UNITED NATIONS **E**

Economic and Social Council

Distr.
GENERAL

E/CN.4/2003/G/22
10 January 2003

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Fifty-ninth session
Item 11 (a) of the provisional agenda

CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF: TORTURE AND DETENTION

Letter dated 16 December 2002 from the Chairman-Rapporteur of the Working Group on Arbitrary Detention addressed to the Chairperson of the Commission on Human Rights

I would like to refer to the attached letter dated 11 December 2002* from the Permanent Representative of Australia to the United Nations Office at Geneva. As you can appreciate, the Permanent Representative of Australia is formally requesting that his Government's comments* (also attached) to the report by the Working Group on Arbitrary Detention on its visit to Australia (E/CN.4/2003/8/Add.2), as well as my letter to him dated 3 December 2002,* be published as an official document of the Commission on Human Rights at its fifty-ninth session.

The Permanent Representative of Australia considers his request necessary, in order to ensure that the information before the Commission is appropriately balanced. I would appreciate if you could do the necessary for the attached documents to be published as an official document of the fifty-ninth session of the Commission on Human Rights under agenda item 11 (a).

(Signed): Louis JOINET
Chairman-Rapporteur
Working Group on Arbitrary Detention

* Reproduced in the annexes as received, in the language of submission only.

Annex I

FROM THE PERMANENT REPRESENTATIVE

AUSTRALIAN PERMANENT MISSION
GENEVA

11 December 2002

Justice Louis Joinet
Chairman/Rapporteur
Working Group on Arbitrary Detention

Dear Justice Joinet.

We appreciated the opportunity to meet with you and other members of the Working Group on 29 November 2002 to convey the Australian Government's concerns about aspects of your report on Australia. This was a constructive and frank exchange that left us with some hope that your report would be revised to reflect our concerns.

We were therefore disappointed to receive your letter of 3 December 2002 indicating the Working Group was not inclined to make any changes to its report. We are particularly concerned at the Working Group's reluctance to address basic factual errors and consider it incumbent on United Nations bodies such as the Working Group not to knowingly perpetuate such inaccuracies, regardless of their source.

In these circumstances, we agree with your suggestion that the Working Group submit the Australian Government's comments and your letter of 3 December to the Commission on Human Rights at the same time as you submit the Working Group's report. Indeed, we would consider this necessary to ensure that the information before the Commission is balanced appropriately

Please accept, Justice Joinet, the assurances of my highest consideration.

Yours sincerely

Mike Smith

Annex II

NATIONS UNIES
HAUT COMMISSARIAT AUX DROITS DE L'HOMME

UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS

Téléfax: (41-22) -917 9008
Télégrammes: UNATIONS, GENEVE
Télex: 41 29 62
Téléphone: (41-22)- 917 9249
Internet: www.unhchr.ch
E-mail: mazlolama.hchr@unog.ch

Address:
Palais des Nations
CH-1211 GENEVE 10

REFERENCE: G/SO 218/2

3 December 2002

Dear Mr. Ambassador,

On behalf of the Working Group on Arbitrary Detention, I would like to express our appreciation to you and to your Government for the attention given to the report of the Working Group on its visit to Australia. The written comments of your Government, which you transmitted during our talks on 29 November 2002, have been given thorough attention.

The report was adopted by the Working Group during its thirty-fourth session, in September 2002. It will be published as an Addendum to the annual report of the Working Group to the Commission on Human Rights. The Working Group suggests that, if you agree, your Government's comments and this letter be submitted to the Commission.

After the first reading of the comments transmitted by your Government, the Working Group would like to make the following general remarks:

Information on which the report is based has been collected at meetings with Government officials, as well as with a very wide range of representatives of Australian civil society, such as lawyers involved in immigration matters, clerics, psychologists, sociologists, human rights activists, and representatives of humanitarian associations. Thanks to the assistance of your Government, the Working Group was also able to visit processing and detention immigration centres and meets with immigration officers, ACM people and a considerable number of detainees.

./...

H.E.Mr. Mike Smith
Ambassador
Permanent Representative of Australia to the
United Nations Office at Geneva
Chemin des Fins 2
1218 Grand-Saconnex

We feel the need to make it clear that the Working Group's intention was to establish facts in an as objective and impartial manner as it was possible during the short time available.

We would like to give expression to our conviction that, should the report reflect factual inaccuracies on some points, this is due to the fact that we have received information from various sources, and is not due to any lack of good intention or fairness on our part. On the other hand, we wish to voice our conviction that information which might be disputable –for example, you mentioned that, as a rule, detainees are not escorted handcuffed outside the centres (information that was given to us by ACM management staff members) - does not have a decisive impact on the report.

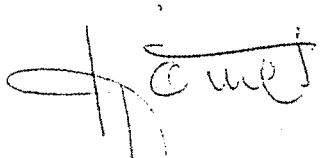
During our talks, you expressed disappointment that our report, as a whole, sheds a negative light on Australia and pays little notice to what your country has done and is always doing to welcome immigrants from oversees.

Dear Mr. Ambassador, let me assure you that the Working Group is well aware of the long-time policy of the Commonwealth of Australia to offer refuge, shelter and home, to thousands of people, who for various reasons, wished or have been forced to find a new homeland. We all congratulate and pay tribute to your Nation for that.

The critical remarks contained in the report were not intended to undermine the respect felt world-wide for past and present Australian hospitality offered to immigrants. The Working Group examined a fairly narrow aspect of the laws and practice of the system: that of mandatory immigration detention and its ensuing effects on detained unlawful immigrants. As it is expressly stated in the report, the Working Group was not mandated, and as a consequence, did not wish to make, an overall assessment on Australia' s immigration policy.

We would like to express our hope that, in this context, the Working Group' s intention –i.e., to assess the various aspects of the immigration detention system, in order to assist the authorities in Australia to comply with the requirements of international law concerning deprivation of liberty- will be better understood by your Government.

Please accept, Mr. Ambassador, the assurances of my highest consideration.



Louis Joinet
Chairman Rapporteur
Working Group on Arbitrary Detention

Annex III

REPORT OF THE WORKING GROUP ON ARBITRARY DETENTION

AUSTRALIAN GOVERNMENT COMMENTS ON THE ADVANCE COPY OF THE REPORT

The Australian Government is concerned that the Working Group on Arbitrary Detention (the Working Group) Report contains a significant number of misunderstandings about immigration detention and the law which governs it. This and reliance on a number of unsubstantiated allegations diminish the document's credibility.

Australia's detailed comments on the report are set out below.

EXECUTIVE SUMMARY

The Executive Summary sets out a number of concerns about the mandatory detention of unauthorised arrivals in Australia which are in the main spelt out in greater detail in the body of the report. Some, however, are not supported by further elaboration and others are over-simplified abbreviations.

The concerns raised in the Executive Summary and Australia's response are as follows:

(a) Automatic and indiscriminate character:

The International Covenant on Civil and Political Rights (ICCPR) requires under Article 9(1) that detention be in accordance with clearly established law. Australia's immigration detention law is consistent with this. The ICCPR does not establish how that law should operate.

