

THE LOST CHILDREN – AUSTRALIAN TREATMENT OF JUVENILE ASYLUM-SEEKERS

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INTRODUCTION

This paper examines Australia's treatment of child asylum-seekers or refugees.

I argue that our treatment of the children already arbitrarily detained within Australia and all the others for whom the Pacific solution is proposed is inhumane; fails to take account of the Crown's responsibilities as *parens patriae*, the children's guardian of last resort; and puts us in breach of our international human rights obligations,

I suggest a different approach. Australian laws might be interpreted, adapted, used or changed to protect the rights of children, our international reputation and civil society. This could be achieved without conceding the sovereign power of the people and our national sovereignty, contributing to the profits of people-smugglers and organised crime, weakening our borders or undermining parental responsibility.

We need an efficient regime for dealing with all asylum seekers. We particularly need humane, civilised ways of meeting the needs and respecting the human rights of displaced children. We have an obligation as a signatory to the UN Convention on the Rights of the Child ('UNCRC') and the Refugee Convention. There is also a biological imperative. All communities care for their children. The rules for civilised treatment of children should be able to cross all barriers of ideology, culture or religion.

The 'war on terrorism' has taken us, as terrorism does, towards wars waged against ordinary people and, necessarily, many more asylum seekers. Yet

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even as Britain's Prime Minister, Tony Blair, announced support for that 'war' on 2nd October 2001, he called for a new moral world order, for all 'the children of Abraham'. 'The world community', he said, 'must show its capacity for compassion, as for force.'

It will only happen in a culture imbued with respect for human rights. This paper suggests some ways of creating that culture.

ABOUT CHILDREN'S RIGHTS

I helped to establish the Office of Children's Rights Commissioner for London at the beginning of 2000. This non-government working model of a children's rights commissioner is founded on the UNCRC as a benchmark of good government. The Office was set up by a consortium of charities¹ and children's groups.² and designed to make the case for a statutory children's rights commissioner for all British children.

In other European countries, independent offices - children's ombudsmen or commissioners - have been established under legislation. Their role is to involve children in government decision-making and to act as watchdogs over children's human rights, influencing government decision-making for children and public perceptions of their status and value.³

The Office of Children's Rights Commissioner for London seeks to fulfill a similar function for London which now has a new regional government, the Greater London Authority ('GLA'). In November 2000 London's Mayor, Ken Livingstone, adopted a children's policy based on the UNCRC. That policy commits the GLA to considering the effect on, involving and being

¹ National Lottery Charities Board, the Calouste Gulbenkian Foundation, Bridge House Estates Trust Fund.

² Save the Children Fund UK; The Children's Society, and the National Society for the Prevention of Cruelty to Children. The Office was auspiced by the Children's Rights Development Unit (later the Children's Rights Alliance for England).

³ Australia's three 'children's commissioners' (Queensland, New South Wales and Tasmania) are not so much 'human rights institutions' (their enabling legislation does not mention the UNCRC, for instance) as with child protection, as is the first formal Children's Commissioner, appointed in Wales in 2001.

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accountable to, children in all its strategies: economic and spatial development; public transport; housing; the environment and culture, not the 'obvious' services, such as education and child protection, provided by the next layer down, the boroughs. The Children's Rights Commissioner is helping to develop the GLA's children's strategy to implement that policy.

London has 1.65 million children – officially – out of a population of 7 million. It does not know how many more refugee and asylum-seeking children it also hosts. London is also the first point of call for nearly all of the 75,000 to 80,000 asylum seeker families that come to the UK each year

The UNCRC rights fall into three categories: children are entitled to the provision of the necessities of a decent life; protection from all forms of violence and exploitation, neglect and cruel or inhumane treatment; and participation in the decisions that affect them and in the life of their community.

It is quite usual in the UK for political leaders and administrators to talk in terms of human rights. It is somewhat less likely in Australia.

One reason for this difference lies in Britain's membership of the European Community. It grew out of the devastation of World War II and its clear proof that political regimes are both unstable and hazardous to their own citizens and their neighbours unless they have internal mechanisms for protecting human, civil, political and social rights that meet internationally agreed human rights standards.

