

Communiqué for the Office of the Prosecutor
regarding Mr Andrew Wilkie MP's application
relating to crimes against humanity in Australia

Ref: OTP-CR-322/14

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Executive Summary

- Tony Abbott and his Cabinet treat people who arrive by sea in search of Australia's protection ('asylum seekers') as a specific class of person, engaging in a systematic attack on this class, intentionally carried out with full knowledge of the consequences and warranting ICC attention.
- Tony Abbott and his Cabinet are responsible for the fact that people in this class are isolated for the purpose of mandatorily and arbitrarily detaining them, removing access to legal recourse, and placing them in conditions causing great suffering and serious injury to mental and physical health.
- The scale and severity of this attack is of sufficient gravity to constitute a crime against humanity. There are several provisions in Article 7 of the Rome Statute, to which Australia has acceded, that are particularly relevant:
 - Article 7(1)(d) relating to the deportation and forced transfer of persons. This is applicable to the transportation of people (including children) against their will to foreign sovereign nations such as the Republic of Nauru and Papua New Guinea;
 - Article 7(1)(e) relating to imprisonment or other severe deprivation of physical liberty. This is applicable to the mandatory and indefinite detention of people in violation of international law including international treaties to which Australia is a party, despite the fact these people have not committed or even been accused of any crime at the time of detention;
 - Article 7(1)(k) relating to other intentional acts causing great suffering or serious injury. This is applicable to the conditions to which detainees are subjected, which have led to widespread sickness, mental health deterioration, self-harm and suicide attempts, and death.
- The policies are in violation of fundamental principles of international law including, *inter alia*, those contained in the Refugee Convention, the International Covenant on Civil and Political Rights, the Convention against Torture and the Convention on the Rights of the Child. These are breaches in their own right, and also form a foundation for several contraventions of Article 7.
- Tony Abbott and his Cabinet have knowledge of the effects of their actions through their close involvement in administering these policies. They are aware of the scale and severity of the harm, which has affected thousands of people and is continuing to affect thousands more. They know there is a direct causal link between their policies and the suffering experienced by these people.
- Through numerous reports and findings, Tony Abbott and his Cabinet know that their policies breach international law. Relevant findings include the UN Committee against Torture's Concluding observations of 26 November 2014, comments by the UN High Commissioner for Human Rights in an address to the Human Rights Council on 2 September 2014, reports prepared by myriad domestic human rights organisations, and individuals with first-hand knowledge of the treatment of asylum seekers.

Background

The effects of decisions made by the individuals named in the complaint, those being Prime Minister Tony Abbott and his Cabinet, have been severe. Furthermore, they have been targeted towards a particular class of persons, namely, people who arrive by sea in search of Australia's protection ('asylum seekers'). Successive regimes since the early 1990s have devised and executed policy which is discriminatory towards asylum seekers generally, but none so exacting or deliberate as decisions made by Tony Abbott and his Cabinet.

In the 2013 Australian general election, one that resulted in the election of Tony Abbott and the party he leads to government, a key election promise was to "stop the boats". The rhetoric of many members of his party involved labelling countless legitimate asylum seekers as "boat people" in a move that dehumanised this class of persons and contributed to the shift from asylum seekers being considered a humanitarian challenge to a border security problem. This meant that a whole class of persons were categorised as a threat to the nation before even being processed and assessed by any Australian agency.

The new Government under the control of Tony Abbott and the Cabinet reintroduced Temporary Protection Visas on 18 October 2013 for asylum seekers already in Australia, as one element of their policy to stop the arrival of asylum seeker boats and further separate "boat people" from other asylum seekers.¹ The visas were met with significant criticism from human rights groups which highlighted the significant negative impacts of the visas when they were in use prior to 2008. In a response to opposition, the visa category was subsequently disallowed by the Senate on 3 December 2013.²

On 4 December 2013, in response to the Senate disallowance of Temporary Protection Visas, Scott Morrison, who was then the Minister for Immigration and Border Security announced the capping of onshore protection visas at 1,650 places for the financial year (1 July to 30 June). This was equal to the number that had been already been issued effectively meaning

¹ Migration Amendment (Temporary Protection Visas) Regulation 2013, Select Legislative Instrument No. 234, F2013L01811 (17 October 2013, disallowed in full 2 December 2013) (Australia), <http://www.comlaw.gov.au/Details/F2013L01811>

² Notification of disallowance – Migration Amendment (Temporary Protection Visas) Regulation 2013 – SLI 234 of 2013, Gazette C2013G01820 (4 December 2013) (Australia) <http://www.comlaw.gov.au/Details/C2013G01820>

that no further protection visas would be issued until July 2014. The Minister stated that this step ensured that no “boat person” would receive a protection visa.

These measures all have the effect that asylum seekers who arrive by boat are cast as criminals and penalised before they have even made their case or had their claims assessed. There is nothing illegal in seeking asylum and on arrival in Australian territory they are not actually charged with criminal offences. Despite this, Tony Abbott and his Cabinet continue to systematically persecute the class of “boat people” by arbitrarily detaining them, forcibly removing them from Australia or returning them to their oppressors, or subjecting them to conditions which cause serious injury to mental and physical health.

This cruel treatment is applied to people whose only crime is fleeing oppressive regimes or economic hardship purely because they are a member of a class of persons that Tony Abbott and key government figures have decided to target. There have been numerous critics of this treatment that point to the effects of long periods of detention on already traumatised people and the substantial economic costs involved. The criticism has been vindicated many times with reports on widespread mental health deterioration often leading to self-harm and attempted suicide, as well as provable disease and actual death.

This communiqué stresses that the gravity of this treatment – both in severity and in scale – warrants the attention of the International Criminal Court. It will cite numerous examples of targeted behaviour that has affected asylum seekers but the scale could be much larger in reality, given that Tony Abbott and his Cabinet have refused to allow information to be made public by measures such as classifying material as sensitive due to its operational nature, drastically or totally restricting journalist access to detention facilities³, and there are allegations of suppressing witnesses to crimes occurring within those facilities.⁴ The true scale may not be known but this communiqué submits that the gravity which has been confirmed through available reports and statistics, especially relating to children in detention, is sufficient to warrant ICC attention.