(b) Its potentially indefinite duration:

As immigration detention is for specific administrative purposes it comes to an end on the occurrence of an event. The limit of detention is defined by an event. Therefore, it is not indefinite.

(c) The absence of judicial control of the legality of detention:

The report itself acknowledges that there are avenues in Australia for challenging the lawfulness of detention in the courts. In the view of the Australian Government, Australia's obligation under Article 9.4 of the ICCPR is to provide for review of the lawfulness of detention in the Australian domestic legal context.

Detainees can challenge the lawfulness of their detention in Australian courts. This allows the court to examine whether the detention is in accordance with the domestic law. If the detention is not in accordance with Australian law, the court can order the release of the person despite the provisions of s196(3) of the *Migration Act*.

In a number of recent cases, the courts have ordered the release of detainees on the grounds that their continued detention was not lawful. These cases demonstrate the right of review is a real one.

(d) The psychological impact of detention on asylum seekers who suffer 'collective depression syndrome'':

The delegation is not qualified to make judgements on the psychological impact on persons based on brief meetings with detainees. The syndrome referred to is unknown medically.

(e) The denial of family unity in several cases:

Circumstances in which families may be separated include those where families voluntarily agree to women and children being accommodated in an alternative place of detention in the nearby community and where families have separated themselves in coming to Australia. In the latter case, there are currently only two such cases where a detainee has a spouse in the community. Asylum provisions available to unauthorised arrivals in Australia are intended to protect refugees not to provide family reunion.

(f) Concern over detention of vulnerable people particularly children:

The *Migration Act 1958* provides for certain particularly vulnerable detainees eg the elderly, children, persons with medical problems to be released on a bridging visa. Moreover particularly vulnerable persons such as some women and children can be moved to alternative places of detention in the community. All unauthorised boat arrival unaccompanied minors who have not been released on a protection or bridging visa have been moved to alternative places of detention, including foster care, except for one child accompanied by non-parental adult relatives.

(g) Lack of adequate information to detainees

Information is available in a variety of ways - through briefings by Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) officers, ongoing advice from Immigration Advice and Application Assistance Scheme (IAAAS) providers, information from the DIMIA Manager at the detention facility and contact from time to time with the DIMIA case officer.

In DIMIA's experience, the issue is not the lack of information but the provision of information that the detainee wishes to hear.

(h) Lack of proper complaints mechanisms:

The draft report does not address ''the lack of proper complaints mechanisms'' other than in this statement in the Executive Summary.

In each detention centre there are mechanisms whereby detainees can make confidential complaints on any matter related to their detention to the staff of DIMIA and/or its Services Provider. A detainees' committee meets regularly with the Services Provider in each detention centre to discuss issues of concern to detainees, including complaints. Detainees also have the right to complain to the Commonwealth Ombudsman and the Human Rights and Equal Opportunity Commission (HREOC) and notices advising of these rights and the way in which to make complaints are publicly displayed around the detention centre. Detainees also take advantage of frequent visits to detention centres by parliamentarians and parliamentary committees and the Immigration Detention Advisory Group (IDAG) to raise individual and general complaints. The Australian Government contends that these multiple avenues provide more than enough mechanisms for complaints. The Australian Government believes the report does not in any way justify this statement and therefore requests its deletion.

(i) Implication of management of detention centres by a private company:

The Australian Government is of the view that for the Working Group to be commenting on this matter is well outside its mandate. Privatisation of public facilities is hardly new - indeed detention facilities, including prisons in many countries, are operated by private companies. This judgement appears to reflect personal views within the Working Group, rather than a matter relevant to international obligations.

(j) Compliance with ICCPR

The draft report states: 'The delegation notes the position of the Government, which is a party, inter alia, to the International Covenant on Civil and Political Rights, that international treaties are not self-executing and must be incorporated into domestic law by the adoption of the specific legislation.' The Working Group should note that this is not simply a 'position' of the Australian Government, but a requirement under Australia's constitutional system.

The Australian Government also wishes to clarify the effect of scheduling the ICCPR to the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*. The effect of scheduling the ICCPR (and other human rights instruments) to the Act is that it defines "human rights" for the purposes of the Act. The Commission's functions are referable back to the definition of "human rights". The scheduling does not mean that the ICCPR thereby has general effect in Australian law. However, we reiterate that this is not to say that the ICCPR has no significance for Australian law. Australia accepts that its laws and practices will be measured against the obligations in the Covenant.

Australia considered the issue of whether or not all of the obligations were met by existing legislation, or whether amendments were required, before it became a party to the ICCPR. Australia ratified the ICCPR in1980, having undertaken such a review. The *HREOC Act* was passed in 1986 and did not result from this review.

The draft report expresses the delegation's hope that the Australian Government will bring its laws into compliance with 'commonly accepted international standards, in

particular the International Covenant on Civil and Political Rights'. The Australian Government is firmly of the view that its laws are in compliance with the obligations in international law to which it is party.

II LEGAL FRAMEWORK

Para 6 The last sentence could be made more accurate if amended at the beginning to read: ''The detention provisions of the Act apply to all non-citizens unlawfully in Australiaregardless...''

Para 7 The Australian Government does not consider that the Working Group's observation on the population in detention is supported by the statistics provided.

Para 8 The Australian Government requests the deletion of this paragraph on the grounds that the Pacific strategy was not within the Working Group's terms of reference for its visit to Australia and it contains inaccuracies.

Para 9 This paragraph contains a number of inaccuracies which should be corrected. First, unlawful non-citizens who are detained for having overstayed or otherwise breached the conditions of their visas do not undergo ''entry enquiries'' after being placed in a detention centre. This process is relevant to unauthorised arrivals, not unlawful non-citizens generally.

Secondly, people are not sent to Immigration Reception and Processing Centres (IRPCs) because they have applied for asylum or any other kind of protection. While it is true that most persons in IRPCs are asylum seekers, they are usually in an IRPC [as opposed to an Immigration Detention Centre (IDC)] because they have arrived unlawfully by boat. While the IDCs are predominantly for unlawful non-citizens who arrive by air or those overstaying or breaching their visas, they also accommodate some boat arrivals and included in all these groups will be people who subsequently apply for asylum or other protection visas.

Thirdly, separation detention is an area or areas in a detention facility in which new arrivals are kept separate from other detainees. Separation detention is a management practice which maintains the integrity of Australia's visa determination process. Effective separation detention provides the Government with the assurance that any claims by unlawful non-citizens to remain in Australia are put forward by detainees without the embellishment and coaching of others. While in separation detention, detainees have access to a range of detention facilities and services, including health, welfare and recreation. Primary health checks undertaken while persons are in separation detention also assist in maintaining public health within each centre.

Para 10 The use of the term ''immigration agent'' is confusing and appears to have various meanings throughout the document. In this paragraph it appears to mean 'DIMIA case officer' and an amendment to that effect should be made.

