Immigration Detention of Children: Arbitrary Deprivation of Liberty

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In Australia today, children are living alongside adults in privately operated immigration detention centres. These centres have been operated by Australasian Correctional Management pursuant to a commercial 'whole of service' agreement with the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) since February 1998. On 27 August 2003, tender negotiations concluded with a four-year agreement between DIMIA and Group 4 Falck Global Solutions Pty Ltd.[1] This Australian subsidiary of the Denmark-based GSL Corporation commenced operating the Maribyrnong Detention Centre in December 2003 and by February 2004, was operating all centres with the exception of Villawood Detention Centre.[2]

Australia presently holds at least 94 children in mainland immigration detention centres and 90 in Nauru.[3] While the average period of child detention has been one year and five months, the longest documented period is 1 998 days.[4] There has been an increasing volume of literature

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1 The agreement is subject to a three-year option. Since entering the agreement, Group 4 Falck Global Solutions Pty Ltd has changed its name to GSL (Australia) Pty Ltd

2 At the time of writing this paper, GSL (Australia) Pty Ltd was expecting to take over the operation of Villawood from Australasian Correctional Management during February / March 2004.

3 For statistics as at December 2003, see <http://www.ajustaustralia.com/informationandresources_factsandstatistics.php>. Under the policy known as the 'Pacific Solution', Australia has entered agreements with Nauru and Papua New Guinea to enable the interception at sea and deflection of boats to these countries where asylum claims are processed by the UNHCR and International Office of Migration. These claims are not determined under Australian migration law.

4 Chen Shi Hai was born in detention and released at the age of five and a half; 28 days after his family members were issued with visas.

about the conditions of detention and the impact of detention on detainees' mental health. High rates of depression, anxiety and post-traumatic stress disorder have been documented within the detention centre environment.[5] Having experienced trauma prior to arriving in Australia, children have been found to suffer neuro-developmental and emotional damage when placed in this environment of uncertainty and anxiety. Children have been exposed to acts of self-harm and suicide by adult detainees and have themselves been involved in such acts.[6] On 13 August 2001, the ABC's *Four Corners* Programme showed the extent to which a child with no pre-existing medical condition may be affected by the detention environment. The programme put forward a human face to the hitherto unseen child detainee by telling the story of six-year-old Shayan Bedraie. After witnessing beatings and suicide attempts at Villawood Detention Centre, Shayan suffered severe post-traumatic stress disorder and was reduced to a near catatonic state in which he would not eat, drink, sleep or move and required drip-feeding.

A psychologist formerly employed by Australasian Correctional Management described her observations in the following terms:

> The detention environment was emotionally stressful and mentally destructive for all detainees. This created an environment where adults were unable to create a safe caring family space. Many parents and adults tried to care for the children and protect them. This was a common element of their distress. The Detention Centre was particularly damaging to children and to families. The environment was punitive, penal and depriving of autonomy and stimulation. Added to this detainees had frequently experienced prior trauma. Distress and self-harm and talk of suicide were daily enacted...[7]

The following conclusions about the detention of children were published in the Medical Journal of Australia following a study by an Iraqi doctor detained at Villawood which was conducted in cooperation with a clinical psychologist:

> Between 10 and 50 children are held at Villawood at any one time. The detention environment, exposure to actions such as hunger strikes, demonstrations, episodes of self-harm and suicide attempts, and forcible-removal procedures,

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5 See, for example, ChilOut, *The Heart of the Nation's Existence* <http://www.chilout.org/> and submissions to the Human Rights and Equal Opportunity Commission's National Enquiry into Children in Immigration Detention. <http://www.hreoc.gov.au/human_rights/children_detention/submissions/index.html>

6 See interview with Dr Zachary Steel on the ABC Radio *AM* Programme at <http://www.abc.net.au/am/content/2003/s853413.htm> and <http://www.mapw.org.au/refugees/02-07-03steel-psych.html> for further information regarding the psychological damage caused by long-term detention.

7 L Bender, Submission to Human Rights and Equal Opportunity Commission Enquiry into Children in Immigration Detention, see <http://www.hreoc.gov.au/human_rights/children_index.html>.

> all impact on a child's sense of security and stability. A secondary effect is mediated via the parents, whose ability to provide a caring and nurturing environment is progressively undermined ...with risk of neglect and physical abuse of dependent children increasing across the course of detention. Following allegations of child sexual abuse at the Woomera centre, detaining authorities have increased their monitoring of parents at Villawood for evidence of negligence and abuse, leading to parental fears of their children being removed, which has further increased family insecurity. At times, children have also become negotiating pawns in attempts to contain protests within the detention centre. For example, on a number of occasions, the authorities have separated children from their parents to pressure adults to cease their hunger strikes.
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> A wide range of psychological disturbances are commonly observed among children in the detention centre, including separation anxiety, disruptive conduct, nocturnal enuresis, sleep disturbances, nightmares and night terrors, sleepwalking, and impaired cognitive development. At the most severe end of the spectrum, a number of children have displayed profound symptoms of psychological distress, including mutism, stereotypic behaviours, and refusal to eat or drink...[8]

The Legislation

Since September 1994, the *Migration Act 1958* (Cth)[9] (*Migration Act*) has distinguished between lawful and unlawful non-citizens. Unlawful non-citizens are persons in the migration zone who do not hold a valid visa.[10] Section 189 provides that all unlawful non-citizens and suspected unlawful non-citizens within the migration zone must be detained. Section 196(1) requires that an unlawful non-citizen must be kept in immigration detention until he or she is granted a valid visa or is removed or deported from Australia. Section 196(3) provides:

> To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.[11]

Delegates of the Minister are not required to give an unlawful non-citizen any opportunity to apply for a visa or to provide any advice with respect to their right to apply for a visa.[12] But the Minister has discretion to end

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[8] Aamer Sultan and Kevin O'Sullivan, 'Psychological Disturbances in Asylum Seekers Held in Long Term Detention: a Participant-Observer Account' (2001) 175(11) *Medical Journal of Australia* 593.

[9] *Migration Reform Act 1994* (Cth).

[10] Sections 13 and 14 of the *Migration Act 1958* (Cth).

[11] Section 273 of the *Migration Act 1958* (Cth) authorises the establishment of detention centres and the making of regulations concerning the operation of the centres and the conduct and supervision of the detainees.

[12] Section 193 of the *Migration Act 1958* (Cth).

the detention of certain categories of persons including children in the form of a temporary bridging visa.[13] Such exercises of Ministerial discretion have been very much the exception.[14]

The International Standards

Australia has ratified a number of international instruments containing standards relevant to the detention of unlawful arrivals. This paper focuses on the *International Covenant on Civil and Political Rights* ('*ICCPR*') and the *Convention on the Rights of the Child* ('*CROC*').[15] The standards contained in these instruments have been considered by courts in recent cases concerning the detention of children. The *ICCPR* has spawned the greatest volume of authoritative interpretation and jurisprudence concerning the standards relevant to immigration detention through its supervisory Human Rights Committee.

