.

Why are we doing this? Australia takes less than .1% of all refugees on the planet. We are hardly in danger of being overwhelmed. The Parliamentary Library also reports that in 2010 there were approximately 6,800 boat arrivals in comparison with 72,000 arriving in 2006 in Italy, Spain, Greece and Malta and 51,000 in those countries in 2007.

¹ Submission of the Australian Psychological Society to the Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010 Senate Enquiry

² Parliamentary Library Background Note – Asylum Seekers and Refugees: What are the facts? – 22 July, 2011

³ Ibid page 6

⁴ Ibid page 6

The Law

The system for mandatory detention has in fact been in place since the early 1990's when it was first implemented by the Hawke government. Since that time the United Nations Human Rights Committee has held on five occasions that Australia's mandatory detention policy must be considered arbitrary within the context of international human rights standards because it is not subject to judicial review; it is for an indeterminate period of time; it is discriminatory and it is made without reference to the particular circumstances of the individual.

A detailed analysis of the proposition that our current arrangements do not comply with international human rights requirements, which has been prepared by QCCL Executive Member Dan Rogers, is **attached** to this submission.

The Human Rights Committee recognised the fact that the legal entry may indicate a need for investigation and that there may be factors relating to particular individuals such as the likelihood of absconding and the lack of cooperation which may justify a period of detention.

But as the committee found judicial oversight of all forms of detention is a fundamental guarantee of liberty and freedom from arbitrariness. The lack of a provision for merits review means that the detention of aliens in Australia is a breach of Article 9.4 of the International Covenant on Civil and Political Rights.

The Council takes the view that the alternative model of detention proposed by the Human Rights and Equal Opportunity Commission in its 1998 report entitled "*Those who've come across the seas*" provides an appropriate balance between the right of the Government to control the inflow of people into the country and the rights of the refugees to be treated with dignity.

Under that model, asylum seekers will only be detained where:-

1. It has not been possible to establish their identity;
2. They pose a demonstrable threat to national security or public order;
3. There is a strong likelihood that the person will abscond;
4. They breach any conditions of release.

An applicant which does not fall within any of the above categories must be released within 90 days of arrival.

There is provision for regular review of detention and regular reporting to the Department of those who have been released.

The Malaysian Solution

The principles by which the government's so-called Malaysian solution are to be assessed, both morally and legally, were set down by the Lisbon Expert Round Table, December 2002, which accepted that:

1. There is no obligation under International Law for a person to seek protection at the first opportunity. On the other hand

asylum seekers and refugees do not have an unfettered right to choose the country that will determine their asylum claim.

2. However, before a person can be returned to a third country, it must be shown that:-
 - a. The person has no well founded fear of persecution in that third country;
 - b. That the fundamental human rights of that person would be respected in accordance with relevant international standards;
 - c. That there is no risk that that person will be sent by the third country to another country in which they will be at risk from persecution;
 - d. That the third party country has agreed to abide by the refugee convention and its related protocols;
 - e. That the third party country in practice complies with the refugee convention and its related protocols;
 - f. That the third party country provides a fair and efficient mechanism for determining the claim of the person's refugee status.

On the basis of these principles both morally and legally the government's so-call Malaysian Solution fails.

Enticing people to get on boats

It is often said that the system implemented by the Rudd government or along the lines argued here is immoral because it *entices* asylum seekers to climb onto dangerous boats to make the dangerous journey to Australia.

Whilst both in law and in moral philosophy a person may be held culpable for creating a state of affairs which entices someone to put themselves in danger, two points need to be made:-

1. The policy supported by the QCCL is clearly not *intended* to entice anyone to get on a boat to come to Australia; and
2. Those who do get to on the boat, at least the adults, do so intentionally and at least they must be presumed to be aware that they are taking some serious risks in doing so.

By way of contrast the policy now being pursued by the government and proposed by the opposition involves the deliberate choice to deprive one group of innocent people of their liberty for the purposes of deterring other people. In the light of the evidence it involves the deliberate choice to expose innocent people to the serious risk of mental illness and death by suicide.

It would be the Council's submission then in weighing the moral culpability of one policy over the other the policy that involves the intentional infliction of harm on one group of innocent people in order to deter others from engaging in conduct is clearly less morally acceptable than the alternative policy which involves no intention to do harm and where those who are

harming themselves have taken an independent decision to engage in the risk.

Clearly what is necessary is an international solution to this problem as was implemented in the 70's and 80's. Until that is achieved Australia's policy should conform to the highest possible moral standards.

Yours faithfully

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
15 August 2011

Australia's immigration policy breaches articles 7, 9 and 10 of the *International Covenant on Civil and Political Rights* (ICCPR). As a signatory to this covenant, Australia's treatment of asylum seekers is appalling and has received the condemnation of the Human Rights Council for many years.