The references to judicial review changes are largely inaccurate. The three sentences before the last sentence would be accurate if amended to read: ''An applicant may seek judicial review of an RRT [Refugee Review Tribunal] decision in the Federal

Magistrates Court, the Federal Court or the High Court. A decision of the Federal Magistrates Court or a single judge of the Federal Court may be appealed to the Full Court of the Federal Court, and subsequently to the High Court. The legislative amendments to the *Migration Act* which last year introduced the 'privative clause' did not affect this access; their effect was only to limit the grounds on which a decision could be set aside.''

The last sentence is also incorrect. The Minister for Immigration and Multicultural and Indigenous Affairs (hereinafter called ''the Minister") is equally constrained by the privative clause and has not challenged any RRT decisions subject to the privative clause since it commenced on 2 October 2001.

Para 11 The Minister can only exercise this power in the public interest and the exercise of his power is subject to judicial review. The statistics do not support the contention that ''the Minister does not seem to avail himself of this power very often.'' In 2001/2002, the Minister, in fact, exercised his power in relation to asylum seekers in 199 cases.

III. THREE ASPECTS OF THE SYSTEM OF DETENTION OF UNLAWFUL NON-CITIZENS IN AUSTRALIA

Para 12 *''The Working Group believes...the initial immigration screening may justify temporary detention of unlawful non-citizens, particularly if they are unwilling to co-operate with the authorities and if they are likely to abscond ....*
''but any deprivation of liberty must be proportionate to the aims pursued and a fair balance shall be struck between the conflicting interests...of the state to implement its immigration policy and protect the community against illegal migration on the one hand, and the fundamental right to liberty of the unlawful entrants on the other hand.''

The Australian Government endorses the Working Group view that ''any deprivation of liberty must be proportionate to the aims pursued''. The Government has determined and the Parliament has endorsed that the detention of unlawful non-citizens is necessary to determine if such persons, whether they be adults or children, have a lawful reason to remain in Australia, to facilitate identity, character, health and security checks, and if they do not to have a lawful reason to remain, to ensure that they are available for removal. Every effort is made within this framework to ensure these assessments are undertaken quickly and to effect a speedy determination of any application. Processing of applications for persons in detention receive the highest priority.

The length of the period of detention should not be considered in the abstract but must be considered alongside the reasons for detention outlined above. The period of time spent in detention can be lengthened by deliberate destruction of documents, appealing negative decisions through tribunals and courts and by detainees' non-cooperation in removal arrangements. Many detainees who have failed to engage Australia's protection obligations can bring their detention to an end by choosing to leave Australia and by cooperating in removal arrangements.

At what point during the visa application process does the Working Group believe that the risk of an unauthorised arrival absconding ceases? The experience of European countries clearly demonstrates that large numbers of failed asylum seekers who are facing the prospect of removal will abscond.

A. *Detention of unlawful non-citizens under the Migration Act 1958 is mandatory, automatic and indiscriminate*

Para 13 *"a presumption whereby each unlawful non-citizen, if not detained, represents a danger to the community.. Since this presumption is irrefutable, even when the immigration agent is convinced..."*

There is no such presumption. Detention is a consequence of Australia's universal visa system. The *Migration Act* requires that all non-citizens in Australia must have a valid visa. If not, they must be detained. Australia does not detain unauthorised arrivals as a form of punishment or to deter others from coming to Australia. The purpose of detaining unlawful non-citizens, including unauthorised arrivals, is to ensure they are available for the processing of any claims to stay in Australia, for their identity to be established and for appropriate clearances for health, character and security to be obtained and inter alia in this context, to check if there is any risk to the Australian community. In addition, detention ensures that people are available for removal if they have no grounds to remain in Australia.

The meaning of "immigration agent" is unclear in this paragraph.

Para 14 *"..conditions of detention are in many respects similar to prison conditions...surrounded by impenetrable and closely guarded razor wire ...if escorted outside the centres [detainees] are as a rule, handcuffed;..."*

This is an unbalanced view. Immigration detention is for administrative not correctional purposes. Consistent with the legislative requirement to keep people in detention, detainees are able to go about their daily life with as few restrictions as possible. Unlike a correctional setting, immigration detention is usually communal with families able to remain together and men women and children able to mix. Importantly, while the Services Provider (contracted by DIMIA to undertake detention services) is not expected to condone or accept criminal behaviour, it is required to understand the context of any disruptive behaviour and to be tolerant and give a degree of latitude towards individual expressions of anger and complaint.

Furthermore, it is incorrect to say that detainees are routinely handcuffed when escorted outside centres. In many cases, detainee excursions outside detention centres are for educational, sporting and recreational activities. Such activities include but are not limited to schooling (for children) and fishing, swimming, shopping, library visits and picnics for both children and adults. Detainees could not participate in any of these activities if they were handcuffed or otherwise physically restrained.

Adult detainees attending medical or dental appointments or making a court appearance are not routinely handcuffed: this would only occur if they were considered a behaviour management or escape risk.

Para 15 *"During talks conducted with government officials it became obvious that one of the goals of the system of mandatory detention and the way it is implemented is to discourage would-be immigrants from entering Australia without a valid visa."*

This is an incorrect assumption. Detention is for the purpose of ensuring unauthorised arrivals are available for the processing of any claims to stay in Australia, for their identity to be established and for appropriate clearances for health, character and security to be obtained. In addition, detention ensures that people are available for removal if they have no grounds to remain in Australia.

B. Detention of unlawful non-citizens is indefinite

Para 16 *"...the lengthy detention of unlawful non-citizens"*

Persons awaiting removal have been found to have no claim to remain in Australia and detention is to ensure their availability for removal. In most cases detainees can bring their detention to an end by cooperating in removal arrangements.

Para 17 *"...the Government cannot or is unwilling to return them."*

This is incorrect. Australia processes cases for removal on a case-by-case basis and achieves removals in a wide variety of individual circumstances. In addition, Australia already has in place successful arrangements with some countries to effect return and is actively pursuing negotiation of similar arrangements with other countries. Australia's capacity to remove unlawful non-citizens can be affected by other countries not meeting their international obligations to take back their nationals and by difficulties in finalising arrangements for return.

However, the largest impediment to speedy removal is the failure or refusal of detainees to cooperate in the removal process. In the great majority of cases, detainees can be removed reasonably quickly where they cooperate in the process.

Para 18 *Many...attempted to commit suicide, Some detainees succeeded.*

There has been only one instance where a detainee's death has been found to be suicide. In one other case, the Coroner delivered an open finding. These and the very few other cases of possible suicide in detention involved neither asylum seekers nor long-term detainees.

C. Lack of access to a court to challenge the lawfulness of detention

Paras 19-22 The report notes that the delegation was informed that under general (common) law, various avenues are available in Australia to challenge the lawfulness of immigration detention but then appears to query the effectiveness of these

including on the grounds that asylum seekers would have to pay for legal assistance to mount such a challenge.

The Australian Government disputes the suggestion that there is a lack of sufficient judicial review of the lawfulness of detention. As the Working Group has noted, persons in immigration detention have the ability to challenge the lawfulness of their detention via a writ of habeas corpus or mandamus. The remedies are both available and effective.

