

# "Immigration Detention - the Current Position"

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## Human Rights Protection in Australia

The Australian HR protection system is a direct result of the history and development of white settlement in this country. If you compare us with the United States, we Australians had no free settlement, no War of Independence and little or no nation building by private entrepreneurship; rather it was done by way of British government fiat. The early hallmarks of this environment were that of dependence on supply ships for food and other necessities, political radicalism that revolved around who controlled the sale of rum and the gradual evolution of the "fair go" principle (although not for indigenous Australians or other despised minority groups such as Irish-Catholics).

In time the system morphed into one which offered fairly solid protection of economic and social rights - although again skewed towards majority "wasp interests" - and a robust democratic Westminster-style, political system. The big gap was explicit protection of civil liberties which was effected, imperfectly, via the common law.

The current system of HR protection is extremely complex, emerging out of a potpourri that includes:

- Centuries of common law;
- Federal and State Constitutions and enacted "positive legislation";
- Political systems based on:
  - Democratically elected governments;
  - Independent judiciary;
  - Free press;
  - A well established civil society;
  - NGOs;
  - Since the 1980s establishment of statutory HR bodies, HREOC etc.

And now I would like to briefly examine some of these important elements.

## The Federal Constitution

The Constitution of Australia divides spheres of legislative, judicial and executive responsibility between the Commonwealth of Australia and the States. In brief, the Federal government is responsible for defined heads of power, including national defence, international affairs and finances, including most taxation. The State governments are responsible for the residual areas, including health, education (with the exception of tertiary education) and policing.

Both Federal and State governments are responsible for human rights protection. States, for example, may also incorporate international human rights principles into state legislation to the extent that such legislation is not inconsistent with any Commonwealth legislation in the area.<sup>(1)</sup>

## No Bill of Rights

On the Federal level, a comprehensive statement of human rights - or citizenship rights as they might have been known at Federation - was not included in Australia's Constitution despite the French and US examples. Legend even has it that some of our "founding fathers" opposed it because of its potential to entrench 'racial equality' throughout Australia! We followed instead the British model of reliance upon the common law to protect individuals against abusive interference by governments.

## Rights in the Constitution

The Australian reliance on the common law rather than constitutional rights meant that very few individual rights were explicitly recognised in the Constitution; or the record they are:

- the right to vote (Section 41); although still to be confirmed by the High Court as explicitly thus;
- the right to a trial by jury in the State where the alleged federal offence took place (Section 80);
- the denial of federal legislative power with respect to religion (Section 116); and
- the prohibition against discrimination on the basis of state of residency (Section 117).

There are also two "economic rights" - s.92 guaranteeing freedom of interstate trade and s.51 mandating payment on just terms for property acquired by the Commonwealth.

## Rights not Recognised

The fundamental freedoms such as:

- freedom of association;
- freedom of movement;
- freedom of peaceful assembly;
- freedom of thought, belief and opinion;
- and freedom from arbitrary arrest or detention.

And:

- the right to a fair trial or due process;
- the equality of all persons in Australia before the law.

## High Court and Human Rights

The Constitutional jurisprudence of the High Court has made a significant contribution to the protection of human rights in Australia. Particularly relevant was the High Court's re-discovery of the external affairs power - that provision in the Constitution which gives the Commonwealth control of external affairs.

Section 51(xxix) of the Constitution, the external affairs power, provides the Commonwealth Parliament with the power to legislate so as to incorporate provisions of international human rights conventions into Australian domestic law. So the High Court affirmed in a decision where Queensland challenged the constitutional validity of the Racial Discrimination Act. <sup>(2)</sup> Ultimately all HREOC's legislation depends on this Constitutional fountainhead.

A High Court interested in an expansive reading of the Constitution has also found that certain individual rights are implicit in the system of government it establishes. Thus in 1992

the individual right to communicate freely in political matters was recognised by the High Court. <sup>(3)</sup>

The courts have also acknowledged that international human rights law is a legitimate influence on the development of the common law which may further strengthen its utility as a means of protecting human rights.

This development reached its apogee in the High Court decision in "Teoh" where the court found that with regard to the Convention on the Rights of the Child, because it had been ratified by the government, entitled a foreign national - convicted on heroin charges and who had Australian children - to have a legitimate expectation that bureaucratic decision-makers would apply the Convention, in determining his residency application.