The *ICCPR* was ratified by Australia in 1980. The Human Rights Committee set up under Article 28 of the Covenant is required to study periodic reports of state parties and provide general comments on the relevant standards. Under the *First Optional Protocol*, state parties to the *ICCPR* recognise the competence of the Human Rights Committee to receive and consider written communications from individuals claiming to be victims of violations of any of the Convention rights. Australia acceded to the *First Optional Protocol* in 1991 and has since been the subject of a number of determinations by the Human Rights Committee with respect to the practice of immigration detention. The Committee's two 2003 determinations

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[13] By s 73 of the *Migration Act 1958* (Cth), a bridging visa operates until a substantive visa is granted or for 28 days following notification that a substantive visa has been refused. Eligibility for a bridging visa is determined by Section 72 of the *Migration Act* and reg 2.20(7) of the *Migration Regulations 1994* (Cth). Categories of persons eligible for a bridging visa include minors provided that the Minister is satisfied that arrangements for care have been made with an Australian citizen, permanent resident or eligible NZ citizen which would not prejudice the interests of the child's guardian or custodian or anyone having the right of access.

[14] Instances of exercise of Ministerial discretion have been primarily concerned with unaccompanied minors.

[15] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1465 UNTS 85 (entered into force 2 September 1990). Other instruments containing relevant standards include the *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*Refugees Convention*') and the *Protocol Relating to the Status of Refugees*, opened for accession 16 December 1966, 606 UNTS 267 (entered into force 4 October 1967) ('*1967 Protocol*'); the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); the *Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); and the *Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment*, GA Res 43/173, UN GAOR, 43rd session, 76th plenary meeting, UN Doc A/43/49 (1988).

both considered the immigration detention of children.[16]

CROC was ratified by Australia in 1990[17] and is the most comprehensive and widely ratified of all human rights treaties.[18] *CROC* recognises the special status of children and reaffirms the application of standards in the core UN human rights instruments to 'every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.' It contains no individual communications procedure but requires reports to be submitted every five years to the Committee on the Rights of the Child.[19]

In drawing a distinction between asylum seekers who arrive by authorised means and those who do not, Australia is violating its obligations under the *ICCPR* and *CROC*, which prohibit discrimination on any ground. Both instruments require that state parties 'respect and ensure' all rights contained in the instruments to all children within their territory.[20] Article 22(1) of *CROC* requires state parties to take appropriate measures to ensure that children seeking asylum and children who are determined to be refugees receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in *CROC* and in other human rights instruments which the state has ratified.

Australia is also failing to fulfil the obligations underpinning *CROC* which are contained in art 3. Article 3(1) provides as follows:

> 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.

Any suggestion that children's best interests are served by indiscriminate, wholesale detention on the basis of their status as unlawful non-citizens can be easily refuted on the evidence available of the impact of detention on

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[16] *Baban v Australia*, Communication No 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (18 September 2003) and *Bakhtiyari v Australia*, Communication No.1069/2002, UN Doc CCPR/C/79D/1069/2002 (29 October 2003) <http://www.unhchr.ch/tbs/doc.nsf >.

[17] Pursuant to art 49, the Convention came into force for Australia on 16 January 1991.

[18] It has been ratified by 191 states. The only states which have failed to ratify are Somalia and the United States of America.

[19] Established under art 43, the Committee studies and responds to the state parties' reports and submits biennial reports to the General Assembly.

[20] Article 2(1) of *CROC* requires that state parties respect and ensure the rights set forth in the Convention to every child within their jurisdiction without discrimination of any kind irrespective of the child's or his or her parents' or legal guardian's legal status. Article 2(2) requires that state parties take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status of their parents, legal guardians or family members. Article 2(1) of the *ICCPR* provides that each state party undertakes to respect and ensure to all individuals within its territory the rights recognised in the covenant. Article 26 prohibits discrimination on any ground. The Human Rights Committee has stated that discrimination in the *ICCPR* should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground including status and which has the effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms: *General Comment 18: Non-discrimination*, Human Rights Committee, 37th sess, 10 November 1989, UN doc A/45/40, 173.

children. This detention also violates art 3(2) of *CROC* which provides:

> States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

The *Migration Act* and policy of mandatory detention fail to honour art 3(2). Parents detained alongside their children are robbed of parental autonomy and the ability to make the most basic decisions concerning the welfare of their children. The failure to comply with art 3(2) is also highlighted by the conflict of interest inherent in the *Immigration (Guardianship of Children) Act 1946* (Cth), pursuant to which unaccompanied minors are placed under the guardianship of the same minister responsible for their detention. Article 3(2) is further violated by the denial of sufficient access to State welfare authorities to enable steps to be taken to ensure that necessary protection and care is provided in detention centres. DIMIA has made assertions for some time now that it is in the process of negotiating memoranda of understanding with state welfare authorities in order to establish lines of responsibility and communication with respect to allegations of child abuse, assault and neglect.[21] Only two such agreements have been concluded, the first with the South Australian government and the second with the government of New South Wales. The New South Wales memorandum of understanding is in similar terms to the South Australian agreement which allows the South Australian Department of Human Services (DHS) to exercise an advisory role in cases where DIMIA invites it to do so. The Family Court of Australia considered the South Australian agreement in *B and B v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FamCA 451 (Unreported, Nicholson CJ, Ellis and O'Ryan JJ, 19 June 2003). The Court commented that the inability of the DHS to take action in the absence of an invitation by DIMIA was 'at least unfortunate' given that the immigration detention centre environment was reported to be the prima facie source of the children's abuse and neglect.[22]

Article 9(1) of the *ICCPR* and 37(b) of *CROC* prohibit arbitrary arrest or detention.[23] Article 37(b) of *CROC* further provides that the arrest,

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[21] DIMIA website <http://www.immi.gov.au/illegals/uad/05.htm>.

[22] See discussion at [296]–[310].

[23] Article 9(1) of the *ICCPR* provides that '[e]veryone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention.' The Human Rights Committee has stated that this right extends to all deprivations of liberty, including matters of immigration control: *General Comment 8: Right to Liberty and Security of Persons*, Human Rights Committee, 16th sess, 27 July 1982, UN doc HRI/GEN/1/Rev6, 130 (2003). Article 37(b) of *CROC* provides that no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. Articles 10 of the *ICCPR* and 37(c) of *CROC* require that children and adults deprived of liberty be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. Article 37(c) of *CROC* requires that every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so. Australia ratified *CROC* subject to a reservation to art 37 (c) which it maintains 'remains necessary because of the demographics, geographic size and isolation of some remote and rural areas of Australia.'[24] Article 9(4) of the *ICCPR* and art 37(d) of *CROC* require the right to challenge the legality of deprivation of liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

The Human Rights Committee first scrutinised Australia's immigration detention regime ten years ago in the *A v Australia*[25] communication brought under the *ICCPR's First Optional Protocol*. The Human Rights Committee rejected claims that detention of asylum seekers was arbitrary *per se* under the *ICCPR* or under customary international law. The Committee stated that 'arbitrariness' must not be equated with 'against the law' but must be interpreted more broadly to include elements such as inappropriateness and injustice. Remand in custody would be considered arbitrary if it was not necessary in the circumstances[26] and not proportional to the aims pursued. Every decision to detain must be open to periodic review and detention should not extend beyond the period for which the state can provide justification. Without justification and proportionality, the Committee concluded that detention may be considered arbitrary even if entry was illegal. The Committee found that the detention for four years of a Cambodian national continued beyond the period for which Australia could provide justification and was arbitrary within the meaning of art 9(1). Article 9(4) was also found to be violated because the courts had no power to review the detainee's continued detention or order his release.