Another reason is the emphasis in the Blair administration on popular participation, including children's participation in government planning. There is a growing understanding that civil society and good government depends on the quality of democratic conversation among citizens and with their

government;⁴ that children are citizens too:⁵ that if they don't learn to express a view and experience it being taken seriously, they won't do it as adults, and that this has political ramifications.⁶

Children are by definition, development and dependency, the most powerless of all social groups. They do not have access to the means of exerting power, or protecting their own vulnerability. They are restricted in the extent to which they can make decisions about their own lives. They do not play any part in the processes which determine the policies which affect them. They, unlike other subjects of discrimination, are peculiarly unable to organise themselves politically.⁷ The only way that they gain power is by losing their unique quality: by growing up.

Thus, we have rules to prevent children from being exploited. All their relationships embody power disparities. They typically need the resources provided within these relationships to protect their vital interests. They can't choose or find other ways to access the resources that the more powerful party controls in their discretion.⁸

We owe them our care, because as Justice Gaudron said in Teoh⁹:

'Citizenship involves more than obligations on the part of the individual to the community constituting the body politic of which he or she is a member. It involves obligations on the part of the body politic to the individual, especially if the individual is in a position of vulnerability . . .

⁴ Putnam, R. *Making Democracy Work Civic Traditions in Modern Italy*, Princeton University Press. 1993.

⁵ "Democracy. the only system capable of reflecting the humanist premise of equilibrium or balance. The key to its secret is the involvement of the citizen.' Saul, John R. The Doubter's Companion. Penguin PP.61, 94. Ontario. 1995

⁶ See Alderson P. *Young Children's Rights: Exploring Beliefs, Principles and Practice*. Part of a Series, Children in Charge 10. Jessica Kingsley Publishers, London and Philadelphia 200. PP130-137.

⁷ Rayner, M. *Taking Seriously the Child's Right to be Heard*, in Alston P. and Brennan G (ed.s) *The UN Children's Convention and Australia*. Human Rights and Equal Opportunity Commission, Sydney, 1991.

⁸ Goodin Robert E. *Protecting the Vulnerable: a Re-Analysis of Our Social Responsibilities*. University of Chicago Press, 1985. Pp195-196.

⁹ *Teoh v Minister for Immigration and Ethnic Affairs* (1995) 183 CLR P.304

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So much was recognised as the duty of kings . . . No less is required of the government and the courts of a civilised democratic society.'

It may be hard to say exactly what some UNCRC rights mean in practice – for example, the right to a decent quality of life¹⁰ - but as MacCormick ¹¹has pointed out, sometimes a 'right' is so clearly of such importance that it would be wrong to deny it or withhold it from any person, and we must simply find a remedy and vest someone with a duty to exercise it.

There is no remedy for a breach of the UNCRC rights within Australia. It has not been implemented through a federal statute –, as, for example, the Race Discrimination Act 1975 implemented the Convention on the Elimination of All Forms of Racism. We have no bill of rights or Human Rights Act. Nevertheless, the Common Law can be interpreted having regard to our international human rights obligations.

In the Teoh case, the High Court was asked to review the fairness of the process by which immigration authorities decided to deport the father of dependent, Australian-born children. The Court found that UNCRC had an effect on the (unwritten) rules of natural justice. Australia's ratification established a 'legitimate expectation' that government officials would consider Australia's international obligations, or give the affected parties the chance to argue that they should be considered, before they made their decision.

It was a small 'remedy', a procedural right, but it sparked what I describe as an immoral panic in some government circles. The then Labor Attorney General and the Minister for Immigration jointly announced that it was not Australia's intention to be bound by the human rights treaties it ratified and such an expectation would henceforth not be 'legitimate'. They drafted legislation to implement this policy, though failed to pass it before they lost office. The present Attorney General has presented even wider legislation.

¹⁰ Article 27

¹¹ MacCormack N. *Children's Rights: a Test-Case*, in *Legal Rights and Social Democracy: Essays in Legal and Political Philosophy*. Clarendon Press. Chapter 8, PP 154-156. 1982
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There was no similar concern in the UK in February in 2001 when a British Court reviewing a prison governor's decision to disclose a departing prisoner's 'spent conviction' for sexual offences to child protection authorities responsible for his children. The Judge concluded that government agents are indeed expected, when exercising discretions and choices affecting children, to consider their country's binding promises under other international treaties. In the particular case, the prisoner's 'right to family life' or privacy was affected by his government's promise to protect children contained in the UNCRC.¹²

The UK has, as Australia has not, chosen to embrace a human rights culture, which we have eschewed. Britain enacted the Human Rights Act in 1998. For the first time in a Common Law country public authorities are required to comply with international human rights obligations as a matter of law.