³ “We need to see Manus Island” The Sydney Morning Herald Online, 24 February 2014,

<http://www.smh.com.au/comment/we-need-to-see-manus-island-20140224-33bk1.html>

⁴ “Asylum seekers offered relocation over silence on Reza Berati death: Burnside” SBS News Online, 6 November 2014,

<http://www.sbs.com.au/news/article/2014/11/06/asylum-seekers-offered-relocation-over-silence-reza-berati-death-burnside>

Crimes Against Humanity and Article 7 of the Rome Statute

There are several specific elements of the treatment of asylum seekers that are particularly contrary to Article 7 of the Rome Statute ('the Statute'). This communiqué refers to that evidence and information which would assist the Office of the Prosecutor in an investigation into whether Tony Abbott and his Cabinet orchestrated the policy knowing that it was a widespread and systematic attack on civilians within the definitions accepted by the ICC and outlined in the Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002.⁵

Imprisonment/Deprivation of Physical Liberty (Article 7(1)(e))

Fundamental to this communiqué is that individuals arriving in Australia by boat with the intention of seeking refuge should be under a presumption of genuineness and innocence. Instead, they are detained like criminals without even a preliminary assessment of their claim. There is a default position that "boat people" are a threat and must be deprived of their liberty in all cases, and also that they are an inherent threat to Australia and therefore must be locked up in secure facilities. As outlined in later sections, many of these people are in fact children.

The physical and administrative conditions of the detention itself are severe in the extreme. The physical conditions – i.e. a lack of adequate food, water, shelter⁶ – are the primary cause for the serious injury to physical health that is discussed below. However, the administrative conditions, including things such as indefinite detention and unnecessary separation from family members, are major contributors to serious injury to mental health. Mental health concerns can in turn lead to physical injury in the cases of suicide attempts and self-harm

⁵ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, First session, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B; *Official Records of the Review Conference of the Rome Statute of the International Criminal Court*, Kampala, 31 May-11 June 2010 (International Criminal Court publication, RC/11); available at <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

⁶ "Manus Island detention centre at risk of another riot as 500 join hunger strike" *The Guardian Australia Online*, 14 January 2015, http://www.theguardian.com/australia-news/2015/jan/14/manus-island-detention-centre-risk-riot-hunger-strike-grows?CMP=share_btn_fb

which have been reported in Australian detention facilities.⁷ Again, many of people who are self-harming are in fact children.

Relevance to required elements: (1) one or more persons have been deprived of their physical liberty through immigration detention, (2) the gravity of the conduct was a violation of fundamental rules of international law such as Convention on the Rights of the Child, Refugee Convention, and the Convention against Torture, (3) the perpetrator was aware of the facts and gravity of the policy through numerous credible reports by the media and international agencies, (4) the conduct was part of the widespread and systematic attack on “boat people” who are civilians, and (5) the perpetrator had actual knowledge through their intention to carry out the conduct and the expert witness reports outlining the effects.

Deportation/Forced Transfer of Population (Article 7(1)(d))

An element that is often missed from the discourse by critics is that Tony Abbott and his Cabinet have made arrangements with other sovereign nations to forcibly transfer asylum seekers to foreign detention facilities. Asylum seekers arriving by boat enter Australian territorial waters and, often before they have had any form of assessment or processing, they are detained and relocated to detention facilities on Nauru and Manus Island. Nauru is a sovereign republic and Manus Island is controlled by the nation of Papua New Guinea. However, the messages conveyed to the Australian people by Tony Abbott and Scott Morrison play down this element as simply an administrative arrangement. In fact, as the asylum seekers have made it to Australian territory in many cases, Australia has a responsibility to ensure they are not deported to foreign states with drastically different rule of law and justice systems, as well as decreased oversight and control.

Furthermore, asylum seekers are also moved to facilities in countries such as Cambodia and Indonesia, or worse they are forcibly returned to the nation from which they are fleeing their alleged persecution before it has been accurately established whether their claims for refugee status have been established. This puts them in real risk of torture, rape and execution when

⁷ “Detention shame: children, mothers self-harming” Australian Human Rights Commission, 7 August 2014, <https://www.humanrights.gov.au/news/opinions/detention-shame-children-mothers-self-harming>; “Self-harm in detention centres on rise” The Australian Online, 9 December 2010, <http://www.theaustralian.com.au/news/nation/self-harm-in-detention-centres-on-rise/story-e6frg6nf-1225967906031>

returned to countries such as Sri Lanka and Afghanistan.⁸ Whether or not the asylum seekers are being returned to the country where they are most at risk, the simple fact of transporting them to other countries where Australia has negligible to no control over their safety or wellbeing is a dereliction of Australia's obligations. Offshore detention facilities are often lacking in adequate government oversight of the security, which is predominantly outsourced to private companies, and aids the secrecy that Tony Abbott and the members of the Cabinet have strived to achieve through their changes to the way 'border security' matters are presented to parliament and the general population.

Relevance to required elements: (1) the perpetrator forcibly transferred one or more persons to other locations and sovereign nations by force through deportation by border security or the navy, (2) the asylum seekers were lawfully present in the area as it is not illegal to seek asylum and they were under the presumption of genuineness as they had not been processed, (3) the perpetrator was aware of the lawfulness of seeking asylum by virtue of their ratification of the Refugee Convention and domestic international law experts, (4) the conduct was part of the widespread and systematic attack on "boat people" who are civilians, and (5) the perpetrator had actual knowledge through their intention to carry out the conduct and the expert witness reports outlining the effects.

Intentional Acts causing Great Suffering and Serious Injury (Article 7(1)(k))

It is indisputable that the deprivation of physical liberty and the transfer of asylum seekers are intentional acts by Tony Abbott and his Cabinet. The harsh attitude was proudly touted as something Tony Abbott and his Cabinet could guarantee if they were elected, and the approach was maintained when questioned by the parliament. Since the inception of this approach, there has been no indication that changes will be made or exceptions granted on compassionate grounds. This refusal is despite the numerous reports and statistics on palpable harm occurring as a direct result of the conditions and treatment.⁹ The link is easily

⁸ "Australia's hasty return of Sri Lankan asylum seekers puts them at risk of torture, rape and other mistreatment" Human Rights Law Centre, 30 September 2014, <http://hrlc.org.au/australias-hasty-return-of-sri-lankan-asylum-seekers-puts-them-at-risk-of-torture-rape-and-other-mistreatment/>

⁹ "Australia's detention of refugees is forbidden by international law: UN Committee Against Torture" Sydney Morning Herald Online, 29 November 2014, <http://www.smh.com.au/national/australias-detention-of-refugees-is-forbidden-by-international-law-un-committee-against-torture-20141128-11wjas.html>

established as detainees have attributed their suffering to various specific aspects of their detention.

Knowledge, complicity and a refusal to change behaviour in the face of the resulting injury strongly indicates an intent to cause this suffering. For the duration of the policy, there has been much debate in the Australian parliament about alternatives, with legislation being proposed by non-government members specifically intended to address these human rights and humanitarian concerns. Despite this, the policy settings of Tony Abbott and his Cabinet have not changed.

