human rights law resource centre

Migration Law Reform in light of Australia's International Human Rights Obligations

Submission to the Senate Legal and Constitutional Legislation Committee Inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

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1. Introduction

1.1 Overview of Submission

This submission is made by the Human Rights Law Resource Centre Ltd ('HRLRC'). The HRLRC aims to bring the influence of international human rights norms and principles to bear on domestic law and policy.

The submission examines and discusses the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, particularly so far as it provides for offshore detention of those deemed to be designated unauthorised arrivals, and an alternative method of processing such asylum seekers which does not:

(a) provide them access to legal assistance;

(b) allow for merits review; and

(c) allow for judicial review.

The submission examines the Bill in light of the following international human rights conventions:

(a) The *International Covenant on Civil and Political Rights* ('*ICCPR*');

(b) The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('*CAT*');

(c) The *Convention on the Rights of the Child* ('*CRC*'); and

(d) The *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*')

Australia has ratified all of these conventions. Accordingly, the terms of the Convention are binding on the Australian government.

Part 2 of the submission provides an overview of the civil and political rights contained in the *ICCPR,* as well as the *CAT* and the *CRC*, and the extent to which the present Bill meets Australia's international obligations in respect of these rights. The rights considered in this Part are the rights to life, freedom from torture and inhumane treatment, freedom from arbitrary detention, a fair trial, and non-discrimination.

Part 3 of the submission examines and discusses the proposed Bill's compatibility with Australia's human rights obligations in respect of economic, social and cultural rights under the *ICESCR* and the *CRC*. Specifically, this Part considers the human rights to health and education.

Although some of the human rights conferred upon children under the *CRC* are considered in Parts 2 and 3, Part 4 of this submission considers the Bill in light of other rights which are specific to children under the *CRC*. These are, namely, the rights conferred upon refugee children, the right to an adequate standard of living, and the right to leisure.

Part 5 of the submission concludes that a number of the Bill's provisions are inconsistent with international human rights principles and standards and Australia's obligations in respect of those norms. The submission therefore recommends that the Bill not be passed in its current form.

The HRLRC notes the joint submission of the Public Interest Law Clearing House and the Victorian Bar, which considers the compatibility of the proposed Bill with the *Convention relating to the Status of Refugees* (as amended by the *1967 Protocol*). The HRLRC endorses that submission, and does not propose to discuss that convention further in this submission.

1.2 About the Human Rights Law Resource Centre Ltd

The Human Rights Law Resource Centre Ltd, a joint initiative of the Public Interest Law Clearing House (Vic) and Liberty Victoria, is an independent community legal centre.

The HRLRC aims to:

1. Contribute to the harmonisation of Australian law and policy with international human rights norms;
2. Support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
3. Empower people that are disadvantaged or living in poverty by operating within a human rights framework.

The HRLRC achieves these aims by conducting and supporting human rights legal services, litigation, education, training, research, policy analysis and advocacy.

The HRLRC undertakes these activities through partnerships and collaboration with the community legal sector and legal aid, human rights organisations, pro bono lawyers, legal professional associations and university law schools.

The HRLRC is the first specialist human rights law resource centre in Australia. It is also the first centre to pilot an innovative service delivery model to promote human rights. The model draws together and coordinates the capacity and resources of pro bono lawyers and legal professional associations, the human rights law expertise of university law schools, and the networks, grass root connections and community development focus of community legal centres and human rights organisations.

The HRLRC was formally incorporated in January 2006 with the Public Interest Law Clearing House (Vic) Inc ('PILCH') and the Victorian Council for Civil Liberties Inc ('Liberty Victoria') as the initial members. PILCH is an independent community legal centre that facilitates the provision of pro bono legal services to marginalised and disadvantaged individuals, groups and communities. Liberty Victoria is an incorporated association whose activities include human rights-focused community and professional legal education, law reform, lobbying and advocacy.