## **Federal Laws and Human Rights**

The history of Australian domestic legislation from the point of compliance with human rights standards is uneven.

The first act of the new federal Parliament in 1901 was to pass the Immigration Restriction Act and the Pacific Island Labourers Act giving effect to the White Australia Policy. This was racist legislation which today would be in clear conflict with a range of contemporary human rights conventions.

## **Voting Rights for Women**

On the other hand, Australia did reasonably well by contemporary standards in creating a democratic system of government. For example, as early as in 1902 the federal franchise - the vote - was extended to women (This voting equality was however not extended to other spheres of importance to women until the early seventies.)

## **Economic Rights**

Australia's particular achievement has been the development of a comprehensive system of protection of economic and social rights, which was put in place well before the Bolshevik revolution in Russia. In fact Australia has been an international leader in this field.

Economic rights for adult European males were strongly supported in the early years of the new federal Parliament with the introduction of the compulsory conciliation and arbitration system in 1904. The Conciliation and Arbitration Court's first major judgment - Harvester in 1907<sup>(4)</sup> - established the minimum - or basic - wage as a worker's right and introduced the national wage fixing system which prevailed in Australia for so many decades.

Women's minimum wage was set at a proportion of that for men (initially 54%) until the Equal Pay Case of 1972<sup>(5)</sup>, while Aboriginal workers were excluded from the process until 1966, when Aboriginal stockmen were granted equal wages to non-Aboriginal stockmen. <sup>(6)</sup>

So, many human rights were protected by domestic legislation well in advance of the emergence of international human rights law and the treaty system.

## **Impact of international human rights law on federal law**

Let us now focus on the impact of the international human rights law on federal legislation.

As we acknowledged earlier Australia, since the end of WWII has been at the forefront of UN activism and has been prominent among the drafters and the promoters of human rights treaties. However, human rights treaties provide simply the mechanisms by which

governments agree on those international human rights which each may wish to recognise for their citizens. Ratification of an international human rights treaty does not, however, mean that the treaty standards automatically became incorporated into domestic law.

## **Instruments ratified by Australia**

By now Australia has now accepted (that is, ratified<sup>(7)</sup>) most of the principal human rights treaties:

- International Covenant on Civil and Political Rights (including the First Optional Protocol allowing individual complaints and the Second Optional Protocol on the death penalty); "
- International Covenant on Economic, Social and Cultural Rights;
- Convention on the Rights of the Child;
- Convention on the Prevention and Punishment of the Crime of Genocide;
- International Convention on the Elimination of All Forms of Racial Discrimination;
- Convention on the Elimination of All Forms of Discrimination Against Women (but not the Optional Protocol allowing individual complaints);
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Convention and Protocol Relating to the Status of Refugees;
- UNESCO Convention Against Discrimination in Education;
- Freedom of Association and Protection of the Right to Organise Convention (ILO 87);
- Right to Organise and Collective Bargaining Convention (ILO 98);
- Equal Remuneration Convention (ILO 100);
- Discrimination (Employment and Occupation) Convention (ILO 111);
- Workers with Family Responsibilities Convention (ILO 156);
- Termination of Employment Convention (ILO 158);

## **Instruments incorporated into domestic law**

Despite Australia's leading role since 1948 in the development of international human rights standards, these standards did not have much impact on domestic law until the early 1970s. Since then many human rights treaties have been either comprehensively or partially incorporated into federal law.

The first notable achievement was the 1975 Racial Discrimination Act which incorporated the International Convention on the Elimination of All Forms of Racial Discrimination into domestic law. A Commissioner for Community Relations was appointed in 1975 to monitor the new Act. Another notable achievement is the fact that the Sex Discrimination Convention (CEDAW) has been almost fully incorporated in Australian law through the Sex Discrimination Act of 1984.