Australia should follow suit.

BRINGING RIGHTS HOME

Most of the European Convention on Human Rights ('ECHR') became a part of domestic law¹³ when the Human Rights Act came fully into effect on 2nd October 2000. This statute introduces international human law norms and principles into an ancient system of customary law – a system Australia inherited - without taking away the sovereignty of the people.

Some of the ECHR Articles – quite like the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights, which Australia has signed - are absolute, such as the right to life and prohibition of torture or inhuman or degrading treatment or punishment (Articles 2 and 3).

¹² *R v Governor of HM Prison Dartmoor ex parte N*. QBD Administrative Court, Turner J. LTL 19/2/01. TLR 19/3/01. ILR 2/4/01. Document No.C0100794, Lawtel.

¹³ Articles 2-12 and 14 of the *Convention* and 103 of the 1st Protocol and 1 and 2 of the 6th Protocol. There are qualifications to most Articles and Article 14 (prohibiting discrimination) is applicable only to discrimination with respect to civil rights under the *Convention* and in conjunction with other Articles.

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Others are limited in their terms - the right to liberty and security and the right to participate in a fair, public and impartial tribunal (Articles 5 and 6), for example.

A third, broad group contains 'qualified' rights – those that must be balanced against the wider public interest (Articles 8-11), which include the right to respect for private and family life (perhaps rightly affected by laws that protect children from sexual predators), and freedom of thought, conscience and religion. These are to be interpreted having regard to four questions:

- Is the interference in accordance with the law?
- Is the interference in pursuance of a legitimate aim?
- Is it necessary in a democratic society? and
- Is it proportionate?

British Courts must now interpret UK statute law so it is, if at all possible, consistent with the Convention. They must have regard to decisions of the European Court of Human Rights in Strasbourg, and of other national courts interpreting the same human rights principles, both under other international treaties and foreign human rights laws. In many instances the courts have taken account of the 'margin of appreciation' in applying Convention rights to British culture and circumstances.

If primary legislation is simply incompatible with Convention rights, a higher court can make a 'declaration of incompatibility'.¹⁴ All that does, if the Government accepts the declaration or a ruling by the European Court, is enable Ministers to change incompatible legislation by a speedy 'remedial order' without need to take an amendment in a Bill through Parliament. If the Government does not agree with the court's declaration, an aggrieved person may take the matter to the European Court of Human Rights in Strasbourg. Ministers responsible for new laws must now make a statement on the compatibility of their Bill with Convention rights.

¹⁴ The courts can set aside subordinate legislation, such as rules and regulations, if found incompatible, so long as the governing primary legislation does not specifically require the incompatibility.

The Human Rights Act also places requirements on ‘public authorities’ to act in a way that is compatible with all Convention rights: this includes government ministers, local authorities, tribunals and ‘any person certain of whose functions are functions of a public nature’.

These new principles are clearly invigorating the Common Law tradition in British courts and heightening public awareness of human rights. The new process is democratic, inviting public scrutiny and debate on crucial issues of trust and responsibility. It seems not to have initiated a landslide of trivial litigation, though it has, at times, inconvenienced administrators.

Thus, in September 2001 a single judge in the Administrative Court ruled that it was unlawful for government automatically to detain asylum-seekers upon entry to the UK pending ‘fast-track’ determination of their claim.¹⁵ The right to liberty of the person is a qualified right under the Convention. The Secretary of State for the Home Office appealed, and won¹⁶. The Court assessed the lawfulness of the initial detention; and the purpose, necessity (in a democratic society) and proportionality of a policy of detaining asylum seekers for up to 10 days to expedite decisions on their applications for asylum¹⁷; the likelihood of absconding and the effect on efficiency, and that detention conditions were appropriate for asylum seekers rather than convicted prisoners. The court considered it all and concluded that a (very short) period of detention was not an unreasonable price to pay for speedy resolution of asylum claims.

We could, and should, be able to review our treatment of child refugees in the same way in Australia. This isn’t possible. Because Australia has no human rights regime, no bill of rights, no Human Rights Act mechanism these issues

¹⁵ *R v Secretary of State for the Home Department ex parte (1) Shayan Baram Saadi, (2) Shenar Fazi Maged, (3) Dilshad Hassan Osman and (4) Rizgan Mohammed*. QBD Administrative Court (Collins J) 7/9/2001.