A similar determination was issued by the Human Rights Committee in *Mr C v Australia*[27] in 1999. Two further determinations were issued in 2003, most recently on 31 October 2003 in the *Bakhtiyari* communication.[28]

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[24] After Australia submitted its first report to the Committee on the Rights of the Child, the Committee questioned Australia on the prospects of withdrawing the reservation. Australia's response was that the reservation 'remains necessary because of the demographics, geographic size and isolation of some remote and rural area of Australia.' This assertion is hardly persuasive in this age of modern transportation!

[25] Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) <http://www.unhchr.ch/tbs/doc.nsf>.

[26] For example, to prevent flight or interference with evidence.

[27] *Mr C v Australia*, Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999 (13 November 1999).

[28] *Baban v Australia*, see above n 16 <http://www.unhchr.ch/tbs/doc.nsf>; and *Bakhtiyari v Australia*, see above, 16 <http://www.unhchr.ch/tbs/doc.nsf>.

The Human Rights Committee considered the detention of Mrs Roqaiha Bakhtiyari for two years and ten months and detention of her five children for two years and eight months, after which they were released on interim orders of the Family Court. The Committee found that Australia had failed to demonstrate that less intrusive measures[29] could not have achieved compliance with Australia's immigration policies. While the Committee viewed a limited period of detention as justified for purposes such as ascertaining identity, it stated that such purposes did not justify detention for an extended period. It concluded that art 9(1) of the *ICCPR* was violated by the detention of the mother and her children. The Committee also found a breach of the *ICCPR*'s art 24(1) which provides that every child shall be afforded, without discrimination, such measures of protection as required by his status as a minor, on the part of his family, society and the State. Interpreting this article with reference to *CROC*, the Committee found that the detention was inconsistent with the paramount 'best interests of the child' principle enshrined in art 3(1). No consideration was given as to whether it was in the best interests of the children to be detained or released.[30] The Committee further found that there was no discretion for a domestic court to review the justification of detention in substantive terms.[31] Accordingly, art 9(4) was violated with respect to Mrs Bakhtiyari. It was also seen to be violated with respect to her children until 19 June 2003, when the Family Court determined that it had jurisdiction to order release.

The Committee further noted that in accordance with art 2(3)(a) of the *ICCPR*, Australia was obliged to provide the Bakhtiyari family with an 'effective remedy'. In addition to releasing Mrs Bakhtiyari from detention, such a remedy extended to the provision of appropriate monetary compensation.[32] Alive to Australia's unwillingness to give effect to its past determinations, the Committee noted that as a party to the *First Optional Protocol*, Australia has recognised its competence to determine whether there has been a Covenant violation. It further noted that Australia has undertaken to ensure to all individuals in its territory and subject to its jurisdiction the rights recognised in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established. The Committee sought a report from Australia within 90 days providing information about the measures taken to give effect

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[29] Such as the imposition of reporting obligations or sureties.

[30] The Committee considered the 'demonstrable, documented and on-going adverse effects' of detention on the children. In light of these effects, measures taken in relation to the children were not guided by their best interests until the Family Court determined that it had welfare jurisdiction which extending to ordering their release.

[31] The Committee regarded the domestic courts' jurisdiction in this case to be 'confined purely to formal assessment of whether she was an "non-citizen" without an entry permit'.

[32] This compensation was required with respect to the detention Mrs Bakhtiyari and with respect to the detention of the children until their release on 25 August 2003 pursuant to interim release orders of the Full Court of the Family Court.

to its views.[33]

Australia's practice of immigration detention extends beyond the short period which can be justified to verify identity and conduct security checks. It has accordingly been characterised by the Human Rights Committee as 'arbitrary' in violation of art 9(1) of the *ICCPR*. It is difficult to understand why Australia has maintained for over a decade the policy of detaining individuals, and particularly children, in harsh conditions for long periods of time. The need to maintain detention to prevent 'disappearance into the community' was repeatedly asserted by the Mr Phillip Ruddock during his term as Minister.[34] The DIMIA website lists among the objectives of detention 'the availability of detainees for health checks, assessment of identity, status and character, processing and, if necessary, removal' in addition to providing asylum seekers access to 'appropriate' refugee application processing services[35] and 'helping them through the culture shock of coming to a new country.'[36] In accordance with the Human Rights Committee's *Bakhtiyari* finding, less intrusive aims would achieve the same purpose.

The DIMIA website makes a further assertion which Mr Ruddock as Minister had repeated so often. That people being held in immigration detention have broken Australian law. This assertion attempts to justify the punishment imposed, to persuade us that illegal entry is itself a punishable crime notwithstanding its absence from the criminal law. The primary aim of maintaining the punitive detention policy in conjunction with so-called 'border protection' measures is clearly deterrence. The Prime Minister, Mr John Howard has said as much.[37] Punishing people and in particular children as a means of deterring others from seeking protection is inconsistent with obligations undertaken by Australia upon ratifying the *ICCPR* and *CROC*.

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[33] While Mr Bakhtiyari still has legal proceedings pending, the possibility of deportation of Mrs Bakhtiyari and her children was also considered. The Committee decided that Australia should refrain from deporting Mrs Bakhtiyari and her children while Mr Bakhtiyari is pursuing domestic proceedings, as any such action on the part of the State party would result in violations of arts 17(1) (concerning arbitrary or unlawful interference with family), and 23(1) (the obligation to protect the family as the fundamental group unit of society).

[34] Phillip Ruddock was succeeded as Minister for Immigration and Multicultural and Indigenous Affairs in October 2003 by Amanda Vanstone.

[35] This assertion is ironic in light of 1999 amendments to the *Migration Act 1958* (Cth) which provide that DIMIA is not obliged to provide unlawful non-citizens with visa and refugee status information. This information need only be provided if specifically requested.

[36] Department of Immigration and Multicultural and Indigenous Affairs, *Immigration Detention Fact Sheet* <http://www.immi.gov.au> at 7 May 2002.

[37] John Howard stated in an ABC radio *AM* Programme interview with Fran Kelly on 14 November 2003: 'Fran, the point of our policy is to deter people from arriving here illegally.' <http://www.pm.gov.au/news/interviews/Interview572.html>.