Of the remaining 13 listed above only five, that is:

- the Refugee Convention;
- the Torture Convention;
- ILO 100 on equal pay;
- ILO 156 on family responsibilities;
- ILO 158 on unfair dismissal;

could be said to have been incorporated to any substantial extent in Australian domestic law.  
<sup>(8)</sup>

The other three, namely:

- International Covenant on Civil and Political Rights;
- Convention on the Rights of the Child;
- Discrimination (Employment and Occupation) Convention (ILO 111);

were attached to the Human Rights Commission's legislation of 1981 and then to the Human Rights and Equal Opportunity legislation of 1986. Their incorporation must be treated as only partial, because they do not give rights independently of the Commission's limited complaints jurisdiction.

To sum up, out of 15 key international human rights treaties, Australia incorporated comprehensively 8 and partially 3, treaties into domestic legislation. Further, it should be noted, that many human rights, especially those relating to criminal investigations and trials, are similar to common law protections well-recognised in Australia.

### **What the Human Rights and Equal Opportunity Commission (HREOC) does**

Turning briefly to the role of HREOC; it was established in 1986 as an independent statutory body replacing the previous Human Rights Commission which had been set-up in 1981. HREOC reports to the federal Parliament through the Attorney-General. Its goal is to foster greater understanding and protection of human rights in Australia and to address the human rights concerns of a broad range of individuals and groups. It has a particular focus on race, sex and disability discrimination as well as the rights of Indigenous Australians. It achieves this through:

- Developing human rights education programs and resources for schools, workplaces and the community. In 2002/03 HREOC's website recorded 4,372,899 page views;
- Resolving complaints of discrimination or breaches of human rights under federal laws;
- Holding inquiries into issues of national importance, such as the forced removal of Aboriginal children from their families, paid maternity leave and the rights of children in immigration detention centres;
- Providing independent advice to assist courts in cases that involve human rights principles;
- Providing advice and assistance to parliament and government to develop laws, programs and policies.

### **Immigration Detention and a Bill of Rights**

Turning now to the specific topic for today's address, first some context. As mentioned earlier the absence of a bill of rights in Australian law means that the federal Parliament is not restricted by basic human rights and civil liberty principles when enacting legislation. A clear example of this is the mandatory immigration detention legislation which was passed in 1992.

Australia's Migration Act requires the detention of all men, women and children who arrive in Australia without a visa; whether or not they are a flight, security or health risk; for indefinite periods of time and without any real review of that detention by a court.

HREOC, along with UN human rights bodies, international lawyers and human rights NGOs have been saying for years that Australia's mandatory detention legislation is a flagrant breach of a person's fundamental protection against arbitrary detention and the associated right of timely review of such detention by a court.

However, because these fundamental rights are not protected by Australia's Constitution or a Bill of Rights, it is extremely difficult to successfully challenge these laws; although another

round of challenges on behalf of detainees, is currently before the High Court and we all await their outcome with interest.

## Immigration Detention and Deterrence

Immigration Minister Ruddock in an interview with ABC Radio National on 1 August 2002 stated: "Detention arrangements have been a very important mechanism for ensuring that people are available for processing and available for removal, and thereby a very important deterrent in preventing people from getting into boats".

UNHCR Guideline 3 of the "UNHCR Detention Guidelines" states: "The detention of asylum seekers as part of a policy to deter future asylum seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law".

Even without this admonition, the concept of proportionality militates against this rationale. Public policy should not only be effective, it should also provide a proportional response to that which it aspires to achieve. Clearly at one end of the spectrum you could staunch the flow of "asylum seeking boats" by sinking them; at the other end of the scale, you could permit all people who arrive at our borders immediate and unrestrained access to the general community without any health or security checks.

Furthermore even if it can be proved that the policy has achieved its deterrence outcome of stopping the boats, it remains a flagrant breach of human rights obligations. A similar outcome could have been achieved, albeit over a longer time-frame, by way of international co-operative measures to ensure the orderly processing of asylum seekers in transit countries. Now let's look at some basic facts about our detention regime.