¹⁶ *R v Secretary Of State For The Home Department, Ex Parte (1) Shayan Baram Saadi (2) Zhenar Fazi Maged (3) Dilshad Hassan Osman (4) Rizgan Mohammed* (2001) [2001] EWCA Civ. 1512, 17/10/01

¹⁷ Art.5 (1)(f) of the *European Convention on Human Rights* recognised the right of states to detain those who sought entry to those states. Proportionality arose in terms of how long the detention was to be for.

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fall to be decided according to general principles of statutory interpretation, and loose considerations of public policy.

The Federal Court's consideration of the rights and wrongs of the Tampa 'rescuees' is a case in point.¹⁸

You know the story. On 31st August 2001 a Melbourne solicitor called Eric Vadarlis and the Victorian Council for Civil Liberties asked the Federal Court to issue two of our most ancient prerogative writs, Mandamus and Habeas Corpus, for the benefit of 433 people who had been rescued by the MV Tampa, then prevented from landing on Christmas Island, where they could have made an asylum claim.

These are ancient prerogative writs, developed well before any notion of 'human rights'. Mandamus requires officials to perform a duty. Habeas Corpus is used to require a person to be brought before a court, to determine whether they are lawfully detained.

Had the 'rescuees' been allowed on shore the Migration Act would have permitted them to make asylum claims. The Federal government very much did not want this to occur, one presumes because it thought it highly likely the applicants fulfilled the requirements for refugee status.

After Federal Court Justice North ordered that the rescuees be brought to land and released an appeal court reconsidered the matter. Three smart, judicially detached men arrived at different decisions, for different reasons, focusing on different aspects of the two issues argued before them: whether the Commonwealth had the executive power to expel the rescuees from Australia and detain them for that purpose, and whether or not they were 'detained' at all, on the Tampa.

¹⁸ *Ruddock v Vadarlis* (2001) HCA 1329 18/9/0

Justice French decided that the Commonwealth must win. Its sovereign power to decide who might enter Australia, to prevent that entry and to compel persons to leave had not been lost by the enactment of the 'comprehensive regime' of the 1958 Migration Act. The fact that our government had ratified the Refugee Convention - didn't fetter its exercise of power, though it might affect how it should be done procedurally (at least considering the Convention as a matter of natural justice, in after Teoh). He thought that the executive had not breached its Convention obligations, anyway. He also thought that the rescuees were not 'detained' because they had no right to enter Australia and the Commonwealth had the power to stop them, 'whatever might be thought about its policy or whether it was exercised wisely or well.' Their detention was the result of the Norwegian captain's decisions rather than the high humanitarian purposes of the SAS troops on board

Chief Justice Black came to the opposite conclusion. He thought that the only executive authority to detain anyone, in modern times, has to come from statute. There was no such power in this case. The Common Law prerogative to expel or exclude non-citizens had last been used in 1771 and just didn't exist in Australia in the 21st century. Australia's laws must now be construed having regard to its treaty obligations, and the Executive's powers should be exercisable consistent with Parliament's provision for the satisfaction of those obligations. Our 'national interest' included Australia's protection obligations under the Refugee Convention. The power to detain was in the Migration Act which was denied by the government decision to board the Tampa and close Christmas Island harbour. As to Habeas Corpus, '[I]n the end, the focus must be upon the ultimate consequences, for the freedom of an individual, of the act or series of acts by which detention is brought about.' Habeas Corpus was a fundamental protection of a fundamental right. The writs should stand.

Justice Beaumont, however, agreed with Justice French that the case should fail. His far from dispassionate judgment focused on defects in the pleadings and the technical nature of the remedy of Habeas Corpus, and his explicit

disapproval of the purpose of bringing the application – to facilitate the asylum claims.

The case has since gone to the High Court for determination, and I am glad of it. It would have been better if the human rights issues – the balancing of individual liberties and the public interest – could have been argued without the need to review Elizabethan authorities on the nature of the forms of action.

CHILD REFUGEES

Since then, the tide of human misery has not slowed and our response – warning shots, boarding, rejection, detention and the creation of gulags or prison islands – are looking increasingly shonky. We need a better way.

We are afraid of being swamped by asylum seekers, but our fear should be reality-tested. London, as I have mentioned, is the first port of call for most of the UK's asylum-seekers, 75,000 to 80,000 a year. In the experience of those working with homeless asylum-seeker families, and according to a recent report¹⁹ the real numbers could be 400,000 a year, including an average of 5 to 8 other family members than the asylum-claiming head of the family. London's population is 7 million people.