Government's position on the Human Rights Norms

The government's response to allegations that immigration detention violates Australia's international obligations has followed a consistent pattern, whether the allegations are made by the Human Rights Committee, the United Nations High Commissioner for Human Rights (UNHCHR) or local lobby groups. The response invariably rejects the allegations made, affirms Australia's commitment to our international obligations, asserts that these obligations are being honoured, and then purports to clarify the misunderstandings (or 'debunk the myths') put forward by these misinformed outsiders.

A 2002 report[38] following a visit to Australia conducted by Justice P N Bhagwati, Personal Envoy to former UN High Commissioner for Human Rights, Mary Robinson, described the author's 'general impressions' in the following terms:

> Justice Bhagwati was considerably distressed by what he saw and heard in Woomera IRPC.[39] He met men, women and children who had been in detention for several months, some of them even for one or two years. They were prisoners without having committed any offence. Their only fault was that they had left their native home and sought to find refuge or a better life on the Australian soil. In virtual prison-like conditions in the detention centre, they lived initially in the hope that soon their incarceration will come to an end but with the passage of time, the hope gave way to despair. When Justice Bhagwati met the detainees, some of them broke down. He could see despair on their faces. He felt that he was in front of a great human tragedy. He saw young boys and girls, who instead of breathing the fresh air of freedom, were confined behind spiked iron bars with gates barred and locked preventing them from going out and playing and running in the open fields. He saw gloom on their faces instead of the joy of youth. These children were growing up in an environment, which affected their physical and mental growth and many of them were traumatized and led to harm themselves in utter despair.

The report concludes that immigration detention 'could, in many ways, be considered inhuman and degrading'. The practice of immigration detention was described as inconsistent with Australia's international human rights obligations, including art 9 of the *ICCPR*, and art 37 of *CROC* in addition to the *International Covenant on Economic, Social and Cultural Rights* with respect to a number of rights including the right to education. The Foreign Affairs Minister, Mr Alexander Downer and then Attorney-General, Mr Darryl Williams issued a hasty rejection of the Bhagwati report

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[38] Justice P N Bhagwati, *Human Rights and Immigration Detention in Australia: Report of Justice PN Bhagwati, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights, Mission to Australia, 24 May to 2 June 2002* (2002) <http://www.unhchr.ch/huricane/huricane.nsf/newsroom>.

[39] Immigration Reception and Processing Centre.

which they alleged 'misconceives the Government's policy and ignores the fact that people in immigration detention have arrived in the country illegally'. The Australian government's response further asserted that the report 'lacks objectivity and misrepresents important aspects of Australia's management of immigration detention, which takes careful account of our international human rights obligations' and that

> (t)he government takes its international obligations, including its human rights obligations, very seriously it does not accept that our system of immigration detention is inconsistent with our international obligations.[40]

These assertions overlook the fact that the right to seek asylum is enshrined in art 14 of the *Universal Declaration of Human Rights*[41] and that the 1951 *Refugees Convention*[42] is premised upon the existence of this right. The right has arguably also emerged as a norm of customary international law.[43] Refugees have a right to seek asylum and art 31 of the *Refugees Convention* prohibits state parties from imposing penalties on refugees on account of their illegal entry or presence. DIMIA's efforts to justify detention on account of detainees' 'illegal' arrival apply the rhetoric of criminality to those who have committed no crime and are entitled to the protections of international obligations willingly undertaken by Australia.

Criticism by domestic lobby groups has elicited a similar response to that of United Nations-based bodies. On a DIMIA web page devoted to 'clarifying the myths and inaccuracies perpetuated on the website of Australians for Just Refugee Programmes', the comments at once affirm Australia's commitment to international human rights law, then in purporting to demonstrate Australia's commitment show how it has violated the standards. The following assertions are made: *That Australia is a signatory to CROC and committed to meeting its standards. That the Migration Act applies equally to adults and children. That efforts are made to ensure that detention of children is a measure of last resort and for the shortest possible period.* It cannot tenably be a last resort if all children who are unlawful non-citizens are detained. Detention of children is plainly not for the shortest possible period. Presumably the shortest possible period would be that required to undergo identification, security and health checks in

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[40] <http://www.minister.immi.gov.au/borders/detention/unreport_response.htm>

[41] GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/Res/217A (1948). Australia was one of the nations involved in the drafting of the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly and adopted by Australia in 1948. The Universal Declaration of Human Rights is a statement of aspiration and does not have strictly binding effect as a treaty, but formed the foundation for the *ICCPR* and the International Covenant on Economic, Social and Cultural Rights which, together with the Universal Declaration form the 'Universal Bill of Rights.'

[42] The Convention was ratified by Australia in 1954 (the *1967 Protocol*, extending the temporal operation of the *Refugees Convention*, was ratified by Australia in 1973).

[43] See Alice Edwards, 'Tampering with Refugee Protection: the Case of Australia', (2003) 15(2) *International Journal of Refugee Law* 192.

accordance with UNHCR guidelines. Yet children are detained until they are granted a visa or removed from Australia.

The Relevance of International Standards in Domestic Law

The Minister for Foreign Affairs has, in the course of parliamentary debates, likened United Nations treaty bodies to courts of appeal, submitting Australia's sophisticated democratic processes to the sometimes-uninformed scrutiny of individuals its citizens have not elected.[44] In contrast to this view, Mr Darryl Williams described the decision in *A v Australia* as a 'mere expression' of the Human Rights Committee's 'views', which Australia was at liberty to accept or reject.[45] The fact is that states ratify treaties of their own volition and thereby express an intention to give effect to treaty obligations. Article 26 of the *Vienna Convention on the Law of Treaties* provides that state parties must perform their treaty obligations in good faith and art 31 requires good faith interpretation of these obligations. Article 27 prohibits a state from invoking its domestic law to justify a failure to perform its treaty obligations. United Nations treaty bodies lack judicial decision-making powers. But, in interpreting the treaties they are charged to supervise, their comments require acceptance by states as part of a constructive dialogue aimed at taking incremental steps to achieve compliance with treaty obligations.

While states are required to perform their treaty obligations in good faith, these obligations do not form part of Australia's domestic law in the absence of legislation specifically incorporating the treaty's provisions into domestic law. In *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 (*'Teoh'*) the High Court found that Australia's ratification of *CROC* created a legitimate expectation that administrative decision-makers would act in conformity with its standards and consider the best interests of the child to be a primary consideration. But the position remained that the obligations contained in an international treaty do not operate as a direct source of individual rights and obligations under Australian law in the absence of specific incorporating legislation. Accordingly, legislation can be interpreted in a manner inconsistent with treaty obligations if the words of the statute are clear and do not accommodate an interpretation consistent with treaty obligations.[46]

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[44] Commonwealth, *Parliamentary Debates*, House of Representatives, 5 September 2000 (Alexander Downer, Minister for Foreign Affairs). Statements made by the Minister for Foreign Affairs which liken UN treaty bodies such as the Human Rights Committee to courts of appeal such as the Privy Council are discussed in Joanne Kinslor ' "Killing Off" International Human Rights Law: An Exploration of the Australian Government's relationship with United Nations Human Rights Committees' (2002) 8(2) *Australian Journal of Human Rights* 79.