Recent jurisprudence demonstrates that detainees do challenge the lawfulness of their detention. Individuals have challenged the lawfulness of their detention on the basis that detention in their particular case is not authorised by the *Migration Act* (such as in *Al Masri*, discussed below). Alternatively, individuals have challenged the lawfulness of their detention on the basis that it is not authorised by the Australian Constitution (such as in *Chu Kheng Lim*, discussed below). Such cases demonstrate that judicial review of the lawfulness of detention is readily available and that it is utilised.

Constitutional limits on the power to detain

In order to understand how the basis on which detainees challenge the lawfulness of their detention via a writ of habeas corpus or mandamus and the remedy of declaration, it is necessary to understand the limits imposed on the legislature and the executive, by the Australian Constitution.

The Australian Constitution is structured upon, and incorporates, the doctrine of the separation of judicial from executive and legislative powers. As a result of Chapter III of the Constitution, the legislature does not have the power to confer judicial authority or power on the executive.

Australian courts have held that some functions are, by reason of their nature or because of historical considerations, essentially and exclusively "judicial" in nature. "Punitive" detention is generally considered to be such a function.

In *Chu Kheng Lim v The Minister for Immigration*, the High Court considered the constitutional validity of laws that purported to authorise the executive to detain aliens. The High Court noted that aliens (unlike citizens) are subject to removal or expulsion, and that the legislature can authorise the executive to remove and expel aliens. The High Court held that the laws concerning immigration detention could be valid:

> "if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered."

The High Court stated that:

> "if the detention which those sections require and authorize is not so limited, the authority which they purportedly confer upon the Executive cannot

> properly be seen as an incident of the executive powers to exclude, admit and deport an alien. In that event, they will be of a punitive nature and contravene Ch. III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates."

The legislature cannot authorise detention that exceeds the limits set by the High Court in *Chu Kheng Lim*.

Interpretation of the Migration Act

In a number of recent court cases (eg *Al Masri* and *Al Khafaji*), the courts have ordered the release of detainees on the grounds that their continued detention was not lawful, as it was no longer authorised under the *Migration Act*.

Accessibility

A writ of habeas corpus or mandamus or the remedy of declaration can be sought from the Federal Magistrates Court, the Federal Court or the High Court.

Persons in immigration detention are exempt from paying court fees in the Federal Court and the High Court. This is because fees are not payable where the applicant is lawfully detained in a public institution and the courts have interpreted this to include immigration detention.

Courts seek to expedite all proceedings where persons are in immigration detention. Applications for these writs would generally be dealt with as a matter of urgency.

Australia does provide legal assistance in certain cases for detainees to challenge the lawfulness of detention. However, it does not accept it is under an obligation of general application to do so.

Under the Commonwealth Legal Aid Guidelines, detainees have access to legal assistance for Commonwealth matters through State and Territory legal aid commissions. This assistance covers judicial review, in relation to proceedings which deal with a migration matter, including a refugee matter, where:

- there are differences of judicial opinion which have not been settled by the Full Federal Court or the High Court; or
- proceedings seek to challenge the lawfulness of detention.

As is the case with all other persons applying for legal aid, detainees' applications are assessed under certain eligibility criteria which includes means and merits tests.

If an application for legal aid is rejected, there are other Commonwealth legal assistance schemes that may be relevant. Under the Commonwealth Public Interest and Test Cases Scheme, assistance may be available, subject to certain eligibility criteria, in cases involving questions arising under a law of the Commonwealth which are considered to be of public importance either because they raise matters in the public

interest or the questions are in the nature of a test case. Under the statutory scheme provided for by section 69 of the *Administrative Appeals Tribunal Act* 1975 (Cth), assistance may be available to a party to proceedings before the Administrative Appeals Tribunal, or on appeal from that Tribunal to the Federal Court, in relation to decisions made under the *Migration Act 1975* (Cth) that are reviewable by the Tribunal. This may include, for example, certain decisions of the Minister or his delegate to refuse or cancel visas, including protection visas, and certain deportation decisions.

A detainee can challenge the lawfulness of their immigration detention in the courts in Australia and it therefore is wrong to assert that there is a lack of sufficient judicial review of detention.

The Australian Government requests that paragraph 19 be amended and paragraph 22 be deleted from the report.

IV. COMPLIANCE WITH INTERNATIONAL STANDARDS

Paras 23-27 The Australian Government rejects absolutely the attribution to it of a view that 'international law does not come into play' in paragraph 23. Like every other party to the ICCPR, Australia accepts that its laws and practices will be measured against the obligations in the Covenant. It would appear that the Working Group has sought to wrongly attribute a general view to Australia, drawn from Australia's correct view on one particular Article. Article 9.4 provides for the 'lawfulness of detention' to be tested by a court. It is quite clear in the *travaux preparatoires* that 'lawfulness' is a reference to lawfulness under domestic law and not lawfulness under international law.

It appears from paragraphs 23-27 (and paragraph 4 of the draft report's Executive Summary) that there may be a degree of confusion over the Australian Government's views on the issue of the significance of international obligations and their status.

As in many other countries, treaties do not form part of Australian law unless and until they are incorporated into domestic law. The Australian Government sought to clarify this issue for the Working Group and gave it a written paper on the matter (see attached). Further, Article 2.2 of the ICCPR concerns implementation. It provides:

> 'Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.'

The Australian Government is firmly of the view that Australian law, policies and practices do give effect to Australia's treaty obligations, in a manner that falls completely within Article 2.2.

In this regard, the Australian Government, before becoming a party to a treaty, examines domestic law, policies and practices to see whether they comply with the prospective treaty obligations. Where there are deficiencies, legislative or other action may be taken so that Australia is in a position to give effect to its obligations under the treaty.

Consequently, the Australian Government objects in the strongest possible terms to the statement in paragraph 24(b) that Australia is 'evading' its obligations under the treaties to which it is a party, including the general international legal obligation, reflected in Article 26 of the Vienna Convention on the Law of Treaties, to perform treaty obligations in good faith. The Australian Government requests that this statement be deleted from the report.

The Australian Government does not dispute that it is legitimate for the Working Group to take the ICCPR into consideration, in examining Australia's compliance with international law (paragraph 27).

With respect to paragraphs 25-26, the Australian Government does not dispute that it is legitimate for the Working Group to have regard to relevant reports of the Human Rights and Equal Opportunity Commission. However, the Working Group should note that the Commission is not a court and its views are not determinative.

V. SUBJECTS OF CONCERN TO THE WORKING GROUP

A. *The detention of vulnerable persons*

Para 28 *...essentially of concern are: children (especially young children/unaccompanied minors) the physically or mentally handicapped, elderly persons, pregnant women and women who are alone.....*

There is scope under the Migration Act to release certain detainees considered vulnerable on a Bridging Visa, which allows the holder to reside lawfully in the community while they await a decision. A bridging visa may be granted where a detainee is:

- under 18 years old (including unaccompanied minors) and it is considered to be in their best interests; or
- is over 75 years old; or
- has a medical condition which cannot be adequately treated in detention.