Australia is a vast and isolated island continent. We have received less than 12,000 asylum-seekers by sea. The majority have white faces and come by air, and 'overstay'.

Australia is also an immigrant nation. We welcome between 70,000 and 108,000 new migrants, mainly from the UK or NZ, every year. More than five and a half million people have come to Australia as new settlers in the last 56 years. More than 590,000 were refugees or humanitarian admittees. We offer 12,000 places to people already vetted by the UN, and found to be refugees, but didn't fill our quota last year.

¹⁹ Centre for Policy Studies, *Welcome to the Asylum*. London 2001.

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If the Indonesian boat had not foundered in October 2001, the 353 dead women and children and men would have been detained when they arrived in Australia. In January 2001 there were 2228 refugees in immigration detention, including 500 children.²⁰ Of all the UK's refugees just 1787 were detained as at 31 May this year, a British and European record.²¹ In October 2001 there were at least 663 children in Australian immigration detention, of whom 73 were unaccompanied minors. None of the British detainees are children, and unaccompanied minors are 'looked after' by the child protection system. In Australia, nearly all of these hundreds of children are detained in camps with adults. YOU MIGHT ADD THAT IN SEPTEMBER 2001 AN AUSTRALIAN FEDERAL COURT JUDGE FOUND THAT AUSTRALIA'S OBLIGATIONS UNDER UNCRC AND TO PROTECT THE RIGHTS OF CHILDREN WERE SIMPLY OVERRIDDEN BY THE MIGRATION ACT (RICHARD CHISHOLM'S DECISION)

Mandatory detention was introduced by Labor in 1992. Since 1997, the Commonwealth maintains its six detention facilities under contract with Australasian Correctional Management – Wackenhut, a US private prison management company. They do not pretend to be child welfare professionals.

This detention is mandatory and it is therefore arbitrary. This is prohibited under many of Australia's international obligations, including Article 31 of the Refugee Convention (which allows only 'necessary' restrictions on the movement of refugees), the International Covenant on Civil and Political Rights and Article 37(b)(c) and (d) of the UNCRC. This requires that no child be subject to arbitrary detention, inhuman treatment or detention without prompt independent review, and that detention be used only as a 'a measure of last resort' and for the 'shortest period of time,' and that a child has the right to legal assistance. (DIMA considers that its officers may not give arrivals information about their right to legal assistance, on an interpretation of Section

²⁰ Department of Immigration and Multicultural Affairs, Australia Fact Sheet 81, *Unauthorised Arrivals by Air and Sea*, 3 January 2001.

²¹ Refugee Council data 7 September 2001.

256 of the Migration Act.) The UN's Human Rights Committee has stated that prolonged mandatory detention pending determination of refugee status may be 'arbitrary' within the meaning of the Refugee Convention unless the detention is on the basis of factors particular to individual such as likelihood of absconding and lack of cooperation – illegal entry is not enough.²²

Many of these children have been detained in difficult, deleterious and (for some) dangerous conditions for months and even years. Independent reviews of asylum-seeker detention have been carried out by HREOC²³, the Ombudsman and on behalf of the Minister for Immigration²⁴ by a standing senate committee²⁵ and by Professor Richard Harding, WA's independent Inspector of Detention Facilities²⁶

On even the most generous or partisan interpretation of their findings, children should not be kept in detention centres.

There is no capacity in detention centres to separate families from the general population. Article 37 of UNCRC requires that children should not be detained with adults unless it is in the best interests of the child 'not to do so'. Article 3 makes a child's best interests a primary consideration. The child also has a right to live with and enjoy the protection and assistance of their parents – as the UNCRC preamble states, '*the child, for the full and harmonious development of his or her personality, should grow up in a family environment of love and understanding.*' UNCRC Article 9 requires that a child not be separated from parents against their will except when it is necessary in the child's best interests.

²² *A v Australia*. Communication No 305/1988, Human Rights Committee Report 1990, Volume II. UN Doc. A/45/40

²³ Human Rights and Equal Opportunity Commission, *Those Who've Come Across the Seas*, AGPS 1998 and more recently (2001) the Human Rights Commissioner's review of 'inhumane' detention conditions in Woomera. www.humanrights.gov.au

²⁴ Commonwealth Ombudsman, *Report of an Own Motion Investigation into the Department of Immigration and Multicultural Affairs' Immigration Detention Centres* March 2001, Parliament of Australia. Flood, P. *Report into Immigration Detention Procedures*, Parliament of Australia, February 2001.