We have included, for the benefit of the committee, an overview of each of these articles and included a short analysis of the case law applicable to Australia's immigration policy. This analysis relates to the issue of mandatory detention but also to minimum health guarantees for those in detention. The removal of asylum seekers to locations where they will suffer inhumane treatment also violates Australia's obligations under the ICCPR.

Article 7

Article 7 states that '[N]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.'¹

Article 7 - General Comments of the Human Rights Committee

This article serves to protect both the dignity and the physical and mental integrity of the individual.² Mental suffering alone can constitute a breach of article 7.³ The protection exists against persons acting in an official capacity. The article is complemented by Article 10(1). The text of Article 7 allows for no limitation and there is no justification or extenuating circumstances which may be invoked to excuse a violation of article 7.⁴

It is also apparent that '[T]he protection of the detainee also requires that prompt and regular access be given to doctors and lawyers.'⁵ This implies a right to minimum health guarantees. Further, '[T]he right to lodge complaints against maltreatment prohibited by

¹ *International Covenant on Civil and Political Rights (ICCPR)*, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967), Article 7

² Office of the High Commissioner for Human Rights, "General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7):. 10/03/1992. CCPR General Comment No. 20. (General Comments)" available electronically at <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument)> (last viewed 29 June 2011), [2]

³ *Ibid*, [5]

⁴ *Ibid*, [2]

⁵ *Ibid*, [11]

article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.⁶

In the view of the Committee, article 7 includes a *non-refoulement* obligation; 'State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.'⁷

Article 7 - Case Law

In *C v Australia*, the applicant was an Iranian national detained from July 1992 to August 1994 as a 'non-citizen'.⁸ A psychologist recommended his released in 1993 because his mental health was deteriorating rapidly and was said to be the direct result of his arbitrary detention. After his release in 1994, he committed criminal offences which saw him imprisoned for 3 ½ years. At the conclusion of that term of imprisonment, the Department of Immigration ordered his deportation as a criminal non-citizen.

The UNHRC found Australia in breach of article 7 because it continued to detain the applicant after becoming aware of his mental illness, which was said to be a direct result of his imprisonment in detention.⁹ This shows that a failure to provide access to appropriate and regular health care can constitute a breach of article 7. For the applicant in *C v Australia*, the illness had reached such a level of severity that irreversible consequences were to follow.¹⁰

The Committee in *C v Australia* also warned that to return him to Iran, where there was evidence he would be persecuted, would further constitute a breach of article 7.¹¹ The non-refoulement obligation was further confirmed in *Kwok v Australia* where the Committee held that to send Kwok back to China, where she faced the real risk of the death penalty or

⁶ Ibid, [14]

⁷ Ibid, [9]

⁸ *C v Australia* 'Communication No. 900/1999: Australia 13/11/2002 CCPR/C/76/D/900/1999. (Jurisprudence) Human Rights Committee Views, available electronically at <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f8755fbb0a55e15ac1256c7f002f17bd?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f8755fbb0a55e15ac1256c7f002f17bd?Opendocument)> (last viewed 1 July 2011)

⁹ Ibid, [8.4]

¹⁰ Ibid, [8.4]

¹¹ Ibid, [8.5]

torture would constitute a breach of article 6 and 7.¹² Proving a real risk of harm, as opposed to definite harm, is sufficient.¹³

Article 9

Article 9(1) states that '[E]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'¹⁴ In this case, Article 9(4) is also engaged which states that '[A]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'¹⁵

Article 9 - General Comments

Article 9(1) and 9(4) is applicable to all deprivations of liberty including in cases for immigration control.¹⁶ Where detention is authorised on the grounds of public security, such as so-called border control, court control of the detention must be available in a timely fashion.¹⁷

Article 9 – Case Law

The Committee, in *C v Australia*, held that the applicant's mandatory detention from 1992-1994 was arbitrary because it was unnecessary and there was no individual justification for it. This was said to constitute a breach of article 9(1). The Committee held that options such as bail with reporting requirements and/or a surety are appropriate and sufficient alternatives to detention. In *Shams et al v Australia*, the Committee held that the State party who arbitrarily detains a person bears the burden to show that 'there were no less invasive

¹² *Kwok v Australia*, "Communication No. 1442/2005: Australia CCPR/C/97/D/1442/2005, 23 November 2009" Human Rights Committee Views, available electronically at <http://www.bayefsky.com/pdf/australia_t5_iccpr_1442_2005.pdf> (last viewed 29 June 2011), [9.4]