2. Civil and Political Rights

2.1 The Human Right to Life

Article 6 of the *ICCPR* protects the human right to life, a right the UN Human Rights Committee ('HRC') has described as "the supreme right from which no derogation is permitted".[1]

The right to life has also been recognised in a range of human rights instruments including art 3 of the *Universal Declaration of Human Rights*, art 6 of the *CRC*, arts 9 and 28 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* and, indirectly, in the *Convention on the Elimination of All Forms of Discrimination against Women*.[2]

This includes a right not to be arbitrarily or unlawfully killed by the State. In addition, it imposes a broad positive obligation on the State to adopt measures that are conducive to allowing one to live.[3]

In General Comment 6, the HRC confirmed that this positive obligation incorporates socio-economic aspects. Specifically at paragraph 5, the HRC commented that signatories should "take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics." Accordingly, in *E.H.P v Canada*,[4] the HRC confirmed that the location of disposal sites for radioactive waste near residential areas could give rise to a legitimate claim that the right to life in art 6 had been breached. Similarly, in various Concluding Observations, the HRC has identified homelessness,[5] the increasing rate of infant mortality,[6] and the shorter life expectancy of women[7] as matters to be addressed in accordance with art 6.

The international jurisprudence makes it clear that this right extends specifically to persons in detention. For example, in *Lantsova v Russian Federation*,[8] a case concerning the death of a previously healthy 25 year old man following inadequate medical treatment in prison, the HRC concluded that the right to life extended to prisoners and persons held in detention and that that right had been violated in this instance. At paragraph 9.2 of its decision, the HRC held that:

> it is incumbent on States to ensure the right of life of detainees, and not incumbent on the latter to request protection…the essential fact remains that the State party by arresting and detaining individuals takes responsibility to care for their life. It is up to the State party by organizing its detention

1 HRC, *General Comment 6: Article 6*, UN Doc HRI/GEN/1/Rev.7 [1] (30 April 1982).

2 See Convention on the Elimination of All Forms of Discrimination Against Women, *General Recommendation No. 19 on violence against women*, [7(a)].

3 HRC, *General Comment 6: Article 6*, UN Doc HRI/GEN/1/Rev.7 (30 April 1982).

4 Communication No. 67/1980.

5 Concluding Observations on Canada (1999) UN doc CCPR/C/79/Add. 105, [12].

6 Concluding Observations on Romania (1994) UN doc CCPR/C/79/Add. 30, [11]; see also Concluding Observations on Brazil (1996) UN doc CCPR/C/79/Add. 66, [23].

7 Concluding Observations on Nepal (1995) UN doc CCPR/C/79/Add. 42, [8].

8 Communication No. 763/1997.

facilities to know about the state of health of the detainees as far as may be reasonably expected.

The HRC went even further in *Fabrikant v Canada*,[9] which concerned an alleged failure on the part of Canadian authorities to provide appropriate medical treatment to a prisoner suffering from a heart condition. Although the HRC found the communication inadmissible on the ground that the author had failed to substantiate his allegation that the State Party had violated any articles of the ICCPR,[10] it concluded at paragraph 9.3 that the State Party "remains responsible for the life and well-being of its detainees" and that, in this regard, it has a positive duty to maintain an adequate standard of health for detainees.

Furthermore, in its Concluding Observations on Georgia,[11] the HRC suggested at paragraph 78.7 that Georgia "should take urgent measures to protect the right to life and health of all detained persons as provided for in articles 6 and 7 of the [*ICCPR*]." In its Concluding Observations on the Republic of Moldova,[12] at paragraphs 84.9-10, the HRC reiterated the State's "obligation to ensure the health and life of all persons deprived of their liberty," and urged the State to "take immediate steps to ensure that the conditions of detention within its facilities comply with the standards set out in articles 6, 7 and 10 of the [*ICCPR*], including the prevention of the spread of disease and the provision of appropriate medical treatment to persons who have contracted diseases, either in prison or prior to their detention."

Given the breadth of Australia's positive obligations under art 6, as demonstrated by the above jurisprudence, the HRLRC is concerned that the proposed Bill will put Australia at grave risk of violating its international human rights obligations. This Bill provides for the offshore processing and detention of asylum seekers. The conditions of detention are not yet known, but present detention conditions under Australia's immigration program have caused severe psychological damage to some detainees, and even led some to attempt suicide. This submission discusses the conditions of detention in more detail below, but for present purposes, it is clear that conditions which can, and have, caused such psychiatric illness are far from conducive to allowing one to life.

This is compounded by the fact that the present Bill also denies asylum seekers access to legal assistance, judicial and merits review, and community support. For people who have undergone the trauma of persecution in their home States, and then the trauma of detention, to be denied basic access to justice and community support services will only augment any psychological damage they sustain.