## Some Basic Facts about the Immigration Detention Regime

- **When was the policy introduced?** 1992 to deal with the perceived influx of Cambodians and Vietnamese. One of the primary purposes was to perform basic health, identity and security checks.
- **Who is detained?** All persons who either arrive without a visa or whose visa expires. If they are intercepted outside Australia's territorial waters or arrive at Christmas/Ashmore, they go to Nauru/PNG; otherwise detained in Australian detention centres.
- **How many boat arrivals?** In practice, most people in long term detention are asylum seekers who arrive by boat. Since 1989, 13,475 have arrived by boat, so in 14 years the total number would roughly fill 15% of the MCG.
- **Where are they from?** Over the past few years most boat arrivals have been from Iran, Iraq, Afghanistan; reasonable numbers have also come from Palestine, Sri Lanka and China.
- **How many in detention (all categories)?** In 2001-2002 approximately 10,000 people in detention; 1,700 were children and 1,400 of those children were boat arrivals. As at 7 July 2003, there were just over 1,000 people in detention, 92 of whom are children.
- **Are they genuine refugees?** Over 90% of child boat arrivals in detention over the past three years have been found to be genuine refugees ie almost all found to have suffered persecution and released into Australian community.
- **Nationality of Children?** Nearly 50% of the children who applied for asylum over past three years are from Iraq and 97% of those were successful. Approximately 35% are from Afghanistan and 95% were successful. Just under 10% were from Iran and 66% were successful.
- In the same period only about 20% of the asylum seekers who arrived with a visa (eg tourist visa) were found to be refugees; this refutes the argument that there is a correlation between being a "boat person" and a "fake refugee"; in fact boat people are much more likely to be refugees.

- **Unaccompanied children UAMs?** During 1999 alone, the last year UNHCR has figures, 20,000 UAMs applied for asylum in Western nations, 46 of those travelled to Australia.
- **How long in detention?** Boat arrivals must stay in detention until they get a refugee visa or are sent back home. Sometimes this can take years.
  - The longest a child has been in detention with a family is 5.5 years.
  - In January 2003, the average length of detention for children was more than one year and three months.
  - By April 2003, 50 children had been in detention for more than 2 years. All of those children were in detention with one or more parents.
- **What type of visa do they get?** Since 1999, those who do get a refugee visa are only eligible for a three year temporary protection visa. After three years is up they must start all over again. This compares with those who arrive (say) on a tourist visa and then apply for refugee status - they are eligible for a permanent visas. Regulations proposed by the Government to bring these applicants into line with "boat arrivals" were disallowed by Parliament in September 2003.
- **What impact do the TPVs have on their recipients?** There is evidence suggesting they suffer from a lack of stability, have difficulty settling and factually they cannot access some key services like the Integrated Humanitarian Settlement Strategy's (IHSS) housing, education and language support package or effectively "social security"; no rights of family reunion and embargoed from returning to Australia if they depart.

## Three phases of Detention

### **Honeymoon:**

In general, one could say, asylum seekers can take up to 2-3 months of detention without major visible impact on them. They are relieved to be in Australia and believe that their new start in life is just around the corner.

### **Trauma:**

After this their behaviour changes: "I'm a father of two teenage children. My 15 year old son sleeps only with the help of sleeping pills. Both of my children are severely depressed after 5 or 6 months in the camp. My daughter is 16". (Iranian man, detainee representative committee meeting, Curtin IRPC.)

This is one of the milder reactions that I have personally observed in the course of my many visits. Other reactions include intense trauma, self-harm and complete family disintegration.

### **Total abandonment:**

After one year in detention the rate of decline is marked: "It's about 16 months since I arrived here. I've been under a lot of pressure. My life has been taken away from me. Within this 16 months I have become mentally and also physically ill. Every day my physical well-being is getting worse....I've become a useless person who wishes for death every day". (Afghan man, interview, Perth IDC.)

My personal observation of the number of detainees requiring psychological and psychiatric help is staggering.

Now whatever one's personal views about immigration detention, all of us must acknowledge that it is premised on the removal of freedom. That is freedom of choice about where to live, freedom about what to eat, freedom about whom you associate with, freedom to fulfil even the most basic functions such as choice of education or health-care provider. The very stuff of day to day life, in all its gloriously normal mundaneness.

## **Prison versus Immigration Detention**

And in considering the above it is important to remember that immigration detention is for "administrative purposes" only and not "punishment" as we understand the concept by reference to Australia's domestic penal arrangements. Clearly the latter is intended to include such a rationale, while equally clearly immigration detention is not. And yet perversely, some aspects of penal incarceration could almost be said to produce superior outcomes. At least in prison you have committed a crime, in immigration detention you have not; in prison your length of sentence is determinate, in immigration detention it is indeterminate; in prison there is a rigid rehabilitation regime which includes a mandated timetable of recreation, work and education; in immigration detention these elements may exist (but sometimes don't), and are often beset with problems of inconsistency, quality unevenness and arbitrariness of application.