Furthermore, within the mandatory detention framework and consistent with the Migration Act, the Australian Government takes innovative approaches to detention arrangements. These arrangements seek to respond to the needs of particular groups, such as women and children and unaccompanied minors. All unauthorised boat arrival unaccompanied minors who have not been released on a protection or bridging visa have been moved to alternative places of detention, including foster care, except for one child accompanied by non-parental adult relatives.

Para 28 *"As of 3 May 2002, 170 minors (65 girls and 105 boys, of whom 5 are unaccompanied) were in detention."*

As at 8 November 2002, there were 137 minors comprising 59 females and 78 males in immigration detention, including 24 in alternative places of detention. Of the five unaccompanied children in immigration detention facilities during the Working Group visit, four were in the care of an adult relative, such as an aunt or uncle.

Para 29 *"These observations are corroborated by those made in the June 2002 report of the Joint Standing Committee on Foreign Affairs Defence and Trade [JSCFADT]"*

The Minister commented publicly at the time of the JSCFADT Report's release that the report was superficial and lacked analysis. The JSCFADT itself conceded that the report was not the result of the normal enquiry process undertaken by the Committee. The Report contains allegations that were accepted at face value by the Committee without checking. The JSCFADT did not seek a range of views and test the evidence in public hearings, nor, despite extensive Departmental briefings, did it raise specific allegations that could be investigated.

Unsubstantiated allegations do not provide corroboration of untested observations by the Committee.

Paras 31 and 32 The Working Group should note that "recurrent behaviour problems" are not the experience of all children in detention.

The statistical report cited inaccurately summarises the data supplied by DIMIA and does not seek to qualify those parts of the data related only to minors. Only 20 (or less than 8%) of self-harm incidents quoted in the statistical

report related to minors and it is likely that some of these involved the same minors. The Working Group should note that the "observations" of parents and former centre staff are allegations that are untested in any way.

Para 33 *"....DIMIA has fitted out several houses in an urban area...for four families.... [Participants in the Woomera Housing Project] were enclosed by barbed wire and under the surveillance of female agents of Australian Correctional Management Pty Ltd...The fathers remained in the detention centre and the majority of families were depressed by the separation.*

The Woomera Housing Project can house up to 25 women and children, not "four families".
There is no barbed wire at the Housing Project. The houses are surrounded by colorbond fencing with a sensor beam.

Participation in the Housing Project is entirely voluntary, and the women and children are free to leave the Project and return to live at the IRPC at any time.

Participants are free to visit each other in the houses, and the Department, through Australasian Correctional Management (ACM), makes arrangements for them to visit friends and relatives at the IRPC every day if requested.

Original conditions of the Project did not permit detainees from the IRPC to visit the Project. However partners/fathers residing at the IRPC are now able to visit their families at organised times.

As in the IRPC, there is an organised recreational program, which is developed jointly by the participants and ACM. Activities include excursions to local shops and other town facilities such as the swimming pool and cinema. Children are able to borrow books and videos from the local Woomera library.

Para 34 *"an Iranian woman [whose] three children were seriously mentally impaired and who had been abandoned by her husband for that reason... The situation of that family who suffered constant rejection by the detainee community, was tragic to behold.."*

DIMIA is aware of the family referred to. The Working Group has commented on some aspects of the case. There is a range of other elements relevant to this family, of which the Working Group is unaware. Privacy reasons do not permit discussion of the details of the case.

B. *The relationship between the legal framework for detention and "collective depression syndrome"*

Para 35 *"The attention of the delegation was also drawn to acts of sexual harassment, directed solely against women on the part of detainees."*

Detainees when inducted into centres are informed of how they are expected to act, taking into account the multicultural environment where the rights, beliefs and practices of others are to be respected. All reported allegations of sexual harassment are investigated, and if appropriate, are referred to relevant authorities.

Paras 36 and 37 *references to "collective depression syndrome" and "immigration depression syndrome" drawn from the JSCFADT Report; "In the light of the many testimonies gathered, the delegation can state the following behavioural anomalies existed: affective regression and infantilism, aggressivity* (sic) *against detainees (at*

Villawood, an increasing number of quarrels between women were noted; and, above all, acts of self-mutilation going as far as suicide.

As mentioned earlier, the Minister has publicly rejected the JSCFADT Report. That report is simply an expression of views. JSCFADT members did not have the expertise to make judgements about the psychological conditions of detainees. There is no established medical basis for such "syndromes" and the "many testimonies gathered" are merely untested allegations.

Para 38 *"an attempt to hang himself by a 12-year-old child who wanted to go home to his grandparents in Iran;"*

The child could certainly have been returned to Iran if his parents had cooperated in removal arrangements. The Iranian Government requires that all returns to that country be voluntary.

Para 38 *"Dr Michael Dudley...mentions specific... allegations concerning five persons said to have committed suicide."*

Only one detainee death has been found by a coroner to be a suicide. The coroner delivered an open finding in one other case.

Para 39 *'These observations were generally corroborated by DIMIA statistics: "In the eight months between 1 March 2001 and 30 October 2001 there were 264 incidents of self-harm...the rates of self harm were appallingly high.."'*

This paragraph is not a quote from DIMIA - it is a quote from pages 32-33 of the report "Damaging Kids", Western Young People Independent Network and the Catholic Commission for Justice, Peace and Development, Melbourne.

Furthermore, the statistics quoted were taken out of context. As at 1 March 2001, there were 2,202 people in immigration detention. In the eight-month period covered by those statistics, a total of 7,112 people went into immigration detention. This equates to a combined throughput of 9,314 detainees and a total of 722,740 detainee days.

The total number of incidents of self-harm reported includes threats as well as any action, and constitutes only one incident for every 2,748 detainee days. Furthermore, the total number of self-harm threats or attempts quoted is in fact the number of incidents that were reported during that period. It does not identify the number of reports that were subsequently found to be unsubstantiated.

DIMIA takes very seriously its duty of care in relation to people in immigration detention. This includes careful monitoring of detainees who are deemed to be at risk of self harm. The number of reports is indicative of the level of attention paid to this issue by both the DIMIA and the Detention Services Provider.

DIMIA requires every incident of actual, alleged, or threatened self harm to be reported regardless of the seriousness of any attempt, or of the actual harm that may have occurred. For example not all individuals who claim or who are initially reported as missing meals are confirmed as undertaking hunger strike action. Some

individuals who are reported as missing a meal are eating in their rooms, or attend subsequent meals. A detainee may claim to have ingested shampoo but may not exhibit any clinical signs. The majority of self-harm incidents are not serious attempts at self-harm.

Para 40 *(a) The wracking uncertainty...concerning the length of detention...without legal limit... (b) The inadequate information provided on the status of their applications..*

Para 41 *''The absence of temporal reference points foments collective turmoil ...''we are suspended in time...'' ''we live in limbo''*

Detainees are well aware that the period of their detention is limited by specific events.