²⁵ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Completed Inquiry: Visits To Immigration Detention Centres.*, Parliamentary Report, Australia, p 1: June 2001

²⁶ ABC TV News 30 October 2001

The conditions under which we detain children not only breach international guidelines for the detention of prisoners, let alone children,²⁷ but quite possibly our international obligations under the 1987 Convention Against Torture or other Forms of Cruel, Inhuman, or Degrading Treatment and Punishment.

What is life like, for children in immigration detention? It means being under constant video surveillance, being addressed by your number, not your name; having no play facilities and sharing sparse recreation space with adults (I have affidavit evidence that children detained in Port Hedland are expected to use the ball ground between 2 and 2.30 – the hottest time of the day). There may be no medical facilities for mentally ill children, no paediatricians, and interminable queues, boredom and regimentation. Child detainees live behind razor wire, surrounded by uniforms, identification badges, roll calls and searches. Their food is prepared by strangers, not by parents, queued for and eaten on schedule or not at all (In one case reported to me by a visitor, guards had told the parents of an 8 month old baby they were ‘there to look after adults not children so there was no baby food.’ Her parents claimed she lost 3 kilos in one week.). It means children seeing adult distress and even violence, watching batons, riot shields, water canons or gas being used.

It means living in a prison under the eye of men and women who were not employed to protect children and may not understand their responsibilities. Our government simply does not see this. When claims were made that a detained child had been sexually abused in the Woomera detention centre late in 2000, the Minister responded that opponents of mandatory detention of children had fabricated them.²⁸ It was not so, a subsequent ministerial investigation showing that the complaint had been mishandled²⁹. During the Flood and Ombudsman inquiries, criticism was made of the inadequacy of

²⁷ Guideline 5. *Detention of Persons under the age of 18*. UNCRC Articles 3,9,20, 22 and 37. *UN Rules for Juveniles Deprived of their Liberty*. UNHCR *Guidelines on Refugee Children*.

²⁸ The Australian. *Ruddock dismisses sex abuse as hearsay*. 22/11/00

²⁹ Flood, P. *Report into Immigration Detention Procedures*. Parliament of Australia February 2001

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efforts to protect women and children from threats of sexual assault, and excessively criminal treatment of children.

Perhaps the best description of what detention means for children is a personal one.

This is Arnold Zable, writing in the Age on 12th October:

'The imprisonment of children is a form of slow torture. I have seen the effects first hand. I first met children from the Maribyrnong detention centre in January. They ranged in age from eight months to teenagers. On the Friday before Christmas last year, 52-year-old Tongan inmate Viliami Tanginoa jumped from a basketball ring to his death after an eight-hour stand-off with detention centre guards. He had just been told that he was to be deported to Tonga for overstaying his visa. Children at the centre had come to know him as a gentle man. A few weeks later, on January 6, the tension was compounded when a 17-year-old detainee cut his throat. Some of the children heard the commotion that followed. This is the tense atmosphere in which child detainees live. I have now visited the Maribyrnong detention centre on many occasions. I have spoken to psychologists about what I have seen and heard. The children display the classic symptoms of trauma resulting from incarceration. These include bed wetting, sudden bouts of anger and periods of withdrawal and depression. Some wake up screaming from nightmares. Others have recurring dreams of their parents being arrested and taken from them. Some symptoms, say psychologists, may stay with these children for the rest of their lives.'

Torture is any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on someone by way of punishment, the intimidation or coercion of themselves or a third person, or for a discriminatory reason, inflicted by or at the instigation of or with the consent or acquiescence of a person acting in an official capacity. Mandatory detention is meant to

deter people-smugglers and their potential prey. Objectively, it seems a particularly severe punishment for our new class of 'illegitimate' children: those who come across the sea without the right papers.

SO WHAT SHOULD WE DO?

1. Firstly, let us get the level of debate out of the gutter and into the realm of reason. This is not a time for fear mongering and point-scoring. Our treatment of child asylum seekers is an issue of child protection, civilised compassion and respect for human rights.