Australasian Correctional Management, the erstwhile immigration detention centre services' provider also manages "Arthur Gorrie" correctional centre in Queensland. As this facility houses some immigration detainees (typically non-citizens who have served a penal sentence for committing a crime in Australia, and are awaiting deportation) I have had cause to visit it on a number of occasions. My observations of conditions there have informed the views expressed in the previous paragraph.

My suspicions in this regard have also been reinforced by discussions with detainees who have experienced both forms of incarceration. Unhesitatingly they tell me that given a choice, they would prefer prison to immigration detention.

In passing I should also add that I consider the commercial out-sourcing of immigration detention services' provision preferable, while the current policy settings prevail, over the suggestion that it should be once again managed "in-house" by the Government. It is demonstrably unworkable, by reference to a raft of other sectors in the Australian economy, to have the regulatory oversight function and the service delivery vehicle bundled together. While the current policy is in force, DIMIA should be responsible for regulatory oversight of immigration detention standards and Group 4/Falcke (the newly appointed service provider) for service delivery.

## **ACM/DIMIA Public Hearing, Sydney 2-5 December 2002**

Finally, I would like to concentrate on some of the material which was discussed during public hearings with DIMIA and ACM in Sydney in December 2002 as part of the Inquiry. My purpose here is not to demonise individuals within DIMIA and ACM, but rather to demonstrate the cultural attitude that the policy has engendered in the department and the company.

Many issues were of particular concern to me during those hearings, especially:

- The bureaucratic rigidity of senior DIMIA officials and their seeming lack of interest in exploring the use of existing options to improve the situation of detainees;
- The insistence of DIMIA that detainees caused their own problems;
- and
- DIMIA's belief that a wealthy 1st world country such as Australia meets its international obligations even if it only provides the minimum requirements.

I believe that all of these factors have led to the provision of services, or lack of them, which have had a serious and unnecessary effect on the health of detainees throughout the period from 1999 to the present. This includes the health of those unlikely to obtain a visa, in that they have been found as not engaging Australia's "protection obligations".

## **1st point - DIMIA Officials and available alternatives to institutional detention**

One of the points that must always be considered is whether a department is responsible for an action or direction, or whether it is just implementing legislation and policy directions. Even if a Department is implementing what government wants, there are often different ways in which such outcomes can be achieved. The legislation itself will often provide these.

Today I will mention a few areas where legislation allows such flexibility.

### **Alternative accommodation**

For example, there is scope within the Migration Act to detain people almost anywhere.

It is not mandated that they can only be detained in a prison-like detention centre. Yet alternatives were only really explored, albeit in minimal ways, subsequent to the problems that occurred with the UAMs in Woomera in January 2002 when serious riots occurred.

This group of unaccompanied minors was removed from Woomera as a result of the concern expressed by the South Australian Department of Human Services for their well-being. Some were subsequently granted visas and placed directly under State protection; others have not been granted visas, and when they turn 18 can in theory be returned to a detention centre.

However, since those Woomera disturbances there has been little change in the options available to others. In fact, there are probably fewer options. From the health point of view, detainees are harder to treat and place, because they have been in detention so long.

From the security point of view, they must be available for removal even if there are no certain plans for removal.

This is the real difficulty with the system that we have at present: the conflicting principles of best interests of the patient and best security practice. In all the different arrangements that have been made since early 2000, these conflicting principles have been most evident.

### ***For example:***

A woman was eventually admitted to psychiatric care on medical intervention, but DIMIA was unwilling to allow the next stage of treatment in a community setting. Intervention was required by a State agency. [Sydney - NSW Public Guardian]. Family eventually received visa in late 2002.