Accordingly, the HRLRC considers that the arrangements contemplated in the present Bill may place Australia in breach of its human rights obligations under art 6 of the *ICCPR*.

The HRLRC also notes that the right to life is reflected in art 2 of the *CRC* in specific application to children. There is a high likelihood that there will be children among the

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9 Communication No. 970/2001.

10 The HRC noted that insufficient evidence had been provided to suggest that the authorities had ever failed to determine the most appropriate medical treatment.

11 (1997) UN Doc CCPR C/79/Add. 74.

12 (2002) UN Doc CCPR CO/75/MDA.

designated unauthorised arrivals under this Bill, and that the proposed regime will also violate art 2 of the *CRC*.

2.2 Freedom from Torture and Rights to Humane Treatment

Article 7 of the *ICCPR* provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." This right is non-derogable and allows of no limitation, even in situations of public emergency.[13] The purpose of this right is "to protect both the dignity and the physical and mental integrity of the individual."[14] Article 7 therefore prohibits "not only…acts that cause physical pain but also…acts that cause mental suffering to the victim".[15]

This is powerfully illustrated by several cases. In *Quinteros v Uruguay*,[16] a mother successfully claimed to be the victim of a breach of art 7 when her daughter was abducted by Uruguayan security forces, because of the mental stress and anguish caused by her not knowing the location of her daughter. The HRC found a similar breach in *Schedko v Belarus*[17] for the mental anguish and stress suffered by a woman who was not notified of the scheduled date for the execution of her son, and was subsequently not notified of the location of her son's grave. The HRC considered that this amounted to inhuman treatment.

However, any judgment as to whether or not there has been a violation of art 7 will be considered by the HRC in the light of all the subjective circumstances of the case. As the HRC said in *Vuolanne v Finland*[18] at paragraph 9.2, "what constitutes inhuman or degrading treatment falling within the meaning of article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim."

There is ample information on the public record to the effect that detention causes harm to the mental health of detainees. A report by the Human Rights and Equal Opportunity Commission following visits to Australian immigration detention facilities by the Human Rights Commissioner in 2001, found that the effects of indefinite detention had caused some detainees to resort to acts of self-harm, and even to attempt suicide.[19] That report also noted that psychological assistance was of little assistance to detainees as the cause or the exacerbation of their mental illness was the fact of their detention. Such people could only find relief upon being released into the community and accessing support.

Both the HRC and the CAT Committee have recognized that mental distress can be as cruel as the infliction of physical pain.[20] In this connection, the HRC has found

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13 HRC, *General Comment 20: Article 7*, UN Doc HRI/GEN/1/Rev.7 [3] (10 March 1992).

14 Ibid [2].

15 Ibid.

16 Communication No. 107/1981.

17 Communication No. 886/1999.

18 Communication No. 265/1987.

19 Australian Human Rights and Equal Opportunity Commission, 'A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner' (2001) < http://www.hreoc.gov.au/Human_RightS/idc/index.html > at 16 May 2006.

20 See, for example, HRC, *General Comment 20*: *Article* 7, UN Doc HRI/GEN/1/Rev.7 [1]-[2] (10 March 1992).

specifically that Australia's immigration detention program, where it results in such severe psychological harm, constitutes a breach of art 7.

C v Australia[21] concerned a man who had developed psychological illness and had attempted suicide as a result of protracted immigration detention. Following a series of psychiatric assessments, the Minister exercised his discretion to release the detainee from immigration detention, but by this stage the detainee had suffered irreversible psychiatric damage. Since the Australian authorities were aware of the detainee's condition and failed to take appropriate action early enough, the HRC held that Australia's conduct constituted a breach of art 7 of the *ICCPR*.

The present Bill only exacerbates this breach. While there is limited information available regarding the conditions of detention in places such as Nauru, Manus Island and Papua New Guinea, there is considerable risk that those conditions will be even worse than those which resulted in a breach of art 7 in *C v Australia*. For example, the detainee in that case had access to regular psychological assessment and permanent observation – a fact that led a minority of the HRC to find in Australia's favour in that case. It is unlikely that even this could be said of the conditions of detention that will arise under this Bill.