2. Secondly, leaving it to the political process, as governments prefer, is not adequate when it comes to children. Whichever administration is in office after 10th November should be asked to examine the UK's Human Rights Act model and consider its appropriation to Australian conditions. It could be readily adapted to our version of the Common Law and our constitutional arrangements. A domestic human rights regime would allow us to 'acclimatise' human rights to Australian conditions; open up some judges' critical horizons and the legal system's capacity to tackle the critical issues of a modern democracy, the proper balance of individual liberties and the public interest, while preserving the role and sovereignty of Parliament, and the executive's responsibility to guide and lead.

3. Third, we should, forthwith, release juvenile asylum seekers and their parents into the community. We should implement the recommendations of the Human Rights and Equal Opportunity Commission³⁰ It is nonsense to have such a body and ignore its recommendations. It recommended years ago that immigration authorities be required to find alternatives to detention unless there is convincing evidence they would be ineffective or - for individual reasons - inappropriate. We should also provide a ready means of judicial review of detention of vulnerable people – children and

³⁰ HREOC, *For Those Who've Come Across the Sea*, Recommendations 3.1-3.3. 1998

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unaccompanied minors, and mentally or physically ill detainees – and not leave it to the vagaries of *Habeas Corpus* or Four Corners.³¹

There is no need to change the Migration Act. The Minister already has power to grant ‘bridging visas’ for children, though there is no specific power to permit their parents to leave detention centres, and the release of children means forcibly separating them from those parents. But detention is a status, under the Migration Act. It permits detention of a person ‘held on behalf of an officer in another place approved by the Minister in writing’.³² They could be ‘detained’ on parole, in the community. This should be done as an urgent matter. We should be aware that providing uncertain, discretionary ‘liberty’ is in itself a breach of a person’s civil and political rights.

4. I am also not convinced that we have exhausted the possibilities of the law. In October 2001 Justice French of the Federal Court decided two applications for temporary visas made by unaccompanied children, which had been rejected by the Refugee Tribunal because they had been made out of the mandatory and fixed time limits set by the Migration Act. One failed because the applicant failed to prove that he was under 18, but the other, in a direct challenge to anyone’s sense of fairness, failed because the Act was designed to exclude him, the detaining authorities failed to protect his interests, and the Minister had a conflict in his statutory and moral duties towards the child. In Marion’s case³³ Justice Gaudron had referred to government obligations over children in³⁴ in terms of the governments and courts of a civilised society being ‘alert to . . . responsibilities to children who are, or may be, in need of protection.’

³¹ Six year old Shayan Badraie who was detained with his parents in Villawood Detention Centre in Sydney was fostered out after the ABC program, Four Corners, showed how badly he had been traumatised by his detention, on 13th August 2001.

³² *Migration Act* S. 5

³³ *JWB and SMB* (1992) 175 CLR 218.

³⁴ See footnote 1, at P. 304

5. Under another piece of federal legislation³⁵ the Minister for Immigration is the guardian of any 'non-citizen child' who enters Australia and is intended to become a permanent resident, though in practice he delegates this responsibility to the State or Territory official responsible for child protection in each of the States and territories. This would appear to either conflict with his duties to administer the Migration Act, or to require that the child's best interests take priority. So it was argued in the case before French: the time limit should not run, because the Minister was under a duty to protect the interests of the child, which included giving him advice on his entitlements and opportunities in a timely way, which should take priority over his interests in enforcing immigration legislation.

The case failed because French found that the legislation did not create a conflict, technically: the Minister had delegated his 'child care' responsibilities to welfare authorities. The sad fact was that they had not set up a regime to ensure they knew which children were under their responsibility in detention or to give them timely or any legal advice or support. It was remarkable that the child had exercise the power at all, but that simply showed his maturity, which meant that the time limit necessarily did run, despite his minority. The minister, French said, had also avoided a personal conflict by the creation of his memoranda of agreement with state authorities. It was, on the facts, not relevant to the 'time limit' under the Act that the state welfare authorities had not implemented his obligations as a wise and loving parent would do.³⁶

Is this the sort of country we have become? Because detention authorities did not tell the child about his legal entitlements, and welfare authorities did not take the trouble to ensure that their wards had proper legal advice, and the federal Minister with the primary authority to care for lone asylum-seeker

³⁵ *Immigration (Guardianship of Children) Act* 1946, Sections 4 and 4AA The Act was intended to deal with non-citizen children imported with a view to adoption in Australia.