A similar situation occurred in another State [South Australia, early 2003, man now living in care of family in community. Intervention of Public Advocate]

Possibly other factors are involved in these decisions, such as:

Was DIMIA willing to pay the costs of such care? Evidence suggests that when some 'unexpected' situation arose, it is more likely to be DIMIA who pays the costs of care than ACM. Has ACM been reluctant to make guards available - it is expensive to provide 24 hour shifts to guard one individual. Does the state have a suitable hospital bed available, especially when ACM guards are forever present? This may be upsetting to other patients in the ward. Overall, it is still security or costs which dominate in these arrangements, not the health of the patient or the professional skills of the doctors.

## **Bridging visas**

There is also an option to allow people to live in the community through the provision of bridging visas. Bridging visas are routinely granted to all people who arrive with a visa and then apply for a Protection Visa. The reason for this, according to DIMIA, is that DIMIA already knows who these individuals are: they have a name, they provided the required information to get a visa therefore it is appropriate to let them live in the community.

Yet it seems from recent public information, that it is possible for a child sex- trafficker to get a visa to bring a twelve year old girl to this country and keep her a prisoner for 15 years to work in the sex industry.

Even though the legislation does make it difficult for some people in detention to obtain a bridging visa because of the no "final determination" clause, many others could potentially access its provisions. For instance:

- A child could apply for a Bridging Visa if a State welfare authority has certified that release is in the best interests of the child;  
and
- A child or adult could apply if a Department-appointed doctor certifies that the person has a health need or torture/trauma experience. <sup>(9)</sup>

However, in discussing bridging visas with DIMIA officers at the December 2002 hearing, it became clear that this option was rarely considered for people in detention. To HREOC this appeared strange because:

- It was aware of many cases of children with disabilities who had been in detention for a long time;
- Many adults and children had other health problems;  
and
- It was more than likely that many people had experienced torture and trauma prior to arrival in Australia.

So, even if we put aside the fact that many people were arguably mentally unwell only as a result of their prolonged detention, it was obvious that bridging visas were not even being considered, for many other detainees, in the limited circumstances originally envisaged by Parliament. This system was put in place by Parliament through legislation and through regulations which have to be agreed to by Parliament. Yet, there seems to be a great reluctance to follow Parliament's line.

## **DIMIA's role**

On questioning DIMIA officials, HREOC counsel found there was no evidence of any bridging-visa action being initiated by DIMIA officials even though it is within the capacity of a detention centre manager to do so. In discussing Bridging Visas for unaccompanied minors with DIMIA, HREOC found that DIMIA had not been much involved in initiating better outcomes for UAMs.

As far as children were concerned, DIMIA thought that State welfare officials should make such assessments. However, there was a Catch 22 - sometimes State welfare departments were unaware of the existence of children, much less their mental health status or any disabilities they might have. In any event, State legislation in itself did not allow them access to children in detention centres, unless DIMIA agreed.

And, on the many occasions when State welfare agencies have become more involved - and this has increased since January 2002 ---DIMIA will not accept the word of recognised experts. The State reports, at best, will trigger a request for a DIMIA-appointed doctor to make an assessment.

## **2nd Point -DIMIA's insistence that detainees caused their own problems**

It is in the area of mental health especially, that DIMIA's attitude to at least the current detainee population is most obviously negative. There is an automatic distrust of people who do not arrive in an orderly fashion; from this follows that any mental "condition" they subsequently manifest must be false. But "orderliness" has never been a characteristic of refugees!!

### **For example:**

Witness Jews escaping the Nazi Holocaust, the many millions seeking to escape Stalin's oppression and the thousands fleeing Vietnam after the fall of Saigon in 1975; these are some representative samples of the manifest absurdity of this proposition.

Assuming that there is a sound Refugee Convention basis for the acceptance by either DIMIA or the RRT of applications for a visa, there was a sound reason for people to leave promptly.

There is often no alternative except to turn to a people smuggler. From the statements of some asylum seekers, they have no idea where they are going, only that the money they have will take them to one place rather than another. Had a better option been available or feasible, or been known to be available, would people not save their money and go to it?

But the understanding demonstrated by DIMIA of asylum seekers especially those who fail in their applications is minimal. During the public hearing in December, DIMIA said:

"the choice to bring the detention period to an end lay within the capacity of the family and... they could choose at any point from then on to return to their home country and so far that has not been the case". <sup>(10)</sup>

This is a strange statement, given that some of the detainees are mentally ill and cannot come to a well informed judgement of what they should do. In many instances, it has been impossible for people to return to their home country, even with DIMIA's help. It is not logical to support a war against Iraq, but for a government department to think it possible at the same time to return to Iraq the very people who were forced to leave.