[45] See Darryl Williams, 'Reforming Human Rights Treaty Bodies' (1999) 5(2) *Australian Journal of Human Rights* 158.

[46] See discussion below concerning *Lim v Minister for Ethnic Affairs* (1992) 176 CLR 1.

The good faith performance and interpretation of human rights treaty obligations is the *raison d'etre* of the Human Rights and Equal Opportunity Commission (HREOC). HREOC is established under the *HREOC Act 1986* (Cth) (*HREOC Act*). Its functions are defined in the *HREOC Act* to include promoting an acceptance and understanding of human rights[47] and reporting on action required to comply with Australia's human rights obligations.[48] A report published by HREOC in 1998[49] concluded that Australia's mandatory detention regime violated art 9(1) of the *ICCPR* and art 37(b) of *CROC*. It further violated art 9(4) of the *ICCPR* and art 37(d) of *CROC* because it did not permit judicial review of the reasonableness and appropriateness of detaining an individual. To the extent that the immigration detention policy was intended to deter boat arrivals, it was found to violate art 9(1) of *ICCPR*, and arts 22 and 37(b) of *CROC*.

HREOC's 1998 report recommended that detention of asylum seekers be for a minimal period,[50] subject to effective independent review and that children should only be detained in exceptional circumstances. The current Human Rights Commissioner, Dr Sev Ozdowski, instituted a national enquiry into Children in Immigration Detention in November 2001. Its terms of reference included 'consideration of the mandatory detention of child asylum seekers, alternatives to their detention and additional measures which may be required in immigration detention facilities to protect the human rights of all detained children.' In 2003, Dr Ozdowski called for all children to be released from immigration detention.[51] The final HREOC report is expected to be tabled in Parliament in May/June 2004.

CROC and *ICCPR* are 'declared instruments' under s 47(1) of the *HREOC Act*, and expressed as schedules to the Act. The rights contained in those instruments are thus, in accordance with s 3, 'human rights' for the purpose of the Act. By reason of the declaration of these two instruments, HREOC has concluded that immigration detention also violates the *HREOC Act*. But the question as to whether the declaration of these and other instruments for the purpose of the *HREOC Act* incorporates their standards into domestic law is presently uncertain. While Toohey J in *Teoh* considered that the declaration of *CROC* to the *HREOC Act* gives rise to an argument that the Convention has been recognised by Parliament as a source of domestic law, he did not have reason to determine the matter and it remains unresolved.

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47 Section 11(1)(g).

48 Section 11(1)(k).

49 Human Rights and Equal Opportunity Commission, *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals* (1998) <http://www.hreoc.gov.au/human_rights/asylum_seekers/index.html#seas>.

50 Ibid. To be a reasonable and proportionate means of verifying identity, determining the elements on which the claim for refugee status is based, and/or to protect national security and public order.

51 See Human Rights and Equal Opportunity Commission, 'It's Time — Release All Children and Their Families from Immigration Detention' (Media release, 7 November 2003) <http://www.hreoc.gov.au/media_releases/2003/53_03.htm> at 7 November 2003.

International Standards in Case Law

How have the international standards impacted upon the law concerning immigration detention of children? They did not feature prominently in the first constitutional challenge to immigration detention which was determined 11 years ago: *Chu Kheng Lim and Others v Minister for Immigration, Local Government and Ethnic Affairs and Another* (1992) 176 CLR 1 (*'Lim'*). This case concerned the predecessor to the current detention regime: the *Migration Amendment Act 1992* (Cth). The legislation required the non-reviewable detention of unauthorised non-citizens who had arrived by boat between 19 November 1989 and 1 December 1992 and were 'designated' by the Department of Immigration, Local Government and Ethnic Affairs. Unlike the current provisions, detention was limited to 273 days.[52] Section 54R, which provided that 'a court is not to order release from custody', was held to be an invalid derogation from the judicial power under Chapter III of Australia's *Constitution*. But the High Court refused to find that detention of unlawful non-citizens was punitive or part of the judicial power of the Commonwealth. Under the aliens power in s 51(xix), these provisions were held valid provided detention was reasonably capable of being seen as necessary for the aliens power purposes of deportation or enabling a visa application to be made and considered.[53] If detention were not limited to one of these legitimate administrative purposes, it would be punitive and contravene Ch III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts.

Underlying the court's conclusion that the provisions were valid lay significant restraints including the statutory time limit and the requirement that detainees be removed from Australia as soon as practicable after refusal of an entry permit, finalisation of any appeals or where a visa application is not made within two months of arrival. Because removal from Australia was required as soon as practicable after a detainee's written request,[54] detention was characterised as in essence voluntary because 'it always lies within the power' of a detainee to end their detention by deciding to request removal.

International standards did not feature prominently in the *Lim* judgment. Brennan, Deane and Dawson JJ accepted that the provisions were inconsistent with the *Refugees Convention*, the *ICCPR* and the *HREOC Act* to which the Covenant is scheduled. In a case of ambiguity they accepted that a construction which accords with Australia's treaty obligations should be favoured. But the provisions here prevailed on account of their unambiguous language. The judgment was consequently based on

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[52] This did not include additional periods, which were not considered to be the responsibility of the Executive, such as delays associated with the supply of information or in the finalisation of legal proceedings.

[53] Section 51(xix) of the Constitution confers authority on the Executive to detain aliens in custody for the purposes of expulsion, admission or deportation.

[54] Section 54P(1) of the *Migration Act 1958* (Cth).

constitutional and legislative interpretation. The resulting characterisation of immigration detention as voluntary carried with it an assumption that the detainee is not a refugee. It overlooked the fact that the asylum seeker is asserting a right to seek asylum under the *Refugees Convention*, which has been incorporated in substance into the *Migration Act*. A consequence of this characterisation was that requests for removal may be made by genuine refugees notwithstanding the *non-refoulement* obligation in the *Refugees Convention* which prohibits state parties from returning refugees to the frontiers of territories where their freedom or life is threatened.[55]

International standards were accorded greater prominence in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 (*'Al Masri'*). Merkel J at first instance then the Full Federal Court (Black CJ, Sundberg and Weinberg JJ) held that s 196(3) of the *Migration Act* was not an obstacle to the release of a person who is detained unlawfully. The Full Federal Court held that where there is no likelihood or prospect of removal from detention in the reasonably foreseeable future, the connection between the purpose of removing aliens and the detention becomes so tenuous as to render detention punitive in character and unlawful. Mr Akram Al Masri was a Palestinian asylum seeker from the Gaza strip who remained in detention after requesting to be removed from Australia and returned to the Gaza strip. [56] In light of refusals by Israel, Egypt, Syria and Jordan to grant him permission to enter, his detention was seen as indefinite and therefore unlawful. The Full Federal Court was fortified in its conclusion that s 196 was subject to an implied temporal limitation by reference to art 9 of the *ICCPR* and art 37(b) of *CROC*. It noted with reference to *A v Australia* that although the Court was not bound by the decisions of the Human Rights Committee, it was appropriate to consider its decisions.