³⁶ **Name of case to come – not reported yet and I have mislaid my copy!**

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children, and a court which has a 'black letter law' responsibility, a detained child ends up being a deported one?

Where a child's detention is concerned ³⁷ it seems obvious that ministers should see to it that the child should be actively protected. We need a Human Rights Act which would review legislation so that it is consistent with our international human rights obligations, at least under the International Bill of Rights – the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. But morally, this position vis a vis our children should be reviewed by the Australian people, in light of the obligation of the Crown to protect the interests and welfare of a child, giving priority to its *parens patriae* role. The Minister has duties of care in respect of children which transcend the merely statutory power to incarcerate: the UNCRC provides a yardstick of reasonable treatment.

5. Finally, should we not now look for an independent Commonwealth officer to review the rights of children in residential care or custody? It seems self-evident that it is inappropriate that children should be apprehended, imprisoned and deported by the same representative of the Crown as is responsible for caring for them and protecting their legal rights. The establishment of a Commissioner to protect and promote the rights of these most vulnerable children is both appropriate and proper.

AUSTRALIA'S ETHICAL RESPONSIBILITIES

I referred, earlier, to our new class of 'illegitimate' children. They are already victims of poverty, the breakdown of the rule of law and foolish or desperate parents. They have been exploited by people smugglers, who have eagerly seized the vast financial opportunity created by the fact that the number of people seeking to escape persecution and poverty far exceeds the number

³⁷ *Bateman's Bay LALC v ACBF* (1998) 194 CLR 247, at 257-267.

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who are welcome in safe and wealthy countries. It is one of the fastest growing and most lucrative criminal enterprises in the world.³⁸

Australia has badly and unethically treated child asylum seekers.

Janusz Korczak wrote that

'Children are not the people of tomorrow, but people today. They are entitled to be taken seriously. They have a right to be treated by adults with courtesy and respect, as equals. They should be allowed to grow into whoever they were meant to be - the unknown person inside each of them is the hope for the future.'

Korczak was a paediatrician, writer, broadcaster and educator who wrote an early version of the UNCRC more than 60 years before the UN got round to it, and got around to it because of him. Korczak was perhaps the best-loved advocate of the rights of the child in Europe. He taught – by example - that it is necessary to respect the child, to learn from children, and to teach children by example that they can trust and rely on adults for respect, love and care.

What are we teaching our Australian children by the way we treat asylum-seeking children?

Korczak wrote books, gave speeches and ran 'democratic' orphanages, but he was Polish and a Jew, and gradually was forced, with his orphans, into the Warsaw ghetto. He chose to stay, though he could have saved himself, saying 'You don't leave children at a time like this.' He could have but did not encourage children to escape, continuing to believe in the goodness of human nature, in the face of growing evidence to the contrary. Once, towards the end, when he was asked how to respond to inhumanity, he said that, *'One must act even more humanely.'*

³⁸ Quoted from Szwarc Josef, *Faces of Racism* Amnesty International August 2001 p. 100
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His final act was truly remarkable. On 6th August 1942, he led a procession of 200 singing children behind the orphanage picnic flag onto the cattle trucks destined for Treblinka. No one came back.

Children can survive great adversity. The least Australia can do is foster resilience in these most vulnerable and damaged children. We know from the international research that 'resilient' children have had the experience of being taken seriously and treated with respect as well as authority; known love as well as discipline; understand values as well as rules. They believe that they can influence their circumstances because they have had that experience and learned those skills. They know that the world makes sense and they have a place and a value in it.³⁹

Rights ownership and resilience are closely linked. Resilient children are competent, able to seek out and take comfort, support and resources from other people that they need; thoughtful, optimistic, capable children:⁴⁰ what Goleman⁴¹ calls 'emotionally intelligent' children.

Such children have, in one way or another, experienced being treated with respect. That is how Australia should treat the children in our immigration detention centres, upon the seas and our prison islands.

The borders we need to protect are around civil society, not our island continent.

³⁹ See Rayner, M and Montague Meg. *Resilient Children and Young People*. DHSU, Deakin University, 1999. Children's Welfare Association of Victoria, 2001.

⁴⁰ Seligman, M.A. *The Optimistic Child: A Revolutionary Program that Safeguards Children Against Depression and Builds Lifelong Resilience*, Random House, Sydney. 1995.

⁴¹ Goleman, D. *Emotional intelligence*, Bloomsbury/Allen & Unwin.1995.

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