Moreover, offshore detainees will be denied access to members of the Australian community who may offer support to detainees of local detention centres, which may deny them a vital emotional and psychological outlet, and adversely affect their mental health. As with immigration detention within Australia, this Bill provides no time frames for processing applications, and therefore allows for indefinite detention.

These concerns are intensified by the absence of sufficient inquiry into the operation of offshore processing arrangements to date. The HRLRC submits that the operation of such a policy should not be extended in the absence of further, transparent evaluation on its operation to date and that, in any event, the regime proposed by this Bill is highly likely to constitute a breach of Australia's international human rights obligations under art 7 of the *ICCPR*.

Any such violation also exposes Australia to the danger of violating art 16 of the *CAT*, which requires Australia "to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture...when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." These obligations are not avoided by shifting processing offshore for designated unauthorised arrivals. Such people remain under the effective control of those acting on Australia's behalf, and are therefore under Australia's jurisdiction.

In addition, the HRLRC also notes art 3 of the *CAT*, which imposes an obligation on Australia to ensure that it does not return a person to another State where there are substantial grounds for believing that person would be in danger of being subject to torture. The processing regime under this Bill does not provide for merits review. It is not transparent, and does not guarantee access to legal assistance. Such a regime leads inevitably to poor decision making, as evidenced by the fact that merits review at the Refugee Review Tribunal has yielded a reversal of as many as 86 per cent of

[21] Communication No. 900/1999.

the Department's decisions in relation to applications of refugees from Iraq. Clearly merits review, as well as transparency and legal assistance, enhance decision-making. The HRLRC's concern is that in the absence of such measures, poor decisions are more likely to be made, thereby significantly increasing the risk that designated unauthorised arrivals under the Bill will be returned to countries where they may be subject to torture, with the result that Australia would fall short of its obligations under art 3 of the *CAT*.

The HRLRC also notes that, on the above analysis, the Bill would constitute a violation of art 37 of the *CRC* to the extent the Bill will apply to children.

2.3 Rights of People Deprived of Liberty

Article 10 of the *ICCPR* requires that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." This appears to prohibit a less serious form of treatment than that prohibited by art 7. In particular, the former is more likely to deal with prison conditions generally, whereas the latter will focus on the conditions suffered by an individual. This notwithstanding, the two articles are often considered together.

In paragraph 2 of General Comment 21, the HRC explained that art 10 applies to "anyone deprived of liberty under the laws and authority of the State who is held in prisons, hospitals – particularly psychiatric hospitals – detention camps or correctional institutions or elsewhere". In the same paragraph, the HRC specified that this applies not only to State-run detention institutions, but also privately run facilities that fall within the jurisdiction of the State. This is particularly relevant to Australia's program of immigration detention, which authorises the detention of persons in privately run institutions. This has been confirmed in *Cabal and Pasini Betran v Australia*[22] which concerned the treatment of detainees within a private detention facility. At paragraph 7.2, the HRC found that "the contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons does not absolve the State party of its obligations under the Covenant, notably articles 7 and 10…". Therefore, the State was accountable for the treatment of inmates of such centres.

The detention contemplated in the present Bill therefore, is clearly within the ambit of art 10 of the *ICCPR*.

Article 10 imposes a positive obligation on the State towards persons who are particularly vulnerable because of their status as persons deprived of liberty. At paragraph 3, the HRC further explained that this means that persons deprived of their liberty may not be "subjected to any hardship or constraint other than that resulting from the deprivation of liberty…Persons deprived of their liberty enjoy all the rights set forth in the [*ICCPR*], subject to the restrictions that are unavoidable in a closed environment."

Breaches of article 10(1) have been found, *inter alia*, in cases where the prisoner is denied adequate bedding, food, exercise or medical attention; is exposed to

22 Communication No. 1020/2001.

unsanitary food/water and/or living conditions; physical abuse; extended periods of isolation; overcrowding; lack of educational opportunities, work or reading materials; and physical, psychological and verbal abuse.[23]

Often, simultaneous breaches of both art 7 and 10 are found.[24] This is not surprising as treatment which violates art 7 will likely violate art 10 if the victim is a detainee. This was the case in *Linton v Jamaica*,[25] in which a prisoner claimed he was subject to severe physical abuse and psychological torture while on death row, and not afforded adequate medical treatment for the injuries suffered. The prisoner claimed that the treatment suffered amounted to violations of arts 7 and 10 respectively. The HRC agreed, stating that the impugned treatment was found to constitute cruel and inhuman treatment contrary to art 7. It then stated at paragraph 8.5 that this finding "therefore also entail[ed] a violation of article 10(1)". The HRC found similarly in *Simpson v Jamaica*.[26]

It is clear then, that for the reasons that the proposed Bill is highly likely to violate art 7 of the *ICCPR*, it is even more likely to violate art 10.