All applicants in immigration detention who apply for a protection visa are provided with publicly-funded assistance under the IAAAS to prepare and lodge their application.

Apart from ongoing advice from IAAAS providers, information is also available from the DIMIA Manager at the detention facility, through briefings by DIMIA officers, and through contact from time to time with the DIMIA case officer.

Para 42 *Among other stress factors...the delegation notes*

(a) *the constant eye of the surveillance camera*

Most areas of detention centres are not under video surveillance.

(b) *the too-frequent process of hand-cuffing...for trips outside centres....*

See response to para 14.

(c) *The frequent roll calls (four per day on average)*

Roll calls are held at meal times in some centres, but this can vary. At Baxter, for example, the Services Provider does not conduct roll calls but instead undertakes one unobtrusive head count per day. Detainees may be asked to undertake a rollcall at night if there are concerns about the numbers who should be in the centre.

(d) *absence of an adequate number of female interpreters*

Where a female detainee requires a female interpreter and none is available on site, arrangements can be made through the Telephone Interpreter Service (TIS) to access

a female interpreter. When a centre is aware in advance of the need for a female interpreter, for example, where a detainee is expected to give birth, the centre ensures that a female interpreter is present.

(e) *"The routine calling for detainees over the public address system using their registrationnumber..."*

Identification numbers are provided to each detainee in immigration detention as an administrative procedure to ensure accurate identification, and are not used in any way to diminish a detainee's dignity. The Services Provider is required to call detainees by their name. In some instances however, for example where there are several detainees with the same name, a detainee may be called by their name and identification number. In some cases a detainee may also indicate their preference to be called by their number. If this occurs, the Services Provider will respect that request.

C. The practice of collective or individual isolation

Para 43 *The goal of collective isolation....This is the time when new arrivals most need advice about their rights in view of their feelings of alienation and the automatic character of detention. Because of their isolation, detainees do not know how to obtain any advice other than that given by their assigned immigration agent* (sic).

The term 'collective isolation' would seem to be a contradiction in terms.

While in separation detention, detainees have access to the range of detention facilities and services, including food, health, welfare and recreation. Detainees in separation detention are provided with reasonable facilities, upon request, to access legal advice, UNHCR, the Red Cross, and Consular personnel. Any request by a detainee in separation detention to make contact with the Commonwealth Ombudsman or the HREOC is facilitated. Detainees have ready access to Departmental staff and the assistance of the centre medical staff. They are also permitted some contact with relatives overseas to notify them of their safe arrival in Australia.

Under ss.193(2) and 256 of the *Migration Act 1958,* DIMIA is required to provide detainees with access to legal advice or visa assistance, upon request. Furthermore, if detainees are assessed as raising information or claims which prima facie may engage Australia's protection obligations or as being eligible to make another visa application, arrangements are put in place to provide them with immigration advice through the Immigration Advice and Application Assistance Scheme. Should they then apply for a Protection Visa, this publicly funded assistance continues in relation to that application.

The term "immigration agent" is again misleading and should be replaced with "DIMIA case officer".

Para 44 It is unclear why the Working Group finds this arrangement "disturbing". Detainees posing management challenges are monitored in order to prevent them from harming themselves or others. What at first may be seen as a behavioural problem may indeed become, or be the result of, a medical problem.

Para 45 There has never been a hunger strike of three months duration, nor anyone held in observation for that period because of a hunger strike or self-harm attempts.

D. Detention in prison

Para 46 Immigration detainees are detained in correctional facilities only in exceptional circumstances where it would be inappropriate for them to be detained in the low security environment of an immigration detention facility. Similarly, in the context of criminal deportees or section 501 cases (i.e. visa cancellation on character grounds) detainees are returned to immigration detention when removal or deportation cannot be effected soon after the completion of a custodial sentence, unless exceptional circumstances exist. Prisons are lawful places of immigration detention under the *Migration Act* and therefore the detention of immigration detainees in state prisons is lawful.

Under no circumstances are immigration detainees transferred to state prisons for capacity reasons. As at 18 November 2002, there were 17 immigration detainees held in state correctional facilities. Of this number, 10 were held in the separate immigration wing of the Arthur Gorrie Correctional Centre in Queensland where there is no immigration detention facility.

The draft report raises the issue of a particular Vietnamese national. Whilst it is not possible to comment on the specifics of individual cases for privacy reasons, it should be noted that last year the Minister signed a Memorandum of Understanding (MOU) with Vietnam that provides for the return of Vietnamese criminal detainees. This MOU is an example of a successful strategy that has facilitated the removal of a large number of immigration detainees from Australia.

As at 28 November 2002, 24 persons have been returned to Vietnam. There are another 19 cases, of whom two have had travel documents issued and 17 cases are under consideration by Vietnamese authorities.

Para 47 References to MSI 421 should be to MSI 244.

Detainees with a psychiatric illness would only be transferred to a correctional facility where this was the appropriate place for their illness to be treated. Usually, detainees with psychiatric illnesses would be sent to psychiatric hospitals.

E. The gross inadequacy of guarantees concerning the role of lawyers and the judiciary

Para 48-52 These paragraphs appear to confuse the merits and judicial review processes and the roles of IAAAS providers, migration agents and lawyers.
The draft report again misconstrues the term "immigration agents" and in this particular context should read "IAAAS provider". IAAAS service providers are fully trained and registered migration agents and the majority of IAAAS providers are lawyers.

The Working Group should note that DIMIA has provided independent immigration assistance to detainees since 1993. Contracts for IAAAS service provision are awarded on the basis of an open competitive tender process with the tender selection criteria being fully public.

Para 52 (a) The nature of the refugee determination process is inquisitorial and administrative. It is not about a prosecution and a defence. In line with the approach taken by UNHCR, the assessment process for protection claims has been designed to operate without the need for any professional or legal advice for asylum seekers. It is designed to be quick, informal, not complex and to not require legal representation. Importantly, and contrary to statements in this paragraph of the report, a person does not have to "request asylum" in order to be considered for Australia's protection.

Para 52 (b) It would be quite inappropriate for RRT hearings to be open to the public, given the issue for decision is whether or not a person is a refugee. The Tribunal holds in camera hearings in order to preserve the privacy of individuals and the safety of colleagues and family abroad. It is not a court. It is an informal and non-adversarial forum where the focus is on obtaining information and evidence from the applicant.

The crucial point is that the applicant needs to tell their story, and answer questions from the RRT as best they can. Although advisers have no right to appear before the RRT, they can appear with the RRT's permission. Such permission is rarely, if ever, withheld.

Para 52(c) There is no conflict of interest.

The report states that unaccompanied minors may not "designate counsel". Unaccompanied minors do, in fact, receive IAAAS assistance (outlined earlier). The Minister, as guardian of unaccompanied minors under the *Immigration (Guardianship of Children) (IGOC) Act 1946*, requires that a child who may *prima facie* engage Australia's protection obligations have the opportunity to present his or her claims to refugee status, with assistance from IAAAS.