Relevance to required elements: (1) the perpetrator inflicted great suffering, serious injury to mental and physical health by means of the inhumane conditions in immigration detention, (2) the conditions are similar in character to other Article 7(1) crimes in that they are torturous, indecent, and against fundamental humanitarian values, (3) the perpetrator is aware of this for the same reasons as they are aware of the other alleged crimes, (4) the conduct was part of the widespread and systematic attack on “boat people” who are civilians, and (5) the perpetrator had actual knowledge through their intention to carry out the conduct and the expert witness reports outlining the effects.

Responsibility under ratified Conventions and Protocols

The alleged breaches of Article 7 are contrary to international law through both an application of the Statute itself, but also the other international instruments that Australia has previously ratified and agreed to honour. These instruments create the foundation for Tony Abbott and his Cabinet demonstratively acting contrary to established and accepted fundamental principles of international law.

Convention on the Rights of the Child

In addition to the primary concerns regarding the Rome Statute, this communiqué highlights the way Tony Abbott and his Cabinet's policy has affected children, which is highly illustrative as the children are not exercising free will in making the decision to travel to Australia as asylum seekers. In the vast majority of cases children travel with their family. Yet they are subjected to the same treatment as adults and, even when the policies have specific approaches to children, they are still just as harmful due to the essential elements mentioned above remaining, and in some cases more damaging as often children are separated from their parents in order to be processed differently. This has its own drastic consequences.

The conditions that many children endure under this policy constitute a breach of provisions contained in the *Convention on the Rights of the Child* (CRC) which imposes obligations on Australia to give all children, including asylum-seeking children, special treatment. These 'special treatment' and 'best interests of the child' tests have been applied to Australian domestic legislation through instruments such as family law legislation and state and territory child protection and child welfare legislation. This is an acknowledgement by Tony Abbott and his Cabinet that they are aware of these obligations, therefore to not apply it specifically to asylum seeker children is attributable solely to the fact they are "boat people" and in the class of persons Tony Abbott and his Cabinet's policy is designed to systematically target.

International Covenant on Civil and Political Rights

Also relevant to Australia's obligations are some of the rights contained in the *International Covenant on Civil and Political Rights* (ICCPR). Specifically, Articles 9 and 10 which relate to arbitrary detention and treatment while in detention respectively. The current approach by

Tony Abbott and his Cabinet is also contrary to Article 14 relating to equality of justice before the law and tribunals. “Boat people”, or ‘asylum seekers’, who have been formally labelled ‘unauthorised maritime arrivals’, are restricted from accessing the same legal avenues and rights of appeal as other types of asylum seekers. This was a specific targeted change which occurred under Tony Abbott as opposed to previous Australian regimes. An example is domestic amendments that were introduced in 2014 which specifically removed the right of judicial review for unauthorised maritime arrivals only, as distinct from other arrivals in Australia.

The Convention against Torture

Australia is a party to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Convention against Torture). The attack by Tony Abbott and his Cabinet on people who seek Australia’s protection breaches numerous articles in the Convention against Torture including; Article 2 relating to the requirement to take measures to prevent acts of torture, Article 3 relating to non-refoulement obligations, Article 11 relating to reviewing of arrangements for the custody and treatment of persons, and Article 16 relating to the prohibition on acts of cruel, inhuman or degrading treatment or punishment.

The UN Commission against Torture examined Tony Abbott and his Cabinet’s policy and the conditions in Australian detention centres in late 2014 stating it was concerned with Australia’s persistence in sending vulnerable people to offshore facilities "despite reports on the harsh conditions prevailing in these centres, including [...] overcrowding, inadequate health care and even allegations of sexual abuse and ill-treatment". There was particular concern raised, from a Convention against Torture perspective, with the “policy of intercepting and turning back boats, without due consideration of [Australia's] obligations" under international law.¹⁰ Despite this, Tony Abbott and his Cabinet persist with the attack on asylum seekers.

¹⁰ “Australia’s detention of refugees is forbidden by international law: UN Committee Against Torture” Sydney Morning Herald Online, 29 November 2014, <http://www.smh.com.au/national/australias-detention-of-refugees-is-forbidden-by-international-law-un-committee-against-torture-20141128-11wjas.html>

The Refugee Convention

The approach by Tony Abbott and his Cabinet is incompatible with Australian obligations under the *Convention relating to the Status of Refugees 1951* as amended by the *1967 Protocol relating to the Status of Refugees* (collectively referred to as ‘the Refugee Convention’). The Refugee Convention specifically requires Australia to apply domestic laws that establish border integrity in such a way that persons fleeing persecution for specific reasons will be protected.¹¹ As discussed below, although direct incorporation into domestic law is not required, this treaty has a codified domestic legislative basis by virtue of s22A of the *Migration Legislation Amendment Act 1989* (Cth) which provides that the Minister *may* (as opposed to *must*) determine whether a person is a refugee. This determination is a prerequisite for a number of different visas and entry permits.

Article 22 of the CRC interacts with the Refugee Convention making it immediately relevant to a consideration of the human rights of children in detention because it requires that a child who is seeking refugee status receive appropriate protection and humanitarian assistance in the enjoyment of the rights contained in the CRC and in other international human rights or humanitarian instruments to which Australia is a party. By allowing the “boat person” class to trump the general category of ‘child’, Tony Abbott and his Cabinet are in dereliction of a duty to protect children even when the child is being processed as a refugee.

¹¹ J Hathaway, *The Law of Refugee Status*, Butterworths, Toronto, 1991, pp1-2, 31-32, 231-233

Codification of International Obligations

Incorporation through Legislative Processes

Australia is a willing state party to the Rome Statute, having signed and ratified, which has the effect of binding the nation to the jurisdiction and authority of the ICC, accepting the legitimacy of crimes and penalties outlined within the Statute, and imposing an obligation to incorporate the Statute into domestic law in order to facilitate compliance.¹² The Australian Department of Foreign Affairs has, including through various members of the Cabinet, acknowledged that Australia has a duty to respect and apply its international human rights obligations to all individuals within its jurisdiction. Australia is also party to the CRC, the ICCPR, Convention against Torture, and the Refugee Convention, so has accepted responsibility under these treaties.

In Australia, from a domestic legislative viewpoint, almost all aspects of the asylum seeker determination process are governed by the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth) as well as several pieces of supporting legislation such as the *Immigration (Guardianship of Children) Act 1946* (Cth).

Under Australian law a treaty only becomes a “direct source of individual rights and obligations” when it is directly incorporated by legislation.¹³ This is because under Australia’s Constitution the making and ratification of treaties is a function of the Commonwealth Executive, whereas the making and alteration of Commonwealth laws is a function of the Commonwealth Parliament (Legislature). There would be *ultra vires* conflict if the Executive usurped the role of the Legislature by agreeing to treaties which automatically became sources of new rights and obligations.