2.4 Freedom from Arbitrary Detention

Article 9 of the *ICCPR* provides a right to liberty and security of person, and that "[n]o 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." The HRC has confirmed that the obligations in this article apply to all forms of detention, including detention for immigration control.[27]

The HRLRC acknowledges that it is not arbitrary *per se* to detain individuals seeking asylum. However, Australia's system of mandatory, non-reviewable, indefinite and often prolonged detention has, on three occasions, been found to be in breach of art 9 of the *ICCPR*. In *A v Australia*[28], the HRC held that "every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can bee assessed."[29] The HRC further found that the prolonged detention (in that case, of a period of nearly four years) had no appropriate justification, and was therefore arbitrary within the meaning of art 9. Similarly in *C v Australia* (discussed above), detention for over two years was held to be without appropriate justification and therefore arbitrary. The HRC reached a similar finding in *Baban v Australia*.[30]

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23 See, for example, *Robinson v Jamaica* (Communication No. 731/1996); *Sextus v Trinidad and Tobago* (Communication No. 818/1998); *Lantsova v Russian Federation* (Communication No. 763/1997); *Freemantle v Jamaica* (Communication No. 625/1995).
See, for example, *Francis v Jamaica* (Communication No. 320/1988), *Bailey v Jamaica* (Communication no. 334/1988), *Soogrim v Trinidad and Tobago* (Communication No. 62/1989).

25 Communication No. 255/1987.

26 Communication No. 695/1996.

27 HRC, *General Comment 8: Article 9*, UN Doc HRI/GEN/1/Rev.7 [1] (30 June 1982).

28 Communication No. 560/1993.

29 Ibid [9.4].

30 Communication No. 1014/2001.

The HRC has also expressed similar concern in several Concluding Observations. For example, in its Concluding Observations on Japan, it expressed concern that asylum-seekers were held for "periods of up to six months, and in some cases, even up to two years."[31] The HRC also criticised Switzerland's laws permitting the detention of foreign nationals for between three months and a year, describing these time frames as "considerably in excess of what is necessary."[32]

Australia's current program of immigration detention has been found, in some circumstances, to be in breach of art 9 of the *ICCPR*. The detention program contemplated in this Bill is at least as likely to be violation of the detainees' right to freedom from arbitrary attention. Indeed, the risk of violation is increased by the proposed system of discretionary detention with no right to seek merits review or review before a court exercising judicial power.

This risk also applies to art 37 of the *CRC* to the extent that the proposed Bill would apply to children detainees. Article 37 provides that even where the detention of children is not arbitrary or unlawful, such detention must be a last resort. The Australian government have forwarded no indication that all other means of handling unauthorised child arrivals have been fully considered. Particularly in light of the fact that the regime under this Bill is in violation of a range of other human rights instruments which Australia has ratified, the HRLRC submits that the detention of children, even in the event that it is not arbitrary, is not a last resort, and would therefore constitute a breach of Australia's international human rights obligations under the *CRC*.

2.5 The Human Right to a Fair Trial

Article 14 of the *ICCPR* provides, among other things, that "[a]l persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The aim of this provision is to ensure the proper administration of justice.[33] It governs criminal proceedings, but also a "suit at law".

In *Y.L. v Canada*[34] the HRC held that whether or not a proceeding is a "suit at law" depends ultimately on the nature of the rights in question or the particular forum in which individual legal systems may provide that the right in question is adjudicated upon. In that case, the majority held that applications for a disability pension that were rejected by a Pension Commission, the Entitlement Board of the Commission, and the Pension Review Board constituted suits at law for the purpose of art 14(1).

The HRC has also made similar findings concerning administrative tribunals in *Casanovas v France*[35] and *Jansen-Gielen v Netherlands*[36].