It should be noted that *Odhiambo v MIMIA* found that the Minister is not obliged to appoint an individual guardian to an unaccompanied minor, and that provision of IAAAS assistance in this context is sufficient. Further, *Odhiambo* found that even if the Minister did have a conflict of interests between his roles as guardian and primary decision-maker, this conflict would be resolved by the provision of independent

merits review by the RRT. Furthermore, French J stated in *Jaffari v MIMIA* (Federal Court, October 2001) as follows:

> The role of the Minister as statutory guardian does not affect his function as decision-maker in relation to the grant of visas to non-citizen children. He is not their guardian for the purpose of advancing applications for visas or initiating review of decisions made under such applications.

Para 52 (e) There is no basis for the assertion that detainees are "frequently and suddenly transferred."

Para 52(f) Teleconferencing is common practice in Australia, including in the courts, and is good and cost-effective use of technology in a large country where great distances between populations exist. Formal mechanisms are in place at the primary and review stage to check that communication by this medium is reliable in each individual case.

The Working Group should note that Australia has the most comprehensive and professional telephone interpreting service in the world.

Para 52(g) Detention is not "indeterminate". It is limited by event.

F. Costs levied on detainees

Para 53 A bridging visa does not "authorise temporary residence", rather, it allows the holder to remain lawfully in the community while an administrative process (such as visa processing or merits or judicial review) is undertaken. There is no charge for those types of bridging visas for which a detainee would be eligible.

The RRT post-decision fee is misrepresented. First, it is not a tax - it simply recognises that many applicants with unmeritorious claims pursue review options. Secondly, the fee is not for a refusal but for an unsuccessful review application. Applicants are initially refused by a DIMIA case officer. They do not need to pursue review by the RRT to receive a final outcome. Thirdly, applications for protection visas by detainees are free - therefore Australia is more generous than those countries that impose a visa fee.

The dash point on detention costs is also misleading. Detention costs incurred by non-citizens are debts to the Commonwealth (section 215 of the *Migration Act*). All persons who have been detained under the Act are liable for the costs of their detention. However in respect of persons who are subsequently granted protection visas, these debts are not actively pursued by the Department. All other visa applicants, must meet public interest criterion 4004 which requires that applicants "must not have outstanding debts to the Commonwealth unless the Minister is satisfied that appropriate arrangements have been made for payment". If a person has not paid or made satisfactory arrangements for the repayment of their detention costs, they will be unable to satisfy the criteria for the grant of the visa. The Permanent Protection Visa and Temporary Protection Visa regulations do not require applicants to satisfy public interest criterion 4004.

The Working Group makes no reference to the carefully established policy position which seeks to ensure that people found to be refugees are not subject to either of these charges.

G. Delays in releasing detainees to whom protection has been granted

Para 54 This is incorrect. Persons who are found to be owed protection under the Refugees Convention - i.e. who are found to be refugees - are released immediately. Any difficulties in obtaining police clearances or other checks are resolved before a decision is made on refugee status. This comment may relate to some individuals who have been assessed by the Refugee Review Tribunal as meeting the criteria set out in Refugees Convention Article 1A for determining who are refugees, but who have yet to receive an assessment of their protection claims taking into account the other criteria in the Refugees Convention for determining who is a refugee. The Refugee Review Tribunal is unable to consider these other matters. Where the Refugee Review Tribunal remits a matter to DIMIA, the Department completes consideration of the refugee status of the individual concerned, taking into account security and other character matters of relevance to the Refugees Convention, before making a decision as to whether a person is a refugee.

H. Ramifications of the privatisation of the centres on the legal status of detention

Paras 55-59 In the Australian Government's view, deliberations about the privatisation of detention services are well outside the Working Group's mandate - it is a matter of public policy not international law. Nevertheless, where corrections or clarifications are necessary in this section, they have been made.

The Working Group should note that the level of self harm and disturbances under public and privatised providers, taking into account the number of detainee days per annum, has not been markedly different, and the open tendering process has provided the opportunity for rigorous immigration detention standards to be designed, imposed and monitored.

Furthermore, the benefits of privatisation of detention services can be seen in the following statement by the Australian Human Rights Commissioner in the 1998/99 Review of Immigration Detention that "the program improvements noted during inspections in 1998 are attributable in large part to the transfer of detention services provision to ACM and the opportunity that transfer created to design and impose immigration detention standards."

Para 57 Access to centres by lawyers and other professionals is set by DIMIA, not its Services Provider. ACM can refuse access to any visitor if there is a threat to the good order and security of a facility.

Para 58 Privatisation of public facilities is hardly a new development, nor is it an exclusively Australian phenomenon.

The Working Group did not ask DIMIA for a copy of the contract with ACM. A public version of the document is available and would have been provided if sought during the Working Group's visit.

Para 59 The Working Group appears not to have taken account of advice provided by DIMIA senior officials about the interplay between the various sanctions under the contract. For example, the Services Provider would also be sanctioned for failure to provide proper amenity and attention to the needs of detainees.

VI. CONCLUSIONS

Para 60 Many statements in paragraph 60 merely repeat inaccuracies contained in previous sections. For example, as discussed earlier, detainees are not routinely handcuffed when escorted outside the centre.

The "goal" of mandatory detention is not to discourage unauthorised arrivals. Detention is for the legitimate purpose of ensuring unauthorised arrivals are available for the processing of any claims to stay in Australia, for their identity to be established and for appropriate clearances for health, character and security to be obtained. In addition, detention ensures that people are available for removal if they have no grounds to remain in Australia.

Paras 63 and 65 The Australian Government believes that the confusion on the part of the Working Group as to the way in which Australia meets its treaty obligations is apparent in these paragraphs. As stated earlier, the Australian Government is firmly of the view that its existing laws, policies and practices comply with our international obligations.

It is unclear what is meant by the phrase 'now that HREOC and the adoption of its founding Act have opened the way' in paragraph 63, and a similar statement in paragraph 65.

The Australian Government seeks amendment and clarification of these paragraphs.

VII RECOMMENDATIONS

The Australian Government requests the Working Group to reconsider its recommendations taking into account the extensive comments we have made on the substance of the report.

Attachment

Implementation of treaty obligations into Australian law

Relationship between domestic and international law

Professor Shearer[1] states that the relationship between international law and domestic law should be seen essentially in terms of accommodation and harmonisation. Although international law and domestic law might be viewed as two separate bodies of law, there is an essential link between them. It flows from this essential link, that if Australia is to assume an international obligation, the legislation and practice necessary to give effect to that obligation should be in place when the obligation enters into force for Australia.

So, how does international law become part of Australia?

In relation to customary international law, as opposed to treaty law, there are two theories - the so-called 'incorporation' and 'transformation' theories. Sir Anthony Mason describes the two theories in the following way:

> 'Essentially the incorporation theory treats customary international law as automatically part of domestic law so that it may be directly applied by domestic courts, provided it is not inconsistent with municipal legislation. In contrast, the transformation theory separates customary international law and domestic law so that international law is not part of domestic law unless it becomes part of domestic law by some act of state'.[2]

While there is some argument at the edges, there is little doubt that the transformation theory holds sway in Australia.[3] That is, customary international law does not form part of Australian domestic law unless it becomes so by an act of state.