Application by Convention and Expectation

However, the absence of a direct correlation between a treaty provision and a domestic legislative provision does not mean that the ratified treaty has no effect. In *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (‘Teoh’), a High Court of Australia decision

¹² *Vienna Convention on the Law of Treaties*, article 26.

¹³ *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J.

in 1995, the Judiciary confirmed that legislative provisions should be interpreted by courts in a manner that ensures, as far as possible, that they are consistent with the provisions of Australia's international obligations under statutes, conventions and protocols.

Applying this decision, and domestic convention around the incorporation of treaties, where a statute or subordinate legislation is ambiguous, the courts should favour a construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, *prima facie*, intends to give effect to Australia's obligations under international law.¹⁴ The High Court also held that ratification of a treaty raised a legitimate expectation that an executive decision-maker will act consistently with its terms:

Ratification of an international instrument is a positive statement by the Executive that it and its agencies will act in accordance with that instrument. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the instrument. For example, there is an expectation that the best interests of children shall be a "primary consideration" as required under the CRC, despite there being no direct domestic statutory enshrining of the CRC at the national government level. Furthermore, it is not necessary that a person seeking to set up such a legitimate expectation should be aware of the international instrument or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.¹⁵

Article 7 Crimes Integrated as Domestic Offences

As part of the process of implementing the ICC regime, Australia has introduced a series of offences into domestic criminal law which replicate the offences over which the ICC has jurisdiction. This is an acknowledgement by the Executive and the Legislature that the crimes identified under the Rome Statute as 'crimes against humanity' are legitimate and correctly defined, and that Australians should be bound by them. One example is a very clear

¹⁴ Teoh (1995) 183 CLR 273 at 287

¹⁵ *Ibid* at 291

replication, both in the language and the elements of the offence. Section 268.12 of the *Criminal Code Act 1995 (Cth)* entitled “Crime against humanity - imprisonment or other severe deprivation of physical liberty” reads:

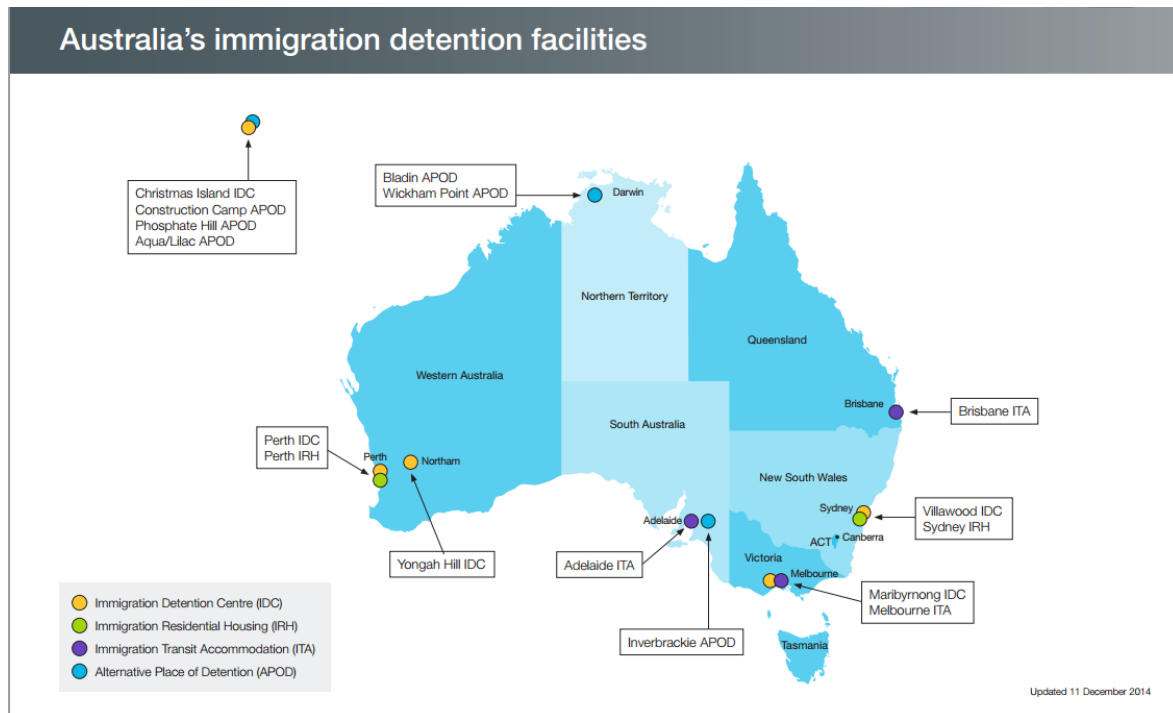
1. A person (the perpetrator) commits an offence if:
 - a. the perpetrator imprisons one or more persons or otherwise severely deprives one or more persons of physical liberty; and
 - b. the perpetrator's conduct violates article 9, 14 or 15 of the Covenant; and
 - c. the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 17 years.

The elements of this offence are relatively simple; the perpetrator imprisons one or more persons; that conduct violates Article 9 of the ICCPR; and the conduct is committed knowingly as part of a systematic attack directed against a civilian population. The United Nations Working Group on Arbitrary Detention has found that the method of mandatory, and often indefinite, detention violates Article 9 of the ICCPR. The conduct is done deliberately, and is part of a systematic and widespread attack directed against “boat people”. Tony Abbott and his Cabinet are not only engaging in conduct which is opposed to the requirements of the Rome Statute, but also strict obligations that have been entirely codified into domestic law, both of which attract published penalties.

Graphics and Statistics: Demonstrating Gravity

The locations of the immigration detention facilities in Australia are indicated on the map below.¹⁶ However, more concerning is that asylum seekers can be deported from Australian territory – and as it is not illegal to seek asylum they are only illegally entering Australian territory if they are found not to be genuine – to foreign countries without assessment or many of the legal resources available to other asylum seekers.



While the conditions in offshore detention facilities are the cause of great suffering, and compounded due to the lack of effective control Australia has over these sites, the conditions in Australian detention centres are identical insofar as they arbitrarily deprive asylum seekers of liberty, subject them to mentally tortuous uncertainty with restricted legal access and media scrutiny, and separation from family and support networks.¹⁷

¹⁶ Source: Department of Immigration and Citizenship, 11 December 2014

¹⁷ "Journalists reporting on asylum seekers referred to Australian police" The Guardian Australia Online, 22 January 2015, http://www.theguardian.com/australia-news/2015/jan/22/journalists-reporting-on-asylum-seekers-referred-to-australian-police?CMP=soc_567

Special Class of Vulnerability

The Human Rights Law Centre – an independent, not-for-profit, non-government rights organisation – has expressed ‘deep concern’ about the use of mandatory detention for children who are seeking asylum, the failure to take into account the best interests of the child as the primary consideration in asylum determinations, and the risk of conflict of interest when guardianship of unaccompanied minors is vested with the Minister for Immigration and Border Protection.