¹³ *Ibid*, [9.5]

¹⁴ *International Covenant on Civil and Political Rights (ICCPR)*, Above n5, Article 9(1)

¹⁵ *International Covenant on Civil and Political Rights (ICCPR)*, Above n5, Article 9(4)

¹⁶ Office of the High Commissioner for Human Rights, "General Comment No. 8: Right to liberty and security of persons (Art. 9):. 30/06/1982. CCPR General Comment No. 8 (General Comments)" available electronically at <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f4253f9572cd4700c12563ed00483bec?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument)> (last viewed 29 June 2011), [1]

¹⁷ *Ibid*, [4]

means of achieving the same ends.¹⁸ In *Shafiq*, the Committee held that the State's 'general experience that asylum seekers abscond if not retained in custody' was insufficient justification for arbitrary detention.¹⁹

More recently in 2009, the Committee held that 'in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.'²⁰ In *Kwok*, the Committee held that four years in mandatory detention was arbitrary and breached article 9(1).²¹ The Committee rejected the Australian Government's argument that Kwok's persistence in exhausting all appeal options contributed to this delay.²² The Committee has held that "the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice."²³

The Human Rights Committee have held that the *Migration Act 1958 (Cth)* does not comply with Article 9(4) because 'the courts have no power to review any substantive grounds for the continued detention of an individual and to order his or her release.'²⁴ In *C v Australia*, the Full Court, in its judgement of 15 June 1994, acknowledged that the *Migration Act* does not allow a substantive review.²⁵ An inability judicially to challenge a detention that is, or has become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.²⁶

Article 10

Article 10(1) states that '[A]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'²⁷

Article 10 - General Comments

¹⁸ *Shams et al v Australia*, "Communication No. CCPR/C/90/D/1255,1256,1259, 1260,1266,1268,1270&1288/2004" Human Rights Committee Views, available electronically at <http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/ccpr/opt/0/node/4/filename/australia_iccpr_t5_1255-56-59-60-66-68-70-88_2004> (last viewed 30 June 2011)

¹⁹ *Shafiq v Australia*, Above n25, [7.3]

²⁰ *Kwok v Australia*, Above n16

²¹ *Kwok v Australia*, Above n16, [9.4]

²² *Kwok v Australia*, Above n16, [9.4]

²³ *Shafiq v Australia*, Above n25, [7.2]

²⁴ *Shafiq v Australia*, Above n25, [7.4]

²⁵ *C v Australia*, Above n12, [8.3]

²⁶ *C v Australia*, Above n12, [8.3]

²⁷ *International Covenant on Civil and Political Rights (ICCPR)*, Above n5, Article 10(1)

The article applies to persons held in detention camps.²⁸ This article serves as an addition to article 7 rights such that 'not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7,... but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.'²⁹ A State's material resources are independent of this guarantee and there can be no discrimination on any ground including race.³⁰

Article 10 – Case Law

It must be remembered that article 10 complements article 7 and as such, the case law relating to article 7 has been recognised as providing assistance and authority to alleged violations of article 10.³¹ A lack of access to appropriate health care is said to constitute a violation of article 10(1).³² This view has been cited with approval in *Sobhraj v Nepal* where a lack of available health care, which caused the inmates deteriorating health, was said to constitute a breach of article 10(1).³³ In *Madaferri v Australia*, the Committee held that the State party's failure to address the deterioration of his mental health while in detention and to take appropriate action constituted a breach of article 7 and 10(1).³⁴

²⁸ Office of the High Commissioner for Human Rights, "General Comment No. 21: Replaces general comment 9 concerning humane treatments of persons deprived of liberty (Art.10):. 10/04/1992. CCPR General Comment No. 21 (General Comments)" available electronically at <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3327552b9511fb98c12563ed004cbe59?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3327552b9511fb98c12563ed004cbe59?Opendocument)> (last viewed 29 June 2011), [2]

²⁹ Ibid, [3]

³⁰ Ibid, [4]

³¹ Ibid, [3]

³² *Kelly v. Jamaica*, 'Communication No. 253/1987, 8 April 1991', [5.7].

³³ *Sobhraj v Nepal*, "Communication 1870/2009 CCPR/C/99/D/1870/2009, 27 July 2010" Human Rights Committee View, available electronically at <http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/ccpr/opt/0/node/4/filename/nepal_iccpr_t5_1870_2009> (last viewed 1 July 2011)

³⁴ *Madaferri v Australia*, "Communication 1011/2001, 26 August 2004" Human Rights Committee View, available electronically at <http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/ccpr/opt/0/node/4/filename/austalia_t5_iccpr_1011_2001> (last viewed 3 July 2011), [9.4]