The *Lim* and *Al Masri* decisions did not consider the position of children in detention. The *Lim* applicants included in their number a child born after his mother's arrival in Australia. But no separate argument was advanced concerning the infant or his status. Al Masri was an adult. But it was his case which was applied by the Full Court of the Family Court in the landmark decision of *B and B v Minister for Immigration and Multicultural and Indigenous Affairs* (*'B and B'*) handed down on 19 June 2003.[57] The Family Court's welfare jurisdiction is derived from s 51(xxi) of the Constitution (the marriage power) and s 51(xxii) (the power to make laws with respect to divorce and matrimonial causes and incidental powers). Nicholson CJ, Ellis and O'Ryan JJ held that the Court's welfare jurisdiction applied to present and prospective harm, allowed the court to protect children of

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[55] Article 33.

[56] Section 198 of the *Migration Act 1958* (Cth) provides that an officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

[57] *B and B v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FamCA 451 (Unreported, Nicholson CJ, Ellis and O'Ryan JJ, 19 June 2003).

marriages from abuse by third parties and extended to the protection of children of marriages in immigration detention.

Nicholson CJ and O'Ryan J held that the Family Court's welfare jurisdiction extended to the making of orders releasing children from immigration detention if the detention was unlawful. Their Honours considered that if it was to be determined at trial that the children's detention was indefinite, their detention would be unlawful. They found that the five applicant children were potentially, like the applicant in *Al Masri*, unable to bring their detention to an end of their own accord. Their parents could take action to bring their children's detention to an end, but to regard this as a determining factor would be effectively treating children as chattels when, under law, they are entitled to the same rights and protections at common law and under the Constitution as adults. They considered the children to be unlikely to have the capacity to themselves make a request for repatriation and said the detention would therefore violate art 37 of *CROC*[58] and be indefinite and therefore unlawful.

Even if the detention were lawful all members of the court found that they may still give directions about the nature and type of detention in which the children are held and may make orders concerning the provision of medical treatment and educational facilities which should be made available to the children while in immigration detention. Nicholson CJ and O'Ryan J held that the children's circumstances were sufficiently related to the marriage of the parents to activate the constitutional power of the Commonwealth to protect the children. They further indicated in obiter comments that the court's welfare jurisdiction is also supported by the external affairs power in s 51(xxix) of the Constitution because relevant amendments to the *Family Law Act* 1975 (Cth) and *Family Law Reform Act 1995* (Cth) sought to implement *CROC* in the area of family law. Their Honours concluded that it is strongly arguable that the relevant amendments were intended to extend protection to all children, not just children of a marriage. The Full Court ordered that the case be remitted for rehearing as a matter of urgency.

Applications for interim release were dismissed by Strickland J on 5 August 2003 on the basis that he was not satisfied that release for an indeterminate period pending final hearing which would separate the five children from both parents was in the children's best interests. On 25 August 2003, a differently constituted Full Family Court ordered interim release of the children on the basis that their detention was unlawful and not in their best interests.[59] Their Honours found that Strickland J had failed to give appropriate weight to his conclusion that the detention was unlawful and had focused on the damage the children might suffer

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[58] Ellis J, dissenting in part, found that the children's detention was not unlawful because it could not be said that there is no real likelihood or prospect in the reasonably foreseeable future of the children being removed and thus released from detention.

[59] *B and B* [2003] FamCA 621 (Unreported, Kay, Coleman and Collier JJ, 25 August 2003).

adjusting to the outside world rather than looking at the damage that the children were suffering as a result of their continued incarceration.[60] Once a finding of unlawful detention was made, their Honours found that the decision to be made was whether the children's best interests lay in being released into the care of strangers or in remaining in detention with one or both of their parents. They concluded that the evidence was overwhelmingly in favour of the children's immediate release. Release was ordered pending final hearing.

Tensions between Executive and Judiciary

The relationship between the Executive and Judiciary with respect to Australia's management of asylum seekers has been characterised by considerable tension. Judicial scrutiny of Executive decision-making pursuant to the *Migration Act* has resulted in a number of attempts by Parliament to restrict judicial review. Recent amendments to the *Migration Act* have included the narrowing of elements of the Refugee Convention definition of a refugee such as 'persecution' and membership of a 'particular social group' in order to restrict judicial review.[61] Since the introduction of mandatory detention, Parliament has sought to prohibit courts from ordering release. Section 54R of the *Migration Amendment Act 1992* provided that 'a court is not to order release from custody' of designated persons who had arrived in Australia within the period specified. As discussed above, section 54R was held to be unconstitutional by the High Court in *Lim*. In September 1994, s 54R was succeeded by s 196(3) which provides that an unlawful non-citizen must be kept in detention and not released 'even by a court' until granted a valid visa or are removed or deported from Australia. But where detention is 'unlawful', courts have applied *Lim* and considered themselves empowered to order release.

The most far-reaching attempt to exclude judicial review was the introduction of *Migration Legislation Amendment (Judicial Review) Act 2001*. Part 8 of the *Migration Act*, which deals with judicial review, was replaced and a new section 474 introduced. Section 474 is a privative clause pursuant to which a wide range of decisions of the Executive were declared 'final and conclusive' and not subject to challenge or 'called into question in any court'. The passing of this legislation was accompanied

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[60] Their Honours also noted that Strickland J gave inappropriate weight to the lack of logistical details of care for the children and erred in criticising the expertise of a psychologist who gave evidence at the hearing.

[61] *Migration Legislation Amendment Act (No 6) 2001* (Cth). For a discussion of this legislation and its implications on restricting judicial review, see Susan Kneebone, 'Bouncing the Ball between Courts and the Legislature: What Is the Score on Refugee Issues?' (Paper presented at the Castan Centre for Human Rights Law conference 'Human Rights 2003: the Year in Review', Melbourne, 4 December 2003). Paper available at <http://www.law.monash.edu.au/castancentre/events/2003/kneebone-paper.pdf>.

by a number of statements by Mr Ruddock and other members of Parliament concerning the need to ensure that an unaccountable and unelected Judiciary does not usurp the role of an 'elected government'.[62] Parliament's attempt to render Executive decision-making free from judicial review shows an alarming disregard for the constitutional guarantee of equality under the law in an area where individuals, including children, who have committed no crime, are routinely deprived of their liberty for extended periods of time. In *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 441 (*'S157'*), the High Court held unanimously that s 75 of the Constitution limits the powers of Parliament or the Executive to confine or avoid judicial review. While the court concluded that the privative clause was valid, it did not remove decisions from judicial review in circumstances of 'jurisdictional error', including failure to comply with the principles of natural justice and an excess of jurisdiction conferred by the *Migration Act*. Five of the seven justices stressed that 'the fundamental premise for the legislation [is] unsound'[63] and stressed that their conclusion, that the Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction, reflects two fundamental constitutional propositions. First, that Parliament cannot remove the High Court's jurisdiction to grant relief under s 75(v) of the Constitution and second, that the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Chapter III of the Constitution.