Since this concern was raised, the *Immigration (Guardianship of Children) Act 1946* (Cth) has been amended so that the Minister is not the guardian of unaccompanied minors moved to a regional processing country under the Migration Act. This has not solved the issue, but rather shifted the responsibility to another sovereign entity, and in fact highlighted that Scott Morrison as the responsible minister attempted to pass on his non-delegable duty of care to a foreign sovereign nation.¹⁸ Furthermore, notwithstanding the amendment, Scott Morrison as the responsible minister is still responsible for the fact that, prior to this, children were being allowed to endure great suffering due to the ability of officials to separate children from their families under the order of the appointed guardian.

The Migration Act provides that children should be detained as a last resort, but in practice the system requires children to remain in closed immigration detention until they are removed from Australia or granted a visa, unless the Minister determines that they are allowed to live in community detention. Young children still remain in detention despite foreshadowing that at least some children would be at least released into community detention.¹⁹ Regardless of what eventually happens with the release of asylum seekers into alternative forms of detention, the harm done to men women and children has already occurred to such a widespread group of affected asylum seekers. The nature of the detention to which they have been subjected has already seen many suicide attempts, including by children.²⁰

¹⁸ Human Rights Law Centre - Children’s Rights Edition 2014, <http://hrlc.org.au/childrensrightsedition2014/#roc>

¹⁹ “Pre-Christmas release looms for kids in detention” The Australian Online, 5 December 2014, <http://www.theaustralian.com.au/national-affairs/immigration/pre-christmas-release-looms-for-kids-in-detention/story-fn9hm1gu-1227145373746>

²⁰ *Id.*

Total Impact

While children are an unambiguous indicator of the intent of Tony Abbott and his Cabinet to inflict serious mental and physical harm, there are also many men and women who are arbitrarily detained and put in constant danger of physical and mental harm. Under the policies of Tony Abbott there has been a move away from onshore detention and processing with time limits applied to both, towards an offshore model where the class of “boat people” is deported to other countries for detention and processing. This generally occurs without the claims of the asylum seekers being properly examined.

It should be noted that while the below table indicates a decline in offshore numbers, these summaries are monthly and the numbers fluctuate depending on boat arrivals and other sources of immigration.²¹

Table 1 – People in Immigration Detention Facilities, Alternative Places of Detention (APOD), Offshore Processing Centres and the Community

Place of immigration detention	Men	Women	Children	Total	Change from Previous Summary 31/10/2014
Christmas Island Immigration Detention Centre	517			517	- 53
Curtin Immigration Detention Centre					0
Maribyrnong Immigration Detention Centre	110	6		116	+ 6
Perth Immigration Detention Centre	38	6		44	- 1
Villawood Immigration Detention Centre	281	41		322	- 11
Wickham Point Immigration Detention Centre	312			312	+ 108
Yongah Hill Immigration Detention Centre	378	7		385	+ 33
Alternative Places of Detention (Christmas Island and Cocos Keeling Island)	58	54	104	216	- 11
Alternative Places of Detention (Mainland)	239	309	334	882	+ 30
Total Immigration Detention Centres/APODs	1933	423	438	2794	+ 101
Perth Immigration Residential Housing	5	4	9	18	+ 2
Sydney Immigration Residential Housing	4	16	23	43	- 7
Adelaide Immigration Transit Accommodation	24	9		33	+ 11
Brisbane Immigration Transit Accommodation	31	14	15	60	- 18
Melbourne Immigration Transit Accommodation	106	51	71	228	+ 3
Total in Immigration Residential Housing and Immigration Transit Accommodation	170	94	118	382	-9
Total Facility	2103	517	556	3176	+ 92
Total Community under Residence Determination	759	719	1633	3111	+ 4
Total Community on Bridging Visa E (Including people in a re-grant process)	20555	2422	2103	25080	+ 23
Republic of Nauru	643	198	155	996	- 99
Manus Province, Papua New Guinea	1044			1044	- 12
Total Offshore Processing Centres	1687	198	155	2040	- 111

²¹ <http://www.immi.gov.au/About/Documents/detention/immigration-detention-statistics-nov2014.pdf>

It also does not account for the fact that the decline in numbers includes any asylum seekers returned to their country of origin, and this communiqué attests that this is a breach of Australia's non-refoulement obligations in the recent case of Sri Lanka and others.²² The High Court of Australia has granted injunctions where an application has been lodged by concerned organisations, acknowledging that the deportation and return of these asylum seekers puts them in real danger.²³ In some cases, where an initial asylum seeker refugee application has been processed with an adverse decision, the asylum seeker is still detained while awaiting a decision on appeal rights or simply being detained arbitrarily while there is no pending application of any time. This has been criticised as a deprivation of liberty with no charge or rights of *habeas corpus*.

²² "High Court injunction blocks handover of 153 asylum seekers to Sri Lanka" ABC News Online, 8 July 2014, <http://www.abc.net.au/news/2014-07-07/high-court-injunction-halts-handover-of-asylum-seekers/5579726>

²³ *Id.*

Declining Rights and Transparency: A Worsening Situation

Since the last Australian general election, Tony Abbott and his Cabinet, led by Scott Morrison in relation to immigration matters, have made moves to seize greater powers in relation to “boat people” that allow them further discriminate while attempting to avoid scrutiny. Some examples of this, all of which are of deep concern to various human rights organisations both domestic and internationally are:

- a) Amending the *Maritime Powers Act 2013* (Cth) to effectively licence the agents of the Executive to breach international law and the rules of natural justice when conducting boat turn-backs and detaining asylum seekers at sea;
- b) Classifying children born in Australia as ‘unauthorised maritime arrivals’ if one or more of their parents is an unauthorised maritime arrival, which has the effect of allowing those children to be subjected to automatic mandatory detention and transfer to foreign states such as the Republic of Nauru;
- c) Severing Australia’s non-refoulement obligations from the removal provisions of the Migration Act, meaning that the power to deport asylum seekers would not be subject to any legally-enforceable requirement to first consider their asylum seeker claims;
- d) Removing references to the Refugee Convention from the Migration Act and replace them with members of the Cabinet’s own interpretation – in effect, a sudden and unilateral reinterpretation of a treaty that has been in force for over 60 years;
- e) Implementing ‘rapid processing’ and ‘streamlined review arrangements’ for asylum seekers arriving by boat, resulting in the introduction of administrative shortcuts into a process that makes life or death decisions as well as not guaranteeing processing or detention time will be any shorter; and
- f) Introducing various forms of temporary protection visas if a visa is even issued, denying permanent protection to thousands of asylum seekers solely on the basis of the mode of transport they use, rather than just allowing the person to remain in Australia.

