Children Out of Detention

PO Box 811
Neutral Bay NSW 2089
ACN 102 747 142
ABN 502 9091 3396

www.chilout.org

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ACT 2600

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BY: MLG

Dear Sirs,

Inquiry into Immigration Detention in Australia

Thank you for the invitation to make a submission to the above Inquiry.

ChilOut, Children Out of Detention, is a parents and community group that came into being in August 2001 with the specific mandate to campaign for the release of all children and their carers from immigration detention centres. We effectively ceased operations after the defeat of the *Designated Unauthorised Arrivals Bill* in August 2006.

However, one of our core aims, namely, that the (1992 and 1994) laws that created indefinite, non-reviewable mandatory detention of all children not holding a valid visa, be amended to meet our obligations under the Convention on the Rights of the Child, has not been achieved.

As we believe this Inquiry might be a means to achieving this end we are pleased to attach our submission in support of legal changes to ensure that the indefinite, mandatory detention of children and families is outlawed.

Yours faithfully

Dianne Hiles
Alanna Hector

Introduction

ChilOut, Children Out of Detention, is a parents and community group that came into being in August 2001 with the specific mandate to campaign for the release of all children and their carers from immigration detention centres. This was effectively achieved in July 2005 with the transfer of all remaining detained families into community detention and the legal recognition that children should only be placed in locked facilities as a last resort.

However the mandatory detention legislation is still in place and there is nothing to stop future governments from re-introducing the regime of cruel and degrading treatment of asylum seeker families that we fought against.

ChilOut makes this submission purely from the perspective of children and families. We call for the repeal of the 1992 and 1994 amendments to the Migration Act, (s189 and s196 which introduced mandatory and indefinite detention respectively) and for the legislation that replaces it to conform fully with our obligations under the Convention on the Rights of the Child, which Australia ratified in 1990.

Legal Considerations

The Convention on the Rights of the Child ('the Convention') obliges government to put children first:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. (Article 3(1))

It outlaws detention except as a measure of last resort, and then only for the shortest period of time (article 37(b)).

It requires Australia to treat every child deprived of liberty with humanity and respect for their inherent dignity (article 37(c)).

It outlaws cruel, inhuman and degrading treatment or punishment (article 37(a)).

In May 2004, Australia's independent national human rights institution found that the mandatory detention system put Australia in breach of numerous obligations under the Convention, including all those mentioned above. (HREOC's *A last resort?: report of the National Inquiry into Children in Immigration Detention)*

The government simply rejected the findings and continued to detain all children indefinitely, no matter how ill they and their parents had become.

In October 2004, in the case *Re Woolley;* [2004] HCA 49, the High Court confirmed that the regime of indefinite mandatory detention as set out in the Migration Act indeed applied to children, on the basis that the Act was expressed in clear terms with no exceptions made for children ("non-citizen", for example, was defined as "a person who is not an Australian citizen"). As Chief Justice Gleeson put it, "It is hardly likely that Parliament overlooked the fact that some of the persons covered by those definitions would be children. Human reproduction, and the existence of families, cannot have escaped notice."

In July 2005, detainee children and families were finally transferred out of "razor wire" detention into houses in the community. Technically they were still in detention but in arrangements referred to as "residence determiantions". This device of declaring unlocked premises as alternative places of detention had been available to the Minister since 1994.

Subsequent amendments were made to the Migration Act by the *Migration Amendment (Detention Arrangements) Act 2005* (Cth) affirm the principle that children shall only be detained 'as a last resort'. However, it is an unenforceable statement of principle. Children are still held for weeks at a time at Perth and Villawood detention centres' immigration housing facilities (2 children at present). At the time of writing, a further 12 children are still on indefinite residence determinations, their parents unable to work.

The Migraiton Act must outlaw the detention of children and their carers unambiguously.

Health and Welfare Considerations

Article 24 of the Convention requires Australia to ensure that detainee children enjoy the highest attainable physical and mental health:

> States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

The deleterious effects of detention upon children and families have been extensively documented (see for instance, HREOC's *A last resort?).* In particular the uncertainty generated by the indefinite nature of detention caused widespread breakdown of families. Parents' ability to determine their children's futures (from what they will eat for breakfast to when they will be free) led to detained children taking on the role of parent and looking at ACM/GSL guards as their only authority figures.

Prior to 2005 there were instances of children with physical and intellectual disabilities being detained for *over 3 years*. This is unacceptable in any civilised society.

Possibly the worst instance involving a child with a disability is Ali who has cerebral palsy. Initially his vulnerable single mother was left to struggle to care for him in Curtin detention centre with no adequate health care and a basic stroller to push him over the gravel. ACM tried to get help for her but the pleas fell on deaf ears in Canberra until ACM headquarters threatened to dump the boy on the Department's doorstep. This was after 19 months at Curtin, a remote detention centre totally unequipped to deal with a disabled child. After Curtin closed in September 2002, the family was transferred to Baxter. They were released after two years and eleven months in detention.

In another unfortunate family, a single mother with four children, three with a rare intellectual disability, were detained for 40 months. The inappropriateness of housing such children in prison-like facilities is reinforced when it is considered that both the boys were molested, first at Port Hedland and then at Villawood. In neither case were charges laid against the perpetrators, the government choosing instead to quietly deport them before they could appear in court.

Thousands of child protection reports were filed with state authorities but they were unable to have the children removed as detention centres were operated by the Commonwealth. Eventually the detention of children was found by HREOC and by the Family Court to be institutionalised child abuse.

The best interests of the child must take precedence in all aspects of detention management. Children in the care of the Minister of Immigration must be afforded the same level of protection as children anywhere else in Australia. Federal child protection laws must be introduced and applied within all immigration detention facilities.

Economic Considerations

Article 26 of the Convention requires Australia to ensure that detainee children benefit from social security:

States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

and Article 27 states:

States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

The economics of perpetrating mental harm on populations that later have to be rehabilitated by the wider community, health groups, charities and specialist support agencies has to be questioned. Empirical evidence has still to be gathered but the resources involved in this rehabilitation must outweigh the costs of providing appropriate living conditions and healthcare support to asylum seekers in the first instance.

Where individuals have sustained lasting damage through their experiencce of the detention regime, in due course the Commonwealth is going to be found liable for significant sums of compensation.

The practice of issuing families with Bridging Visa (E)s and expecting them to be supported by charities or the community must stop. Apart from diverting resources and eneregies away from other needy causes in the community the practice of releasing detained families into the community with no means of support or work rights constitutes cruel and degrading treatment. This policy promotes rather than prevents destitution. Where children are involved it is unconsionable.

Recommendations

While ChilOut acknowledges some advances have been made in the area of immigration detention reform, in the light of the preceding considerations, ChilOut believes these recommendations to be the minimum requirements to ensure we are never able to relapse to the former punitive and harmful regime of detaining children.

1. There should be NO detention of families and children in any detention facilities, including Christmas Island, Perth immigration housing or Villawood immigration housing.
2. The Migration Act should outlaw the detention of children.
3. A time limit on detention should be reintroduced so that no family is on an indefinite residence determination.
4. All legislation relating to child immigration detainees should be reviewed to ensure compliance with Australia's international obligations.
5. Detained children should be protected under child protection laws, and have access to the health and social security systems.
6. Adult asylum seekers in the community should be able to work as soon as health and safety checks have been completed. There should be a maximum time period that this could take, e.g. 90 days.