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31 (1998) UN doc. CCPR/C/79/Add. 102, [19].

32 (1996) UN doc. CCPR/C79/Add 70.

33 HRC, *General Comment 13: Article 14*, UN Doc HRI/GEN/1/Rev.7 [1] (13 April 1984).

34 Communication No. 112/1981.

35 Communication No. 441/1990.

36 Communication No. 846/1999.

The rights governed by the present Bill are of immense gravity. They concern the refugee status, and accordingly, the liberty of the subject. Such rights are of such a nature that they have always been subject to judicial review, and are appropriately considered the subject of a "suit at law".

However, the present Bill does not entitle designated unauthorised arrivals to judicial review. In the view of the HRLRC, this constitutes a violation of art 14, on the basis that arrivals falling outside the jurisdiction of this Bill are entitled to judicial review, while those within its jurisdiction are not. The HRLRC submits that there cannot be equality before the law where people of a particular status are denied access to the law. This was precisely the finding of the HRC in *Bahamonde v Equatorial Guinea*[37], where it said "the notion of equality before the courts and tribunals encompasses the very access to the courts…a situation in which an individual's attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated runs counter to the guarantees of article 14, paragraph 1". A similar finding was made in *Avellanal v Peru*[38] where married women were denied access to court for suits regarding matrimonial property.

The Bill therefore violates Australia's international obligations under art 14 of the *ICCPR*.

2.6 The Human Right to Non-Discrimination

Article 2(1) of the *ICCPR* requires Australia, as a signatory, to respect and ensure the rights contained in the *ICCPR* to all individuals within its territory, and subject to its jurisdiction. Such rights are to be respected and ensured without distinction of any kind on the basis of a person's status.

The operation of this article is limited to the rights contained in the *ICCPR*. That is, art 2(1) requires non-discrimination in the provision of the rights specified in the *ICCPR*.

Article 26, however, is of broader application. It provides that all persons are equal before the law and entitled to equal protection of the law without any discrimination on the basis of any ground including national origin and other status. In *Broeks v The Netherlands*,[39] the HRC held that art 26, unlike art 2, was not constrained in scope by the rights specified in the *ICCPR*. The HRC subsequently reiterated this position in General Comment 18, in which it held that art 26 of the *ICCPR* "does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities."

The HRC continued in this General Comment to observe that "discrimination" should be understood to encompass any distinction, exclusion, restriction or preference based on any identified ground that has the purpose or effect of nullifying or impairing

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37 Communication No. 468/1991, [9.4].

38 Communication No. 202/1986.

39 Communication No. 172/1984.

the recognition, enjoyment or exercise by all persons, on an equal footing of all rights and freedoms.

However, in both *Broeks v The Netherlands* and General Comment 18, the HRC noted that not every differentiation of treatment will constitute discrimination. Specifically, differentiation is permissible where based on "reasonable and objective" criteria, and where the aim is to achieve a purpose which is legitimate under the Covenant.

The HRLRC submits that this Bill would constitute a clear violation of arts 2 and 26 because it rests on a fundamental distinction between those who arrive without authorisation, based on their mode of arrival. A person arriving by boat will be subject to this Bill as a designated unauthorised arrival. A person arriving without authorisation but, for example, by aeroplane, will be detained and have their visa application processed in Australia. A designated unauthorised arrival will not have the benefit of access to legal assistance, merits review, or judicial review. They are less likely to be able to access support services. In short, they will be subjected to an inferior, less transparent processing system than those who arrive by other means. The HRLRC also notes that the likely result of such discrimination is that arrivals from European or Western backgrounds, who are more likely to arrive by aeroplane, will be treated more favourably than those from poorer nations, particularly in the region. The Bill may therefore have the effect, even if indirect or unintended, of discriminating on the basis of national origin – a ground specifically prohibited under arts 2 and 26 the *ICCPR*.

Such discrimination is not based upon "reasonable and objective" criteria as required by international law. There is no demonstrated reasonable or objective reason why a person should be deprived of the benefits of legal assistance, judicial and merits review simply because their status is such that they arrived by boat rather than by air.