Evidence and Examples

Australian detention facilities all create very similar conditions for the detainees. Each will have its specific concerns but nowhere within Tony Abbott and his Cabinet's policy is safe for asylum seekers.

Manus Island

The United Nations High Commissioner for Refugees ('UNHCR') has made multiple monitoring visits to the Manus Island Regional Processing Centre ('MIRPC') in Papua New Guinea, and on each occasion have found that the centre is providing inhumane conditions of treatment in detention while failing to comply with international standards.²⁴ The combined effect of the subordinate conditions of detention on Manus Island, the open-ended nature of that detention, and the uncertainty about detainees fates have been said to violate the prohibition on torture and other ill-treatment.²⁵

The MIRPC is located on a former World War II military base, now a Papua New Guinea Defence Force Base. It is stark and isolated. The facility is a closed detention centre, and is reported to resemble a combination of a prison and a military camp. The compounds that house the detainees are made up of a network of tents, marquees, 'demountables' (similar to converted shipping containers) and World War II-era buildings with concrete walls and corrugated iron roofs.²⁶ Some small dorms in the facility sleep up to 112 men on 56 sets of bunk beds, arranged with no more than 20 centimetres between each. A former guard from the MIRPC recorded evidence that "there's no air conditioning, the beds are extremely close

²⁴ See summary findings: "UNHCR Monitoring Visit to Manus Island, Papua New Guinea, 15 to 17 January 2013" UNHCR <http://unhcr.org.au/unhcr/images/2013-02-04%20Manus%20Island%20Report%20Final.pdf>; "UNHCR Monitoring Visit to Manus Island, Papua New Guinea, 11 to 13 June 2013" UNHCR, [http://unhcr.org.au/unhcr/files/2013-07-12_Manus_Island_Report_Final\(1\).pdf](http://unhcr.org.au/unhcr/files/2013-07-12_Manus_Island_Report_Final(1).pdf); "UNHCR Monitoring Visit to Manus Island, Papua New Guinea, 23 to 25 October 2013" UNHCR, <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Manus%20Island%20PNG%2023-25%20October%202013.pdf>

²⁵ 'This is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, PNG' Amnesty International Australia, December 2013, p 4, http://www.amnesty.org.au/images/uploads/about/Amnesty_International_Manus_Island_report.pdf

²⁶ *Ibid*, p 36

together and the living standards are filthy”.²⁷ This demonstrates clearly why so many detainees experience a rapid decline in their physical health.

Detainees held at the MIRPC are also constantly subject to harsh weather conditions. Manus Island is in the tropics, and temperatures frequent between 30 and 40 degrees centigrade. Humidity is high, while the weather alternates between intense sunshine and heavy rain lasting for several hours. Reports indicate that there is almost no shade to protect people from the sun, heat or rain. International Health and Medical Services staff reported that the lack of shade has led to numerous health issues, including people collapsing from heat stroke.²⁸ The non-governmental organisation Amnesty International observed poor drainage in the facilities during a visit to the MIRPC, stating that it was common for rainwater to gather and form stagnant puddles under raised buildings.²⁹

Serious concerns exist with regard to the MIRPC’s inability to cope with the growing demand for health and mental health services. Detainees are reported to frequently complain about delays in medical appointments and that certain treatment is not available.³⁰ The inadequacies of MIRPC medical services can be exemplified by the death of 24-year-old Iranian detainee, Hamid Kehazaei; whose skin infection from a cut foot turned into a fatal case of septicaemia after being forced to wait more than 24 hours for medical transfer off Manus Island, despite urgent warning from IHMS staff at the centre.³¹

Prolonged detention is said to also have had devastating impacts on the detainee’s mental health, and has resulted in diagnoses of illnesses including depression, anxiety, post-traumatic stress disorder and acute stress reaction.³² Factors such as uncertainty around resettlement

²⁷ “Manus Island whistleblower describes ‘filthy’ conditions inside detention centre” ABC News Online, 7 September 2014, <http://www.abc.net.au/news/2014-09-06/manus-island-whistleblower-describes-filthy-conditions/5725042>

²⁸ ‘*This is Breaking People: Human Rights Violations at Australia’s Asylum Seeker Processing Centre on Manus Island, PNG*’. Amnesty International Australia, December 2013, p 41

²⁹ *Ibid*, p 40

³⁰ *Ibid*, p 52

³¹ “Hamid Kehazaei case: Seriously ill asylum seeker forced to wait more than 24 hours for medical transfer” ABC News Online, 9 December 2014, <http://www.abc.net.au/news/2014-12-08/ill-fated-asylum-seeker-forced-to-wait-for-medical-transfer/5952756>

³² ‘*Asylum Seekers, Refugees and Human Rights: Snapshot report*’, Australian Human Rights Commission, 2013. Page 17, https://www.humanrights.gov.au/sites/default/files/document/publication/Children_Detention2014_Discussion_paperFINAL.pdf

and processing, limited contact with family members and a lack of mental stimulation are seen as contributors to the growing mental health crisis within the centre. During a visit from Amnesty International, one health service provider reported that “this is the process of how you break someone mentally,” when describing the conditions in the centre.³³ The security of the detainees has also come into question on numerous occasions in recent years. Claims have emerged of repeated incidents of self-harm, attempted suicide, bullying, as well as claims of violence, sexual assault, rape and mistreatment.³⁴

In increasing acts of desperation, detainees have been reported to have sewn their lips together, engaged in prolonged hunger-strikes and to have swallowed razor blades in acts of protest against conditions within the centre.³⁵ Conditions at the MIRPC have also resulted in a number of violent ‘disturbances’.³⁶ The most alarming being an incident which resulted in the death of 23 year-old Iranian Reza Barati, alongside the injuring of more than 70 other detainees. An Australian Senate committee report into the incident blamed the vexed process for assessing asylum claims; as well as a ‘massive influx’ of single adult males to the centre, resulting in the MIRPC reaching more than double the initial intended capacity in the space of 12 weeks.³⁷ However, a Salvation Army representative reported that other employees in

³³ *This is Breaking People: Human Rights Violations at Australia’s Asylum Seeker Processing Centre on Manus Island, PNG*. Amnesty International Australia, December 2013, Page 56

³⁴ “Rape and torture on Manus Island: Whistleblower” SBS Dateline Online, 26 August 2013, <http://www.sbs.com.au/news/article/2013/07/24/rape-and-torture-manus-island-whistleblower>; “Federal Government confirms hunger strike, self-harm protests on Manus Island; sister fears for brother who swallowed razor blades” ABC News Online, 15 January 2015, <http://www.abc.net.au/news/2015-01-15/government-confirms-self-harm-protests-on-manus-island/6018102>; “Violence, self-harm and bullying: whistleblowers speak of detention” SBS News Online, 5 March 2014,