The privative clause has impacted upon the case law concerning immigration detention of children. In *B and B*, Nicholson CJ and O'Ryan J stated that the privative clause 'would have no application to this Court's review of this type of decision of the Minister'.[64] But in two subsequent Family Court judgments, Chisholm J held that the privative clause prevented him from making orders concerning, inter alia, the release of children from immigration detention. In *HR and DR v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FamCA 616 (Unreported, Chisholm J, 14 August 2003) (*'HR and DR'*), interim orders were sought on behalf of a family comprised of two parents and three children restraining the Minister from placing or keeping the family members in the Baxter Detention Centre or any other detention centre and to instead accommodate them for the purposes of immigration detention in the private premises of a specified individual or such other place as the court might order. Chisholm J interpreted comments made by Nicholson CJ and O'Ryan J in *B and B* to indicate that that the Family Court can make orders relat-

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[62] See comments of De-Anne Kelly quoted in Helen Pringle and Elaine Thompson 'Tampa as Metaphor: Majoritarianism and the separation of powers' (2003) 10 *Australian Journal of Administrative Law* 107, and Frank Brennan, *Tampering with Asylum* (2003).

[63] *S157* (2003) 211 CLR 441, 510 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[64] *B and B* [2003] FamCA 451, [399], with reference to the Federal Court judgment of Ryan J in *VLAH v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1554 (Unreported, Ryan J, 13 December 2002).

ing to the welfare of children in immigration detention to the extent that those orders do not conflict with section 474. Accordingly, in each case, if the court otherwise has jurisdiction to make the orders sought, the court must consider whether s 474 applies. His Honour concluded that s 474 applied in the present case and that he was accordingly unable to make the orders sought. In any event, even if s 474 did not apply, his Honour commented that the Family Court is not permitted to interfere with the Minister's arrangements for the detention of adult members of a child's family where all family members are in immigration detention. Similar orders were sought in *AI and AA v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FamCA 943 (Unreported, Chisholm J, September 2003) (*'AI and AA'*). Referring to his judgment in *HR and DR*, Chisholm J noted that s 474 of the *Migration Act* prevents the Family Court from making orders for release from detention unless the detention is arguably unlawful.[65]

In *HR and DR*, Chisholm J commented that whether s 474 applies in specific circumstances is a matter upon which judicial views may differ.[66] But it is clear that despite the limited operation of section s 474 as a consequence of the High Court's *S157* judgment, the privative clause can and indeed has operated to prohibit judicial review of immigration detention of children. It appears that this has not been sufficient to contain disquiet within the Executive and Legislature concerning the Judiciary's ability to review arrangements made be the Executive for detention of unlawful non-citizens. The Migration Amendment (Duration of Detention) Bill 2003 (Cth) was introduced on 18 June 2003. The Bill proposed four subsections to s 196 of the *Migration Act* and sought to ensure that unlawful non-citizens remain in detention until any substantive proceedings concerning the lawfulness of their detention or concerning whether the person is an unlawful non-citizen have been determined. The stated aims of the Bill were to

> put it beyond doubt that an unlawful non-citizen must be kept in immigration detention unless a court finally determines that:

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[65] He considered comments made by Nicholson CJ and O'Ryan J in *B and B* and concluded from their Honours' language that the detention of children may be illegal in some circumstances irrespective of their own competence to bring detention to an end. In any event, what the Full Court said about indefinite and/or illegal detention was of a hypothetical nature and did not constitute the ratio decidendi. The essential question was whether the detention of children is indefinite and therefore illegal. He asked: 'Is the period of detention, in all the circumstances, properly related to the carrying out f the Minister's responsibility under the Migration Act?'. *Al Masri* was distinguished on the basis that there was no prospect that the detention of the respondent in *Al Masri* would cease whereas the detention of the applicants in the present case would cease when the parents' legal challenges were finalised. The detention was therefore not indefinite and was lawful and the court had no power to order release.

[66] [2003] FamCA 616 (Unreported, Chisholm J, 14 August 2003). At [49], his Honour concludes that 'the scope of "jurisdictional error" is a matter on which opinions may differ'.

- The detention is unlawful, or
- He or she is not an unlawful non-citizen[67]

Parliament's Bills Digest comments as follows:

> The Bill has been introduced to prevent interlocutory or interim orders for the release of detainees whether or not in the context of broader judicial review proceedings. This has been prompted by several cases where release has been ordered by the Federal Court, for example Al Masri's case...[68]

In seeking to render the Judiciary unable to order interim release, the Migration Amendment (Duration of Detention) Bill 2003 (Cth) sought to ensure that even those detained unlawfully are kept in detention until final determination. The courts' power to order interlocutory relief is aimed at doing justice prior to the final determination and minimising irreparable harm. In light of the fact that the average period of immigration detention for children has been one year and five months, rendering courts unable to order relief until the resolution of often-lengthy proceedings would amount to a denial of justice. In light of the increasingly documented psychological impact of detention and the specific developmental needs and vulnerability of children, curtailment of judicial power to order interlocutory release would be likely to cause irreparable harm. If outright prohibition of judicial review of Executive decision-making is inconsistent with the Constitution, legislation prohibiting interlocutory release is a fortiori unconstitutional.

The *Migration Amendment (Duration of Detention) Act* 2003 (Cth) received Royal Assent on 23 September 2003. After vigorous debate in both the House of Representatives and Senate, the Bill was passed in amended form. Instead of denying due process to all unlawful non-citizens, the prohibition on interlocutory release was restricted to criminal deportees[69] and people subject to visa cancellation on character grounds.[70] The constitutional validity of the legislation is yet to be judicially determined.

In expressing his disappointment that the legislation was passed in amended form, Mr Phillip Ruddock announced his intention to introduce a new bill prohibiting interlocutory release of all unlawful non-citizens. In a show of executive determination, the Migration Amendment (Duration of Detention) Bill 2004 was introduced on 19 February 2004 by Mr Ruddock's successor as Minister for Immigration and Multicultural and Indigenous Affairs, Ms Amanda Vanstone. The Bill was in substance a reproduction of its 2003 predecessor. After a repetition of debate played

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[67] Explanatory Memorandum, Migration Amendment (Duration of Detention) Bill 2003 (Cth) <http://scaleplus.law.gov.au/html/ems/0/2003/0/2003061802.htm>.

[68] Department of the Parliamentary Library, Parliament of Australia, *Bills Digest* <http://www.aph.gov.au/library/pubs/bd/2002-03/03bd182.htm>.

[69] Section 200 of the *Migration Act 1958* (Cth).

[70] After failing the character test in s 501 of the *Migration Act 1958* (Cth).

out six months earlier, this most recent attempt to undermine the rule of law and marginalise the judiciary was defeated on 8 March 2004.

B and B and Beyond

The Full Family Court's *B and B* decision concerning the Court's welfare jurisdiction was appealed by the Minister for Immigration and Multicultural and Indigenous Affairs. The appeal was heard by the High Court on 30 September and 1 October 2003. Judgment has been reserved. If the appeal is successful, the five children released from detention on 25 August 2003 will be re-detained on the basis that the Family Court did not have jurisdiction to order release. If the appeal is unsuccessful, the children's application for final orders for release will be heard by the Family Court and other children in immigration detention will be able to apply for release on the basis that their detention is unlawful.