3. Economic Social and Cultural Rights

3.1 The Right to Health

Article 12 of the *ICESCR* requires States to take progressive steps for the full realisation of "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The Committee on Economic, Social and Cultural rights ('CESCR') has described the right to the highest attainable of health as "a fundamental human right indispensable for the exercise of other human rights."[40]

Article 12 outlines steps that States may take to realise this right. This is done, by way of illustration,[41] and is therefore not exhaustive

In General Comment 14, the CESCR elucidated that the right to health entails more than the right to health care. At paragraph 4, the CESCR said "the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health,

40 CESCR, *General Comment 14: Article 12*, UN Doc HRI/GEN/1/Rev.7 [1] (11 August 2000).
41 Ibid [2].

such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment."

Accordingly, the right to health is "understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health."[42]

Additionally, the CESCR noted at paragraph 3 of General Comment 14 that the right to health "is closely related to and dependent upon the realization of other human rights…including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health."

The potential that the Bill has to violate civil and political rights as described in Part 2, applies equally to potential breaches of Australia's obligations as they pertain to the right to health under art 12 of the ICESCR. (*consider instead of para below)*

(Therefore, the above discussion of civil and political rights violations that may be caused by this Bill are relevant to the Australia's obligations under the right to health. So, the HRLRC's concerns that Australia risks breaching its obligations under the right to non-discrimination lead to further concern that this Bill will also violate the right to health under article 12 of the *ICESCR*.)

The HRLRC also emphasises the holistic nature of the right to health contained in art 12 of the *ICESCR*, which expressly incorporates a right to the enjoyment of the highest attainable standard of *mental* health. This has been reinforced in General Comment 14 of the CESCR and various decisions and concluding comments of the UN treaty bodies.[43]

General Comment 14 notes explicitly, at paragraph 34, that the right to health extends to "prisoners…asylum seekers, and illegal immigrants". Similarly, the *UN Basic Principles for the Treatment of Prisoners* provide at paragraph 9 that "prisoners shall have access to the heath services available in the country without discrimination on the grounds of their legal situation". Principle 6 of the *UN Body of Basic Principles for the Treatment of Prisoners* provides that no person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Much of the international jurisprudence discussed above concerning freedom from arbitrary detention and the rights of those deprived of their liberty is equally applicable to the right to health of prisoners and detainees.

The above discussion of the impact of immigration detention conditions, both in Australia and offshore, demonstrates a high risk of violation of art 12. It is clear that the conditions in which some detainees have suffered irrevocable psychological harm and attempted suicide are inconsistent with providing the highest attainable standard

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42 Ibid [9].

43 See for example, Mauritius, ICESCR, E/1995/22 (1994) 37 at [180]; Argentina, ICESCR, E/2000/22 (1999) 49 [286]; Nepal, ICESCR, E/2002/22 (2001) 83 [545] and [550]; Thailand, CEDAW, A/54/38/Rev.1 part I (1999) 24 [241]; China, CEDAW, A/54/38/Rev.1 part I (1999) 26 [303]; United Kingdom of Great Britain and Northern Ireland, CEDAW, A/54/38/Rev.1 part II (1999) 71 [315]; Lithuania, CEDAW, A/55/38 part II (2000) 61 [158] and [159]; Iraq, CEDAW, A/55/38 part II (2000) 66 [203] and [204]; Uzbekistan, CEDAW, A/56/38 part I (2001) 18 [188]; Mongolia, CEDAW, A/56/38 part I (2001) 26 [273].

of mental health. This is exacerbated by the absence of any guaranteed provision of health care services under the Bill.

The HRLRC considers that this Bill places Australia at significant risk of violating its human rights obligations under art 12 of the *ICESCR*.

Moreover, the HRLRC notes that the right to health is echoed in an array of international human rights instruments to which Australia is a party, including the *Universal Declaration of Human Rights*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, and the *UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*. The Bill is at risk of violating Australia's obligations under these instruments.

The HRLRC notes specifically that the Bill would, for the reasons articulated in this section, also constitute a violation of art 24 of the *CRC* which upholds the child's right "to the enjoyment of the highest attainable standard of health". Moreover, art 19 of the *CRC* requires States to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child." In the HRLRC's submission, no adequate measures have been taken to satisfy this obligation, particularly given the trauma that is likely to be inflicted upon child detainees.