<http://www.sbs.com.au/news/article/2014/03/04/violence-self-harm-and-bullying-whistleblowers-speak-detention>

³⁵ “Federal Government confirms hunger strike, self-harm protests on Manus Island; sister fears for brother who swallowed razor blades” ABC News Online, 15 January 2015, <http://www.abc.net.au/news/2015-01-15/government-confirms-self-harm-protests-on-manus-island/6018102>

³⁶ “Manus Island: Immigration Minister Scott Morrison confirms one asylum seeker dead, 77 injured during second night of unrest” ABC News Online, 18 March 2014, <http://www.abc.net.au/news/2014-02-18/one-dead-77-injured-in-manus-island-unrest/5265960>

³⁷ “Legal and Constitutional Affairs References Committee Report: Incidents at the Manus Island Detention Centre from 16 February to 18 February 2014” The Australian Senate, December 2014, http://www.aph.gov.au/~media/Committees/Senate/committee/legcon_ctte/Manus_Island/Report/report.pdf

the centre aided in instigating the violence, and that the Salvation Army was made aware of employees wanting to fight the detainees prior to the incident.³⁸

There have been many instances in which ‘whistleblowers’ from various bodies operating within the MIRPC have opened up to the media and told of the ongoing atrocities that occur. Former Salvation Army workers have told of widespread racism and bullying of detainees from guards, and even reported that many guards would often ‘mime shooting detainees on site with their hands’.³⁹ A former head of Occupational Health and Safety made a series of disturbing allegations about conditions at the centre; stating “I’ve never seen human beings so destitute, so helpless and so hopeless before”, as he described repeated instances of rape and sexual abuse between asylum seekers with the full knowledge of staff.⁴⁰ When Amnesty International asked during their visit to MIRPC, staff did not know about any official procedures in place for responding to allegations or instances of sexual assault within the facility.⁴¹

Republic of Nauru

The conditions in the detention facilities on the Republic of Nauru are comparable to those on Manus Island, with its own examples of cruelty and suffering perpetrated.

In November 2013, the Australian Asylum Seeker Resource Centre, a national advocacy and support group for asylum seekers, revealed that an unaccompanied female minor had been transported to Nauru.⁴² Concerns were raised about who was responsible for her, as while she remained in Australia the Minister for Immigration was her legal guardian and on arrival in Nauru this became less clear. This case also highlighted the inherent conflict of the

³⁸ “Manus whistleblower claims he warned Salvation Army of employees wanting to fight”, The Sydney Morning Herald Online, 9 September 2014, <http://www.smh.com.au/federal-politics/political-news/manus-whistleblower-claims-he-warned-salvation-army-of-employees-wanting-to-fight-20140909-10efaa.html>

³⁹ “Violence, self-harm and bullying: whistleblowers speak of detention” SBS News Online, 5 March 2014, <http://www.sbs.com.au/news/article/2014/03/04/violence-self-harm-and-bullying-whistleblowers-speak-detention>

⁴⁰ “Rape and torture on Manus Island: Whistleblower”, SBS Dateline Online, 26 August 2013, <http://www.sbs.com.au/news/article/2013/07/24/rape-and-torture-manus-island-whistleblower>

⁴¹ *This is Breaking People: Human Rights Violations at Australia’s Asylum Seeker Processing Centre on Manus Island, PNG*. Amnesty International Australia, December 2013, Page 50

⁴² “Unaccompanied girl sent to detention on Nauru, refugee advocates say” ABC News Online, 20 November 2013, <http://www.abc.net.au/news/2013-11-20/unaccompanied-girl-sent-to-detention-on-nauru-refugee-advocates/5105678>

Immigration Minister also being responsible for the best interests of children in the immigration system, and further demonstrated the extent of Tony Abbott and his Cabinet's derogation for duty when it comes to asylum seekers.

In January 2014, the UNHCR specifically identified Nauru facilities as "not provid[ing] safe and humane conditions of treatment in detention" referring to it as "rat-infested, cramped and very hot" where "suggestions and proposals for transferring unaccompanied children for [the UNHCR] is even more deeply concerning".⁴³ This comment came under two months after Tony Abbott and his Cabinet had already placed an unaccompanied female child into the Nauru facility, amid fears for her safety particularly relating to possible sexual abuse and rape.⁴⁴ The fear of ongoing child sex abuse as well as violence has been heightened throughout all facilities after workers at the Nauru facility reported abusive behaviour by guards after witnessing it firsthand.⁴⁵

Cumulatively, the harsh living conditions, the inadequate standard of medical services, the dwindling state of detainee mental health, the threats to individual security, and the slowness and lack of clarity of processing asylum claims, all create a deterrent effect that is punitive in nature for those affected, rather than promoting fair and efficient outcomes for processing asylum seekers. Both UNHCR reports into the two facilities provide extensive detail on the inadequacy of the current policy and the severe injury it has and is causing.⁴⁶

⁴³ "United Nations slams living conditions for asylum seekers at Nauru, Manus Island detention centres" ABC News Online, 9 January 2014, <http://www.abc.net.au/news/2013-11-27/unhcr-report-on-nauru/5118588>

⁴⁴ "Asylum seeker alleges she was raped in family compound on Nauru" Sydney Morning Herald Online, 28 November 2014, <http://www.smh.com.au/federal-politics/political-news/asylum-seeker-alleges-she-was-raped-in-family-compound-on-nauru-20141128-11w16m.html>

⁴⁵ "Detention centre child sex abuse claims number in dozens" Sydney Morning Herald Online, 30 September 2014, <http://www.smh.com.au/federal-politics/political-news/detention-centre-child-sex-abuse-claims-number-in-dozens-20140930-10o7pv.html>

⁴⁶ UNHCR monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013, <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Manus%20Island%20PNG%2023-25%20October%202013.pdf>; UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013, <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf>

Case Study: Children in Australian Immigration Detention

The CRC is a comprehensive treaty, which incorporates many of the provisions of the ICCPR and the *International Covenant on Economic Social and Cultural Rights*, and specifically applies them to the needs of children. It also protects children from non-discrimination on the basis of sex, race, disability and other grounds, thereby reflecting provisions of the *Convention on the Elimination of All Forms of Discrimination against Women*, the *Convention on the Elimination of All Forms of Racial Discrimination* and the *Declaration on the Rights of Disabled Persons* among others.