There is such a degree of contradiction and perversity in what DIMIA says and does that the effect can be quite surreal. Speaking of refugees, and the effect on them of detention itself, the DIMIA officer stated on one hand:

"Of course, some of these people have had a very difficult and often perilous voyage to get to Australia and they may well have other predispositions or issues in their life well before any thought of coming to Australia which might also be impacting on their personal circumstances whilst here".

Firstly, this statement says to me that DIMIA believes:

- mental health problems are probably not caused by detention - people carry them with them.

Secondly, DIMIA also seems to be saying:

- 'at most these people had an unpleasant voyage to Australia; this has contributed to their mental health problems' and also:
- 'they may have been losers in their own country. It has really got nothing to do with Australia.'

Yet DIMIA knows that it expends significant funding on torture and trauma services under its settlement services for people who arrived as recognised refugees under the "off-shore humanitarian program". What is the difference? The fact that we carefully chose one group and didn't choose the other group? I believe we all have a responsibility to point out the lack of logic and the discriminatory attitudes that are being perpetuated by these statements.

### **3rd Point - Provision of Bare minimum of services**

I don't believe that detention centres have ever been very generous in their provision of services to detainees. From the detailed evidence provided to the Commission, this certainly appears to be the case over the past few years. Maybe this wouldn't matter much if there was a short maximum period of detention. It is when detention is for many months and even years, that the greatest damage is done.

International conventions are rarely specific about the standard of services that should be provided or the time by which this standard must be reached. But in terms of children, the CRC states that detention must be the last resort and must be for the shortest possible period. As far as health and related services are concerned, a country such as Australia should seek to provide the highest standard that it can. The CRC speaks of taking positive action to restore and rehabilitate, not just to hand out Panadol.

In its evidence to the Inquiry in December last year, DIMIA's position appeared to be that due to the large number of detainees, services could only be basic:

"The provision of immigration detention services is a complex and dynamic area of public administration. It is not possible to predict the number of unauthorised arrivals that may come to Australia. After all people simply do not book in. Nor is it possible to predict the means of their arrival, the characteristics of the population that arrives nor the validity of any claims they may make to remain in Australia". <sup>(11)</sup>

If numbers were relevant, many disadvantaged countries would have a good excuse to provide the bare minimum. et, the Inquiry heard evidence that even countries dealing with massive numbers of traumatised people - such as in central Africa - were assessing the nutritional intake of children.

I agree that the provision of services to a refugee or asylum seeker population is complex. The way the system is structured means that one is essentially running small separate towns in isolated parts of the country. But this is a poor excuse for such a wealthy country as Australia.

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1. s109 Australian Constitution

2. Koowarta v Bjelke-Petersen (1982) 153 CLR 168.

3. Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106.

4. Ex parte H V McKay (1907) 2 CAR 1.

5. In the Equal Pay Case of 1969 - (1969) 127 CAR 1142 - the principle adopted was 'equal pay for equal work'. This was readily circumvented by labelling female workers differently - eg women were called seamstresses whereas men were called tailors. The principle in 1972 was 'equal pay for work of equal value': (1972) 147 CAR 172.

6. Re Cattle Industry (Northern Territory) Award (1966) 113 CAR 651.

7. Australia undertakes a two stage adoption process of (1) signature which indicates intention to become a party in the future and (2) ratification which makes the treaty binding within a stipulated period. Between signature and ratification the federal government now undertakes a detailed State and Territory government consultation process.

8. Refugees Convention in the Migration Act 1958; Torture Convention in the Crimes Act 1914 (section 23Q) and the Extradition Act 1988; ILO 100, ILO 111, ILO 156 and ILO 158 in the Workplace Relations Act 1996.

9. Migration Act S72; Migration Regulations 2.20(7) and 2.20(9)

10. Transcript of evidence, DIMIA, Sydney 5 December 2002, p. 37

11. Transcript of evidence, DIMIA, Sydney 2 December 2002, p. 6