3.2 The Right to Education

Under Article 13 of the *ICESCR*, States recognise that everyone has the right to education, and agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. Such education must enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace. The CESCR regards the right to education as "both a human right in itself and an indispensable means of realizing other human rights."[44]

Article 13.2 specifies that, among other things, primary education must be compulsory and freely available to all, and secondary education must be made generally available and accessible. In General Comment 13, the CESCR noted at paragraph 6(b) that this requires that "educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party." This, in turn, requires education to be accessible to the most vulnerable groups, in law and in fact, without discrimination on any prohibited grounds. It also requires education to be physically and economically accessible.

As noted above, designated unauthorised arrivals remain within Australia's jurisdiction despite the fact that the individual is held and has their application

[44] CESCR, *General Comment 13: Article 13* UN Doc HRI/GEN/1/Rev.7 [1] (8 December 1999).

processed offshore. Accordingly, detainees under the proposed Bill possess this right. In the case of immigration detention, people, and especially children, will be denied their human right to education unless provisions are made within detention centres for it to be met. There is no evidence that this right has satisfactorily been met in the past for immigration detainees, and there is no indication that the proposed regime under the present Bill will rectify this.

Accordingly, the HRLRC considers that the passage of this Bill would risk violating Australia's human rights obligations under art 13 of the *ICESCR*. For similar reasons to those identified in this section, the Bill also risks violating art 28 of the *CRC* to the extent it applies to child detainees.

4. Rights Specific to Children

The rights of children are protected under the *CRC*. This submission has referred to several of these rights above in the context of civil and political rights, and economic, social and cultural rights. There remain, however, certain rights specific to children in the *CRC* that are not replicated in the *ICCPR*, the *CAT*, and the *ICESCR*. These are considered below.

4.1 Rights for Refugee Children

Article 22 of the *CRC* provides a specific right to refugee children to "receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in [the *CRC*] and in other human rights or humanitarian instruments to which the States are Parties."

Accordingly, any violations of Australia's human rights obligations under the *ICCPR,* the *ICESCR* and the *CAT are* also likely to constitute a separate violation of art 22 of the *CRC*.

4.2 The Right to an Adequate Standard of Living

Article 27 of the *CRC* confers on children a right "to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."

This right may be seen as a subset of the right to health discussed above, and indeed, much of the same analysis applies. For those reasons, the HRLRC considers that children in immigration detention, particularly offshore detention, will be deprived of an adequate standard of living. In fact, the HRLRC submits that the trauma of such detention is likely to do harm to the child's physical, mental, spiritual, moral and social development.

4.3 The Right to Leisure

Article 31 of the *CRC* provides for "the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts."

There is little doubt that a child in immigration detention will have his or her rights in this respect circumscribed. The evidence is that children in immigration detention are more likely to suffer mental harm than to engage in play and recreational activities. Certainly, the very nature of detention is such that detainees cannot participate freely in cultural life and the arts.

Nevertheless, the HRLRC acknowledges that a violation of art 31 of the *CRC* may be avoided where the detention of children is not arbitrary or unlawful, and is a last resort. However, given the conclusion of the foregoing analysis that the detention of children under the present Bill does not conform with Australia's human rights obligations in this regard, the HRLRC submits that the Bill also constitutes a violation of Article 31 of the *CRC*.

5. Conclusion

The Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 contains a number of provisions that will have the direct or indirect effect of denying the human rights of those deemed designated unauthorised arrivals under the Bill.

Specifically, the HRLRC considers that the proposed Bill violates, or is at serious risk of violating:

- Articles 2, 6, 7, 9, 14 and 26 of the *ICCPR*;
- Articles 3 and 16 of the *CAT*;
- Articles 2, 19, 22, 24, 27, 28, 31 and 37 of the *CRC*; and
- Articles 12 and 13 of the *ICESCR*.

These articles contain such fundamental human rights as the right to life, freedom from torture or cruel, inhuman and degrading treatment or punishment, freedom from arbitrary detention and the rights of people deprived of liberty, and the human rights to a fair trial, non-discrimination, health and education.

As a nation that has ratified, and seeks to promote human rights internationally, these likely violations should be a matter of utmost concern to this Senate Inquiry, and to the Commonwealth.

The HRLRC recommends accordingly that the Bill not be passed in its current form.