The CRC applies to all children within Australia's jurisdiction, and this communiqué argues that it must include all children who are legally within Australia's territorial waters. A 'child' is defined to include any person under 18 years of age.⁴⁷ The policy of Tony Abbott and his Cabinet has tangibly caused suffering, and this highlighted by the fact that children are treated ostensibly the same as adults – notwithstanding that the conditions are sufficient to cause serious injury to adults – when Australia owes them a higher standard of care. This higher standard is established as an expectation in accordance with the Teoh codification and convention of the Executive described above on page 13. Several key obligations are not being honoured in Australia's treatment of children in immigration detention (articles referenced are CRC provisions):

1. the best interests of the child must be a primary consideration in all actions concerning children (Article 3(1));
2. detention must be a measure of last resort and for the shortest appropriate period of time; children must not be deprived of liberty unlawfully or arbitrarily (Article 37(b));⁴⁸
3. children in detention have the right to be treated with humanity and respect for the inherent dignity of the person (Article 37(a), (c));⁴⁹
4. children have the right to enjoy, to the maximum extent possible, development and recovery from past trauma (Articles 6(2), 39); and

⁴⁷ CRC, article 1

⁴⁸ See also ICCPR, article 9.

⁴⁹ See also ICCPR, articles 7 and 10.

5. asylum-seeking and refugee children are entitled to appropriate protection and assistance (Article 22(1)).⁵⁰

Australia's system of mandatory detention requires that children without a valid visa remain in closed immigration detention until they are granted a visa or removed from Australia, unless the Minister for Immigration decides to make a 'residence determination' allowing them to live in community detention. They may be separated from one or more of their family members and when transferred to other sovereign nations their guardianship arrangements are unclear.

The recent report by the Australian Churches Refugee Task Force, *Protecting the Lonely Children*, referred to the current policy of guardianship and treatment of unaccompanied children as 'convoluted, inequitable, grievously lacking in transparency and accountability'.⁵¹ The National Inquiry into Children in Immigration Detention 2014 has seen and heard evidence that causes grave concern for the mental and physical health of children and new mothers on Christmas Island. The UN High Commission for Refugees has called on the government to stop sending children and families to Manus Island and Nauru after visits during October 2013. Its report states that Nauru is "particularly inappropriate", thus no child, either unaccompanied or with a family, should be transferred there.⁵²

There is medical consensus from peak organisations such as the Australian Medical Association that doctors unanimously agree there is "compelling evidence that when children are incarcerated in detention centres their health deteriorates. This can be in the form of depression, stress, eating disorders that can lead to malnutrition, and general poor physical health".⁵³ Furthermore, the children have high rates of sexually transmitted diseases attributed to both poor access to basic medical care and occurrences of sexual abuse.⁵⁴ The

⁵⁰ See also Refugee Convention, articles 1A, 31 and 33.

⁵¹ "Protecting the Lonely Children" Australian Churches Refugee Taskforce, July 2014, <http://www.australianchurchesrefugeetaskforce.com.au/wp-content/uploads/2014/07/ProtectingTheLonelyChildren.pdf>

⁵² UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013, <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf>

⁵³ "Detention centres no place for children" Australian Medical Association, <https://ama.com.au/media/detention-centres-no-place-children-ama>

⁵⁴ "High rates of STDs among children in detention" Australian Medical Association, <https://ama.com.au/ausmed/high-rates-stds-among-children-detention>

Royal Australasian College of Physicians concurs with this view and has stated specifically that a dereliction of international obligations is directly related to the deteriorating health of children in detention.⁵⁵

The scale of the problem is vast. As at the end of May 2014, there were 775 children in immigration detention facilities and 1,507 children in community detention in Australia. By the end of December 2013 there were 1,028 children being held in immigration detention facilities in Australia, including 460 children in detention on Christmas Island. As at the end of November 2014 there were 1391 children in detention, and a further 116 children who had been transferred into detention on Nauru under the a third country processing regime, which as discussed at multiple points in the communiqué is a dereliction of the duty of care owed to all asylum seekers and particularly children. The gravity of the harm is already severe and continuing to increase.

⁵⁵ “The health of asylum seekers and refugees” The Royal Australasian College of Physicians, <https://www.racp.edu.au/page/asylum-seekers>

Statelessness

Additional to the direct issues associated with the policy of Tony Abbott and his Cabinet, there are issues that raise serious concerns in regards to perpetrating crimes against humanity that result from those policies. When a child is removed from Australia which is occurring under the current regime, this effectively denies his or her right to apply for Australian citizenship. This has major impact on the child's mental and physical health later in their life. Two situations can result: a child is born to parents who are stateless or a child is born to parents who are citizens of another country.⁵⁶

A child is stateless if born to parents who themselves are stateless. The Convention on the Reduction of Statelessness (CRS), to which Australia has acceded, is an international attempt to reduce the incidence of statelessness.⁵⁷ Australia enacted s21(8) of the *Australian Citizenship Act 2007* (Cth), which ensures that 'no-one born in Australia remain stateless' and directly addresses Article 1 of the CRS.⁵⁸ Section 21(8) requires the Minister to grant citizenship to a stateless person if they meet certain criteria relating to genuine statelessness. Examples of this type of child have already occurred in Australia and advocacy groups are fighting for recognition of the children as Australian citizens.⁵⁹ UNICEF Australia said that a component of the policy is an attempt to authorise babies born in Australia being mandatorily detained in foreign sovereign nations.⁶⁰

When the parents have a nationality but the child is born in immigration detention, a *Registration of Birth* form is submitted by immigration officials to the relevant state or territory department. The form allows the parents to request a birth certificate for the child. It is often not feasible for parents who have fled from their country, often at risk of torture, trauma or death from their government, to obtain a birth certificate from that country.⁶¹ The

⁵⁶ Migration Amendment (Protecting Babies Born in Australia) Bill 2014, Civil Liberties Australia Inc.

⁵⁷ *Convention on the Reduction of Statelessness*, UNHCR, <http://www.unhcr.org/3bbb286d8.html>

⁵⁸ *Id.*

⁵⁹ "Asylum Seeker Rights" Maurice Blackburn, <http://www.mauriceblackburn.com.au/legal-services/general-law/social-justice/asylum-seeker-rights/>

⁶⁰ "Increasing power and decreasing accountability" Human Rights Law Centre, 31 October 2014, <http://hrlc.org.au/wp-content/uploads/2014/11/sub166.pdf>

⁶¹ "Asylum Statistics – Australia Quarterly tables March Quarter 2013" Department of Immigration and Citizenship, <http://www.immi.gov.au/media/publications/statistics/asylum/files/asylumstats-march-quarter-2013.pdf>

fact that registration of birth is a state and territory based system is further illustration of the problems with sending asylum seekers to Papua New Guinea and Nauru.

It is clearly in the best interests of children born in Australia to asylum seekers to be given the opportunity to apply for Australian citizenship. This is the case whether their parents are stateless or citizens of the country from which they are escaping. In these circumstances, where obtaining another nationality is either impossible or highly unlikely, upholding the human rights of children is paramount.

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