During the course of the High Court hearing of the *B and B* appeal, McHugh J commented that by bringing proceedings in the Family Court, the respondent's representatives might have lost sight of available arguments concerning validity.[71] The invitation implicit in his Honour's comments has been accepted. On 3 February 2004, the High Court heard a constitutional challenge to the detention provisions insofar as they concern children.[72] The proceeding was issued under the High Court's original jurisdiction on behalf of four children detained since arriving in Australia with their parents on 15 January 2001.[73] Orders were sought that ss 189 and 196 of the *Migration Act* are invalid to the extent that they authorise the detention of children. Gavan Griffiths QC submitted on the children's behalf that the provisions are unconstitutional because they apply indiscriminately to children, without accounting for their developmental needs and vulnerabilities and that detention of children does not satisfy the *Lim* requirement of being reasonably capable of being seen as necessary. In its submission seeking leave to intervene,[74] HREOC focussed on the particular developmental needs of children and their vulnerability to harm. It noted that ss 189 and 196 'create a scheme of mandatory detention for all, with no sufficient provision taking account of the distinct interests and nature of children as a class, nor any adequate

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[71] His Honour asked the following question: 'Insofar as your submissions seek to defend the case, you do so on the basis of the Al Masri principle, but have you given any consideration as to whether or not Chapter III of the Constitution prohibits in all circumstances the involuntary detention of children, full stop?'.

[72] Transcript of Proceedings, *Applicants M276/200, Ex parte-Re Woolley and Anor* (High Court of Australia, Gleeson CJ, McHugh, Gummow, Kirby, Hane, Callinan and Heydon JJ, 3 February 2004).

[73] An appeal against the Refugee Review Tribunal's refusal to grant the children and their father a protection visa is currently pending in the Federal Court.

[74] The Attorney-General of the Commonwealth of Australia also intervened.

provision for individual assessment of the relevant interests.'[75] HREOC was granted leave to intervene. Brett Walker QC on HREOC's behalf characterised detention as comprising three notional periods. While Dr Griffiths had argued that detention of children was unconstitutional for any length of time, Mr Walker argued that in the initial assessment phase, and the final phase where deportation or removal might occur, detention could be reasonably necessary in order to achieve a legitimate purpose in accordance with the *Lim* test. No such purpose could be discerned from the long middle phase, which had significant detrimental effects on children. David Bennett QC for the respondents[76] submitted that the legitimate non-punitive purposes of detention were facilitation of removal or deportation and prevention of absorption into the community. In support of his assertion that these purposes apply equally to adults and children of all ages, Mr Bennett argued with no substantaiting evidence that children could easily be concealed by a trusted adult. Judgment has been reserved. If the challenge is successful, all children will be released from immigration detention.

Conclusion

Australia's detention of children seeking its protection, perhaps the most vulnerable individuals within its jurisdiction, violates international obligations to which Australia has voluntarily submitted. But criticism by domestic lobby groups and United Nations-based bodies has generated an unhelpful response. Recent caselaw, which has to a small extent allowed a consideration of international standards but has more often focussed on Australia's *Constitution*, has been met with attempts to curtail the Judiciary's ability to order release from detention. If the High Court is to give effect to Australia's international obligations, the court will need to determine the extent to which the declaration of *ICCPR* and *CROC* in the *HREOC Act* may incorporate their standards into domestic law.

Further, in order to give effect to Australia's obligations, it would be desirable for the High Court to consider the nature of detention and reconsider the premise behind its judgment in *Lim*. *Lim* is premised upon the assumption that immigration detention is voluntary on the basis that a detainee can seek removal from Australia. Like the Executive's repeated assertions with respect to the illegal arrival of asylum seekers, the *Lim* formulation assumes that detainees are not refugees. It assumes that their claims for protection will ultimately be rejected. Justice Marcus Einfeld commented 10 years ago that detention of asylum seekers for long periods constitutes 'punishment in advance and presumption of

[75] Submissions of the Human Rights and Equal Opportunity Commission, seeking leave to intervene at <http://www.hreoc.gov.au/legal/intervention/sakhi.html>.

[76] Mr Bennett QC also represented the Attorney-General as intervener.

adverse determination.'[77] This presumption is contrary to available statistics concerning the granting of protection visas.[78] It fails to accommodate the experience of asylum seekers who have fled their country of origin and sought Australia's protection. If detention is voluntary, where can a genuine asylum seeker who requests removal from Australia go? Perhaps they can go back home, but such return may result in their life or liberty being threatened. Returning such a person raises significant concerns about Australia's commitment to the *non-refoulement* obligation, which lies at the heart of the *Refugees Convention.* A formulation which acknowledges an unlawful non-citizen's right to seek asylum and the possibility that a protection visa may be granted is less likely to result in individuals being subjected to punishment for exercising their legal right to seek asylum.

Immigration detention as required under the *Migration Act* is a penalty imposed for the purpose of deterrence. It is punitive per se and a fortiori with respect to children. I believe that we have created a new sub-class to whom criminality is attributed by using the rhetoric of illegality and that we have afforded these people fewer rights than convicted criminals.[79] The *Migration Act* makes no distinction between adults and children and provides no accommodation for children's vulnerabilities and developmental needs. Immigration detention of children as practiced in Australia today does not satisfy the test laid down in *Lim* because it is never administratively necessary to place children in indeterminate and often prolonged detention to effect removal, deportation or consider their visa applications. Whether children can properly request repatriation may ultimately depend on the age of a child. In light of the position of impotence in which parents in detention are placed, the fact that a parent can request removal (and thereby abandon their own and their children's entitlement to have their protection claims determined) should not result in children's detention being characterised as voluntary. The risk of children disappearing into the community is minimal and can be further reduced by appropriate safeguards such as reporting requirements. Alternatives to detention can achieve the purpose of enabling admission, removal or deportation without constituting punishment. In any event, the risk of a small number of disappearances into the community is worth taking in a democratic nation committed to the rule of law, willing to honour its obligation to act in the best interests of all children and to ensure that children are not arbitrarily deprived of their liberty.

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[77] Justice Marcus Einfeld, 'Detention, Justice and Compassion' in Mary Crock (ed), *Protection or Punishment: The Detention of Asylum Seekers in Australia* (1993) 41.

[78] Statistics based on unauthorised boat arrivals between July 1999 and June 2002 reveal a 90% success rate for asylum claims. Taken from Department of Immigration and Multicultural and Indigenous Affairs, Annual *Report 2002–03* (2003). Statistics reproduced at <http://www.refugeecouncil.org.au/html/facts_and_stats/stats.html#unauth>.

[79] For example, the *Children and Young Persons Act 1989* (Vic) requires that following criminal conviction, a child can only be detained if non-custodial orders have been considered and found inappropriate. Detention must be for a specified term, which for children under the age of fifteen cannot exceed one year.