Treaties are not self-executing

Consistent with the transformation theory, treaties do not form part of the domestic law unless and until they are incorporated by statute. This fundamental rule was expressed by Mason CJ and Deane J in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273:

> "It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power, whereas the making and alteration of the law fall within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot

---

1 'The Relationship Between International Law and Domestic Law', *International Law and Australian Federalism* (Ed. Opeskin and Rothwell. Melbourne University Press) at p.34.

2 A Mason, 'International Law as a Source of Domestic Law' in Opeskin and Rothwell at p.212.

3 Mason at p.218.

operate as a direct source of individual rights and obligations under that law."

Each time a new treaty is entered into, a decision has to be made by the Federal Government as to whether legislation is warranted. Legislative changes may not be necessary where, for example, the treaty is capable of being implemented solely by administrative means. Similarly, legislative changes may not be required if the treaty obligations are capable of being implemented through existing legislation, in combination with the common law.

Where a decision is taken to introduce new legislation, it is generally timed to predate or to coincide with the entry into force of the treaty for Australia. This is to ensure that the Commonwealth is in a position to comply with its international obligations.

Forms of legislation

Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Federal, State and Territory authorities. In some cases, the implementation of treaties obligations will require changes to, or the introduction of new Federal laws. Similarly, legislative changes, or new laws may be required in the States and Territories.

In some cases, the actual text or the operative provisions of a treaty is incorporated into legislation, thereby becoming part of domestic law. For example, the *Diplomatic Privileges and Immunities Act 1967* (Cth) enacted many of the articles of the Vienna Convention on Diplomatic Relations. The *Racial Discrimination Act 1975* (Cth) enacted many of the articles of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

In other cases, selected parts of a treaty are incorporated into a larger piece of legislation. For example, section 36(1) of the *Migration Act 1958* (Cth) establishes a class of visas know as "protection visas". Section 36(2) states that a "criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol." This legislation is part of a wider package of legislation and policies, which seeks to give effect to Australia's obligations under the Convention regarding the Status of Refugees, as amended by the 1969 Protocol regarding the Status of Refugees.

Human Rights Treaties

As a result of Australia's federal constitutional system, it is unlikely that a single piece of Federal legislation would be enough to give effect to Australia's obligations under human rights treaties. Further, the Federal Government's power to legislate with respect to treaties is not unlimited. It depends largely on the 'external affairs' power in the Australian Constitution.

The Federal Government does not have the power to interfere in the core activities of the States and Territories.

The general manner of giving effect to human rights treaty obligations is by a combination of the following:

- liberal democratic institutions
- constitutional guarantees, including freedom of religion
- common law guarantees of personal liberty and natural justice
- international law as a source of common law development (see further below)
- the federal anti-discrimination, human rights and privacy Acts as well as the Act establishing the Aboriginal and Torres Strait Islander Commission (ATSIC)
- State and Territory anti-discrimination legislation.

Seven international human rights instruments are scheduled to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), including the ICCPR and CROC[4]. People can complain about federal government actions and the Commission can attempt to conciliate. Ultimately the Commission can report on the matter to the federal Attorney-General.

In discrimination matters the complaint process can be pursued into the Federal Court, which can award civil remedies.

In addition, the Aboriginal and Torres Strait Islander Social Justice Commissioner has specific functions under the *HREOC Act* and under the *Native Title Act* (Cth). These functions relate to the monitoring of the enjoyment or otherwise by Indigenous people of their rights under the law. The Sex Discrimination Commissioner also has responsibilities in relation to federal awards and equal pay under the *Workplace Relations Act 1996* (Cth).

The *Racial Discrimination Act 1975* (Cth) gives effect to Australia's obligations under CERD. Its major objectives are to:

- promote equality before the law for all persons, regardless of their race, colour or national or ethnic origin, and
- make discrimination against people on the basis of their race, colour, descent or national or ethnic origin unlawful.

The *Sex Discrimination Act 1984* (Cth) gives effect to Australia's obligations under CEDAW and certain aspects of the International Labour Organisation (ILO) Convention 156. Its major objectives are to:

---

4 Also the International Labour Organisation Discrimination (Employment) Convention ILO 111, the Declaration of the Rights of the Child, the Declaration on the Rights of Disabled Persons, the Declaration on the Rights of Mentally Retarded Persons, and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

- promote equality between men and women
- eliminate discrimination on the basis of sex, marital status or pregnancy and, with respect to dismissals, family responsibilities, and
- eliminate sexual harassment at work, in educational institutions, in the provision of goods and services, in the provision of accommodation and the delivery of Commonwealth programs.

The *Disability Discrimination Act 1992* (Cth) has as its major objectives to:

- eliminate discrimination against people with disabilities
- promote community acceptance of the principle that people with disabilities have the same fundamental rights as all members of the community, and
- ensure as far as practicable that people with disabilities have the same rights to equality before the law as other people in the community.

From 1st July 2000 the *Privacy Act 1998* (Cth) is administered by the new statutory office of the Federal Privacy Commissioner.

Further, all States and Territories have systems of anti-discrimination legislation that prohibit discrimination on certain grounds, such as sex, marital status, race or religion. These laws give further effect to Australia's international obligations, for example, under the CERD, CEDAW and the ICCPR.

Treaties and statutory interpretation

Just because a treaty has not been directly incorporated into domestic law, this does not mean that its ratification has not significance for Australian law.

Australia's international obligations, including treaty obligations, may be used by the courts in the interpretation of statutes. This flows from the presumption that a parliament, in enacting legislation, intended to act consistently with Australia's obligations under international law. As a matter of statutory interpretation, domestic statutes will be construed, where the language permits, so that the statute conforms with treaty obligations.

This common law rule has, to a degree, been given statutory force in s.15AB of the *Acts Interpretation Act 1901* (Cth).

It has been stated that through this rule of statutory interpretation, international law is an indirect source of domestic law. However, it is clear that international obligations under a treaty cannot be used to override the plain words of a statute, even if those plain words are inconsistent with a treaty.

Treaties and development of the common law

As noted by Justice Brennan in the *Mabo v Queensland* [No. 2] (1992) 175 CLR 1, at page 42,

> "The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."

In the *Mabo* case, Justice Brennan used international human rights standards in support of recognition of indigenous rights and interests in land.

However, the majority in the *Teoh* case recommended "circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law." They went on to say that "judicial development of the common law must not be seen as a back door means of importing an unincorporated convention into Australia law."

Treaties and administrative decision making

The majority in the *Teoh* decision found that ratification of a treaty gave rise to a legitimate expectation in administrative law that administrative decision-makers will act in conformity with the treaty.

Some statutes specifically require administrative decision makers to take account of Australia's obligations under human rights treaties. One example is the *Extradition Act*, which requires the Attorney-General to be satisfied that extradition would not result in the person liable to extradition suffering torture, in the country to which they were returned.

- - - - -